

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENTS ON BEHALF OF STUDENT,

v.

HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2024030579

ORDER FOLLOWING PREHEARING CONFERENCE FOR
HEARING BY VIDEOCONFERENCE DENYING MOTION TO
STRIKE, DENYING MOTION TO DISMISS, AND DEFERRING
RULING ON REQUEST FOR OFFICIAL NOTICE

JULY 5, 2024

On June 28, 2024, Administrative Law Judge Ted Mann, 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.

Student's Mother, called Parent, appeared on behalf of Student. Attorney Melissa Hatch appeared on behalf of Huntington Beach Union High School District, called Huntington Beach. The PHC was recorded.

Administrative Law Judge Mann was unable to issue this Order because he was unexpectedly unavailable. Administrative Law Judge Ashok Pathi reviewed the recording of the June 28, 2024, PHC and issues the following order:

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on July 9, 10, and 11, 2024 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 three 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

The ALJ has clarified and reorganized the statement of some issues as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made. These will be the issues considered at hearing. A party believing that an issue has been misstated or improperly omitted shall promptly file a notice in writing, prior to the first day of hearing, stating its concern and referring to supporting portions of the complaint. No motion to amend the issues may be made for the first time at the hearing.

A free appropriate public education is called a FAPE. 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:

ISSUES

1. Did Huntington Beach Union High School District have a duty to assess Student in all areas of need, including Speech and Language, Occupational Therapy, Vision Therapy, Assistive Technology, Psychology, and/or Educationally Related Mental Health from May 18, 2022, through the end of the 2021-2022 school year?

2. Did Huntington Beach Union High School District have a duty to assess Student in all areas of need, including Speech and Language, Occupational Therapy, Vision Therapy, Assistive Technology, Psychology and/or Educationally Related Mental Health during the 2022-2023 school year?
3. Did Huntington Beach Union High School District have a duty to assess Student in all areas of need, including Speech and Language, Occupational Therapy, Vision Therapy, Assistive Technology, Psychology and/or Educationally Related Mental Health from the beginning of the 2023-2024 school year through March 18, 2024?
4. Did Huntington Beach Union High School District's 2023 triennial evaluation comply with all legal requirements to appropriately assess Student in all areas related to his suspected disabilities?
5. Did Huntington Beach Union High School District fail to offer Student a FAPE through Student's relevant IEPs from May 18, 2022, through the end of the 2021-2022 school year?
6. Did Huntington Beach Union High School District fail to offer Student a FAPE through Student's relevant IEPs during the 2022-2023 school year?
7. Did Huntington Beach Union High School District fail to offer Student a FAPE through Student's relevant IEPs from the beginning of the 2023-2024 school year through March 18, 2024?

PROPOSED RESOLUTIONS

The resolutions requested by Student include compensatory education, reimbursement for educational services provided by Parent, modifications to Student's IEP, and independent educational evaluations.

Huntington Beach filed its response to Student's complaint on March 26, 2024. (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

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). If further assistance is needed, please contact OAH at OAHSEOps@dgs.ca.gov.

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. Huntington Beach must use the letter D before the number to identify Huntington Beach's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Huntington Beach'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 expected to testify as an expert.

Huntington Beach's exhibits must include a color copy of the school calendar for each school year in question.

Electronic copies of exhibits shall be uploaded to Case Center 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 upload 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.

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 Wednesday, July 3, 2024, by 5:00 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, electronically viewing exhibits during the hearing, and 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 the authenticity and admissibility of documents to shorten the length of time needed for the hearing.

As part of the meet and confer process, Huntington Beach shall inform Student which proposed witnesses are District employees. Huntington Beach shall also identify the witnesses on Student's list that require a subpoena. Huntington Beach may agree to accept service for a witness under Huntington Beach's 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 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 Huntington Beach, unless otherwise ordered.

WITNESS SCHEDULE

The parties must provide a joint proposed witness schedule to the ALJ on the first day of hearing. The schedule should include the first and last name of the witness, the witness' title, 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 shall prepare a separate written schedule. 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 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 file a motion requesting permission to do so before the hearing. Any motion filed after the prehearing conference must be accompanied by a declaration stating why the motion was not filed on time as directed in the scheduling order.

ELECTRONIC RECORDINGS

AUDIO RECORDING

Both parties requested permission to make an audio recording of the hearing for their personal note-taking needs. Permission to make an audio recording is granted, subject to the following conditions:

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.

