BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

SEQUOIA UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2023110714

ORDER FOLLOWING EXPEDITED PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE

DECEMBER 11, 2023

On December 11, 2023, Administrative Law Judge Marlo Nisperos, Office of Administrative Hearings, held a prehearing conference by videoconference. The Administrative Law Judge is called an ALJ. The Office of Administrative Hearings is called OAH. The prehearing conference is called a PHC.

Evan Goldsen, Attorney at Law, appeared on behalf of Student. Eliza McArthur and Justin Manganiello, Attorneys at Law, appeared on behalf of Sequoia Union High School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

EXPEDITED DUE PROCESS HEARING

The hearing will take place on December 19, 20, and 21, 2023, and continue day to day at the discretion of the ALJ. The hearing may be held on Monday and Friday. The hearing shall begin at 9:30 AM each day and generally end at 3:30 PM, unless otherwise ordered. The parties anticipate it will take between five and fourteen days to complete the hearing. Additional hearing dates will be discussed with the ALJ during the hearing.

HEARING LOCATION

OAH is authorized to conduct due process hearings by videoconference or telephone. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) OAH will conduct the due process hearing by videoconference using the Zoom application. Unless otherwise ordered, participants are required to appear by videoconference using computer or device with video capability and Zoom.

The parties shall immediately notify all potential witnesses of the hearing dates and shall subpoena witnesses, if necessary, to ensure that the witnesses will appear to testify. A party's failure to notify or subpoena a witness to testify will not be considered good cause to continue the hearing. Instructions for issuing and responding to subpoenas and optional forms for subpoenas can be found on the website at https://www.dgs.ca.gov/OAH/Case-Types/Special-Education/Forms/Subpoenas?search=special%20education%20subpoena.

ISSUES AND PROPOSED RESOLUTIONS

The ALJ has slightly altered the statement of the issue as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist*. (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist*. (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist*. (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made. A party believing that the issue has been misstated shall promptly file a notice in writing stating its concern and referring to supporting portions of the complaint. No motion to amend the statement of issues will be considered unless it is made in time to be resolved before the hearing.

ISSUE

> Did Sequoia Union fail to conduct a legally complaint manifestation determination review on May 8, 2023, by not determining whether Student's conduct on April 28, 2023, was a direct result of Sequoia Union's failure to implement Student's individualized education program?

Student raised two additional issues in his expedited prehearing conference statement. The undersigned ruled that the two claims do not fall under 20 U.S.C. 1415(k), but they remain issues in Student's non-expedited due process hearing.

SEQUOIA UNION'S MOTION TO UNEXPEDITE

On December 8, 2023, Sequioa Union filed a motion to unexpedite. Sequoia Union contended that Student's allegations do not constitute an appeal pursuant to 20 U.S.C. § 1415(k)(3), and thus the mandatory provisions of Section 1415(k)(4)(B) for an expedited hearing do not apply as Student only seeks relief under Section 1415(b)(6)(A). Sequoia Union asserted that there was no disciplinary change of placement and the

manifestation determination review team determined Student's behavior was a manifestation of his disability. Sequoia Union argued that since there is no appeal or disagreement with the manifestation determination team's decision, all claims should be unexpedited and consolidated with the non-expedited issues.

In Student's prehearing conference statement, issues one and two stated:

- Issue 1: Did district misrepresent the facts and circumstances surrounding the April 28, 2023, incident at Student's May 8, 2023, manifestation determination meeting significantly impeding Parent's ability to meaningfully participate?
- Issue 2: Did district deny Student his procedural rights at his May 8, 2023, manifestation determination meeting when district failed to provide parent documents and video recordings necessary for Student's advocacy, either before or during the meeting?

At PHC, Student clarified issues one and two allege FAPE denials for impeding Parent's ability to meaningfully participate in the May 8, 2023, meeting and also for withholding documents and video recordings. However, Student also clarified his intent to present alternate facts challenging whether the reported conduct occurred. In support of this position, Student offered a December 6, 2023, Order Determining Non-Expedited Due Process Complaint Allegations Sufficient, in which ALJ Pahl ruled that three expedited claims were deemed appropriate for an expedited hearing. Student argued that he wanted to present the truth at the expedited hearing and asserted that the ALJ had broad equitable powers to correct the facts about Student's behavior on April 28, 2023. Sequoia argued that challenging whether the underlying violation of the conduct code occurred is outside the scope of the IDEA and, therefore, OAH's jurisdiction.

Decisions of federal courts support Sequoia's position. Specifically, it is not the job of a manifestation determination team to resolve disputes about the identity of the perpetrator of the disciplinary event. The manifestation determination team "typically does not determine the facts of the incident for which an eligible student is subject to discipline." (*Patrick v. Success Acad. Charter Schs., Inc.* (E.D.N.Y. 2018) 354 F. Supp. 3d 185, 220 (quoting *Bristol Township. Sch. Dist. v. Z.B.* (E.D. Pa. Jan. 14, 2016, No. 15-CV-4604 (SRD)), 2016 WL 161600, p. 4.)

The district court's decision in *Danny K. v. Department of Educ.* (D. Hawai'i, Sept. 27, 2011, Civ. No. 11–00025 ACK–KSC) 2011 WL 4527387, stated that it is not the ALJ's or manifestation determination team's role to determine the underlying facts of a disciplinary event. In *Danny K.*, the student set off a firework or bomb in a bathroom. (*Ibid*, p. 1.) He was suspended, and his IEP team conducted a manifestation determination review which found that his conduct was not related to his disability. (*Ibid.*)

At the manifestation determination review, the student and his mother argued that the student did not set off the bomb; he merely falsely confessed in order to get money from the actual perpetrator. (*Danny K.*, *supra*, 2011 WL 4527387, p. 12.) On appeal to the District Court, the student faulted the manifestation determination team for not considering his claim that he falsely confessed and that another student actually engaged in the prohibited conduct. The court rejected the argument, holding that the determination student was the perpetrator was not the business of the manifestation determination team.

The *Danny K.* court first held that there was no authority to suggest that "a manifestation determination team must review the merits of a school's findings as to how a student violated the code of student conduct." It added that such a requirement

"would essentially deputize manifestation determination teams, and in turn, administrative hearings officers and federal courts, as appellate deans of students." (*Danny K.*, *supra*, 2011 WL 4527387, p. 12.) And it noted: "If Plaintiffs wished to challenge Defendant's finding that Student set off the firework, they should have followed Defendant's typical procedures for contesting findings of student misconduct. . . . {T]he IDEA was not intended to provide disabled students an additional avenue with which to challenge a school's underlying findings of misconduct." (*Ibid*, fn. 20.)

Here, Student's proposed issues one and two can be litigated in the non-expedited portion of the case to the extent Student does not intend to challenge whether the underlying conduct or violation of the code of conduct actually occurred. As stated in *Danny K.*, it is not the ALJ's role at an expedited hearing, or the manifestation determination team's role, to determine the facts related to Student's misconduct when determining whether the behavior was a manifestation of Student's disability. As a result, Student's issues one and two were deemed non-expedited claims and were dismissed from being heard on an expedited basis.

PROPOSED RESOLUTIONS

The resolutions requested by Student include an order that Student's behavior was a manifestation of his disabilities and the result of district's failures, an order finding that district and its staff, agents, and employees misrepresented the facts and circumstances surrounding the incident of April 28, 2023, an order directing the district's superintendent to write a letter requesting the criminal juvenile petition filed against Student as a result of the incident be dismissed, references to Student's suspension as a result of the incident be expunged from his educational records, compensatory education, services, functional behavior assessment, and training for district staff.

