BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF:

PARENT ON BEHALF OF STUDENT,

v.

ABC UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2019020957

and

ABC UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT,

OAH CASE NUMBER 2019090707

ORDER FOLLOWING PREHEARING CONFERENCE; GRANTING MOTION TO CONSOLIDATE AND DENYING MOTION TO CONTINUE

On September 23, 2019, Administrative Law Judge Paul H. Kamoroff, Office of Administrative Hearings, held a telephonic prehearing conference. The Administrative

Law Judge will be referred to as an ALJ. The Office of Administrative Hearings will be referred to as OAH. The prehearing conference will be referred to as PHC.

Tania L. Whiteleather, Attorney at Law, appeared on behalf of Parent and Student. Kristin M. Myers, Attorney at Law, appeared on behalf of ABC 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 October 1, 2, and 3, 2019, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM on the first day of the hearing and at 9:00 AM on all other days, unless otherwise ordered.

HEARING LOCATION

The hearing will be held at ABC Unified's office located at 16700 Norwalk Boulevard, Cerritos, CA 90703.

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.

ABC Unified's facilities shall fully comply 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 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing

accessibility of government facilities to persons with disabilities. ABC Unified is required to file written certification with OAH that the facilities it provides comply with these laws.

On August 19, 2019, OAH ordered ABC Unified to file the required certification by August 21, 2019. ABC Unified failed to do so. ABC Unified shall file the required certification within one day of this Order and provide facilities that comply with these laws. Failure to do so may result in sanctions against ABC Unified.

Before the beginning of the hearing, ABC Unified shall ensure that the hearing room is configured into a courtroom setting and shall contain:

- a table for Student and his representatives;
- a table for ABC Unified's legal representative and special education representative;
- a table for the witness;
- a table for the ALJ, near an electrical outlet with a chair that adjusts to an appropriate height for typing at the table provided; and
- water and tissue available for the participants.

The same hearing room shall be used for each day of hearing and shall be available at least one hour before the beginning of the hearing each day. The hearing room shall be locked following the hearing each night. ABC Unified shall ensure that the hearing room and access to it are in compliance with the all laws governing accessibility of government facilities to persons with disabilities.

ABC Unified shall also ensure that one parking space is available on each hearing day for each of the following: the ALJ, Parents, Student's attorneys, ABC Unified's attorneys, and witnesses.

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 prehearing conference are:

STUDENT'S ISSUES

1. Did ABC Unified deny Student a free appropriate public education, referred to as a FAPE, by failing to timely provide appropriate educational related services in the areas of behavior, speech and language, and occupational therapy, or appropriate interim educational services?
2. Did ABC Unified deny Student a FAPE, by failing to offer or provide Student an individual, applied behavior analysis aide, after December 12, 2017?
3. Did ABC Unified fail to timely convene an individualized education program, referred to as an IEP, team meeting, following Parent's July 2018 request for an IEP team meeting?
4. Did ABC Unified assess Student without Parent's consent in fall 2018?
5. Whether ABC Unified should be ordered to reimburse Student for a July 2018 independent speech and language evaluation?

ABC UNIFIED'S ISSUES

6. Did ABC Unified's December 17, 2018 IEP offer Student a FAPE in the least restrictive environment?
7. Did ABC Unified's January 11, 2019 IEP offer Student a FAPE in the least restrictive environment?

PROPOSED RESOLUTIONS

The resolutions requested by Student include compensatory education, reimbursement for educational expenses, and school staff training. ABC Unified requests an order that it may implement the IEP placement absent Parent's consent.

ABC Unified filed its response to Student's complaint on March 4, 2019. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

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. The ALJ and witnesses must be able to easily turn to exhibit tabs and to turn pages in the binders. Multiple binders may be submitted if necessary.

TAB AND PAGE NUMBERS

The parties shall place a letter followed by a number on each tab to identify each exhibit. Student shall use the letter S before the number to identify Student's exhibits. ABC Unified shall use the letter D before the number to identify ABC Unified's exhibits. For example, S-1 means Student's exhibit tab 1 and D-1 means ABC Unified's exhibit tab 1. Each page of each binder shall be numbered consecutively from the first page of the first exhibit to the last page of the last exhibit in the binder. Parties may use a Bates-stamp type system for numbering.

CONTENT

Each exhibit shall 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. Documents offered as evidence to support a request for reimbursement must be separated by vendor and should be internally chronological where possible. 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 to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

ABC Unified's binder shall include a color copy of the school calendar for each school year in question and shall have witnesses available to explain the calendar if necessary.

COPIES OF BINDERS

The parties shall serve copies of their evidence binders on each other. This exchange is required by Education Code section 56505, subdivision (e)(7). Each party shall bring two additional sets of the binders containing their exhibits 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 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 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 will 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 September 25, 2019. The parties shall discuss the availability of witnesses, the order of witnesses and the length of witness testimony. ABC Unified shall make witnesses that are presently employed by ABC Unified available to Student to testify without a subpoena. ABC Unified shall provide the last known contact information for any witnesses previously employed by ABC Unified, if requested by Student. 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 consolidated matter, Student's case-in-chief shall be presented first, followed by ABC Unified.

