

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENTS ON BEHALF OF STUDENT,

v.

FREMONT UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021080628

ORDER FOLLOWING PREHEARING CONFERENCE FOR
HEARING BY VIDEOCONFERENCE DENYING
REQUEST FOR CONTINUANCE

OCTOBER 5, 2021

On October 4, 2021, Administrative Law Judge Theresa Ravandi, Office of Administrative Hearings, held a prehearing conference by videoconference. The Administrative Law Judge is called an ALJ. The Office of Administrative Hearings is called OAH. The prehearing conference is called a PHC.

Sheila Bayne, Attorney at Law, appeared on behalf of Student. Alejandra Leon and Elizabeth Schwartz, Attorneys at Law, appeared on behalf of Fremont Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

REQUEST TO CONTINUE

On September 30, 2021, Fremont filed a written motion to continue on the grounds that it had not received a copy of Student's complaint until September 29, 2021. Fremont established good cause for not timely filing its motion. Student opposed the motion on the grounds that Student would be prejudiced by a continuance and had timely served Fremont the complaint as indicated in the proof of service.

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. OAH considers all relevant facts and circumstances in determining whether good cause exists to grant an extension. (See Cal. Rules of Court, rule 3.1332(d).)

From the pleadings and docket in this case, the undersigned makes the following determinations. Student filed her complaint with OAH with a proof of service to Fremont at its working fax number on August 18, 2021. While Fremont argues it has no record of receiving the complaint, Student provided Fremont with proof of successful transmission of the complaint. This transmission receipt is attached to Fremont's motion.

On September 9, 2021, Student forwarded Fremont a copy of an August 18, 2021 email that Student had sent to Fremont. The August 18, 2021 email referenced that Student's complaint was attached and showed there was one attachment titled, "[Student] v. Fremont Unified.pdf." Fremont argues it did not receive the August 18, 2021 email until it received the September 9, 2021 email. Fremont acknowledges it had notice of the filing by at least September 9, 2021.

Fremont indicates it overlooked the September 9, 2021 email and did not notice that the complaint was not attached until September 29, 2021. Fremont also contends it did not receive a scheduling order from OAH until it requested a copy on September 30, 2021. OAH successfully sent Fremont the scheduling order and general case orders for this matter through secure email transmission on August 23, 2021. Further, the OAH case manager left Fremont a message on September 9, 2021, offering to assist in scheduling a mediation if so requested.

While Fremont's counsel did not receive the complaint until September 29, 2021, the motion does not establish that Fremont was not timely served. Fremont did not meet its burden of proving that Student failed to properly serve her complaint and therefore did not establish good case for the requested continuance.

DUE PROCESS HEARING

The hearing will take place on October 12, 13, and 14, 2021, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM each day and generally end at 3:30 PM, unless otherwise ordered. The parties anticipate it will take more than three days to complete the hearing. Additional hearing dates will be discussed with the ALJ during the hearing.

HEARING LOCATION

OAH is authorized to conduct due process hearings by videoconference or telephone. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Based on state and federal guidance to address safety procedures due to the novel coronavirus, COVID-19, OAH will conduct the due process hearing by videoconference using the Microsoft Teams application. Unless otherwise ordered, participants are required to appear by videoconference using a webcam and Microsoft Teams.

The parties shall immediately notify all potential witnesses of the hearing dates and shall subpoena witnesses, if necessary, to ensure that the witnesses will appear to testify. A party's failure to notify or subpoena a witness to testify will not be considered good cause to continue the hearing. Instructions for issuing and responding to subpoenas and optional forms for subpoenas can be found on the website at <https://www.dgs.ca.gov/OAH/Case-Types/Special-Education/Forms/Subpoenas?search=special%20education%20subpoena>.

