

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

**IN THE MATTER OF:
PARENT ON BEHALF OF STUDENT,**

v.

**ALAMEDA UNIFIED SCHOOL DISTRICT.
OAH CASE NUMBER 2019070683**

ORDER FOLLOWING PREHEARING CONFERENCE

On August 30, 2019, Administrative Law Judge (called ALJ) Charles Marson, Office of Administrative Hearings (called OAH), held a telephonic prehearing conference. Eileen Matteucci, Attorney at Law, appeared on behalf of Student. Jan E. Tomsy, Attorney at Law, appeared on behalf of the Alameda Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issued an Order Following Prehearing Conference on August 30, 2019.

On September 5, 2019, Student filed a request for clarification of two passages in the August 30, 2019 order. No response was received from Alameda. The request is granted. This Amended Prehearing Conference order is identical to the Prehearing Conference Order issued August 30, 2019, with the following exceptions: 1) the date of the Order is changed; 2) the school year referenced in the preface to Issue Number Two is changed to 2018-2019; and 3) the proposed resolution on page five is expanded to specify reimbursement for tutoring and, separately, reimbursement for a summer

program during the 2019 extended school year. This Amended Order wholly supersedes the original Order filed on August 30, 2019.

DUE PROCESS HEARING DATES, TIMES AND LOCATION

HEARING DATES AND TIMES

On August 28, 2019, Alameda filed a request to continue the due process hearing until October 22, 2019 on the ground that its counsel was unavailable on September 11, 2019, due to a long-scheduled speaking engagement. The District requested in the alternative to go dark on September 11. Student opposed continuing the entire hearing but had no opposition to going dark on September 11. The matter has not been continued previously.

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. (34 C.F.R. § 300.515(a)(2006); Ed.Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) In ruling on a motion for continuance, OAH is guided by the provisions found within the Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, rule 3.1332.) Generally, continuances of matters are disfavored. (Cal.Rules of Court, rule 3.1332(c).)

The District has shown good cause for a continuance. After discussion of the logistics of obtaining American Sign Language interpreters, and the date on which they will be required, Student withdrew his opposition to continuance. The parties and the ALJ then agreed to continue the due+ process hearing to October 8, 9 and 10, 2019. Student anticipates that the witness needing ASL interpreters will testify on the afternoon of October 8, 2019.

The hearing will therefore take place on October 8, 9 and 10, 2019, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. on the first day of the hearing and at 9:00 a.m. on all other days, unless otherwise ordered.

HEARING LOCATION

The hearing will be held at the Alameda Unified School District, 2060 Challenger Drive, Alameda, California, in a room to be provided by Alameda.

The parties shall immediately notify all potential witnesses of the hearing dates and location, 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.

District facilities shall fully comply 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 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. Districts are required to file written certification with OAH that the facilities they provide comply with these laws. Alameda filed the required certification.

Alameda shall ensure that the hearing room is configured into a courtroom setting and shall contain:

- a table for Student and his representatives;
- a table for Alameda's legal representative and special education representative;
- a table for the witness; and
- a table for the ALJ, near an electrical outlet.

Unless otherwise ordered, 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 at lunch breaks and following the hearing each night.

ISSUES AND PROPOSED RESOLUTIONS

The ALJ has slightly altered the statement of some issues as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made. A party believing that an issue has been misstated or omitted shall promptly file a notice in writing stating its concern. The issues at the due process hearing and proposed resolutions, as alleged in the complaint and clarified by the parties and the ALJ during the PHC are:

ISSUES

1. Did Alameda deny Student a free appropriate public education, called a FAPE, in the 2017-2018 school year because
 - a) its September 15, 2017 language arts assessment was not legally compliant, and
 - b) its September 17, 2017 individualized education program, called an IEP, with amendments, failed
 - 1) to provide individualized or specialized instruction or support for his hearing loss, and
 - 2) failed to provide placement in the least restrictive environment?
2. Did Alameda deny Student a FAPE in the 2018-2019 school year because

a) its April 23, 2019 psychoeducational assessment was not legally compliant,

b) its September 11, 2018 IEP, including amendments, failed to provide individualized or specialized instruction or support for his hearing loss; and

c) it failed to make a written IEP offer of placement for the 2019 extended school year?

3. Did Alameda deny Student a FAPE in the 2019-2020 school year because it failed to make a written IEP offer of placement?

PROPOSED RESOLUTIONS

As resolutions, Student seeks an order requiring Alameda to reimburse Parents for private tutoring during the 2017-2018 school year, the 2018 extended school year, and the 2018-2019 school year, and for a summer program during the 2019 extended school year; to provide independent assessments in all areas assessed for Student's triennial review except for Deaf/Hard of Hearing needs; and to promptly convene an IEP team meeting to make Student an offer of FAPE for the 2019-2020 school year.

RESPONSE TO COMPLAINT

OAH has not received a copy of Alameda's response to Student's complaint.
(*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)
Alameda shall file its response with OAH within three business days from the date of this PHC.

