BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Matter of:<br><br>PARENT ON BEHALF OF STUDENT,<br><br>v.<br><br>HAYWARD UNIFIED SCHOOL DISTRICT. | OAH Case No. 2017120638<br><br>ORDER FOLLOWING EXPEDITED PREHEARING CONFERENCE |

On January 12, 2018, a telephonic prehearing conference was held before Administrative Law Judge Theresa Ravandi, Office of Administrative Hearings. Rosa Bay and Fanna Gamal, Attorneys at Law, appeared on behalf of Parent and Student. Shawn Olson Brown and Richard Yao, Attorneys at Law, appeared on behalf of Hayward Unified School District. 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 at Hayward's District Office located at 24411 Amador Street, Hayward, California, 9450, on January 24, 2018, at 9:30 a.m., and January 25, 2018, at 9:00 a.m., and continuing day to day, Monday through Thursday, at the discretion of the ALJ.

As ordered in the scheduling order, Hayward 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. Hayward certified that the facilities used for this case comply with the law. Hayward shall inform OAH within two days of the date of this order if it is unable to comply with this order.

Prior to the beginning of the hearing, Hayward 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 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. Hayward 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. Hayward 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. Expedited Issues and Proposed Resolutions. The expedited issues at the due process hearing, and the proposed resolutions, were discussed and clarified during the PHC and are listed below.

*Issue 1:* Did Hayward have a "basis of knowledge" that Student was a student with a disability prior to the November 8, 2017 incident, thus entitling her to procedural safeguards under the Individuals with Disabilities Act, specifically those found at 20 U.S.C. section 1415(k)?

*Issue 2:* Was Student's November 8, 2017 conduct a manifestation of Student's disability?[1]

*Proposed Resolutions:* Students seeks an Order that Hayward must reverse the manifestation determination review findings; return Student to Mt. Eden High School; rescind its recommendation for expulsion; and expunge all references thereto.

3. Hayward's Motion to Dismiss Issue 2. During the PHC, Hayward moved to dismiss Student's Expedited Issue 2.[2] Hayward asserts that its manifestation determination findings made during a manifestation determination review team meeting held under Section 504 of the Rehabilitation Act is beyond OAH's jurisdiction. Hayward further contends that the question of whether Student's conduct was a manifestation of her disability should be dismissed from this expedited hearing as it cannot be addressed separate from Student's non-expedited "Child Find" claim. Student asserts that she is entitled to appeal the manifestation determination review findings from November 2017 if she proves that Hayward had a basis of knowledge that she was a Student with a disability. **During the PHC, Hayward's verbal**

[1] During the PHC, Student agreed that this was how she framed Issue 2 in her complaint and that this was the second expedited issue she was pursuing.

[2] Hayward represented that it had not timely filed a written motion to dismiss as it did not receive Student's expedited PHC statement until January 9, 2018, the third business day prior to the PHC. Hayward asserts that Student's revised framing of her Issue 2: "Did Hayward improperly find that the conduct in question was not a manifestation of Student's disability?" prompted its motion to dismiss, as Hayward asserts that its manifestation determination findings during a manifestation determination review team meeting held under Section 504 of the Rehabilitation Act is beyond OAH's jurisdiction.

**motion to dismiss was denied without prejudice subject to it filing a written motion to dismiss by close of business January 17, 2018. Student will have until close of business January 18, 2018, to file a response.**

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 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 timely exchanged shall not be admitted into evidence at the hearing unless 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 timely disclosed except for good cause shown and at the discretion of the ALJ.

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 witnesses' testimony, to ensure that this matter is concluded within the time allotted, based upon the parties' time estimates as well as on the issues presented.

The parties shall attempt to reach agreement on a witness list for the first day of hearing. Hayward shall have witnesses available in case agreement on a witness list is not reached. At the commencement of the due process hearing, the parties shall present a proposed joint written witness schedule for the hearing, with time estimates for direct and cross examination, to the ALJ. 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. 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. 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. Student may be filing a motion to allow her pediatrician to testify telephonically.

8. Electronic Recording of Hearing.

a. Audio Recording. The requests of both parties to make an audio recording of the hearing are 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, in order to avoid recording conversations while off the record; and 3) 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.

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 her case-in-chief, followed by Hayward.

10. Motions. Other than Hayward's motion to dismiss detailed above, and Student's possible motion for telephonic testimony, no further pretrial motions are pending or contemplated. Any 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 three business days prior to the prehearing conference of January 12, 2018.

11. Compensatory Education and 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 at the time of hearing, in written form and signed by both counsel.

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. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the 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 Closed To the Public. At the request of Student, 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 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: January 16, 2018

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Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings