BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. FRESNO UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2012100242
FRESNO UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH CASE NO. 2012100291 ORDER FOLLOWING PREHEARING CONFERENCE

On June 5, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Troy Taira, Office of Administrative Hearings (OAH). Parent appeared on behalf of Student. Sang-Jin Nam and Melody Hawkins, Attorneys at Law, appeared on behalf of Fresno Unified School District (District). The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on June 24, 25, 26, and 27, 2013, at District's Professional Development Center located at 1833 E Street, Fresno, California 93706.[1] The hearing shall begin at 1:30 p.m. on June 24th, the first day of the hearing, and at 9:00 a.m. all other days unless otherwise ordered. The hearing shall continue thereafter, day to day, Monday through Thursday, as needed in the discretion of the ALJ. The parties are directed to complete the hearing by close of business on June 27, 2013, or establish good cause why further hearing time is necessary.

[1] At a minimum for the hearing, the room shall have separate tables capable of being moved into a courtroom configuration, as follows: (1) one table for Student's representatives; (2) one table for District's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. District shall ensure that all parties and the ALJ have drinking water available to them.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing "good cause" to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

2. Issues and Proposed Resolutions. The issues at the due process hearing are listed below. [2]

Student's Issues

a) Did District deny Student a free appropriate public education (FAPE) for the 2010-2011 school year, including the 2011 extended school year (ESY), by:

1. Failing to develop an adequate transition plan, including goals, and services;

2. Failing to develop annual goals in all areas of need;

3. Failing to offer ESY services;

4. Failing to provide Student with mobility training; and,

5. Failing to provide an adequate educational program, specifically in the areas of written expression, reading, mathematics, and transition?[3]

b) Did District deny Student a FAPE for the 2011-2012 school year, including ESY, by:

1. Failing to develop an adequate transition plan, including goals, and services;

2. Failing to develop annual goals in all areas of need;

3. Failing to offer ESY services;

[2] The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) The issues have been reworded from what was discussed during the PHC for clarity and to conform to applicable statutes and regulations. No substantive changes have been made. At the beginning of the hearing the ALJ and parties shall review the issues and determine whether further rewording is necessary.

[3] Student's issues are limited to those occurring with the two-year statute of limitations, on or after October 3, 2010.

4. Failing to provide Student with mobility training;

5. Failing to provide Student with access to peer socialization, including lunch;

6. Failing to provide Student with an adequately trained one-to-one aide;

7. Failing to provide Student with behavior services, goals, and a plan to address her avoidance of third period;[4]

8. Dis-enrolling Student twice from her educational placement without parental consent;

9. Failing to offer Student placement in the least restrictive environment (LRE);

10. Failing to provide adequate transportation services; and

11. Failing to provide an adequate educational program, specifically in the areas of written expression, reading, mathematics, and transition?

c) Did District deny Student a FAPE for the 2012-2013 school year, including ESY, by:

1. Failing to develop an adequate transition plan, including goals, and services;

2. Failing to develop annual goals in all areas of need;

3. Failing to offer ESY services;

4. Failing to provide Student with mobility training;

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[4] During the PHC, Parent stated that this allegation was misplaced in the complaint and belongs in Student's first issue a), relating the 2010-2011 school year. Parent requested to move this allegation from the 2011-2012 school year to the 2010-2011 school year. District objected. The ALJ finds that such a revision would be a material change and would amend Student's complaint under 20 U.S.C. §1415(c)(2)(E)(i)(II). **Should Parent desire to include this allegation in the 2010-2011 school year, Parent shall file and serve a request to amend Student's complaint, no later than June 12, 2013, at 5:00 p.m., along with a proposed amended complaint.** If the complaint is not amended, this allegation will remain relating solely to the 2011-2012 school year.

5. Failing to provide Student with access to peer socialization, including lunch;

6. Failing to offer Student placement in the LRE; and

7. Failing to provide adequate transportation services?

d) Did District procedurally deny Student a FAPE during the 2012-2013 school year by:

1. Predetermining her educational placement;

2. Refusing to provide Student with access to peer socialization, including lunch;

3. Failing to convene an individualized education program (IEP) team meeting to offer placement and services; and,

4. Failing to provide copies of all educational records?

Student's Proposed Resolutions

Student requests declaratory relief that District denied Student a FAPE and otherwise failed to comply with state and federal laws; compensatory education, specifically individual tutoring in all academic areas of need, including written expression, reading, mathematics, and transition services; reimbursement for transportation costs; placement in a community college program with access to both disabled and nondisabled peers in a classroom setting; a transition program that includes vocational goals; and mobility training for Student. Student also requests an order for District staff to undergo training in the areas of ethics and special education laws.

