BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

LOS ALAMITOS UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019090036

ORDER FOLLOWING PREHEARING CONFERENCE, GRANTING MOTION TO AMEND, DENYING REQUEST FOR PUPIL RECORDS, AND DENYING REQUEST TO REMOVE HARBOTTLE LAW GROUP AS COUNSEL

On November 8, 2019, Administrative Law Judge Linda Johnson Office of Administrative Hearings held a telephonic prehearing conference. The Administrative Law Judge will be referred to as an ALJ. The Office of Administrative Hearings will be referred to as OAH. The prehearing conference will be referred to as a PHC.

Parents appeared on behalf of Student. Tracy Johnson, Attorney at Law, appeared on behalf of Los Alamitos 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 November 19, 20, and 21, 2019, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM on the first day of the hearing and at 9:00 AM on all other days, unless otherwise ordered.

HEARING LOCATION

The hearing will be held at Los Alamitos Unified School District, 10293 Bloomfield Street, Los Alamitos, California 90720.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing good cause to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

District facilities shall fully comply with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. Districts are required to file written certification with OAH that the facilities it provides comply with these laws.

Los Alamitos shall file the required certification by November 14, 2019, and provide facilities that comply with these laws.

Before the beginning of the hearing, Los Alamitos shall ensure that the hearing room is configured into a courtroom setting and shall contain:

- a table for Student and his representatives;
- a table for Los Alamitos's legal representative and special education representative;
- a table for the witness;
- a table for the ALJ, near an electrical outlet with a chair that adjusts to an appropriate height for typing at the table provided; and
- water and tissue available for the participants.

The same hearing room shall be used for each day of hearing and shall be available at least one hour before the beginning of the hearing each day. The hearing room shall be locked following the hearing each night. Los Alamitos shall ensure that the hearing room and access to it are in compliance with the all laws governing accessibility of government facilities to persons with disabilities.

Los Alamitos shall also ensure that one parking space is available on each hearing day for each of the following: the ALJ, Parents, Student's attorneys, Los Alamitos's attorneys, and witnesses.

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 prehearing conference are:

ISSUES

1. Did Los Alamitos deny Student a free appropriate public education by failing to implement the May 7, 2019 individualized education program leaving her without necessary services?

PROPOSED RESOLUTIONS

Student seeks reimbursement for parentally funded services and an independent psychoeducational evaluation. Student also seeks prospective funding, placement and services.

Los Alamitos filed its response to Student's complaint on September 13, 2019. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

BINDERS

Exhibits shall be pre-marked and placed in three-ring binders before the hearing. Exhibit binders shall include a tab for each exhibit. Each binder shall contain a detailed table of contents which clearly identifies the tabs and documents. The ALJ and witnesses must be able to easily turn to exhibit tabs and to turn pages in the binders. Multiple binders may be submitted if necessary.

TAB AND PAGE NUMBERS

The parties shall place a letter followed by a number on each tab to identify each exhibit. Student shall use the letter S before the number to identify Student's exhibits. Los Alamitos shall use the letter D before the number to identify Los Alamitos's exhibits. For example, S-1 means Student's exhibit tab 1 and D-1 means Los Alamitos's exhibit tab 1. Each page of each binder shall be numbered consecutively from the first page of the first exhibit to the last page of the last exhibit in the binder. Parties may use a Bates-stamp type system for numbering.

CONTENT

Each exhibit shall 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. Documents offered as evidence to support a request for reimbursement must be separated by vendor and should be internally chronological where possible. Exhibits in the binders should be in chronological order.

Parties should include resumes or curriculum vitae for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

Los Alamitos's binder shall include a copy of the school calendar for each school year in question and shall have witnesses available to explain the calendar if necessary.

COPIES OF BINDERS

The parties shall serve copies of their evidence binders on each other. This exchange is required by Education Code section 56505, subdivision (e)(7). Each party shall bring two additional sets of the binders containing their exhibits to the hearing. One set will be used by the ALJ, and the other set will be used by witnesses. The parties may not serve exhibits on OAH before the hearing.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

WITNESSES

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 shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party shall 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 who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subd. (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 will 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 November 15, 2019, at 5:00 PM. The parties shall discuss the availability of witnesses, the order of witnesses and the length of witness testimony. The parties should attempt to eliminate duplicate exhibits from their binders. The parties may discuss whether they can produce a written stipulation stating basic facts to shorten the length of time needed for the hearing.

