BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:

PARENT ON BEHALF OF STUDENT,

and

PLEASANTON UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2024041122

OAH CASE NUMBER 2023120389

ORDER DISMISSING STUDENT'S MOTION TO EXCLUDE EVIDENCE AND

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE

AUGUST 7, 2024

On August 5, 2024, Administrative Law Judge Claire Yazigi, 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.

Nicole Hodge Amey, Attorney at Law, appeared on behalf of Student. Attorneys Shawn Olson Brown and Lenore Silverman appeared on behalf of Pleasanton Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

STUDENT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE

On August 1, 2024, Student filed a motion in limine to exclude evidence at hearing. The motion was not filed at least three business days before PHC as required by scheduling order. At the latest, Student's motion should have been filed with OAH by July 31, 2024. Pleasanton filed an objection to Student's motion on August 2, 2024. Both parties were given an opportunity to verbally address the timeliness of Student's motion at PHC.

Student asserted that the reason for the delay in filing the motion was that Student's counsel only recently became aware of the facts giving rise to the motion to exclude evidence. But the representations in Student's own motion indicate that counsel became aware of those facts on July 29, 2024, which would have allowed Student two business days to timely file its motion.

Further, Pleasanton argued that the facts giving rise to Student's motion to exclude evidence, specifically, Pleasanton's intention to introduce documentary evidence and examine employees from the Sacramento City Unified School District, was disclosed in its PHC statements filed in the secondary matter on December 26, 2023. While counsel did not represent Student at the time the December 26, 2023, PHC was filed, knowledge of the administrative file in the secondary case is still imputed. Student did not establish good cause as to why this motion should be heard despite being untimely,

and the undersigned dismissed the motion. Nothing in this Order shall prevent Student from moving to exclude evidence at hearing.

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on August 13, 14, and 15, 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. 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

Pursuant to discussions with the parties during the 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. 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.

At PHC, Student withdrew Issue Three as set forth in the complaint which alleged that "Pleasanton's September 5, 2023, assessments were legally invalid resulting in a denial of FAPE." Student withdrew Issue Three because it was encompassed by Issue Two and was duplicative.

Pleasanton argued at PHC that Student's parental participation claim, set forth as Issue Seven in the complaint, was limited to the IEP team meetings held September 5-8, 2023. September 8, 2023, per Pleasanton, was the last IEP team meeting held during the statutory period.

Student argued that the parental participation claim is not limited to participation at IEP team meetings. Student alleges that, because Pleasanton did not conduct the assessments Parent requested and conducted a flawed multidisciplinary assessment, Parent did not have an understanding of Student's needs and was prevented from meaningful participation in the IEP process through the end of the statutory period.

Pleasanton's request to limit the issue is denied. The issue is included as asserted by Student. Pleasanton, however, can raise this argument as a defense to Student's

claim. Student shall have the burden to establish that both the law and facts support this claim.

At PHC, the undersigned dismissed, *sua sponte*, Issue Eight as set forth in Student's complaint, as it was an allegation made under the McKinney Vento Homeless Assistance Act and was thus outside the jurisdiction of OAH.

Similarly, the undersigned also dismissed Issue Nine, as it made allegations under Section 504 of the Rehabilitation Act, the Americans with Disabilities Acts, Title VI, and "other related civil rights statutes," and was thus outside the jurisdiction of OAH.

The issues at the due process hearing, and proposed resolutions, as alleged in the complaint and clarified by the parties and the ALJ during the PHC are:

STUDENT'S ISSUES

1. Did Pleasanton deny Student a FAPE during the 2022-2023 school year by failing to:
    a. Conduct an autism assessment and an educationally related mental health assessment since May 2023;
    b. Assess in the areas of ADD/ADHD, anxiety, dyslexia, apraxia of speech, apraxia of physical therapy, apraxia of occupational therapy, central processing disorder, and sensory processing, pursuant to Parent's June 5, 2023, request;
    c. Implement services as set forth in Student's January 24, 2020, IEP, specifically:
        i. Providing Student with more SAI minutes than agreed upon in the January 24, 2020, IEP, without Parental consent;

ii. Failing to consistently provide speech language, physical therapy, and transportation services; and

iii. Failing to implement any goals, and thus also failing to report on any goal progress; and

d. Ensure Parent's meaningful participation in the decision-making process regarding the provision of FAPE to Student?