OAH has not received a copy of Sequoia Union's response to Student's complaint. Sequoia Union shall file its response with OAH within three business days from the date of this PHC. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

The parties shall serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). The parties shall upload their exhibits electronically according to the Order Setting Procedures for Filing Exhibits Electronically. Timely uploading electronic hearing exhibits five business days before the first day of hearing constitutes that party's timely exchange of evidence in compliance with Education Code section 56505, subdivision (e)(7). If further assistance is needed, please contact OAH at OAHSEOps@dgs.ca.gov.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged as required by Education Code section 56505, subdivision (e)(7) shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

IDENTIFYING EXHIBITS AND PAGE NUMBERS

Each exhibit must be identified by a letter and number. Student must use the letter S before the number to identify Student's exhibits. Sequoia Union must use the letter D before the number to identify Sequoia Union's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Sequoia Union's exhibit 1. A cover sheet with this identifying letter and number should be the first page of each exhibit. The electronic evidence program will automatically number the exhibits and additional page numbering or bates stamping should not be added.

CONTENT

Each exhibit must consist of one document. Separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Exhibits should be in chronological order.

Parties should include resumes or curriculum vitae for each witness expected to testify as an expert.

Sequoia Union's exhibits must include a copy of the school calendar for each school year in question.

Electronic copies of exhibits filed with OAH shall be filed by 5:00 PM at least five business days before the first day of hearing. Please refer to the General Order OAH issued with the Scheduling Order that contains the Order Setting Procedures for Filing Exhibits Electronically. It includes instructions for how to file exhibits electronically. Beginning three business days before the hearing, the electronic evidence system will not allow parties to upload exhibits unless permitted by the ALJ during the hearing at the ALJ's discretion.

WITNESSES

The parties shall serve their list of witnesses on each other in compliance with Education Code section 56505. No party shall be permitted to call any witnesses not timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

Parties are responsible for ensuring that all participants are familiar with and follow the Instructions for Joining the Online Due Process Hearing provided with this Order. Participants who have not previously used the Zoom application, may find

informative instructions on at by visiting, Getting Started with Zoom at https://support.zoom.us/hc/en-us/categories/200101697.

The parties are responsible for ensuring that witnesses join the virtual hearing room at the designated date and time to testify. Witnesses are required to join the due process hearing by computer and appear by videoconference unless they do not have the necessary computer equipment. If a witness does not have the necessary equipment, the ALJ may permit the witnesses to appear by audio only or by telephone. "Audio only" means using a computer without video. A witness's inability to attend the hearing by videoconference will be discussed at the start of the hearing.

The parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Parties shall make witnesses under their control reasonably available. The parties must schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order.

The ALJ has discretion to limit the number of witnesses and the time allowed for testimony. Education Code, section 56505.1, subdivision (h), empowers the ALJ to set a reasonable limit on the length of the hearing after consideration of four factors. The first two factors are the issues to be heard and the complexity of facts to be proven. The second two factors are the ability of the parties or their representatives to present their respective cases and the parties' estimates of the time needed to present their cases.

MEET AND CONFER

The parties are encouraged to review and shorten their witness and exhibit lists before the hearing. Evidence may be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

The parties are ordered to meet and confer no later than December 15, 2023, at 5:00 PM to discuss scheduling witnesses and how much time each witness will take. The parties shall discuss any issues related to counsel and witnesses appearing by videoconference for hearing, electronically viewing exhibits during the hearing, and subpoenas, if any. The parties should attempt to eliminate duplicate exhibits from their hearing exhibits. The parties shall discuss whether they can produce a written stipulation as to pertinent facts, contentions, resolutions and the authenticity and admissibility of documents to shorten the length of time needed for the hearing.

As part of the meet and confer process, by December 12, 2023, at 5:00 PM, Sequoia Union shall inform Student which proposed witnesses are District employees. Sequoia Union shall also identify the witnesses on Student's list that require a subpoena. Sequoia Union may agree to accept service for a witness under Sequoia Union's control or provide Student with the witness's most recent contact information.

PARTICIPANT INFORMATION FORM

Both parties have an ongoing obligation to ensure that OAH has current information on the Participant Information Form filed with OAH and shall file an updated Form as necessary. The Participant Information Form is not served upon the opposing party. The ongoing obligation to ensure that the Participant Information Form filed with OAH is current does not change the parties' statutory obligation to timely disclose their witnesses to the other party(s) at least five business days prior to hearing. The parties must file an updated Participant Information Form to inform OAH of any changes, additions, or deletions, including the required information no later than 5:00 PM at least two business days before the first day of hearing.

Any contact information provided shall be used for the limited purpose of issuing subpoenas or for contacting a witness to attend the hearing. Any contact information shall not be disclosed to any other person.

EVIDENCE PRESENTATION

In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In this case Student requested the hearing and bears the burden of proof. Student's case-in-chief shall be presented first, followed by Sequoia Union's, unless otherwise ordered.

WITNESS LISTS

The parties must provide a joint proposed witness list to the ALJ on the first day of hearing. The list should include the first and last name of the witness, which party is calling the witness to testify, and include dates and time estimates of each witness's expected testimony. In the event an agreement cannot be reached, each party shall prepare a separate written list. Student must have witnesses available in case there is no agreement.

At the beginning of the hearing, the ALJ and the parties will discuss the length of time anticipated for each witness and scheduling issues for individual witnesses. The ALJ will finalize the witness schedule. Parties must be prepared at the end of each day to discuss the witnesses to be presented the next day and the estimated time for the testimony of each witness.

SCOPE OF WITNESS EXAMINATION

Each witness will be called to testify only once, except for rebuttal purposes. All parties must examine a witness on all issues when the witness is first called to testify. Requiring a witness to appear only once takes priority over the order in which parties present their case-in-chief.

AUDIO ONLY OR TELEPHONIC TESTIMONY

Whether a witness may appear by audio only or telephone instead of videoconference 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 audio only or telephone shall request permission to do so before the hearing. Any party seeking to present a witness who cannot access exhibits electronically must inform the ALJ at the beginning of the hearing.

ELECTRONIC RECORDINGS

AUDIO RECORDING

A party may request permission to make an audio recording of the hearing. Permission to make an audio recording is subject to the ALJ's discretion and based upon the following conditions:

1. the OAH recording is the only official recording;
2. the parties shall turn their recording device on and off at the same time that the ALJ is on and off the record to avoid recording conversations while off the record;

3. operation of the party's recording mechanism will not be allowed to delay the hearing;
4. a party's recording may not be given, provided or played to a witness, or potential witness;
5. the recording is subject to the same confidentiality as the due process hearing; and
6. participants shall not take screenshots of the videoconference nor share or publish any portion of the videoconference or audio recording.

Student's and District's requests to make an audio recording of the hearing is granted.

VIDEO RECORDING

No party, witness or anyone else may videorecord any part of the proceedings or stream live through any means.

RECORDINGS AS EXHIBITS

At the PHC, the parties' request to upload recordings to the electronic evidence program was granted. The ALJ has discretion to admit or exclude evidence in the form of a recording.

The ALJ may grant or deny the request or grant the request subject to certain conditions. The party offering the recording must establish that all or a part of the recording is relevant. The ALJ may request a transcript of the portion of the recording requested or have the party offering the recording to provide an exact identifiable portion of the recording the party seeks to admit. The identities of any person speaking on the portion of the tape being introduced must be established. An ALJ may allow the

opposing party to offer additional portions of a recording to establish the context, or to rebut, the recording.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education. Documents offered as evidence to support a request for reimbursement must be separated by vendor.

MOTIONS

On December 7, 2023, Sequoia Union filed a Motion to Quash Subpoenas Duces Tecum for the nine subpoenas that Student issued. At PHC, Student requested for the Court to conduct an in camera review of his response because it contained work product. The undersigned granted Student's request to submit his response in writing by 5:00 PM on December 12, 2023.

