

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

PLEASANTON UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2022010423 NON-EXPEDITED

ORDER FOLLOWING PREHEARING CONFERENCE FOR

HEARING BY VIDEOCONFERENCE

MARCH 17, 2022

On March 14 and 15, 2022, Administrative Law Judge Robert G. Martin, 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.

Blanca Vaughan , Attorney at Law, appeared on behalf of Student. Yonit Kovnator, Attorney at Law, appeared on behalf of Pleasanton Unified School District, called Pleasanton. 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 March 22, 23, and 24, 2022, 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 four to 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 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

The issues at the due process hearing, and proposed resolutions, as alleged in the complaint and clarified by the parties and the ALJ during the PHC are:

ISSUES

1. Shall the two-year statute of limitations governing special education cases be tolled to permit Student to bring claims against Pleasanton that accrued more than two years prior to the filing of Student's complaint on January 18, 2022, based on Pleasanton's withholding and misrepresenting material information to Parent that it was required to provide, specifically:
 - a. Failing to provide Parent's and Student's rights related to Student's suspensions based on Student's behavioral issues from 2018 to the present?
 - b. Withholding from Parent the September 27, 2018 triennial assessment conducted by Livermore Valley Joint Unified School District, called Livermore?
 - c. Failing to convene a triennial individualized education program team meeting, called an IEP meeting, to review the September 27, 2018 Livermore triennial assessment results and develop a new IEP for Student?
 - d. Misrepresenting to Parent, since the September 27, 2018 Livermore triennial assessment, that Student's sole special education eligibility category was other health impairment, when, in fact, Student's primary eligibility category was emotional disturbance, with a

secondary eligibility category of OHI?

2. Did Pleasanton deny Student a free appropriate public education, called a FAPE, by failing to perform timely behavioral assessments and develop a behavior intervention plan and supports for Student despite Student's suspensions during 2018-2019 and 2019-2020 school years?
3. Did Pleasanton deny Student a FAPE by failing to provide Parent notice and reports of Student's behavioral incidents?
4. Did Pleasanton deny Student a FAPE by failing to convene IEP team meetings before suspending Student during the 2018-2019, 2019-2020, and 2020-2021 school years?
5. Did Pleasanton deny Student a FAPE from the beginning of the 2018-2019 school year to the filing of the complaint, by failing to develop appropriate measurable goals and objectives in Student's IEP for Student's behavior and academics?
6. Did Pleasanton deny Student a FAPE, by failing to perform comprehensive initial assessments of all of Student's suspected disabilities, and further assessments when additional needs should have been suspected?
7. Did Pleasanton deny Student a FAPE, by failing to provide Parent quarterly written progress reports on Student's goals and academic performance?
8. Did Pleasanton deny Student a FAPE, by failing to provide Student a clear written offer of FAPE at Student's May 31, 2018, April 27, 2020, and April 22, 2021 IEP meetings?
9. Did Pleasanton deny Student a FAPE, by failing to perform comprehensive

and appropriate triennial evaluations on September 29, 2018 and April 22, 2021?

10. Did Pleasanton deny Student a FAPE and deny Parent's procedural rights by failing to properly respond to Parent's November 5, 2021 request for an independent educational evaluation?
11. Did Pleasanton deny Student a FAPE by failing have an IEP in place for Student at beginning of the 2018-2019, 2019-2020, 2020-2021, and 2021-2022 school years
12. Did Pleasanton deny Student a FAPE by failing to convene Student's annual IEP team meeting for the 2018-2019 and 2019-2020 school years?
13. Did Pleasanton deny Student a FAPE and deny Parent's procedural rights by failing to provide Parent Student's educational records in response to Parents' requests in October, November, and December 2021, and January 2022?
14. Did Pleasanton deny Student a FAPE in accordance with Senate Bill 98 (2019-2020 Reg. Sess.), by violating the provisions of Education Code sections 43504, subdivision. (b), 43503 subdivision. (b)(4), 43509 subdivisions (f) (l) and (3), and 43509 subdivision (f)(l)(A), during the school years and extended school years of 2019- 2020 and 2020-2021, and 2021-2022 by:
 - a. Failing to provide a proper placement and in-person instruction?
 - b. Failing to address Student's regression suffered due to being assigned to distance learning?

- c. Suspending student's special education and related services during distance learning?
15. Did Pleasanton deny Student a FAPE and deny Parent's right to participate in the development of Student's IEP in Student's April 27, 2020 and April 22, 2021 IEP meetings, by predetermining that Student would be offered placement in a special day class in Livermore.

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 prehearing conference.

