BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

FREMONT UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020020631

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE, VACATING ORDER TO SHOW CAUSE REGARDING TRANSFER OF EDUCATIONAL RIGHTS, GRANTING MOTION TO QUASH, AND DENYING MOTION TO ESTABLISH DUE PROCESS FILING DATE

JUNE 17, 2020

On June 15, 2020, Administrative Law Judge Cole Dalton, 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.

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

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on June 23, 24, and 25, 2020 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 five 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. (5 C.C.R. § 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.

ISSUES AND PROPOSED RESOLUTIONS

For purposes of this order, a free appropriate public education is referred to as FAPE. An individualized education program is referred to as an IEP. 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 Fremont deny Student a FAPE by predetermining services and accommodations at the March 20, 2019 IEP meeting?
2. Did Fremont deny Student a FAPE by failing to provide an appropriate placement and services in her IEP dated February 28, 2018?
3. Did Fremont deny Student a FAPE, when Fremont failed to allow Parent to discuss violations of the August 2, 2017 Settlement Agreement, at IEP team meetings taking place from February 28, 2017 through August 7, 2019?
4. Did Fremont deny Student a FAPE from February 18, 2018 through February 18, 2020, by failing to provide:
    a. Appropriate home instruction?
    b. Placement in one general education elective class at Kennedy High School each semester?
    c. One-60-minute-session per week of 1:1 counseling with Children's Health Council?
5. Did Fremont deny Student a FAPE by failing to give Student timely notification of the transfer of educational rights between February 20, 2018 and February 20, 2019?

6. Did Fremont deny Student a FAPE by failing to appropriately schedule the June 6, 2019 IEP meeting and by not legally excusing required IEP team members during the January 17, 2020 IEP meeting?
7. Did Fremont deny Student a FAPE when the Director of Special Education restricted the time for the March 20, 2019 IEP meeting and, once it began, ended the meeting prematurely?
8. Did Fremont deny Student a FAPE by creating an adversarial environment during the March 20, 2019 IEP meeting, which delayed completion of Student's annual IEP?
9. Did Fremont deny Student a FAPE by inviting the Director of Special Education to the March 20, 2019 IEP meeting when the Program Specialist was also present?
10. Did Fremont deny Student a FAPE from February 18, 2018 through February 18, 2020, by failing to consider Parent's request for alternate means of providing academic instruction to Student, specifically, by Student's personal trainer, Varsity Tutors, or other means coordinated through the home instruction program at Collaborative Online International Learning?
11. Did Fremont deny Student a FAPE from February 18, 2018 through the end of the 2018-2019 school year by failing to provide at least three hours of instruction a day for 175 days each calendar year?
12. Did Fremont significantly impede Parent's opportunity to participate in the decision making process during the March 20, 2019 IEP team meeting by failing to consider Parent's concerns for enhancing Student's education?

13. Did Fremont deny Student a FAPE by failing to consider the results of Dr. Peterson's assessment when it proposed services and accommodations not recommended by Dr. Peterson?
14. Did Fremont deny Student a FAPE in the March 20, 2019 IEP, by failing to offer increased counseling services and social interaction within the community, as recommended by Dr. Peterson?
15. Did Fremont deny Student a FAPE by failing to provide appropriately qualified at home instructors to address Student's unique needs arising from emotional disturbance from February 18, 2018 through June 13, 2018?

Student's issues, identified in her complaint as "u" and "v," were withdrawn after a discussion on the record during the PHC. The portions of Student's issues "w" and "x," which were not considered a remedy, were combined to form Issue 15. Student's issues "d," "g," and "h" were dismissed as being outside of the statute of limitations. Student's complaint alleged neither late discovery of the underlying facts supporting the issues nor an exception to the two-year statute of limitations. Student could not make an offer of proof to support claims otherwise beyond the statute of limitations.

PROPOSED RESOLUTIONS

The resolutions requested by Student include compensatory education, reimbursement, and changes to her IEP.

Fremont filed its response to Student's complaint on April 20, 2020. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

Each party shall file one paper copy of their exhibits with OAH at 2349 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833, on the Friday before the first day of hearing by noon. The parties shall also upload their exhibits electronically according to the instructions provided.

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). Student was granted leave to serve her exhibits on Fremont through email and to subsequently electronically file them with OAH.

