BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2022120076

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE AND ORDER DENYING MOTION TO CONTINUE

JUNE 20, 2023

On June 19, 2023, Administrative Law Judge Sabrina Kong, 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.

Parents appeared on Student's behalf. Attorney Dan Harbottle appeared on Capistrano Unified School District's, called Capistrano, behalf. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order.

DENIAL OF CAPISTRANO'S REQUEST FOR CONTINUANCE

On November 30, 2023, Student filed a due process hearing request. Student's two prior attorneys' withdrew their representation of Student on January 5, 2023, and March 23, 2023. OAH granted a hearing continuance on April 21, 2023, so Student could amend his complaint. Student filed an amended complaint on May 17, 2023.

On June 14, 2023 Capistrano filed a request for a hearing continuance to August 15, 2023, supported by a declaration under the penalty of perjury by its attorney. Capistrano's attorney represented generally that he was handling another later filed case, and one of its witness's, Rick Nichols, unavailability the week of the hearing.

On June 16, 2023, Student opposed the continuance stating the case should no longer be delayed. Student also argued the hearing could be scheduled to accommodate the testimony of a witness who was unavailable the week of the currently scheduled hearing date.

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. (Ed. Code, § 56505, subd. (f)(3); 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 or imposing conditions on the continuance; and any other relevant fact or circumstance. (Cal. Rules of Court, rule 3.1332(d).)

Per discussions with Attorney Harbottle at the PHC, the consolidated matter in OAH case numbers 2023010514 and2022120586, was filed after this case and was unlikely to proceed to hearing. Capistrano did not demonstrate good cause for a further continuance of this case. The request for a hearing continuance is denied. All PHC and hearing dates are confirmed and shall proceed as calendared.

Attorney Harbottle informed the ALJ that witness Nichols was a key Capistrano witness, and was not available until July 10, 2023. The ALJ discussed with the parties the option of starting hearing on June 27, 2023, or July 10, 2023. Attorney Harbottle agreed for the hearing to start as scheduled on June 27, 2023, if Nichols were permitted to testify outside of the currently scheduled hearing dates. Because Nichols was the only witness unavailable to testify the week of June 27, 2023, the ALJ agreed that OAH would arrange for Nichols to testify when he is available.

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on June 27, 28, and 29, 2023, 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. Student anticipates it will take four days to

complete the hearing. Additional hearing dates and a hearing date for Nichols' testimony 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).) OAH will conduct the due process hearing by videoconference using the Zoom application. Unless otherwise ordered, participants are required to appear by videoconference using computer or device with video capability and Zoom.

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

A free appropriate public education is called a FAPE. An individualized education program is called 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 Capistrano deny Student a FAPE by failing to convene an annual IEP team meeting in December 2019?
2. Did Capistrano deny Student a FAPE by failing to respond without unnecessary delay to Student's February 2020 requests for independent educational assessments, either by filing a due process complaint to defend its multidisciplinary assessment, speech and language assessment, occupational therapy assessment, and functional behavioral assessment, or by agreeing to fund Student's requests for independent educational evaluations in those areas?
3. Did Capistrano deny Student a FAPE by failing to have an IEP in place at the beginning of the 2020-2021 school year?
4. Did Capistrano deny Student a FAPE by failing to send Parents a prior written notice in compliance with and addressing the specific requirements of 34 C.F.R. § 300.503 in response to the closures related to the COVID-19 pandemic?
5. Did Capistrano deny Student a FAPE by failing to appropriately assess Student starting in February 2020?
6. Did Capistrano deny Student a FAPE by failing to convene an annual IEP team meeting in December 2020?
7. Did Capistrano deny Student a FAPE by failing to hold an IEP team meeting in response to the January 2021 emails from Parents regarding their concerns?
8. Did Capistrano deny Student a FAPE by failing to include comprehensive assessments of Student in its February 1, 2021 assessment plan?
9. Did Capistrano deny Student a FAPE by failing to file for due process when Parents did not consent to the February 1, 2021 assessment plan?

10. Did Capistrano deny Student a FAPE by failing to hold an IEP team meeting in response to the September 10, 2021 letter from Parents' counsel regarding their concerns?
11. Did Capistrano deny Student a FAPE by failing to include appropriate assessments of Student in its September 22, 2021 assessment plan?
12. Did Capistrano deny Student a FAPE by failing to file for due process when Parents did not consent to the September 22, 2021 assessment plan?
13. Did Capistrano deny Student a FAPE by failing to convene an annual IEP team meeting in December 2021?
14. Did Capistrano deny Student a FAPE by failing to develop an interim IEP pursuant to Parents' request on August 17, 2022?
15. Did Capistrano's use of a modified discrepancy model in the September 2022 assessment plan constitute a denial of FAPE, such that it failed to address all areas of unique need?
16. Did Capistrano deny Student a FAPE in the November 15, 2022, and December 16, 2022 IEPs, by failing to offer appropriate:
    a. Goals;
    b. Accommodations;
    c. Services; and
    d. Placement?
17. Did Capistrano deny student a FAPE by failing to facilitate meaningful parent participation in the November 15, 2022, IEP process?

Parent agreed that issues listed as 2.16, 2.17, and 2.18 in Student's PHC's statement are encompassed under all subsections of Issue 16 above. Specifically, issues 2.19 and 2.20 of Student's PHC statement pertain to Issue 16a above regarding goals. Issues 2.21 of Student's PHC statement pertain to Issues 16b above regarding

accommodations. Issues 2.22 of Student's PHC statement pertain to Issues 16c and 16d regarding services and placement.

A party must immediately file written objections with OAH and serve the filing on the opposing party if the above issues do not reflect the party's understanding of the issues clarified, and agreed to, at the PHC. The ALJ will address any objections on the first day of hearing.

At the PHC, the ALJ stated that Issues one to five above are outside of the two-year statutory period under Education Code section 56505, subdivision (l). Parent stated he was familiar with Education Code section 56505, subdivision (l). The parties represented that a tolling agreement permitted Student to allege issues outside the two-year statutory period. The parties agreed that the complaint was filed on November 30, 2022.

The ALJ informed the parties to be prepared to address on the first day of hearing why Issues one to five above should not be dismissed. The allegations on the face of the complaint showed that Student knew, or reasonably should have known, of the facts underlying the claims against Capistrano within two years of the initial complaint filing on November 30, 2022. The ALJ also informed the parties to be prepared to discuss on the first day of hearing if their tolling agreement effectively modified the applicability of Education Code section 56505, subdivision (l).

PROPOSED RESOLUTIONS

The resolutions requested by Student include reimbursements, compensatory education, training of Capistrano's teachers and professionals, and placement of Student in a non-public school with appropriate related services including transportation.

Capistrano filed its response to Student's amended complaint on May 30, 2023. (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

The parties shall serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). The parties shall upload their exhibits electronically according to the Order Setting Procedures for Filing Exhibits Electronically. Timely uploading electronic hearing exhibits five business days before the first day of hearing constitutes that party's timely exchange of evidence in compliance with Education Code section 56505, subdivision (e)(7). If further assistance is needed, please contact OAH at OAHSEOps@dgs.ca.gov.

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. Capistrano must use the letter D before the number to identify Capistrano's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Capistrano'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 expected to testify as an expert.

Capistrano'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 who have not previously used the Zoom application, may find

informative instructions on by visiting, Getting Started with Zoom at https://support.zoom.us/hc/en-us/categories/200101697.

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 video. A witness's inability 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. 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.

The ALJ has discretion to limit the number of witnesses and the time allowed for 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 5:00 PM on June 20, 2023, 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, electronically viewing exhibits during the hearing, and 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 the authenticity and admissibility of documents to shorten the length of time needed for the hearing.

As part of the meet and confer process, Capistrano shall inform Student which proposed witnesses are its employees. Capistrano shall also identify the witnesses on Student's list that require a subpoena. Capistrano may agree to accept service for a witness under Capistrano's control or provide Student with the witness's 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 a witness to attend the hearing. Any contact information shall not be disclosed to any other person.

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 Capistrano, 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 is calling the witness to testify, and include dates and time estimates of each witness's expected testimony. In the event an agreement cannot be reached, each party shall prepare a separate written list. Both parties 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 of each witness.

SCOPE OF WITNESS EXAMINATION

Each witness will be called to testify only once, except for rebuttal purposes. All parties must examine a witness on all issues when the witness is first called to testify. 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.

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 the following conditions:

1. the OAH recording is the only official recording;
2. 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;

3. operation of the party's recording mechanism will not be allowed to delay the hearing;
4. a party's recording may not be given, provided or played to a witness, or potential witness;
5. the recording is subject to the same confidentiality as the due process hearing; and
6. participants shall not take screenshots of the videoconference nor share or publish any portion of the videoconference or audio recording.

Capistrano's requests to make an audio recording of the hearing is granted. If Student wants to record the hearing, the request must be made before the hearing.

VIDEO RECORDING

No party, witness or anyone else may videorecord 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

No prehearing motions are pending or contemplated. Any motion that was not filed three business days before the PHC, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

STIPULATIONS

Stipulations to pertinent facts, contentions, 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 PARTICIPANTS AND HEARING ROOM DECORUM

All participants to the videoconference should observe the same decorum as in an in-person due process hearing. Participants 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. Participants 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. The parties, their representative 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

Neither party requested an accommodation or a language interpreter. A party or participant in this case, such as a witness, requiring reasonable accommodation to participate in a mediation or hearing may contact OAH at (916) 263-0880, or send an email to 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/Request-Reasonable-Accommodations-for-OAH-Legal-Proceedings.

HEARING CLOSED TO THE PUBLIC

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

SETTLEMENT

The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately if they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH by visiting OAH Secure e-file 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 PHC. 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.

Sabrina Kong

Sabrina Kong
Administrative Law Judge
Office of Administrative Hearings