HEARING OF PRELIMINARY STATUTE OF LIMITATIONS ISSUE

Parents generally must file a special education due process hearing request on behalf of their child within two years of the date they knew or should have known about the alleged action that forms the basis of the complaint. (*Avila v. Spokane School District 81* (9th Cir. 2017) 852 F.3d 936, 944; (Ed. Code, § 56505, subd. (I); 20 U.S.C. §1415(f)(3)(C).) However, title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (I), establish exceptions to this statute of limitations in cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency's withholding of information from the parent that was required to be provided to the parent.

Student contends both exceptions to the statute of limitations should apply in this case to allow Student to pursue claims based on alleged actions or inaction of Pleasanton occurring more than two years before the January 18, 2022 filing of

Student's complaint. Because these claims involve different issues and witnesses than Student's claims within the Statute of limitations, it is in the interest of judicial economy to address at the outset of the hearing whether the statute of limitations bars them.

The parties will be allotted a total of three hours at the start of testimony to introduce evidence on whether the statute of limitations should be tolled in this case. By close of business Monday, March 21, 2022, the parties shall file with OAH, a proposed joint witness list with time estimates for direct and cross examination for the witnesses to be called regarding this preliminary question. After hearing evidence on this question, the ALJ will issue a ruling from the bench as to whether Student is entitled to proceed with claims that accrued more than two years prior to the filing of Student's complaint on January 18, 2022.

The parties shall be prepared to immediately proceed with the hearing as to the remaining issues following the ruling on the record. The ALJ's analysis will be contained in the final decision following hearing.

PROPOSED RESOLUTIONS

The resolutions requested by Student include an order finding Student the prevailing party on all issues, and directing Pleasanton to fund independent educational evaluations in the areas of functional behavior, speech and language, occupational therapy, assistive technology, and educationally related mental health services. Student also requests an order directing Pleasanton to fund a three-year therapeutic program or residential treatment program, a summer program to address Student's behavioral and social-emotional deficits, an after-school social skills program, a reading intervention program, and to provide additional funds to be used to obtain services for Student in the areas of occupational therapy, speech, behavior, and social-emotional functioning,

plus transportation. Student also requests Pleasanton be ordered to reimburse Parent for independent evaluations or IEP attendance by doctors Greenberg, Doyle, and Adams, for the costs of Student's Quest therapeutic program, Spett counseling, Vision Mountain Wilderness program, and the New Vision Wilderness and Meridell residential programs, and for transportation and all other out-of-pocket expenses associated with Student's special education and loss of education for the school years of 2018-2019, 2019-2020, 2020-2021, and 2021-2022.

Pleasanton filed its response to Student's complaint on March 14, 2022. (*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 constitutes that party's timely exchange of evidence on 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. Pleasanton must use the letter D, for district, before the number to identify Pleasanton's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Pleasanton'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.

Pleasanton'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 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 that 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.

Pleasanton has agreed to make current employees available as witnesses without need for subpoena. By close of business the day following service of Student's final witness list, Pleasanton will inform Student if any witness identified by Student as a Pleasanton employee is no longer employed by Pleasanton, and will require a subpoena to appear as a witness. Pleasanton may agree to accept service for witnesses under its control, or provide Student with the witness' most recent contact information.

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 telephonically on March 17, 2022 at 12:00 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.

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) at least five business days prior to 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 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 any other person(s).

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, followed by Pleasanton's, 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, which party(s)

are calling the witness to testify, and include dates and time estimates of each witness' expected testimony. In the event an agreement cannot be reached, each party shall prepare a separate written list. Pleasanton 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 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 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

Student requested 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 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 parties' recording may not be given, provided or played to a witness, or potential witness; and
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 shall not be part of the official record;
8. participants shall not take screenshots of the videoconference or share or publish any portion of the videoconference or audio recording.

Student's request is granted. Either party may make an audio recording of the hearing, subject to the above 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

Neither party proposes to introduce all or part of a recording of an individualized education program 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 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

On March 15, 2022, the parties filed a joint motion to schedule mediation and continue the hearing of this matter. That motion will be addressed in a separate Order. 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

Neither party requested an 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 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 shall inform OAH in writing immediately if they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at <https://www.applications.dgs.ca.gov/oah/oahsftweb>.

If a full and final written settlement agreement is reached after 4:00 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 prehearing conference. 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 black ink, appearing to read "Robert G. Martin". The signature is written in a cursive, flowing style with a prominent initial "R" and a long, sweeping underline.

Robert G. Martin

Administrative Law Judge

Office of Administrative Hearings