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.

PAPER COPIES OF EXHIBITS

The paper copies of exhibits shall be pre-marked and bound or placed in three-ring binders before filing with OAH. The exhibits shall contain a detailed table of contents which clearly identifies exhibits and the document page numbers.

EXHIBIT COVER PAGES AND PAGE NUMBERS

Each exhibit must be identified by a letter and number. Each exhibit may have a cover sheet that identifies that letter and number in the middle of the page. 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 Fremont's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Fremont exhibit 1. Parties may either number each page within each exhibit or number each page in the binder consecutively beginning with the cover page before exhibit one as page 1, through the last page of the last exhibit. For example, if there are 100 total pages in the binder the first cover page in front of the first page of the first exhibit is page 1 and the last page of the last exhibit in the binder is 100.

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

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. The electronic copies must be an exact duplicate of the paper copies filed with OAH. **On June 5, 2020, OAH issued an Amended Order for Filing Exhibits Electronically and Instructions for Joining Online DPH that included instructions for how to file exhibits electronically.**

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. In that situation, 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 shall be discussed at the start of the hearing.

Parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. 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 who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subd. (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 5:00 PM on June 19, 2020 to discuss scheduling witnesses and how much time each witness will take. The parties shall discuss any issues pertaining to the parties, counsel and witnesses appearing by videoconference for hearing and electronically viewing exhibits during the hearing. 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 Fremont's 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, 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 case 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.

During the PHC, Student sought leave to attend hearing through teleconference only. Student's request was denied. Student was directed to contact OAH regarding any requested accommodations pursuant to the instructions identified below.

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:

- the OAH recording is the only official recording;
- participants shall not use Teams to record the hearing;
- the parties shall turn their recording device on and off at the same time that the ALJ is on and off the record to avoid recording conversations while off the record;
- operation of the party's recording mechanism will not be allowed to delay the hearing;
- a parties' recording may not be given, provided or played to a witness, or potential witness; and
- the recording is subject to the same confidentiality as the due process hearing;
- use of the chat function in the videoconference is prohibited and shall not be part of the official record;
- participants shall not take screenshots of the videoconference, or share or publish any portion of the videoconference or audio recording;
- all recordings must be destroyed when the time for filing an appeal has passed, or, in the event of an appeal, when the time for filing the record on appeal has passed.

Student's request is granted, subject to these conditions. If Fremont wants to record the hearing, the request must be made before the hearing.

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

Student proposes to introduce all or part of a recording of an individualized education program team meeting. 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

ORDER TO SHOW CAUSE REGARDING STUDENT'S TRANSFER OF EDUCATIONAL RIGHTS

On June 3, 2020, Fremont filed a motion to dismiss Student's complaint on the ground that Parent lacked standing to pursue this matter on behalf of Student, then 19-years-old. The motion was initially heard during the June 8, 2020 PHC. At that time, Parent provided an offer of proof. Student previously produced documents stating her intent to allow Parent to file and pursue due process on her behalf, which stopped short of transferring educational rights. Student was granted additional time within which to file a Notice of Transfer of Educational Rights from Student to Parent.

On June 11, 2020, Parent filed a notarized Transfer of Educational Rights signed by Student and Parent. Student transferred her educational rights to Parent, effective June 11, 2020, to allow the instant matter to proceed to due process hearing.

Based upon the legal authority cited in OAH's Order following the June 8, 2020 PHC, once a student reaches the age of majority, their educational rights transfer to them. California State law is silent on the issue of an adult student transferring or delegating their rights back to a parent. However, it has been OAH's practice to accept a fully executed and notarized transfer of educational rights. Accordingly, Parent can proceed to due process on the instant complaint brought on behalf of Student.

FREMONT'S MOTION TO QUASH

On June 3, 2020, Fremont filed a motion to quash subpoenas issued to Fremont attorneys Alejandra Leon and Jan Tomsky, former special education director Karen Russell, current special education director Fran English, and former district superintendent Kim Wallace. At the June 8, 2020 PHC, the parties were ordered to meet and confer regarding the subpoenas. OAH also issued a briefing schedule.

On June 10, 2020, Student filed an opposition to Fremont's motion to quash.

