BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: MILPITAS UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2018100006 ORDER FOLLOWING PREHEARING CONFERENCE

On October 15, 2018, a telephonic prehearing conference was held before Administrative Law Judge Cynthia C. Fritz, Office of Administrative Hearings. Elizabeth Rho-Ng and Michael Law, Attorneys at Law, appeared on behalf of Milpitas Unified School District. Carla Crenshaw, Director of Special Education also appeared for the PHC. Mother appeared on behalf of Student. The PHC was recorded.

Based upon discussion with the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location: The hearing shall take place on **October 23, 24, and 25, 2018,** continuing day to day at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered. The hearing shall take place at the Milpitas Unified School District, 1331 E. Calaveras Boulevard, Room 701, Milpitas, California 95035.

As ordered in the scheduling order, Milpitas shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 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. Milpitas provided the ADA compliance certification.

Prior to the beginning of the hearing, Milpitas shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (1) a table for Student and his representatives; (2) a table for Milpitas's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Milpitas shall provide drinking water and tissue to all parties, witnesses and the ALJ. 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 following the hearing each night. Milpitas shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

The parties shall immediately notify all potential witnesses of the hearing dates, 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.

2. Issues and Proposed Resolutions: The issues at the due process hearing, and the proposed resolutions, are listed below.

Issues

1. Does Milpitas Unified School District's April 24, 2018 IEP, as amended on May 11, 2018, June 28, 2018, July 9, 2018, August 24, 2018, and September 21, 2018, offer Student a free and appropriate public education in a least restrictive environment in light of Student's needs, circumstances, and progress.

2. May the April 24, 2018, IEP, as amended on May 11, 2018, June 28, 2018, July 9, 2018, August 24, 2018, and September 21, 2018, be implemented without parental consent for the 2018-2019 school year.

Proposed Resolutions:

1. OAH shall issue an order that Milpitas complied with the procedural and substantive requirements of the Individuals with Disabilities Act (IDEA) and offered on April 24, 2018 IEP, as amended on May 11, 2018, June 28, 2018, July 9, 2018, August 24, 2018, and September 21, 2018, a free and appropriate public education in a least restrictive environment in light of Student's needs, circumstances, and progress.

2. OAH shall issue an order to implement the April 24, 2018 IEP, as amended on May 11, 2018, June 28, 2018, July 9, 2018, August 24, 2018, and September 21, 2018, without parental consent for the 2018-2019 school year.

3. Exhibits: Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letter "S" or "D" in front of the exhibit to designate if it is a Student or Vacaville exhibit (for example, "S-5, S-6, or D-1, D-2"). All of a party's exhibits shall be Bates-stamped with numbers running consecutively through the binder. Each exhibit binder shall contain a detailed table of contents. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7). At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted

into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible.

Parties are encouraged to present resumes or curriculum vitae for each professional witness.

Milpitas is encouraged to include a color copy of the school calendar for each school year.

4. Witnesses: Each party is responsible for procuring the attendance at hearing of its own witnesses. 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. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

5. Meet and Confer: The parties are encouraged to review and shorten their witness lists and lists of exhibits 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. To that end, parties are ordered to meet and confer no later than **5 p.m. on October 18, 2018**, to discuss whether routine information can be the subject of stipulations to shorten the hearing by avoiding the necessity of testimony, particularly as to routine matters, and/or exhibits. **The parties agreed to meet and confer by telephone at 11:00 a.m. on October 18, 2018.** The parties shall also discuss the order of witnesses and the length of witness testimony and be prepared to present the ALJ with a written joint witness list with time estimates and dates of expected testimony on the first day of hearing.

Should agreement on a list not be reached, each party shall prepare separate lists and Student shall have witnesses available so the hearing can proceed promptly. 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.

6. Scope of Witness Examination: Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

7. Order of Presentation of Evidence: In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005)

546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Milpitas is the petitioning party. Accordingly, Milpitas bears the burden of proof and shall present its case-in-chief, followed by Student.

8. Telephonic Testimony: 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 move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. The proponent of the witness shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled. No party requested telephonic testimony.

9. Electronic Recording of Hearing:

a. Audio Recording. All parties' motions to make an audio recording of the hearing are granted subject to the following conditions: 1) OAH's recording is the only official recording; 2) that 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; 3) the recording device will be removed by the party recording during any recess where the party leaves the room; and 4) that operation of the party's recording mechanism will not be allowed to delay the hearing.

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

10. IEP Recordings: Student and Milpitas requested to introduce an IEP recording or portions of an IEP recording at the preconference hearing which was granted.

11. Motions: Milpitas requested that the hearing be held on October 29, 2018, for the second week of hearing because it has one witness that can only come on that day. The request was noted and will be discussed at the onset of the hearing. Student requested that a witness be excluded at the time of hearing. The ALJ stated that it will be discussed at the onset of hearing. Any other motions that were not filed three business days prior to the prehearing conference, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

12. Stipulations: Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

13. 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, pagers, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

14. Special Needs and Accommodations: Milpitas requested a Dari interpreter for one witness, Student's grandmother. Student's mother objects to the participation of that witness due to her health. The parties were ordered to meet and confer regarding this witness, among other issues, in an attempt to come up with a resolution before hearing. If not, the issue will be discussed at the onset of the hearing. Should a party need accommodations at the time of the hearing, please contact the ALJ.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the mediation or hearing may contact the assigned calendar staff, identified in the scheduling order, at (916) 263-0880, as soon as the need is known. Additional information concerning requests for reasonable accommodation is available on OAH's website at https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

15. Hearing Open to the Public: At the request of Student, the hearing will be Open to the public.

16. 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 should 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.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 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 CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY **EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT** https://www.dgsapps.dgs.ca.gov/oah/oahsftweb **.**

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 upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

17. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: October 16, 2018

DocuSigned by:
Cynthia Fritz
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CYNTHIA FRITZ
Administrative Law Judge
Office of Administrative Hearings