BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

MOUNT DIABLO UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019050382

ORDER FOLLOWING PREHEARING CONFERENCE

On August 12, 2019, Administrative Law Judge (or ALJ) Charles Marson, Office of Administrative Hearings (called OAH), held a telephonic prehearing conference. Student's Mother appeared on behalf of Student. Deborah U. Ettinger, Attorney at Law, appeared on behalf of the Mt. Diablo Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

DUE PROCESS HEARING DATES, TIMES, AND LOCATION

HEARING DATES AND TIMES

The hearing will take place on August 20, 21 and 22, 2019, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. on the first day of the hearing and at 9:00 a.m. on all other days, unless otherwise ordered.

HEARING LOCATION

The hearing will be held at the Mt. Diablo Unified School District, 1936 Carlotta Drive, Concord, California 94519, in a room to be provided by Mt. Diablo.

The parties shall immediately notify all potential witnesses of the hearing dates and location, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing good cause to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

District facilities shall fully comply with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. Districts are required to file written certification with OAH that the facilities they provide comply with these laws. Mt. Diablo has filed the required certification.

Mt. Diablo shall ensure that the hearing room is configured into a courtroom setting and shall contain:

- a table for Student and her representatives;
- a table for Mt. Diablo's legal representative and special education representative;
- a table for the witness; and
- a table for the ALJ, near an electrical outlet.

Unless otherwise ordered, the same hearing room shall be used for each day of hearing and shall be available at least one hour prior to the commencement of the

hearing each day. The hearing room shall be locked at lunch breaks and following the hearing each night.

ISSUES AND PROPOSED RESOLUTIONS

The ALJ has slightly altered the statement of some 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. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made. A party believing that an issue has been misstated or omitted shall promptly file a notice in writing stating its concern. 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

Did Mt. Diablo deny Student a free appropriate public education during the school years 2017-2018 (from May 7, 2017) and 2018-2019 by:

1. Failing to provide her safe and adequate transportation to and from school; specifically, by failing to transport her directly to and from home by the shortest route and without the presence of other students who might manifest aggressive or sexual behavior;

2. Failing to provide her a one-to-one aide; and

3. Failing to provide her a private school placement?

Student's complaint also alleges violations of the Americans With Disabilities Act, but OAH does not have jurisdiction over ADA claims and they will not be addressed at the hearing.

PROPOSED RESOLUTIONS

As resolutions, Student seeks an order requiring Mt. Diablo to:

- provide safe and adequate transportation to and from school;
- provide a one-to-one aide; and/or
- provide placement at a private school or a private online school; and
- reimburse Grandfather for expenses incurred in transporting Student to and from school.

RESPONSE TO COMPLAINT

Mt. Diablo filed its response to Student's complaint on May 17, 2019. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

BINDERS

Exhibits shall be pre-marked and placed in three-ring binders before the hearing. Exhibit binders shall include a tab for each exhibit. The parties shall use numbers to identify exhibits in a way that clearly identifies the party offering it (such as "S1" or "D2"). Each exhibit shall be internally paginated, by exhibit, or all of a party's exhibits shall be Bates-stamped. Each binder shall contain a detailed table of contents. Parties are encouraged to present resumes or curricula vitae for all professional witnesses.

CONTENT

Each exhibit shall 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 in the binders should be in chronological order. In the event of duplicate exhibits, the most legible version will be used.

COPIES OF BINDERS

The parties shall serve copies of their evidence binders on each other as required by Education Code section 56505, subdivision (e)(7). Each party shall bring two additional sets of the binders containing their exhibits to the hearing. One set will be used by the ALJ, and the other set will be used by witnesses. The parties may not serve exhibits on OAH before the hearing.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

WITNESSES

Each party is responsible for producing its own witnesses unless otherwise ordered by the ALJ. Each party shall make witnesses under its control reasonably available. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Each witness shall be called to testify only once, except for rebuttal purposes. All parties shall examine witness on all issues when the witness is first called. Requiring a witness to appear only once takes precedence over the order in which parties present their cases in chief.

MEET AND CONFER

The parties shall meet and confer by telephone on or before August 15, 2019, in order to reach agreement on a witness list for the first day of hearing. Mt. Diablo shall have witnesses available in case agreement on a witness list is not reached. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, the parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony of each such witness is expected to take. The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for their testimony.

EVIDENCE PRESENTATION

Burden of Proof and Order of Proceeding

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 shall present her case-in-chief first, followed by Mt. Diablo.

TELEPHONIC TESTIMONY

At present neither party intends to present a witness by telephone. Whether a witness may appear by telephone 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 telephone shall

request for leave to do so before the hearing, unless the opposing party has stipulated that the witness may appear by telephone. The party offering the witness shall provide the witness a complete set of exhibits from all parties before the hearing. Electronic copies are not permitted. The party offering telephonic testimony shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and allows the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

ELECTRONIC RECORDINGS

Audio Recording of Hearing

Any party desiring to make such a recording shall move in advance of the hearing for leave to do so, and any recording shall be subject to the conditions that:

- OAH's recording is the only official recording;
- The recording will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record;
- No part of the recording shall be played to any witness or potential witness while the hearing is proceeding; and
- Operation of the party's recording mechanism will not be allowed to delay the hearing.

Mt. Diablo's request to make an audio recording of the hearing is granted subject to the conditions above. If Student desires to make such a recording, she shall request leave to do so before the beginning of the hearing.

Video Recording of Hearing

No party, witness or anyone else may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures shall present admissible evidence of the expenditures, or a stipulation to the amount of the expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

MOTIONS

Student's motion that she be allowed to speak privately with the ALJ is denied, as it proposes an unlawful ex parte communication.

Student's motion that she not be required to appear at hearing to testify, and instead be allowed to make written answers to questions selected by her psychiatrist, is denied without prejudice. Student may renew the request and make a proper showing of medical necessity supported by a statement of a treating medical professional. The renewed request, if made, is subject to ALJ ruling.

Student's motion that the witnesses Bryan Cassin, Nadia Visaya and Hilary Shen be produced by Mt. Diablo at hearing without the necessity of subpoenas, is denied as

moot, since Mt. Diablo has represented that it will voluntarily produce those witnesses at hearing.

At present 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 or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in writing.

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless the ALJ grants permission otherwise. No food or drinks other than water will be permitted in the hearing room during the hearing.

LANGUAGE ASSISTANCE AND REASONABLE ACCOMMODATIONS

Student's Mother has requested an accommodation. That request has been considered and decided by the Americans with Disabilities Act Coordinator. Mother will be allowed breaks during the hearing as deemed necessary by the ALJ.

At present neither party anticipates the need for any other special accommodation for any witness or party, or for the services of an 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 the OAH ADA Coordinator at 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.

HEARING CLOSED TO THE PUBLIC

At Student's request, the hearing will be closed 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 p.m. 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 cell 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 by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed to by the assigned ALJ.

If the matter is settled subject to school 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 vacated without this information.

FAILURE TO COMPLY

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

IT IS SO ORDERED.

DATED: August 12, 2019

Charles Marson
Administrative Law Judge
Office of Administrative Hearings