BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

IRVINE UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019100553

# ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE, ORDER DENYING REQUEST FOR CONTINUANCE, AND ORDER TO SHOW CAUSE AS TO WHY MATTER SHOULD NOT BE DISMISSED FOR FAILURE TO PROSECUTE

JUNE 8, 2020

On June 8, 2020, Administrative Law Judge Linda Johnson, 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.

Amy Rogers and Daniel Lowe, Attorneys at Law, appeared on behalf of Irvine Unified School District. The undersigned ALJ called Parent twice, leaving a message both times. The OAH case manager also called Parent and left a message. The OAH case manager also talked to Student's advocate and urged Parent to join the PHC via Microsoft Teams. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

## FAILURE TO PROSECUTE

Student filed the request for due process on October 14, 2019. Student moved to amend the complaint on November 21, 2019, which reset the timelines. OAH Granted Irvine's motion to continue on December 3, 2019, over Student's objection. OAH granted Student's motion to continue this matter on February 26, 2020, over Irvine's objection. OAH denied the parties joint request to continue on April 30, 2020. However, OAH granted Student's renewed request to continue on May 4, 2020, setting the PHC for June 8, 2020, at 1:00 PM, and the hearing to commence on June 16, 2020. On May 5, 2020, OAH sent Parent a letter explaining the accommodations OAH would put in place so Parent could participate in a video PHC and hearing. On June 4, 2020, Student requested a fourth continuance. OAH called both parties on June 4, 2020, to inform them the request to continue would be addressed at the PHC on June 8, 2020.

Parent, on Student's behalf, did not participate in the PHC. Student submitted a letter at 12:50 PM on June 8, 2020, alleging Parent only recently learned of the PHC and could not participate in a telephonic PHC because he needed an accommodation due to a hearing loss. The undersigned ALJ called Parent at 1:05 PM to have Parent join the PHC and left a message informing him that OAH had real time captioning available so he could participate. An OAH case manager called Parent at 1:20 PM and left a message again informing him of real live captioning and asking if he needed assistance accessing

Microsoft Teams. The undersigned ALJ called Parent again at 1:30 PM informing him that if he did not participate OAH would issue an Order to Show Cause as to Why Matter should not be Dismissed for Failure to Prosecute. At 1:35 PM, Student's advocate called OAH regarding the PHC; an OAH case manager informed her Parent could call and would receive instructions on how to connect to Microsoft Teams. At 1:42 PM OAH received a second letter from Student alleging that Parent's internet was not sufficient for him to participate in a videoconference with captioning.

Here, Student has not diligently pursued this due process matter, which is now more than seven and a half months old. Student has filed numerous requests to continue each time citing the same or similar concerns that OAH previously addressed. Student's latest claim, that Parent was not aware of the PHC until moments before the PHC is disingenuous. Not only did OAH inform Student in writing of the PHC date and time on May 4, 2020, and informed Parent on June 4, 2020, that the request to continue would be addressed at the June 8, 2020 PHC, Student's own motion, the request to continue filed on June 4, 2020, listed the PHC date and time.

Student is ordered to show cause in writing no later than 5:00 PM on June 10, 2020, as to why this matter should not be dismissed. Student shall address why Parent failed to appear at the PHC. Student should further explain and show good cause why her due process complaint should not be dismissed for failure to diligently prosecute. Irvine may file a response if it so chooses by 5:00 PM on June 11, 2020.

The order to show cause hearing shall take place via Microsoft Teams, with the use of real time captioning, on June 12, 2020, at 1:00 PM, unless otherwise ordered. Failure by Student to submit a written response to the Order to Show cause by June 10, 2020, or to appear at the June 12, 2020 videoconference hearing, may result in this matter being dismissed or other sanctions.

If Student demonstrates that the matter should not be dismissed, the hearing shall proceed on June 16, 2020. The timelines set below for evidence exchange, witness list exchange, and meet and confer must be followed.

## REQUEST TO CONTINUE

Student requested a fourth continuance on June 4, 2020. Irvine opposed the request.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (Ed. Code, § 56505, subd. (f)(3); Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance or imposing conditions on the continuance; and any other relevant fact or circumstance. (Cal. Rules of Court, rule 3.1332(d).)

The request for continuance is denied. As OAH previously determined, there is an inclination that there will never be an appropriate time for this matter to be heard based on the conflicts and difficulties Parent, Parent's advocate, Irvine Unified School District, and the attorney for Irvine Unified School District have based on issues related and unrelated to the Covid-19 pandemic. Student's allegation that denying the request for continuance will prejudice Student as her assessment has been delayed due to the Covid-19 pandemic is without merit. This is the first time Student has raised this concern in the seven and a half months this hearing has been pending. Despite the Covid-19 pandemic Student's assessment from an unrelated district would not have been completed when the hearing was scheduled to be held based on the filing of Student original or amended complaint. Student's allegation that Parent will not be able to participate because OAH denied Parent's accommodation request of an FM system is also without merit. Parent is welcome to use an FM system if he has one available and OAH is providing real time captioning during the hearing. Student's allegation that the only reason Parent has not been able to assign "co-educational rights" to Student's advocate is because the probate court is closed is again without merit as Parent could have done that when the complaint was filed in October 2019.

