

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:
PARENT ON BEHALF OF STUDENT

AND

PALOS VERDES PENINSULA UNIFIED SCHOOL DISTRICT,
OAH CASE NUMBER 2023040044
OAH CASE NUMBER 2023050453

ORDER FOLLOWING PREHEARING CONFERENCE FOR
HEARING BY VIDEOCONFERENCE

AUGUST 04, 2023

On August 4, 2023 Administrative Law Judge Clifford H. Woosley, 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.

N. Jane DuBovy, Attorney at Law, appeared on behalf of Student. Sundee M. Johnson, Attorney at Law, appeared on behalf of Palos Verdes Peninsula 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 August 15, 16, and 17, 2023, 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 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).) OAH will conduct the due process hearing by videoconference using the Zoom application. Unless otherwise ordered, participants are required to appear by videoconference using computer or device with video capability and Zoom.

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

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

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:

STUDENT'S ISSUES

1. During the 2018-2019, 2019-2020, 2020-2021, 2021-2022 and the 2022-2023 regular school years, until November 2022, did Palos Verdes Peninsula deny Student a FAPE by failing to:
 - a. Meet its child find obligations to locate, identify, and evaluate Student?
 - b. Make Student eligible for special education?
 - c. Have an IEP in effect by the start of each school year, which infringed upon Parents' right to meaningful participate and caused loss of educational benefits?
 - d. Provide prior written notice, in Parents' native language, regarding Palos Verdes Peninsula's:
 - i. Proposed actions at any of the times it proposed to conduct assessments of Student;
 - ii. Refusal to initiate related services such as therapy/counseling under an IEP;
 - iii. Proposal to change Student's placement from the regular, comprehensive high school setting to the Palos Verdes Peninsula's alternative/continuation school?

- e. Provide notice of procedural safeguards to Parents, in their native language, at any time that it proposed assessments, initiation of eligibility by the IEP process, or changing placement, and when it refused to initiate related services as sought by Parents?
 - f. Consider Parents' concerns in determinations related to eligibility, assessments, and placement;
 - g. Promptly conduct a full and comprehensive initial special education evaluation of Student despite known deficits arising from Student's disabilities, while misleading Parents with regard to the assessment process?
 - h. Make a substantive FAPE offer which provided a special education program that met Student's unique needs and enabled him to make meaningful progress, including appropriate goals, specialized academic instruction, and related services, and placement to address Student's social emotional needs?
2. Did Palos Verdes Peninsula deny Student a FAPE, when it conducted its November 2022 initial assessments of Student, by:
- a. Failing to assess Student in all areas of suspected disability?
 - b. Not adequately and comprehensively assessing Student, in the areas of psychoeducational, academics, educationally related intensive counseling services, and transition, such that the assessments do not meet statutory and regulatory standards and are not legally appropriate?
3. From November 2022 through the end of the 2022-2023 regular school year, did Palos Verdes Peninsula deny Student a FAPE by failing to:

- a. Convene an IEP meeting for lack of anticipated progress after the November 2022 initial IEP, and failing to review and revise Student's IEP in subsequent amendment IEP meetings based on lack of progress, throughout the school year?
- b. Develop the November 2022, December 2022, January 2023, and February 2023 IEP's in a manner that:
 - i. Included all required content and sufficient detail to provide Parents with sufficient information, including an adequate statement of present levels of performance, goals, a full description of related services, and a clear and cohesive offer of placement?
 - ii. Considered Parents' concerns in the development of the IEP, regarding the need to address Student's social emotional functioning and, as of December 2022, Student's need for residential placement?
 - iii. Considered the private reports and information from private providers?
 - iv. Included Parents as members of the IEP team in making decisions regarding eligibility, placement, and the provisions of FAPE, without having predetermined its offers?
 - v. Provided legally complaint prior written notices, either within the IEP document or with a subsequent letter, of significant proposed and refused actions, related to Student's placement, actions in response to Student's hospitalizations, Parent concerns, and related services.

- vi. Included informing Parents of their rights, in their native language, by providing notice of procedural safeguards and accurate information during the IEP process, instead of misleading Parents as to their consent rights?

STUDENT'S PROPOSED RESOLUTIONS

The resolutions requested by Student includes:

1. Funded independent educational evaluations; an order preventing the issuance of a diploma to Student; compensatory education and reimbursement to Parents to remedy the failure to provide FAPE during the time period in question; compensatory education.
2. An order ensuring a prospective FAPE, with placement in a residential treatment center and appropriate related services.
3. Revision of the individualized transition plan, to include robust transition services in all areas.

Palos Verdes Peninsula filed its response to Student's complaint on April 10 2023. (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

PALOS VERDES PENINSULA'S ISSUES

1. Did Palos Verdes Peninsula's November 18, 2022, Academic Summary Report, Health Assessment, and Initial Assessment Report appropriately assess Student, in compliance with legal requirements, and in all areas of suspected disability, such that Palos Verdes Peninsula is not required to fund independent educational evaluations in the areas of

psychoeducation, educationally related intensive counseling services, and transition?

