BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

V.

SAN BENITO HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2021030859

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE

MAY 10, 2021

On May 10, 2021, 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.

Attorneys Melissa Amster, Diana Renteria, and then Sheila Bayne appeared on Student's behalf. Attorney Meagan Kinsey appeared San Benito High School District's behalf. San Benito High School District is called San Benito. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order.

STUDENT'S REPRESENTATION AND PHC PREPAREDNESS

Student's attorneys were at least 15 minutes late to the PHC, and joined after the ALJ called Student's attorney of record, The Law Office of Sheila C. Bayne, twice. Attorney Amster joined the PHC first, advised that she was prepared, and would speak on Student's behalf. Attorney Renteria joined by phone shortly. Attorney Bayne joined approximately 40 minutes after the PHC started, and after the parties discussed in detail re-framing the issues for hearing. Neither attorneys Amster, nor Renteria were the attorney of record for Student, and no one informed the ALJ at any time during the PHC until the ALJ initiated questioning on this issue.

Throughout the PHC, both Amster and Bayne informed the ALJ that Amster would speak on Student's behalf and was the one attorney who was prepared for the PHC. Renteria was unaware of the hearing dates. When advised of the hearing dates, Renteria stated she was unavailable on May 20, 2021, but did not state definitively that she would be representing Student at hearing. When questioned by the ALJ, Amster stated that she was not the attorney of record, and would not be representing Student at hearing.

The ALJ suggested that the parties meet and confer about a brief hearing continuance because both McKinsey and Bayne represented that they were in another OAH hearing which could go beyond this week. Bayne represented that she preferred to proceed with the current hearing dates, and "someone" will be representing Student at hearing, as she wanted the case to conclude before the fall. McKinsey stated she was not opposed to a brief hearing continuance, but stated that San Benito may have difficulty obtaining witnesses during the summer. The ALJ expressed concerns that Amster, the only person who was prepared for the PHC on Student's side, was not the attorney of record, and would not be representing Student at hearing. Bayne explained

that she was unprepared and late for the PHC because she had been in another OAH hearing and was tired, but declined a hearing continuance. The ALJ reviewed the issues that were discussed, reframed, withdrawn and agreed upon by the parties before Bayne joined the PHC again with Bayne. Bayne agreed to all the issues as stated below.

ALJ reminded Bayne that appearing unprepared was a waste of OAH's resources, disrespectful to opposing counsel's time, and a disservice to her client. The ALJ stated that if this occurred again, an order to show cause regarding sanctions would be set if the attorney of record was not prepared at the PHC, or at hearing. Only attorneys of record shall represent Student at hearing. All parties shall be prompt and prepared for hearing.

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on May 18, 2021 through May 20, 2021, and continue day to day at the discretion of the ALJ. The hearing will begin at 9:30 am each day and generally end at 3:30 pm, unless otherwise ordered. The parties anticipate it will take three to ten days to complete the hearing. Additional hearing dates will be discussed with the ALJ during the hearing.

HEARING LOCATION

OAH is authorized to conduct due process hearings by videoconference or telephone. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Based on state and federal guidance to address safety procedures due to the novel coronavirus, COVID-19, OAH

will conduct the due process hearing by videoconference using the Microsoft Teams application. Unless otherwise ordered, participants are required to appear by videoconference using a webcam and Microsoft Teams.

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

ISSUES AND PROPOSED RESOLUTIONS

The 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 San Benito deny Student a FAPE from the beginning of the 2020-2021 school year through March 24, 2021, by assigning Student to distance learning without providing in-person services, in person?
2. Did San Benito deny Student a FAPE from the beginning of the 2020-2021 school year through March 24, 2021, by assigning Student to distance learning without offering, or evaluating the need for, all necessary accommodations?
3. Did San Benito deny Student a FAPE from the beginning of the 2020-2021 school year through November 2020, by assigning only one hour a day of virtual distance learning?

4. Did San Benito deny Student a FAPE by failing to develop appropriate academic goals in the 2020-2021 school year through March 24, 2021?
5. Did San Benito deny Student a FAPE from the beginning of the 2020-2021 school year through March 24, 2021, by failing to offer sufficient intensive individual services in the form a one-to-one aide?

Student withdrew issues listed as eight and 13 in the PHC statement.

PROPOSED RESOLUTIONS

The resolutions requested by Student include an order that San Benito provide Student's services in-person through San Benito staff at Student's home or by a non-public agency. Student also requested that San Benito evaluate Student's current educational setting, offer necessary accommodations, and develop an appropriate IEP. Student further requested that San Benito fund independent educational evaluations, fund compensatory education, and reimburse parent for educationally related expenses.

San Benito responded to Student's complaint on April 2, 2021. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

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

The parties must serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). Timely uploading electronic hearing exhibits five business days before the first day of hearing constitutes that party's timely exchange of evidence on each other in compliance with Education Code section 56505, subdivision (e)(7).

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged as required by Education Code section 56505, subdivision (e)(7) will 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. San Benito must use the letter D before the number to identify San Benito's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means San Benito's exhibit 1. The electronic evidence program will automatically number the exhibits and additional page numbering or bates stamping should not be added.

CONTENT

Each exhibit must consist of one document. Separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Exhibits should be in chronological order.

