

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF:
PARENT ON BEHALF OF STUDENT,

and

IRVINE UNIFIED SCHOOL DISTRICT,
OAH CASE NUMBER 2021080012
OAH CASE NUMBER 2021080052

ORDER FOLLOWING PREHEARING CONFERENCE FOR
HEARING BY VIDEOCONFERENCE

SEPTEMBER 14, 2021

On September 10, 2021, Administrative Law Judge Tara Doss, from the 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 Christian Knox appeared on behalf of Student. Attorney Daniel Gonzalez appeared on behalf of Irvine Unified School District. OAH recorded the PHC. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

MOTION TO CONTINUE

On September 3, 2021, Student filed a Motion for Reconsideration of a September 1, 2021 OAH Order Denying Student's Request for Continuance, and a Motion to Continue. On September 9, 2021, Irvine filed an opposition to Student's motions. During the PHC, the undersigned ALJ alerted the parties that Student's Motion for Reconsideration was denied but that OAH would rule on Student's Motion to Continue in this PHC Order.

Student argues there is good cause to continue the hearing because Parent will be unavailable on September 22, through 24, 2021, due to a required work conference that cannot be rescheduled, and Student's attorney has an OAH hearing in an earlier-filed case, on calendar during the same dates scheduled in this consolidated matter. Student further argues its attorney is unavailable from September 28, through November 8, 2021, due to other OAH hearings in earlier-filed cases, and a prepaid vacation. For these reasons, Student requests OAH continue the hearing in this consolidated matter to November 16, through 18, 2021.

Irvine argues it will be prejudiced if OAH grants the continuance because it has prepared for the hearing and scheduled witnesses to testify. Irvine further argues one parent's unavailability is not good cause for a continuance because Student's other parent can attend. Finally, Irvine argues the other OAH hearings Student's attorney raised are likely to settle and therefore, do not warrant continuing the hearing in this consolidated matter for nearly two months.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good

cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (Ed. Code, § 56505, subd. (f)(3); Cal. Rules of Court, rule 3.1332(c).)

OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance or imposing conditions on the continuance; and any other relevant fact or circumstance. (Cal. Rules of Court, rule 3.1332(d).)

Parental participation is an integral part of the Individuals with Disabilities Education Act, called IDEA. Pursuant to the IDEA, parents have the right to participate in meetings with respect to the identification, evaluation, and educational placement of their child, and the provision of a free appropriate public education to their child. (20 U.S.C. § 1415(b)(1).) Parents also have the right to participate in an impartial due process hearing whenever a complaint is filed related to their child. (20 U.S.C. § 1415(f)(1)(A).)

OAH has reviewed the request for good cause and considered all relevant facts and circumstances. The request is denied in part and granted in part. Student did not

establish Parent's or Student's attorney's unavailability on September 21, 2021. Parent's work conference begins on September 22, 2021, and Student's attorney dismissed the OAH case that had conflicting hearing dates with this consolidated matter. Thus, there is not good cause to continue the September 21, 2021 hearing date. However, Student did show good cause to continue the hearing dates set for September 22, and 23, 2021. Parent has a right to participate at the due process hearing if so desired. Because Parent is unavailable on these dates, the hearing will begin on September 21, 2021, and then be continued to resume on September 28, through 30, 2021. OAH cases that have a hearing underway take precedent over hearings that have not yet started, so Student's argument that hearings scheduled in the future may conflict with the hearing in this consolidated matter is unpersuasive.

Accordingly, Student's Motion to Continue the September 21, 2021 hearing date is denied. Student's Motion to Continue the September 22, and 23, 2021 hearing dates is granted, and those dates are vacated.

DUE PROCESS HEARING

The hearing will take place on September 21, and 28, through 30, 2021, and continue day to day at the discretion of the ALJ. The hearing will 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. (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 must immediately notify all potential witnesses of the hearing dates and must 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 complaints and clarified by the parties and the ALJ during the PHC are described below. A party must immediately file a written request for relief if the issues as stated in this Order do not reflect their understanding of the issues as clarified at the PHC.

A free appropriate public education is called a FAPE. An individualized education program is called an IEP.

STUDENT'S ISSUES

1. Did Irvine deny Student a FAPE during the 2018-2019 school year, including extended school year, by:
 - a. failing to timely convene an annual IEP team meeting;
 - b. failing to implement Student's stay-put placement;
 - c. failing to offer appropriate, measurable goals in all areas of need;

