

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021110217

ORDER FOLLOWING PREHEARING CONFERENCE FOR

HEARING BY VIDEOCONFERENCE

MARCH 11, 2022

On March 11, 2022, 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 David Grey appeared on behalf of Student. Attorney Meagan Kinsey appeared on behalf of Long Beach Unified School District. OAH recorded the PHC. 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 March 22, through 24, 2022, 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 eight 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.

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 described below.

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

ISSUES

1. Did Long Beach deny Student a FAPE, from November 5, 2019, through November 5, 2021, by failing to adequately assess Student's language, communication, audiology, and deaf and hard of hearing needs?
2. Did Long Beach deny Student a FAPE in the October 5, 2020 IEP, and amendments, by failing to offer an appropriate special education program in the least restrictive environment, that addressed Student's needs as a deaf and hard of hearing student, pursuant to title 20 United States Code section 1414(d)(3)(B)(iv), and Education Code sections 5600.5, 56341.1, subdivision (a)(4), and 56345, subdivision (d)?
3. Did Long Beach deny Student a FAPE, from November 5, 2019, through April 7, 2021, by failing to implement the October 7, 2019 IEP, and specifically, by failing to provide Student videos with closed captions?
4. Did Long Beach deny Student a FAPE, from April 7, 2021, through November 5, 2021, by failing to implement the October 5, 2020 IEP, and amendments, and specifically, by failing to:
 - a. have teachers repeat, rephrase, and clarify directions and instructions;
 - b. provide videos with closed captions;
 - c. pass a microphone from student to student in Student's classes;
 - d. provide deaf and hard of hearing itinerant services; and
 - e. have teachers make proper use of Student's hearing assistive technology system?

5. Did Long Beach deny Student a FAPE in the March 17, 2021 IEP, by predetermining it would not provide Student with word for word transcription, called CART?

A party must immediately file a written objection if the issues as described above do not reflect the party's understanding of the issues or do not reflect the discussion the parties and the ALJ had at the PHC. The ALJ will address any concerns or questions regarding the issues on the first day of hearing.

PROPOSED RESOLUTIONS

The resolutions requested by Student include compensatory education, reimbursement, assessments in the areas of audiology including functional hearing, auditory, oral, and deaf hard of hearing, appropriate goals, services and placement, and CART transcription for all classes.

Long Beach Unified filed its response to Student's complaint on November 15, 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. The electronic evidence system will not allow parties to upload any documents beginning three days before the start of the hearing. A party must request permission to upload additional exhibits at the hearing. The ALJ has discretion to grant or deny the request.

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. Long Beach 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 Long Beach's exhibit 1. A cover sheet with this identifying letter and number should be included with 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. Long Beach'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. OAH will issue a separate Order Setting

Procedures for Filing Exhibits Electronically that includes instructions for how to file exhibits electronically.

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. 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 will be discussed at the start of the hearing.

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 who testify 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 March 17, 2022, at 5:00 PM, to discuss scheduling witnesses and how much time each witness will take. The parties must discuss any issues pertaining to the parties, attorneys, 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 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, Long Beach must inform Student which proposed witnesses are its employees. Long Beach must also identify the witnesses on Student's list that require a subpoena. Long Beach may agree to accept service for

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

PARTICIPANT INFORMATION FORM

The parties have an ongoing obligation to ensure that OAH has current contact information for attorneys, parties, and witnesses. A party must file a Participant Information Form with OAH by 5:00 PM, at least two business days before the first day of hearing. The Participant Information Form is not served on an 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 at least five business days before hearing.

Any contact information provided must be used for the limited purpose of issuing subpoenas or for contacting witnesses to attend the hearing and cannot 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 this case, Student requested the hearing and bears the burden of proof. Student's case will be presented first, followed by Long Beach's case, unless otherwise ordered.

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 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 of 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.

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:

- the OAH recording is the only official recording;
- participants must not use Teams to record the hearing;
- the parties must turn their recording device on and off at the same time 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 party's recording may not be provided to, or played for, a witness or potential witness;
- the recording is subject to the same confidentiality as the due process hearing;
- use of the chat function in the videoconference is prohibited and will not be part of the official record; and
- participants cannot take screenshots of the videoconference, or share or publish any portion of the videoconference or audio recording.

Student and Long Beach 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.

COMPENSATORY EDUCATION OR 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

MOTION TO DISMISS

On March 8, 2022, Long Beach filed a Motion to Dismiss Issue 3 in Student's complaint, on the grounds that OAH does not have jurisdiction to decide claims based on Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act. On March 9, 2022, Student filed an opposition to Long Beach's motion.

A party has the right to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child. (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a free appropriate public education to a child; the

refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

OAH does not have jurisdiction to decide claims based on Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) or the Americans with Disabilities Act (42 U.S.C. §§ 1201, et seq.). Therefore, Issue 3 of Student's complaint is dismissed. The issues in this PHC Order have been reorganized to reflect this change.

OTHER MOTIONS

Student's attorney is currently scheduled to appear at a due process hearing in a different OAH case on March 15, through 17, 2022. If that case requires additional days of hearing, Student anticipates filing a Motion to Continue the hearing in this case.

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 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. Attorneys, 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. Attorneys, parties, and witnesses must 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. Attorneys and parties 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 for Parent. OAH will provide the interpreter. Word for word transcription, or CART services are being requested for Student to act as an observer and witness at the hearing. Student anticipates attending each day of hearing from 1:00 PM to 3:30 PM.

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 the day prior to 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