

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:
PARENTS ON BEHALF OF STUDENT,

and

LAMMERSVILLE UNIFIED SCHOOL DISTRICT,
OAH CASE NUMBER 2022010354
OAH CASE NUMBER 2022020274

ORDER FOLLOWING PREHEARING CONFERENCE FOR
HEARING BY VIDEOCONFERENCE

MARCH 1, 2022

On February 28, 2022, Administrative Law Judge Tara Doss, 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 Nicole Hodge Amey appeared on behalf of Student. Attorney David Mishook appeared on behalf of Lammersville 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 8, through 10, 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 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.

The parties must 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

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.

STUDENT'S ISSUES

1. Did Lammersville deny Student a FAPE during the 2021-2022 school year, through January 14, 2022, by failing to provide Student's educational records to Parents and Student's attorney within statutory timelines?
2. Did Lammersville deny Student a FAPE during the 2018-2019, 2019-2020, 2020-2021, and 2021-2022 school years, through January 14, 2022, by failing to:
 - a. adhere to child find obligations;
 - b. timely and appropriately assess Student in all areas of suspected disability;
 - c. conduct a health assessment;
 - d. conduct an assistive technology assessment; and
 - e. conduct any appropriate evaluations?
3. Did Lammersville deny Student a FAPE during the 2019-2020, 2020-2021, and 2021-2022 school years, through January 14, 2022, by failing to offer Student appropriate and measurable annual goals in the areas of reading, spelling, writing, math, and speech?
4. Did Lammersville deny Student a FAPE during the 2019-2020, 2020-2021, and 2021-2022 school years, through January 14, 2022, by failing to provide Parents with a clear written offer of FAPE, in IEPs dated November 6, 2019, October 20, 2020, December 9, 2020, and October 20, 2021?

5. Did Lammersville deny Student a FAPE during the 2019-2020, 2020-2021, and 2021-2022 school years, through January 14, 2022, by failing to deliver and implement services, and specifically by failing to implement Student's:
 - a. November 6, 2019 IEP as written, beginning in March 2020, due to school closures related to the COVID-19 pandemic;
 - b. October 20, 2020 IEP in the area of speech; and
 - c. October 20, 2021 IEP in its entirety?
6. Did Lammersville deny Student a FAPE during the 2019-2020, 2020-2021, and 2021-2022 school years, through January 14, 2022, and specifically, at IEP team meetings dated November 19, 2019, October 20, 2020, December 9, 2020, May 11, 2021, September 8, 2021, and October 20, 2021, when it predetermined Student's special education eligibility, supports, related services, and placement?
7. Did Lammersville deny Student a FAPE during the 2019-2020, 2020-2021, and 2021-2022 school years, through January 14, 2022, and specifically, at IEP team meetings dated November 19, 2019, October 20, 2020, December 9, 2020, May 11, 2021, September 8, 2021, and October 20, 2021, by failing to make an offer of supports, services, instruction, and placement to enable Student to make progress in light of Student's circumstances?

Issues 6 and 8 in Student's PHC statement were combined to create Issue 7 in this PHC Order. At the PHC, OAH dismissed Issue 9 in Student's complaint because OAH does not have jurisdiction to decide claims related to Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, or other related federal statutes.

A party must immediately file an objection with OAH, in writing, if the issues described in this PHC Order do not reflect the party's understanding of the issues or the discussion the parties and the ALJ had during the PHC.

STUDENT'S PROPOSED RESOLUTIONS

The resolutions requested by Student include compensatory education, reimbursement, and training for Lammersville's staff.

LAMMERSVILLE'S ISSUE

Lammersville's sole issue for hearing is:

Did Lammersville's October 20, 2021 IEP offer Student a FAPE in the least restrictive environment?

On February 25, 2022, Lammersville filed its response to Student's complaint. (*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. Lammersville 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 Lammersville'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.

Lammersville'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, 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 during

the hearing to upload additional exhibits. 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. A witness's 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 March 3, 2022, 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, Lammersville must inform Student which proposed witnesses are school district employees. Lammersville must also identify the witnesses on Student's list that require a subpoena. Lammersville 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 contact information for due process hearing participants. Any changes to the parties' information must be filed in an updated Participant Information Form, as necessary, but no later than 5:00 PM, two business days before the first day of hearing. The Participant Information Form is not served upon the opposing party. This does not change the parties' statutory obligation to timely disclose their witnesses to the other party at least five business days prior to 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 this consolidated matter, each party bears the burden to prove its own issues. Here, Student's case-in-chief will be presented first, followed by Lammersville's case-in-chief, 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 names 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 each witness's estimated testimony time.

SCOPE OF WITNESS EXAMINATION

Each witness will be called to testify only once, except for rebuttal purposes. All parties must examine witnesses 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 RECORDINGS

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 on 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 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;
8. participants cannot take screenshots of the videoconference or share or publish any portion of the videoconference or audio recording.

Both Student and Lammersville 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

Student intends to introduce all or part of a recording of an IEP team meeting. 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 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

No 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 conclusion 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 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. Attorneys, 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

Student requested the hearing 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. (Cal. Code Regs., Tit. 1, § 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 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.

During the PHC, and in writing, after the PHC, Student requested permission for Parents' advocate Cari Edwards to attend the hearing as an observer. The ALJ will address this request on the first day of hearing.

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