BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

DEL MAR UNION SCHOOL DISTRICT.

OAH CASE NUMBER 2020120692

ORDER FOLLOWING PREHEARING CONFERENCE GRANTING REQUEST FOR CONTINUANCE; ORDER GRANTING REQUEST FOR OFFICIAL NOTICE; ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

FEBRUARY 1, 2021

On February 1, 2021, Administrative Law Judge Rommel P. Cruz, 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 Sheila Bayne appeared on behalf of Student. Attorney Summer Dalessandro appeared on behalf of Del Mar Union School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

MOTION TO CONTINUE

On January 28, 2021, Student filed a motion to continue the hearing based on a conflict with another due process hearing scheduled on the same dates as this matter. In addition, Student contends a continuance is required as psychologist, Sharon Lerner Baron, a key witness for Student, is unavailable on the dates for hearing. At the PHC, Student represented that Ms. Baron would not be available until March 16, 2021, at the earliest. Del Mar Union objected to the continuance.

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

to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance or imposing conditions on the continuance; and any other relevant fact or circumstance. (Cal. Rules of Court, rule 3.1332(d).)

OAH has reviewed the request for good cause and considered all relevant facts and circumstance. The motion for continuance is granted based on the unavailability of Student's witness, Ms. Baron, on the currently scheduled dates for hearing, and to avoid an unreasonably long delay between hearing dates in February and at the earliest, mid-March 2021. Accordingly, all dates are vacated. Based on the discussion of the parties and the ALJ as to the earliest available dates for the parties, the matter will proceed as follows:

The PHC is rescheduled to April 2, 2021, at 1:00 PM. The parties filed PHC statements, and therefore, need not file additional statements unless changed circumstances warrant it. PHC motions shall be filed no later than three business days prior to the PHC.

The hearing will take place on April 13, 14, and 15, 2021, 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. Additional hearing dates will be discussed with the ALJ during the hearing.

OAH is authorized to conduct due process hearings by videoconference or telephone. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Based on state and federal guidance to address safety procedures due to the novel coronavirus, COVID-19, OAH will conduct the due process hearing by videoconference using the Microsoft Teams

application. Unless otherwise ordered, participants are required to appear by videoconference using a webcam and Microsoft Teams.

The parties shall immediately notify all potential witnesses of the hearing dates and shall subpoena witnesses, if necessary, to ensure that the witnesses will appear to testify. A party's failure to notify or subpoena a witness to testify will not be considered good cause to continue the hearing. 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.

At the PHC, Del Mar Union indicated it would be subpoenaing records from several of Student's witnesses and requested that Student provide email addresses to witnesses not within its control. Specifically, Del Mar Union sought email addresses for Dian Tackett, Ph.D. and David Paltin, Ph.D. At the PHC, Student indicated it would provide Del Mar Union with Dr. Tackett's and Dr. Paltin's email addresses by the end of day on February 1, 2021. Student is ordered to provide Del Mar Union with Dr. Tackett's and Dr. Paltin's email addresses, along with any other witnesses identified by Student that is not within the control of Del Mar Union.

OFFICIAL NOTICE

On January 27, 2021, Del Mar Union filed a request for OAH to take judicial notice of directives and guidance issued by the California Department of Public Health and related state and local agencies. Specifically, Del Mar Union requested judicial notice of the following:

1. County of San Diego, Health and Human Services Agency, Order of the Health Officer, signed March 12, 2021.
2. County of San Diego, Health and Human Services Agency, Amended Order of the Health Officer and Emergency Regulations, signed on March 16, 2020, with three addendums dated March 17, 18, and 23, 2020.
3. County of San Diego, Health and Human Services Agency, Order of the Health Officer and Emergency Regulations, signed on April 8, 2020.
4. County of San Diego, Health and Human Services Agency, Order of the Health Officer and Emergency Regulations, signed April 30, 2020.
5. California Department of Public Health's COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year, dated July 17, 2020.
6. California Department of Public Health and California Department of Industrial Relations, COVID-19 Industry Guidance: Schools and School-Based Programs, dated August 3, 2020.
7. California Department of Public Health, California Department of Public Health Schools Guidance FAQs, dated August 3, 2020.
8. County of San Diego, Health and Human Services Agency, Order of the Health Office and Emergency Regulations, signed August 21, 2020.

At the PHC, Student did not object to OAH taking official notice of the eight documents.

In administrative proceedings, the doctrine of judicial notice is encompassed with the doctrine of official notice. The Government Code provides that administrative tribunals may take official notice of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the

California courts. (Gov. Code, § 11515.) Evidence Code section 452 governs the material which may be judicially noticed by the California courts, which includes official acts the legislative, executive, and judicial departments of the United States and of any state of the United States, and facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code, § 452, subd. (c), (h).)

The eight documents listed above involve official acts and guidance issued by the State of California and the County of San Diego, are not reasonably subject to dispute, and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Accordingly, the documents fall within Evidence Code section 452 subdivisions (c) and (h), and are therefore, subject to official notice pursuant to Government Code section 11515. As a result, official notice of the orders and guidance listed above is taken. Del Mar Union shall make each officially noticed document part of its hearing exhibits, identifying each document as a separate exhibit.

MOTION TO DISMISS

On January 26, 2021, Del Mar Union moved to dismiss Student's Issues 1, 3, 7, and 8. Del Mar Union contends that Issues 1 and 3 allege violations of system-wide changes, not limited to Student. Further, Del Mar Union argues Issues 1 and 3 are contained within Student's Issues 2 and 4, and therefore, duplicative.

Del Mar Union further contends Issues 7(a), 7(b), and 7(c), raise claims based on Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.), the Americans with Disability Act (42 U.S.C. §§ 1201, et seq.), and the United States and California constitutions, which are outside OAH's jurisdiction, and should therefore, be dismissed. Del Mar Union also contends Issue 8 involving alleged bullying experienced by Student

improperly alleges violations under California Education Code sections 234 and 48900, which are not within OAH's jurisdiction. On January 29, 2021, Student filed an opposition.

The purpose of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education," referred to as a FAPE, and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) The Individuals with Disabilities Education Act is referred to as the IDEA.

A party has 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); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a free appropriate public education 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].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified School. Dist*. (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

While OAH has jurisdiction under the IDEA to hear individual claims raised by Student that Del Mar Union denied him a FAPE, OAH does not have jurisdiction to hear Student's claims of systemic violation and/or claims on behalf of similarly situated students. (*Student v. Oxnard School Dist*. (Oct. 1, 2018) OAH Case No. 2018090070 (Order Dismissing in Part Student's Complaint); see *J.R. v. Oxnard School Dist.* (C.D. Cal., July 30, 2019, Case No. LA CV17-04304 JAK (FFMx)) 2019 WL 4438243, *19.). Therefore,

to the extent any of Student's issues raise claims of a system wide violation and/or on behalf of similarly situated students, those claims are dismissed as outside OAH's jurisdiction.

Further, OAH does not have jurisdiction to decide claims based on Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.), Section 1983 of Title 42 United States Code, the Americans with Disability Act (42 U.S.C. §§ 1201, et seq.), or the Unruh Civil Rights Act (Civ. Code, § 51), or other federal and state civil tort laws.

Student's opposition acknowledges that the claims raised in Issues 7(a), 7(b), and 7(c), are not IDEA claims. Regardless, Student contends the claims involve alleged retaliation by Del Mar Union in response to Student's efforts to assert his right to receive a FAPE, and are therefore proper claims before OAH. However, Student's contention is misplaced. Though OAH does has jurisdiction to hear claims relating to the identification, evaluation, or educational placement of a child, or the provision of a FAPE to such a child, the claims must be based on an alleged violation of the IDEA, not Section 504 of the Rehabilitation Act of 1973, the Americans with Disability Act, or any other federal and state civil tort laws. Accordingly, Student's Issue 7(a), 7(b), and 7(c) are dismissed as OAH does not have jurisdiction to resolve these claims.

However, Issues 1 and 3 are not wholly encompassed or duplicative of Issues 2 and 4. Issues 1 and 2 differs in that Issue 1 alleges a failure to provide in-person services. In contrast, Issue 2 alleges a failure to offer Student distance learning without first evaluating him or providing him necessary accommodations. Likewise, Issues 3 and 4 are similarly distinguishable. Further, as determined above, the claims in Issues 1 and 3 regarding Student's "Rights" that were allegedly violated are limited to claims under the IDEA, and claims involving only Student, and not based on claims outside OAH's jurisdiction. Therefore, Del Mar Union's motion to dismiss Issues 1 and 3 is denied.

As to Issue 8, Student's claim of a denial of FAPE based on bullying he may have experienced is not wholly outside OAH's jurisdiction. To the extent Issue 8 alleges a denial of a FAPE based on a failure by Del Mar Union to properly respond to the bullying Student experienced which resulted in depriving him of a meaningful educational benefit, that is within OAH's jurisdiction. (*Dear Colleague Letter*, Office of Special Education and Related Services (OSERS) (August 20, 2013) 61 IDELR 263.) Therefore, Del Mar Union's motion to dismiss Issue 8 is denied. The parties and the ALJ will have a further opportunity to organize and clarify the issues for hearing at the PHC.

FAILURE TO COMPLY

The failure to comply with this Order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

Rommel P. Cruz

Rommel P. Cruz
Administrative Law Judge
Office of Administrative Hearings