BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

FREMONT UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020100499

ORDER FOLLOWING PREHEARING CONFERENCE

JANUARY 11, 2021

On January 11, 2021, Administrative Law Judge Rita Defilippis, Office of Administrative Hearings, held a prehearing conference by videoconference. The Administrative Law Judge is called an ALJ. The Office of Administrative Hearings is called OAH. The prehearing conference is called a PHC.

Parent appeared on behalf of Student. Elizabeth Schwartz, Attorney at Law, appeared on behalf of Fremont Unified School District, called Fremont. Based upon discussion with the parties, the ALJ issues the following order:

STUDENT'S MOTION TO QUASH

On January 8, 2021, Fremont issued a subpoena on Student to compel Student's videoconference testimony at hearing. The subpoena was served on Parent via e-mail.

At the prehearing conference, Parent orally moved to quash the subpoena on the grounds that Student is not knowledgeable about the law and that testifying at hearing would be stressful for Student. Fremont opposed the motion contending that Student has direct knowledge relevant to the issues in this case. Fremont asserts that it will only call Student as a witness if the necessary information cannot be elicited from other witnesses or documentary evidence. Additionally, Fremont argued that Student will not be required to testify regarding her knowledge of the law. Further, she has testified successfully in a past due process hearing; and reasonable accommodations may be requested to reduce or eliminate Student's stress.

APPLICABLE LAW

California Code of Regulations, title 5, section 3082, subdivision (c)(2), specifies the right of the parties in a special education hearing to compel the attendance of witnesses at hearing. That regulation states, "[t]he hearing officer shall have the right to issue subpoenas (order to appear and give testimony) upon a showing of reasonable necessity by a party." Thus, subpoenas are available to require the production of information that is reasonably necessary in order for a party to present their case at hearing.

In the absence of regulations pertaining to the details of subpoena processes in administrative hearings, OAH requires parties to comply with procedures described in California Civil Code. California Civil Code section 1985 governs the issuance of subpoenas. In accordance with the California Civil Code, OAH allows attorneys to issue

subpoenas to witnesses to require their attendance at hearing with documents and to excuse the attendance of witnesses if documents are produced. Parties must also comply with the consumer protections of California Civil Code 1985.3 when seeking the production of the personal records of a consumer. (*Sehlmeyer v. Dept. of General Services* (1993) 17 Ca. App. 4th 1072.) A subpoena for the attendance of a witness must also meet the good cause requirement by a factual showing of why the testimony and/or production of records are material and relevant to the litigated issues. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.)

In consideration of the argument of the parties and relevant legal provisions, Student's motion to quash is denied. Fremont established good cause for compelling Student's testimony, which is necessary to defend their case. Student failed to offer any persuasive reason why Student cannot testify at hearing. Accordingly, Student's motion to quash is denied. Nothing in this order prevents Student from requesting reasonable accommodations for Student if called to testify at hearing.

DISMISSAL OF STUDENT'S ISSUE 2(G)

The purpose of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education", and to protect the rights of children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child;

the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist*. (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

OAH does not have jurisdiction regarding violations of privacy pursuant to the Family Educational Rights and Privacy Act, called FERPA. Nor does OAH have jurisdiction regarding alleged violations of privacy resulting from the disclosure of confidential information as defined in California Education Code section 49076.7.

Student's Issue 2(f), as set forth in Student's prehearing conference statement, alleges that Fremont violated Student's confidential information, pursuant to Education Code section 49076.7. Student also alleged at the prehearing conference that Issue 2(f) alleges a violation of Student's privacy pursuant to the FERPA. As OAH does not have jurisdiction regarding violations of privacy as alleged, the undersigned ALJ dismissed Student's Issue 2(f), on her own motion, for lack of OAH jurisdiction.

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on January 26, 27, and 28, 2021, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM each day and generally end at 3:30 PM, unless otherwise ordered. The parties anticipate it will take three days to complete the hearing. Additional hearing dates will be discussed with the ALJ during the hearing.

HEARING LOCATION

OAH is authorized to conduct due process hearings by videoconference or telephone. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Based on state and federal guidance to address safety procedures due to the novel coronavirus, COVID-19, OAH will conduct the due process hearing by videoconference using the Microsoft Teams application. Unless otherwise ordered, participants are required to appear by videoconference using a webcam and Microsoft Teams.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses, if necessary, to ensure that the witnesses will appear to testify. A party's failure to notify or subpoena a witness to testify will not be considered good cause to continue the hearing.