District's Issues[5]

e) May District conduct Student's triennial assessment in all areas of need identified in the October 25, 2011 assessment plan without parental consent?

[5]District Issues g) and h) seem to request compliance determinations that are outside of OAH's jurisdiction. For purposes of the PHC, the ALJ has included Issues g) and h) in District's issues for hearing. However, that ALJ has ordered District to submit a brief to explain why it believes OAH has jurisdiction to determine these two issues. **District shall submit its brief to OAH by June 12, 2012 at 5:00 p.m.** Student may also submit a brief by June 12, 2013 at 5:00 p.m. if she believes OAH does not have jurisdiction to determine these two issues.

f) May District discontinue Student's specialized academic instruction, identified in the October 25, 2011 IEP and provided as a regional occupation program (ROP) class at Duncan Polytechnic High School, because District has determined Student receives no educational benefit?

g) Did District comply with ALJ Hohensee's order issued in OAH case number 2012010705 by exercising reasonable efforts to perform an independent educational evaluation (IEE) of Student?

h) Did Parent fail to comply with ALJ Hohensee's order issued in OAH case number 2012010705 by refusing to make Student reasonably available for an IEE?

i) Did District's October 25, 2011 IEP and September 26, 2012 prior written notice offer Student a FAPE in the LRE and, if so, may the offer be implemented without parental consent?

District's Proposed Resolutions

District requests as declaratory relief OAH orders that it may conduct a triennial assessment pursuant to the October 25, 2011 assessment plan without parental consent; that it may terminate Student's ROP class; that it complied with the judicial order in OAH case number 2012010705 and that Parent failed to comply; and that the October 25, 2011 IEP and September 26, 2012 prior written notice offered Student a FAPE and may be implemented without parental consent.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letter "S" or "D" in front of the exhibit number on their exhibit lists to designate if it is a Student or District exhibit (for example, "S-5, S-6, or D-1, D-2"). Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits may be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7), no later than June 17, 2013, at 5:00 p.m. At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

4. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party shall be

permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

The parties will coordinate the availability and order of testimony of witnesses. The witness schedule will be finalized at the commencement of the due process hearing. Student has identified 30 witnesses to be called at the hearing, and District has identified 28 witnesses. Some of the witnesses are listed by both parties. In light of the fact four days have been scheduled for the hearing in this matter, it would be unrealistic to complete the hearing as scheduled with so many witnesses. The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

The parties shall attempt to reach agreement on a witness list for the first day of hearing. The District shall have witnesses available in case agreement on a witness list is not reached. The parties shall be prepared before the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony of each such witness is expected to take.

5. Scope of Witness Examination. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination. However, if a witness is to be called by more than one party, the parties will be allowed to question the witness so that the testimony can be completed in a single session without requiring the witness to return.

6. Telephonic Testimony. Whether a witness may appear by telephone 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 telephone shall ask in advance for leave to do so. The proponent of the witness shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to their testimony, and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Where the ALJ has granted permission, the witness will be not heard by telephone unless all these requirements have been fulfilled.

District's request to allow Mr. Howard Landis to testify telephonically is granted. District shall provide Mr. Landis with a complete exhibit binder from each party, containing all of each party's exhibits, prior to his testimony, and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness.

7. Timely Disclosure of Witnesses/Exhibits. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits "at least" five business days prior to the hearing. Therefore, witnesses/exhibits shall be exchanged by June 17, 2013 at 5:00 p.m.

8. Order of Presentation of Evidence. This matter is consolidated and Student's case was designated as the primary case. As the petitioner in the primary complaint, Student will present her evidence first and then District will present its evidence.

9. Motions. District requested to exclude some of the witnesses listed in Student's PHC statement. The ALJ deferred ruling on objections to specific witnesses or exhibits until the hearing. No other pretrial motions are pending or contemplated. Any motion filed after this date shall establish good cause as to why the motion was not made prior to or during the prehearing conference of June 5, 2013.

10. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

11. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other electronic devices shall be shut off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

12. Compensatory Education/Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

13. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for translation services.

14. Hearing Open/Closed To the Public. At the request of the parent, the hearing will be open to the public.

15. 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 should 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.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. 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. THE PARTIES SHOULD SIMULTANEOUSLY FAX THE SIGNATURE PAGE OF THE

SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE AT (916) 376-6319.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received 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 the evening prior to the hearing or the morning of the hearing.

16. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

Dated: June 07, 2013

/s/

TROY K. TAIRA
Administrative Law Judge
Office of Administrative Hearings