BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHALF OF STUDENT, v. FAIRFIELD SUISUN UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2013030894
FAIRFIELD SUISUN UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH CASE NO. 2013050758 ORDER FOLLOWING PREHEARING CONFERENCE

On July 15, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH). Attorney Tania Whiteleather appeared on behalf of Student and Parents (Student). Attorney Van T. Vu appeared on behalf of the Fairfield-Suisun Unified School District (District). The PHC was recorded.

Based on discussion with the parties, the following order is issued:

1. Hearing Dates, Times, and Location: The hearing dates are confirmed. The hearing shall take place on July 30, and 31, and August 6, and 7, 2013, for a total of four days of hearing. The hearing shall begin at 9:30 a.m. on July 30, 2013, and at 9:00 a.m. on all other days. The parties are directed to complete the hearing by close of business on August 7, 2013, or establish good cause why further hearing time is necessary. The hearing shall be held at the District's offices at 2490 Hilborn Road, Fairfield, California 94534.[1]

2. Notice to Witnesses: The parties shall immediately notify their witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will

[1] At a minimum, the hearing room shall have four or more separate tables capable of being moved into a courtroom configuration with an electrical outlet near the ALJ's table. The District shall ensure that all parties and the ALJ have drinking water and tissue available to them during the hearing.

be available to testify. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall use good faith efforts to make witnesses under its control reasonably available to the other party without need for a subpoena. As provided in Paragraph 5, District will notify Student of any problem regarding the voluntary production of its employees by close of business on July 24, 2013. A witness will not be regarded as unavailable for purposes of showing good cause to continue the hearing if the witness has not been properly notified of the hearing date or properly subpoenaed, as applicable. However, as to District's request for Student's testimony, the parties are directed to Paragraph 9 of this order.

3. Issues: The issues for hearing are limited to those alleged in Student's amended request for due process (complaint), and District's consolidated complaint. The issues were discussed during the PHC, and are reframed and clarified below.[2]

Student's Issues:

> *Issue 1:* Beginning in or after the fall of 2011, did District deny Student a free appropriate public education (FAPE) by failing to timely provide Parents with Student's educational records, specifically his individualized education program (IEP) documents, and/or with accurate IEP documents containing clear written offers, which significantly impeded Parents' opportunity to participate in the IEP decision making process regarding the provision of a FAPE?[3]

> *Issue 2:* Beginning in the fall of 2011, following Student's suicidal ideation and resulting hospitalization, did District deny him a FAPE by failing to meet its Child Find obligations to locate, identify and timely assess Student for a suspected disability?[4]

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[2] The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) The issues have been reframed and clarified for consistency with the applicable law but have not been substantively changed or amended.

[3] During the PHC, Student clarified that, contrary to his original wording about a denial of participation in "due process," Issue 1 does not involve a claim that District failed to produce records upon request in order to prepare for the due process hearing. District estimates that there were approximately nine IEP team meetings during the time period at issue. Student shall be prepared to identify, by meeting date, which IEP team meeting documents are at issue by the commencement of the hearing.

[4] Under the Individuals with Disabilities Education Act (IDEA) and California law, a school district has an affirmative, continuing obligation to locate, identify and evaluate all children with disabilities residing within its boundaries. (20 U.S.C. § 1412(a)(3); Ed. Code § 56300, et seq.) Among other things, the parties factually dispute when District timely

Issue 3: Beginning in the fall of 2011, did District deny Student a FAPE by failing to offer him appropriate special education placement and related services to address his unique emotional, mental health, and/or counseling needs to allow him to access and benefit from his education?[5]

Issue 4: Beginning in the fall of 2011, did District deny Student a FAPE by failing to offer special education placement and educational services, specifically placement and educational services in Student's home, to allow him to make educational progress?[6]

District's Issue:

Issue 5: Did District conduct a legally compliant and appropriate mental health assessment of Student, from November 2012 through January 2013?

