BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:

PARENT ON BEHALF OF STUDENT,

and

MT. DIABLO UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2023010234

OAH CASE NUMBER 2022120477

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE

MARCH 14, 2023

On March 13, 2023, Administrative Law Judge Cynthia Fritz, 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.

Parent appeared on behalf of Student. Attorney Christine Huntoon appeared on Mount Diablo Unified School District, called Mount Diablo. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

MOTIONS

MOUNT DIABLO'S MOTION TO DISMISS IS GRANTED IN PART.

On March 8, 2023, Mount Diablo filed a motion to dismiss Student's complaint, in part. Student filed opposition the same day. The parties' argued this matter at the PHC.

Mount Diablo argued that some of Student's issues, sub-issues, and proposed resolutions should be dismissed because:

1. any alleged IDEA violations before September 1, 2022, were waived under a settlement agreement and are outside OAH's jurisdiction;

2. the alleged breach of reimbursement provisions of the October 27, 2021 settlement agreement have already been addressed by the California Department of Education and are outside OAH's jurisdiction; and

3. any allegations related to the Americans with Disabilities Act, California Penal Code, discrimination, United Nations human rights guidelines, and tortious negligence cannot be heard by OAH.

Student believes all issues should remain and be adjudicated by OAH.

Under the Individuals with Disabilities Education Act, referred to as the IDEA, Parents have the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); see also Ed. Code, § 56501, subd. (a).) Of accord, the California Education Code affords a party the right to present a complaint regarding matters involving a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the

provision of a free appropriate public education or FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility. (Ed. Code, § 56501, subd. (a).) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

Mount Diablo's motion to dismiss is granted in part. Student's issues 11, 12A, 12B, and 19 allege violations of health and safety, the California Penal Code, neglect, and perjury. These issues are outside OAH's jurisdiction. Thus, Student's issues 11, 12A, 12B, and 19, as stated in Student's March 8, 2023 prehearing conference statement, are dismissed.

Mount Diablo's request to dismiss any issues, sub-issues, and proposed resolutions related to the October 27, 2021 settlement agreement as outside of OAH's jurisdiction including that the alleged IDEA violations before September 1, 2022, were waived, and that the breach of reimbursement was addressed by CDE, will be determined in phase one of the due process hearing as described below in EVIDENCE PRESENTATION.

Student also plans to file a motion for clarification on a prior order regarding records. 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.

EVIDENCE PRESENTATION

There will be a phase one and phase two of the due process hearing.

Phase One: Preliminary issues related to the prior settlement agreement between the parties. The ALJ will determine the issues over which OAH has jurisdiction considering the October 2021 settlement agreement.

Phase Two: Substantive Issues

On the first day of hearing, the ALJ will only hear evidence pertinent to the parties' prior settlement agreement and determine if sine of Student's issues must be dismissed. This is called phase one of the hearing. First, Student will offer evidence of the reasons Student believes all issue should remain for determination at the hearing. Then, Mount Diablo will have the opportunity to offer its evidence in favor of the dismissal of some of Student's issues due to a prior settlement agreement and lack of OAH jurisdiction. Student may have a brief period for rebuttal if deemed necessary by the ALJ. The parties will then give oral concluding statements regarding this preliminary matter.

Subsequently, a recess will be taken. Depending on how long the testimony takes, and the volume of evidence to be considered, the break may be short or may be an afternoon or overnight. When the hearing resumes, the ALJ will determine if none or some issues are dismissed, and what issues remain. This ruling will be made orally and on the record. Then Phase Two of the case proceeds. The ruling on this preliminary matter will be explained in detail in the written decision.

There is no continuance between phase one and two of the hearing. Student should be prepared to have witnesses available to timely begin phase two of the hearing.

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, both parties have the burden of proof related to their issues. In this consolidated matter, Student's case-in-chief shall be presented first, followed by Mount Diablo, unless otherwise ordered.

SCOPE OF WITNESS EXAMINATION

Each witness will be called to testify only once for each phase of the hearing, except for rebuttal purposes. All parties must examine a witness on all issues for that specific phase when the witness is first called to testify. Requiring a witness to appear only once for each phase of the hearing takes priority over the order in which parties present their case-in-chief.

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on March 21, 22, and 23, 2023 and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM each day and generally end at 3:30 PM, unless otherwise ordered. The parties anticipate it will take 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 were clarified by the parties and the ALJ during the PHC as follows:

STUDENT'S ISSUES

1. Mount Diablo denied Student a free appropriate public education, called FAPE, during the 2021-2022 school year by:

a. predetermining the October 2021 individualized education program, called IEP, offer;

b. failing to offer appropriate goals in all areas at the October 2021 IEP team meeting;

c. failing to consider, revise the IEP, and implement the recommendations from the March 2022 feeding evaluation;

d. failing to consider, revise the IEP, and implement the recommendations from the April 2022 neuropsychological evaluation;

e. failing to consider, revise the IEP, and implement the recommendations from the May 2022 occupational therapy evaluation;

f. failing to assess Student in all areas of need before entering Mount Diablo in August 2022;

g. failing to offer a revised reading goal at the May 2022 IEP team meetings;

h. failing to offer revised writing goals in writing endurance, anchoring, and sizing at the May 2022 IEP team meetings;

i. failing to offer a revised math goal at the May 2022 IEP team meetings;

j. failing to provide some educational benefit to Student in reading, writing, and math;

k. predetermining the May 2022 offer of supports and services;

l. failing to have all required IEP team members present at the May 2022 IEP team meetings; and

m. impeding parent's right to participate in the May 18, 2022 IEP meeting because it predetermined the IEP offer and failed to consider the evaluations?

2. Mount Diablo denied Student a FAPE during the 2022-2023 school year up to the date of the filing by:

a. failing to implement Student's October 2021 IEP when it failed to have a one-to-one aide in close proximity to Student on October 25, 2022;

b. failing to offer appropriate goals in all areas of need at the November 2022 IEP;

c. failing to revise Student's IEP to address Student's need for heated food;

d. failing to implement the October 2021 and November 2022 IEPs related to permitting weekly video for parent and the feeding provider;

e. failing to implement the October 2021 and November 2022 IEPs related to parent meetings;

f. failing to implement the October 2021 and November 2022 IEPs by failing to allow a paraprofessional to attend the parent meetings;

g. failing to provide Parent progress reports in quarter one of Student's school year; and

h. impeding upon parent's right to participate in the IEP decision-making process by failing to provide weekly notes and allow observations more than once per month so that Parent could review and revise?

STUDENT'S PROPOSED RESOLUTIONS

The resolutions requested by Student include reimbursement of expenses incurred, compensatory education, independent assessments, comply with feeding recommendation in settlement agreement, implement goals, one-to-one aide feeding assistance, details of how feeding therapist will evaluate; fund a microwave for Student at school, heat food at school, IEP consultations, IEP implementation, hold IEP to discuss school counseling, social skills program, provide Student documents to show implementation; allow Parent to review school security video, allow Parent to observe at school with 24-48 hours' notice, provide weekly video for Parent and provider, schedule Parent for weekly feeding observations if video is not available; fund Child's Play, and Nikki Zader consultation time, schedule Parent meeting with paraprofessionals, set up

audio recording for consultations and providers, allow written communication between providers, and allow recording and written communications with providers.

MOUNT DIABLO ISSUES

1. Can Mount Diablo assess Student under the November 4, 2022 assessment plan without parental consent?
2. Can Mount Diablo speak to Student's medical doctors and private providers, without parental consent?

MOUNT DIABLO'S PROPOSED RESOLUTIONS

Mount Diablo requests OAH order allow Mount Diablo to assess under the November 4, 2022 assessment plan without parental consent and allow it to speak with medical doctors and private providers.

Mount Diablo filed a response on January 20, 2023. (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.) The ALJ has clarified the statement of issues as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist*. (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2017) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) The issues in the complaint have been reorganized and rephrased for clarity. No change in substance has been made. A party believing that an issue has been misstated must file a notice in writing, before the first day of hearing, stating its concern and referring to supporting portions of the complaint.

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. Mount Diablo must use the letter D before the number to identify its exhibits. 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.

Mount Diablo 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 are ordered to meet and confer no later than March 17, 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.

As part of the meet and confer process, Mount Diablo shall inform Student which proposed witnesses are District employees and identify the witnesses on Student's list that require a subpoena.

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.

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.

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 requests to make an audio recording of the hearing is 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. 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. The parties must provide a transcript as an exhibit for any 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.

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 and accommodation or a language interpreter at the time of the PHC. Parent stated that Student may need accommodations but did not know at the time of the PHC.

The parties were informed at the PHC to contact OAH at (916) 263-0880 or send an email to OAHADA@dgs.ca.gov as soon as a reasonable accommodation is known for the due process hearing. 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 OPEN TO THE PUBLIC

Parent requested an open hearing. An ALJ may restrict attendance because of the physical limitations of the hearing facility or take other action to promote due process or the orderly conduct of the hearing. (Cal. Code Regs., Tit. 1, § 1030.) Government Code, section 11425.20 empowers the ALJ to order an open hearing to be closed or make other protective orders to the extent necessary or proper to ensure a fair hearing in the circumstances of the case. Currently, all hearings are being conducted via

videoconference without observers present or participating in the videoconference. OAH will provide the hearing recording upon request.

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.

Cynthia Fritz

Cynthia Fritz
Administrative Law Judge
Office of Administrative Hearings