- d. failing to provide a clear offer of accommodations;
 - e. failing to offer an appropriate structured literacy program;
 - f. offering a modified curriculum;
 - g. failing to offer appropriate placement;
 - h. predetermining Student's placement;
 - i. failing to consider a continuum of placement options;
 - j. failing to offer appropriate extended school year placement; and
 - k. failing to file a request for due process hearing?
2. Did Irvine deny Student a FAPE during the 2019-2020 school year, including extended school year, by:
- a. failing to implement Student's stay-put placement;
 - b. failing to offer appropriate, measurable goals in all areas of need;
 - c. failing to offer appropriate accommodations;
 - d. failing to offer an appropriate structured literacy program;
 - e. offering a modified curriculum;
 - f. failing to offer appropriate placement;
 - g. predetermining Student's placement;
 - h. failing to consider a continuum of placement options;
 - i. failing to offer appropriate extended school year placement; and
 - j. failing to file a request for due process hearing?
3. Did Irvine deny Student a FAPE during the 2020-2021 school year, including extended school year, by:
- a. failing to implement Student's stay put placement;
 - b. failing to offer appropriate, measurable goals in all areas of need;
 - c. failing to offer appropriate accommodations;
 - d. failing to offer an appropriate structured literacy program;

- e. offering a modified curriculum;
 - f. failing to offer appropriate placement;
 - g. predetermining Student's placement;
 - h. failing to offer appropriate extended school year placement;
 - i. failing to offer an appropriate individualized transition plan; and
 - j. failing to timely complete a triennial IEP?
4. Was Irvine's November 12, 2020 psychoeducational evaluation inappropriately conducted?

STUDENT'S PROPOSED RESOLUTIONS

Student's proposed resolutions include reimbursement for an independent psychoeducational assessment; reimbursement for tuition and school fees, transportation, counseling, and speech and language services; and prospective placement at a nonpublic school.

IRVINE'S ISSUE AND PROPOSED RESOLUTION

Irvine's sole issue for hearing is as follows:

Was Irvine's November 12, 2020 multidisciplinary assessment of Student legally compliant, such that Student is not entitled to an independent educational evaluation at public expense?

Irvine's proposed resolution is a finding that its November 12, 2020 multidisciplinary assessment was appropriate, and that Student is not entitled to an independent educational evaluation at public expense.

Irvine filed its response to Student's complaint on August 25, 2021. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

The parties must upload their exhibits electronically according to the Order Setting Procedures for Filing Exhibits Electronically.

The parties must 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 the other party 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) will 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. Irvine 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 Irvine'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.

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. Irvine's exhibits must include a copy of the school calendar for each school year in question.

Electronic copies of exhibits filed with OAH must 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. A party must seek permission from the ALJ at hearing to access the system after that date. The ALJ has discretion to grant or deny the request.

WITNESSES

The parties must serve their list of witnesses on each other in compliance with Education Code section 56505. No party will 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 Microsoft 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 must 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.

The ALJ has discretion to limit the number of witnesses and the time allowed for witness 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 September 16, 2021, at 5:00 PM, to discuss scheduling witnesses and how much time each witness will take. The parties must 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 must discuss whether they can produce a written stipulation as to pertinent facts, contentions, resolutions, authenticity, and admissibility of documents to shorten the length of time needed for the hearing.

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

PARTICIPANT INFORMATION FORM

Both parties have an ongoing obligation to ensure that OAH has current information on the Participant Information Form and must 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 is current does not change the parties' statutory obligation to timely disclose their witnesses to the other party at least five business days before 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 must only be used for the limited purpose of issuing subpoenas or for contacting the witnesses to attend the hearing and must not be disclosed to any other person.

EVIDENCE PRESENTATION

In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In these consolidated cases, Student's case-in-chief will be presented first, followed by Irvine's case-in-chief, unless otherwise ordered. Student has the burden of proving its issues and Irvine has the burden of proving its issue.

WITNESS LIST

The parties must provide a joint proposed witness list to the ALJ on the first day of hearing. The list should include the first and last name of the witness, which party is calling the witness to testify, and include dates and time estimates of each witness's expected testimony. In the event an agreement cannot be reached, each party must 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 any 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 each witness's testimony.

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 must 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 must not use Teams to record the hearing;
3. the parties must 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 party's recording may not be given to or played for a witness, or potential witness;
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 will not be part of the official record; and
8. participants cannot take screenshots of the videoconference or share or publish any portion of the videoconference or audio recording.

Both Student and Irvine 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

IEP team meeting audio 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 AND REIMBURSEMENT

Any party seeking reimbursement for expenditures must 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

No other prehearing motions are pending or contemplated. Any motion that was not filed three business days before the PHC, must be supported by a declaration under penalty of perjury, establishing good cause for why the motion was not timely filed.

STIPULATIONS

Stipulations to pertinent facts, contentions, resolutions, authenticity, and admissibility of documents are encouraged. Any proposed stipulation must be submitted, in writing, to the assigned ALJ before 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, parties, and witnesses must conduct

themselves in a professional and courteous manner at all times. Cellular phones, telephones, and computer notifications must be turned 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. Counsel, parties, and witnesses are prohibited from passing notes to, exchanging electronic messages with, or signaling the witness in any way while the witness is testifying.

REASONABLE ACCOMMODATIONS

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 must immediately inform OAH, in writing, 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 must 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, on the day before hearing, the parties must 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 OAH receives and processes the letter of withdrawal or signature page of the signed agreement. 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 must 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 PHC. 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.

Tara Doss

Tara Doss

Administrative Law Judge

Office of Administrative Hearings