BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. FILLMORE UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018020337 ORDER FOLLOWING EXPEDITED PREHEARING CONFERENCE

On February 26, 2018 an expedited telephonic prehearing conference was held before Administrative Law Judge Clifford H. Woosley, Office of Administrative Hearings. Franchesca S. Verdin, attorney at law, appeared on behalf of Student. Adam J. Newman, attorney at law, appeared on behalf of Fillmore Unified School District.

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

1. District's Motion to Dismiss

District filed a motion to dismiss the expedited complaint, which Student opposed. Counsel orally argued the motion. The motion is denied. OAH shall issue a separate order denying the motion to dismiss.

2. Expedited Hearing Dates, Times, and Location.

The expedited hearing shall take place on **March 6, 7, and 8, 2018**, at **9:30 AM** on the first day of hearing and **9:00 AM** on the remaining hearing days, continuing day to day, Monday through Thursday, as needed at the discretion of the ALJ. The hearing shall take place at District's offices, **627 Sespe Ave., Fillmore, CA 93015.**

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.

The scheduling order directed the named local educational agency to certify that it would provide a facility for the hearing that fully complies 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. District failed to certify that it would

provide a facility for this case that complied with the law. District shall inform OAH within **two days of the date of this order** that it is able to certify it will provide a facility that complies with the law.

Prior to the beginning of the hearing, District shall assist the ALJ to ensure that the hearing room is configured into a courtroom setting, including (1) a table for Student and his representatives; (2) a table for District's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. District shall also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

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.

3. Issues and Proposed Resolutions.

Student's issues at the expedited due process hearing are as follows:

(1) Did District fail to hold an appropriate manifestation determination meeting consistent with 20 U.S.C., section 1415, subdivision (k), 34 Code of Federal Regulations, section 300.530, and/or Education Code section 56500.4, when District failed to:

(a) Provide written notice of a reasonable time before the District proposed to initiate or change the educational placement of Student;

(b) Inform Parent of Student's right to attend the meeting as a relevant member of the IEP team;

(c) Meaningfully discuss and consider whether Student's violation of a code of student conduct was related to his disability;

(d) Meaningfully discuss and consider whether Student's violation of a code of student conduct was related to District's failure to implement Student's IEP at the time of the alleged expulsion incident and at all times prior; and/or

(e) Meaningfully discuss and consider whether or not Student's behavior intervention plan addressed Student's behavior or required modification?

(2) Did District fail to hold an appropriate manifestation determination meeting by violating Educational Code section 56341.5(i), which denied Parent the ability to understand the proceedings and meaningfully participate in the meeting, because District did not provide effective translation of Student's December 2, 2017 psychological report?

(3) Did District error in determining that Student's conduct, which was a violation of a student code of conduct, was not a manifestation of Student's disability?

Student proposes the following remedies:

(1) Expulsion and manifestation determination be reversed.

(2) An IEP meeting to ensure Student's IEP properly addresses his behavioral, educational, and placement needs.

(3) A functional behavioral assessment and appropriate behavioral intervention services and modifications.

(4) Compensatory Education.

4. 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 District exhibit (for example, "S-5, S-6, or D-1, D-2"). Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be Bates-stamped. Each exhibit shall be separately identified, with a tabbed divider. Each exhibit binder shall contain a detailed table of contents. The parties were to serve their evidence binders on each other by close of business, **February 27, 2018**, in compliance with Education Code section 56505, subdivision (e)(7).

The District's exhibits shall include its school calendar for all school years that are related to the issues herein.

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 shall 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.

5. 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.

Each party shall provide current curriculum vitae for witnesses called to testify where the witnesses' education and experience are relevant to the witnesses' testimony, opinion, credibility and/or persuasiveness. These shall be properly numbered and placed in the parties' exhibit binders.

The parties are ordered to meet and confer by **March 2, 2017**, to reach agreement on an hour-by-hour witness schedule for the first day of hearing. The parties shall have a proposed hour-by-hour witness schedule for the remainder of the hearing, which includes estimated time of direct and cross-examination by both parties. 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 witness is expected to take. The District shall have witnesses available in case agreement on a witness list is not reached.

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.

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. 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. The parties did not request permission for a witness to telephonically testify.

8. Electronic Recording of Hearing.

a. Audio Recording. Student's motion to make an audio recording of the

hearing is granted, subject to the following conditions: 1) that 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 to avoid recording conversations while off the record; 3) that operation of the party's recording mechanism will not be allowed to delay the hearing; 4) and that the audio recording – or transcript thereof – shall not be played or shown to any witness in the hearing (other than the parties or their representative). District may similarly make an audio recording of the hearing, subject to the same conditions.

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.

9. 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, Student is the petitioning party. Accordingly, Student shall present his case-in-chief, followed by District.

10. Motions. No pretrial motions are pending or contemplated. Any further motion shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made by February 21, 2018, the date upon which the PHC statements were due.

11. 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. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

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 provided by the ALJ.

14. Special Needs and Accommodations.

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: http://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

Parents require Spanish translation throughout hearing.

15. Hearing Closed To the Public. The hearing will be closed 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 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.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall submit a request for a status conference and provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

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

IT IS SO ORDERED.

DATE: February 26, 2018

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CLIFFORD H. WOOSLEY
Administrative Law Judge
Office of Administrative Hearings