2. Did Pleasanton deny Student a FAPE during the 2023-2024 school year through April 29, 2024, by failing to:

a. Timely provide complete educational records in response to Parent's request dated December 12, 2023, and counsel's request on March 28, 2024;

b. Conduct legally compliant assessments on September 5, 2023, in the areas of psychoeducation, speech language, occupational therapy, physical therapy, academics, and health;

c. Assess in the areas of ADD/ADHD, anxiety, dyslexia, apraxia of speech, apraxia of physical therapy, apraxia of occupational therapy, central processing disorder, sensory processing, autism, and an educationally related mental health;

d. Implement services in Student's January 24, 2020, IEP, specifically:

i. Providing Student with more SAI minutes than agreed upon in the January 24, 2020, IEP, without Parental consent;

ii. Failing to consistently provide speech language, physical therapy, and transportation services;

iii. Failing to implement any goals, and thus also failing to report on any goal progress;

iv. Failing to implement Student's January 24, 2020 IEP after unilaterally exiting Student from special education on September 8, 2023, instead placing Student on a fade-out plan and terminating special education services completely by November 12, 2023;

v. Unlawfully exiting Student from special education on September 8, 2023, when he remained eligible under Autism and Speech Language Impairment.

e. Hold an IEP team meeting within 30 days of Parent's February 13, 2024, request;

f. Ensure Parent's meaningful participation in the decision-making process regarding the provision of FAPE to Student?

DISTRICT'S ISSUES

1. Was Pleasanton's September 5, 2023, multidisciplinary psychoeducational assessment of Student legally compliant, such that Student is not entitled to an independent educational evaluation at public expense?
2. Is Pleasanton entitled to exit Student from special education without parental consent because Student is no longer eligible for special education under Autism and Speech Language Impairment?

PROPOSED RESOLUTIONS

The resolutions requested by Student include independent educational evaluations, the development of interim goals pending the results of the independent educational evaluations, compensatory education, and staff training.

The resolutions requested by Pleasanton on its issues include a determination that the September 5, 2023, multidisciplinary assessment was legally compliant such that Student is not entitled to an independent educational evaluation. Pleasanton seeks permission to exit Student from special education because he is no longer eligible under the categories of Autism or Speech Language Impairment.

Pleasanton filed its response to Student's complaint on August 2, 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. Pleasanton must use the letter D before the number to identify Pleasanton's exhibits. For example, S-1 means

Student's exhibit 1 and D-1 means Pleasanton'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.

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

Electronic copies of exhibits filed with OAH shall be filed by 5:00 PM at least five business days before the first day of hearing. Please refer to the General Order OAH issued with the Scheduling Order that contains the Order Setting Procedures for Filing Exhibits Electronically. It includes instructions for how to file exhibits electronically. Beginning three business days before the hearing, the electronic evidence system will not allow parties to upload exhibits unless permitted by the ALJ during the hearing at the ALJ's discretion.

WITNESSES

The parties shall serve their list of witnesses on each other in compliance with Education Code section 56505. No party shall be permitted to call any witnesses not

timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

Parties are responsible for ensuring that all participants are familiar with and follow the Instructions for Joining the Online Due Process Hearing provided with this Order. Participants who have not previously used the Zoom application, may find informative instructions on at by visiting, Getting Started with Zoom at https://support.zoom.us/hc/en-us/categories/200101697.

The parties are responsible for ensuring that witnesses join the virtual hearing room at the designated date and time to testify. Witnesses are required to join the due process hearing by computer and appear by videoconference unless they do not have the necessary computer equipment. If a witness does not have the necessary equipment, the ALJ may permit the witnesses to appear by audio only or by telephone. "Audio only" means using a computer without 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 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 Friday, August 9, 2024, 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, Pleasanton shall inform Student which proposed witnesses are district employees. Each party shall also identify the witnesses on the opposing party's list that require a subpoena. A party may agree to accept service for a witness under its control or provide the opposing party with the witness's most recent contact information including telephone number, email address, and physical address, unless otherwise prohibited by law.

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 consolidated matter, each party has the burden of proof on their issues pled. Student's case-in-chief shall be presented first, followed by Pleasanton, 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 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 list. The parties 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

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.

Student's and District's requests 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

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

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 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

Student requested that, during Parent's testimony at hearing, Parent be provided with sensory breaks roughly every 15 minutes, with each break lasting anywhere from three to five minutes each. Student's request is granted. During these breaks, Parent shall not communicate with Student's counsel or any other person about her testimony, unless otherwise ordered by the ALJ.

Neither party requested 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 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 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.

Claire Yazigi

Claire Yazigi
Administrative Law Judge
Office of Administrative Hearings