

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

FRESNO UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2012110106

ORDER FOLLOWING PREHEARING
CONFERENCE

On January 7, 2013, a mandatory telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH).). Attorney Sang Jin Nam appeared on behalf of the Fresno Unified School District (District). No one appeared on behalf of Student (Student).¹ The PHC was recorded.

Based on discussion with the District, the following order is issued:

1. Hearing Dates, Times, and Location: The hearing dates are confirmed. The hearing shall take place on January 23 through 25, 2013, for a total of three days of hearing.² Unless otherwise ordered, the hearing shall begin at 9:30 a.m. on January 23, and at 9:00 a.m. on all other days. The hearing shall be held at the District's offices at 1833 E. Street, Fresno, California 93706.³

¹ The ALJ was initially unable to reach Parent (Mother), left two telephone messages at her telephone number of record, and continued the PHC to 2:00 p.m. At that time, the ALJ again called Mother's number but was unable to reach her and left another message indicating the PHC would proceed.

² In November 2012, District initially requested two days but increased the estimate to four days in its PHC statement. However, during the PHC, District agreed the case may take two to three days at most. The ALJ retains discretion to adjust the length of the hearing as necessary.

³ At a minimum, the hearing room shall have four or more separate tables capable of being moved into a courtroom configuration with an electrical outlet near the ALJ's table. The District shall ensure that all parties and the ALJ have drinking water and tissue available to them during the hearing.

2. Notice to Witnesses: The parties shall immediately notify their witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party. A witness will not be regarded as unavailable for purposes of showing good cause to continue the hearing if the witness has not been properly notified of the hearing date or properly subpoenaed, as applicable.

3. (a) Issues: The issues for hearing are limited to those alleged in District's request for due process hearing (complaint).⁴ The issues were discussed during the PHC, and are reframed, reorganized, and clarified below.

Issue 1: May the District perform Student's triennial assessment in all areas identified in its Assessment Plan/Consent for Assessment, most recently presented at Student's February 15, 2012 individualized education program (IEP) team meeting, without the consent of Parent?

*Issue 2:*⁵ May the District terminate the provision of Student's special education and related services as provided in his October/November 2007 IEP due to Parent's failure to allow Student to attend the Adult Transition Program (ATP) at the Instructional Media Center (IMC)?⁶

⁴ 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).)

⁵ District's original second issue, identified in its complaint and PHC statement, was whether District may terminate or modify Student's related services as provided in his October/November 2007 IEP "as dictated by the results of" the triennial assessment. Termination of services is actually a proposed remedy for Issue 1, and not a separate legal issue. To the extent that it may encompass a legal issue, it is not ripe for adjudication because the triennial assessment has not yet been conducted, and the law requires an IEP team meeting after the assessment to consider any IEP changes. Therefore, District's original Issue 2 is dismissed and its content will be addressed as a proposed remedy.

⁶ District's original third issue is now the second issue. It also included a request to permit the District to terminate services based on Parent's failure to consent to its proposed triennial assessment plan, which is redundant and has been eliminated as a separate legal issue as found above. District also argues that Judge Peter Paul Castillo's Order in the OAH Corrected Decision dated August 9, 2012, in Case Number 2012020778, provides that Student's failure to attend the IMC ATP is an independent basis to support an order permitting termination of the obligation to provide services to him. While the ALJ questioned that interpretation of the Order during the PHC, the ALJ will await evidence and legal argument on the issue, and the issue is therefore reserved for hearing.

Issue 3: Did the District's proposed annual goals, placement, and services contained in Student's February 15, 2012 IEP offer Student a free appropriate public education (FAPE) in the least restrictive environment (LRE) such that District may implement them without Parent's consent?⁷

(b) Proposed Remedies: In general, District requests an order relieving it of the obligation to provide special education and related services to Student based on Parent's failure to consent to the triennial assessment plan, and as a remedy should Parent fail to make Student reasonably available for assessment. As noted above, OAH does not have jurisdiction to issue an order permitting the District to terminate services as "directed" by a triennial assessment. That issue is not ripe because assessment results require consideration at an IEP team meeting. In addition, District seeks an order, based on Student's failure to attend the ATP at IMC, permitting it to terminate special education and related services. Finally, if required to continue providing services, District seeks an order permitting it to implement the February 2012 IEP to provide a FAPE.

4. Exhibits and Witnesses: The OAH scheduling order issued in this case on November 6, 2012, required both parties to file PHC statements with OAH **at least three business days prior to the PHC**, containing lists disclosing their respective witnesses and exhibits intended for hearing. Student did not file a PHC statement in connection with the PHC on November 26, 2012, but Mother appeared telephonically. During that PHC, and in the written PHC order of the same date, the undersigned ALJ ordered Student to file his PHC statement not less than three business days prior to the PHC of January 7, 2013. Student failed to obey that order. As of the date of this order, Student has not filed a PHC statement disclosing his lists of witnesses and exhibits.

