BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF:

PARENT ON BEHALF OF STUDENT,

v.

NORRIS SCHOOL DISTRICT,

OAH CASE NUMBER 2020010423

and

NORRIS SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT,

OAH CASE NUMBER 2020060184

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE AND GRANTING MOTION TO COMPEL EDUCATIONAL RECORDS

JUNE 19, 2020

On June 19, 2020, Administrative Law Judge Adrienne L. Krikorian, 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 Goriune Dudukgian appeared on behalf of Student. Attorney Stephanie Virrey Gutcher appeared on behalf of Norris 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 30, July 1 and 2 , 2020 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 six 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. (5 C.C.R. § 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.

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

Free appropriate public education is referred to as FAPE. Individualized education program is referred to as IEP.

1. Did Norris School District deny Student a FAPE by materially failing to implement Student's November 27, 2018 and March 6, 2019 IEP's?
2. Did Norris School District deny Student a FAPE from November 28, 2018 by failing to conduct an appropriate functional behavioral assessment?
3. Did Norris School District deny Student a FAPE from November 28, 2018 by failing to offer IEP's that included:

a. Appropriate annual goals in the areas of academics, social skills, pragmatics, executive function, and behavior;
b. Adequate behavioral services;
c. A behavior intervention plan; and
d. Appropriate occupational therapy services?

4. Did Norris School District deny Student a FAPE by failing to make a clear written offer of FAPE in the November 21, 2019 IEP?
5. Did Norris School District offer Student a FAPE in Student's January 22, 2020 IEP, such that Norris School District may implement the January 22, 2020 IEP over Parents' objections?
6. Did Norris School District deny Student a FAPE during the 2020 COVID-19 school closure through May 7, 2020, by failing to provide Student any appropriate special education or related services, including appropriately tailored alternative service delivery options?

PROPOSED RESOLUTIONS

The resolutions requested by Student include behavior intervention services with consultation by a non-public agency, occupational therapy by a non-public agency, and compensatory educational services. Norris School District seeks an order permitting it to implement the January 22, 2020 IEP without parental consent.

Norris School District filed its response to Student's amended complaint on May 15, 2020. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

Each party shall file one paper copy of their exhibits with OAH at 2349 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833, **on the Friday before the first day of hearing by noon**. The parties shall also upload their exhibits electronically according to the instructions provided.

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.

PAPER COPIES OF EXHIBITS

The paper copies of exhibits shall be pre-marked and bound or placed in three-ring binders before filing with OAH. The exhibits shall contain a detailed table of contents which clearly identifies exhibits and the document page numbers.

EXHIBIT COVER PAGES AND PAGE NUMBERS

Each exhibit must be identified by a letter and number. Each exhibit shall have a cover sheet that identifies that letter and number in the middle of the page. That page must be the first numbered page of each exhibit. Student must use the letter S before the number to identify Student's exhibits. Norris must use the letter D before the

number to identify Norris's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Norris's exhibit 1. Parties may either number each page within each exhibit or number each page in the binder consecutively beginning with the cover page before exhibit one as page 1, through the last page of the last exhibit. For example, if there are 100 total pages in the binder the first cover page in front of the first page of the first exhibit is page 1 and the last page of the last exhibit in the binder is 100.

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 must be in chronological order. Resumes may be included, each as a separate exhibit, at the end of the exhibits and should be uploaded for the ALJ, and provided to opposing counsel no later than 24 hours before the witness is scheduled to testify, unless otherwise ordered.

Parties shall include resumes or curriculum vitae for each witness who is expected to testify as to their education and professional credentials. Norris's exhibits must include a legible copy of the school calendar for each school year in question.

ELECTRONIC COPIES OF 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. The electronic copies must be an exact duplicate of the paper copies filed with OAH. OAH will issue a separate Order Setting Procedures for Filing Exhibits Electronically that includes instructions for how to file exhibits electronically.

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. In that situation, 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 shall be discussed at the start of the hearing.

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. Parties are responsible for providing their respective

witnesses with access to CaseLines for the electronic copy, or a paper copy, of all exhibits.

