BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017080534
v.	ORDER FOLLOWING PREHEARING CONFERENCE AND DENYING FAIRFIELD-SUISUN'S MOTION TO DISMISS
FAIRFIELD-SUISUN UNIFIED SCHOOL DISTRICT.	

On December 4, 2017, a telephonic prehearing conference was held before Administrative Law Judge Rita Defilippis, Office of Administrative Hearings. Parent appeared on behalf of Student. Jan Tomsky, Attorney at Law, appeared on behalf of Fairfield-Suisun Unified School District. The PHC was recorded.

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

1. Fairfield-Suisun's Motion to Quash Subpoena Duces Tecum. On November 14, 2017, Student emailed a subpoena Duces Tecum to Counsel for Fairfield-Suisun, requesting documents. On November 28, 2017, Fairfield-Suisun filed a Motion to Quash Student's subpoena Duces Tecum on the grounds that the subpoena was improperly served on Counsel for the district instead of properly serving the subpoena directly on the District. At the prehearing conference Fairfield-Suisun withdrew its Motion to Quash as moot due to Student subsequently serving his subpoena on the district.

2. Parent Request for Continuance. At the prehearing conference, Student requested a continuance of the due process hearing and stated that she will submit a written request for a continuance including a statement of good cause for the request. Fairfield-Suisun is not opposed to Student's request for continuance and agrees that a continuance is needed. The parties agreed to written continuance requests and responses, to be filed following the prehearing conference, including reasons for the request constituting good cause.

3. Fairfield-Suisun's Motion to Dismiss. On December 4, 2017, prior to the prehearing conference, Suisun-Fairfield filed a Motion to Dismiss Student's due process complaint based on the claims that Student's issues one and two are precluded by the Doctrines of Res Judicata and Collateral Estoppel because the OAH decision issued in OAH case number 2017051304 was a judgement on the merits that Student's issues raised in his complaint were considered and rejected in the OAH decision.

Fairfield-Suisun's Motion to Dismiss Student's issue two is also based on a claim that Student raises an issue of discrimination and harassment which is not a claim within the jurisdiction of OAH.

Argument was heard and considered and Fairfield's Motion to Dismiss Student's due process complaint is denied. The case, upon which Fairfield-Suisun's claims of Res Judicata and Collateral Estoppel are based, was a district filed case with the only issue being whether Fairfield-Suisun's April 10, 2017, IEP offer constituted a free and appropriate public education such that Fairfield-Suisun may implement the services without Parent consent. The issues raised by Student in the instant matter, as discussed in detail below, involve questions of whether Student was denied a free and appropriate public education during the 2015-2016 and 2016-2017 school years. These school years were not at issue in the adjudicated case referenced in Fairfield-Suisun's Motion to Dismiss. Therefore Fairfield-Suisun's Res Judicata and Collateral Estoppel argument, as a basis for its Motion to Dismiss, is rejected.

Fairfield-Suisun's Motion to Dismiss Student's issue two as outside the jurisdiction of OAH is similarly rejected. Student is represented by his Parent, and is not represented by an attorney. Therefore more latitude is given to the language of Student's complaint when determining whether the complaint states an issue governed by the Individuals with Disabilities Education Act. Student's issue one regards allegations of a denial of FAPE for the 2015-2016 and 2016-2017 school years. Student's issue two alleges that Fairfield Suisun's proposed change of placement from the deaf and hard of hearing program, which Student attended for the time at issue in the instant matter, resulted from Fairfield-Suisun's allegations of Student's excessive behavior problems, which Parent alleges were not properly documented and which were denied by Student and Parent.

Parent alleges in issue two of the complaint that Fairfield -Suisun did not respond to Student's and Parent's claimed denials and instead accused Student of inappropriate behavior and recorded Student's behavior daily, in front of his peers to the point that Student suffered emotionally and socially. Parent further alleges that Fairfield-Suisun did not consider Student's disability. Parent discussed the meaning of her wording of issue two at length during the prehearing conference. When asked to explain Student's issue two at the prehearing conference, Parent expressed that Fairfield should have held a meeting to discuss Parent and Student concerns that the reports of Student's excessive behaviors were not accurate and that the documentation provided to support the allegation of excessive behaviors was inadequate. Parent stated that instead of holding a meeting to discuss the concerns about the behavior allegations, Fairfield responded to Parent's and Student's concerns by harassing Parent and Student by filing meritless CPS complaints and continued Student blame.

