

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2014080645

ORDER FOLLOWING PREHEARING
CONFERENCE

On October 27, 2014, a telephonic prehearing conference was held before Administrative Law Judge Rebecca Freie. Patricia Siehl, Attorney at Law, appeared on behalf of Student. Damara Moore, Attorney at Law, appeared on behalf of San Francisco Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. At the beginning of the PHC Student and San Francisco asked that the due process hearing be continued, due to a death in Student's family and unavailability of some witnesses.

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. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

Good cause is found for continuing the due process hearing. The hearing shall commence at 1:30 p.m. on December 8, 2014, and continue through December 11, 2014, beginning at 9:00 a.m. on the other days, and concluding at 5:00 p.m. each day, at the discretion of the ALJ. If additional hearing days are necessary, the hearing shall continue day to day, Monday through Thursday as needed, at the discretion of the ALJ.

The hearing shall take place at San Francisco's administrative offices located at 555 Franklin Street, San Francisco, California 94102.¹ San Francisco is responsible for preparing the room for the hearing. At a minimum, the hearing room shall have four or more separate tables capable of being moved into a courtroom configuration with an electrical outlet near the ALJ's table. San Francisco shall ensure that all parties and the ALJ have drinking water, and that tissue is available on the witness table during the hearing.

San Francisco shall ensure that the facility for the hearing fully complies 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), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

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.

A continued telephonic PHC is also set for 3:00 p.m. on November 17, 2014, to address any matters that have arisen, or were not considered during this PHC, and any prehearing motions filed by the parties after October 27, 2014, that have not previously been ruled upon. If the parties believe that this continued PHC is not necessary, they shall make a request that the continued PHC date be vacated no later than close of business on November 14, 2014. However, if any motions are pending at this time, the PHC of November 17, 2014, shall occur as scheduled.

2. Issues and Proposed Resolutions. The issues at the due process hearing are listed below.²

¹ If San Francisco's administrative office building does not have a suitable location for the hearing on the dates currently set, San Francisco shall notify OAH and Student of the new location for hearing as soon as practicable.

² The parties and ALJ discussed the proposed wording for the issues and proposed resolutions extensively at the PHC. San Francisco objected to the proposed wording for the issues to the extent that the wording does not reflect that Student has the burden of producing evidence to prove each issue. However, pursuant to *Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387], Student has that burden, and the ALJ has determined that it is not necessary that each issue, as stated, include this information.

a) Did San Francisco deny Student a free appropriate public education by failing to find her eligible for special education at an individualized education program team meeting on May 28, 2013?

b) Did San Francisco deny Student a FAPE by failing to find her eligible for special education in April 2014?

c) Did San Francisco violate Parent's procedural rights by failing to timely provide her with Student's educational records following a request in May 2014, thus denying her meaningful participation in the IEP development process?

d) Did San Francisco violate Parent's procedural rights by failing to provide her with San Francisco's psychoeducational assessment report upon completion of the report and prior to the IEP team meeting of May 28, 2013, thus denying her meaningful participation in the IEP development process?

The issues for hearing will be finalized at the beginning of the due process hearing.

Student proposes the following resolutions:³

a) Student shall be found eligible for special education and related services, and San Francisco shall convene an IEP team meeting to develop an IEP;

b) San Francisco shall pay for the attendance of Student's independent assessors, Michele Limon-Freeman, Ph.D., and David Grisham, O.D. at the aforementioned IEP team meeting;

c) San Francisco shall reimburse Parent for Dr. Grisham's assessment;

d) San Francisco shall reimburse Parent for all costs, including transportation, for tutoring, reading programs, and educational counseling obtained during the two-year period immediately preceding the filing of the due process request in this matter; and

e) San Francisco shall provide Student with compensatory education according to proof.⁴

³ San Francisco also objected to the proposed resolutions as stated in this order, to the extent that they include proposed resolutions that were not stated in Student's PHC statement, but only stated in Student's amended request for a due process hearing. San Francisco could produce no authority to support this objection, and the objection is overruled.

⁴ San Francisco objected to this proposed resolution as being in conflict with the proposed resolution that it reimburse Parent for all costs discussed in the preceding proposed

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing, with each exhibit separated from the next by a divider. It is suggested, but not ordered, that the parties use different colored binders for ease of use by witnesses when testifying. The parties shall use numbers to identify exhibits. At the hearing the ALJ shall place the letter “S” or “D” in front of an admitted exhibit to designate if it is a Student or District exhibit (for example, “S-5, S-6, or D-1, D-2”). Each exhibit shall be internally paginated by exhibit, or all of a party’s exhibits shall be consecutively numbered or Bates-stamped. Each exhibit binder shall contain a detailed table of contents. San Francisco has already served its exhibit binder on Student. Student shall serve its exhibit binder on District in compliance with Education Code section 56505, subdivision (e)(7). 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.

If either party wishes to add an exhibit after the other party has received its evidence binder, prior to five business days immediately preceding the commencement of the due process hearing, it shall provide the other party with a copy of that exhibit 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 included in the exhibit lists and not previously timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible. Parties shall be prepared to explain, under penalty of perjury, why the exhibit was not previously produced to the other party in a timely manner.

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, or in a witness list provided to the other party in compliance with Education Code section 56505, subdivision (e)(7), except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

The parties are ordered to meet and confer by close of business on November 24, 2014, as to the schedule of witnesses. The parties shall coordinate the availability and order of testimony of witnesses to ensure that there is a witness available to testify at all times during the hearing, and to ensure that the hearing is completed as scheduled.

resolution. However, the ALJ will determine remedies in the Decision, if Student prevails on any issue, based on the evidence produced at hearing, which may include compensatory education. An ALJ is not precluded from ordering a remedy that a prevailing party has not asked for.

The witness schedule will be discussed at the commencement of the due process hearing. 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. 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 witnesses' testimony.

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. If both parties have timely disclosed the intention to call a specific witness, the second party questioning the witness shall be allowed to expand cross-examination to include questions that would have been asked on direct examination had that party initially examined the witness.

6. Telephonic Testimony. Neither party has requested that a witness testify telephonically. 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. That party shall also 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.

7. Motions. As previously discussed, the motion to continue the due process hearing was granted at the commencement of the PHC. No other pretrial motions are pending or contemplated. Any motion filed after the date of the continued PHC on November 17, 2014, 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 continued prehearing conference of November 17, 2014.

8. Audio Recording of the Hearing. It is within the discretion of the ALJ to permit the audio recording of a due process hearing. The parties are free to make such a request. However, the parties are advised that OAH always makes a digital recording of the proceedings, and this recording is the official record of the hearing. Parties who record the hearing are to turn off their recorders whenever the ALJ orders that the hearing is "off the record." Any violation of this order to turn off recorders when the matter goes off the record will result in the revocation of permission to record the hearing.

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

10. 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, unless permission to the contrary is obtained from the ALJ.

11. Compensatory Education and 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.

12. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for interpreter services. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made known. Additional information concerning a requests for reasonable accommodation is available on OAH's website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>.

13. Hearing Closed To the Public. The hearing will be closed to the public.

14. 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 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 NOON ON THE BUSINESS DAY IMMEDIATELY PRECEDING THE COMMENCEMENT DATE OF THE 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. THE PARTIES SHOULD SIMULTANEOUSLY 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 or the morning of the hearing.

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

IT IS SO ORDERED.

DATE: October 30, 2014

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings