BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

MORGAN HILL UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021040203

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE

MAY 25, 2021

On May 24, 2021, Administrative Law Judge Cynthia Fritz, 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 Blanca Vaughan appeared on behalf of Student. Attorneys Laura Schulkind and Amy Brandt appeared on behalf Morgan Hill 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 2 and 3, 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 4-9 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.

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

1. Is Student entitled to toll the two-year statute of limitations for special education claims alleged against Morgan Hill because Parents were prevented from requesting the due process hearing due to:
    a. specific misrepresentations that Morgan Hill had solved the problem forming the basis of the due process hearing request; including misrepresenting Student's assessment scores, failing to provide accurate information, stating that Student and Parents have no rights under the Individuals with Disabilities Education Act, and could not request a due process hearing, at the June 4, 2018, and December 5, 2018 meetings; and
    b. Morgan Hill withheld information from Parents that was required to be provided to the Parents, including procedural safeguards?
2. Did Morgan Hill deny Student a free appropriate public education, called FAPE, during the 2017-2018 school year by failing to:
    a. meet its child find obligation through June 3, 2018, and failing to find Student eligible for special education under the categories of other health impairment and specific learning disability;
    b. assess Student in academics; cognitive and intellectual functioning; language processing, development, and use; gross and fine motor, sensory integration, social emotional, autism, attention deficit

activity disorder, and special circumstances instructional assistant, and after Parents requested assessment;

c. timely provide Parents with an assessment plan within 15 days of Parents' request for assessment;

d. timely complete all necessary assessments and hold an IEP team meeting within 60 days of Parents' consent to the assessments on April 11, 2018;

e. timely and appropriately issue a prior written notice after Parents' and Student providers' requested assessments;

f. file for due process hearing after Parents disagreed with the initial assessment results;

g. provide Parents with procedural safeguards when legally required;

h. make a formal, clear, and specific FAPE offer in the June 4, 2018 service plan;

i. timely consider third-party assessments and reports from Kaiser Permanente and Rebekah Children Services prior to developing the June 4, 2018, individualized education plan;

j. consider Parent's input and Parent's request for assessments before developing the June 4, 2018 individualized education plan;

k. provide copies of the documents in Spanish on or before the June 4, 2018 meeting; and

l. develop an appropriate individual service plan on June 4, 2018?

3. Did Morgan Hill deny Student a FAPE during the 2018-2019 school year by:

a. failing to assess Student in academics; cognitive and intellectual functioning; language processing, development, and use; gross and

fine motor, sensory, social emotional, autism, attention deficit activity disorder, and special circumstances instructional assistant, and after Parents requested assessment;

b. failing to timely provide Parents with assessment plan within 15 days of a referral for assessment;
c. failing to timely and appropriately issue a prior written notice after Parents' and Student providers' requested assessments;
d. failing to provide Parents with procedural safeguards when legally required;
e. predetermining the December 5, 2018 individualized education program, called IEP, offer;
f. failing to make a formal, clear, and specific FAPE offer at the December 5, 2018 IEP team meeting;
g. failing to have the required IEP team members at the December 5, 2018 IEP team meeting;
h. failing to provide copies of the IEP documents in Spanish on or before the December 5, 2018 IEP team meeting;
i. failing to consider third-party assessments and reports from Kaiser Permanente and Rebekah Children Services before developing the December 5, 2018, IEP;
j. failing to consider Parent's input and Parent's request for assessments before developing the December 5, 2018 IEP;
k. failing to develop an appropriate individual education plan on December 5, 2018, and by failing to address Student's unique needs and develop appropriate and measurable goals?