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 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 June 23, 2020, to discuss scheduling witnesses and how much time each witness will take. The parties shall discuss any issues pertaining to the parties, counsel and witnesses appearing by videoconference for hearing and electronically viewing exhibits during the hearing. 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, Norris shall inform Student which proposed witnesses are district employees. Norris shall also identify the witnesses on Student's list that require a subpoena. Norris may agree to accept service for witnesses

under Norris's control or provide Student with the witness' most recent contact information.

PARTICIPANT INFORMATION FORM

Both parties have an ongoing obligation to and must 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

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 matter, Student's case-in-chief shall be presented first, followed by Norris, unless otherwise ordered.

WITNESS LISTS

The parties must electronically upload a joint proposed witness list and schedule to CaseLines no later than 4:00 p.m. on the day before 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 reasonable time estimates of each witness' expected testimony. The parties should include a break for lunch, and should anticipate that short breaks will happen throughout the day. In the event an agreement cannot be reached, each party shall prepare and upload a separate written list. Norris 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:

- the OAH recording is the only official recording;
- participants shall not use Teams to record the hearing;
- 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;
- operation of the party's recording mechanism will not be allowed to delay the hearing;
- a parties' recording may not be given, provided or played to a witness, or potential witness; and
- the recording is subject to the same confidentiality as the due process hearing;
- use of the chat function in the videoconference is prohibited and shall not be part of the official record;
- participants shall not take screenshots of the videoconference, or share or publish any portion of the videoconference or audio recording.

Both parties may audio record the hearing 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

The ALJ has discretion to admit or exclude evidence in the form of a recording. 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.

Both parties requested permission to offer a recording with a transcript and or partial transcripts of recordings from Student's IEP meetings. Transcripts must be uploaded electronically as an exhibit following the same procedures for all proposed exhibits. The parties may also upload a copy of the recording, and or provide it on a flash drive with their hard copy of the exhibit binder, providing they exchange an identical copy with the other party. The parties shall meet and confer before the first day of hearing to ensure that the transcripts uploaded are accurate. The identities of any person speaking on the portion of the recording or transcript being introduced during hearing must be established.

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

MOTION TO COMPEL EDUCATIONAL RECORDS

Student timely filed a motion to compel production of Student's educational records on June 16, 2020. Student contends Parents requested, in preparation for hearing, a full set of Student's educational records on June 3, 2020. Norris's attorney met and conferred with Student's attorney, and responded that Norris would produce the records without the need for a subpoena. As of the date of the motion, Parent had not received any records. During the PHC, Student's attorney represented that Norris had partially produced the documents, and promised to produce the remainder on June 22, 2020.

To guarantee parents the ability to make informed decisions about their child's education, the IDEA grants parents of a child with a disability the right to examine all relevant records relating to their child's "identification, evaluation and educational placement." (20 U.S.C. §1415(b)(1).) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing, or resolution session. (See 34 C.F.R. §300.613(a).) Parents have the right to receive copies of all school records within five business days after parents make a request. (34 C.F.R. § 300.613(a); Ed. Code, §56504.)

Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act. (20 U.S.C. § 1232; 34 C.F.R. § 99.3.) Education records include

"records, files, documents, and other materials" containing information directly related to a student, other than directory information, which "are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A); Ed. Code, § 49061, subd. (b).)

In March 2020, schools closed under general orders by the Governor of California due to the Covid-19 pandemic. On March 17, 2020, the California legislature, with approval from the California governor, waived special education timelines, including those associated with production of educational records under Senate Bill No. 117, section 8(b). However, Senate Bill No. 117 did not waive corresponding requirements under federal law, including provisions of the Individuals with Disabilities with Education Act or its enabling regulations.

Student has established good cause to compel production of Student's educational records before the due process hearing commences to enable Student to prepare for hearing. The motion is granted. Norris shall produce to Parent, through Parent's attorney, all educational records, digitally or by hard copy at Parents' choosing, no later than June 22, 2020, at 4:00 p.m. If Norris fails to do so, Student may seek an order from the hearing ALJ precluding Norris from introducing any educational record for Student that was not timely provided to Parents.

OTHER MOTIONS

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 shall appear from a private location, unless otherwise ordered. Participants should take reasonable efforts to minimize background noise 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

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 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. (Tit. 1, Cal. Code Regs., § 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 particular 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.

DocuSigned by:
Adrienne L. Krikorian
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Adrienne L. Krikorian

Administrative Law Judge

Office of Administrative Hearings