BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF:

BAKERSFIELD CITY SCHOOL DISTRICT

v.

PARENT ON BEHALF OF STUDENT,

OAH CASE NUMBER 2020010042

and

PARENT ON BEHALF OF STUDENT

v.

BAKERSFIELD CITY SCHOOL DISTRICT,

OAH CASE NUMBER 2019120777

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE

MAY 1, 2020

On May 1, 2020, Administrative Law Judge Chris Butchko, Office of Administrative Hearings, held a prehearing conference by videoconference. The Administrative Law Judge is called an ALJ; the Office of Administrative Hearings is called OAH; and a prehearing conference is called a PHC.

Gabrila Torres, Attorney at Law, accompanied by Andria Seo, Attorney at Law, appeared on behalf of Student. Kidd Crawford, Attorney at Law, appeared on behalf of Bakersfield City School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on May 12 through 14, 2020, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM each day and generally end at 3:30 PM, unless otherwise ordered. The parties anticipate it will take between three and six days to complete the hearing. Additional hearing dates will be discussed with the ALJ during the hearing.

HEARING LOCATION

OAH is authorized to conduct due process hearings by videoconference or telephone. (5 C.C.R. § 3082, subd. (g).) Based on state and federal guidance to address safety procedures due to the novel coronavirus, COVID-19, OAH will conduct the due process hearing by videoconference using the Microsoft Teams application. Unless otherwise ordered, participants are required to appear by videoconference using a webcam and Microsoft Teams.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses, if necessary, to ensure that the witnesses will appear to testify. A party's failure to notify or subpoena a witness to testify will not be considered a showing good cause to continue the hearing.

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

Bakersfield's Issues:

1. Were Bakersfield's November 12, 2019 psychoeducational evaluation, its November 9, 2018 functional behavior analysis, and/or its March 4, 2020 educationally-related mental health services assessments appropriate such that Bakersfield is not required to fund independent educational evaluations in those areas at public expense?
2. Did Bakersfield offer Student a free appropriate public education, known as FAPE, through the individualized education plan developed at the team meetings held on November 13, 2019, December 4, 2019, and January 29, 2020?

Student's Issues:

1. Did Bakersfield fail in its "child find" responsibility by not finding Student eligible for special education services prior to November 2019?
2. Did Bakersfield fail to respond to Parent's November 15, 2019, request for independent evaluations of Student without unnecessary delay?

3. Did Bakersfield fail to appropriately evaluate Student in all areas of suspected disability by failing to assess him for autism-related special education needs?
4. Did Bakersfield deny Student a FAPE by failing to provide an appropriate behavior intervention plan?
5. Did Bakersfield deny Student a free appropriate public education by inappropriately restraining him during the 2019-2020 school year?
6. Did Bakersfield deny Student a free appropriate public education by failing to implement his behavior intervention plan?

PROPOSED RESOLUTIONS

Bakersfield seeks an order stating that it need not fund the requested independent assessments and that it may implement the January 29, 2020, IEP without parental consent.

Student seeks reimbursement to Parents for an independent psychoeducational assessment and an independent functional behavior analysis, including the cost of development of a behavior improvement plan, for Bakersfield to fund independent ERMHS, speech and language, occupational therapy, and assistive technology assessments, the provision to Student of a 1:1 ABA-trained aide with supervision by a BCBA, the modification of Student's IEP to include the accommodations, supports, and services recommended by Student's independent assessors, compensatory education services, and an order directing Bakersfield to train its staff on "child find" responsibilities.

Bakersfield filed its response to Student's second amended complaint on February 21, 2020. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

Each party shall file one paper copy of their exhibits with OAH at 2349 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833, by noon on the Friday, May 8, 2020, before the first day of hearing. The parties shall also upload their exhibits electronically according to the instructions provided.

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.

PAPER COPIES OF EXHIBITS

The paper copies of exhibits shall be shall be pre-marked and bound or placed in three-ring binders before filing with OAH. The exhibits shall contain a detailed table of contents which clearly identifies the tabs and the document page numbers.

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. Bakersfield must use the letter D before the number to identify its exhibits. For example, S-5 means Student's exhibit tab 5 and D-105 means Bakersfield's exhibit tab 105. 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 300 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 300.

CONTENT

Each exhibit must consist of one document. Separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Exhibits should be in chronological order.

Parties should include resumes or curriculum vitae for each witness who is expected to testify as an expert.

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

ELECTRONIC COPIES OF EXHIBITS

Electronic copies of the exhibits filed with OAH shall be filed by noon on the Friday before the first day of hearing. The electronic copies must be an exact duplicate of the paper copies filed with OAH. OAH has issued a separate Order Setting Procedures for Filing Exhibits Electronically that includes instructions for how to file exhibits electronically.

WITNESSES

The parties shall serve their list of witnesses on each other in compliance with Education Code section 56505. No party shall be permitted to call any witnesses not timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

Parties are responsible for ensuring that all participants are familiar with and follow the Instructions for Joining the Online Due Process Hearing provided with this Order. Participants that have not previously used the MS Teams platform, may also find

informative videos available like the one at this link from Microsoft: https://support.office.com/en-us/article/join-a-teams-meeting-078e9868-f1aa-4414-8bb9-ee88e9236ee4.

The parties are responsible for ensuring that witnesses join the virtual hearing room at the designated date and time to testify. Witnesses are required to join the due process hearing by computer and appear by videoconference unless they do not have the necessary computer equipment. In that situation, the ALJ may permit the witnesses to appear by audio only or by telephone. "Audio only" means using a computer without webcam. Witness inability to attend the hearing by videoconference shall be discussed at the start of the hearing.

Parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Parties shall make witnesses under their control reasonably available. The parties must schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party will be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

The ALJ has discretion to limit the number of witnesses 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 close of business on Thursday, May 7, 2020, to discuss scheduling witnesses and how much time each witness will take. The parties shall discuss any issues pertaining to the parties, counsel, or witnesses appearing by videoconference for hearing and electronically viewing exhibits during the hearing. The parties should attempt to eliminate duplicate exhibits from their hearing exhibits. The parties shall discuss whether they can produce a written stipulation as to pertinent facts, contentions, resolutions, and authenticity and admissibility of documents to shorten the length of time needed for the hearing.

As part of the meet and confer process, Bakersfield shall inform Student which proposed witnesses are district employees. Bakersfield shall also identify the witnesses on the respective witness lists that require a subpoena and agree to accept service or provide Student with the witness' most recent contact information.

UPDATED PARTICIPANT INFORMATION FORM

Both parties shall have an ongoing obligation to ensure that the information on the Participant Information Form filed with OAH is current, and shall file an updated Form as necessary. 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 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, and include the required information no later than 5:00 PM at least two business days before the first day of hearing.

Any contact information provided by Bakersfield shall be used by Student for the limited purpose of issuing subpoenas or for contacting the witness(es) for purposes of attending the hearing and shall not be disclosed to any other person(s).

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, Student filed the first action, so his case-in-chief shall be presented first, followed by Bakersfield, unless the ALJ orders otherwise at the start of the hearing.

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(s) are calling the witness to testify, and include dates and time estimates of each witness' expected testimony. In the event an agreement cannot be reached, each party shall prepare a separate written list. Bakersfield 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 witness on all issues when the witness is first called. Requiring a witness to appear only once takes priority over the order in which parties present their case in chief.

AUDIO ONLY OR TELEPHONIC TESTIMONY

Whether a witness may appear by audio only or telephone instead of videoconference is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by audio only or telephone shall request permission to do so before the hearing. Any party seeking to present a witness who cannot access exhibits electronically must inform the ALJ at the beginning of the hearing. Student has reported that one witness has no computer access and will need to appear telephonically.

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;
- participants shall not use Teams to record the hearing;

- 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;
- 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;
- use of the chat function in the videoconference is prohibited and shall not be part of the official record;
- participants shall not take screenshots of the videoconference, or share or publish any portion of the videoconference or audio recording.

Both parties have been granted permission to audio-record the hearing, subject to these conditions.

VIDEO RECORDING

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

RECORDINGS AS EXHIBITS

Both parties propose to introduce all or part of a recording of an individualized education program team meeting and other recordings. 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 of, or to rebut, the recording.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Student seeks an award of reimbursement to Parents and compensatory educational services. 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

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

STIPULATIONS

Stipulations to pertinent facts, contentions, resolutions and authenticity and admissibility of documents are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in writing prior to the start of the hearing.

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

All participants to the videoconference should observe the same decorum as in an in-person due process hearing. Counsel, all parties, and all witnesses must conduct themselves in a professional and courteous manner at all times. Cellular phones, telephones, and computer notifications must be shut off or set to silent during the hearing unless the ALJ grants permission otherwise. Counsel, parties, and witnesses shall appear from a private location, unless otherwise ordered. Participants should take reasonable efforts to minimize background noise maintain adequate room lighting. Use of virtual background images are at the discretion of the ALJ. Witnesses are prohibited from reading exhibits, documents, notes, text messages, telephones, or computers while testifying, unless permitted to do so by the ALJ. Parties, counsel, and witnesses are prohibited from passing notes to, exchanging electronic messages with, or signaling the witness in any way while the witness is testifying.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

No language interpretation services are required.

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



Chris Butchko
Administrative Law Judge
Office of Administrative Hearings