WITNESS LISTS

The parties shall give the ALJ a joint proposed witness list for 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. ABC Unified shall have witnesses available in case there is no agreement. Before the hearing begins, 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 shall be prepared at the end of each day to discuss the witnesses to be presented the next day and the estimated time the testimony each witness is expected to take.

SCOPE OF WITNESS EXAMINATION

Each witness shall be called to testify only once, except for rebuttal purposes. All parties shall examine witness on all issues when the witness is first called. Requiring a witness to appear only once takes precedence over the order in which parties presents their case in chief.

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 request for leave to do so before the hearing, unless the opposing party has stipulated that the witness may appear by telephone. The party offering the witness shall provide the witness with a complete set of exhibit binders from all parties before the hearing. The binders must be exact paper copies of all of each party's exhibits. Electronic copies are not acceptable. The party presenting the witness shall ensure the witness testifies from a private location with no other persons present. The party offering telephonic testimony shall ensure that the witness has telephone equipment that allows clear testimony at a volume that allows clear transmission of what the witness is saying, allows the witness' testimony to make a clear recording, and allows the witness to hear objections and rulings. ABC Unified shall ensure that the hearing room has telephone speaker equipment that allows everyone in the room to hear the witness, and allows the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled. At present, neither party has requested for a witness to appear by telephone.

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. Such requests are routinely granted on the following conditions:

- 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 the testimony of a witness in the hearing;
- the recording shall not be shared with any non-party, possible witness, or through social media;
- The parties shall not use the recording in any subsequent due process hearing;
- the recording is subject to the same confidentiality as the due process hearing; and
- the parties shall dispose of the unofficial recording when the time for filing an appeal has passed or, in the event of an appeal, when the time for submission of the record on appeal has passed.

Student's request to audio record the hearing 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. Any person doing so shall be subject to sanctions.

Recordings as exhibits

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.

MOTIONS

MOTION TO CONSOLIDATE

On February 22, 2019, Student filed with OAH a Request for Due Process Hearing in OAH case number 2019020957, First Case, naming ABC Unified. On September 18, 2019, ABC Unified filed a Request for Due Process in OAH case number 2019090707, Second Case, naming Student.

On September 18, 2019, ABC Unified filed a Motion to Consolidate First Case with Second Case. During the PHC, Student opposed the request.

No statute or regulation specifically provides a standard to be applied in deciding a motion to consolidate special education cases. However, OAH will generally consolidate matters that involve the same parties, a common question of law and/or fact, and when consolidation of the matters furthers the interests of judicial economy by saving time or preventing inconsistent rulings. (See Gov. Code, § 11507.3, subd. (a) [administrative proceedings may be consolidated if they involve a common question of law or fact]; Code of Civ. Proc., § 1048, subd. (a) [same applies to civil cases].)

Here, First Case and Second Case involve a common question of law or fact, specifically, the appropriateness of Student's 2018 and 2019 educational programs. In addition, consolidation furthers the interests of judicial economy because each case involves similar witnesses and consolidation will prevent inconsistent rulings. Accordingly, consolidation is Granted.

MOTION TO CONTINUE

During the PHC, ABC Unified moved to continue the hearing. Student opposed the motion.

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.)

ABC Unified failed to submit the motion three business days prior to the PHC, as previously ordered by OAH. ABC Unified failed to meet and confer with Student regarding the motion or to propose alternative hearing dates. ABC Unified failed to establish good cause for the continuance, citing only that the attorney of record, Sundee Johnson, may be unavailable due to an unspecified case.

OAH has previously granted multiple continuances for the matter, and ABC Unified jointly selected the present hearing dates. ABC Unified also overlooks that First Case was filed on February 22, 2019, and takes precedence over later filed cases. Finally, ABC Unified failed to explain the delay in filing its complaint, as the most recent IEP at issue is from January 2019.

OAH has reviewed the request for good cause and considered all relevant facts and circumstances. The request is Denied. All dates shall remain as set.

ABC Unified anticipates submitting another motion to continue, that, if filed, should include a Motion for Reconsideration. No additional 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 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 shall conduct themselves in a professional and courteous manner at all times. Cellular phones, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless the ALJ grants permission otherwise. No food or drinks other than water will be permitted in the hearing room during the hearing.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

At present, neither party has requested an interpreter or accommodation.

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 TO THE PUBLIC

At Student's request, the hearing will be open to the public. The parties, should inform the ALJ if Student expects any group or members of the press to be present during the hearing. No one may record any part of the hearing, and all electronic devices must be off or silent in the hearing room unless permitted by the ALJ.

Parents should be aware that by opening the hearing, ABC Unified employees who are not witnesses, or other people that Parents might not know, may attend the hearing. Persons disclosed on either party's witness list, with the exception of ABC Unified's representative, will be excluded from the hearing until their testimony has been completed. **The parties shall meet and confer by 5:00 PM on September 25, 2019, as to the seating requirements for members of the public.** The parties shall immediately notify each other and OAH if they are aware that there will be media attending the hearing.

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 particular case. The ALJ may also exclude persons whose actions impede the orderly conduct of the hearing, 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. (Tit. 1, Cal. Code Regs., § 1030.)

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 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.

DocuSigned by:
Paul Kamoroff
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DATED: September 23, 2019

Paul H. Kamoroff
Administrative Law Judge
Office of Administrative Hearings