During the prehearing conference, Counsel for Fairfield-Suisun argued that Student's issue two does not expressly state that the district denied Student a FAPE and only alleges discrimination and harassment. However Parent clarified that it was the manner of Fairfield's response to Parent and Student's voiced concerns that form the basis of issue two.

Parent wishes to present evidence at hearing that Student did not engage in the alleged behaviors because Fairfield-Suisun never gave Student or Parent a process to do that. During the prehearing conference, Counsel for Fairfield-Suisun maintained that the undersigned ALJ was assisting Parent to state issues not evidenced in Student's complaint or prehearing conference statement.

After consideration and review of Student's complaint and prehearing conference statement and the written and oral argument of the parties, Fairfield-Suisun's Motion to Dismiss Student's due process complaint for lack of OAH jurisdiction is denied. Student states issues within the jurisdiction of OAH.

4. Hearing Dates, Times, and Location. The hearing shall take place on December 12. 13 and 14, 2017, continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the Fairfield-Suisun Unified School District's offices located at 2490 Hilborn Road, Fairfield, California, 94534. 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.

As ordered in the scheduling order, Fairfield-Suisun 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. Fairfield-Suisun certified that the facilities used for this case comply with the law. Fairfield-Suisun 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, Fairfield-Suisun 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 Fairfield-Suisun's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Fairfield-Suisun 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. Fairfield-Suisun 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.

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

Issues

1. Did Fairfield-Suisun deny Student a free and appropriate public education during the 2015-2016 and 2016-2017 school years by:

a. failing to develop goals to address Student's unique deaf and hard of hearing and social-emotional needs; and

b. separating and alienating Student in front of his classroom peers during educational time in the regional deaf and hard of hearing program while failing to provide Student with an appropriate educational program to meet his unique disability needs?

2. Did Fairfield-Suisun deny Student a free and appropriate public education by:

a. recommending a change of placement based on Student's alleged excessive inappropriate behavior without proper documentation of such alleged behavior;

b. continuously reprimanding Student for alleged behaviors in front of his peers causing him emotional and social harm;

c. failing to respond to Student and Parent claims denying alleged excessive inappropriate behavior and Parent claims that Student's unique disability needs were not being addressed; and

d. harassing Parent by filing several meritless child protective services complaints against Parent in response to Parent's requests for appropriate special education services in the deaf and hard of hearing program.

Proposed Resolutions

1. Fairfield-Suisun shall provide compensatory education services by funding two years of a deaf and hard of hearing after school tutoring program one time a week for two years, including reimbursement for transportation and enrollment fees.

2. Fairfield-Suisun shall provide Student with educational services geared towards children who are deaf and hard of hearing without prejudice.

6. 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. **The parties mutually agreed to exchange evidence by the close of business on December 7, 2017.**

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

The District shall include a color copy of the school calendar for each school year in question and shall have witnesses available to testify as to any legend notations that might be unique to Fairfield-Suisun.

7. 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 mutually agreed to exchange witness lists by close of business on December 7, 2017.**

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 parties shall attempt to reach agreement on a witness list for the first day of hearing. 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.

8. 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.

9. Telephonic Testimony. Neither party has requested that a witness appear by telephone at this time. 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.

10. Electronic Recording of Hearing.

a. Audio Recording. Neither party requested to audio record 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.

11. 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 its case-in-chief, followed by Fairfield-Suisun.

12. Motions. No 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.

13. 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.

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

15. 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.

16. Special Needs and Accommodations. Fairfield-Suisun requested the services of an American Sign Language Interpreter for witnesses Kathryn Reyes. An American Sign Language interpreter will be provided to this witnesses at hearing.

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.

17. Hearing Closed To the Public. At the request of Student, the hearing will be closed to the public.

18. 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 FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE at 916-376-6319.

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.

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

IT IS SO ORDERED.

DATE: December 4, 2017

DocuSigned by:
Rita DeFilippis
8BD5FE332F4847E...

RITA DEFILIPPIS
Administrative Law Judge
Office of Administrative Hearings