BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

KENTFIELD SCHOOL DISTRICT.

OAH CASE NUMBER 2024070418

ORDER GRANTING REQUEST FOR CLARIFICATION OF PREHEARING CONFERENCE ORDER ON REMAND, GRANTING IN PART REQUEST FOR RECONSIDERATION, VACATING DATE FOR SUBMISSION OF CLOSING BRIEFS, CONTINUING MATTER, AND SETTING HEARING

AUGUST 15, 2024

On July 28, 2024, the undersigned Administrative Law Judge issued an Order Following Prehearing Conference on Remand, Vacating Hearing Dates, Continuing Matter for Closing Briefs, and Granting In Part District's Motion to Supplement the Administrative Record. The July 28, 2024, order granted, in part, Kentfield School District's motion to supplement the administrative record, allowing Kentfield to

supplement the record with four of its eight proposed additional exhibits. The order vacated the hearing dates, and continued the matter to August 15, 2024, for the submission of written closing briefs.

The Order directed the parties to use Case Center to manage the administrative record in this case. The Order stated the parties had been given access in Case Center to two cases, the original proceeding, OAH Case number 2022010393, and the proceeding on remand, OAH Case number 2024070418. The parties were ordered to upload their supplemental exhibits on remand to OAH Case number 2024070418 in Case Center.

On August 5, 2024, the parties filed a Joint Request for Clarification of Order Following Prehearing Conference, seeking clarification regarding "the identification of documents that make up the record in this proceeding." The parties requested clarification of how to handle documents in the administrative record on appeal to the district court that were not addressed in the July 28, 2024, Order, specifically, the following documents from OAH Case number 2022010393:

- Decision dated July 18, 2022.
- Hearing Transcript.
- All pleadings, motions, and filings in the case through the date of the Decision.

On August 7, 2024, Student filed an Objection and Motion to Reconsider the July 28, 2024, Order. Student moved OAH to reconsider and/or clarify the following aspects of the Order:

- The determination that OAH had subject matter jurisdiction to consider Kentfield's motion to supplement the record.

- The ruling that no hearing would be held to consider rebuttal testimony and documents from Student to address the supplemental Kentfield documents.
- Failure to apply a "trial de novo standard" requiring OAH to be "careful not to allow [supplemental] evidence to change the character of its hearing from one of review to a trial de novo."
- The direction to the parties to include in their closing briefs an analysis of the deference, if any, that should apply to Kentfield's decision to use the pattern of strength and weaknesses methodology as part of its evaluation of Student's eligibility under the category of specific learning disability, and the weight that should be given by the ALJ on remand to any subsequent eligibility determinations made using a different methodology, such as the severe discrepancy method.

RECONSIDERATION OF PREHEARING CONFERENCE ORDER

The Office of Administrative Hearings will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time, generally within ten days. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances, or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.)

Student offered no new or different facts, circumstances, or law justifying reconsideration of the July 28, 2024, order's determination that OAH had subject matter jurisdiction to consider Kentfield's motion to supplement the record. OAH clearly has the ability in at least some cases on remand to supplement the previous administrative

record. In *E.M. v. Pajaro Valley Unified School Dist*. (9th Cir. 2011) 652 F.3d 999, the Ninth Circuit criticized the district court for failing to consider an assessment the student had submitted to OAH while the matter was on remand to OAH. ("E.M. asserts that the 2008 assessment was submitted to the OAH after the district court remanded his case. PVUSD does not dispute this assertion. It is unclear to us why the assessment does not appear in the district court's record. The district court should consider the assessment on [remand from the Ninth Circuit]." (*Id*. at p. 1006).) Student has not cited any authority for the proposition that a district court can confer subject matter jurisdiction on OAH that OAH otherwise lacks, or that it must explicitly direct OAH to consider in a matter on remand additional evidence that was not part of the record in the underlying proceeding in order for OAH to do so. The district court's July 8, 2024, Order on Kentfield's Motion for Clarification stated Student or Kentfield would need to seek leave from the ALJ to further supplement the administrative record, and that the court took no position on whether further supplementation of the record would be warranted. Student's motion to reconsider this question is denied.

Student moved for reconsideration of the July 28, 2024, order's vacating the hearing date on remand based on the agreement of the parties at the prehearing conference that no hearing was necessary to evaluate Student's and Kentfield's supplemental evidence. Student's grounds for reconsideration was that Student's attorney expressed discomfort at the July 19, 2024 PHC with taking a definitive position on whether rebuttal testimony/evidence was necessary for Kentfield's proposed supplemental evidence, later that day filed an opposition to Kentfield's motion to supplement the record that reserved Student's right to demand live testimony depending on OAH's ruling on Kentfield's motion, and now is asserting a right to submit rebuttal testimony/evidence with respect to Kentfield's supplemental evidence.

The ALJ has reviewed the audio record of the July 19, 2024, PHC and confirmed that the July 28, 2024, order accurately reflected the agreement of Student's attorney at the PHC that no hearing would be necessary, regardless of the outcome of Kentfield's motion, even if all eight of Kentfield's proposed exhibits were added to the record. This agreement followed an extensive discussion among the ALJ and parties of whether a hearing should be held to give context to any of Kentfield's proposed supplemental exhibits if they were added to the record to be considered by the ALJ. The purpose of the discussion at the PHC was to arrive at the procedure to follow on remand to evaluate Student's supplemental documents, and documents presented by Kentfield, if Kentfield were allowed to supplement the administrative record. No determination was made at the time of the PHC whether Kentfield would be allowed to supplement the administrative record, as Student's opposition to Kentfield's motion to supplement was not due to be filed until close of business.