4. Did Morgan Hill deny Student a FAPE during the 2019-2020 school year by:
    a. failing to assess Student in academics; cognitive and intellectual functioning; language processing, development, and use; gross and fine motor, sensory integration, social emotional, autism, attention deficit activity disorder, and special circumstances instructional assistant, and after Parents requested assessment;
    b. failing to timely provide Parents with assessment plan within 15 days of a referral for assessment;
    c. failing to timely and appropriately issue a prior written notice after Parents' and Student providers' requested assessments;
5. d failing to provide Parents with procedural safeguards when legally required;
    a. predetermining the August 21, 2019, IEP offer;
    b. failing to make a formal, clear, and specific FAPE offer at the August 21, 2019 IEP team meeting;
    c. failing to have the required IEP team members at the August 21, 2019 IEP team meeting;
    d. failing to provide copies of the IEP documents in Spanish on or before the August 21, 2019 IEP team meeting;
    e. fail to timely consider third-party assessments and reports from Kaiser Permanente and Rebekah Children Services prior to developing the August 21, 2019 IEP; and
    f. failing to consider Parent's input and Parent's request for assessments before developing the August 21, 2019 IEP?

6. Did Morgan Hill deny Student a FAPE during the 2020-2021 school year through April 5, 2021 by:
    a. failing to assess Student in academics; cognitive and intellectual functioning; language processing, development, and use; gross and fine motor, sensory, social emotional, autism, attention deficit activity disorder, and special circumstances instructional assistant, and after Parents requested assessment;
    b. failing to timely provide Parents with assessment plan within 15 days of a referral for assessment;
    c. failing to provide Parents with procedural safeguards when legally required;
    d. exiting Student from special education services on October 8, 2020, without a comprehensive assessment and because Parents refused to sign the June 4, 2018 service plan; and
    e. failing to provide Parents with complete educational records since November 3, 2020?

"Offer" as used in this order, generally includes the concept of providing; if something is not offered it is also not provided. However, "offer" does not include the failure of a district to implement an IEP provision.

The issues in the complaint have been reorganized and rephrased for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431.)

PROPOSED RESOLUTIONS

The resolutions requested by Student include: reimbursement for private school expenses, independent educational assessments, placement at a non-public school, transportation, and extended school year; school records; compensatory education; 1:1 aide; counseling; speech services; equipment; attendance of facilitator at IEP team meetings; and other out-of-pocket expenses.

Morgan Hill filed its response to Student's complaint on April 15, 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).

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. Morgan Hill 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 Morgan Hill'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. A table of contents for the exhibits must be included.

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.

Morgan Hill must include a copy of the school calendar for each school year in question as exhibits.

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. Morgan Hill is ordered to make its witnesses under its control reasonably availably for hearing, including those witnesses listed on Student's witness list

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 27, 2021, regarding the 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, Morgan Hill shall inform Student which proposed witnesses are district employees and identify the witnesses on Student's list that require a subpoena.

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

a. 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.) Here, Student requested the hearing and bears the burden of proof. Student's case-in-chief shall be presented first, followed by Morgan Hill, subject to the exception in paragraph b, below.
b. On the first day of hearing, the ALJ will only hear evidence pertinent to the statute of limitations and whether Student may assert claims arising more

than two years before the filing of the complaint. This is called phase one of the hearing. First, Student will offer evidence of the reasons Student believes the statute of limitations should be extended. Then, Morgan Hill will offer its evidence in favor of the application of the two-year statute of limitations. Student will have a brief period for rebuttal. The parties will then give oral concluding statements regarding this issue. Subsequently, a recess will be taken. Depending on how long the testimony takes, and the volume of evidence to be considered, the break may be short or may be an afternoon and overnight. When the hearing resumes the ALJ will announce the ruling on this preliminary issue regarding the time period in this hearing orally on the record, and then the hearing will resume. Thereafter, the parties will receive a short recess to determine any changes to the witness order based on the ruling. The hearing will proceed as described in paragraph a, above, which is called phase two of the hearing. The statute of limitations ruling will be explained in the Decision. There is no break between phase one and two of the hearing. Student's counsel should be prepared to have witnesses available to timely begin phase two of the hearing.

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. 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 in each phase of the hearing. All parties must examine witness on all issues when the witness is first called. Requiring a witness to appear only once for each phase of the hearing 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.

Both parties' requests to record the hearing are 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

Both parties contemplate motions related to subpoenas. No ruling was made at the time of the prehearing conference related to subpoenas. 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

Student requests a Spanish 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 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.

Cynthia Fritz

Cynthia Fritz
Administrative Law Judge
Office of Administrative Hearings