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 improperly omitted shall promptly file a notice in writing, prior to hearing, stating its concern and referring to supporting portions of the complaint. 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. From March 2020 until the end of the 2019-2020 school year, did Fremont deny Student a free appropriate public education, called FAPE, by:
 - a. Failing to implement Student's operative individualized education program, called IEP, because during distance learning it did not provide in-person services and accommodations required by the IEP on an in-person basis;

- b. Assigning her to distance learning without evaluating her needs for, and offering, necessary accommodations in the distance learning setting; and
 - c. Failing to assess for and offer extended school year services in light of her regression?
- 2. During the 2020-2021 school year, did Fremont deny Student a FAPE by:
 - a. Failing to implement Student's operative IEP, because during distance learning it did not provide in-person services and accommodations required by the IEP on an in-person basis;
 - b. Failing to evaluate her needs for, and offer, necessary accommodations in the distance learning setting; and
 - c. Failing to assess for and offer extended school year services in light of her regression?
- 3. Did Fremont deny Student a FAPE in the January 27, 2021 IEP, by:
 - a. Failing to assess her needs in light of the distance learning setting;
 - b. Failing to offer sufficient specialized academic instruction and failing to offer this instruction in person;
 - c. Failing to offer sufficiently challenging goals that could be achieved during distance online learning and instead carrying forward prior goals;
 - d. Failing to offer an in-person, one-to-one aide; and
 - e. Failing to assess for and offer extended school year services in light of his regression?

PROPOSED RESOLUTIONS

The resolutions requested by Student include in person services; Fremont to evaluate her current circumstances and needs for distance learning accommodations and develop appropriate goals; a behavior aide; compensatory education including transportation; services to address regression; independent functional behavior, applied behavior analysis, physical therapy and occupational therapy assessments; a home applied behavior analysis program; three hours a week of speech services; two hours a week of occupational therapy; and four hours per month behavior counseling.

Fremont filed its response to Student's complaint on October 1, 2021. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

The parties shall upload their exhibits electronically according to the Order Setting Procedures for Filing Exhibits Electronically.

The parties shall serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). Timely uploading electronic hearing exhibits five business days before the first day of hearing constitutes that party's timely exchange of evidence on each other in compliance with 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 as required by Education Code section 56505, subdivision (e)(7) shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

IDENTIFYING EXHIBITS AND PAGE NUMBERS

Each exhibit must be identified by a letter and number. Student must use the letter S before the number to identify Student's exhibits. Fremont must use the letter D before the number to identify its exhibits. For example, S-1 means Student's exhibit 1, and D-1 means Fremont's exhibit 1. A cover sheet with this identifying letter and number should be the first page of each exhibit. The electronic evidence program will automatically number the exhibits and additional page numbering or bates stamping should not be added.

CONTENT

Each exhibit must 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 should be in chronological order.

Parties should include resumes or curriculum vitae for each witness who is expected to testify as an expert.

Fremont's exhibits must include a copy of the school calendar for each school year in question.

Electronic copies of exhibits filed with OAH shall be filed by 5:00 PM at least five business days before the first day of hearing. Please refer to the General Order OAH issued with the Scheduling Order that contains the Order Setting Procedures for Filing Exhibits Electronically. It includes instructions for how to file exhibits electronically. Beginning three business days before the hearing, the electronic evidence system will not allow parties to upload exhibits unless permitted by the ALJ during the hearing at the ALJ's discretion.

WITNESSES

The parties shall serve their list of witnesses on each other in compliance with Education Code section 56505. No 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.

Parties are responsible for ensuring that all participants are familiar with and follow the Instructions for Joining the Online Due Process Hearing provided with this Order. Participants that have not previously used the MS Teams platform, may also find informative videos available like the one at this link from Microsoft:

<https://support.office.com/en-us/article/join-a-teams-meeting-078e9868-f1aa-4414-8bb9-ee88e9236ee4>.

The parties are responsible for ensuring that witnesses join the virtual hearing room at the designated date and time to testify. Witnesses are required to join the due process hearing by computer and appear by videoconference unless they do not have the necessary computer equipment. If a witness does not have the necessary equipment, the ALJ may permit the witnesses to appear by audio only or by telephone. "Audio only" means using a computer without webcam. Witness ability to attend the hearing by videoconference will be discussed at the start of the hearing.

The parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Student disclosed the intent to call Dr. Restori as an expert witness regarding Student's behavior and distance learning needs. Parties shall make witnesses under their control reasonably available. The parties must schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses

out of order. Neither party will be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

The ALJ has discretion to limit the number of witnesses and the time allowed for witnesses' testimony. Education Code, section 56505.1, subdivision (h), empowers the ALJ to set a reasonable limit on the length of the hearing after consideration of four factors. The first two factors are the issues to be heard and the complexity of facts to be proven. The second two factors are the ability of the parties or their representatives to present their respective cases and the parties' estimates of the time needed to present their cases.

MEET AND CONFER

The parties are encouraged to review and shorten their witness and exhibit lists before the hearing. Evidence may be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

The parties are ordered to meet and confer no later than October 6, 2021, to discuss scheduling witnesses and how much time each witness will take. The parties shall discuss any issues related to counsel and witnesses appearing by videoconference for hearing and electronically viewing exhibits during the hearing, or subpoenas, if any. The parties should attempt to eliminate duplicate exhibits from their hearing exhibits. The parties shall discuss whether they can produce a written stipulation as to pertinent facts, contentions, resolutions and authenticity and admissibility of documents to shorten the length of time needed for the hearing.

As part of the meet and confer process, Fremont shall inform Student which proposed witnesses are district employees. Fremont shall also identify the witnesses on Student's list that require a subpoena. Fremont may agree to accept service for

witnesses under its control or provide Student with the witness' most recent contact information.

PARTICIPANT INFORMATION FORM

Both parties have an ongoing obligation to ensure that OAH has current information on the Participant Information Form filed with OAH and shall file an updated Form as necessary. The Participant Information Form is not served upon the opposing party. The ongoing obligation to ensure that the Participant Information Form filed with OAH is current does not change the parties' statutory obligation to timely disclose their witnesses to the other party(s) at least five business days prior to hearing. The parties must file an updated Participant Information Form to inform OAH of any changes, additions, or deletions, including the required information no later than 5:00 PM at least two business days before the first day of hearing.

Any contact information provided shall be used for the limited purpose of issuing subpoenas or for contacting the witness(es) for purposes of attending the hearing and shall not be disclosed to any other person(s).

EVIDENCE PRESENTATION

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 bears the burden of proof. Student's case-in-chief shall be presented first, followed by Fremont's, unless otherwise ordered.

WITNESS LISTS

The parties must provide a joint proposed witness list to the ALJ on the first day of hearing. The list should include the first and last name of the witness, which party(s)

are calling the witness to testify, and include dates and time estimates of each witness' expected testimony. In the event an agreement cannot be reached, each party shall prepare a separate written list. Student must have witnesses available in case there is no agreement.

At the beginning of the hearing, the ALJ and the parties will discuss the length of time anticipated for each witness and scheduling issues for individual witnesses. The ALJ will finalize the witness schedule. Parties must be prepared at the end of each day to discuss the witnesses to be presented the next day and the estimated time for the testimony each witness.

SCOPE OF WITNESS EXAMINATION

Each witness will be called to testify only once, except for rebuttal purposes. All parties must examine witness on all issues when the witness is first called. Requiring a witness to appear only once takes priority over the order in which parties present their cases in chief.

AUDIO ONLY OR TELEPHONIC TESTIMONY

Whether a witness may appear by audio only or telephone instead of videoconference 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 audio only or telephone shall request permission to do so before the hearing. Any party seeking to present a witness who cannot access exhibits electronically must inform the ALJ at the beginning of the hearing.

