BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2023050849

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE, PHASE 2 – REMEDIES

MARCH 22, 2024

On March 18, 2024, Administrative Law Judge Robert G. Martin, 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.

Attorney Tania Whiteleather appeared on behalf of Student. Attorney Karen Gilyard appeared on behalf of San Bernardino City Unified School District, referred to as San Bernardino. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

On March 22, 2024, after the PHC in this matter, OAH issued an Order continuing the hearing. The hearing is now set for April 18, 23, and 24, 2024, continuing day to day thereafter 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 three 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).) 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.

ISSUE AND PROPOSED RESOLUTIONS FOR HEARING

The issue in this phase of the due process hearing, and proposed resolutions, as clarified by the parties and the ALJ during the PHC, are:

ISSUE

> What remedies are appropriate to address San Bernardino's failure to offer Student a free appropriate public education from September 1, 2021, to the filing of Student's amended complaint on August 15, 2023?

A party believing that an issue has been misstated or improperly omitted shall promptly file a notice in writing, prior to the first day of hearing, stating its concern and referring to supporting portions of the complaint.

PROPOSED RESOLUTIONS

The resolutions requested by Student in their due process hearing request included a decision finding Student the prevailing party on all issues, and ordering that San Bernardino assess Student's mental health and behavior, provide independent educational evaluations in all other areas, including assistive technology, provide Student appropriate services including parent training, and provide compensatory education according to proof.

San Bernardino filed its response to Student's amended complaint on August 25, 2023. (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

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). If further assistance is needed, please contact OAH at OAHSEOps@dgs.ca.gov.

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 Bernardino must use the letter D, for district, before the number to identify San Bernardino's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means San Bernardino'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 expected to testify as an expert.

San Bernardino's exhibits must include a copy of any assessments of Student completed by San Bernardino in the 2023-2024 school year and not included in the exhibits for Phase 1 of this hearing, and the school calendar for the 2024 extended school year and 2024-2025 school year.

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 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.

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.

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.

OAH will produce OAH witness Ann Simun, Psy.D. for the hearing.

San Bernardino has agreed to make current employees available as witnesses without need for subpoena. San Bernardino is ordered to inform Student if any witness identified by Student as a San Bernardino employee is not currently employed by San Bernardino, by close of business the day following the parties' exchange of final witness lists. San Bernardino may either agree to accept service for witnesses under its control or provide Student with the witness' most recent contact information.

The ALJ has discretion to limit the number of witnesses and the time allowed for 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 complete a final prehearing meet and confer no later than April 16, 2024 at 5:00 p.m. to discuss scheduling witnesses and how much time each witness will take.

OAH will arrange for witness Ann Simun, Psy.D. to testify at hearing on April 23, 2024 from 9:30 a.m. to 1:00 p.m. Student and San Bernardino, in that order, will each have one hour to examine Dr. Simun following the ALJ's one-hour examination of Dr. Simun. As discussed at the PHC, the parties are to develop a schedule in which Dr. Simun's testimony is preceded by the testimony of percipient witnesses with knowledge of Student's current educational program, and anticipated future educational program for the extended school year and the 2024-2025 school year.

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 the authenticity of documents to shorten the length of time needed for the hearing.

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 a witness to attend the hearing. Any contact information shall not be disclosed to any other person.

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 Bernardino's, unless otherwise ordered.

WITNESS SCHEDULE

The parties must provide a joint proposed witness schedule to the ALJ on the first day of hearing. The schedule should include the first and last name of the witness, which party is calling the witness to testify, and include dates and time estimates of each witness's expected testimony. In the event an agreement cannot be reached, each party

shall prepare a separate written list. Student must have witnesses available if 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, except for rebuttal purposes. All parties must examine a witness on all issues when the witness is first called to testify. 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 in writing before the hearing. Any motions filed after the PHC must be accompanied by evidence establishing good cause for the late filing. 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

Student requested permission to make an audio recording of the hearing for use by their attorney in preparing notes. 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 on and off at the same time that the ALJ is on and off the record to avoid recording conversations while off the record.
3. Operation of 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.
5. Participants shall not take screenshots of the videoconference nor share or publish any portion of the videoconference or audio recording.

Student's request to make an audio recording of the hearing is granted. Either party may make a recording of the hearing, subject to the conditions above.

VIDEO RECORDING

No party, witness, or anyone else may videorecord any part of the proceedings or stream 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 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

Student's pending motion for clarification as to who will pay Ann Simun, Psy.D. for her work in this case, and pending notice of payment and request for reimbursement, will be addressed separately. No other motions are pending. Any

motion filed hereafter must be supported by a declaration under penalty of perjury establishing good cause why the motion was not filed three business days before the PHC.

STIPULATIONS

Stipulations to pertinent facts, contentions, resolutions, and authenticity 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 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. 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. The parties, their representatives 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

Neither party requested an accommodation or language interpreter.

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/Request-Reasonable-Accommodations-for-OAH-Legal-Proceedings.

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 to 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.

Witnesses and potential witnesses who are not a party or a party's hearing representative may not observe the hearing until after they have completed their testimony. The parties and their attorneys may not send links to the hearing to witnesses or potential witnesses until after they have completed their testimony, or it has been determined the potential witness will not be called.

Student's PHC statement raised objections to conducting the open hearing virtually, rather than in person, and to any post-hearing distribution of the audio recording of the hearing. Student reserved the right to assert these objections in the

future. Student's request that witnesses confirm that they are not accessing cell phones or electronic devices during the hearing will be addressed on a witness-by-witness basis at the hearing.

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.



Robert G. Martin
Administrative Law Judge
Office of Administrative Hearings