VIDEO RECORDING

No party, witness or anyone else may videorecord 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

HUNTINGTON BEACH'S MOTION TO STRIKE

On June 25, 2024, Huntington Beach sought to strike Student's prehearing conference statement. Huntington Beach asserted that Student's prehearing conference statement was inconsistent with Student's due process hearing request and sought to add new issues and proposed resolutions.

There are no provisions governing a motion to strike in a special education hearing. Therefore, OAH looks to the California Code of Civil Procedure for guidance. Section 436 authorizes a court to strike "any irrelevant, false, or improper material inserted in any pleading . . . or any pleading not drawn or filed in conformity with the laws of this state, a court rule or an order of the court."

The parties were ordered to file prehearing conference statements with OAH prior to the PHC. Student has done so here. As such, there is nothing improper with the pleading on its face. Further, and in light of Parent being self-represented and the relatively informal nature of the due process proceedings authorized under special education law, Huntington Beach's motion to strike is not warranted. Any concerns regarding scope of the issues were addressed at the PHC and can be further addressed on the first day of the due process hearing, as ordered above.

Huntington Beach also objected to the change in Student's proposed resolutions between the initial complaint and Student's prehearing conference statement. Administrative law judges are not bound by a party's requested resolutions, as

requested in the complaint or in the prehearing conference statement. Therefore, any change in Student's requested resolutions has not legal effect. As such, Huntington Beach's motion to strike Student's prehearing conference statement is denied.

HUNTINGTON BEACH'S MOTION TO DISMISS

On June 25, 2024, Huntington Beach moved to partially dismiss Student's complaint on the ground that Huntington Beach did not become Student's responsible local educational agency until the start of the 2022-2023 school year in August 2022.

Student partially opposed the motion on June 27, 2024. Student agreed to withdraw claims prior to March 18, 2022, which was the date of Student's IEP team meeting to transition him from the elementary school district to Huntington Beach. During the PHC, Parent corrected the date of that IEP team meeting to May 18, 2022, and adjusted her opposition to Huntington Beach's motion to dismiss accordingly.

To the extent that Student withdrew issues beginning before May 18, 2022, Huntington Beach's motion to dismiss is denied as moot.

Although OAH will grant motions to dismiss allegations that are facially outside of OAH's jurisdiction, special education law does not provide for a summary judgment procedure, which would require a ruling on the merits of the complaint, prior to an evidentiary hearing. Huntington Beach's motion to dismiss would require OAH to determine whether Huntington Beach was the responsible local education agency during the May 18, 2022, IEP team meeting without the opportunity for a full hearing on that issue. To the extent that Huntington Beach seeks to dismiss issues between May 18, 2022, and the beginning of the 2022-2023 school year, the motion is denied. Nothing about this Order prevents Huntington Beach from raising any defenses during the due process hearing.

HUNTINGTON BEACH'S REQUEST FOR OFFICIAL NOTICE

On June 25, 2024, Huntington Beach requested that OAH take judicial notice of an Investigation Report from the California Department of Education, dated November 7, 2022.

Official notice is the administrative law counterpart to judicial notice in civil litigation. (Official Notice, The Rutter Group, California Practice Guide: Administrative Law 9:160.) In reaching a decision in an administrative matter, official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. (Gov't. Code § 11515.) An administrative law judge may take official notice of material in the record of an administrative agency adjudication. (*Hogen v. Valley Hospital* (1983) 147 Cal. App. 3d, 119, 125; Evid. Code § 452(c).) Official notice may also be taken of facts and propositions that are not reasonably subject to dispute and which are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code § 452(h).)

"Although the existence of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable." (*J.W. ex rel. J.E.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 440; citing *Unruh-Haxton v. Regents of University of California*, (2008) 162 Cal.App.4th 343, 364, 76 Cal.Rptr.3d 146.)

The undersigned defers ruling on the motion for official notice. Huntington Beach may raise this request again with the administrative law judge presiding over the due process hearing.

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 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 PARTICIPANTS 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. Participants 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. The parties, their representative 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 accommodation or a language 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/Request-Reasonable-Accommodations-for-OAH-Legal-Proceedings>.

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.

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 by visiting OAH Secure e-file 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.

Ashok Pathi

Ashok Pathi

Administrative Law Judge

Office of Administrative Hearings