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

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

Electronic copies of exhibits filed with OAH must 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 must serve their list of witnesses on each other in compliance with Education Code section 56505. No party will be permitted to call any witnesses not timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

Parties are responsible for ensuring that all participants are familiar with and follow the Instructions for Joining the Online Due Process Hearing provided with this Order. Participants that have not previously used the MS Teams platform, may also find informative videos available like the one at this link from Microsoft: https://support.office.com/en-us/article/join-a-teams-meeting-078e9868-f1aa-4414-8bb9-ee88e9236ee4.

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

The parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Parties must make witnesses under their control reasonably available. The parties must schedule their witnesses to avoid delays in the hearing and

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

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

MEET AND CONFER

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

The parties are ordered to meet and confer no later than 5:00 pm on May 13, 2021, to discuss scheduling witnesses and how much time each witness will take. The parties must discuss any issues related to counsel and witnesses appearing by videoconference for hearing and electronically viewing exhibits during the hearing, or subpoenas, if any. The parties should attempt to eliminate duplicate exhibits from their hearing exhibits. The parties must 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, San Benito must inform Student which proposed witnesses are district employees. San Benito must also identify the witnesses

on Student's list that require a subpoena. San Benito may agree to accept service for witnesses under San Benito's control or must 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 must 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 must be used for the limited purpose of issuing subpoenas or for contacting the witness(es) for purposes of attending the hearing and must not be disclosed to any other person(s).

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.

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 will be presented first, followed by San Benito, 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 or parties 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 must 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 of each witness.

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

must request permission to do so before the hearing. Any party seeking to present a witness who cannot access exhibits electronically must inform the ALJ at the beginning of the hearing.

ELECTRONIC RECORDINGS

AUDIO RECORDING

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

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

The parties' requests are granted, subject to these conditions.

VIDEO RECORDING

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

RECORDINGS AS EXHIBITS

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

DISTRICT'S REQUEST FOR OFFICIAL NOTICE

San Benito requests official notice of a number of documents, but fails to provide sufficient information, by sworn declaration or argument, of whether or how these documents are relevant to the matter to be heard. San Benito's request for official notice is denied.

This ruling does not bar San Benito from renewing its request with sufficient support, or seeking to admit the documents into evidence after laying a proper foundation and establishing their relevancy at hearing.

STUDENT'S REQUEST TO TAKE JUDICIAL NOTICE

Student requests judicial notice of two OAH decisions, a Senate bill and two executive orders by the Governor of the State of California. San Benito informed that it would waive its right to a written opposition to the requests for judicial notice, opting instead for oral argument. San Benito argued that that Student's request for judicial notice was untimely, and failed to show how the matters for which judicial notice was requested were relevant to the issues before OAH.

Student fails to provide sufficient information, by sworn declaration or argument, of whether or how these documents are relevant to the matter to be heard. Student's request for judicial notice is denied. Further, orders and decisions by OAH may be cited by the parties in their closing briefs or arguments as persuasive authority without the need for judicial notice. (Cal. Code Regs., tit. 5, § 3085.)

This ruling does not bar Student from renewing its request with sufficient support, or seeking to admit the documents into evidence after laying a proper foundation and establishing their relevancy at hearing.

NOTICE OF ERRATA

San Benito's attorney informed OAH that Student's name was wrong, and should be "Ariana" instead of "Adriana". The parties agreed that Student's filing a notice of errata before the hearing will be sufficient to address this oversight. No further prehearing motions are pending or contemplated. Any motion that was not filed three business days before the PHC, must 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 must be submitted to the assigned ALJ in writing prior to the start of the hearing.

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

All participants to the videoconference should observe the same decorum as in an in-person due process hearing. Counsel, all parties, and all witnesses must conduct themselves in a professional and courteous manner at all times. Cellular phones, telephones and computer notifications must be shut off or set to silent during the hearing unless the ALJ grants permission otherwise. Counsel, parties, and witnesses should appear from a private location, unless otherwise ordered. Participants should take reasonable efforts to minimize background noise and maintain adequate room lighting. Use of virtual background images are at the discretion of the ALJ. Witnesses

are prohibited from reading exhibits, documents, notes, text messages, telephones or computers while testifying, unless permitted to do so by the ALJ. Parties, counsel and witnesses are prohibited from passing notes to, exchanging electronic messages with, or signaling the witness in any way while the witness is testifying.

REASONABLE ACCOMMODATIONS

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/Accommodations-at-OAH.

HEARING OPEN TO THE PUBLIC

Special Education hearings are closed to the public unless Student requests the hearing to be open to the public. The hearing is open to the public at Bayne's request.

An ALJ may restrict attendance because of the physical limitations of the hearing facility or take other action to promote due process or the orderly conduct of the hearing. (Cal. Code Regs., Tit. 1, § 1030.) Government Code, section 11425.20 empowers the ALJ to order an open hearing to be closed or make other protective orders to the extent necessary or proper to ensure a fair hearing in the circumstances of the case. Currently, amid COVID-19 concerns, all hearings are being conducted via videoconference without observers present or participating in the videoconference. OAH will provide the hearing recording upon request.

SETTLEMENT

The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties must 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 must 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 3:00 pm the day prior to hearing, the parties must 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 must 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.

Sabrina Kong

Sabrina Kong
Administrative Law Judge
Office of Administrative Hearings