ISSUES AND PROPOSED RESOLUTIONS

The issues were discussed at length at the prehearing conference. The parties agreed that Student's issues 2(b), and 2(c), as set forth in Student's prehearing conference statement, were duplicative. The issues were reworded, reorganized and renumbered according to the discussion at the prehearing conference. The ALJ has authority to reword and re-organize a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) As already discussed, Student's issue 2(f) was dismissed by the ALJ at the prehearing conference for lack of OAH jurisdiction.

The issues at the due process hearing, and proposed resolutions, as alleged in the complaint and clarified by the parties and the ALJ during the PHC are:

ISSUES

1. Did Fremont deny Student a free appropriate public education by:

   a. failing to timely provide notice of the May 4, 2020 individualized education program, called IEP, team meeting;

   b. failing to schedule the May 4, 2020 IEP team meeting at a mutually agreeable time and place;

   c. convening an IEP team meeting on May 4, 2020, without Parent;

   d. providing a placement offer to Student, in Parent's absence, at the May 4, 2020 IEP team meeting;

   e. failing to provide a legally sufficient notice of the May 4, 2020, IEP team meeting, specifically, failing to include the names of IEP team participants;

   f. including a general education teacher on the IEP team;

   g. including a general education teacher on the IEP team who was not currently involved in Student's education?

PROPOSED RESOLUTIONS

1. Student requests to be found the prevailing party on all issues alleged in her complaint.
2. Student requests an order requiring Fremont to give Parent notice of future IEP team meetings at least three weeks in advance of proposed IEP team meetings.
3. Student requests an order requiring Fremont to come to a mutually agreed upon date, time and location for future IEP team meetings, even when Parent requests a last minute change regarding an IEP team meeting.
4. Student requests Fremont to cease and desist efforts to place Student in a residential placement and to offer a free appropriate public education, called

a FAPE, specifically, home instruction by teachers who are trained to serve Student's unique educational needs.

5. Student requests an order requiring Fremont to provide every opportunity for Parent participation in the IEP team meeting process by accommodating Parent's request for a particular date and time for the IEP team meeting, even if communicated by Parent at the last minute.
6. Student requests an order prohibiting Fremont from holding an IEP team meeting without the presence of Parent when there are continuous communications between Parent and Fremont indicating Parent's request for an alternate date and time for the IEP team meeting.
7. Student requests an order requiring Fremont to include the names of all IEP team meeting participants in the IEP team meeting notice and a statement of whether any member requests to be excused from the meeting in whole or in part.
8. Student requests an order requiring Fremont to include only IEP team members who are currently involved in Student's education or who are providing educational services to Student.

The parties are ordered to review the issues as set forth in this Order and promptly file any written objections to the wording of the issues if either party contends that they do not accurately reflect the discussion of the issues at the prehearing conference. Any disputes regarding the issues will be discussed on the first day of hearing.

Fremont filed its response to Student's complaint on October 26, 2020. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

The parties shall upload their exhibits electronically according to the Order Setting Procedures for Filing Exhibits Electronically.

The parties shall serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). Timely uploading electronic hearing exhibits five business days before the first day of hearing constitutes that party's timely exchange of evidence on each other in compliance with Education Code section 56505, subdivision (e)(7).

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged as required by Education Code section 56505, subdivision (e)(7) shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible. The electronic evidence system will not allow parties to upload any documents beginning three days prior to the start of the hearing. The admission of any additional documents after that time must be addressed during the hearing to be determined by the ALJ.

IDENTIFYING EXHIBITS AND PAGE NUMBERS

Each exhibit must be identified by a letter and number. Student must use the letter S before the number to identify Student's exhibits. Fremont must use the letter D before the number to identify Fremont's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Fremont's exhibit 1. A cover sheet with this identifying letter and number should be included with each exhibit. The electronic evidence program will automatically number the exhibits and additional page numbering or bates stamping should not be added.

CONTENT

Each exhibit must consist of one document. Separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Exhibits should be in chronological order.

Parties should include resumes or curriculum vitae for each witness who is expected to testify as an expert.

Electronic copies of exhibits filed with OAH shall be filed by 5:00 PM at least five business days before the first day of hearing. OAH will issue a separate Order Setting Procedures for Filing Exhibits Electronically that includes instructions for how to file exhibits electronically.

WITNESSES

The parties shall serve their list of witnesses on each other in compliance with Education Code section 56505. No party shall be permitted to call any witnesses not timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

Parties are responsible for ensuring that all participants are familiar with and follow the Instructions for Joining the Online Due Process Hearing provided with this Order. Participants that have not previously used the MS Teams platform, may also find informative videos available like the one at this link from Microsoft: https://support.office.com/en-us/article/join-a-teams-meeting-078e9868-f1aa-4414-8bb9-ee88e9236ee4.

