BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021050118

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE AND GRANTING MOTION TO QUASH SUBPOENAS

JUNE 21, 2021

On June 18, 2021, Administrative Law Judge Charles Marson, 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.

Thomas S. Nelson, Attorney at Law, appeared on behalf of Student. Sarah L.W. Sutherland and Daniel Lowe, Attorneys at Law, appeared on behalf of the San Diego 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 June 29 and 30 and July 1, 2021, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 p.m. each day and generally end at 3:30 p.m., unless otherwise ordered. The parties anticipate it will take three to four days to complete the hearing. Additional hearing dates will be discussed with the ALJ during the hearing if necessary.

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 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 ALJ has slightly altered the statement of some issues 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. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made. A party believing that an issue has been misstated or improperly omitted shall promptly file a notice in writing stating its concern and referring to supporting portions of the complaint.

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:

1. Did San Diego deny Student a free appropriate public education, called a FAPE, in the 2019-2020 school year by:

   a. failing to assess in all areas of suspected disability; specifically, by failing to conduct a music therapy assessment;

   b. failing to timely respond to Parent's request for Supplemental Support Services;

   c. failing to provide prior written notice before refusing to begin or change his identification, evaluation or educational placement or the provision of a FAPE to him;

   d. failing to provide appropriate special education and related services in the least restrictive environment; specifically, by

      i. failing to offer essential related services during distance learning,

      ii. failing to provide related services required by the governing IEP,

      iii. failing to complete the repair and updating of Student's communications device; and

iv. failing to ensure sufficient exposure to his non-disabled peers;

e. failing to consider a continuum of placement options;

f. repeating goals from previous years;

g. failing to implement Student's governing IEP; specifically by failing to provide related services during distance learning and failing to provide a functioning communications device;

h. failing to make a specific offer of FAPE; specifically by failing to provide sufficient detail for parental decision-making concerning

i. whether the services would be delivered individually or in groups,

ii. how many minutes would be provided,

iii. where the services would be provided, and

iv. how they related to Student's Individual Health Safety Plan, called an IHSP;

vi. making the implementation of the IEP contingent upon agreeing to all aspects of it and also to all aspects of the IHSP?

2, Did San Diego deny Student a FAPE, in the 2019-2020 school year by:

a. failing to assess in all areas of suspected disability; specifically, by failing to conduct a music therapy assessment;

b. failing to timely respond to Parent's request for Supplemental Support Services;

c. failing to provide prior written notice before refusing to begin or change his identification, evaluation or educational placement or the provision of a FAPE to him; specifically, parent's request for Applied Behavior Analysis and Compensatory Education, and for changes in his IHSP;

d. failing to provide appropriate special education and related services in the least restrictive environment; specifically, by

i. failing to offer essential related services during distance learning and failing to provide related services required by the governing IEP,

ii. failing to offer an aide in the classroom,

iii. failing to offer Applied Behavioral Analysis,

iv. failing to complete the repair and updating of Student's communications device;

v. failing to provide instruction by a credentialed teacher;

vi. failing to provide speech services at a time he was available to participate,

vii. insisting on physical barriers and physical distancing and isolating him from his peers upon his return to in-person instruction, and

viii. failing to ensure sufficient exposure to his non-disabled peers;

e. failing to provide appropriate goals and objectives; specifically, goals and objectives concerning pragmatic language and to help him to deal with the use of his mask;

f. repeating goals from previous years;

g. failing timely to convene an IEP team meeting on Parent's fall 2020 request;

h. failing to make a specific offer of FAPE; specifically by failing to provide sufficient detail for parental decision-making concerning

i. whether the services would be delivered individually or in groups,

ii. how many minutes would be provided,

iii. where the services would be provided, and

iv. how they related to his IHSP;

i. failing to develop goals in all areas of need; specifically, in pragmatic language and use of his mask;

j. making the implementation of the IEP contingent upon agreeing to all aspects of it and also to all aspects of the IHSP, and refusing to consider Parent's requests for changes in the IHSP and for accommodations;

k. failing to have all necessary members at the IEP team meeting of February 17, 2021, specifically someone with the authority to make changes in Student's IHSP;

l. making the implementation of the offered IEP contingent upon agreeing to all aspects of the IEP, including the IHSP;

m. failing to provide the accommodations and modifications required by the governing IEP in a classroom with his non-disabled peers; and

n. predetermining placement and services; specifically, by predetermining the contents of the IHSP?

PROPOSED RESOLUTIONS

The resolutions requested by Student include:

- Compensatory education in the areas of academics, speech and language, and training of staff and parents;
- Independent educational evaluations in the areas of psychoeducational status, auditory processing and speech and language;
- Reimbursement for services and placement obtained by Parent;
- Implementation of his IEP among his peers without requiring him to wear a mask;
- aide support in the classroom; and

- an alternative placement such as a non-public school, including transportation?

San Diego filed its response to Student's complaint on May 11, 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 of 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. San Diego 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 San Diego'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 a resume or curriculum vitae for each witness who is expected to testify as an expert.

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

Electronic copies of exhibits filed with OAH shall be filed by 5:00 p.m. 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.

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, June 24, 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, San Diego shall inform Student which proposed witnesses are district employees. San Diego shall also identify the witnesses on Student's list that require a subpoena. San Diego 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 San Diego's, 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. San Diego 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. At present neither party anticipates presenting a witness by audio only or 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. The conditions are:

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

3. 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;
4. operation of a party's recording mechanism will not be allowed to delay the hearing;
5. a partys' 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 shall not be part of the official record; and
8. participants shall not take screenshots of the videoconference or share or publish any portion of the videoconference or audio recording.

Neither party has made a request to audio record the hearing. If either party wants to record the hearing, the request must be made before the hearing.

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

At present Student proposes to introduce all or part of a recording of a 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 15, 2021, San Diego filed a motion to quash four subpoenas for the testimony of two witnesses from the San Diego County Office of Education and two witnesses from the California Department of Education, known as CDE. Student filed an opposition on June 17, 2021, in which he withdrew the subpoenas for the witnesses from the County Office without prejudice.

The subpoenas remaining in dispute are for Heather Calomese and Sean Howland of CDE. Student argues their testimony is relevant to an issue in this matter, which was whether San Diego improperly excluded Student from his education by

requiring him to wear a mask in alleged violation of state and local guidelines. Apparently they were involved in the drafting and adoption of CDE's guidelines on wearing masks in schools, and Student wants them to describe "the appropriateness" of San Diego's application of state and local guidelines to Student.

Student's argument is not persuasive. Assuming that San Diego was required to follow a CDE guideline, it was required to follow the text of the document, not the unwritten views of its authors. Their drafting of the policy does not make them sufficiently expert to opine on San Diego's relationship with Student concerning masks. And the legal bases asserted by Student are not on point. Relevance is the standard for admitting evidence, not issuing subpoenas, and compelling need is the standard for not excluding witnesses from the hearing. (Cal. Code Regs., tit. 5, sec. 3082, subds. (b), (c).) The standard for issuing and quashing subpoenas is whether there is "reasonable necessity" for the testimony, and Student has not shown that there is. (*Id.,* subd. (c)(2).) The motion to quash the subpoenas of Heather Calomese and Sean Howland is granted.

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

At present neither party anticipates a need for an interpreter or any other accommodation for a party or participant in this case. Any participant, 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 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 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.

Charles Marson

Charles Marson
Administrative Law Judge
Office of Administrative Hearings