BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2022090021

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE

DECEMBER 23, 2022

On December 23, 2022, Administrative Law Judge Ted Mann, 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.

Meagan Nunez and Jennifer L. Varga, Attorneys at Law, appeared on behalf of Student. Tiffany Santos, Attorney at Law, appeared on behalf of San Diego 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 January 10, 2023 through 12, 2023, and continue day to day at the discretion of the ALJ. Parties are permitted to schedule witnesses for January 17, 2023 through January 19, 2023 in keeping with parties' estimated hearing length. 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 five to 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. (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 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. 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:

ISSUES

1. Did San Diego deny Student a free appropriate public education, called a FAPE, during the 2020-2021 school year by:
   a. Failing to implement Student's individualized educational program, called an IEP, dated December 18, 2019, from August 31, 2020 through October 9, 2020;
   b. Failing to offer or provide Student with appropriate services and supports from August 31, 2020 through October 9, 2020;
   c. Failing to assess Student in the area of behavior from August 31, 2020 through October 9, 2020;
   d. Failing to offer an appropriate educational placement in the October 9, 2020 IEP;
   e. Failing to offer appropriate services and supports in the October 9, 2020 IEP;
   f. Failing to offer appropriate annual goals in the October 9, 2020 IEP;
   g. Failing to include legally sufficient present levels of performance in the October 9, 2020 IEP;
   h. Failing to provide Parents with prior written notice of its decision to reduce Student's mental health services in the October 9, 2020 IEP;
   i. Failing to make a clear and specific offer of FAPE at the October 9, 2020 IEP;
   j. Predetermining Student's October 9, 2020 IEP;

k. Failing to consider the full continuum of educational placements in the October 9, 2020 IEP;

l. Failing to assess Student in the area of behavior prior to the October 9, 2020 IEP meeting;

m. Failing to offer to re-evaluate Student on or about October 9, 2020;

n. Failing to revise Student's IEP at the October 9, 2020 IEP meeting to address Student's changing needs;

o. Failing to create an IEP with a description of the means by which the IEP would be provided under emergency conditions at the October 9, 2020 IEP;

p. Failing to offer an appropriate educational placement in the November 5, 2020 and November 13, 2020 IEPs;

q. Failing to offer appropriate services and supports in the November 5, 2020 and November 13, 2020 IEPs;

r. Failing to offer appropriate goals in the November 5, 2020 and November 13, 2020 IEPs;

s. Failing to include legally sufficient present levels of performance in the November 5, 2020 and November 13, 2020 IEPs;

t. Failing to consider the full continuum of educational placements at the November 5, 2020 and November 13, 2020 IEPs;

u. Providing Parents with inaccurate information which impeded their ability to participate in the IEP process in the November 5, 2020 and November 13, 2020 IEPs;

v. Failing to assess Student in the area of behavior on or about November 2020;

w. Failing to re-evaluate Student on or about November 2020 in the areas of psychoeducation, educationally related mental health services and social/emotional functioning;

x. Failing to revise Student's IEP at the November 5, 2020 and November 13, 2020 IEP meetings to address Student's changing needs;

y. Failing to create an IEP with a description of the means by which the IEP would be provided under emergency conditions at the November 5, 2020 and November 13, 2020 IEP meetings;

z. Failing to revise Student's IEP on or about December 2020 to address Student's changing needs;

aa. Failing to create an IEP with a description of the means by which the IEP would be provided under emergency conditions on or about December 2020;

bb. Failing to convene an IEP meeting within 30 days of parental request on March 6, 2021;

cc. Failing to consider Dr. Zeisz's independent evaluation at the April 27, 2021 IEP meeting;

dd. Failing to consider the full continuum of educational placements at the April 27, 2021 IEP meeting;

ee. Failing to provide Parents with prior written notice of San Diego's decision not to place Student at a residential treatment center at the April 27, 2021 IEP meeting;

ff. Failing to make a formal offer of FAPE at the April 27, 2021 IEP meeting;

gg. Failing to make a clear and specific offer of FAPE at the April 27, 2021 IEP meeting;

hh. Failing to create an IEP with a description of the means by which the IEP would be provided under emergency conditions at the April 27, 2021 IEP meeting?

2. Did San Diego deny Student a FAPE during the 2021-2022 school year by:
   a. Failing to make an appropriate offer of FAPE in the August 17, 2021 letter;
   b. Predetermining San Diego's offer of FAPE in the August 17, 2021 letter;
   c. Failing to revise Student's IEP in the August 17, 2021 letter;
   d. Failing to include Parents in the decision regarding Student's IEP in the August 17, 2021 letter;
   e. Failing to make a placement decision with a group of people knowledgeable about Student and their evaluation data in the August 17, 2021 letter;
   f. Failing to make a clear and specific offer of FAPE in the August 17, 2021 letter;
   g. Making an offer of FAPE in the August 17, 2021 letter without convening an IEP meeting;
   h. Failing to consider Dr. Zeisz's independent evaluation in the preparing the August 17, 2021 letter;
   i. Failing to make an offer of FAPE at the October 8, 2021 IEP meeting;
   j. Failing to revise Student's IEP at the October 8, 2021 IEP meeting to address Student's changing needs;
   k. Failing to offer or provide and appropriate educational placement at the October 8, 2021 IEP meeting;
   l. Failing to offer or provide Student with appropriate services and supports in the October 8, 2021 IEP meeting;

m. Failing to assess and develop and develop an IEP within 60 days of parental consent to an assessment plan signed May 13, 2021; and

n. Failing to provide Parents with Student's complete educational file within five days of parental requests on January 29, 2022 and May 4, 2022?

The issues have been reworded for clarity within the discretion of the Administrative Law Judge. (*M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189.) Parties are to notify OAH in writing, prior to the hearing, if the foregoing issues are not consistent with their understanding of the issues as discussed at the PHC.

PROPOSED RESOLUTIONS

The resolutions requested by Student include parental reimbursement for tuition, parental visits and Student's transportation to and from Trails Carolina and Whetstone Academy, along with attorney's fees.

San Diego filed its response to Student's complaint on September 9, 2022. (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

The parties shall serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). The parties shall 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).

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.

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

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

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. 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 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 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 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.

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 were ordered during the PHC to meet and confer no later than Wednesday, January 4, 2023, by 5:00 PM, to discuss scheduling witnesses and how much time each witness will take. The parties shall 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 shall 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. The parties are also ordered to meet and confer regarding methods for utilizing Student's proposed exhibits of IEP recordings and transcripts of those recordings.

As part of the meet and confer process, San Diego shall inform Student which proposed witnesses are District employees. San Diego shall also identify the witnesses on Student's list that require a subpoena. San Diego may agree to accept service for a witness under San Diego's control or provide Student with the witness's 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 a witness to attend the hearing. Any contact information shall not be disclosed to any other person.

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 San Diego, 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 shall 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 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 the following conditions:

1. the OAH recording is the only official recording;
2. 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;
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 shall 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.

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. Here, Student is granted permission to upload the recording and transcript of the IEP dated October 8, 2021. The ALJ has discretion to admit or exclude evidence in the form of a recording. Any request to utilize or admit a recording or transcript 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. As noted, above, the parties are ordered to meet and confer regarding the use of the IEP recording and/or transcript at hearing.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education. Documents

offered as evidence to support a request for reimbursement must be separated by vendor.

MOTIONS

Student's motion to quash records subpoenas to Trails Carolina and Whetstone Academy and San Diego's motion to quash a subpoena for testimony and records to Sarah Ott are pending.

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, 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 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 any accommodation or an interpreter at the PHC.

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 "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 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 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 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.

IT IS SO ORDERED.

Ted Mann

Ted Mann
Administrative Law Judge
Office of Administrative Hearings