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 Student's case-in-chief shall be presented first, followed by Los Alamitos.

WITNESS LISTS

The parties shall give the ALJ a joint proposed witness list for the first day of hearing. The list should include dates and time estimates of expected testimony. In the event an agreement cannot be reached, each party shall prepare a separate written list. Los Alamitos shall have witnesses available in case there is no agreement. Before the hearing begins, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses. The ALJ will finalize the witness schedule. Parties shall be prepared at the end of each day to discuss the witnesses to be presented the next day and the estimated time the testimony each witness is expected to take.

SCOPE OF WITNESS EXAMINATION

Each witness shall be called to testify only once, except for rebuttal purposes. All parties shall examine witness on all issues when the witness is first called. Requiring a witness to appear only once takes precedence over the order in which parties presents their case in chief.

TELEPHONIC TESTIMONY

Whether a witness may appear by telephone 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 telephone shall request for leave to do so before the hearing, unless the opposing party has stipulated that the witness may appear by telephone. The party offering the witness shall provide the witness with a complete set of exhibit binders from all parties before the hearing. The binders must be exact paper copies of all of each party's exhibits. Electronic copies are not acceptable. The party presenting the witness shall ensure the witness testifies from a private location with no other persons present. The party offering telephonic testimony shall ensure that the witness has telephone equipment that allows clear testimony at a volume that allows clear transmission of what the witness is saying, allows the witness' testimony to make a clear recording, and allows the witness to hear objections and rulings. Los Alamitos shall ensure that the hearing room has telephone speaker equipment that allows everyone in the room to hear the witness, and allows the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

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. Such requests are routinely granted on the following conditions:

- the OAH recording is the only official recording;
- the parties shall turn the 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;
- the recording device will be removed by the party recording during any recess where the party leaves the room;

- operation of the party's recording mechanism will not be allowed to delay the hearing;
- a parties' recording may not be used to prepare the testimony of a witness in the hearing;
- the recording shall not be shared with any non-party, possible witness, or through social media;
- The parties shall not use the recording in any subsequent due process hearing;
- the recording is subject to the same confidentiality as the due process hearing; and
- the parties shall dispose of the unofficial recording when the time for filing an appeal has passed or, in the event of an appeal, when the time for submission of the record on appeal has passed.

Student's request 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. Any person doing so shall be subject to sanctions.

Recordings as exhibits

Excerpts of an audio record of an individualized education program team meeting must be transcribed and offered as documentary evidence. The portion of the audio record transcribed shall be provided to the opposing party with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcription need not be done by a certified court reporter. Electronic recording of the excerpts of the audio

record shall be included with the transcript, at the ALJ's discretion, to allow the ALJ to listen to the recording as well as read the transcript.

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.

MOTIONS

MOTION TO AMEND

Student's complaint included one issue for hearing. Student's PHC statement included 12 issues. Los Alamitos did not consent to adjudicate the additional issues. During the PHC Student asked to amend her complaint to include the new issues. Los Alamitos did not oppose Student's motion to amend.

An amended complaint may be filed when the other party consents in writing and is given the opportunity to resolve the complaint through a resolution session, or when the hearing officer grants permission. The hearing officer may grant permission at any time more than five days before the due process hearing. (20 U.S.C. §1415(c)(2)(E)(i).) The filing of an amended complaint restarts the applicable timelines for the due process hearing. (20 U.S.C. §1415(c)(2)(E)(ii).)

Student's motion to amend is granted provided Student submits an amended complaint by 4:00 PM on November 12, 2019, that includes in one document all issues for hearing. If Student does not file an amended complaint the hearing will proceed on the sole issue alleged in Student's original complaint. Should Student file an amended

complaint, all applicable timelines shall be reset as of November 12, 2019. OAH will issue a scheduling order with the new dates.

REQUEST TO COMPEL RECORDS

In Student's PHC statement she alleges that Los Alamitos has ignored, delayed, and prevented access to her records. Student requested a continuance to allow Los Alamitos to produce the records. During the PHC Student asked that OAH compel Los Alamitos to produce the records.

