BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

VENTURA UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021040678

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE, DENYING MOTION TO CONTINUE HEARING, AND DENYING REQUEST FOR OFFICIAL NOTICE

JUNE 28, 2021

On June 28, 2021, Administrative Law Judge Christine Arden, 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.

Coleman Alguire, Sheila Bayne, and Lynda Williams, Attorneys at Law, appeared on behalf of Student. Melissa Hatch, Attorney at Law, appeared on behalf of Ventura

Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

VENTURA'S SECOND MOTION TO CONTINUE HEARING, AND DUE PROCESS HEARING

Ventura Unified School District filed with OAH a second request to continue hearing dates on June 25, 2021, one business day prior to the prehearing conference. The motion did not provide an explanation as to why this request was not timely filed. On June 28, 2021, Student filed with OAH an opposition to the motion. Ventura Unified School District's second request to continue the hearing failed to show good cause for the continuance of the hearing dates sought. The motion is denied. However, two hearing days are added to accommodate the vacation schedule of witness Marcus Konantz.

The hearing will take place on July 7, 8, 13, and 14, 2021, 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. The parties anticipate it will take from four to eight 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 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

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 Ventura Unified School District deny Student a free appropriate public education, called a FAPE, from March, 2020, until the end of the 2019-2020 school year, by failing to implement his individualized education program, called an IEP, in place at that point, by assigning Student to distance/virtual learning and not providing him with the in-person specialized academic instruction, and related services, specifically, speech and language therapy and occupational therapy, offered in his IEP?
2. Did Ventura Unified School District deny Student a FAPE by assigning Student to distance/virtual learning from March, 2020, until the end of the 2019-2020 school year without assessing Student to determine what accommodations he needed to access distance/virtual learning and

without offering him accommodations to ensure he could receive a FAPE through distance/virtual learning?

3. Did Ventura Unified School District deny Student a FAPE during the 2020-2021 school year by failing to implement his IEP by assigning him to distance/virtual learning and failing to provide him with the specialized academic instruction, and related services, specifically, speech and language therapy and occupational therapy, offered in his IEP?
4. Did Ventura Unified School District deny Student a FAPE by assigning Student to distance/virtual learning for the 2020-2021 school year without assessing Student to determine what accommodations he needed to access distance/virtual learning and without offering him accommodations to ensure he could receive a FAPE through distance/virtual learning?
5. Did Ventura Unified School District deny Student a FAPE by failing to appropriately assess him in all areas of suspected disability, specifically, academics, behavior, speech and language, and occupational therapy, prior to the annual IEP meeting held on October 14, 2020 IEP?
6. Did Ventura Unified School District deny Student a FAPE in the IEP dated October 14, 2020, by failing to offer him appropriate:
    a. goals in the areas of math, reading, writing, social emotional, language communication, and motor skills development;
    b. specialized academic instruction;
    c. related services, specifically, speech and language therapy, occupational therapy, and behavioral services;
    d. a full-time one-to-one aide; and
    e. accommodations?

7. Did Ventura Unified School District deny Student a FAPE, from March, 2020, through April 21, 2021, by failing to address the regression Student had suffered as a result of being assigned to distance/virtual learning?

At the prehearing conference Student withdrew the issue which was originally numbered 7 in both Student's complaint and Student's prehearing conference statement.

PROPOSED RESOLUTIONS

The resolutions requested by Student include an Order that Ventura Unified School District must provide certain specialized academic instruction and related services to Student in person. Student further seeks an Order that Ventura Unified School District shall provide Student compensatory education. Student further seeks an Order that Ventura Unified School District shall provide Student independent educational evaluations in the areas of psychoeducation, functional behavior, occupational therapy, and applied behavior analysis. Student further seeks an Order that Ventura Unified School District shall offer Student an appropriate behavior intervention plan, in-home applied behavior analysis services, and a one-to-one behavior aide with supervision. Student further seeks an Order that Ventura Unified School District shall offer Student appropriate present levels of performance and goals in all areas of needs. Student further seeks an Order that Ventura Unified School District shall offer Student appropriate speech and language, and occupational therapy services to be provided by a nonpublic agency. Student further seeks an Order that Ventura Unified School District shall offer Student appropriate counseling services. Student further seeks an Order that Ventura Unified School District shall offer Student transportation and a transportation aide. Student further seeks an Order that Ventura

Unified School District shall reimburse Parents for the costs of educational services they incurred.

Ventura Unified School District filed its response to Student's complaint on May 13, 2021. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

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

The parties shall 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) 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. Ventura Unified School District must use the letter D before the number to identify its exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Ventura Unified School District'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 who is expected to testify as an expert.

Ventura Unified School District's exhibits must include a copy of the school calendar, including extended school year, 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 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 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 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 June 29, 2021, 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 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 shall 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, Ventura Unified School District shall inform Student which proposed witnesses are district employees. Ventura Unified School District shall also identify the witnesses on Student's list that require a subpoena. Ventura Unified School District may agree to accept service for witnesses under its control or 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 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 the witness(es) for purposes of attending the hearing and shall not be disclosed to any other person(s).

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 Ventura Unified School District 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(s) 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 shall prepare a separate written list. Ventura Unified School District 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 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.

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 certain conditions. The conditions are:

a. the OAH recording is the only official recording;
b. participants shall not use Teams to record the hearing;

c. 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;
d. operation of the party's recording mechanism will not be allowed to delay the hearing;
e. a parties' recording may not be given, provided or played to a witness, or potential witness; and
f. the recording is subject to the same confidentiality as the due process hearing;
g. use of the chat function in the videoconference is prohibited and shall not be part of the official record;
h. participants shall not take screenshots of the videoconference or share or publish any portion of the videoconference or audio recording.

Both Student and Ventura Unified School District's requests to audio record the hearing 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

Neither party proposes to introduce all or part of a recording of an individualized education program team meeting. 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

On June 7, 2021, Student filed a Request for Judicial Notice, with the following five attachments: Order Granting Motion for Stay Put issued on August 24, 2020 in Student v. Pleasanton Unified School District and Contra Costa County Office of Education, OAH case number 2020070970; Decision issued on August 24, 2020 in Student v. Los Angeles Unified School District, OAH case number 2020050465; California Senate Bill No. 98, dated June 29, 2020; March 13, 2020 Executive Order No.

N-26-20 of Governor Newsome; and March 4, 2020 Executive Order No. N-33-20 of Governor Newsom. Ventura Unified School District did not file an opposition to Student's request for judicial notice. Student's request for judicial notice is considered a request for official notice under CA Government Code section 11515. That statute permits official notice of any generally accepted technical or scientific matter within an agency's special field or of any fact which may be judicially noticed by the courts of this State. None of the five documents Student submitted for official notice offer notice of a generally accepted technical or scientific matter, and are not appropriate subjects for a request for official notice. Student's request for judicial or official notice is denied. The parties will have an opportunity to present persuasive legal authority in their written closing briefs in this case.

No other 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 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.

LANGUAGE INTERPRETERS AND 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

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

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 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 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 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.

Christine Arden

Christine Arden
Administrative Law Judge
Office of Administrative Hearings