

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

FRESNO UNIFIED SCHOOL DISTRICT.

OAH Case No. 2015030220

ORDER FOLLOWING PREHEARING
CONFERENCE

On May 22, 2015, a telephonic prehearing conference was held before Administrative Law Judge Rebecca Freie, Office of Administrative Hearings. Mother appeared on behalf of Student. Diandra Netto, Attorney at Law, appeared on behalf of Fresno Unified School District. Sydney Smith, Attorney at Law, was also present with Ms. Netto. 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 occur on June 10, 11, and 12, 2015.¹ The hearing shall start at 9:30 a.m. on June 10, and at 9:00 a.m. on other days. The hearing shall end no later than 5:00 p.m. each day, unless otherwise ordered. If the hearing is not completed by June 12, 2015, it shall continue day to day, Monday through Thursday as needed, at the discretion of the ALJ.

The hearing shall take place at Fresno's Professional Development Center, 1833 E Street, Fresno, California 93706. 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. Fresno shall ensure that all parties and the ALJ have drinking water, and that tissue is available on the witness table during the hearing. Fresno shall ensure that the facility for the hearing 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), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

¹ Although OAH does not normally schedule hearings on Fridays, the undersigned ALJ is willing to conduct the hearing on Friday, June 12, 2015, if doing so will ensure the conclusion of the hearing on that date. However, if another ALJ is assigned to the hearing, or the needs of OAH make it impossible to have the case heard that Friday, the case may not go forward on June 12, 2015, and the parties were so advised.

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.

a) Did Fresno deny Student a free appropriate public education by committing procedural violations that impeded Student’s right to a FAPE, cause a deprivation of educational benefit, and/or significantly impeded Parents’ meaningful participation in the individualized education program process from March 3, 2013, to March 3, 2015, by:

- 1) not having all legally required persons at IEP team meetings ;²
- 2) failing to provide Parents with required progress reports regarding Student’s progress meeting his annual goals; and
- 3) failing to develop legally compliant goals for Student at IEP team meetings in April 2013, and August 2014?

b) Did Fresno deny Student a free appropriate public education by committing procedural violations that impeded Student’s right to a FAPE, cause a deprivation of educational benefit, and/or significantly impeded Parents’ meaningful participation in the individualized education program process at IEP team meetings in August 2014, by:

- 1) attempting to change his primary disability from Autism to speech and language impairment; and
- 2) failing to provide accurate levels of academic achievement and functional performance?

c) Did Fresno deny Student a free appropriate public education by committing procedural violations that impeded Student’s right to a FAPE, cause a deprivation of educational benefit, and/or significantly impeded Parents’ meaningful participation in the individualized education program process by:

² No later than close of business Wednesday, June 3, 2015, Mother shall file with OAH, and serve on counsel for Fresno, a list of the dates of IEP team meetings when required personnel were not present, and which required persons were missing from the meeting.

1) failing to provide Student with notice of his procedural rights when he reached the age of majority, and failing to discuss a transition plan with him during his 11th and 12th grade years; and

2) fabricating IEP documents after August 29, 2014.³

d) Was Student denied a FAPE because Fresno failed to offer him a program (placement, accommodations and modifications) and services that would meet his unique needs and provide him with educational benefit during the two years prior to the filing of the complaint?

Proposed Resolutions: As proposed resolutions Student is asking that Fresno provide him with compensatory education in the areas of reading comprehension, written language, speech and language. Further, Student is asking that Parents be reimbursed for out-of-pocket educational expenses incurred during the two years prior to the filing of the complaint.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing, with each exhibit separated from the next by a divider. It is suggested, but not ordered, that the parties use different colored binders for ease of use by witnesses when testifying. The parties shall use numbers to identify exhibits. At the hearing the ALJ shall place the letter “S” or “D” in front of an offered or admitted exhibit, or an exhibit referred to by a witness, 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 shall be consecutively numbered or Bates-stamped. Each exhibit binder shall contain a detailed table of contents. In accordance with Education Code section 56505, subdivision (e)(7), the parties shall serve the evidence binders on each other five business days prior to the commencement of the hearing, unless they agree to a later date. (See Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, Analysis of Comments and Changes, regarding 34 C.F.R. 300.512 (b), 71 Fed.Reg. 46706 (August 14, 2006).)

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.

Inclusion of an exhibit in an exhibit binder, or presentation of an exhibit to the other side according to the agreed upon timeline, does not guarantee the admission of an exhibit. The ALJ shall determine whether the exhibit is relevant and admissible.

The parties are asked, but not ordered, to provide curricula vitae or resumes for witnesses testifying in their professional capacity, such as teachers. Except for good cause

³ No later than close of business Wednesday, June 3, 2015, Mother shall file with OAH, and serve on counsel for Fresno, a list of the documents she believes were fabricated.

shown, or unless used solely for rebuttal or impeachment, any not previously exchanged in a timely manner shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible. A party seeking admission of a previously undisclosed document must be prepared to make an offer of proof as to why it was not previously produced. The parties have agreed that curricula vitae or resumes are not included as exhibits subject to this order if provided to opposing counsel prior to the day the hearing commences.

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 disclosed within statutory guidelines except for good cause shown.

The parties are ordered to meet and confer by close of business June 3, 2015, as to the schedule of witnesses. The parties have agreed to coordinate the availability and order of testimony of witnesses to ensure that there is a witness available to testify at all times during the hearing, and to ensure that the hearing is completed as scheduled.

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 be prepared to make an offer of proof as to the testimony of each witness, so that the ALJ has sufficient information to determine whether a witness shall be heard. The parties shall be prepared at the beginning and end of each day of hearing to discuss the witness schedule and the time the testimony of each such witness is expected to take. The ALJ can limit time for the testimony of witnesses if it becomes necessary, to ensure the hearing is completed as scheduled.

5. Scope of Witness Examination. If a witness is to be called by more than one party, the second party questioning the witness may expand cross-examination to include questions that might have been asked on direct examination had the party called the witness first. 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.

6. Telephonic Testimony. One witness, Nicole Catenasso, may testify telephonically. 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.

7. Timely Disclosure of Witnesses/Exhibits. The parties understand that unless they agree otherwise, exhibits must be exchanged at least five business days prior to the commencement of the due process hearing on June 10, 2015. (Ed. Code § 56505, subd. (e)(7).

8. Motions. No motions were made that were ruled upon at the PHC. No pretrial motions are pending or contemplated. If any motion is filed after the date of the PHC, it must contain an explanation as to why the motion was not made prior to or during the prehearing conference of May 22, 2015.

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

10. 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.

11. Audio Recording of the Hearing. It is within the discretion of the ALJ to permit the audio recording of a due process hearing. The ALJ has informed the parties that they may record the hearing. However, the parties are advised that OAH always makes a digital recording of the proceedings, and this recording is the official record of the hearing. Parties who record the hearing are to turn off their recorders whenever the ALJ orders that the hearing is “off the record.” Parties will not be given time during the hearing to deal with any malfunction of their recording equipment. Any violation of this order to turn off recorders when the matter goes off the record will result in the revocation of permission to record the hearing. No video recording is allowed.

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. Neither party anticipates the need for an interpreter during the hearing. Should any party require an interpreter, OAH shall be notified as soon as that need is determined.

A party or participant in this case, such as a witness, requiring reasonable accommodation to participate in the hearing, may contact the assigned calendar clerk at (916) 263-0880, or the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880, as soon as the need is known. Information concerning a request for reasonable accommodation is available on OAH’s website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>.

14. Hearing Open/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 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.

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

IT IS SO ORDERED.

DATE: May 26, 2015

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings