BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

SAN DIEGUITO UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2024110272

ORDER FOLLOWING PREHEARING CONFERENCE, DENYING REQUEST TO ADD SUB-ISSUE 2D, AND QUASHING SUBPOENA DUCES TECUM

JANUARY 31, 2025

On January 31, 2025, Administrative Law Judge Penelope Pahl, 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.

Attorneys Margaret Adams, and Jennifer Varga, appeared on behalf of Student. California State Bar Certified Legal Intern Joshua Sarsfield attended with Student's attorneys. Attorney Jasey Mahon appeared on behalf of San Dieguito Union High

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 February 11, 12, and 13, 2025. After the scheduled dates, the hearing shall continue day to day, as needed, Mondays and Fridays included, 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, if needed 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

Pursuant to discussions with the parties during the Prehearing Conference, the ALJ has clarified the statement of some issues and re-ordered the 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. 2002) 291 F.3d 1086, 1090. No change in substance has been made.

ISSUES

1. Did San Dieguito Union High School District, deny Student a free, appropriate public education, or FAPE during the 2022-2023 school year, beginning December 1, 2022, by failing to assess in the areas of social emotional needs and mental health and find Student eligible for special education under the category of Emotional Disability?
2. Did San Dieguito deny Student a FAPE during the 2023-2024 school year, including extended school year, by failing to:
    a. Offer adequate social emotional or mental health supports in the August 11, 2023 IEP;
    b. Convene an IEP team meeting within 30 days of Parent's September 1, 2023 request for an IEP team meeting; and
    c. Complete an educationally related mental health services assessment within sixty days of Parent's November 14, 2023 consent to the assessment plan?
3. Did San Dieguito deny Student a FAPE during the 2024-2025 school year, through November 8, 2025, by failing to:
    a. Have an IEP in place by the beginning of the school year;

b. Convene an IEP team meeting within thirty days of Parent's July 18, 2024 request for an IEP meeting;
c. Complete the educationally related mental health services assessment Parent consented to on November 14, 2023;
d. make an offer of FAPE at any time prior to November 8, 2024;

DISTRICT'S OBJECTION TO STUDENT'S ISSUE 2d, AS STATED IN STUDENT'S PREHEARING CONFERENCE STATEMENT

Student included sub-issue, 2d, in her prehearing conference statement that she concedes was not included in her complaint. The issue was:

> "Whether District denied Student FAPE during the 2023–2024 school year including ESY 2024 by failing to provide an assessment plan for an ERMHS assessment within 15 days of Parent's first request for an ERMHS assessment on September 1, 2023."

Student argues that her complaint gave notice to District that Student would be raising this issue on pages 8 and 9 of the complaint where facts related to the claim were discussed. Student argues the pleading should be "liberally construed" to allow the issue to be heard.

San Dieguito did not consent to adding this issue to the claims to be considered at hearing. The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).). San Dieguito objected to inclusion of this issue as it was not pled in the complaint in the issue statement. San Dieguito argues that Student makes many assertions of fact in the complaint that were not included as issues. Furthermore, the

issues and sub-issues Student did raise were specifically stated in the issue statements of the complaint.

Student's request to add sub-issue 2d is denied. Student does make several assertions in her complaint that are not listed as sub-issues. Student does, however, specifically list the sub-issues to be heard in their complaint. San Dieguito cannot be required to guess which statements are being asserted as issues and which are being asserted for context or other reasons. Student's prehearing conference statement acknowledged the issue was "inadvertently omitted from the due process complaint." There are procedural steps to remedy such an oversight, such as amending the complaint.

PARTY ISSUE REVIEW RESPONSIBILITY AND DISPUTE NOTIFICATION

The parties are responsible for carefully reviewing the issues as stated in this prehearing conference order. These will be the hearing issues. A party believing that an issue has been misstated or improperly omitted shall promptly file a notice in writing, prior to the first day of hearing, stating its concern and referring to supporting portions of the complaint.

PROPOSED RESOLUTIONS

The resolutions requested by Student include a finding that Student prevailed on all issues and an order requiring San Dieguito to reimburse Parent for tuition and related costs associated with Student's residential treatment center placement.

EXHIBITS

Exhibits must be uploaded electronically according to the Order Setting Procedures for Filing Exhibits Electronically which was attached to the Scheduling Order in this case. This order gives detailed instructions for naming and identifying exhibits.

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 regarding exhibit uploads, please contact OAH at OAHSEOps@dgs.ca.gov. It is not necessary to file exhibits or witness schedules with OAH if they have been uploaded into Case Center.

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) and this order, 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 for example, S-1, S-2, etc. San Dieguito must use the letter D before the number to identify San Dieguito's exhibits, for example, D-1, D-2 etc. 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.

EXHIBIT CONTENT

- Each exhibit must consist of one document with all of its pages.
- Different documents may not be combined into one exhibit.
- Emails may be consolidated into one exhibit if they are part of a single chain of messages.
- Exhibits should be uploaded into Case Center in chronological order. If you were given permission to provide paper copies of your documents, please stack them in date order when giving a copy to the other side.
- Parties should include resumes or curriculum vitae for each witness who will testify to their professional credentials.
- San Dieguito's exhibits must include a color copy of the school calendar for each school year in question.

WITNESSES

The parties shall disclose witnesses they intend to call to 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.

AUDIO ONLY OR TELEPHONIC TESTIMONY

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. If either side has a witness who is unable to attend the hearing by computer, a motion must be filed with OAH prior to the beginning of the hearing explaining why the person is unable to join the hearing using a computer and video.

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 file a motion requesting permission to do so before the hearing. Any motion filed after the prehearing conference must be accompanied by a declaration stating why the motion was not filed on time as directed in the scheduling order.

WITNESS ATTENDANCE IS THE PARTY'S RESPONSIBILITY

The parties are responsible for making sure their own witnesses attend the hearing, 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.

ALJ MAY LIMIT UNNECESSARY OR DUPLICATIVE EVIDENCE

The ALJ has discretion to limit the number of witnesses and the time allowed for testimony. Education Code, section 56505.1, subdivision (h), gives the ALJ authority 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.

Parties will be expected to be prepared for hearing. Parties will be expected to prepare questions they need to ask witnesses before the hearing begins. Parties are allowed to ask witnesses questions about documents, events relevant to the issues being decided, and about their opinions if their opinions are relevant to the case.

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, or does not help the judge to understand a parties' arguments. The judge may also refuse to hear evidence if the evidence is too time consuming to justify the time it would take to hear compared to the value of the information it will provide to the judge.

The parties are ordered to meet and confer no later than **February 6, 2025** at 3:00 PM to discuss:

- how many witnesses each side will most likely call and how many of those witnesses are on both sides' witness lists;

- scheduling witnesses and an estimate of how much time each side will need to question a witness;
- any concerns related to a witness' inability to appear by videoconference for hearing, use the electronic evidence program Case Center, or the need for witness subpoenas, if any; and
- whether duplicate exhibits can be eliminated by comparing the documents each side wants the judge to consider.

As part of the meet and confer process, San Dieguito will inform Student whether witnesses Student wishes to call are current San Dieguito employees. Each side will inform the other whether witnesses under their control must be subpoenaed instead of just given notice to attend the hearing on a certain date and time.

WITNESS ATTENDANCE IS THE PARTY'S RESPONSIBILITY

The parties are responsible for making sure their witnesses attend the hearing, unless otherwise ordered by the ALJ. A party's failure to properly notify or subpoena a witness is not an excuse justifying additional hearing time, or a delay in the hearing.

PARTICIPANT INFORMATION FORM

Both parties must ensure OAH has current contact information for all hearing participants and witnesses, including email addresses and telephone numbers. Updated Participant Information forms are required if a party or witness' contact information is not current. Updated forms must be filed two business days before the hearing starts.

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 shall be presented first, followed by San Dieguito's unless otherwise ordered.

WITNESS SCHEDULE

The parties must provide a proposed joint witness schedule to the ALJ on the first day of hearing. The schedule should include:

- the first and last name of all witnesses, the parties believe will be called;
- the witnesses' title;
- which party is calling the witness to testify;
- the date the witness will testify; and
- The hours each witness is expected to testify.

It is expected that the parties will cooperate to develop the joint witness list. In the rare event this is not possible, each party shall prepare a separate written schedule, accompanied by a declaration as to why separate scheduled were required. Student must have witnesses available to start the case.

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 parties must schedule their witnesses to avoid delays in the hearing. 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, unless needed for rebuttal purposes. All parties must ask the witness all necessary questions 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.

ELECTRONIC RECORDINGS

AUDIO RECORDING

Both parties requested permission to make an audio recording of the hearing for the attorney's personal notetaking purposes. Permission to make an audio recording is subject to the ALJ's discretion. Both parties' requests to make a single audio recording of the hearing for the attorney's note-taking purposes only are granted subject to the following conditions:

1. the OAH recording is the only official recording;

2. the parties shall turn their recording device off at the same time that the ALJ is off the record to avoid recording conversations while off the record;

3. problems with 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; and the recording shall not be shared with any non-party, possible witness, or posted online;

5. participants shall not take screenshots of the videoconference nor share or publish any portion of the videoconference or audio recording.

6. All internal comment and chat features of Zoom have been disabled for purposes of the hearing. Use of any of these features is prohibited and shall not be part of the official record.

VIDEO RECORDING

No party, witness or anyone else may videorecord any part of the proceedings or stream the proceedings live through any means.

RECORDINGS AS EXHIBITS

Student may request the opportunity to present a portion of an IEP recording as an exhibit. Recordings may not be uploaded electronically without the ALJ's permission. However, any recording Student wishes to present as evidence must be exchanged with opposing parties as required by California Education Code section, 56505, subdivision (e)(7). 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 exact portions of the recording being offered as evidence

must be identified, and the persons speaking must be established with admissible evidence. The ALJ may request a transcript of the portion of the recording being offered. 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.

MOTION TO QUASH

On January 28, 2025, San Dieguito filed a motion to quash the subpoena issued to Orletta Nguyen, San Dieguito Union High School District's director of special education. Student's subpoena was issued on January 21, 2025 and sought documents to be produced on the first day of hearing, February 11, 2025. The documents sought were described as:

> "any and all documents and electronically stored Information: including, but not limited to: any and all correspondence including but not limited to emails, voicemails, faxes, and/or text messages and/or any other type of communication that referred or related to [Student] or her parent, [Parent] as identified by name, initials and/or identification number to/from Nicole Edgett, Deb Lawler,

> Heather Lutz, and/or Orletta Nguyen for the time period from August 11, 2023 through January 22, 2025."

San Dieguito objects that the subpoena fails to establish reasonable necessity, is overly broad, and is unduly burdensome. Student argues that the documents relate to the scope of testimony of several witnesses.

In general, there is no right to prehearing discovery in due process proceedings under the Individuals with Disabilities Education Act. (20 U.S.C. § 1400 et seq.) Rather, the IDEA provides parties with the right to present evidence and compel the attendance of witnesses at "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h).)

In special education proceedings in California, "[t]he hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and Subpoenas Duces Tecum (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party)." (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 shall 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.)

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecum. 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 shall declare, including protective orders.

Here, the subpoena was issued to one employee, Orletta Nguyen, seeking a broad and partially undefined range of documents and undefined electronically stored information which mentions either Student or Student's parents over a two-year period. The documents sought could include topics wholly unrelated to the hearing. The subpoena to Ms. Nguyen also seeks documents "to/from Nicole Edgett, Deb Lawler, and Heather Lutz."

Student's Counsel's declaration of necessity failed to specify even categories of documents that Student anticipates would be relevant to the litigation or limit the topics in any way. The declaration also fails to identify the people listed on the subpoena, other than Nguyen, who Student is seeking documents either issued to or received from. Student seeks all documents with names, initials or identification numbers of Student and her Parent. Depending on their positions, such a request could be asking for a wide range of communication wholly irrelevant to this litigation. A bare statement that documents will relate to witness testimony is not a declaration of necessity.

Student's subpoena fails to meet the requirements to specify the documents being sought and why they are materials to the case. The subpoena is quashed.

NO OTHER MOTIONS ANTICIPATED

Neither side contemplates additional prehearing motions and no motions are pending. 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 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

Neither of the parties requested an interpreter.

REASONABLE ACCOMMODATIONS

Student's counsel has received accommodations for the hearing which will be implemented. Neither party had knowledge of anyone else requiring disability accommodations.

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.

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.

Penelope Pahl

Penelope S. Pahl
Administrative Law Judge
Office of Administrative Hearings