BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

CAPISTRANO UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NUMBER 2024030280

ORDER FOLLOWING EXPEDITED PREHEARING CONFERENCE BY VIDEOCONFERENCE AND ORDER DENYING STUDENT'S MOTION TO CONTINUE THE EXPEDITED PRE-HEARING CONFERENCE AND EXPEDITED DUE PROCESS HEARING

MARCH 18, 2024

On March 18, 2024, Administrative Law Judge Thanayi Lindsey, Office of Administrative Hearings, held an expedited 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.

Tracy Petznick Johnson Attorney at Law, appeared on behalf of Capistrano Unified School District, referred to as Capistrano District. Madeline Knutson Attorney at Law appeared on behalf of Student. Student's counsel appeared on a limited scope for this expedited PHC and mediation on March 19, 2024, at 9:00 AM.

The expedited PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

EXPEDITED HEARING DATES, TIMES, AND LOCATION

EXPEDITED DUE PROCESS HEARING

The expedited hearing will take place on March 26, 27 and 28, 2024 and continue day to day at the discretion of the ALJ. The expedited 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 3 days to complete the expedited hearing. Additional hearing dates will be discussed with the ALJ during the hearing.

EXPEDITED 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 expedited 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 expedited 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.

EXPEDITED ISSUES AND PROPOSED RESOLUTIONS

A free appropriate public education is called a FAPE, and an individualized education program is called an IEP. Interim alternative educational setting is called IAES. Therapeutic behavior intervention classroom is called TBIC.

Pursuant to discussions with the parties during the Expedited Prehearing Conference, the ALJ has clarified 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. No change in substance has been made.

The expedited 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:

EXPEDTIED ISSUES

1. Is maintaining Student's current educational placement within Capistrano District's schools substantially likely to result in injury to Student or to others, such that Capistrano District can remove Student to an IAES of in-home instruction, remote speech, and occupational therapy consultations for not more than forty-five school days?

PARTY ISSUE REVIEW RESPONSIBILITY AND DISPUTE NOTIFICATION

The parties are responsible for carefully reviewing the issues as stated in this prehearing conference order. 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.

PROPOSED EXPEDITED RESOLUTION

The resolution requested by Capistrano District includes an order permitting it to change Student's educational placement from Arroyo Vista Elementary School's TBIC to an IAES of an in-home instruction, remote speech, and occupational consultations for not more than 45 school days. Additionally, Capistrano District seeks an order for parents to visit the non-public school sites as listed pursuant to the IEP amendment meeting dated February 14, 2024, during the IAES placement period of not more than 45 school days.

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. Capistrano District must use the letter D before the number to identify Capistrano District's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Capistrano District'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.

EXHIBIT 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.

Capistrano District'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 on March 19, 2024. 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. A witness's inability 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 does not help the judge to understand a parties' arguments. The judge may also refuse to hear evidence if the evidence is too time consuming to justify the time it would take to hear compared to the value of the information it will provide to the judge.

The parties are ordered to meet and confer no later than March 19, 2024, at 5:00 PM to discuss:

- how many witnesses each side will most likely call and how many of those witnesses are on both sides' witness lists;
- scheduling witnesses and an estimate of how much time each side will need to question a witness;
- any concerns related to a witness's inability to appear by videoconference for hearing, use the electronic evidence program Case Center, or the need for witness subpoenas, if any; and
- whether duplicate exhibits can be eliminated by comparing the documents each side wants the judge to consider.

As part of the meet and confer process Capistrano District shall inform Student whether witnesses Student wishes to call are Capistrano District employees. Each side will inform the other whether witnesses under their control must be subpoenaed instead of just given notice to attend the hearing on a certain date and time. Capistrano District may agree to accept service for a witness under Capistrano District'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 Capistrano District requested the hearing and bears the burden of proof. Capistrano

District's case-in-chief shall be presented first, followed by Student 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 all witnesses, the parties believe will be called;
- the witnesses' title;
- which party is calling the witness to testify;
- the date the witness will testify; and
- the hours each witness is expected to testify.

In the event an agreement cannot be reached, each party shall prepare a separate written list. District must have witnesses available to start the case.

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.

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 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.

Both parties' request to make an audio recording of the hearing is granted.

VIDEO RECORDING

No party, witness, or anyone else may videorecord any part of the proceedings or stream live through any means.

RECORDINGS AS EXHIBITS

Neither side anticipates uploading a video or audio of the IEP or any other type of recording as an exhibit. Recordings may not be uploaded electronically without the ALJ's permission. However, they must still be exchanged in a timely manner. 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. Any party offering a portion of a recording must establish its relevance and the speakers by admissible evidence. 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. If a recording is offered as an exhibit, any other portion of the recording may be offered by the opposing party if relevant, to establish the context, or to rebut, the recording.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education. Documents offered as evidence to support a request for reimbursement must be separated by vendor.

MOTIONS

On March 18, 2024, Student filed a Notice of Representation with OAH. During the expedited PHC, Student made an oral motion to continue the expedited pre-hearing conference and expedited hearing. Student based this motion on the need to receive

documents to prepare for the expedited due process hearing. Capistrano District objected on the grounds that expedited hearings usually are not continued due to safety reasons. As a professional courtesy to resolve the document issue, Capistrano District will exchange a draft copy of the evidence with Student on March 18, 2024 by 5:00 PM. Student's oral motion to continue the case is moot and therefore is denied.

Neither side contemplates additional expedited prehearing motions, and no expedited motions are pending. Any expedited motion that was not filed three business days before this 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 PARTICIPANTS AND EXPEDITED 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

None of the parties requested an interpreter. Nor did any of the parties anticipate a need for disability accommodations. 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.

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.

EXPEDITED HEARING CLOSED TO THE PUBLIC

Student did not request an open expedited hearing and therefore, this expedited hearing is closed 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 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 expedited 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 expedited hearing has discretion to reconsider any part of this Order.

IT IS SO ORDERED.

Thanayi Lindsey
Thanayi Lindsey (Mar 18, 2024 17:07 PDT)

Thanayi Lindsey
Administrative Law Judge
Office of Administrative Hearings