BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: TRAVIS UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT,	OAH Case No. 2016080598
PARENT ON BEHALF OF STUDENT, v. TRAVIS UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016071059 ORDER FOLLOWING PREHEARING CONFERENCE AND DENYING MOTION FOR CONTINUANCE OF DUE PROCESS HEARING

On October 3, 2016, a telephonic prehearing conference was held before Administrative Law Judge Rebecca Freie, Office of Administrative Hearings. Diane Foos, Attorney at Law, appeared on behalf of Student. She was accompanied by Christian Knox, Attorney at Law. Sarah Sutherland, Attorney at Law, appeared on behalf of Travis. The PHC was recorded.

Based upon discussion with the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. On September 29, 2016, Student filed a motion to continue the due process hearing based on unavailability of counsel. Travis filed an opposition on October 3, 2016.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court,

rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

In his motion to continue Student claimed that there were only three attorneys in the law office representing him who "conduct" due process hearings. Student contended that all three attorneys were currently in hearing on other OAH cases at the time the due process hearing in this matter is set to be heard, October 25, 26, and 27, 2016. Student provided the OAH Case Numbers for each of the other three cases presently set for hearing during the time this consolidated matter is set for hearing. In its opposition, Travis pointed out that Ms. Foos was assigned to this matter as lead attorney, and one of the partners in Student's law firm had confirmed that during earlier settlement negotiations between the parties. Student responded orally during the PHC stating that she was only a part-time employee of the firm, and therefore could not try the case.

The ALJ looked up each of the OAH cases that Student asserted were set for hearing at the same time as the instant matter. One of the cases was just filed in September 2016. The two cases in this consolidated matter were filed in July and August 2016, and therefore have precedence in terms of going to hearing. Further, Ms. Foos has been an attorney for many years, and is experienced in this field. Her part-time status should not be a barrier to her trying this case. Accordingly, Student's motion to continue the hearing in this matter was denied.

The hearing shall take place on October 25, 26, and 27, 2016, continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the Travis's administrative offices located at 2751 De Ronde Drive, Fairfield, California 94533. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days.

As ordered in the scheduling order, Travis is to provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. Travis failed to certify that it would provide a facility for this case that complies with the law. Travis shall inform OAH within five days of the date of this order that it is able to certify that it will provide a facility that complies with the law.

Prior to the beginning of the hearing, Travis shall ensure that the hearing room is configured into a courtroom setting, including (1) a table for Student and his representatives; (2) a table for Travis's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Travis shall also make

reasonable efforts to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that they 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, and the proposed resolutions, are listed below.

Student's Issue

Did Travis High School deny Student a free appropriate public education for the 2016-2017 school year, including the extended school year by:

a. failing to make a timely and valid offer of educational placement, services and goals at individualized education program team meetings in May 2016;

b. failing to make a clear offer at IEP team meetings in May 2016 because:

1) Mother was provided with discrepant and confusing IEP documents;

2) goals were not developed in the areas of reading accuracy, written expression, writing fluency, social initiation with peers, executive functioning, and keyboarding;

3) occupational therapy consultation services were offered, but no dates were listed for the beginning and end of services;

4) direct occupational therapy services were offered, but it was unclear whether this was to be individual, group, push-in, pull-out, or consultative, and the IEP stated that services would be those "to help [Student's] needs[;]"

5) assistive technology consultation services were offered "as needed," with no beginning or end date for services;

6) the IEP did not specify what portion of the 159 daily minutes of specialized academic instruction was to be group, and what portion was to be individual, and no end date was specified; and

7) it was unclear what the end date was for 30 monthly minutes of psychological services that were offered;

c) failing to accurately report Student's present levels of performance in reading and English language arts;

d) failing to offer measurable goals in all areas of need, specifically reading accuracy, written expression, writing fluency, social initiation with peers and keyboarding;

e) predetermining placement by offering Student the inappropriate reading intervention program of SRA Reading Laboratory 2.0 for 20 minutes per day ;

f) failing to offer research-based individualized reading and written expression programs that would meet Student's unique needs;

g) denying Mother meaningful participation in the IEP process by failing to develop a plan to schedule assessments of Student so as to provide him with advance notice so as to minimize the psychological impact on him, although Mother requested such a plan at an IEP team meeting in May 2016;

h) failing to offer Student placement in the least restrictive environment of general education classes for math and history;

i) failing to offer Student push-in aide support for general education elective classes, math and history;

j) failing to offer Bookshare and access to assistive technology devices consistent with Student's independent evaluator's suggestions; and

k) failing to offer Student extended school year services for the summer of 2017?