In addition, the law requires each party to serve on the other party copies of their respective exhibits and a list of all witnesses, describing the general area of their testimony, not less than five business days prior to the start of the hearing.⁸

If Student intends to present witness testimony and/or documents at the hearing, Student shall do the following: (1) Student shall file with OAH, and serve on the other party, a PHC statement containing a list of all witnesses he intends to call at hearing and their general area of testimony, and a list of all exhibits he intends to use at hearing. (2) In addition, Student shall deliver to the attorneys for the District a binder with a table of contents (or list of exhibits) and copies of all exhibits he intends to introduce into evidence at

⁷ It is unclear whether District intends to place its whole IEP offer at issue or just the components listed. District shall clarify this issue at the outset of the hearing.

⁸ Education Code section 56505, subdivision (e)(7). The law also provides that the ALJ has discretion to exclude testimony of witnesses or admission of documents that were not disclosed by the parties pursuant to Education Code sections 56505, subdivision (e)(8), and 56505.1, subdivision (f).

hearing. The deadline for Student to complete both of the above disclosures is the close of business on Tuesday, January 15, 2013.

5. Exhibits: Exhibits shall be pre-marked and placed in a three-ring exhibit binder prior to the hearing. The parties' exhibits shall be pre-marked using numbered tabs and accompanied by a detailed exhibit list. Student's exhibit list shall identify each exhibit by number and the designation "S" (e.g., S1), and the District's exhibit list shall identify each exhibit by number along with a "D" (e.g., D1). Any document over five pages in length shall be internally paginated. Each exhibit binder shall contain a detailed table of contents or list. Each party shall serve an exhibit binder containing its respective exhibits and list on the other party not less than five business days prior to the start of the hearing. At the hearing, the parties shall supply an additional exhibit binder containing their respective exhibits and lists for use by the ALJ, and another exhibit binder for use by the witnesses. In the event of duplicate exhibits, the most legible version will be used, unless otherwise ordered. The parties shall not serve exhibits on OAH prior to the hearing.

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 may not be admitted into evidence at the hearing unless it is supported by a declaration under penalty of perjury, and the ALJ rules that it is admissible.

6. Witnesses: At this time, District intends to call all 10 witnesses disclosed in its PHC statement. Student's witnesses are unknown at the present time. Neither party shall be permitted to call any witnesses not disclosed under Education Code section 56505, subdivision (e)(7), and as ordered above, except for good cause shown, supported by declaration under penalty of perjury, and at the discretion of the ALJ.

At the commencement of the due process hearing, the ALJ and the parties will discuss the witness schedules, including the length of time anticipated for examination of each witness and any scheduling issues for individual witnesses. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for any witness's testimony. 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. Each party shall manage the number of witnesses so that the party's evidence will be presented within its approximate allocation of fifty percent of the total hearing time. The parties shall proceed efficiently in their questioning of witnesses and shall narrow their witness lists and their questions to witnesses to avoid unnecessary, cumulative, or duplicative testimony. The parties should bear in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

7. 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).) Neither party requested the telephonic testimony of any witness.

A party seeking to present a witness by telephone shall move in advance for leave to do so with an explanation of the reasons for the request. If OAH grants the request, the party requesting the telephonic testimony 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 testimony of the witness. In addition, if the request is granted, the District shall ensure that the hearing room has a speaker telephone with adjustable volume control and a long telephone cord, so that the telephone can be placed close to all parties to ensure the ability to hear and record the testimony of the witness and the witness to hear objections and rulings.

8. Order of Presentation of Evidence: District shall produce its evidence first. Where Student and District intend to call the same person to testify, each party will examine the witness immediately after the other party, so the witness will only need to be called to the witness stand once.

9. Closed Hearing: The hearing shall be closed to the public in the absence of a request from Student otherwise.

10. Motions: 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 this PHC.

11. Special Needs and Accommodations: No special accommodations were requested during the PHC.⁹

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 turned off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

13. 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. Any party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

14. Settlement: The parties are encouraged to negotiate to reach a settlement 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. If a settlement is reached five business days or fewer before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact during business hours by telephone at **(916) 263-0880**.

⁹ District informed the ALJ that Father required a Spanish translator at the prior hearing. However, Student has not submitted any witness list to OAH at this time.

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. IF A FULL AND FINAL SETTLEMENT IS REACHED AFTER 5:00 P.M. ON THE LAST BUSINESS DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035, AND SHALL ALSO LEAVE CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. OAH will check for messages the evening prior to the hearing and the morning of the hearing.

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

Dated: January 8, 2013

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings