BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

PERRIS UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2023100314

# ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE, DENYING MOTION TO CONTINUE, AND ORDERING SUPPLEMENTAL BRIEFING ON MOTION FOR SANCTIONS

DECEMBER 5, 2023

December 4, 2023, Administrative Law Judge Christine Arden, Office of Administrative Hearings, held a prehearing conference by videoconference. The Administrative Law Judge is called an ALJ. The Office of Administrative Hearings is called OAH. The prehearing conference is called a PHC.

Sheila Bayne, Attorney at Law, appeared on behalf of Student. Rebecca Diddams and Austin Jones, Attorneys at Law, appeared on behalf of Perris Union High School

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

## DISTRICT'S MOTION TO CONTINUE HEARING

On December 1, 2023, Perris Union High School District filed a motion to continue the due process hearing to January 9, 2024, based on its contention that witnesses Sara Sayler, Jay Nalaboff, and Adam Contreas are unavailable to testify on December 12, 13 and 14, 2023, due to final examinations scheduled that week. District further contends that witness Yer Hartley is unavailable to testify starting on December 16, 2023. Student opposed Perris Union High School District's motion to continue hearing on the grounds that the motion failed to demonstrate good cause for the requested continuance, and that the motion was untimely.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (Ed. Code, § 56505, subd. (f)(3); Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance

on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance or imposing conditions on the continuance; and any other relevant fact or circumstance. (Cal. Rules of Court, rule 3.1332(d).)

On October 11, 2023, OAH issued a scheduling order informing the parties that prehearing motions were due to OAH no later than the date the prehearing conference statements are due, or the party must demonstrate good cause why it was not possible to file the motion by that date.

Here, the motion was untimely filed only one business day before the PHC. Additionally, the motion was not supported by a declaration given under penalty of perjury providing facts to establish good cause why the motion was filed less than three business days before the PHC. This ground alone is sufficient to deny the motion to continue.

The parties have also failed to establish good cause for the requested continuance. Witness Hartley can testify sometime between December 12 and December 14, 2023. Based on Student's estimate of the duration of the hearing, this hearing is likely to require a second week from December 19, 2023, through December 21, 2023. Witnesses Sayler, Nalaboff, and Contreas can all testify sometime between December 19 and December 21, 2023. There has been no showing that the witnesses cannot testify at this time. Therefore, each of the four witnesses that District claimed were unavailable to testify, actually will be available to testify at hearing on either the currently scheduled hearing dates, or the following week. OAH does not continue hearings because a school district has a scheduled break from its regular instruction schedule, such as winter break, or spring break. If a district cannot produce its

employees to testify at hearing because the hearing takes place during a school break, the parties must subpoena district employees to appear as witnesses at hearing.

Perris Union High School District's motion to continue the hearing is both untimely and failed to establish the requisite good cause for the requested continuance. Therefore, its motion to continue hearing is denied.

## ORDER TO SHOW CAUSE WHY THIS CASE SHOULD NOT BE DISMISSED OR OAH'S COSTS SHOULD NOT BE SHIFTED TO STUDENT'S ATTORNEYS FOR THEIR FAILURE TO APPEAR AT NOVEMBER 20, 2023 PHC

No attorney appeared on Student's behalf at the November 20, 2023 PHC. Consequently, the ALJ set a hearing for December 4, 2023 on an order to show cause why this case should not be dismissed for failure to prosecute and why OAH's costs incurred in connection with the November 20, 2023 PHC should not be shifted to Student's attorneys, called the OSC. Student filed a response to the OSC stating that attorney Peter Collisson, who was assigned to attend the November 20, 2023 PHC was provided an electronic link to the videoconference PHC by attorney Sheila Bayne. Student argues that instead of appearing at the PHC in this case, Collisson inadvertently appeared at a PHC before ALJ Rommel Cruz in case number 2023100415 on November 20, 2023 at 10:00 AM. Collisson inexplicably remained at the PHC before ALJ Cruz, even though another attorney from the Law Office of Sheila C. Bayne, Student's counsel of record in this case, appeared at that proceeding and spoke on the petitioner's behalf in that case.

Perris Union High School District filed a reply to Student's response to the OSC. It contends that Collisson's conduct was beyond "excusable neglect" and constitutes "bad faith and incompetence."

The matter was argued in the papers filed by both parties. The ALJ determined that no dismissal would issue based on a failure to prosecute because it would unduly prejudice Student. The ALJ took under submission the OSC's remaining issue of whether costs OAH incurred for the ALJ's appearance at the November 20, 2023 PHC, should be shifted to Student's attorneys. A separate order will be issued on this residual issue.

## DISTRICT'S MOTION FOR SANCTIONS

Perris Union High School District filed a motion for sanctions seeking an order shifting the costs it incurred for appearing at the November 20, 2023 PHC, to Student. District's motion did not include a contention or declaration regarding the amount in costs it incurred in connection with the November 20, 2023 PHC. The ALJ ordered Perris Union High School District to file a supplement to its motion with OAH by 5:00 PM on December 6, 2023. That supplement must specify the amount of costs it incurred in connection with the November 20, 2023 PHC. The supplement must also include a breakdown of the nature of the legal services provided in connection with the November 20, 2023 PHC, the amount of time it took to provide those services, the hourly rate charged by each billing attorney, and a description of the billing attorney's experience justifying the hourly rate charged for that attorney's legal services. This information must be supported by a declaration sworn under penalty of perjury by an attorney with personal knowledge of the facts.

Student may file a response to Perris Union High School District's supplemental filing by 5:00 PM on December 8, 2023. The ALJ's ruling will be addressed in a separate Order.

## HEARING DATES, TIMES, AND LOCATION

### DUE PROCESS HEARING

The hearing will take place on December 12 through December 14, 2023, 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 to eight days to complete the hearing. Additional hearing dates will be discussed with the ALJ during the hearing.

### HEARING LOCATION

OAH is authorized to conduct due process hearings by videoconference or telephone. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) OAH will conduct the due process hearing by videoconference using the Zoom software 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 listed below. A free appropriate public education is called a FAPE. An individualized education program is called an IEP.

A party must immediately file a written request for relief if the issues as stated in this Order do not reflect their understanding of the issues clarified at the PHC or otherwise object to any stated issue. Any objections will be addressed on the first day of hearing. The ALJ may request further clarification of the issues on the first day of hearing.

### ISSUES

1. Did Perris Union High School District, called Perris District, deny Student a free appropriate public education, called a FAPE, in the 2021-2022 school year, in the individualized education program, called an IEP, dated February 10, 2022, by:
    a. failing to offer a one-to-one aide;
    b. failing to offer an appropriate individual transition plan;
    c. failing to offer appropriate goals in the areas of math, writing, and transition;
    d. failing to offer an extended school year program for summer 2022; and
    e. predetermining the offer of a FAPE by failing to consider Parent's request for tutoring services?

2. Did Perris District deny Student a FAPE, in the 2022-2023 school year, in the IEP dated February 27, 2023, by:
    a. failing to offer a one-to-one aide;
    b. failing to offer an appropriate individual transition plan;
    c. failing to offer counseling services;
    d. failing to offer an extended school year program for summer 2023; and
    e. predetermining the offer of a FAPE failing to consider Parent's request for tutoring services?

## PROPOSED RESOLUTIONS

The resolutions requested by Student include an Order finding the Perris District provide Student with necessary programs, related services, supports, goals, a transition plan, transition services, and compensatory education, as established at hearing.

Perris District filed its response to Student's complaint on October 24, 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 to the Case Center electronic evidence software application, 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. Perris District must use the letter D before the number to identify its exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Perris District's exhibit 1. A cover sheet with this identifying letter and number should be the first page of each exhibit. The Case Center 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. Email threads 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, or regarding their professional work experience or credentials, or their education.

Perris District's exhibits must include a copy of the school calendar for each regular and extended school year in question.

Electronic copies of exhibits shall be uploaded to the Case Center electronic evidence software application 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 or delete 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 by OAH. 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. A witness's inability 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.

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 meet and confer no later than 5:00 PM on December 6, 2023, to discuss scheduling witnesses and how much time each witness will take to testify. The parties shall discuss any issues related to counsel and witnesses appearing by videoconference for hearing, electronically viewing exhibits during the hearing, and subpoenas, if any. The parties should attempt to identify duplicate exhibits from their hearing exhibits, and decide which exhibit will be used at hearing. The parties shall discuss whether they can produce a written stipulation as to pertinent facts, contentions, resolutions and the authenticity and admissibility of documents to shorten the length of time needed for the hearing.

As part of the meet and confer process, Perris District shall inform Student which proposed witnesses are District employees. Perris District shall also identify the witnesses on Student's list that require a subpoena. Perris District may agree to accept service for a witness under its control or provide Student with the witness's 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 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 Perris District, unless otherwise ordered.

## WITNESS LISTS

The parties must provide a joint proposed witness list to the ALJ on the first day of hearing. The list should include the first and last name of the witness, which party 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 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, 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 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 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. the recording is subject to the same confidentiality as the due process hearing; and
6. participants shall not take screenshots of the videoconference nor share or publish any portion of the videoconference or audio recording.

Student's and District's requests to make an audio recording of the hearing are granted, subject to the six above conditions.

## 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

Other than the motions addressed above, 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 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 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

Neither party requested an accommodation or a 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 a 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.

## 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.

*Christine Arden*

Christine Arden
Administrative Law Judge
Office of Administrative Hearings