

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2012110608

v.

FRESNO UNIFIED SCHOOL DISTRICT,

FRESNO UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2012110688.

v.

PARENT¹ ON BEHALF OF STUDENT.

ORDER FOLLOWING PREHEARING
CONFERENCE

On January 16, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH). Attorney Celia Bernal appeared on behalf of Student and Parent (Student). Attorney Sang Jin Nam appeared on behalf of the Fresno Unified School District (District).² The PHC was recorded.

Based on discussions with the parties, the following order is issued:

1. Hearing Dates, Times, and Location: The hearing dates are confirmed. The hearing shall take place on February 5 through 7, 2013, plus one more day, for a total of four days of hearing. The fourth day of hearing shall be on Friday, February 8, 2013, if the undersigned Administrative Law Judge (ALJ) hears the case. If another ALJ is assigned, the fourth day of hearing shall be on either February 8, or Tuesday, February 12, 2013, at the discretion of the assigned ALJ, unless otherwise ordered. The hearing shall begin at 9:30 a.m. on February 5, and at 9:00 a.m. on all other days. The hearing shall be held at the District's Professional Development Center offices at 1833 E Street, Fresno, California 93706.³

¹ In these consolidated cases, the "Parent" is Student's Educational Rights Holder.

² Attorney Melody Hawkins was present with Mr. Nam.

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.

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 without need for a subpoena. 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. Issues: The issues for hearing are limited to those alleged in the parties' respective requests for due process (complaints). The issues were discussed during the PHC, and are reframed, reorganized, and clarified below.⁴

*Student's Issues*⁵

Issue A: Beginning on November 16, 2010, did District deny Student a free appropriate public education (FAPE) by failing to adequately assess him in the following areas related to his suspected disability:

- (1) Vocational and postsecondary transition;
- (2) Mental health;
- (3) Assistive technology; and
- (4) Psychoeducational and/or neuropsychological?

Issue B: Beginning on November 16, 2010, did District deny Student a FAPE by failing to offer him an appropriate educational placement in a small, highly structured, interactive educational setting?

Issue C: Beginning on November 16, 2010, did District deny Student a FAPE by failing to offer him the following appropriate related services to meet his unique needs:

The District shall ensure that all parties and the ALJ have drinking water and tissue available to them during the hearing.

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 During the PHC, Student dismissed the following issues originally set forth in his complaint: Issue 4, beginning on line 14, page 12; Issue 5, beginning on line 1, page 13; Issue 5 [sic], beginning on line 18, page 14; and Issue 8, beginning on line 17, page 17. However, the body of Issue 5, beginning on line 1, page 13, is retained to support Student's Issue C(5) regarding transition plans and services.

- (1) One-to-one tutoring;
- (2) Behavioral support and services;
- (3) Speech and language services;
- (4) Assistive devices;
- (5) Vocational and postsecondary transition services; and
- (6) Psychiatric supports?

Issue D: Beginning on November 16, 2010, did District deny Student a FAPE by failing to provide Parent with a full and complete copy of Student's educational records?⁶

*Issue E:*⁷ Beginning on November 16, 2010, did District deny Student a FAPE by failing to comply with or implement Student's last agreed-upon individualized education program (IEP), dated October 5, 2011, with respect to the IEP provision to send a special education teacher to Student's home to prepare him for transition to an educational placement at Millbrook?

*District's Issues*⁸

Issue F: May District conduct Student's triennial assessment in all areas identified in its Assessment Plan/Consent for Assessment dated September 6, 2012, without the consent of his Educational Rights Holder?⁹

⁶ Student indicated during the PHC that he believes Parent requested his records in about the fall of 2010, and again through his attorney in about May 2012.

⁷ Student's Amended PHC Statement contained an additional issue about District's failure to "have a statutorily compliant IEP in place at the beginning of the 2012-2013 school year." However, that problem was not set forth in Student's complaint, and is not an issue in this case.

⁸ During the PHC, District dismissed its second issue in its complaint, beginning on line 23, page 2.

⁹ During the PHC, Student indicated that Educational Rights Holder has recently signed District's Assessment Plan. However, it was apparently defective and will be resubmitted. District will advise the ALJ at the outset of the hearing whether this issue remains or is dismissed.

Issue G: Did District's September 13, 2012 IEP, including annual goals, placement and services, and as presented in a prior written notice dated September 20, 2012, offer Student a FAPE such that District may implement it without the consent of his Educational Rights Holder?¹⁰

Proposed Resolutions and Remedies: The parties' respective proposed resolutions and remedies were discussed during the PHC. Each party retains the right to present its defenses and proposed resolutions and remedies with respect to the remaining issues during the hearing and in closing arguments.

4. Exhibits: Exhibits shall be pre-marked and placed in three-ring exhibit binders 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.¹¹ 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. During the PHC, the ALJ informed both parties that OAH is not a repository for all of Student's records and all documents not marked for identification will be returned to the parties at the close of 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. The parties retain all rights to proffer objections to exhibits at hearing.

5. Witnesses: The parties shall meet and confer regarding witness schedules prior to the hearing. 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

¹⁰ District's statement of this issue includes the least restrictive environment (LRE). However, during the PHC District explained that the issue pertains to the entire IEP offer, and is not limited to LRE or to "placement, services and goals."

¹¹ Education Code section 56505, subdivision (e)(7).

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 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.

At the present time, Student and District intend to call all witnesses listed in their respective prehearing conference statements. During the PHC, the parties identified their top witnesses for the record. Student clarified that he is not waiving attorney-client privilege by calling a former attorney and/or advocate as a witness. If Student intends to call Dr. Skyler, Student will use best efforts to send a resume or curriculum vitae to the attorney for the District before January 29, 2013.

6. Telephonic Testimony: Neither party requested telephonic testimony of a witness, although Student indicated he may need to make such a request for Agnes Williams and/or Dr. Fox. District noted its objection to any telephonic testimony by Dr. Fox for the record. The ALJ directed the parties to file such a motion as soon as possible to allow sufficient time for the opposing party to file a reply, and for the ALJ to rule on the motion prior to the start of the hearing.

Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5 § 3082, subd. (g).) 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 exhibits 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.

7. Order of Presentation of Evidence: Student shall produce his 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.

8. Closed Hearing: The hearing shall be closed to the public unless Student requests otherwise.

9. 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.

10. Special Needs and Accommodations: District has requested security for the hearing. OAH will make security arrangements.

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 noisemaking electronic devices shall be turned 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. Any party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

13. 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**.

Dates for hearing will not be cancelled until a letter of withdrawal, request for dismissal, and/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 (AFTER HOURS SETTLEMENT HOTLINE), 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.

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

Dated: January 17, 2013

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings