

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. 2015070735

ORDER FOLLOWING PREHEARING
CONFERENCE

On December 4, 2015, a telephonic prehearing conference was held before Administrative Law Judge Rebecca Freie, Office of Administrative Hearings. Karen Watkins, Attorney at Law, appeared on behalf of Student. Diandra Netto, Attorney at Law, appeared on behalf of Fresno Unified School District. She was accompanied by Sydney Smith, Attorney at Law.

1. Hearing Dates, Times, and Location. The hearing shall take place from December 15, 2015, through December 17, 2015, in Room 209 at Fresno offices located at 1733 E Street, Fresno, California 93706. The hearing shall begin at 9:30 a.m. on December 15, 2015, and at 9:00 a.m. on all other days. If the hearing is not completed as scheduled, it shall continue Monday through Thursday, as ordered by the ALJ.

Fresno shall certify, no later than 5:00 p.m. on December 7, 2015, that the hearing location fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities, and shall file that certification with OAH. If Fresno is unable to comply with this order, it shall inform OAH immediately.

The hearing room shall be configured into a courtroom setting, including (1) a table for Student and his representatives; (2) a table for Fresno's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Fresno shall also make reasonable effort to ensure that drinking water and tissues are available to all parties, witnesses and the ALJ. The same hearing room shall be used for each day of hearing and shall be available at least one hour prior to the commencement of the hearing each day. The hearing room shall be locked following the hearing each night.

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, and the proposed resolutions, are listed below.

- 1) Did Fresno deny Student a free appropriate public education during the 2013-2014 school year by:
 - a. Failing to provide Student with assistive technology services and devices; and
 - b. Failing to provide Student with a program, specifically speech and language services, that would meet his unique academic needs in the academic area of English language arts?
- 2) Did Fresno deny Student a free appropriate public education during the 2014-2015 school year by:
 - a. Failing to provide Student with the assistive technology assessment identified in the June 10, 2014 IEP;
 - b. Failing to provide Student with assistive technology services and devices;
 - c. Failing to provide Student with a program, specifically one including speech and language services, that would meet his unique academic needs in the academic area of English language arts;
 - d. Failing to provide Student with adaptive physical education services; and
 - e. Failing to offer and provide Student with a one to one aide that would meet his unique needs and provide him with educational benefit?
- 3) Did Fresno commit procedural violations that denied Student a FAPE by:
 - a. Failing to provide prior written notice that it would not perform the assistive technology assessment identified in the June 10, 2014 IEP;
 - b. Failing to have an assistive technology specialist attend the

June 10, 2014 IEP team meeting;

- c. Failing to have an assistive technology specialist at the March 15, 2015 IEP team meeting;
 - d. Failing to include assistive technology services and devices in the IEP offers of March 10, 2015, and May 19, 2015;
 - e. Failing to timely respond to, and/or provide an independent educational evaluation in the area of psychoeducation following requests on March 20, 2014, and May 14, 2014; and
 - f. Failing to include all independent educational evaluator's recommendations in the IEP offer of May 19, 2015?
- 4) Did Fresno deny Student a FAPE by failing to provide Student with special education and related services during the extended school year programs in the summers of 2014 and 2015, specifically adaptive physical education, speech and language services, and assistive technology?

Proposed Resolutions:

- 1) Parent and staff training for Student's assistive technology;
- 2) A functional behavior assessment, and training for Parents and school staff as recommended by the assessor;
- 3) Compensatory education in English language arts and behavior therapy; and
- 4) Attorney fees and costs.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letter "S" or "D" in front of the exhibit 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 Bates-stamped. Each exhibit binder shall contain a detailed table of contents. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7), unless they agree to exchange binders on a later date. 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. In the event of duplicate exhibits, the most legible version will be used. The parties are encouraged, but not ordered, to use different colored binders for the convenience of witnesses. Further, the parties are

encouraged to present resumes or curriculum vitae for witnesses who are testifying in their professional capacity. The parties have agreed that resumes and curriculum vitae can be exchanged after the statutory time period specified in Education Code section 56505, subdivision (e)(7).

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible. This provision does not apply to resumes or curriculum vitae.

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 timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

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 attempt to reach agreement on a witness list for the first day of hearing, and have agreed to meet and confer about the witness schedule no later than 5:00 p.m. on December 9, 2015. Fresno shall have witnesses available in case agreement on a witness list is not reached. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, the parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony of each such witness is expected to take.

5. Scope of Witness Examination. Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. If both parties intend to call the same witness, the second party examining the witness may include questions that would have been asked had that party called the witness first. After the first direct and cross-examinations, each party shall be limited in examining the witness as to only those matters raised in the immediately preceding examination. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

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.

7. Electronic Recording of Hearing.

a. Audio Recording. Any party seeking to audio record the hearing must obtain the consent of the ALJ conducting the hearing. Any party recording the hearing is subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the recording will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record; and 3) that operation of the party's recording mechanism will not be allowed to delay the hearing.

b. Video Recording. No party, witness, or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

8. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Student is the petitioning party. Accordingly, Student shall present his case-in-chief, followed by Fresno.

9. Motions. At the commencement of the PHC the parties discussed the possibility of making a motion for a continuance, but were informed that unless extraordinary good cause was shown, no further continuances would be granted since this matter has been pending since July 2015. No further 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 December 4, 2015.

10. 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.

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

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 shut off during the hearing unless permission to the contrary is obtained from the ALJ.

13. Special Needs and Accommodations. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar staff, identified in the scheduling order, at (916) 263-0880, as soon as the need is known. Additional information concerning requests for reasonable accommodation is available on OAH's website at: <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>. The parties do not anticipate the need for accommodations by any party or witness. Neither party anticipates the need for an interpreter.

14. Hearing Open/Closed To the Public. The hearing will be closed to the public unless Student requests that it be open.

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 ON MONDAY, DECEMBER 14, 2015, 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: December 8, 2015

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