EXHIBITS

BINDERS

Exhibits shall be pre-marked and placed in three-ring binders before the hearing. Exhibit binders shall include a tab for each exhibit. The parties shall use numbers to identify exhibits in a way that clearly identifies the party offering it (such as "S1" or "D2"). Each exhibit shall be internally paginated, by exhibit, or all of a party's exhibits shall be Bates-stamped. Each binder shall contain a detailed table of contents.

Parties are encouraged to present resumes or curricula vitae for all professional witnesses. Alameda shall introduce a color copy of the school calendar for each school year in question and shall have witnesses available to explain the calendar if necessary.

CONTENT

Each exhibit shall consist of one document. Separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Exhibits in the binders should be in chronological order. In the event of duplicate exhibits, the most legible version will be used.

COPIES OF BINDERS

The parties shall serve copies of their evidence binders on each other as required by Education Code section 56505, subdivision (e)(7). Each party shall bring two additional sets of the binders containing their exhibits to the hearing. One set will be used by the ALJ, and the other set will be used by witnesses. The parties may not serve exhibits on OAH before the hearing.

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 the ALJ rules that it is admissible.

WITNESSES

Each party is responsible for producing its own witnesses unless otherwise ordered by the ALJ. 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. Each witness shall be called to testify only once, except for rebuttal purposes. All parties shall examine witness on all issues when the witness is first called. Requiring a witness to appear only once takes precedence over the order in which parties present their cases in chief.

MEET AND CONFER

a) The parties shall meet and confer by October 2, 2019, in order to reach agreement on a witness list for the first day of hearing. Alameda 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. 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 ALJ has discretion to limit the number of witnesses who testify and the time allowed for their testimony.

EVIDENCE PRESENTATION

Burden of Proof and Order of Proceeding

In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In this case Student requested the hearing and shall present his case-in-chief first, followed by Alameda.

TELEPHONIC TESTIMONY

At present neither party intends to present a witness by telephone. 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 request for leave to do so before the hearing, unless the opposing party has stipulated that the witness may appear by telephone. The party offering the witness shall provide the witness a complete set of exhibits from all parties before the hearing. Electronic copies are not permitted. The party offering telephonic testimony shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and allows the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

ELECTRONIC RECORDINGS

Audio Recording of Hearing

Any party desiring to make an audio recording shall move in advance of the hearing for leave to do so, and any recording shall be subject to the conditions that:

- OAH's recording is the only official recording;
- 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;
- No part of the recording shall be played to any witness or potential witness while the hearing is proceeding; and
- Operation of the party's recording mechanism will not be allowed to delay the hearing.

Student's request to make an audio recording of the hearing is granted, subject to those conditions.

Video Recording of Hearing

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

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures shall present admissible evidence of the expenditures, or a stipulation to the amount of the 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.

MOTIONS

At present no prehearing motions are pending or contemplated. Any motion that was not filed three business days before the PHC shall be supported by a

declaration under penalty of perjury establishing good cause why the motion was not timely filed.

STIPULATIONS

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

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, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless the ALJ grants permission otherwise. No food or drinks other than water will be permitted in the hearing room during the hearing.

LANGUAGE ASSISTANCE AND REASONABLE ACCOMMODATIONS

American Sign Language interpreters are required for Student's expert witness Susan Gonzalez on the afternoon of October 8, 2019. OAH will provide the interpreters.

At present neither party anticipates the need for special accommodation for any witness or party, or for the services of another interpreter. A party or participant in this case, such as a witness, requiring reasonable accommodation to participate in a mediation or hearing may contact OAH at (916) 263-0880, or send an email to the OAH Americans with Disabilities Act Coordinator at OAHADA@dgs.ca.gov as soon as the need is known. The e-mail should have "Request for Accommodation" in the Subject Line. Additional information concerning requests for reasonable accommodation is available on OAH's website at: <https://www.dgs.ca.gov/OAH/Services/Page->

Content/Office-of-Administrative-Hearings-Services-List-Folder/Accommodations-at-OAH.

HEARING CLOSED TO THE PUBLIC

At Student's request, the hearing will be closed to the public.

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 if 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. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at <https://www.applications.dgs.ca.gov/oah/oahsftweb>.

If a full and final written settlement agreement is reached after 4:00 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 cell phone numbers of each party or counsel for each party.

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 to by the assigned ALJ.

If the matter is settled subject to school board approval, in addition to a signed copy of the signature page of the settlement agreement, the parties shall provide the

date of the next board meeting. The hearing dates will not be vacated without this information.

FAILURE TO COMPLY

The failure to comply with this Order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATED: September 10, 2019

Charles Marson
Administrative Law Judge
Office of Administrative Hearings

DATED: September 10, 2019

DocuSigned by:
Charles Marson
22945BBAD50448E...
Charles Marson
Administrative Law Judge

Office of Administrat