BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

LEMOORE UNION ELEMENTARY SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NUMBER 2022080193

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE

FEBRUARY 27, 2023

On February 24, 2023, Administrative Law Judge Penelope Pahl, of the Office of Administrative Hearings, called OAH, held a prehearing conference by videoconference. The Administrative Law Judge is called an ALJ. The prehearing conference is called a PHC.

Attorneys Elizabeth Rho-Ng and Adrienne Nichelini , appeared on behalf Lemoore Union Elementary School District. John Raven, Assistant Superintendent of Special Services for Lemoore also attended the PHC. Mother appeared on behalf of Student. 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 March 7, 8, and 9, 2023, and continue day to day, Fridays and Mondays included, 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. Additional hearing dates, if necessary, 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

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:

ISSUE:

The ALJ has clarified the issue statement as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. No change in substance has been made.

The sole issue to be considered at this hearing is:

1. Did Lemoore Union Elementary School District's March 29, 2022 Individualized Education Plan, also called an IEP, continued on May 25, 2022 , June 28, 2022, and amended on August 9, 2022 and January 30, 2023, offer Student a free, appropriate public education, or FAPE, such that the District may implement it without parental consent?

A party believing that an issue has been misstated or improperly left out shall file a notice in writing, no later than close of business on the day before the first day of hearing, stating its concern, and referring to supporting portions of the complaint.

PROPOSED RESOLUTIONS

The resolutions requested by Lemoore include a declaration that the IEP at issue offered Student a FAPE, and an order allowing Lemoore to implement the IEP without parental consent.

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).

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 for example, S-1, S-2, etc. Santa Ana must use the letter D before the number to identify Santa Ana's exhibits, for example, D-1, D-2 etc. The electronic evidence program will automatically number the exhibits and additional page numbering or bates stamping should not be added.

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. Lemoore must use the letter D before the number to identify Lemoore's exhibits. 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 pages of the exhibits. Do number the pages of the exhibits.

EXHIBIT CONTENT

- Each exhibit must consist of one document with all of its pages.
- Different documents may not be combined into one exhibit.

- Emails may be consolidated into one exhibit if they are part of a single chain of messages.
- Exhibits should be uploaded into Case Center in chronological order. If you were given permission to provide paper copies of your documents, please stack them in date order when giving a copy to the other side.
- Parties should include resumes or curriculum vitae for each witness who will testify to their professional credentials.
- Lemoore's exhibits must include a color copy of the school calendar for each school year in question.

INSTRUCTIONS FOR STUDENT'S WITNESS LIST AND DOCUMENT EXCHANGE:

- The parties agreed at the PHC that Parent would drop off a copy of Student's witness list, and a copy of each document Student would like considered by the Administrative Law Judge during the hearing, to Yvonne in the Lemoore District Offices. Yvonne's telephone number was provided so Parent could text to coordinate the drop off on Tuesday, February 28, 2023 before 4:30 PM. Parent and Yvonne have exchange text messages about school business in the past.
- After the documents are dropped off at the Lemoore District Offices, Mr. Raven will have the documents scanned and sent to Ms. Rho-Ng and Ms. Nichelini's offices.
- Lemoore has provided Student a copy of the documents on paper in binders. These documents were printed after uploading to Case Center and have the same page numbers Case Center assigned. Parent does not have to provide a copy of any document she wishes to discuss in the

hearing that is already included in the Exhibit binders. Parent does need to list any document provided by the district that Parent also wishes to discuss during the hearing on Student's Exhibit list.

- Parent must also provide a list of witnesses she wishes to call to testify about Student's side of the case. The list must state the name of the witness, their title and a short statement of what Student believes the person will say to help the judge understand Student's side of the case.

Counsel for Lemoore has agreed to upload Student's exhibits to Case Center. Electronic copies of exhibits shall be uploaded to Case Center 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 at by visiting, Getting Started with Zoom at https://support.zoom.us/hc/en-us/categories/200101697.

AUDIO ONLY OR TELEPHONIC TESTIMONY

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. If either side has a witness who is unable to attend the hearing by computer, a short written statement must be sent to OAH explaining why the person is unable to join the hearing using a computer and video.

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.

WITNESS ATTENDANCE IS THE PARTY'S RESPONSIBILITY

The parties are responsible for making sure their own witnesses attend the hearing, 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.

ALJ MAY LIMIT UNNECESSARY OR DUPLICATIVE EVIDENCE

The ALJ has discretion to limit the number of witnesses and the time allowed for testimony. Education Code, section 56505.1, subdivision (h), gives the ALJ authority 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.

Parties will be expected to be prepared for hearing. Parties will be expected to prepare questions they need to ask witnesses before the hearing begins. Parties are allowed to ask witnesses questions about documents, events relevant to the issues being decided, and about their opinions if their opinions are relevant to the case.

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, or does not help the judge to understand a parties arguments. The judge may also refuse to hear evidence if the evidence is too time consuming to justify the time it would take to hear compared to the value of the information it will provide to the judge.

The parties are ordered to meet and confer no later than March 2, 2023 at 2:00 PM to discuss:

- how many witnesses each side will most likely call and how many of those witnesses are on both sides' witness lists;

- scheduling witnesses and an estimate of how much time each side will need to question a witness;
- any concerns related to a witness' inability to appear by videoconference for hearing, use the electronic evidence program Case Center, or the need for witness subpoenas, if any; and
- whether duplicate exhibits can be eliminated by comparing the documents each side wants the judge to consider.

As part of the meet and confer process, Lemoore will inform Parent whether witnesses Parent wishes to call are current Lemoore employees, and whether Lemoore will require its employees to be subpoenaed instead of just given notice to attend the hearing on a certain date and time. However, every party is responsible for getting their witnesses to the hearing. A party's failure to properly notify or subpoena a witness is not an excuse justifying additional hearing time or a delay in the hearing.

PARTICIPANT INFORMATION FORM

Both parties must ensure OAH has current contact information for all hearing participants and witnesses, including email addresses and telephone numbers. Updated Participant Information forms are required if a party or witness' contact information is not current. Updated forms must be filed two business days before the hearing starts.

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 Lemoore requested the hearing and bears the burden of proof. Lemoore's case shall be presented first, followed by Student's unless otherwise ordered.

WITNESS LISTS

The parties must provide a proposed witness list to the ALJ on the first day of hearing. The list should include:

- the first and last name of all witnesses, the parties believe will be called;
- which party is calling the witness to testify;
- the date the witness will testify; and
- time estimates for each witness's expected testimony.

In the event an agreement cannot be reached, each party shall prepare a separate written list. Lemoore must have witnesses available to start the case, 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, unless needed for rebuttal purposes. All parties must ask the witness all necessary questions when the witness is first called to testify.

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 off at the same time that the ALJ is off the record to avoid recording conversations while off the record;
3. problems with 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; and the recording shall not be shared with any non-party, possible witness, or posted online;
5. participants shall not take screenshots of the videoconference nor share or publish any portion of the videoconference or audio recording.
6. All internal comment and chat features of Zoom have been disabled for purposes of the hearing. Use of any of these features is prohibited and shall not be part of the official record.

Both parties' requests to make an audio recording of the hearing are granted subject to these conditions.

VIDEO RECORDING

No party, witness or anyone else may videorecord any part of the proceedings or stream the proceedings 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 a request to offer part of a recording as evidence subject to certain conditions:

- the party offering the recording must establish the exact minutes of the recording that are being offered as an exhibit and establish that the part of the recording offered is relevant.
- The party must make a typed transcript of the portion of the recording requested;
- the identities of any person speaking on the portion of the tape being introduced must be established by admissible evidence;
- The 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

Student may present a request for audio only or telephone testimony if a witness is unable to join the hearing with a computer. Lemoore did not anticipate any additional motions prior to hearing. Any motion that was not filed three business days before the PHC, shall be supported by a sworn statement establishing good cause why the motion was not filed prior to the Prehearing Conference.

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. The ALJ does not permit the use of virtual background images. Participants may blur the background of personal spaces. 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

SIGN LANGUAGE INTERPRETER MAY BE NEEDED

It is possible a sign language interpreter may be necessary, depending on the witnesses Student decides to call. OAH will provide the interpreter. Student is required to notify the OAH case manager assigned to this case no later than Wednesday, March 1, 2023 if a witness requiring a sign language interpreter is being called.

Any 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 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.

Penelope S. Pahl

Penelope S. Pahl
Administrative Law Judge
Office of Administrative Hearings