BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT

v.

VENTURA UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2022020094

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE, ORDER GRANTING MOTION FOR JUDICIAL NOTICE, ORDER DENYING MOTION FOR MEDIATION AND CONTINUANCE, AND ORDER DENYING MOTION TO DISMISS

JUNE 13, 2022

On June 13, 2022, Administrative Law Judge Chris Butchko, 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.

Phillip VanAllsburg, Attorney at Law, appeared on behalf of Student. Melissa Hatch and Beatrice Hoffman, Attorneys at Law, appeared on behalf of Ventura 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 June 21, 2022, through June 23, 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 may take more than 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 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. Did Ventura deny Student a free appropriate public education by failing to offer Student appropriate goals, modifications, and services to meet his needs in the Individualized Education Plan, known as an IEP, created at the March 8, 2021 team meeting?
2. Did Ventura's failure to expunge private, misleading, and/or inaccurate information from Student's education file deny him a free appropriate public education?

PROPOSED RESOLUTIONS

As remedy, Student seeks compensatory educational services.

OAH has not received a copy of Ventura's response to Student's complaint. Ventura shall file its response with OAH within three business days from the date of this PHC. (*M.C. v. Antelope Valley Union High 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 of 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. Ventura 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 Ventura'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.

Ventura'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 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.

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 no later than 5:00 PM on Thursday, June 16, 2022, 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, Ventura shall inform Student which proposed witnesses are district employees. Ventura shall also identify the witnesses on Student's list that require a subpoena. Ventura may agree to accept service for witnesses under its 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 witnesses for purposes of attending the hearing and 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 Ventura, 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 parties 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. Ventura 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. No party sought permission to have a witness appear by audio only.

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. 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 to audio-record the hearing is granted, subject to these conditions. Ventura may audio-record the hearing on the same terms.

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

No party proposes at this time 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 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

VENTURA'S REQUEST FOR JUDICIAL NOTICE

On June 8, 2022, Ventura moved to have the ALJ take judicial notice of an OAH decision by ALJ Lehrman in a previously-decided case between the parties. In that action, Judge Lehrman decided that Ventura properly exited Student from special education services following an IEP team meeting on October 21, 2021. The request for judicial notice was not opposed by Student. Judicial notice may be taken of facts not reasonably subject to dispute which are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code, § 452 (h).) ALJ decisions issued by OAH satisfy that requirement. Accordingly, judicial notice will be taken of ALJ Lehrman's April 2, 2022 decision in OAH Case Number 2021120575. The request for judicial notice is granted.

STUDENT'S MOTION FOR MEDIATION AND CONTINUANCE

On June 9, 2022, Student filed a motion seeking to have Ventura compelled to attend a mediation and for a continuance of the hearing dates. Student asserts that he agreed to waive the resolution session on the condition that the parties mediate the matter. Ventura agreed to do so, and a mediation was scheduled for April 25, 2022. Student cancelled the mediation on April 21, 2022, due to Parent's work conflict. At that

time, Student stated that he would work with Ventura to reschedule, but nothing was done until June 7, 2022, when Student contacted Ventura to propose new dates for the mediation and hearing. At that time, Ventura was unwilling to mediate or agree to continue the hearing dates.

Student states that Ventura should be made to mediate because that was a condition of the waiver of the resolution session. However, Ventura did agree to mediate and a mediation was scheduled. Once Student cancelled that mediation, Ventura was released from any further obligation to mediate. After cancelling the mediation, Student took no action until over a month later, when he contacted Ventura on the eve of the motion cut-off before the prehearing conference. Student's lack of diligence in rescheduling the mediation undercuts his position that mediation is important to the resolution of this matter. In addition, ordering Ventura to attend a mediation in this matter would be an empty act, as it has said it is unwilling to mediate and would have the right to exit the mediation immediately after it was convened. Accordingly, the request for mediation and continuance is denied.

VENTURA'S MOTION TO DISMISS

Ventura moved on June 8, 2022, to dismiss Student's action on the grounds that ALJ Lehrman's decision in the previous matter rendered Student's claims moot and barred further adjudication of facts involving the parties under the doctrines of collateral estoppel and res judicata. Ventura notes that Judge Lehrman held a five-day hearing on an action filed on December 17, 2021, by Ventura to affirm the decision made by the IEP team at the October 21, 2021 meeting to exit Student from special education because he was no longer eligible for services. The April 4, 2022 decision found that the team's decision was supported by assessments in all areas of need and that Student no longer qualified for special education under any eligibility category.

Before that hearing was held, and well before the decision was issued, Student filed this action on February 1, 2022. Here, Student asserts that Ventura's offer of programs and services made at the March 8, 2021 IEP team meeting did not constitute a free appropriate public education and that Student's educational file contained private, inaccurate or misleading information. Judge Lehrman's decision contains no discussion of those issues and is concerned with a time period months after that at issue here. A decision that a student was not eligible for special education services in October of 2021 does not establish anything about his need for such services in March of that year or the proper contents of his educational records. None of the doctrines cited by Ventura dictate a particular resolution to Student's claims here. District's motion to dismiss is denied.

The doctrine of collateral estoppel "applies to a question, issue, or fact when four conditions are met: (1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Oyeniran v. Holder* (9th Cir. 2012) 672 F.3d 800, 806 (citing *Montana v. United States*, (1979) 440 U.S. 147, 153-54). "Once an issue is actually litigated, the court's determination is conclusive in subsequent suits based on different causes of action." *Islam v. U.S. Dep't of Homeland Sec*. (N.D. Cal. 2015) 136 F. Supp. 3d 1088, 1091. Application of collateral estoppel enforces the axiomatic principle that "a losing litigant deserves no rematch after a defeat fairly suffered[ ]... on an issue identical in substance to the one he subsequently seeks to raise." *Astoria Fed. Sav. & Loan Ass'n v. Solimino* (1991) 501 U.S. 104, 107. OAH decisions are final determinations with potential preclusive effect. *Loof v. Upland* (E.D. CA 2021) 2021 WL 4974797.

The April 4, 2022 decision does, however, establish significant facts in this matter. It has been established between the parties and cannot now be challenged that Student was no longer eligible for special education services as of October 21, 2021. That date is established as the cut-off date for any claim for compensatory education services. Any contention that necessarily challenges or attempts to revisit a finding in Judge Lehrman's decision may not be raised in this action. Outside of those limitations, Student's action is free to proceed.

NO FURTHER MOTIONS

No further 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

No language interpretation services are required.

A party or participant in this case, such as a witness, requiring reasonable accommodation to participate in the 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.

Chris Butchko

Chris Butchko
Administrative Law Judge
Office of Administrative Hearings