The parties are responsible for ensuring that witnesses join the virtual hearing room at the designated date and time to testify. Witnesses are required to join the due

process hearing by computer and appear by videoconference unless they do not have the necessary computer equipment. In that situation, the ALJ may permit the witnesses to appear by audio only or by telephone. "Audio only" means using a computer without webcam. Witness ability to attend the hearing by videoconference shall be discussed at the start of the hearing.

Parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Parties shall make witnesses under their control reasonably available. The parties must schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party will be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subdivision (h), empowers the ALJ to set a reasonable limit on the length of the hearing after consideration of four factors. The first two factors are the issues to be heard and the complexity of facts to be proven. The second two factors are the ability of the parties or their representatives to present their respective cases and the parties' estimates of the time needed to present their cases.

MEET AND CONFER

The parties are encouraged to review and shorten their witness and exhibit lists before the hearing. Evidence may be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

The parties are ordered to meet and confer no later than January 21, 2021, at 3:00 pm, to discuss scheduling witnesses and how much time each witness will take. The

parties shall discuss any issues pertaining to the parties, counsel and witnesses appearing by videoconference for hearing and electronically viewing exhibits during the hearing. The parties should attempt to eliminate duplicate exhibits from their hearing exhibits. The parties shall discuss whether they can produce a written stipulation as to pertinent facts, contentions, resolutions and authenticity and admissibility of documents to shorten the length of time needed for the hearing.

As part of the meet and confer process, Fremont shall inform Student which proposed witnesses are district employees. Fremont shall also identify the witnesses on Student's list that require a subpoena. Fremont may agree to accept service for witnesses under Fremont's control or provide Student with the witness' most recent contact information.

PARTICIPANT INFORMATION FORM

Both parties have an ongoing obligation to ensure that OAH has current information on the Participant Information Form filed with OAH and shall file an updated Form as necessary. The Participant Information Form is not served upon the opposing party. The ongoing obligation to ensure that the Participant Information Form filed with OAH is current does not change the parties' statutory obligation to timely disclose their witnesses to the other party(s) at least five business days prior to hearing. The parties must file an updated Participant Information Form to inform OAH of any changes, additions, or deletions, including the required information no later than 5:00 PM at least two business days before the first day of hearing.

Any contact information provided shall be used for the limited purpose of issuing subpoenas or for contacting the witness(es) for purposes of attending the hearing and shall not be disclosed to any other person(s).

EVIDENCE PRESENTATION

In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In this case Student requested the hearing and bears the burden of proof. Student's case-in-chief shall be presented first, followed by Fremont, unless otherwise ordered.

WITNESS LISTS

The parties must provide a joint proposed witness list to the ALJ on the first day of hearing. The list should include the first and last name of the witness, which party(s) are calling the witness to testify, and include dates and time estimates of each witness' expected testimony. In the event an agreement cannot be reached, each party shall prepare a separate written list. Student must have witnesses available in case there is no agreement.

At the beginning of the hearing, the ALJ and the parties will discuss the length of time anticipated for each witness and scheduling issues for individual witnesses. The ALJ will finalize the witness schedule. Parties must be prepared at the end of each day to discuss the witnesses to be presented the next day and the estimated time for the testimony each witness.

SCOPE OF WITNESS EXAMINATION

Each witness will be called to testify only once, except for rebuttal purposes. All parties must examine witness on all issues when the witness is first called. Requiring a witness to appear only once takes priority over the order in which parties present their case in chief.

AUDIO ONLY OR TELEPHONIC TESTIMONY

Whether a witness may appear by audio only or telephone instead of videoconference is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by audio only or telephone shall request permission to do so before the hearing. Any party seeking to present a witness who cannot access exhibits electronically must inform the ALJ at the beginning of the hearing.

ELECTRONIC RECORDINGS

AUDIO RECORDING

A party may request permission to make an audio recording of the hearing. Permission to make an audio recording is subject to the ALJ's discretion and based upon certain conditions. The conditions are:

- the OAH recording is the only official recording;
- participants shall not use Teams to record the hearing;
- the parties shall turn their recording device on and off at the same time that the ALJ is on and off the record to avoid recording conversations while off the record;
- operation of the party's recording mechanism will not be allowed to delay the hearing;
- a parties' recording may not be given, provided or played to a witness, or potential witness; and
- the recording is subject to the same confidentiality as the due process hearing;

- use of the chat function in the videoconference is prohibited and shall not be part of the official record;
- participants shall not take screenshots of the videoconference, or share or publish any portion of the videoconference or audio recording.