PURPOSE OF DUE PROCESS HEARING

The purpose of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.), referred to as IDEA, is to ensure that all children with disabilities have available to them a free appropriate public education, and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.)

A party has the right to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education, called a FAPE, to such child. (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified School. Dist*. (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

SUBPOENAS FOR WITNESSES AND EVIDENCE

A party to a due process hearing under the Individuals with Disabilities in Education Act has the right to present evidence and compel the attendance of witnesses in "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h); see also Ed. Code, § 56505, subd. (e).)

In special education proceedings in California, "[t]he hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and Subpoenas Duces Tecum (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party)." (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) This requirement mirrors that required by Code of Civil Procedure section 1985, subdivision (b), which requires a subpoena duces tecum be served with a copy of an affidavit showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

The good cause requirement is met by a factual showing of why the requested documents or things are material and relevant to the litigated issues. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.)

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecum. In ruling on such motions, OAH relies by analogy on the relevant portions of the Code of Civil Procedure. Code of Civil Procedure section 1987.1 provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders. [inapplicability of Govt. Code, §§ 11450.05-11450.30 to due process hearing procedures].)

NO RIGHT TO PREHEARING DISCOVERY

In general, there is no right to prehearing discovery in due process proceedings under the IDEA. (20 U.S.C. § 1400 et seq.) Rather, the IDEA provides parties with the

right to present evidence and compel the attendance of witnesses at "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h).) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings (Ed. Code, § 56505, subd. (e)), but does not confer the right to prehearing discovery.

While subpoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings. Pre-hearing discovery in special education cases at the administrative hearing stage is limited. Parents or adult students are entitled to request copies of the educational records, relating to the student in question, that are maintained by the school district. (Ed. Code, § 56504; *Burnett v. San Mateo Foster City School Dist*. (9th Cir. 2018) 739 Fed. Appx. 870, 873.) The parties are also entitled to disclosures of any evidence an opposing party plans to introduce at hearing 5 business days prior to the date of the first day of hearing. (Ed. Code, 56505(e)(7).)

WITNESS SUBPOENAS FOR ATTORNEYS TOMSKY AND LEON

Student contends she may subpoena Fremont attorneys Jan Tomsky and Alejandra Leon to testify at hearing to support allegations concerning criminal fraud and because Ms. Leon attended an IEP team meeting.

OAH's jurisdiction is limited to the identification, evaluation, or educational placement, or the provision of a FAPE, to a child. OAH has no jurisdiction to hear matters of either criminal or civil fraud.

Ordering a party's attorney to testify as a witness may result in disqualification of that attorney to represent their client. (See, *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App. 4th 573, 580.) Because replacing counsel on the eve of hearing may

delay due process and otherwise impact the integrity of the proceeding, a court determines whether counsel's testimony is "genuinely needed." (*Reynolds v. Superior Court* (1986) 177 Cal.App.3d 1021, 2017.)

To the extent that Ms. Leon attended any of Student's IEP team meetings, Student has failed to show Ms. Leon's testimony is genuinely needed at hearing. School employees, who regularly attended Student's IEP team meetings are available to testify at hearing. IEP documents and recordings are available as evidence. Student made no representations tying Ms. Leon's participation at any IEP team meeting to the need for her testimony at hearing.

Student made no showing as to the necessity of having Ms. Tomsky, who did not attend IEP team meetings, testify. Student did not tie any information that Ms. Tomsky may have to any specific need to prove the claims Student is bringing to hearing.

Fremont's motion to quash subpoenas for the attendance of Ms. Tomsky and Ms. Leon is granted.

WITNESS SUBPOENAS FOR RUSSELL, ENGLISH, AND WALLACE

Fremont agreed to make subpoenaed witnesses Ms. Russell and Ms. English, available to testify at hearing. Fremont did not agree to produce Ms. Wallace. Fremont's motion is granted as to Ms. Wallace for several reasons.

Student subpoenaed former district superintendent Kim Wallace to testify regarding denial of an intradistrict transfer. The denial of the intradistrict transfer occurred in December 2016.

Student's complaint was filed February 18, 2020. Fremont's denial of an intradistrict transfer permit in December 2016 falls outside of the two-year statute of

limitations. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) Student's complaint does not allege an exception to the statute of limitations. Student cannot pierce the statute of limitations as she was aware of the facts underlying her claim at the time the claim arose. Specifically, Student appealed the intradistrict transfer decision at or near the time it was made.

Further, Student made no offer of proof that the decline of Student's intradistrict transfer request was a matter relating to Student's identification, evaluation, or educational placement, or Fremont's provision of FAPE.

The ALJ has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (Gov. Code §11513 (f).) No evidence is admissible except relevant evidence. (Evid. Code, § 350.) Relevant evidence is defined as evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210; see also, *Student v. Montecito Union Elementary School Dist.* (OAH 2011) Case No. 2010110031.)

Here, Student was unable to make an offer of proof that Ms. Wallace's testimony was needed to support any of the issues Student is bringing to hearing. Fremont's motion to quash the subpoena of Ms. Wallace is granted.

SUBPOENA DUCES TECUM

Student seeks production of all emails and other documents, including billing records, between Fremont and their attorneys from March 2015 through May 2020. These emails and documents are not educational records within the meaning of Educational Code section 56504.

Student seeks production, by Ms. Wallace, of all emails between her and the "IEP team" from American, Thornton, and Kennedy schools. Student seeks emails from unidentified personnel from April 2014 through June 2018. Student also seeks emails and other documents between Ms. Russell and Fremont's attorneys from September 2016 through June 2018.

Student seeks production by Ms. English of all emails and other documents between her and the Kennedy IEP team from July 2018 through May 2020. Student seeks all documents between Ms. English and Fremont's attorneys during this same time frame.

Based upon the discussion held on the record during the PHCs held on June 8, 2020 and June 15, 2020, Student could not make a showing of materiality for any of the subpoenaed documents. First, most of the documents sought are for issues that are beyond the statute of limitations and Student was unable to make an offer of proof as to how any such documents would support any of the claims she is bringing to hearing.

Second, Student admitted, on the record, that she is unaware of any specific emails being sent between any of the persons subpoenaed to any of the other persons identified in the subpoenas. Student was only hopeful that, among the many documents which might be produced and the ALJ might review during the due process hearing, some of them might be relevant to the proceedings.

Fishing expeditions are not allowed in special education due process hearings. A general belief that a subpoena duces tecum may produce some relevant documents does not fulfill the requirement of a factual showing of why the requested documents or things are material and relevant to the litigated issues. (*Johnson, supra.,* at 258 Cal. App.2d 829, 835-836.)

Accordingly, Fremont's motion to quash the subpoenas duces tecum issued to Alejandra Leon, Ms. Russell, and Ms. English is granted.

STUDENT'S MOTION TO ESTABLISH FILING DATE

On June 12, 2020, Student filed a motion to establish that the filing date of her complaint be deemed to be February 14, 2020, rather than February 18, 2020. Student based her motion on the fact that she filed her complaint before midnight on February 14, 2020. Student relied on civil statutes applying to superior court proceedings to support her motion.

On June 15, 2020, Fremont filed an opposition to Student's motion.

Student's motion was addressed for the second time during the June 15, 2020 PHC. Student's motion is untimely, having not been filed three business days before the June 8, 2020 PHC. Student did not attach a declaration establishing good cause for filing the motion after the June 8, 2020 PHC. Even if the motion were timely, Student was aware of OAH's filing deadline being the close of business, or 5:00 PM, on each business day.

OTHER MOTIONS

Fremont intends to submit a motion to quash regarding additional subpoenas served by Student. OAH set a briefing schedule for the motion to quash during the PHC held on June 8, 2020, which is set forth in the subsequently issued PHC Order.

Fremont was granted leave to file a motion regarding whether Student's transfer of educational rights relates back to the date her complaint was filed in this matter.

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 shall appear from a private location, unless otherwise ordered. Participants should take reasonable efforts to minimize background noise 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

The parties are not aware of the need for an interpreter. The parties were advised to request needed accommodations at the earliest possible date and were given the contact information, below, during the June 15, 2020 PHC.

A party or participant to 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 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, with the exception of Student's testimony. 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. (Tit. 1, Cal. Code Regs., § 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 particular 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.

DocuSigned by:
57CDEBDAC9CC499...

Cole Dalton

Administrative Law Judge

Office of Administrative Hearings