

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 AND SAN DIEGO
COUNTY OFFICE OF EDUCATION.
OAH CASE NUMBER 2021050037

ORDER FOLLOWING PREHEARING CONFERENCE FOR
HEARING BY VIDEOCONFERENCE, AND DENYING SAN
DIEGO COUNTRY OFFICE OF EDUCATION'S MOTION TO
BIFURCATE

OCTOBER 15, 2021

On October 15, 2021, Administrative Law Judge Adrienne L. Krikorian, Office of Administrative Hearings, called OAH, held a telephonic prehearing conference. The Administrative Law Judge will be referred to as an ALJ. The prehearing conference will be referred to as a PHC. Attorney Kathleen Loyer appeared on behalf of Student. Attorney Ines Kuperschmit appeared on behalf of San Diego County Office of Education.

Attorneys Sarah Sutherland and Aundrea Cardoza appeared on behalf of San Dieguito Union High School District. The PHC was held by videoconference and 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 October 26 and 27, 2021, and continue day to day at the discretion of the ALJ. The ALJ informed the parties that OAH is dark on October 28 and 29, 2021. 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).) 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>.

ISSUES AND PROPOSED RESOLUTIONS

Free appropriate public education is called FAPE. The Individuals with Disabilities Education Act is called IDEA. 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 Dieguito and San Diego COE deny Student a FAPE by failing to meet their respective duties to develop and execute an appropriate "child find" policy under the IDEA?
2. Did San Dieguito and San Diego COE deny Student a FAPE by failing to provide Student's parents with mandated information regarding Student's right to services while Student was privately placed in a for-profit nonpublic school?
3. Did San Dieguito and San Diego COE deny Student a FAPE during the applicable two year statute of limitations by failing to timely conduct Student's annual and triennial assessments?
4. Did San Dieguito and San Diego COE deny Student a FAPE by failing to assess Student during Student's triennial assessment in the areas of sensory integration, and assistive technology?
5. Did San Dieguito and San Diego COE deny Student a FAPE by failing to use appropriate accommodations to timely assess Student during the 2020 Covid-19 pandemic school closures?

6. Did San Dieguito and San Diego COE deny Student a FAPE in 2020 during the Covid-19 pandemic school closures by failing to find Student eligible for special education under the primary category of other health impairment and secondary category of emotional disturbance?
7. Did San Dieguito and the San Diego COE deny Student a FAPE by failing to timely conduct annual IEP meetings during the applicable two year statutory period?
8. Did San Dieguito and the San Diego COE deny Student a FAPE by failing to invite and solicit input from current teaching and therapy staff, including a general education teacher, at Student's April 2, 2021 IEP team meeting?
9. Did San Dieguito and the San Diego COE deny Student a FAPE in Student's April 2, 2021 IEP by failing to include appropriate present levels of performance?
10. Did San Dieguito and the San Diego COE deny Student a FAPE in Student's April 2, 2021 IEP by failing to offer an appropriate placement?
11. Did San Dieguito deny Student a FAPE in Student's April 2, 2021 IEP by failing to offer appropriate goals in the areas of occupational, social emotional, behavior, mental health, vision and sensory integration?
12. Did San Dieguito and the San Diego COE deny Student a FAPE in Student's April 2, 2021 IEP by failing to offer appropriate supports and services in the areas of mental health, behavior, sensory therapy, assistive technology, vision, and social skills?

Student's complaint alleges violations of Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the civil rights act under 42 U.S.C. §1983. OAH's jurisdiction is limited to those claims arising under the IDEA, title 20 United States

Code section 1400 *et seq.* To the extent Student's claims under Section 504, the Americans with Disabilities Act, or civil rights statutes are incorporated into any of the issues stated above, they are dismissed as outside of OAH jurisdiction.

A party must immediately file a written objection if the issues as stated in this Order do not reflect the party's understanding of the issues as clarified at the PHC.

PROPOSED RESOLUTIONS

The resolutions requested by Student include reimbursement for educationally related expenses incurred by Parents, compensatory services, and staff training on child find policy and procedure.

San Diego COE filed its response to Student's amended complaint on June 10, 2021. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

OAH has not received a copy of San Dieguito's response to Student's second amended complaint. San Dieguito shall file its response with OAH within three business days from the date of this PHC. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

The parties shall upload their exhibits electronically according to the Order Setting Procedures for Filing Exhibits Electronically.

The parties shall serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). Timely uploading electronic hearing exhibits five business days before the first day of hearing constitutes that party's timely exchange of

evidence on each other 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 Dieguito must use the letter SD before the number to identify San Dieguito's exhibits. San Diego COE must use the letters COE to identify its exhibits. For example, S-1 means Student's exhibit 1 and SD-1 means San Dieguito's exhibit 1, and COE-1 means San Diego COE'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 who is expected to testify as to their education and professional credentials. San Dieguito's and San Diego COE's exhibits must include a copy of the applicable 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 that have not previously used the MS Teams platform, may also find informative videos available like the one at this link from Microsoft:
<https://support.office.com/en-us/article/join-a-teams-meeting-078e9868-f1aa-4414-8bb9-ee88e9236ee4>.

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 webcam. Witness ability 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. Neither party will be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

The ALJ has discretion to limit the number of witnesses and the time allowed for witnesses’ 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 close of business on Tuesday October 19, 2021 to discuss scheduling witnesses, the order of 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 and electronically viewing exhibits during the hearing, or subpoenas, if any. The parties shall discuss and

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 authenticity and admissibility of documents to shorten the length of time needed for the hearing.

As part of the meet and confer process, San Dieguito and San Diego COE shall inform Student which proposed witnesses are their respective employees. The respondent entities shall also identify the witnesses on Student's list that require a subpoena. The respondent entities may agree to accept service for witnesses under the respondent entities' respective control or provide Student with the witness' most recent contact information.

PARTICIPANT INFORMATION FORM

All 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 the witness(es) for purposes of attending the hearing and shall not be disclosed to any other person(s).

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 Dieguito and San Diego COE, unless otherwise ordered.

WITNESS LISTS

The parties must provide a joint proposed witness list and schedule to the ALJ on the first day of hearing. The list should include the first and last name of the witness, which party(s) are calling the witness to testify, and include dates and reasonable time estimates of each witness' expected testimony. The witness schedule shall take into consideration necessary breaks and transitions between witnesses. If the parties cannot reach an agreement, each party shall prepare a separate written list. Each party 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 parties shall be prepared to address any scheduling conflicts on the first day of 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 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. 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 certain conditions. The conditions are:

1. the OAH recording is the only official recording;
2. participants shall not use Teams to record the hearing;
3. 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;
4. operation of the party's recording mechanism will not be allowed to delay the hearing;
5. a parties' recording may not be given, provided or played to a witness, or potential witness; and

6. the recording is subject to the same confidentiality as the due process hearing;
7. use of the chat function in the videoconference is prohibited and shall not be part of the official record;
8. participants shall not take screenshots of the videoconference or share or publish any portion of the videoconference or audio recording.

All parties may record the hearing, subject to these conditions.

VIDEO RECORDING

No party, witness or anyone else may make any video recording of 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.

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

SAN DIEGO COUNTY OFFICE OF EDUCATION'S MOTION TO BIFURCATE

San Diego COE filed an untimely motion to bifurcate Student's claims against it on October 13, 2021. San Diego COE seeks, in effect, a separate hearing on Student's claims against it, such that San Diego COE would not have to attend the other portions of the hearing that may not involve San Diego COE. San Diego COE's counsel did not accompany the motion with a declaration establishing good cause for the late-filed motion. The ALJ considered argument from San Diego COE's counsel during the PHC. San Diego COE did not establish any practical or compelling reason for bifurcation, particularly given that Student has named San Diego COE in each of the issues defined above for hearing. The motion is therefore denied.

The parties shall meet and confer, as required by this Order, to discuss the order of witnesses and may, at their choosing, schedule witnesses such that San Diego COE may elect to not have its counsel or representative in attendance on all hearing days, at its own risk. The ALJ will consider and rule on the proposed witness schedule on the first day of hearing.

OTHER MOTIONS

Student contemplates filing a motion to continue and or a motion to stay the hearing. 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 COUNSEL AND HEARING ROOM DECORUM

All participants to the videoconference should observe the same decorum as in an in-person due process hearing. Counsel, all parties, and all witnesses 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. Counsel, parties, and witnesses 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. Parties, counsel 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

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/Accommodations-at-OAH>.

CLOSED TO THE PUBLIC

The hearing is closed to the public. Special Education hearings are closed to the public unless Student requests the hearing to be open to the public.

SETTLEMENT

The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately if they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at <https://www.applications.dgs.ca.gov/oah/oahsftweb>.

If a full and final written settlement agreement is reached after 4:00 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.

Adrienne L. Krikorian

Adrienne L. Krikorian

Administrative Law Judge

Office of Administrative Hearings