## HEARING DATES, TIMES, AND LOCATION

### DUE PROCESS HEARING

The hearing will take place on June 16, 17, and 18, 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. Student anticipate it will take between six and nine 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 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

1. Did Irvine deny Student a free appropriate public education by failing to implement her March 28, 2018 individualized education program when she reentered the district for the 2018-2019 school year?
2. Did Irvine's March or April 2017 assessment fail to meet all legal requirements such that Student is entitled to an independent educational evaluation at public expense?

3. Did Irvine deny Student a free appropriate public education by failing to develop an appropriate individualized education program for Student from March 2017 to the present?
4. Did Irvine deny Student a free appropriate public education from September 11, 2018, to the present by wrongly removing Student's individualized education program and refusing to correct the error when Parent told Irvine he did not intend to revoke consent?
5. Did Irvine deny Student a free appropriate public education by insisting on a full reassessment instead of a records review after Irvine believed Parent revoked consent to Student's individualized education program in September 2018?
6. Did Irvine deny Student a free appropriate public education by holding an individualized education program team meeting without Parent on September 27, 2018?

## PROPOSED RESOLUTIONS

Student requests reinstatement of her individualized education program, independent educational evaluations, compensatory education, and reimbursement for private assessments.

Irvine filed its response to Student's complaint on October 24, 2019. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

## BIFURCATION

As previously ordered during the February 21, 2020, PHC, Irvine's motion to bifurcate was partially granted. Student will be required to present all evidence as to how she was prevented from filing a due process hearing request regarding Irvine's

March or April 2017 assessment and Irvine's March 2017 IEP. Student had two years from March or April of 2017 for file a due process hearing request regarding the adequacy of the assessments or March 2017 IEP. Student has the burden of proof to show that Irvine prevented Student from filing a due process hearing complaint within the two-year period because of misrepresentation or withholding information. After Student presents her evidence OAH will issue an oral ruling as to whether or not she can proceed on Issues 2 and 3.

## EXHIBITS

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

The parties shall serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). Timely uploading electronic hearing exhibits five business days before the first day of hearing constitutes that party's timely exchange of evidence on each other in compliance with Education Code section 56505, subdivision (e)(7).

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 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 exhibits and the document page numbers.

### EXHIBIT COVER PAGES AND PAGE NUMBERS

Each exhibit must be identified by a letter and number. Each exhibit shall have a cover sheet that identifies that letter and number in the middle of the page. Student must use the letter S before the number to identify Student's exhibits. Irvine must use the letter D before the number to identify Irvine's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Irvine's exhibit 1. Parties may either number each page within each exhibit or number each page in the binder consecutively beginning with the cover page before exhibit one as page 1, through the last page of the last exhibit. For example, if there are 100 total pages in the binder the first cover page in front of the first page of the first exhibit is page 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 should be in chronological order.

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

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

## ELECTRONIC COPIES OF EXHIBITS

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. The electronic copies must be an exact duplicate of the paper copies filed with OAH. OAH will issue 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 ability 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 June 9, 2020, at 5:00 PM, to discuss scheduling witnesses and how much time each witness will take. The parties shall discuss any issues pertaining to the parties, counsel and 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, Irvine shall inform Student which proposed witnesses are district employees. Irvine shall also identify the witnesses on Student's list that require a subpoena. Irvine may agree to accept service for witnesses under Irvine's control or provide Student with the witness' 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 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 case Student

requested the hearing and bears the burden of proof. Student's case-in-chief shall be presented first, followed by Irvine, 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(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. Irvine 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 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.

## 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.

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 or stream live through any means.

## RECORDINGS AS EXHIBITS

Student propose to introduce all or part of a recording of an individualized education program team meeting. 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

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

OAH will provide real time captioning service during the hearing.

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 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.

## ORDER TO SHOW CAUSE

1. The Order to Show Cause Hearing will take place via video conference at 1:00 PM, June 12, 2020, at which time Student will show cause why her complaint should not be dismissed for lack of prosecution.
2. Student must file a brief by close of business, June 10, 2020, addressing why her complaint should not be dismissed for lack of prosecution.
3. If Student successfully demonstrates good cause that the complaint not be dismissed on June 12, 2020, the hearing shall proceed on June 16, 2020, unless otherwise ordered.




Linda Johnson

Administrative Law Judge

Office of Administrative Hearings