Parents may request copies of their child's pupil records at any time, and are entitled to receive those copies within five business days of their request. (Ed. Code, § 56504.) A pupil record means any item of information directly related to an identifiable pupil, other than directory information, that is maintained by a school district, or required to be maintained by an employee in the performance of his or her duties, whether recorded by handwriting, print, tapes, film, microfilm, or other means. (Ed. Code, § 49061, subd. (b).) A pupil record does not include informal notes related to a pupil compiled by a school officer or employee that remain in the sole possession of the maker and are not accessible or revealed to any other person except a substitute. (*Ibid.*) "Substitute" means a person who performs the duties of the individual who made the notes on a temporary basis, and does not refer to a person who permanently succeeds the maker of the notes in his or her position. (*Ibid.*)

A parent does not have to be involved in a due process hearing or other legal proceeding to request their child's pupil records. Such a request is not considered prehearing "discovery," the procedure by which a party in certain types of legal proceedings may obtain evidence from other parties to the proceeding.

The law does not provide any discovery procedures allowing a party to obtain documents that are not defined as pupil records, or any other evidence, prior to the start of the hearing in a due process case. However, each party to a due process hearing does have the right at the hearing to present evidence and compel the attendance of witnesses. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56506, subd. (d)(2) and (3).) Thus, prior to the hearing, a parent or other party may have the hearing officer in a due process case issue subpoenas (order to appear and give testimony at hearing), and subpoenas duces tecum (order to produce document(s) or paper(s)at hearing), if the party making the request shows that the testimony or documents are reasonably necessary. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) This requirement is similar to Code of Civil Procedure section 1985, subdivision (b) (Section 1985(b)), which requires:

1. A copy of an affidavit shall be served with a subpoena duces tecum . . ., showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.
2. The requesting party shows good cause by making a factual showing of why the requested documents or things are material and relevant to the litigated issues. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.)

Also, no later than five business days prior to the hearing, each party is entitled to receive from the other parties a copy of all documents and a list of all witnesses and

their general area of testimony the other parties intend to present at hearing. (Ed. Code, § 56505, subd. (e).)

Here, Student's request to compel Los Alamitos to produce pupil records is not supported by testimony or documents submitted under penalty of perjury. The unsworn contentions stated in the request and during the PHC are not evidence on which an order may be based. Student therefore has not provided evidence that may be considered to evaluate whether Student has asked Los Alamitos to produce pupil records, whether the requested documents qualify as pupil records that Los Alamitos must produce, and whether the requested documents are material and relevant to Student's issues in this case. Student's request for an order to compel Los Alamitos to provide Student's records is denied without prejudice. Student may file a motion to compel pupil records that complies with the above requirements.

REQUEST TO REMOVE HARBOTTLE LAW GROUP AS LEGAL COUNSEL

Student requests in her PHC statement that she opposes Harbottle Law Group as counsel for Los Alamitos. Student alleges a conflict of interest. Student requested during the PHC that OAH remove Harbottle Law Group as legal counsel for Los Alamitos. Student did not provide any legal authority that OAH has the authority to remove a district's chosen counsel or otherwise prevent counsel from participating in a due process hearing. Student's request to remove Harbottle Law Group as counsel is denied.

No additional prehearing motions are pending or contemplated. Any motion that was not filed three business days before the Prehearing Conference, 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 or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in writing.

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless the ALJ grants permission otherwise. No food or drinks other than water will be permitted in the hearing room during the hearing.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

A party or participant to 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 TO THE PUBLIC

At Student's request, the hearing will be open to the public. The parties, should inform the ALJ if Student expects any group or members of the press to be present during the hearing. No one may record any part of the hearing, and all electronic devices must be off or silent in the hearing room unless permitted by the ALJ.

Parents should be aware that by opening the hearing, Los Alamitos employees who are not witnesses, or other people that Parents might not know, may attend the hearing. Persons disclosed on either party's witness list, with the exception of Los Alamitos's representative, will be excluded from the hearing until their testimony has been completed. The parties shall confer on November 15, 2019, as to the seating requirements for members of the public. The parties shall immediately notify each other and OAH if they are aware that there will be media attending the hearing.

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 particular case. The ALJ may also exclude persons whose actions impede the orderly conduct of the hearing, 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. (Tit. 1, Cal. Code Regs., § 1030.)

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 p.m. 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 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.

IT IS SO ORDERED.

DocuSigned by:
Linda Johnson
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DATED: November 8, 2019

Linda Johnson
Administrative Law Judge
Office of Administrative Hearings