BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

OAKLAND UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2023060353

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE, AND DENYING MOTION TO QUASH

OCTOBER 2, 2023

On September 29, 2023, Administrative Law Judge Alexa Hohensee, 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.

Attorney Nicole Hodge Amey appeared on behalf of Student. Attorney Elizabeth Schwartz appeared on behalf of Oakland Unified 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 October 10 through 12, 2023, and continue day to day at the discretion of the ALJ. The hearing will begin at 9:30 AM each day and generally end at 3:30 PM, unless otherwise ordered. The parties anticipate it will take three days to complete the hearing. Additional hearing dates will be discussed with the ALJ during the hearing. Student's attorney is scheduled to appear in an expedited due process hearing from October 17 through 19, 2023, and Oakland's attorney has a pre-planned trip scheduled for October 17 and 18, 2023.

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 must immediately notify all potential witnesses of the hearing dates and must 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

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 stated below. A free appropriate public education is called a FAPE. An individualized education program is called an IEP.

ISSUES

1. Did Oakland deny Student a FAPE by failing to provide all of Student's educational records within five days of Parents' April 10, 2023 request?
2. Did Oakland deny Student a FAPE by failing to assess her from June 7, 2021, through the end of the 2022-2023 school year in:
    a. assistive technology,
    b. speech and language, and
    c. social emotional skills?
3. Did Oakland deny Student a FAPE from June 7, 2021, through the end of the 2021 extended school year by:
    a. failing to offer IEPs reasonably calculated to enable Student to make progress appropriate in light of her circumstances, specifically sufficient specialized academic instruction, language and speech services, and social emotional support, and
    b. failing to offer Student 2021 extended school year services?
4. Did Oakland deny Student a FAPE from June 7, 2021, through the end of the 2021 extended school year by failing to implement Student's IEP, specifically, by failing to:
    a. implement Student's IEP goals,
    b. collect data,

c. provide assistive technology aids, services, and other supports, and

d. provide a structured literacy program?

5. Did Oakland deny Student a FAPE during the 2021-2022 school year and 2022 extended school year by failing to:

   a. offer appropriate and measurable writing goals in the December 7, 2021 IEP,

   b. make a clear, specific written offer of FAPE in the December 7, 2021 IEP,

   c. offer special education and related services reasonably calculated to enable Student to make progress appropriate in light of her circumstances, specifically sufficient specialized academic instruction, language and speech services, and social emotional support, and

   d. offer Student 2022 extended school year services?

6. Did Oakland deny Student a FAPE during the 2021-2022 school year and 2022 extended school year by failing to implement Student's IEP, specifically, by failing to:

   a. implement Student's IEP goals,

   b. collect data,

   c. provide assistive technology aids, services, and other supports, and

   d. provide a structured literacy program?

7. Did Oakland deny Student a FAPE during the 2022-2023 school year and 2023 extended school year by failing to:

   a. conduct a timely annual IEP team meeting,

   b. offer appropriate and measurable writing goals in the April 17, 2023 IEP,

   c. make a clear, specific written offer of FAPE in the April 17, 2023 IEP,

d. offer special education and related services reasonably calculated to enable Student to make progress appropriate in light of her circumstances, specifically, specifically sufficient specialized academic instruction, language and speech services, and social emotional support,

e. offer an appropriate placement, and

f. offer Student 2023 extended school year services?

8. Did Oakland deny Student a FAPE by predetermining placement at the April 14, 2023, IEP team meeting?

9. Did Oakland deny Student a FAPE during the 2022-2023 school year and 2023 extended school year by failing to implement Student's IEP, specifically, by failing to:

a. implement Student's IEP goals,

b. collect data,

c. provide assistive technology aids, services, and other supports, and

d. provide a structured literacy program?

A party must immediately file a written objection with OAH if the issues as described above do not reflect the party's understanding of the issues as clarified at the PHC. The ALJ will address any objections on the first day of hearing.

PROPOSED RESOLUTIONS

The resolutions requested by Student include placement in a nonpublic school with transportation, compensatory education, independent educational evaluations, and reimbursement to Parents for educationally related expenses.

OAH has not received a copy of Oakland's response to Student's complaint. Oakland must file its response with OAH within three business days from the date of this PHC. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

The parties must serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). The parties must 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) will 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. Oakland must use the letter D before the number to identify Oakland's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Oakland'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.

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

Electronic copies of exhibits filed with OAH must 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 must serve their list of witnesses on each other in compliance with Education Code section 56505. No party will 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 must 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 October 5, 2023, to discuss scheduling witnesses and how much time each witness will take. The parties must 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 must 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, Oakland must inform Student which proposed witnesses are District employees. Oakland must also identify the witnesses on Student's list that require a subpoena. Oakland may agree to accept service for a witness under Oakland's control or provide Student with the witness's most recent contact information.

Any contact information provided must be used for the limited purpose of issuing subpoenas or for contacting a witness to attend the hearing. Any contact information must not be disclosed to any other person.

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 must 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 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.

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 will be presented first, followed by Oakland, 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 must prepare a separate written list. Student 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 must 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 must 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 must 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 are granted subject to these conditions.

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

MOTIONS

On September 25, 2023, Oakland issued a subpoena duces tecum on the Academy of Alameda, Student's current school of attendance. The subpoena sought the following categories of documents, dated from May 1, 2023, through October 10, 2023, to be produced on the first day of hearing, October 10, 2023:

1. Any and all school records including but not limited to education, enrollment, discipline, Individualized Education Programs ("IEP"), teacher/administration notes or comments for Student,

2. Assessment and evaluation reports, including draft reports, that reference Student and/or Tina and/or Robert Farman ("Parents") by name, initials, or identification number,

3. Special education documents that reference Student or Parents by name, initials, or identification number,

4. Assessments, report cards, progress reports, work samples, and testing data that reference Student or Parents by name, initials, or identification number,

5. Assessment and test protocols that reference Student or Parents by name, initials, or identification number,

6. Observation data and notes that reference Student or Parents by name, initials, or identification number,

7. Communication logs that reference Student or Parents by name, initials, or identification number,

8. Any documents that reference Student's attendance or enrollment at any private school, public school, charter school, or educational program,

9. Correspondence, including but not limited to, letters and emails, between The Academy of Alameda and Parents regarding Student,

10. Contracts for service and registration documents that reference Student or Parents by name, initials, or identification number, and

11. Any and all documents relating to provision of services to Student, including, but not limited to: specialized academic instruction, speech and language, assistive technology, or any related services logs that reference Student or Parents by name, initials, or identification number.

On September 26, 2023, Student filed a motion to quash the subpoena duces tecum on the grounds that Oakland had not identified a reasonable necessity for the production, and that the subpoena duces tecum was overly broad and burdensome.

On September 28, 2023, Oakland filed an opposition. Oakland argued that the information sought from Student's current program was particularly material and

relevant to Student's remedies requests for prospective placement and services, particularly nonpublic school placement or reimbursement for private placement.

A party to a due process hearing under the Individuals with Disabilities Education Act has the right to present evidence and compel the attendance of witnesses. (20 U.S.C. § 1415(h); see also Ed. Code, § 56505, subd. (e).)

In special education proceedings in California, the hearing officer has the right to issue subpoenas duces tecum, or an order to produce document, upon a showing of reasonable necessity. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) This requirement mirrors that required by Code of Civil Procedure section 1985, subdivision (b), which requires:

> A copy of an affidavit must be served with a subpoena duces tecum . . ., showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

The good cause requirement is met by a factual showing of why the requested documents or things are material and relevant to the litigated issues. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.)

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecum. In ruling on such motions, Office of Administrative Hearings, called OAH, relies by analogy on the relevant portions of the Code of Civil

Procedure. Code of Civil Procedure section 1987.1 provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court must declare, including protective orders.

Student argues the subpoena duces tecum should be quashed because it fails to make the requisite showing of reasonable necessity for the requested documents with a statement of facts showing the material and relevant information sought. Oakland wrote the reasonable necessity in the subpoena duces tecum:

> Production of the requested records is reasonably necessary for Respondent to defend against Student's current due process filing in the OAH Case No. 2023060353. In her due process filing, Student alleges that Respondent denied Student a free appropriate public education ("FAPE") by failing to address her needs and failing to appropriately assess Student.
>
> By belief and information, Parents enrolled Student at The Academy of Alameda at the start of the 2023-2024 school year. Student alleges that the District failed to offer an appropriate program and that Student requires placement at a nonpublic school. In order for the District to defend against Student's claim that a nonpublic school is appropriate placement, the District will need to obtain current Student records from The Academy of Alameda in order to understand Student's current placement and needs.

Here, Student's claims are limited to alleged actions and inactions of Oakland from June 7, 2021, through the end of the 2022-2023 school year. However, Student challenges the appropriateness of Oakland's FAPE offer in the April 14, 2023, IEP, and seeks as a remedy prospective placement at a nonpublic school with transportation, and

reimbursement for private placement, among other remedies. Oakland's declaration of reasonable necessity establishes that the educational program Student is currently in, and his progress in that program, is material and relevant to Student's prospective remedies. At hearing, Student's attorney represented that Student's current school of attendance is a charter school, rather than a private school. However, the documents sought by the subpoena duces tecum are still material and relevant to Student's program going forward as a prospective remedy.

The subpoena duces tecum is not too broad in scope and is specifically limited to a short period of time, from May 1, 2023, through October 10, 2023. This brief time period also limits the responsive documents, and the production sought is not burdensome for Academy of Alameda.

Accordingly, the motion to quash is denied.

No other prehearing motions are pending or contemplated. Any motion that was not filed three business days before the PHC must 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 must 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

Neither party requested an accommodation or 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 the words 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 must 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 must 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 must 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 must 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.

Alexa Hohensee

Alexa Hohensee
Administrative Law Judge
Office of Administrative Hearings