ELECTRONIC RECORDINGS

AUDIO RECORDING

A party may request permission to make an audio recording of the hearing. Permission to make an audio recording is subject to the ALJ's discretion and based upon certain conditions. The conditions are:

1. the OAH recording is the only official recording;
2. participants shall not use Teams to record the hearing;
3. the parties shall turn their recording devices on and off at the same time that the ALJ is on and off the record to avoid recording conversations while off the record;
4. operation of the party's recording mechanism will not be allowed to delay the hearing;
5. a parties' recording may not be given, provided, or played to a witness, or potential witness;
6. the recording is subject to the same confidentiality as the due process hearing;
7. use of the chat function in the videoconference is prohibited and shall not be part of the official record; and
8. participants shall not take screenshots of the videoconference or share or publish any portion of the videoconference or audio recording.

Both parties' requests to audio record the hearing are granted, subject to these conditions.

VIDEO RECORDING

No party, witness, or anyone else may make any video recording of any part of the proceedings or stream live through any means.

RECORDINGS AS EXHIBITS

Recordings may not be uploaded electronically without the ALJ's permission. The ALJ has discretion to admit or exclude evidence in the form of a recording. Any request to submit a recording shall be considered at the time of hearing.

The ALJ may grant or deny the request or grant the request subject to certain conditions. The party offering the recording must establish that all or a part of the recording is relevant. The ALJ may request a transcript of the portion of the recording requested or have the party offering the recording to provide an exact identifiable portion of the recording the party seeks to admit. The identities of any person speaking on the portion of the tape being introduced must be established. An ALJ may allow the opposing party to offer additional portions of a recording to establish the context, or to rebut, the recording.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education. Documents offered as evidence to support a request for reimbursement must be separated by vendor.

MOTIONS

Student requested that Parent be allowed to appear by telephone in case this was needed. Student's motion was denied without prejudice. Student may file a written motion stating the basis for any request that Parent appear other than on the TEAMS platform.

Fremont anticipates that it may be filing a motion for reconsideration of the order denying continuance and a possible motion regarding standing and the status of an educational rights holder.

No other 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, resolutions and authenticity and admissibility of documents are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in writing prior to the start of the hearing.

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

All participants to the videoconference should observe the same decorum as in an in-person due process hearing. Counsel, all parties, and all witnesses must conduct themselves in a professional and courteous manner at all times. Cellular phones, telephones and computer notifications must be shut off or set to silent during the hearing unless the ALJ grants permission otherwise. Counsel, parties, and witnesses should appear from a private location, unless otherwise ordered. Participants should

take reasonable efforts to minimize background noise and maintain adequate room lighting. Use of virtual background images are at the discretion of the ALJ. Witnesses are prohibited from reading exhibits, documents, notes, text messages, telephones or computers while testifying, unless permitted to do so by the ALJ. Parties, counsel, and witnesses are prohibited from passing notes to, exchanging electronic messages with, or signaling the witness in any way while the witness is testifying.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

No reasonable accommodations are requested at this time.

A party or participant in this case, such as a witness, requiring reasonable accommodation to participate in a hearing may contact OAH at (916) 263-0880, or send an email to 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

The hearing is open to the public. Special Education hearings are closed to the public unless Student requests the hearing to be open to the public.

An ALJ may restrict attendance because of the physical limitations of the hearing facility or take other action to promote due process or the orderly conduct of the hearing. (Cal. Code Regs., tit. 1, § 1030.) Government Code section 11425.20 empowers the ALJ to order an open hearing to be closed or make other protective orders to the extent necessary or proper to ensure a fair hearing in the circumstances of the case.

Currently, amid COVID-19 concerns, all hearings are being conducted via videoconference without observers present or participating in the videoconference. OAH will provide the hearing recording upon request.

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 PM 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 and processed 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 before the hearing.

If the matter settles subject to 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 cancelled without this information.

FAILURE TO COMPLY

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

ORDER INCLUDES ALL RULINGS

This Order includes all rulings made at the prehearing conference. Any discussion and conversation not referenced in this Order is not binding on the ALJ conducting the hearing and may not be relied upon by the parties. The parties should be aware that, at hearing, the ALJ conducting the hearing has discretion to reconsider any part of this Order.

IT IS SO ORDERED.

Theresa Ravandi

Theresa Ravandi

Administrative Law Judge

Office of Administrative Hearings