Student's Proposed Resolutions

1) Declaratory relief that Travis denied Student a FAPE for the 2016-2017 school year, including extended school year.

2) Travis shall reimburse Parents for all costs, including transportation, associated with Student's placement in an intensive specialized reading program for the 2016-2017 school year.

3) Prospectively Travis shall offer Student a placement which includes an intensive systematic specialized English language arts/reading program with specific focused instruction that will meet student's unique needs in this area, as well as placement in general

education classes with accommodations to meet Student's needs, and push-in aide support for general education math, history, science and elective classes.

4) Prospectively Travis shall offer and provide Student with assistive technology services and equipment that is consistent, Bookshare, training and support in the area of initiating social interactions with peers, and extended school year program and services. Goals will be developed in the areas of reading accuracy, written expression, writing fluency, social initiation with peers, keyboarding, and additional goals in the area of executive functioning. Travis will provide transportation for Student to and from the educational placement.

5) Travis shall provide Student with such other and further relief, which is unknown to Student at this time, as deemed appropriate by the ALJ at the hearing.

District's Issue

May Travis implement the IEP developed in May 2016 without Parental consent since it constitutes an offer of a FAPE in the least restrictive environment?

Travis's Proposed Resolution

Travis may implement the IEP developed in May 2016 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 to designate if it is a Student or Travis 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 exhibit binder shall be consecutively paginated or Bates-stamped. Each exhibit binder shall contain a detailed table of contents. It is recommended, but not ordered that the parties use different colored binders for the convenience of the witnesses and the ALJ. It is recommended, but not ordered that the parties have resumes or curriculum vitae for witnesses who are testifying in their professional capacity such as teachers. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7). 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.

The ALJ shall determine what evidence will be admitted. Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely provided to the other party shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible. The parties agree that this provision does not apply to the resumes or curriculum vitae referred to above.

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 at the discretion of the ALJ.

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 parties shall attempt to reach agreement on a witness list and shall meet and confer no later than close of business on October 13, 2016, regarding the schedule for witnesses. Travis shall have witnesses available in case agreement on a witness list is not reached. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, the parties shall be prepared at 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. Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. After the first direct and cross-examinations, each party shall be limited in examining the witness as to only those matters raised in the immediately preceding examination. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

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 move 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 the hearing; 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. No witness will be heard by telephone unless all these requirements have been fulfilled. At this time neither party anticipates calling a witness to testify telephonically.

7. Electronic Recording of Hearing.

a. Audio Recording. Student shall be permitted to make an audio recording of the hearing subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the recorder will be turned on and off at the same time as the ALJ's recorder, in order to avoid recording conversations while off the record; and 3) that operation of the party's recording mechanism will not be allowed to delay the hearing. If Travis wishes to record the hearing, it shall move for leave to do so in advance of the recording, and the same conditions shall apply.

b. Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

8. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) This is a consolidated hearing. The parties have agreed to meet and confer to determine which party shall present its case in chief first. Allowances shall be made for the calling of a witness out of order for the convenience of the witnesses.

9. Motions. As previously discussed, Student's motion to continue the hearing was denied. No other pretrial motions are pending or contemplated. Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during the prehearing conference of October 3, 2016.

10. 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.

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

12. 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 noisemaking electronic devices shall be shut off during the hearing unless permission to the contrary is obtained from the ALJ.

13. Special Needs and Accommodations. Neither party requires a foreign language interpreter or other accommodations.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar staff, identified in the scheduling order, at (916) 263-0880, as soon as the need is known. Additional information concerning requests for reasonable accommodation is available on OAH's website at: http://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing Closed To the Public. The hearing will be closed 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 NOON ON 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.

DATE: October 5, 2016

DocuSigned by:

Rebecca Freie

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REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings