BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

OAKLAND UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NUMBER 2019101219

ORDER FOLLOWING PREHEARING CONFERENCE

On December 23, 2019, Administrative Law Judge Marlo Nisperos, Office of Administrative Hearings, held a telephonic prehearing conference. The Administrative Law Judge is called an ALJ; the Office of Administrative Hearings is called OAH; and a prehearing conference is called a PHC.

Nicole Hodge Amey, Attorney at Law, appeared on behalf of Student. David Mishook, Attorney at Law, appeared on behalf of Oakland Unified School district. 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 January 7 through 9, 2020 and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM on the first day and at 9:00 AM on all other days, unless otherwise ordered. The parties anticipate it will take 4 days to complete the hearing. Additional hearing dates will be discussed with the ALJ on the first day of hearing.

HEARING LOCATION

The hearing will be held at Office of Administrative Hearings at 1515 Clay Street Suite 206 in Oakland, California 94612.

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.

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 ALLEGED BY STUDENT

1. Did Oakland Unified School District deny Student a free appropriate public education in the 2018 - 2019 school year by:

a. Predetermining student's placement and the following related services:
    i. Transportation via bus without a 1:1 bus aide and the length of time of travel on the bus
    ii. Adaptive Physical Education
    iii. Augmentative and Alternative Communication (AAC)
    iv. Placement in an inclusion program without a 1:1 aide
b. Failing to implement the following components of Student's individualized education program (IEP):
    i. 1:1 aide
    ii. Assistive Technology
    iii. Augmentative and Alternative Communication and Speech Services
c. Failing to make an appropriate offer of placement based on staffing issues;
d. Failing to design a program that would allow student to make progress;
e. Failing to develop goals that addressed Student's needs in the following areas:
    i. Communication
    ii. Adaptability
    iii. Occupational therapy
    iv. Self help
    v. Academic, specifically reading, writing, and math
    vi. Sensory Support
    vii. Social Interactions

f. Denying parent participation in Student's IEP process by not providing written notice when parent requested a change of placement in August, November, and December 2018?

2. Did Oakland Unified School District deny Student a free appropriate public education in the 2019 - 2020 school year through the first day of hearing by:

    a. Predetermining student's placement and the following related services:

        i. Transportation via bus without a 1:1 bus aide and the length of time of travel on the bus

        ii. Adaptive physical education

        iii. Augmentative and alternative communication

        iv. Placement in an inclusion program without a 1:1 aide

    b. Failing to implement the following components of Student's individualized education program (IEP):

        i. 1:1 aide

        ii. Assistive technology

        iii. Augmentative and alternative communication and speech services

    c. Failing to make an appropriate offer of placement based on staffing issues;

    d. Failing to design a program that would allow student to make progress;

    e. Failing to develop goals that addressed Student's needs for his disability in the following areas:

        i. Communication

ii. Adaptability
iii. Occupational therapy
iv. Self help
v. Academic specifically reading, writing, and math
vi. Sensory support
vii. Social interactions

f. Failing to file for due process to defend its IEP developed in January and May 2019?
g. Failing to provide parent with appropriate interpretation and translation services from August 2019 to present?

ISSUE ALLEGED BY DISTRICT

1. Whether District's February 11, 2019 IEP offer, as amended by the May 13, 2019 IEP, offers Student a free appropriate public education in the least restrictive environment?

PROPOSED RESOLUTIONS

The resolutions requested by Student include: the district to fund Student's placement at nonpublic school, compensatory education and additional services, individual educational evaluation (IEE) by an assessor selected by parent, an IEP meeting within 10 days of the IEE being completed, training of district staff on IDEA procedural safeguards and substantive issues, district to fund attorney and educational advocate to attend future IEP meetings, and district to pay Student's attorney's fees.

Oakland Unified School District requests the following resolution: a finding the February 11, 2019 IEP offer, as amended by the May 13, 2019 IEP, offers student a free appropriate public education in the least restrictive environment.

EXHIBITS

BINDERS

Exhibits shall be pre-marked and placed in three-ring binders before the hearing. Exhibit binders shall include a tab for each exhibit. Each binder shall contain a detailed table of contents which clearly identifies the tabs and documents. Binders should not be so full that the ALJ and witnesses cannot easily turn to the exhibit tabs and pages in the binders. Multiple binders may be submitted if necessary.

TAB AND PAGE NUMBERS

The parties must place a letter followed by a number on each tab to identify each exhibit. Student must use the letter S before the number to identify Student's exhibits. Oakland must use the letter D before the number to identify Oakland's exhibits. For example, S-1 means Student's exhibit tab 1 and D-1 means Oakland's exhibit tab 1. Parties may either number each page within each tabbed exhibit or number each page in the binder consecutively beginning with the first page of the first exhibit through the last page of the last exhibit. For example, if there are 100 total pages in the binder the first page of the first exhibit is 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 in the binders should be in chronological order.

Parties should include resumes or curriculum vitae for each witness who is expected to testify as an expert. Parties must exchange resumes not later than 24 hours

before the witness is scheduled to testify and provide a copy to the ALJ before the witness testifies.

Oakland's binder must include a color copy of the school calendar for each school year in question.

COPIES OF BINDERS

The parties must serve copies of their evidence binders on each other. This exchange is required by Education Code section 56505, subdivision (e)(7). Each party must bring two additional sets of their exhibit binders to the hearing. One set will be used by the ALJ, and the other set will be used by witnesses. The parties may not serve exhibits on OAH before the hearing.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

WITNESSES

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 Thursday, December 26, 2019 by close of business to discuss the availability of witnesses, the order of witnesses and the length of witness testimony. The parties should attempt to eliminate duplicate exhibits from their binders. The parties may discuss whether they can produce a written stipulation stating basic facts to shorten the length of time needed for the hearing.

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 filed the initial complaint and bears the burden of proof related to Student's complaint. Oakland bears the burden of proof related to the single issue raised in its complaint. In this consolidated matter, Student's case-in-chief shall be presented first, followed by Oakland.

WITNESS LISTS

The parties must provide a joint proposed witness list to the ALJ on the first day of hearing. The list should include dates and time estimates of 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 direct and cross-examination of 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.

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;
- the parties shall turn the 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;
- the recording device will be removed by the party recording during any recess where the party leaves the room;

- operation of the party's recording mechanism will not be allowed to delay the hearing;
- a parties' recording may not be used to prepare a witness, or potential witness; and
- the recording is subject to the same confidentiality as the due process hearing.

Student's and Oakland's request is granted, subject to these conditions.

VIDEO RECORDING

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

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

Oakland raised objections to two witnesses listed in Student's Prehearing Conference Statement. The two witnesses are Neena Bawa, Special Education Director and Kyla Johnson, Superintendent of Oakland Unified School district. Student advised that he did not anticipate calling Kyla Johnson at the due process hearing. Parties were advised the issue related to Neena Bawa's testimony would be addressed on the first day of hearing.

STIPULATIONS

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

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

Counsel, all parties, and all witnesses must conduct themselves in a professional and courteous manner at all times. Cellular phones must be shut off or set to vibrate during the hearing unless the ALJ grants permission otherwise.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

An Arabic language interpreter is required. OAH will provide the interpreter. Oakland advised that an Arabic language interpreter that is fluent in the Yemeni dialect is required as Parent speaks this dialect. Ms. Hodge Amey will notify OAH by close of business on December 26, 2019 if a different dialect other than Yemeni Arabic is required at hearing to assist Parent.

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 OR 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 at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 4:00 p.m. 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.

IT IS SO ORDERED.

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Marlo Nisperos
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DATED: December 24, 2019

Marlo Nisperos
Administrative Law Judge
Office of Administrative Hearings