

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

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

v.

**FREMONT UNION HIGH SCHOOL DISTRICT.
OAH CASE NUMBER 2019060018**

ORDER FOLLOWING PREHEARING CONFERENCE

On September 16, 2019, Administrative Law Judge, or ALJ, Charles Marson of the Office of Administrative Hearings, called OAH, held a telephonic prehearing conference, referred to as a PHC. Joshua Cruz, Attorney at Law, appeared on behalf of Student. Melanie D. Larzul, Attorney at Law, appeared on behalf of the Fremont Union High School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

DUE PROCESS HEARING DATES, TIMES, AND LOCATION

HEARING TIMES

The hearing will take place on September 24, 25, and 26, 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 Fremont Union High School District, 589 W. Fremont Ave., Sunnyvale California 94087, in a room to be provided by Fremont.

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. Fremont has filed the required certification.

Fremont 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 Fremont'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 move for appropriate relief. 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

Did Fremont deny Student a free appropriate public education or FAPE during the 2018-2019 academic year by:

1. failing to identify, locate and evaluate Student between August 20, 2018, and September 25, 2018;
2. failing to assess Student in all areas of suspected disability, namely, by failing to conduct a transition assessment;
3. failing to offer adequate services and supports for Student's autism, behavioral and anxiety-related needs;
4. failing to offer an appropriate residential placement;
5. predetermining Student's program before the September 25 and December 12, 2018, and January 17, 2019 individualized education program or IEP team meetings;

6. failing to hold a timely IEP team meeting to discuss Dr. Kelly's independent educational evaluation report;
7. failing to provide Student's complete records in response to Parents' request on or about April 9, 2019;
8. failing to hold an IEP team meeting to address Student's transitional needs; and
9. failing to have an offer of placement and services in place by the beginning of the 2018-2019 school year?

PROPOSED RESOLUTIONS

As resolutions, Student seeks declaratory relief that Fremont denied him a FAPE as alleged in the issues, and an order that requires Fremont:

1. to reimburse Parents for all costs relating to the unilateral provision of FAPE to Student, including costs of Camphill School and related transportation;
2. to provide compensatory education according to proof; and
3. to provide a prospective placement according to proof.

RESPONSE TO COMPLAINT

OAH has received a copy of Fremont's response to Student's complaint. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

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" for Student's first exhibit, or "D1" for District's. 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. Fremont 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

The parties shall meet and confer by September 19, 2019, in order to reach agreement on a witness list for the first day of hearing. Fremont 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 Fremont.

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 request for leave to do so before the hearing. 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.

Student's motion to allow witnesses from Camphill School in Pennsylvania to testify telephonically was unopposed and is granted provided all the required conditions are met.

ELECTRONIC RECORDINGS

Audio Recording of Hearing

At present no party intends to make an audio recording of the hearing. Any party that desires to make such a 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.

Neither party has made a request to audio record the hearing to date. Should either party seek to record the hearing, it shall make a request to do so before the hearing.

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 unless otherwise ordered.

LANGUAGE ASSISTANCE AND REASONABLE ACCOMMODATIONS

At present neither party anticipates the need for special accommodation for any witness or party, or for the services of an 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 OPEN TO THE PUBLIC

At Student's request, the hearing will be open 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 cellular 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 settles 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 18, 2019

DocuSigned by:
Charles Marson
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Charles Marson
Administrative Law Judge
Office of Administrative Hearings