Student's and Fremont's requests to audio record the hearing are granted, subject to these conditions.

VIDEO RECORDING

No party, witness or anyone else may make any video recording of any part of the proceedings or stream live through any means.

RECORDINGS AS EXHIBITS

Student proposed to introduce all or part of a recording of an individualized education program team meeting. The ALJ has discretion to admit or exclude evidence in the form of a recording. Any request to submit a recording shall be considered at the time of hearing. The ALJ may grant or deny the request or grant the request subject to certain conditions. The party offering the recording must establish that all or a part of the recording is relevant. The ALJ may request a transcript of the portion of the recording requested or have the party offering the recording to provide an exact identifiable portion of the recording the party seeks to admit. The identities of any person speaking on the portion of the tape being introduced must be established. An ALJ may allow the opposing party to offer additional portions of a recording to establish the context, or to rebut, the recording.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education. Documents offered as evidence to support a request for reimbursement must be separated by vendor.

MOTIONS

There is a pending motion by Fremont to quash the subpoenas duces tecums issued to Fran English, Jasmine Zartman, and Stephanie Walton, and the subpoena issued to Edward Velez. A separate order will be issued regarding this pending motion.

Any motion that was not filed three business days before the PHC, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

STIPULATIONS

Stipulations to pertinent facts, contentions, resolutions and authenticity and admissibility of documents are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in writing prior to the start of the hearing.

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

All participants to the videoconference should observe the same decorum as in an in-person due process hearing. Counsel, all parties, and all witnesses must conduct themselves in a professional and courteous manner at all times. Cellular phones,

telephones and computer notifications must be shut off or set to silent during the hearing unless the ALJ grants permission otherwise. Counsel, parties, and witnesses shall appear from a private location, unless otherwise ordered. Participants should take reasonable efforts to minimize background noise maintain adequate room lighting. Use of virtual background images are at the discretion of the ALJ. Witnesses are prohibited from reading exhibits, documents, notes, text messages, telephones or computers while testifying, unless permitted to do so by the ALJ. Parties, counsel and witnesses are prohibited from passing notes to, exchanging electronic messages with, or signaling the witness in any way while the witness is testifying.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

Neither party requested the services of an interpreter. Student plans to request accommodations if called to testify at hearing. A party or participant in this case, such as a witness, requiring reasonable accommodation to participate in a mediation or hearing may contact OAH at (916) 263-0880, or send an e-mail to OAHADA@dgs.ca.gov as soon as the need is known. The e-mail should have "Request for Accommodation" in the Subject Line. Additional information concerning requests for reasonable accommodation is available on OAH's website at: https://www.dgs.ca.gov/OAH/Services/Page-Content/Office-of-Administrative-Hearings-Services-List-Folder/Accommodations-at-OAH.

HEARING OPEN TO THE PUBLIC

Special Education hearings are closed to the public unless Student requests the hearing to be open to the public. Student requests the hearing to be open to the public.

An ALJ may restrict attendance because of the physical limitations of the hearing facility, or take other action to promote due process or the orderly conduct of the hearing. (Cal. Code Regs., Tit. 1, § 1030.) Government Code, section 11425.20 empowers the ALJ to order an open hearing to be closed or make other protective orders to the extent necessary or proper to ensure a fair hearing in the circumstances of the particular case. Currently, amid COVID-19 concerns, all hearings are being conducted via videoconference without observers present or participating in the videoconference. OAH will provide the hearing recording upon request.

Student asserted that an open hearing allows Student to forward Student's invitation to the videoconference hearing to members of the public. The undersigned ALJ made clear to Student that designating the hearing as open to the public does not entitle members of the public to virtually enter or observe the videoconference hearing. OAH will only provide the hearing recording to a member of the public, upon request.

SETTLEMENT

The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately if they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 4:00 PM the day prior to hearing, the parties shall leave a voicemail message regarding the settlement at

(916) 274-6035. The parties should also leave contact information such as cellular phone numbers of each party or counsel for each party.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received and processed by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages before the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement, the parties shall provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

FAILURE TO COMPLY

The failure to comply with this Order may result in the exclusion of evidence or other sanctions.

ORDER INCLUDES ALL RULINGS

This Order includes all rulings made at the prehearing conference. Any discussion and conversation not referenced in this Order is not binding on the ALJ conducting the hearing and may not be relied upon by the parties.

The parties should be aware that, at hearing, the ALJ conducting the hearing has discretion to reconsider any part of this Order.

IT IS SO ORDERED.

Rita Defilippis

Rita Defilippis

Administrative Law Judge

Office of Administrative Hearings