BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF:

SAN JOSE UNIFIED SCHOOL DISTRICT,

and

PARENT ON BEHALF OF STUDENT,

OAH CASE NUMBER 2021030858

OAH CASE NUMBER 2021050178

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

MAY 10, 2021

On May 10, 2021, Administrative Law Judge Jennifer Kelly, 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.

Joshua Cruz, Attorney at Law, appeared on behalf of Student. Jeff Maisen, Attorney at Law, appeared on behalf of San Jose Unified School District, referred to as San Jose. 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 May 18 through 20, 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 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).) 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.

CONSOLIDATION

On May 6, 2021, San Jose filed a Request for Due Process Hearing in OAH case number 2021050178, Second Case, naming Parent on behalf of Student. On May 6, 2021, San Jose Unified School District filed a Motion to Consolidate the present matter OAH Case Number 2021030858, referred to as First Case with Second Case.

On May 10, 2021, Student filed an objection to consolidation on the grounds that San Jose's complaint does not raise common issues of fact, San Jose untimely filed its motion to consolidate filed it for the purpose of delaying this due process hearing.

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

Here, First Case and Second Case involve a common question of law or fact. Student alleges San Jose Unified School District failed to offer Student a free appropriate public education, FAPE during the 2018-2019, 2019-2020, and 2020-2021 school years by, among other things, failure to assess Student in all areas of need, provide Parent updated assessment results, develop appropriate annual goals, and offer appropriate educational services to meet Student's needs. San Jose's complaint alleges, in part, that its October 15, 2020 individualized education program, IEP offered Student

a FAPE, and further that it has the right to reassess Student according to its March 26, 2021 assessment plan without parental consent. In addition, consolidation furthers the interests of judicial economy because the matters involve the same parties and witnesses and hearing them jointly will save time and resources. Accordingly, consolidation is granted.

Student's case, OAH 2021030858, is designated as the Primary case. All dates set in the second case, OAH Case 2021050178 are vacated. The 45-day day deadline for issuance of the decision in this consolidated case shall be based on the date of the filing in Primary Case, OAH 2021030858

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

STUDENT'S ISSUES:

1. Did San Jose Unified School District, San Jose deny Student a free appropriate public education, referred to as FAPE, during the 2018-2019 academic years by:
    a. Failing to assess Student the following areas of suspected disability: behavior, social-emotional and educationally related mental health;
    b. Failing to provide Parent copies of the Student's triennial assessment reports in the areas of psychoeducational and speech and language prior to the triennial IEP team meeting;

c. Failing to offer Student appropriate services to address Student's unique educational needs in the areas of behavior, including during transportation on the school bus, social-emotional, educationally related mental health and extended school year;

d. Failing to adequately implement Student's IEP services pursuant to her last consented to IEP dated March 30, 2018 in the areas of specialized academic instruction and speech and language;

e. Failing to develop measurable annual goals in the areas of expressive language, articulation and academics accurate and relevant baselines;

f. Failing to make meaningful progress on Student's IEP goals in the areas of speech and language and academics; and

g. Predetermining Student's special education services at the March 28, 2019 IEP team meeting.

2. Did San Jose Unified School District deny Student a FAPE during the 2019-2020 academic years by:

    a. Failing to assess Student in the following areas of suspected disability: behavior, social-emotional and educationally related mental health, and sensory processing; and assistive technology and health following distance learning;

    b. Failing to either complete the assessments consented to by Parent in the May 13, 2019 assessment plan or to provide Parent copies of the triennial assessment reports;

    c. Failing to offer Student appropriate services to address Student's unique educational needs in the areas of educationally related mental health, specialized academic instruction, speech and language, behavior, including during transportation on the school bus, social-

emotional, sensory processing, assistive technology, health and extended school year.

d. Failing to adequately implement Student's IEP services from the last consented to IEP dated March 30, 2018 in the areas of specialized academic instruction and speech and language;

e. Failing to develop annual goals in the areas of speech and language and academics with accurate and relevant baselines;

f. Predetermining Student's special education supports and services for Student's distance learning education program.

3. Did San Jose Unified School District deny Student a FAPE during the 2020-2021 academic years by:

a. Failing to assess Student in all areas of suspected disability, including behavior, social-emotional, educationally related mental health, sensory processing, health and assistive technology;

b. Failing to conduct a psychoeducational assessment;

c. Failing to offer Student appropriate services to address Student's unique educational needs in the areas of specialized academic instruction, speech and language, behavior, including during transportation on the school bus, social-emotional, educationally related mental health, extended school year, assistive technology and health;

d. Failing to adequately implement Student's IEP services from the last consented to IEP dated March 30, 2018 in specialized academic instruction and speech and language;

e. Failing to develop annual goals in the areas of academics and speech and language with accurate and relevant baselines; and

f. Predetermining Student's special education supports and services at the November 4, 2020 IEP team meeting and developing Student's distance learning plan.

