

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

MADERA UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021090530

ORDER FOLLOWING PREHEARING CONFERENCE FOR

HEARING BY VIDEOCONFERENCE

NOVEMBER 2, 2021

On November 1, 2021, Administrative Law Judge Elsa H. Jones, 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.

Sandra Robinson, Attorney at Law, appeared on behalf of Student and Parent, collectively, Student. Kidd Crawford, Attorney at Law, appeared on behalf of Madera 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 9, 2021, through November 10, 2021, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM each day and generally end at 3:30 PM, unless otherwise ordered. The parties anticipate it will take approximately five 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. Parent shall appear by videoconference using a webcam and Microsoft Teams to the extent practicable.

The parties shall immediately notify all potential witnesses of the hearing dates and shall subpoena witnesses, if necessary, to ensure that the witnesses will appear to testify. A party's failure to notify or subpoena a witness to testify will not be considered good cause to continue the hearing. Instructions for issuing and responding to subpoenas and optional forms for subpoenas can be found on the website at <https://www.dgs.ca.gov/OAH/Case-Types/Special-Education/Forms/Subpoenas?search=special%20education%20subpoena>.

ISSUES AND PROPOSED RESOLUTIONS

At the PHC, Student withdrew his contention that the statute of limitations was tolled, and withdrew all claims based upon events that occurred prior to September 14, 2019. Specifically, Student withdrew Issues 2 and 3, as numbered in the complaint, in their entirety, as well as portions of issues 1 and 4, as numbered in the complaint. The remaining issues to be heard at the due process hearing as well as proposed resolutions, as alleged in the complaint and clarified by the parties and the ALJ during the PHC, are renumbered and stated below.

ISSUES

1. Did Madera Unified deprive Student of a free appropriate public education, referred to as a FAPE, by failing to provide Student with statutorily required prior written notices from September 14, 2019, through September 14, 2021?
2. Did Madera Unified deny Student a FAPE by :
 - A. Failing to appropriately assess Student in all areas of suspected disability, specifically, autism, speech and language, occupational therapy, attention and focus, executive functioning skills, mental health, adaptive behavior, social/emotional/behavioral functioning, and transition from September 14, 2019 until his 2021 triennial assessment; and
 - B. Failing to offer Student a sufficient level of specialized academic instruction, including extended school year services, from September 14, 2019, to March 2020?
3. Did the October 2019 amendment individualized education program, referred to as an IEP, deny Student a FAPE by:

- A. Failing to offer counseling services that were based on an educationally related mental health assessment; and
 - B. Failing to follow the required procedures to excuse the general education teacher's attendance at the IEP team meeting?
- 4. Did Madera Unified deny Student a FAPE in developing the March 12 2020 amendment IEP by:
 - A. Failing to follow the required procedures to excuse the general education teacher from attending the IEP team meeting;
 - B. Failing to include accurate present levels of performance regarding Student's reading levels;
 - C. Failing to include a clear offer of FAPE regarding when the offered services would begin;
 - D. Failing to include objectively measurable and appropriate goals;'
 - E. Failing to include goals in the areas of mental health, attention and focus, social, emotional, and behavioral functioning, speech and language, adaptive daily living, visual motor integration, executive functioning, and occupational skills; and
 - F. Failing to include appropriate levels and types of services, including extended school year services?
- 5. Did Madera Unified deprive Student of a FAPE in the development of the April 2020 amendment IEP by unilaterally reducing Student's level of specialized academic instruction;
- 6. Was Madera Unified's 2021 triennial assessment inappropriate because:
 - A. The assessment was not bilingual; and

- B. It did not appropriately assess Student in the areas of academics, mental health, speech and language, occupational therapy, behavior and emotional functioning, and transition?
7. Did the April 15, 2021 triennial IEP deprive Student of a FAPE by:
- A. Failing to include accurate present levels of performance;
 - B. Failing to include objectively measurable and appropriate goals;
 - C. Failing to include goals in the areas of reading skills, reading fluency, math, written expression, adaptive living skills, attention and focus, mental health, transition, and social/emotional/behavioral functioning;
 - D. Failing to include a clear offer as to when services would start;
 - E. Failing to offer an appropriate level of services, and
 - F. Failing to offer extended school year services?

By no later than noon on November 5, 2021, Student shall file with OAH and serve a list of the events for which Student contends Madera Unified was statutorily required to provide prior written notices and failed to do so.

PROPOSED RESOLUTIONS

The resolutions requested by Student include bilingual independent assessments in the areas of neuropsychological, speech and language, transition, occupational therapy, functional behavior, educationally related mental health, as well as direct funding and transportation for Student to attend Lindamood-Bell Academy or other qualified provider.

Madera Unified filed its response to Student's complaint on September 24, 2021. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

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

The parties shall serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). Timely uploading electronic hearing exhibits five business days before the first day of hearing or at the time to which the parties have stipulated constitutes that party's timely exchange of evidence with each other in compliance with Education Code section 56505, subdivision (e)(7).

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged as required by Education Code section 56505, subdivision (e)(7) shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

IDENTIFYING EXHIBITS AND PAGE NUMBERS

Each exhibit must be identified by a letter and number. Student must use the letter S before the number to identify Student's exhibits. Madera Unified 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 Madera Unified'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 inserted.

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.

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

Electronic copies of exhibits filed with OAH shall be filed by 5:00 PM on November 3, 2021, as agreed to by the parties. Please refer to the General Order OAH issued with the Scheduling Order that contains the Order Setting Procedures for Filing Exhibits Electronically. It includes instructions for how to file exhibits electronically. Beginning three business days before the hearing, the electronic evidence system will not allow parties to upload exhibits unless permitted by the ALJ during the hearing at the ALJ's discretion.

WITNESSES

The parties shall serve their list of witnesses on each other in compliance with Education Code section 56505. No party shall be permitted to call any witnesses not timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

Parties are responsible for ensuring that all participants are familiar with and follow the Instructions for Joining the Online Due Process Hearing provided with this Order. Participants who have not previously used the MS Teams platform may also find

informative videos available like the one at this link from Microsoft:

<https://support.office.com/en-us/article/join-a-teams-meeting-078e9868-f1aa-4414-8bb9-ee88e9236ee4>.

The parties are responsible for ensuring that witnesses join the virtual hearing room at the designated date and time to testify. Witnesses are required to join the due process hearing by computer and appear by videoconference unless they do not have the necessary computer equipment. If a witness does not have the necessary equipment, the ALJ may permit the witnesses to appear by audio only or by telephone. "Audio only" means using a computer without webcam. Witness ability to attend the hearing by videoconference will be discussed at the start of the hearing.

The parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Parties shall make witnesses under their control reasonably available. The parties must schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party will be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

At the PHC, Student's counsel advised that one of Student's witnesses, Dr. Timothy Foster, is only available to testify on the following dates: November 19, December 3, and December 17. At Student's request, Dr. Foster will be permitted to testify on one of those dates. The specific date for receiving Dr. Foster's testimony will be determined by the ALJ at hearing.

The ALJ has discretion to limit the number of witnesses and the time allowed for witnesses' testimony. Education Code, section 56505.1, subdivision (h), empowers the ALJ to set a reasonable limit on the length of the hearing after consideration of four

factors. The first two factors are the issues to be heard and the complexity of facts to be proven. The second two factors are the ability of the parties or their representatives to present their respective cases and the parties' estimates of the time needed to present their cases.

MEET AND CONFER

The parties are encouraged to review and shorten their witness and exhibit lists before the hearing. Evidence may be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

The parties are ordered to meet and confer no later than November 5, 2021, at 3:00 PM to discuss scheduling witnesses and how much time each witness will take. The parties shall discuss any issues related to counsel and witnesses appearing by videoconference for hearing and electronically viewing exhibits during the hearing, or subpoenas, if any. The parties should attempt to eliminate duplicate exhibits from their hearing exhibits. The parties shall discuss whether they can produce a written stipulation as to pertinent facts, contentions, resolutions, and authenticity and admissibility of documents to shorten the length of time needed for the hearing.

As part of the meet and confer process, Madera Unified shall inform Student which proposed witnesses are Madera Unified's employees. Madera Unified shall also identify the witnesses on Student's list who require a subpoena. Madera Unified may agree to accept service for witnesses under its control or provide Student with their 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 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) pursuant to Education Code section 56505, subdivision (e)(7). 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 anyone else.

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 bears the burden of proof. Student's case-in-chief shall be presented first, unless otherwise ordered.

WITNESS LISTS

The parties must provide a joint proposed witness list to the ALJ on the first day of hearing. The list should include the first and last name of the witness, and the party who is calling the witness to testify. It shall also include dates and time estimates of each witness's expected testimony. In the event an agreement cannot be reached, each party shall prepare a separate written list. Madera Unified 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 cases-in-chief.

AUDIO ONLY OR TELEPHONIC TESTIMONY

Whether a witness may appear by audio only or telephone instead of videoconference is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by audio only or telephone shall request permission to do so before the hearing. Any party seeking to present a witness who cannot access exhibits electronically must inform the ALJ at the beginning of the hearing.

ELECTRONIC RECORDINGS

AUDIO RECORDING

A party may request permission to make an audio recording of the hearing. Permission to make an audio recording is subject to the ALJ's discretion and based upon certain conditions. The conditions are:

1. the OAH recording is the only official recording;
2. participants shall not use Teams to record the hearing;
3. the parties shall turn their recording devices 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 a party's recording mechanism will not be allowed to delay the hearing;
5. no party's recording may be given, provided, or played to a witness, or potential witness;
6. the recording is subject to the same confidentiality requirements as the due process hearing;
7. use of the chat function in the videoconference is prohibited and shall not be part of the official record; and
8. participants shall not take screenshots of the videoconference or share or publish any portion of the videoconference or audio recording.

Madera Unified's request to audio record the hearing is granted, subject to these conditions. Student may also 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

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 provide an exact identifiable portion of the recording the party seeks to admit. The identities of all speakers on the portion of the tape being introduced must be established. An ALJ may allow the opposing party to offer additional portions of a recording to establish the context, or to rebut, the recording.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education. Documents offered as evidence to support a request for reimbursement must be separated by vendor.

MOTIONS

Madera Unified filed a motion to dismiss claims or bifurcate the hearing based upon the statute of limitations. The motion is denied as moot, due to Student's withdrawal of the claims upon which the motion was based.

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

STIPULATIONS

Stipulations to pertinent facts, contentions, resolutions, and authenticity and admissibility of documents are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in writing prior to the start of the hearing.

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

All participants to the videoconference should observe the same decorum as in an in-person due process hearing. Counsel, all parties, and all witnesses must conduct themselves in a professional and courteous manner at all times. Cellular phones, telephones, and computer notifications must be shut off or set to silent during the hearing unless the ALJ grants permission otherwise. Counsel, parties, and witnesses should appear from a private location, unless otherwise ordered. Participants should take reasonable efforts to minimize background noise and maintain adequate room lighting. Use of virtual background images are at the discretion of the ALJ. Witnesses are prohibited from reading exhibits, documents, notes, text messages, telephones, or computers while testifying, unless permitted to do so by the ALJ. Parties, counsel and witnesses are prohibited from passing notes to, exchanging electronic messages with, or signaling the witness in any way while the witness is testifying.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

A Spanish language interpreter is required. OAH will provide the interpreter.

A party or participant in this case, such as a witness, requiring reasonable accommodation to participate in a mediation or hearing may contact OAH at (916) 263-0880, or send an email to OAHADA@dgs.ca.gov as soon as the need is known. The email 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 closed to the public. Special Education hearings are closed to the public unless Student requests the hearing be open to the public.

SETTLEMENT

The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately if they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall 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 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.

A handwritten signature in cursive script that reads "Elsa Jones".

Elsa H. Jones

Administrative Law Judge

Office of Administrative Hearings