

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BRENTWOOD UNION SCHOOL
DISTRICT.

OAH Case No. 2015040291

ORDER FOLLOWING PREHEARING
CONFERENCE AND GRANTING
CONTINUANCE OF HEARING DATE

On May 22, 2015, a telephonic prehearing conference was held before Administrative Law Judge Rebecca Freie, Office of Administrative Hearings. Nicole Hodge Amey, Attorney at Law, appeared on behalf of Student. Van Vu, Attorney at Law, appeared on behalf of Brentwood Union School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. Prior to the PHC, Student filed a motion to continue the hearing to July 2015. Brentwood opposed the motion.

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).)

The hearing was set to begin on May 28, 2015, and continue day-to-day, Monday through Thursday, at the discretion of the ALJ. Student's attorney claimed that she was

unavailable to begin the hearing on May 28, 2015, because she believed she would be in another OAH hearing that was to begin on May 26, 2015. However, prior to the PHC, that hearing was continued to another date. The attorney for Student also stated that she had an appearance in federal court in San Francisco on May 28, 2015. She further claimed that she would be unable to proceed with the hearing on June 3, 2015, due to an important family matter. During the PHC she also claimed unavailability for part of June 4, 2015, due to that same event. Brentwood opposed continuing the hearing to July 2015 because its special education director will be retiring in mid-June 2015, and another employee will be unavailable to testify in July 2015.

The request for continuance was partially granted. The hearing shall take place on June 2, 4, 9 and 10, 2015, at Brentwood's offices located at 255 Guthrie Lane, Brentwood, California 94513. The hearing shall begin at 9:30 a.m. on June 2 and 9. The hearing shall begin at 1:30 p.m. on June 4. The hearing shall begin at 9:00 a.m. on June 10, 2015. The hearing shall continue day-to-day, Monday through Thursday, at the discretion of the ALJ.

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. Brentwood shall ensure that all parties and the ALJ have drinking water, and that tissue is available on the witness table during the hearing. Brentwood 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.

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.

Issue 1: Did Brentwood deny Student a free appropriate public education by unilaterally predetermining Student's eligibility under the category of emotional disturbance at the January 15, 2014 individualized education program team meeting?

Issue 2: Did Brentwood deny Student a FAPE by unilaterally predetermining Student's eligibility under the category of emotional disturbance at the January 29, 2015 IEP team meeting?

Issue 3: Did Brentwood deny Student a FAPE from January 29, 2015, through April 3, 2015, (the date Student filed his complaint with OAH) by predetermining Student's

placement in its special education day classroom for emotionally disturbed students, without considering a continuum of placements?

Issue 4: Did Brentwood deny Student a FAPE during the 2013-2014 school year by failing to conduct the following assessments:

- 1) a functional analysis assessment; and
- 2). a social behavioral assessment?

Issue 5: Did Brentwood deny Student a FAPE during the 2014-2015 school year, until April 3, 2015, by failing to conduct the following assessments:

- 1) a functional analysis assessment; and
- 2) a social behavioral/functional behavior assessment?

Issue 6: Did Brentwood deny Student a FAPE during the 2013-2014 school year by failing to conduct legally compliant assessments by failing to assess Student's social, emotional and behavior needs as part of its May 29, 2013 initial psychoeducational assessment?

Issue 7: Did Brentwood deny Student a FAPE by failing to conduct a legally compliant psychoeducational assessment in December 2013 as follows:

- 1) by incorrectly stating that Student was taking the medication Risperdone;
- 2) by spending insufficient time assessing Student's needs; and
- 3) by determining that Student met the criteria for emotional disturbance?

Issue 8: Did Brentwood deny Student a FAPE during the 2013-2014 school year by failing to include a behavior intervention plan as part of Student's IEPs during that school year?

Issue 9: Did Brentwood deny Student a FAPE during the 2014-2015 school year by failing to provide a behavior intervention plan?

Issue 10: Did Brentwood procedurally deny Student a FAPE by excusing necessary team members from IEP team meetings as follows:

- 1) the school psychologist on September 24, 2013; and
- 2) the behaviorist at all IEP team meetings?

Proposed Resolutions: Student seeks compensatory education including intensive academic instruction in math, language arts, and reading, and is asking for one-on-one tutoring in these areas. Student also is asking for psychotherapy/counseling services and a functional behavior assessment.

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 shown, or unless used solely for rebuttal or impeachment, any exhibit 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 in a timely manner except for good cause shown.

The parties are ordered to meet and confer by close of business May 26, 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, to be called by Brentwood, Lucy Berk-Fisher, 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. Order of Presentation of Evidence. Student shall present his evidence first, followed by Brentwood, unless it is necessary to call a witness earlier due to witness scheduling issues.

8. Motions. The ALJ ruled on Student's motion to continue the hearing as discussed above. 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 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 shall 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, THE LAST BUSINESS 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: May 26, 2015

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings