BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHALF OF STUDENT, v. FRESNO UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2013010033
FRESNO UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH CASE NO. 2012120631 ORDER FOLLOWING PRE-HEARING CONFERENCE

On May 13, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Adeniyi A. Ayoade, Office of Administrative Hearings (OAH). Student's Mother and Father (Parents) appeared on behalf of Student (Student). Sang-Jin Nam and Melody A. Hawkins, Attorneys at Law, appeared on behalf of the Fresno Unified School District (District). The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on **May 21-23 and May 28-30, 2013,**[1] at the District's offices located at **4120 North 1st Street, Fresno, California, 93726.** The hearing shall begin at 9:30 a.m. and end at 5:00 p.m. each day, with the exception of May 28, 2013, on which days hearing shall begin at 1:30 p.m., unless otherwise ordered.

The District shall ensure that there is an appropriate room available for the due process hearing. The room shall meets OAH specifications, and at a minimum, the room shall have separate tables capable of being moved into a courtroom configuration, as follows:

[1] While both parties raised some concerns regarding their availability on some of the scheduled dates, the parties are unable to agree on any acceptable alternative due process hearing dates. Therefore, the parties may make any appropriate request, and/or discuss with the hearing ALJ regarding any issue(s) each party may have relating to availability on any of the scheduled hearing dates herein.

(1) one table for Student's representatives; (2) one table for District's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. A room with one large conference table is not suitable. If a suitable room is not available for any of the hearing days, the District shall immediately notify OAH and the parties and propose a different location. Fresh water and tissue shall be available in the hearing room at all times.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing "good cause" to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

2. Issues and Proposed Resolutions. The issues at the consolidated matters are those alleged in the individual party's due process complaint, as clarified in the parties' PHC statements, and discussed by the parties and the ALJ at the PHC. The issues are as follows:[2]

a) **PRELIMINARY ISSUE:**

1) Whether any of Student's claims, which allegedly occurred prior to December 31, 2010, are barred by the two-year statute of limitations? [3]

b) **STUDENT'S ISSUE**

2) Whether District procedurally denied Student a free appropriate public education (FAPE) by denying the Parents their right to meaningfully participate in the individualized educational program (IEP) development process because:

a. District falsified the signature page on the January 2011 IEP by allowing the general education teacher and the guidance counselor who did not attend the IEP team meeting to sign the IEP document;

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[2] As necessary, the issues have been clarified and reframed for clarity, as set forth herein below. All of the issues were discussed at the May 13, 2013 PHC, and all parties agreed that the below listed issues are the only issues to be considered and decided in this due process hearing. Therefore, any amendments to a Due Process Complaint, not permitted by this Order, shall comply with California Education Code section 56502, subdivision (e). The filing of an amended complaint will restart the applicable timelines for a due process hearing. (20 U.S.C. § 1415(c)(2)(E)(ii).)

[3] The ALJ added this preliminary issue in order to determine whether any of Student's claims are barred by the two-year statute of limitations as alleged in District's motion to dismiss, dated January 4, 2013.

b. District failed to provide a copy of the January 2011 IEP prior to April 2011 and prior to requesting that parents sign the January 2011 IEP document;

c. District failed to provide a copy of the April 2010 triennial IEP prior to April 2011;

d. District forged signatures of Sierra Charter School's staff on the April 2010 IEP, and improperly changed dates in Student's 2009 Sierra Charter School IEP document; and

e. District failed to have the regular educational teacher and school administrative personnel at the April 2010 IEP team meeting?

b) **DISTRICT'S ISSUES**

1) Whether District's January 2012 triennial assessment and the April 2012 triennial addendum assessment of Student were appropriate?

2) Whether District's offer of placement and services contained in the June 2012 IEP and the November 15, 2012 prior written notice (PWN) provides Student a FAPE in the least restrictive environment (LRE) so that District may implement the IEP without parental consent?

c) **PROPOSED REMEDIES**. As proposed resolutions, Student seeks an order from OAH finding that Student's January 2011 and April 2010 IEP's denied Student a FAPE, and thus directing District to offer Student an appropriate IEP that is designed to meet Student's unique needs in the areas of speech and language, behavior and personal safety, learning disorder - auditory processing and working memory deficits, academic deficiencies, and mental health. Student further requests that District should be required to place him at Sierra Charter School with one-to-one instruction and supervision during the period before a new IEP is developed, among other proposed remedies.

On its part, as proposed resolutions, District requests an order from OAH finding that its triennial assessment and the triennial addendum assessment of Student were appropriate, that that it provides Student with a FAPE in the LRE, through its June 12, 2012 IEP and the November 15, 2012 PWN, and that District could implement the IEP and PWN offers without parental consent.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties may use numbers or alphabets to identify exhibits. If numbers are used by both parties, each party shall place the letter "S" or "D" in front of the exhibit to designate if it is a Student or District exhibit (for example, D-1, D-2). Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be Bates-stamped.

Each exhibit binder shall contain a detailed table of contents. At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used. **Exhibit binders shall be exchanged five business days prior to the hearing in accordance with Education Code section 56505, subdivision (e)(7), unless the parties agree to a later date.**

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing, unless good cause is shown as to why it was not previously exchanged. The parties shall be prepared to make such an offer of proof. The ALJ shall determine whether an exhibit is to be admitted into evidence. Only exhibits relevant to the issues previously stated in this order shall be admitted, unless used for impeachment purposes. The fact that an exhibit is placed in an exhibit binder does not guarantee its admission.

4. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement except for good cause shown, and at the discretion of the ALJ.

The parties are ordered to meet and confer to schedule the order of witnesses. At the commencement of the hearing, each party shall provide the ALJ with a schedule of witnesses and a time estimate for each witness's direct and cross-examinations. In light of the fact that Student has identified 55 potential witnesses (including four expert witnesses) to be called at the hearing, and District has identified 21 potential witnesses, 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. **Parties shall be prepared to make an offer of proof, if asked, as to why a specific witness' testimony is necessary.**

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. In the case of witnesses who have professional licenses and credentials, it is strongly recommended (but not ordered) that the party calling such witnesses be prepared to present copies of their *curriculum vita* (CV) or resume as exhibits, and exchange them with the other party.

5. Scope of Witness Examination. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination.

6. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by telephone shall move in advance for leave to do so. The proponent of the witness shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled. No request for telephonic testimony has been made by either party.

7. Motions. Other than as discussed below or included herein, no other pretrial motions are pending. Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during the prehearing conference of May 13, 2013.

> **Order Granting Motion to Exclude Witnesses:** District moves to exclude the testimonies of its attorneys, Ms. Hawkins and Mr. Nam. District argues that its attorneys are not the appropriate witnesses for the issues that have been identified for adjudication in the consolidated matters. The ALJ agrees, and District's motion to exclude Sang-Jin Nam and Melody A. Hawkins from Student's witnesses' list is granted.
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> In addition, OAH finds that Parents' description of Ms. Harkins on page 4 of Student's PHC statement is both discourteous and improper. **Therefore, OAH wishes to remind both parties that counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times.**

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

9. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off during the hearing unless permission to the contrary is obtained from the ALJ.

10. Compensatory Education/Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

11. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for interpreter services.

12. Hearing Opened To the Public. At the request of the Student, the hearing shall be opened to the public.

13. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. If the parties believe a mediator may assist them in settlement negotiations, they should submit a request for mediation as soon as possible. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. ON MARCH 16, 2012, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULATANEOUSLY FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE AT 916-376-6319.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing and the morning of the hearing.

14. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

Dated: May 14, 2013

/s/

ADENIYI AYOADE
Administrative Law Judge
Office of Administrative Hearings