PALOS VERDES PENINSULA'S PROPOSED RESOLUTIONS

The resolution requested by Palos Verdes Peninsula is for a determination that its assessments are legally appropriate and that it is not required to fund the independent educational evaluations requested by Student.

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.

EXHIBITS

The parties shall serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). The parties shall upload their exhibits electronically according to the Order Setting Procedures for Filing Exhibits Electronically. Timely uploading electronic hearing exhibits five business days before the first day of hearing constitutes that party's timely exchange of evidence 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. Palos Verdes Peninsula must use the letter D before the number to identify Palos Verdes Peninsula's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Palos Verdes Peninsula'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.

Palos Verdes Peninsula'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 who have not previously used the Zoom application, may find informative instructions on at by visiting, Getting Started with Zoom at <https://support.zoom.us/hc/en-us/categories/200101697>.

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.

The ALJ has discretion to limit the number of witnesses and the time allowed for 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 August 9, 2023, 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, Palos Verdes Peninsula shall inform Student which proposed witnesses are district employees. Palos Verdes Peninsula shall also identify the witnesses on Student's list that require a subpoena. Palos Verdes Peninsula may agree to accept service for witnesses under Palos Verdes Peninsula's control or provide Student with the witness' 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) 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 a witness to attend the hearing. Any contact information shall 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 case Student requested the hearing and bears the burden of proof. Student's case-in-chief shall be presented first, followed by Palos Verdes Peninsula, unless otherwise ordered.

PRESENTATION OF EVIDENCE REGARDING STATUTE OF LIMITATIONS

Student bears the burden of proving by a preponderance of the evidence that Student may pursue the claims which predate the two-year statute of limitations. Therefore, on the first day of hearing, Student and Palos Verdes Peninsula shall call any and all witnesses, and present their documentary evidence, regarding any delay in the running of the statute of limitations and any application of statutory exceptions to the statute of limitations in this matter. Student will present Student's evidence first, followed by Palos Verdes Peninsula.

The parties shall call their witnesses on the running of, and exceptions to, the statute of limitations first, regardless of whether the parties will again call those witnesses later in the hearing on other issues. The parties are to present evidence as to the statute of limitations, not child find and the provision of FAPE. After both parties have presented their evidence on this issue, the ALJ will take a break in the hearing and decide whether Student will be permitted to go forward on issues predating April 3, 2021, or whether those issues are barred by the statute of limitations.

The statute of limitations for special education due process claims in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) The statute of limitations operates to bar claims based upon facts outside of the two-year period. (*J.W. v. Fresno*, *supra*, 626 F.3d 431, 444-445; *Breanne C. v. Southern York County School Dist.* (M.D. Pa. 2009) 665 F.Supp.2d 504, 511-512; *E.J. v. San Carlos Elementary School Dist.* (N.D.Cal. 2011) 803 F.Supp.2d 1024, 1026, fn. 1.) Title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (l), establish two exceptions to the 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 by the local educational agency's withholding of information that was required to be provided to the parent.

A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.D. v. Southington Board of Ed.* (2d Cir. 2003) 334 F.3d 217, 221; *M.M. & E.M. v. Lafayette School Dist.* (N.D.Cal., Feb. 7, 2012 Nos. CV 09-4624, 10-04223 SI) 2012 WL 398773, ** 17 - 19.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a

party learns that they have a legal claim. (See *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039; see also *M.M. V. Lafayette School District* (9th Cir. 2014) 767 F.3d 842, 858-59.)

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. Palos Verdes Peninsula 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 a witness on all issues when the witness is first called to testify. 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

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. 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;
3. operation of the party's recording mechanism will not be allowed to delay the hearing;
4. a party's recording may not be given, provided or played to a witness, or potential witness;
5. the recording is subject to the same confidentiality as the due process hearing; and

6. participants shall not take screenshots of the videoconference nor share or publish any portion of the videoconference or audio recording.

Student's request is granted, subject to these conditions. If either party wants to record the hearing, the request must be made before the hearing.

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 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

No 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. Participants 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 Japanese 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 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>.

The parties are unaware of any hearing participant that requires reasonable accommodations.

HEARING OPEN TO THE PUBLIC

The hearing is open to the public. Special education hearings are closed to the public unless a student requests the hearing to 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.

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.

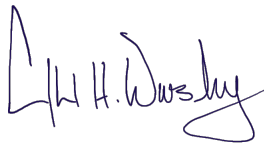
FAILURE TO COMPLY

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 blue ink, appearing to read "Clifford H. Woosley". The signature is stylized with a large initial "C" and "W".

Clifford H. Woosley

Administrative Law Judge

Office of Administrative Hearings