

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. 2015050567

ORDER FOLLOWING PREHEARING
CONFERENCE

On August 7, 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. Elizabeth Rho-Ng, 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. The hearing shall occur on August 18, 19, 20, 24, 25, 26, and 27, 2015. It shall begin at 9:30 a.m. on August 18, 2015, and 1:30 p.m. on August 24, 2015. The hearing shall end at 5:00 p.m. each day, with the exception of August 19, 2015, when it shall end at 4:00 p.m. Starting and end times are at the discretion of the ALJ. Should the hearing not be completed on August 27, 2015, it shall continue day to day, Monday through Thursday as needed at the discretion of the ALJ.

The hearing shall take place at District's offices at 255 Guthrie Lane, Brentwood, California 94513. 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. District shall ensure that all parties and the ALJ have drinking water, and that tissue is available on the witness table during the hearing. District 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. The issues have been reworded for clarity. Any motions regarding the rewording of issues should be filed no later than the beginning of the hearing.

a) Did District's failure to provide Parents with all documents from Student's file pursuant to Education Code section 56504, following a request on April 7, 2015, constitute a procedural violation, which denied Student a free appropriate public education?¹

b) From May 6, 2013, to May 5, 2015, did District deny Student a FAPE by failing to assess Student in the areas of neuropsychology, functional behavior, and social behavior?

c) In August 2013, did District commit the procedural violation of administering to Student the Wechsler Intelligence Scale for Children-IV, in violation of *Larry P. v. Riles*, (9th Cir. 1984, as amended en banc 1986) 793F.2d 969 which resulted in a denial of FAPE?

d) Did District deny Student a FAPE from May 6, 2013, to May 5, 2015, by failing to design and implement a behavior intervention plan?

e) Did District deny Student FAPE by failing to offer school-based counseling from May 6, 2013, to February 19, 2015, and from May 6, 2013, to May 5, 2015, by failing to conduct an educationally related mental health services assessment?

f) Did District commit the procedural violation of holding an IEP team meeting in Parents' absence on August 29, 2013, which resulted in the denial of FAPE?

Proposed Resolutions: Student asks for independent educational evaluations in all areas of suspected disability including cognitive development, academic/functional skills, social/emotional, behavioral and adaptive skills, and a functional behavioral assessment.

He asks for compensatory educational in all areas of need identified as a result of the independent educational evaluations.²

Student also asks for District to fund placement at a residential facility or nonpublic school, including transportation. Student asks that Parents be reimbursed for out-of-pocket costs related to his admission to a residential facility, including transportation, and transportation related to home/hospital services he received. Student also asks for

¹ Student was not prepared at the PHC to list the documents that allegedly were not provided. No later than close of business on August 12, 2015, Student shall send District and OAH a list of the documents that purportedly were not provided.

² This proposed resolution does not relieve Student of the burden of producing evidence as to his need for compensatory education as discussed in paragraph 12.

reimbursement for out-of-pocket expenses related to social/emotional, and behavioral camps and/or groups Student has attended to date. Student asks for funding for applied behavioral analysis therapy, family therapy, and individual therapy training, including transportation costs, to help deal with Student's behavioral issues, and to reimburse Parents for any services of this nature provided to date.

Student asks that OAH issue an order for District to provide Parents with all Student's records not previously provided, and that Student be permitted to file an additional complaint against District if the review of these records shows additional claims. Student asks that OAH waive the two-year statute of limitations in relation to these additional claims.

Finally, Student asks for OAH to order an appropriate placement and services that Student requires to receive a FAPE.

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 and place the letter "S" or "D" in front of each exhibit number, 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.

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 document 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 witness testifying.

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. District advised Student during the PHC that a few proposed witnesses are no longer employed by District, or are on leave. District shall make reasonable attempts to obtain addresses for these proposed witnesses so that they can be served with a subpoena by Student, or District shall otherwise make a good faith effort to procure the attendance of such witnesses.

The parties are ordered to meet and confer by close of business August 12, 2015, as to the schedule of witnesses. The parties shall 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. 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. District indicated that one or two of its witnesses may need to testify telephonically. This will be addressed at the hearing.

7. Motions. District made an oral motion during the PHC asking the ALJ to dismiss Student's first issue on grounds that it had previously provided all records to Student. The ALJ denied the motion, but advised Student that to prevail on his issue he has to burden to prove that specific documents were not provided to him, and how this procedural violation denied him a FAPE.

Student may file a motion asking that the ALJ not allow Student to testify at hearing, if District is intent on calling him as a witness. No other motions were made that were ruled upon at the PHC. No other pretrial motions are pending or contemplated. If any motion, other than Student's motion concerning him being a witness 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 August 7, 2015.

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

9. 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.

10. 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.

11. 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.

12. 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. Neither party anticipates any other accommodations being needed for a participant or witness

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>.

13. Hearing Closed To the Public. The hearing will be closed to the public.

14. 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 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.

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

IT IS SO ORDERED.

DATE: August 11, 2015

/s/
REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings