

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

MT. DIABLO UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2023090887

ORDER FOLLOWING PREHEARING CONFERENCE FOR

HEARING BY VIDEOCONFERENCE

JANUARY 5, 2024

On January 5, 2024, Administrative Law Judge Brian H. Krikorian, 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.

Nicole Hodge Amey, Attorney at Law, appeared on behalf of Student Alejandra Leon, Attorney at Law, appeared on behalf of Mt. Diablo Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on January 17 and 18, 2024 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 three to five 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

A free appropriate public education is referred to as a FAPE. An individualized education program is referred to as an IEP. The parties should also check the following issues for correctness and completeness and notify OAH in writing, immediately, of any errors or disputes.

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.

Mt. Diablo made a motion to dismiss some issues on the grounds that the issues were barred by the statute of limitations, and that OAH lacked jurisdiction. The disposition of the motion is discussed, *infra*, and are reflected in the issues. 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 Mt. Diablo Unified's conduct result in the statute of limitations extending beyond two years from 2014 through September 27, 2021?
2. Did Mt. Diablo Unified deny Student a FAPE when it failed to provide all of Student's educational records within the required statutory timelines during the 2022-2023 and 2023-2024 school years?
3. Did Mt. Diablo Unified deny Student a FAPE by failing to adhere to its child find obligations and failed to timely or properly assess Student in all areas of suspected disability, including behavior, assisted technology, and augmentative and alternative communication, from September 27, 2021 through September 27, 2023?

4. Did Mt. Diablo Unified deny Student a FAPE from September 27, 2021 through September 27, 2023 by failing to offer Student appropriate and measurable annual goals in the areas of pre-academic areas, maintaining attention, reciprocal play adaptive behavior, speech sound, vocabulary, expressive language, comprehension, fine motor scissors, fine motor visual motor, sensory processing, speech, and occupational therapy?
5. Did Mt. Diablo Unified deny Student a FAPE from September 27, 2021 through September 27, 2023 by failing to provide behavior consultation services, speech consultation services, and augmentative and alternative communication consultation services?
6. Did Mt. Diablo Unified deny Student a FAPE by unreasonably delaying Student's independent educational evaluations from September 27, 2021 through September 27, 2023?
7. Did Mt. Diablo Unified deny Student a FAPE by failing to file for due process when Parents did not provide full consent to the May 9, 2022 and May 8, 2023 IEPs?
8. Did Mt. Diablo Unified deny Student a FAPE by offering Student inadequate placement, services, and goals to help him obtain academic benefit from September 27, 2021 through September 27, 2023?

PROPOSED RESOLUTIONS

The resolutions requested by Student include compensatory education, non-public school placement, funding of private specialists, training for Mt. Diablo staff, and costs and fees.

Mt. Diablo filed its response to Student's complaint on November 6, 2023. (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

The parties shall serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). The parties shall upload their exhibits electronically according to the Order Setting Procedures for Filing Exhibits Electronically. Timely uploading electronic hearing exhibits five business days before the first day of hearing constitutes that party's timely exchange of evidence in compliance with Education Code section 56505, subdivision (e)(7). If further assistance is needed, please [contact OAH](mailto:OAHSEOps@dgs.ca.gov) at OAHSEOps@dgs.ca.gov.

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. Mt. Diablo Unified must use the letter D before the number to identify Mt. Diablo Unified's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Mt. Diablo Unified's exhibit 1. A cover sheet with this identifying letter and number should be the first page of each exhibit. The electronic evidence program will automatically number the exhibits and additional page numbering or bates stamping should not be added.

CONTENT

Each exhibit must consist of one document. Separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Exhibits should be in chronological order.

Parties should include resumes or curriculum vitae for each witness expected to testify as an expert.

Mt. Diablo Unified's exhibits must include a copy of the school calendar for each school year in question.

Electronic copies of exhibits filed with OAH shall be filed by 5:00 PM at least five business days before the first day of hearing. Please refer to the General Order OAH issued with the Scheduling Order that contains the Order Setting Procedures for Filing Exhibits Electronically. It includes instructions for how to file exhibits electronically. Beginning three business days before the hearing, the electronic evidence system will not allow parties to upload exhibits unless permitted by the ALJ during the hearing at the ALJ's discretion.

WITNESSES

The parties shall serve their list of witnesses on each other in compliance with Education Code section 56505. No party shall be permitted to call any witnesses not timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

Parties are responsible for ensuring that all participants are familiar with and follow the Instructions for Joining the Online Due Process Hearing provided with this Order. Participants who have not previously used the [Zoom application](#), may find

informative instructions on at by visiting, Getting Started with Zoom at <https://support.zoom.us/hc/en-us/categories/200101697>.

The parties are responsible for ensuring that witnesses join the virtual hearing room at the designated date and time to testify. Witnesses are required to join the due process hearing by computer and appear by videoconference unless they do not have the necessary computer equipment. If a witness does not have the necessary equipment, the ALJ may permit the witnesses to appear by audio only or by telephone. "Audio only" means using a computer without video. A witness's inability to attend the hearing by videoconference will be discussed at the start of the hearing.

The parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Parties shall make witnesses under their control reasonably available. The parties must schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order.

The ALJ has discretion to limit the number of witnesses and the time allowed for testimony. Education Code, section 56505.1, subdivision (h), empowers the ALJ to set a reasonable limit on the length of the hearing after consideration of four factors. The first two factors are the issues to be heard and the complexity of facts to be proven. The second two factors are the ability of the parties or their representatives to present their respective cases and the parties' estimates of the time needed to present their cases.

MEET AND CONFER

The parties are encouraged to review and shorten their witness and exhibit lists before the hearing. Evidence may be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

The parties are ordered to meet and confer no later than 5:00 p.m. on Friday, January 12, 2024 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, Mt. Diablo Unified shall inform Student which proposed witnesses are District employees. Mt. Diablo Unified shall also identify the witnesses on Student's list that require a subpoena. Mt. Diablo Unified may agree to accept service for a witness under Mt. Diablo Unified's control or provide Student with the witness's most recent contact information.

PARTICIPANT INFORMATION FORM

Both parties have an ongoing obligation to ensure that OAH has current information on the Participant Information Form filed with OAH and shall file an updated Form as necessary. The Participant Information Form is not served upon the opposing party. The ongoing obligation to ensure that the Participant Information Form filed with OAH is current does not change the parties' statutory obligation to timely disclose their witnesses to the other party(s) at least five business days prior to hearing. The parties must file an updated Participant Information Form to inform OAH of any changes, additions, or deletions, including the required information no later than 5:00 PM at least two business days before the first day of hearing.

Any contact information provided shall be used for the limited purpose of issuing subpoenas or for contacting a witness to attend the hearing. Any contact information shall not be disclosed to any other person.

EVIDENCE PRESENTATION

In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In this case Student requested the hearing and bears the burden of proof. Student's case-in-chief shall be presented first, followed by Mt. Diablo Unified, unless otherwise ordered.

WITNESS LISTS

The parties must provide a joint proposed witness list to the ALJ on the first day of hearing. The list should include the first and last name of the witness, which party is calling the witness to testify, and include dates and time estimates of each witness's expected testimony. In the event an agreement cannot be reached, each party shall prepare a separate written list. The party presenting their case-in-chief must have witnesses available in case there is no agreement.

At the beginning of the hearing, the ALJ and the parties will discuss the length of time anticipated for each witness and scheduling issues for individual witnesses. The ALJ will finalize the witness schedule. Parties must be prepared at the end of each day to discuss the witnesses to be presented the next day and the estimated time for the testimony of each witness.

SCOPE OF WITNESS EXAMINATION

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

AUDIO ONLY OR TELEPHONIC TESTIMONY

Whether a witness may appear by audio only or telephone instead of videoconference is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by audio only or telephone shall request permission to do so before the hearing. Any party seeking to present a witness who cannot access exhibits electronically must inform the ALJ at the beginning of the hearing.

ELECTRONIC RECORDINGS

AUDIO RECORDING

A party may request permission to make an audio recording of the hearing. Permission to make an audio recording is subject to the ALJ's discretion and based upon the following conditions:

1. the OAH recording is the only official recording;
2. the parties shall turn their recording device on and off at the same time that the ALJ is on and off the record to avoid recording conversations while off the record;

3. operation of the party's recording mechanism will not be allowed to delay the hearing;
4. a party's recording may not be given, provided or played to a witness, or potential witness;
5. the recording is subject to the same confidentiality as the due process hearing; and
6. participants shall not take screenshots of the videoconference nor share or publish any portion of the videoconference or audio recording.

Both parties may audio record subject to these conditions.

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.

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

Mt. Diablo Unified filed a Motion to Dismiss on November 1, 2023. Mt. Diablo Unified argues that several issues are barred by the statute of limitations, or are not within OAH's jurisdiction. Student did not file a written opposition to the motion.

STATUTE OF LIMITATIONS

The statute of limitations for due process hearings in California is two years. (Ed. Code, § 56505(l); see also 20 U.S.C. § 1415(f)(3)(C).) State law and the IDEA, however, provide two narrow exceptions to this limitations period when a petitioner has been prevented from filing for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or due to the local educational agency's withholding of information from the parent that was required to be provided to the parent. (Ed. Code, § 56505(l); 20 U.S.C. § 1415(f)(3)(D).) See *Avila v. Spokane Sch. Dist.* 81 (9th Cir. 2017) 852 F.3d 936. The knowledge of facts requirement does not require that the petitioner know the specific legal theory or even of the specific facts of a relevant claim; rather, the petitioner must have known or reasonably should have known the facts underlying the supposed learning disability and their IDEA rights. (*Miller v. San Mateo-Foster City Unified Sch.*

Dist. (N.D. Cal. 2004) 318 F.Supp.2d 851.) "Congress intended to obtain timely and appropriate education for special needs children. Congress did not intend to authorize the filing of claims under the IDEA many years after the alleged wrongdoing occurred." (*Id.*)

In this case, Student alleges that Mt. Diablo Unified should be held accountable for actions going back to the 2014-2015 school year. In Student's complaint, Student makes assertions, but fails to provide any specific facts that the Mt. Diablo Unified willfully misrepresented or withheld information, resulting in Parent being ignorant of the claims. For example, Student alleges that Mt. Diablo Unified failed to conduct timely evaluations and then asserts that this failure "is evidence of the District's intentional and willfully withholding of information from Parents." This allegation does not provide specific detail. Student did not file written opposition to the motion, but stated on the record at the PHC that Student intended to prove at hearing facts showing the statute of limitations was extended. Because of the high burden of piercing the two-year statute of limitations and lack of a written opposition, Mt. Diablo Unified's motion to dismiss is partially granted. Issues 2, 3, 4, 5 and 7 are modified to encompass the two-year statute of limitations. However, a preliminary issue has been added to determine if Student can prove that the two-year statute of limitations has been waived by Mt. Diablo Unified's conduct.

JURISDICTION

OAH's jurisdiction is limited to the subject matter delineated in the IDEA and California Education Code. (20 U.S.C. 1415(b); 34 C.F.R. § 300.507; Ed. Code, § 56501(a).) These are the only issues over which OAH has jurisdiction in a due process hearing. "OAH does not have jurisdiction to entertain claims based on Section 504 of the Rehabilitation Act of 1973 (Section 504) (29 U.S.C. § 701 et seq.), the Americans with

Disability Act (ADA) (Title 42 U.S.C. §§ 1201, et seq.) and, the Unruh Civil Rights Act (Civ. Code, § 51)."

Issue 8 in Student's Complaint attempts to raise claims under Section 504 of the Rehabilitation Act, the ADA, Title VI, and "other related civil rights statutes." Student acknowledges OAH does not have jurisdiction over these claims. As such, Student's Issue 8 is dismissed in its entirety.

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 an accommodation or a language interpreter. 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](https://www.dgs.ca.gov/OAH/Services/Page-Content/Office-of-Administrative-Hearings-Services-List-Folder/Request-Reasonable-Accommodations-for-OAH-Legal-Proceedings) 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.

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.

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](https://www.applications.dgs.ca.gov/oah/oahsftweb) 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.

A handwritten signature in black ink, appearing to read "Brian H. Krikorian". The signature is fluid and cursive, with the first name "Brian" being more prominent.

Brian H. Krikorian

Administrative Law Judge

Office of Administrative Hearings