The decision not to hold a hearing regarding such evidence was based largely on the parties' preference to not have a hearing, and their agreement that no hearing was necessary. In its July 8, 2024, Order, the district court stated that in considering Student's supplemental documents on remand, the ALJ should "decide in the first instance what weight to give the reports, if any." The parties indicated they were comfortable with the ALJ weighing Student's supplemental documents, and Kentfield's proposed supplemental documents, without hearing testimony or admitting further rebuttal evidence. However, based on Student's current assertion that Student would be denied due process if not provided an opportunity to offer rebuttal testimony and evidence, the ALJ grants reconsideration of the question of whether to hold a hearing in this matter to allow evidence and testimony with respect to Student's and Kentfield's supplemental evidence.

The documents admitted to supplement the administrative record are few in number and narrow in scope. They consist of a November 11, 2022 neuro-educational report for Student prepared by Student's expert James Bylund, a contemporaneous November 3, 2022 psychoeducational assessment report for Student prepared by Tamalpais Union High School District, a report on Student's performance in high school in the fall of 2022, prepared by certified education specialist Sean McCormick, who worked with Student, and the results of standardized testing of Student in the Spring of 2022 through the statewide 2021-2022 California Assessment of Performance and Progress ("CAASPP"). A rehearing of the evidence previously presented in OAH Case number 2022010393 is not required to assist the ALJ in deciding what weight to give these documents. Instead, a limited scope hearing will be held to allow the parties the opportunity to examine witnesses and introduce relevant supporting and rebuttal testimony and documents concerning the supplemental documents.

The parties will be allowed to call witnesses to provide relevant testimony regarding all of the documents admitted to supplement the administrative record. In examining witnesses, the parties will be allowed to use the initial administrative record and the supplemental documents previously admitted by the district court and OAH. The parties may also seek to introduce additional documents and testimony regarding Student's performance through the fall 2022 time period considered in the Bylund, McCormick, and Tamalpais reports, and ending December 31, 2022. If parties wish to introduce such evidence, they must upload it timely to Case Center. Any objections will be heard at the time the party wishes to introduce the evidence at hearing.

Student's motion to reconsider the direction given to the parties regarding issues to address in their closing briefs is mooted by the vacating of the date for submission of

closing briefs. If applicable, the content of closing briefs will be discussed on the record at hearing.

CLARIFICATION OF HANDLING OF ADMINISTRATIVE RECORD FOR HEARING ON REMAND

The parties' request for clarification is granted. To handle in this proceeding on remand the documents identified by the parties as being part of the administrative record on appeal to the district court from OAH's Decision in OAH Case number 2022010393, but not addressed in the July 28, 2024, Order:

- OAH will take official notice of the Decision dated July 18, 2022. Student is ordered to upload the decision to Case Center.
- OAH will take official notice of any pleading, motion or filing in the case through the date of the Decision. Each party is ordered to upload to Case Center any pleading, motion, or filing that it wants OAH to consider as evidence in this proceeding on remand.
- The parties are ordered to upload to Case Center the transcript of the administrative hearing.

ORDER

DATE FOR CLOSING BRIEFS VACATED

The August 15, 2024, deadline for submitting closing briefs is vacated.

MATTER CONTINUED FOR HEARING

The matter is continued to September 10, 11, and 12 for a hearing regarding the documents admitted to supplement the administrative record from OAH Case number

2022010393. The hearing will continue day to day thereafter 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. If needed, 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

EXHIBITS

In examining witnesses, the parties will be allowed to use the initial administrative record and the supplemental documents previously admitted by the district court and OAH. The parties may also seek to introduce additional documents and testimony regarding Student's performance through the fall 2022 time period considered in the Bylund, McCormick, and Tamalpais reports, and ending December 31, 2022. If parties wish to introduce such documents, they must upload them timely to Case Center. Any

objections to documents or testimony will be heard at the time the party wishes to introduce the evidence at hearing.

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.

OAH will take official notice of the Decision dated July 18, 2022, in OAH Case number 2022010393. Student is ordered to upload the decision to Case Center. OAH will also take official notice of any pleading, motion and filing in the case through the date of the Decision. Each party is ordered to upload to Case Center any pleading, motion, or filing that it wants OAH to consider as evidence in this proceeding on remand. The parties are ordered to upload to Case Center the transcript of the administrative hearing in OAH Case number 2022010393.

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. For evidence other than the Bylund and McCormick reports already uploaded into Case Center as Student's exhibits S-1 and S-2, Student must use the letters SR, for Student Remand, before the number to identify Student's exhibits. Kentfield must use the letters DR, for District Remand, before the number to identify Kentfield's exhibits. For example, SR-3 means Student's remand exhibit 3 and DR-3 means Kentfield's remand exhibit 3. 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.

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 video.

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.

Kentfield is ordered to make its current employees available as witnesses without need for subpoena. Kentfield is ordered to inform Student by the close of business the day following the parties' exchange of final witness lists if any witness identified by Student as a Kentfield employee is not currently employed by Kentfield and must be

subpoenaed to appear at the hearing. Kentfield may either agree to accept service of a subpoena for such witnesses 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 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 September 6, 2024, at 5:00 PM to discuss scheduling witnesses and how much time each witness will take. Student's attorney shall place the call to Kentfield's attorney to start the meet and confer. 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.

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 bears the burden of proof. Student's case-in-chief shall be presented first, followed by Kentfield's, unless otherwise ordered.

WITNESS SCHEDULE

The parties must provide a joint proposed witness schedule to the ALJ on the first day of hearing. The list 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 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

Beach party's attorneys may make an audio recording of the hearing for their personal note taking purposes, based upon 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.
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.

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 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 has requested any accommodation or 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 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.

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.

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.



Robert G. Martin
Administrative Law Judge
Office of Administrative Hearings