BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF:

PARENTS ON BEHALF OF STUDENT,

v.

MCCABE UNION ELEMENTARY SCHOOL DISTRICT,

OAH CASE NUMBER 2019040734

and

MCCABE UNION ELEMENTARY SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT,

OAH CASE NUMBER 2019050092

ORDER FOLLOWING JANUARY 6, 2020 PREHEARING CONFERENCE

On, January 6, 2020, Administrative Law Judge Rommel P. Cruz, Office of Administrative Hearings, held a telephonic prehearing conference. The Administrative

Law Judge is called an ALJ; the Office of Administrative Hearings is called OAH; and a prehearing conference is called a PHC.

Attorneys Meagan Nunez and Patricia Darlin appeared on behalf of Student. Attorney Jack Sleeth appeared on behalf of McCabe Union Elementary 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 January 14, 15, and 16, 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.

HEARING LOCATION

The hearing will be held at McCabe Union's offices located at 701 West McCabe Road, El Centro, CA 92243.

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.

On November 18, 2019, OAH ordered McCabe Union to file the required certification within three days of the Order. McCabe Union failed to file the required certification as ordered. McCabe Union shall file the required certification within three days of this Order and provide facilities that comply with these laws.

Before the beginning of the hearing, McCabe Union shall ensure that the hearing room is configured into a courtroom setting and shall contain:

- a table for Student and his representatives;
- a table for McCabe Union'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. McCabe Union 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:

STUDENT'S ISSUES

1. Did McCabe Union substantively deny Student a free appropriate public education, also referred to as a FAPE, during the 2017-2018 school year by failing to fulfill its child find obligation?
2. Did McCabe Union procedurally deny Student a FAPE during the 2017-2018 school year by failing to fulfill its child find obligation resulting in:
    a. Preventing Parents from participating in Student's education;
    b. Depriving Student of an education benefit; and
    c. Depriving Student of educational opportunities?
3. Did McCabe Union substantively deny Student a FAPE during the 2018-2019 school year by:
    a. Failing to fulfill its child find obligation;
    b. Failing to educate Student since February 12, 2019;
    c. Failing to conduct legally adequate evaluations in all areas of suspected need; and
    d. Failing to find Student eligible for an individualized education program, also called an IEP?
4. Did McCabe Union procedurally deny Student a FAPE during the 2018-2019 school year by:
    a. Failing to find Student eligible for an IEP resulting in:
        i. Preventing Parents from participating in Student's education;
        ii. Depriving Student of an educational benefit;
        iii. Depriving Student of educational opportunities;
    b. Depriving Student of educational opportunities by:
        i. Failing to conduct legally adequate evaluations in all areas of suspected need; and

ii. Failing to present the March 20, 2019 psychoeducational assessment results to Parents in a comprehensible manner?

McCabe Union's Issue

1. Did McCabe Union's March 20, 2019 psychoeducational assessment comply with federal and state laws such that Student is not entitled to publicly funded independent educational evaluations?

Proposed Resolutions

The resolutions requested by Student include independent educational evaluations in the areas of functional behavior and psychoeducation; and compensatory education services in the areas of behavior and academics. McCabe Union seeks a finding that its March 20, 2019 psychoeducational assessment was legally compliant and is not obligated to fund an independent educational evaluation.

OAH has not received a copy of McCabe Union's response to Student's amended complaint that was deemed filed on August 22, 2019. McCabe Union shall file its response with OAH within three business days from the date of this PHC.

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. McCabe Union must use the letter D before the number to identify McCabe Union's exhibits. For example, S-1 means Student's exhibit tab 1 and D-1 means McCabe Union'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.

McCabe Union's binder must include a color copy of the school calendar for each school year in question, including the 2018-2019 school year.

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 inquired as to whether McCabe Union would make school psychologist Apolos De La Garza available for hearing. McCabe Union indicated that it would make Mr. De La Garza 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 10, 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 and McCabe Union requested the hearing and each bears the burden of proof as to issues raised in their complaint. In this consolidated matter, Student's case is designated the primary case, and therefore, Student's case-in-chief shall be presented first, followed by McCabe Union's.

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. McCabe Union 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. McCabe Union 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

Student's and McCabe Union's requests to make an audio recording of the hearing is granted on the following conditions:

- 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.

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

At the PHC, Student moved to exclude his testimony and provided the basis for his motion. Student contends his testimony is irrelevant to the issues for hearing, would cause him significant trauma and anxiety, and would be cumulative. Following the PHC, Student filed with OAH and served McCabe Union's attorney, a written motion for exclusion of his testimony with a declaration by Student in support of his motion. Any

response by McCabe Union shall be filed no later than 5:00 PM on January 7, 2020. OAH will rule on the motion in a separate order.

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

Neither party indicated a need for any accommodations in this case. 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 6, 2020

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