4. Did San Jose commit procedural violations which prevented Parent's meaningful participation in the development of Student's IEP and deprived Student of educational benefit by:

   a. Failing to timely provide Student's school records to Parent after requests on January 25, 2021 and February 20, 2021;

   b. Failing to provide progress reports on Student's annual goals for the period two years prior to filing of the due process complaint;

   c. Failing to schedule IEP meetings at mutually agreed upon times on March 25, 2019, March 28, 2019, June 4, 2019, December 5, 2019, February 12, 2020, March 27, 2020, October 15, 2020 and November 4, 2020;

   d. Failing to include Parent at the IEP team meetings held on March 28, 2019 and November 4, 2020;

   e. Failing to hold an IEP team meeting within 60-days of Parent's signature to the May 13, 2019 assessment plan;

   f. Failing to timely hold IEP team meetings during the 2019-2020 and 2020-2021 academic years;

   g. Failing to provide Parent with prior written notice before materially reducing Student's IEP services in the areas of specialized academic instruction and speech and language during the 2019-2020 and 2020-2021 academic years during distance learning;

   h. Failing to provide Parent a copy of the IEP meeting documents after the March 11, 2021 IEP team meeting;

i. Failing to make a clear offer of FAPE for the 2019-2020 and 2020-2021 academic years;

j. Failing to respond to Parent's request dated March 7, 2021 for an independent educational evaluation in the area of psychoeducational;

k. Failing to translate IEP notices, assessment plans, assessments, procedural safeguards and vital IEP documents into Parent's primary language of Spanish.

SAN JOSE'S ISSUES:

1. Did San Jose's offer of FAPE reflected in the IEP dated October 15, 2020, that resulted from the IEP meeting held on November 4, 2020, constitute an offer of a FAPE?
2. Can San Jose conduct a comprehensive reassessment of Student pursuant to its March 26, 2021 assessment plan, without parental consent?

PROPOSED RESOLUTIONS

The resolutions requested by Student include an order finding San Jose denied Student a FAPE and that Student's appropriate placement in the least restrictive environment is a nonpublic school. Student seeks an order requiring San Jose to fund a non-public school placement; compensatory education; and an independent educational evaluation in the area of psychoeducational. Student further seeks an order requiring San Jose to assess Student in the areas of educationally related mental health, health and sensory processing. Student seeks an order compelling San Jose to produce Student's educational records, IEP progress reports IEP meeting notices and IEPs in Parent's native language of Spanish, and to provide third-party training on special education procedures under the Individuals with Disabilities Education Act.

The resolutions requested by San Jose include an order declaring that its current IEP offer to Student, reflected in the October 15, 2020 IEP, constitutes a FAPE. San Jose further requests an order that it is entitled to reassess Student according to the March 2021 reassessment plan without parental consent, and if Parent does not present Student for assessment, or does not cooperate with San Jose, San Jose will not be obligated to provide special education and related services to Student until such time as Parent complies with the assessment plan.

San Jose Unified School District filed its response to Student's complaint on May 4, 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). The parties stipulated that the timely uploading of exhibits by 5:00 PM on May 12, 2021, shall constitute the party's timely exchange of evidence on each other.

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 Jose must use the letter D before the number to identify San Jose's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means San Jose'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.

San Jose's 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 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 May 14, 2021 by 5:00 PM 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 Jose shall inform Student which proposed witnesses are district employees. San Jose shall also identify the witnesses on Student's list that require a subpoena. San Jose may agree to accept service for witnesses under San Jose's 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 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 witnesses for purposes of attending the hearing and shall not be disclosed to any other persons.

EVIDENCE PRESENTATION

In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In this consolidated case, Student bears the burden of proof on its complaint, and San Jose bears the burden of proof on its complaint. Student's case-in-chief shall be presented first, followed by San Jose, 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 parties 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. Student 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:

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 the party's recording mechanism will not be allowed to delay the hearing;
5. a parties' recording may not be given, provided or played to a witness, or potential witness; and
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;
8. participants shall not take screenshots of the videoconference or share or publish any portion of the videoconference or audio recording.

Student's and San Jose's requests to audio record the due process hearing is granted, subject to these conditions.

VIDEO RECORDING

No party, witness or anyone else may make any video recording of any part of the proceedings or stream live through any means.

RECORDINGS AS EXHIBITS

Student 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

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.

San Jose filed a motion to quash subpoenas duces tecum on May 6, 2021. Student filed an opposition on May 10, 2021. OAH will issue a subsequent order on San Jose's motion.

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

Student requested a Spanish language interpreter. OAH will provide the 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/Accommodations-at-OAH.

HEARING OPEN OR CLOSED 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. 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.

Jennifer Kelly

Jennifer Kelly
Administrative Law Judge
Office of Administrative Hearings