BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

OAKLAND UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019080045

ORDER FOLLOWING PREHEARING CONFERENCE

On November 1, 2019, Administrative Law Judge (called ALJ) Charles Marson, Office of Administrative Hearings (called OAH), held a telephonic prehearing conference in this matter. Lindsay A. Whyte, Attorney at Law, appeared on behalf of Student. David Mishook, Attorney at Law, appeared on behalf of the Oakland Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

DUE PROCESS HEARING DATES, TIMES, AND LOCATION

HEARING TIMES

The hearing will take place on November 12, 13 and 14, 2019, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. on the first day of the hearing and at 9:00 a.m. on all other days, unless otherwise ordered.

HEARING LOCATION

The hearing will be held at the Office of Administrative Hearings, 1515 Clay Street, Suite 206, Oakland, California 94612. The parties shall immediately notify all potential witnesses of the hearing dates and location, 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.

ISSUES AND PROPOSED RESOLUTIONS

The ALJ has slightly altered the statement of some issues as allowed by the holdings *in J.W. v. Fresno Unified Sch. Dist*. (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist*. (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made. A party believing that an issue has been misstated or omitted shall promptly file a notice in writing stating its concern. 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. Did Oakland deny Student a free appropriate public education during the 2017-2018 school year, and 2018 extended school year, by:

a. failing to offer measurable goals in all areas of need: specifically, in the areas of reading decoding, phonological processing, reading fluency, executive functioning, attention and social-emotional functioning;

b. failing to offer an adequate structured literacy program;

c. failing to offer adequate accommodations;
d. denying his Mother meaningful participation in the individualized education program process at the December 14, 2017 IEP team meeting by failing to provide adequate Spanish translation, and failing to provide adequate data in progress reports on Student's 2017 goals;
e. failing to make a clear written offer;
f. failing to provide adequate specialized academic instruction;
g. failing to offer assistive technology devices, software, applications and services; and
h. failing to offer extended school year placement and services?

2. Did Oakland deny Student a FAPE during the 2018-2019 school year, and 2019 extended school year, by:

a. failing to offer measurable goals in all areas of need; specifically, in the areas of reading decoding, auditory processing, phonological processing, reading fluency, written expression, executive functioning and social-emotional functioning;
b. failing to offer an adequate structured literacy program;
c. failing to offer adequate accommodations;
d. denying his Mother meaningful participation in the IEP process by failing to provide accurate present levels of Student's performance at the February 11, 2019 IEP team meeting, and instead copying the information verbatim from Student's February 1, 2017 IEP;
e. failing to make a clear written offer;
f. failing to provide adequate specialized academic instruction;
g. failing to offer assistive technology devices, software, applications and services;

h. failing to offer extended school year placement and services; and
i. failing to adequately maintain his student records?
3. Did Oakland deny Student a FAPE during the 2019-2020 school year, through the filing of the complaint, by:
a. failing to offer measurable goals in all areas of need; specifically, in the areas of reading decoding, auditory processing, phonological processing, reading fluency, written expression, executive functioning and social-emotional functioning;
b. failing to offer an adequate structured literacy program;
c. failing to offer adequate accommodations;
d. failing to provide adequate specialized academic instruction; and
e. failing to offer assistive technology devices, software, applications and services?
4. Did Oakland deny Student a FAPE in all relevant school years by failing to assess him in all areas of suspected disability; namely, by failing to conduct an assistive technology assessment?

PROPOSED RESOLUTIONS

As resolutions, seeks an order answering the above questions in the affirmative and ordering Oakland:

1. to fund an independent assistive technology evaluation, and to fund the attendance of the assessor at the IEP team meeting at which the results of the assessment are presented;
2. to provide compensatory instruction in an amount according to proof in the areas of structured literacy, academic tutoring, counseling and executive functioning, which may include placement in a non-public school;

3. to place Student prospectively in a non-public school for students with learning disabilities, or in the alternative, provide him direct instruction in executive functioning and a structured literacy program, and provide him counseling; and
4. to undergo training in the proper storage of student records.

RESPONSE TO COMPLAINT

Oakland filed its response to Student's complaint on October 31, 2019. (*M.C. v. Antelope Valley Unified Sch. 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. The parties shall use numbers to identify exhibits in a way that clearly identifies the party offering it (such as "S1" or "D2"). Each exhibit shall be internally paginated, by exhibit, or all of a party's exhibits shall be Bates-stamped. Each binder shall contain a detailed table of contents.

Parties are encouraged to present resumes or curricula vitae for all professional witnesses. Fremont shall introduce a color copy of the school calendar for each school year in question and shall have witnesses available to explain the calendar if necessary.

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. Exhibits in the binders should be in

chronological order. In the event of duplicate exhibits, the most legible version will be used.

COPIES OF BINDERS

The parties shall serve copies of their evidence binders on each other as 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

Each party is responsible for producing its own witnesses unless otherwise ordered by the ALJ. Each party shall make witnesses under its 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. 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 present their cases in chief.

MEET AND CONFER

a. Student has identified 29 witnesses to be called at the hearing, and Oakland has identified 20 witnesses. Some of the witnesses are listed by both parties. In light of the fact that 3 days have been scheduled for the hearing,

examination of the number of witnesses proposed would make it difficult to complete the hearing as scheduled. Therefore, at the beginning of the hearing, each party shall serve on the other party and provide the ALJ a tentative witness list, identifying the witnesses the party intends to call, as opposed to witnesses the party may call depending on the flow of the hearing and the evidence. Each revised witness list shall contain an estimate of the length of each witness's direct examination testimony. The parties shall meet and confer telephonically on or before November 7, 2019, for this purpose.

b. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, the parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony of each such witness is expected to take. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for their testimony, and to exclude evidence if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

EVIDENCE PRESENTATION

BURDEN OF PROOF AND ORDER OF PROCEEDING

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 [126 S.Ct. 528; 163 L.Ed.2d 387].) In this case Student requested the hearing and shall present his case-in-chief first, followed by Oakland.

TELEPHONIC TESTIMONY

At present neither party intends to present a witness by telephone. 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 a complete set of exhibits from all parties before the hearing. Electronic copies are not permitted. The party offering telephonic testimony shall ensure that the hearing room has sound 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 of Hearing

Any party desiring to make an audio recording shall move in advance of the hearing for leave to do so, and any recording shall be subject to the conditions that:

OAH's recording is the only official recording;

The recording will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record;

No part of the recording shall be played to any witness or potential witness while the hearing is proceeding; and

Operation of the party's recording mechanism will not be allowed to delay the hearing.

Student's request to make an audio recording of the hearing is granted, subject to these conditions. Should Oakland seek to record the hearing, it shall make a request to do so before the hearing.

Video Recording of Hearing

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.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures shall present admissible evidence of the expenditures, or a stipulation to the amount of the expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

MOTIONS

At present no 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 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 ASSISTANCE AND REASONABLE ACCOMMODATIONS

A Spanish interpreter is required for both Parents. OAH will provide the interpreter.

At present neither party anticipates the need for any other special accommodation for any witness or party, or for the services of another 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 the OAH Americans with Disabilities Act Coordinator at 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

At Student's request, the hearing will be closed 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 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 cell 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 to by the assigned ALJ.

If the matter is settled subject to school 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 vacated 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.

DATED: November 5, 2019

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Charles Marson
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Charles Marson
Administrative Law Judge
Office of Administrative Hearings