Student stated he will file a motion to amend based on a recently held IEP team meeting. Sequoia Union stated it may file motions in limine regarding witnesses for hearing.

No other prehearing motions are pending or contemplated. Any motion that was not filed three business days before the PHC, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

STIPULATIONS

Stipulations to pertinent facts, contentions, resolutions and authenticity and admissibility of documents are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in writing prior to the start of the hearing.

CONDUCT OF PARTICIPANTS AND HEARING ROOM DECORUM

All participants to the videoconference should observe the same decorum as in an in-person due process hearing. Participants must conduct themselves in a professional and courteous manner at all times. Cellular phones, telephones and computer notifications must be shut off or set to silent during the hearing unless the ALJ grants permission otherwise. Participants should appear from a private location, unless otherwise ordered. Participants should take reasonable efforts to minimize background noise and maintain adequate room lighting. Use of virtual background images are at the discretion of the ALJ. Witnesses are prohibited from reading exhibits, documents, notes, text messages, telephones or computers while testifying, unless permitted to do so by the ALJ. The parties, their representative and witnesses are prohibited from passing notes to, exchanging electronic messages with, or signaling the witness in any way while the witness is testifying.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

Neither party requested an accommodation or language interpreter.

A party or participant in this case, such as a witness, requiring reasonable accommodation to participate in a mediation or hearing may contact OAH at (916) 263-0880, or send an email to OAHADA@dgs.ca.gov as soon as the need is known. The e-mail should have "Request for Accommodation" in the Subject Line.

Additional information concerning requests for reasonable accommodation is available on OAH's website at: https://www.dgs.ca.gov/OAH/Services/Page-Content/Office-of-Administrative-Hearings-Services-List-Folder/Request-Reasonable-Accommodations-for-OAH-Legal-Proceedings.

HEARING OPEN TO THE PUBLIC

The Student has requested an open hearing. Either party may forward the invitation to observers. Observers will only be admitted to the hearing at the beginning of the hearing day and after the lunch break. Observers do not need to identify themselves but must have respectful usernames when joining the hearing. Any prospective witness may not observe the hearing until their testimony is completed and with the ALJ's permission.

By choosing an open hearing, Student is on notice that highly sensitive personal information will be seen and heard by observers.

The following Order applies to observers:

1. Microphone and video shall be off at all times, unless otherwise ordered by the ALJ.
2. Hearing observers will not be allowed to record, photograph, or broadcast the hearing. (California Rules of Court, rule 1.150.) Any person who suspects a member of the public violating this rule, must immediately report the violation to the ALJ.
3. An ALJ may exclude persons whose actions impede the orderly conduct of the hearing, restrict attendance because of the physical limitations of the hearing facility, or take other action to promote due process or the orderly conduct of the hearing. (Cal. Code Regs., Tit. 1, § 1030, subd. (e).) Further, an ALJ may order an open hearing to be closed or make other protective

orders to the extent necessary or proper to ensure a fair hearing in the circumstances of the case, including to protect a minor witness or a witness with a developmental disability. (Gov. Code § 11425.20, subd. (a).)

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 if 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. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH by visiting OAH Secure e-file at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 4:00 PM 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.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received and processed 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 before the hearing.

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

FAILURE TO COMPLY

The failure to comply with this Order may result in the exclusion of evidence or other sanctions.

ORDER INCLUDES ALL RULINGS

This Order includes all rulings made at the prehearing conference. Any discussion and conversation not referenced in this Order is not binding on the ALJ conducting the hearing and may not be relied upon by the parties. The parties should be aware that, at hearing, the ALJ conducting the hearing has discretion to reconsider any part of this Order.

IT IS SO ORDERED.

Marlo Nisperos

Marlo Nisperos
Administrative Law Judge
Office of Administrative Hearings