Proposed Resolutions and Defenses*:* The parties are directed to Paragraph 12 of this order regarding evidence for proposed remedies. The parties retain the right to present all relevant defenses during the hearing.

Student asks OAH to order the following proposed remedies: compensatory education; appropriate educational placement and related services; reimbursement for the costs of independent educational evaluations (IEE's) incurred by Parents in the areas of behavior and mental health; and reimbursement for Parents' costs of private services incurred, identified in Student's former Issue 5 as psychiatric and psychological services of the Health Center of Benicia.[7]

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tendered assessment plans to Parents in compliance with the law. Child Find therefore does not involve the substantive appropriateness of a district's assessments. Student's claim to the contrary is overruled and his complaint does not otherwise contain an issue claiming District's assessments were inappropriate. Student has the right to timely seek to amend his complaint. Student's contention that District's mental health assessment was not appropriate is a defense to District's Issue, *infra.*

[5] During the PHC, Student clarified and agreed that his original use of the word "provided" in both this issue and Issue 4 did not implicate a failure to implement or provide an IEP service, but rather meant "offered," which focuses on what District offered or failed to offer in connection with each IEP at issue.

[6] Student's next issue, originally labeled Issue 5, involves a request for reimbursement and is not a legal issue but rather a proposed remedy. Accordingly, it is addressed as such in this order.

[7] During the PHC, Student's claim for both behavioral and mental health IEE's as a remedy in his case was distinguished from his defense to District's issue, which is limited

District asks as a proposed remedy an order that its mental health assessment was appropriate such that Student is not entitled to an IEE at public expense.

4. Exhibits: Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties' exhibits shall be pre-marked using numbered tabs and accompanied by a detailed exhibit list. Student's **exhibit list** shall identify each exhibit by number and the designation "S" (e.g., S1), and the District's **exhibit list** shall identify each exhibit by number along with a "D" (e.g., D1).[8] Any document over five pages in length shall be internally paginated. Each exhibit binder shall contain a detailed table of contents or list. Each party shall serve an exhibit binder containing its respective exhibits and list on the other party not less than five business days prior to the start of the hearing.[9]

At the hearing, the parties shall supply an additional exhibit binder containing their respective exhibits and lists for use by the ALJ, and another exhibit binder for use by the witnesses. In the event of duplicate exhibits, the most legible version will be used, unless otherwise ordered. The parties shall not serve exhibits on OAH prior to the hearing.

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 may not be admitted into evidence at the hearing unless it is supported by a declaration under penalty of perjury, and the ALJ rules that it is admissible.

5. Witnesses: **By close of business on Wednesday, July 24, 2013, the parties shall informally meet and confer to coordinate their witness production and schedules. At the commencement of the hearing, the parties will present their witness schedules. T**he ALJ and the parties will discuss the witness schedules, including the length of time anticipated for examination of each witness and any scheduling issues for individual witnesses. The ALJ has discretion to limit the number of witnesses who testify and the time

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solely to its mental health assessment. An evidentiary hearing is necessary to determine whether a behavioral assessment in this case would be, or was separate from, or included in the mental health assessment disputed by Parents for application of the IEE law (Ed. Code, § 56329, subd. (b).) As noted, however, the ALJ has authority to order an IEE as an equitable remedy even the remedy would not be an IEE as to a disputed assessment. The distinction is important to note because different legal standards apply to each remedy.

[8] Student represented that his exhibits have already been organized using the alphabet instead of numbers. Student is not required to renumber them and may keep the letters in this case. However, in future cases, particularly with voluminous documents, his counsel should use numbers instead, as discussed during the PHC. However, only the exhibit lists are required to contain each party's designation of "S" or "D," not the separating tabs.

[9] Education Code section 56505, subdivision (e)(7). The parties agree that this deadline is by close of business on Tuesday, July 23, 2013.

allowed for any witness's testimony. 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 party shall manage the number of witnesses so that the party's evidence will be presented within its approximate allocation of 50 percent of the total hearing time.

The parties shall proceed efficiently in their questioning of witnesses and shall narrow their witness lists and their questions to witnesses to avoid unnecessary or duplicative testimony. The parties should bear in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

At the present time, Student intends to call the following witnesses from his PHC statement list of 36 witnesses: Father; Rosa Velasquez (District special education coordinator); Michael Overstreet (District behavior specialist); Diana Diamond (Children's Nurturing Project (CNP) clinician); Sue Warnock-Brooks (District assistant director of special education); April Seto (District school psychologist); Emily-Grace Parangalan (District home hospital teacher); Linda Geller (educational advocate); Stephanie Solar (private assessor); Christine Meade (behavior specialist); Jacob Lippmann (CNP); and Cheryl Chin (CNP).

At the present time, District intends to call the following witnesses from its PHC statement list of 27 witnesses: Mother; Student; Rosa Velasquez; Carla Neyer (PERL psychologist); JP Grelet (behavior analyst); Jacob Lippman (CNP); Cheryl Chin (CNP); Lauren Ryan (case manager and PERL special education teacher); Beth Ellis (special education teacher); Michael Overstreet; April Seto; and Emily-Grace Parangalan.

6. Telephonic Testimony: Whether a witness may appear by telephone is a matter within the discretion of the ALJ, on specified terms and conditions. (Cal. Code Regs., tit. 5 § 3082, subd. (g).) The parties did not request the telephonic testimony of any witness during the PHC.

7. Order of Presentation of Evidence and Scope of Examination: Student shall produce his evidence first. Where Student and District intend to call the same person to testify, each party will examine the witness immediately after the other party, so the witness will only need to be called to the witness stand once. 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 unless otherwise ordered.

8. Closed Hearing: Consistent with Student's request, the hearing shall be closed to the public.

9. Motions: During the PHC, the following motion was considered:

Student's Testimony: Student objected to District calling him as a potential witness at hearing and moved to exclude Student as a witness due to his disability of emotional disturbance, where his ability to travel outside his home is purportedly difficult. However, a

party to a due process hearing under the IDEA has the right to present evidence and compel the attendance of witnesses at the hearing. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56505, subds. (e)(2), (3).) District has merely placed Student on its witness list and has not yet requested or subpoenaed his presence at hearing. Therefore, Student's request is denied as premature and not supported by substantive evidence. In view of Student's age and disability, however, the following orders are made:

(a) In the event District determines to call Student as a witness, District shall not serve any subpoena on him or Parents directly. Instead, District shall serve Student's attorney's office and Ms. Whiteleather has agreed that her office will accept service of such subpoena.

(b) Student has the right to file a motion quash such subpoena and/or for a protective order. In addition, Student need not wait for service of a subpoena to file a motion to request his telephonic testimony or other appropriate order to protect Student's concerns, such as a change of venue, or limitations of examination, supported by declarations under penalty of perjury or other competent evidence and legal authorities.

Any other motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during this PHC.

10. Special Needs and Accommodations: No special accommodations were requested during the PHC or ordered.

11. 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 electronic devices shall be turned off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ. Recording the hearing is not permitted without the permission of the ALJ.

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

13. Settlement: The parties are encouraged to negotiate 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. If a settlement is reached five business days or fewer before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact during business hours by telephone at **(916) 263-0880.**

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. IF A FULL AND FINAL SETTLEMENT IS REACHED AFTER 5:00 P.M. ON THE LAST BUSINESS DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT **(916) 274-6035,** AND SHALL ALSO LEAVE CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY.

If a settlement agreement has been executed but is subject to approval of a school board, the parties may file a motion for OAH to vacate the hearing dates and set a telephonic status conference for a date following board approval. OAH will check for messages the evening prior to the hearing and the morning of the hearing.

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

Dated: July 17, 2013

/s/
DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings