BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

LEGAL GUARDIAN ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019070571

ORDER FOLLOWING JANUARY 17, 2020 PREHEARING CONFERENCE

On January 17, 2020, Administrative Law Judge Rommel P. Cruz, Office of Administrative Hearings held a telephonic prehearing conference. The Office of Administrative Hearings will be referred to as OAH. The Administrative Law Judge will be referred to as ALJ. The prehearing conference will be referred to as PHC.

Attorney Carol Churchill appeared on behalf of Student. Attorney Debra Ferdman appeared on behalf of Long Beach Unified School District. The prehearing conference was recorded. Based upon discussion with the parties, the Administrative Law Judge issues the following order:

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on January 28, 29, and 30, 2020, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM on the first day and at 9:00 AM on all other days, unless otherwise ordered. Additional hearing dates will be discussed with the ALJ on the first day of hearing.

HEARING LOCATION

The hearing will be held at Long Beach Unified's offices located at Tucker Offices, 2221 Argonne Avenue, Long Beach, CA 90815.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing good cause to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

School district facilities shall fully comply with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. OAH requires school districts to file written certification that the facilities provided comply with these laws.

Long Beach Unified filed the required certification. Long Beach Unified shall notify OAH within three business days of the date of this Order if it is unable to provide facilities that comply with the laws governing accessibility of government facilities to persons with disabilities.

Before the beginning of the hearing, Long Beach Unified shall ensure that the hearing room is configured into a courtroom setting and shall contain:

- a table for Student and her representatives;
- a table for Long Beach Unified's legal representative and special education representative;
- a table for the witness; and
- a table near an electrical outlet for the ALJ.

The same hearing room shall be used for each day of hearing and shall be available at least one hour before the beginning of the hearing each day. The hearing room shall be locked following the hearing each night. Long Beach Unified shall ensure that the hearing room and access to it are in compliance with the all laws governing accessibility of government facilities to persons with disabilities.

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 Long Beach Unified deny Student a free appropriate public education, also referred to as a FAPE, as its February 27, 2019 individualized education program, also called an IEP, failed to offer:
    a. Appropriate goals;
    b. Appropriate supports;
    c. Appropriate speech therapy; and
    d. Appropriate placement?

2. Did Long Beach Unified deny Student a FAPE by failing to offer Student digital educational equipment in the February 27, 2019 IEP?
3. Did Long Beach Unified deny Student a FAPE by:
    a. Failing to timely respond to Guardian's requests made from January 2019 through June 2019 for testing and meetings; and
    b. Providing Guardian with Student's report cards that were misleading?

PROPOSED RESOLUTIONS

The resolutions requested by Student include ordering Long Beach Unified to assign Student with a full-time one-to-one aid, to adopt the goals proposed by Guardian, and to provide weekly progress reports to Guardian. Student also seeks an order that Long Beach Unified provide, at no cost to Student, take-home digital learning tools and programs with instructions to Guardian and Student on the use of the tools and programs. In addition, Student request that Long Beach Unified be ordered to comply with statutory requirements in the development and implementation of an IEP. Furthermore, Students request that Long Beach Unified place Student in a specialized educational setting, which may include a nonpublic school.

Long Beach Unified filed its response to Student's complaint on July 25, 2019. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

BINDERS

Exhibits shall be pre-marked and placed in three-ring binders before the hearing. Exhibit binders shall include a tab for each exhibit. Each binder shall contain a detailed

table of contents which clearly identifies the tabs and documents. Binders should not be so full that the ALJ and witnesses cannot easily turn to the exhibit tabs and pages in the binders. Multiple binders may be submitted if necessary.

TAB AND PAGE NUMBERS

The parties must place a letter followed by a number on each tab to identify each exhibit. Student must use the letter S before the number to identify Student's exhibits. Long Beach Unified must use the letter D before the number to identify Long Beach Unified's exhibits. For example, S-1 means Student's exhibit tab 1 and D-1 means Long Beach Unified's exhibit tab 1. Parties may either number each page within each tabbed exhibit or number each page in the binder consecutively beginning with the first page of the first exhibit through the last page of the last exhibit. For example, if there are 100 total pages in the binder the first page of the first exhibit is 1 and the last page of the last exhibit in the binder is 100.

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 in the binders should be in chronological order.

Parties should include resumes or curriculum vitae for each witness who is expected to testify as an expert. Parties must exchange resumes not later than 24 hours before the witness is scheduled to testify and provide a copy to the ALJ before the witness testifies.

Long Beach Unified's binder must include a copy of the school calendar for each school year in question.

COPIES OF BINDERS

The parties must serve copies of their evidence binders on each other. This exchange is required by Education Code section 56505, subdivision (e)(7). Each party must bring two additional sets of their exhibit binders to the hearing. One set will be used by the ALJ, and the other set will be used by witnesses. The parties may not serve exhibits on OAH before the hearing.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

WITNESSES

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.

At the PHC, Student identified Florence Wolfe, Kristin Bogdan, and Amy Kutis as witnesses for Student's case-in-chief and requested Long Beach Unified make these witnesses available for the hearing. Long Beach Unified indicated it would make these witnesses available.

The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subd. (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 January 24, 2020, to discuss the availability of witnesses, the order of witnesses and the length of witness testimony. The parties should attempt to eliminate duplicate exhibits from their binders. The parties may discuss whether they can produce a written stipulation stating basic facts to shorten the length of time needed for the hearing.

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. Therefore, Student shall present her case-in-chief first, followed by Long Beach Unified.

WITNESS LISTS

The parties must provide a joint proposed witness list to the ALJ on the first day of hearing. The list should include dates and time estimates of expected testimony. In the event an agreement cannot be reached, each party shall prepare a separate written list. Long Beach Unified 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 direct and cross-examination of 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.

TELEPHONIC TESTIMONY

Whether a witness may appear by telephone 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 telephone shall request permission to do so before the hearing. The party offering the witness must provide the witness with a complete set of exhibit binders from all parties before the witness testifies. The binders must be exact paper copies of all of each party's exhibits. Electronic copies are not acceptable. The party presenting the witness shall ensure the witness testifies from a private location with no other persons present. The party offering telephonic testimony shall ensure that the witness has telephone equipment that allows testimony at a volume that allows clear transmission of what the witness is saying, allows the witness' testimony to make a clear recording, and allows the witness to hear objections and rulings. Long Beach Unified shall ensure that the hearing room has telephone speaker equipment that allows everyone in the room to hear the witness, and allows the witness to hear objections and

rulings. No witness will be heard by telephone unless all of these requirements have been fulfilled.

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:

- the OAH recording is the only official recording;
- the parties shall turn the 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;
- the recording device will be removed by the party recording during any recess where the party leaves the room;
- operation of the party's recording mechanism will not be allowed to delay the hearing;
- a parties' recording may not be given, provided or played to a witness, or potential witness; and
- the recording is subject to the same confidentiality as the due process hearing.

Neither party has made a request to audio record the hearing to date. If either party wants to record the hearing, the request must be made before the hearing.

Video Recording

No party, witness or anyone else may make any video recording of any part of the proceedings.

Recordings as Exhibits

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

Student's PHC statement listed Ms. Churchill and Student as potential witnesses. At the PHC, Long Beach Unified moved to exclude their testimony. At the PHC, Student

indicated that Ms. Churchill's and Student's testimony may be necessary for the purposes of rebuttal. Student objected to the motion to exclude their testimony.

The ALJ has discretion to exclude any otherwise relevant evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, create a substantial danger of undue prejudice, or result in confusing the issues. (Evid. Code, § 352; Gov. Code, § 11513 (f).) It is premature to determine that Ms. Churchill's and Student's testimony will necessitate undue consumption of time, create a substantial danger of undue prejudice, or result in confusing the issues. Accordingly, the motion to exclude their testimony is denied without prejudice.

No other prehearing motions are pending or contemplated. Any motion that was not filed three business days before the PHC, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

STIPULATIONS

Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in writing.

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

Counsel, all parties, and all witnesses must conduct themselves in a professional and courteous manner at all times. Cellular phones must be shut off or set to vibrate during the hearing unless the ALJ grants permission otherwise.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

Student requested Long Beach Unified provide childcare for Student during times when Guardian would be unavailable to supervise Student during the hearing. Long Beach Unified objected to the request. The request for Long Beach Unified to provide Student with childcare during the hearing is denied.

Neither party indicated a need for any other accommodations. A party or participant to 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/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 p.m. 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.

IT IS SO ORDERED.

DATED: January 17, 2020

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Rommel P. Cruz
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Rommel P. Cruz
Administrative Law Judge
Office of Administrative Hearings