BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. NEW HAVEN UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013031128 ORDER FOLLOWING **EXPEDITED** PREHEARING CONFERENCE

On April 24, 2013, a telephonic expedited prehearing conference (expedited PHC) was held before Administrative Law Judge (ALJ) Theresa Ravandi, Office of Administrative Hearings (OAH). Attorney Nicole Hodge Amey appeared on behalf of Student and Parents (Student). Attorney Laurie Reynolds appeared on behalf of the New Haven Unified School District (District). The expedited PHC was recorded

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

1. Expedited Hearing Dates, Times, and Location. The expedited hearing (hearing) shall take place on April 25, May 2, May 6 and May 7, 2013, and shall continue day to day thereafter, Monday through Thursday, until the hearing is concluded, as needed and at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. on April 25 and May 2, 2013. On May 6, 2013, the hearing shall begin at 1:30 p.m., and on May 7, 2013, the hearing shall begin at 9:00 a.m., unless otherwise ordered. The location for the hearing is **the Barnard White Middle School located at 725 Whipple Road, Union City, CA 94587**.[1]

The parties shall immediately notify all potential witnesses of the hearing dates and new location, 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.

[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.

2. Expedited Issues. The issues for hearing are limited to those alleged in Student's request for due process hearing (complaint) as further clarified by ALJ Susan Ruff's April 9, 2013 Order Granting Motion to Dismiss Non-expedited Portion of Case.[2]

Issue One: Was Student's October 26, 2012 physical altercation with a staff member the direct result of the District's failure to implement Student's Individualized Education Program (IEP)?

Issue Two: Was Student's October 26, 2012 conduct a manifestation of her disability?[3]

3. 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 represent that they have served 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.

Student identified her expert's report as an additional exhibit for hearing. The District objected to Student's additional exhibit on the grounds that it is untimely and its admission would prejudice the District who has not yet received a copy. Student indicated she received her expert's report on Friday, April 19, 2013. Student indicated that her expert report has been delayed due to Parent's request that the teachers complete rating scales and due to the District not timely providing Student with all necessary records.[4] Additionally, Student stated that she received a document yesterday, a list of Student's behavior incidents since 2004, which may change her expert's assessment.

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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).)

[3] Currently, this issue is limited to whether Student's conduct was a manifestation of her attention deficit hyperactivity disorder (ADHD) pursuant to the January 2013 settlement agreement. However, as discussed at the PHC, this issue may be modified at hearing based upon evidence regarding the February 2013 manifestation determination review findings.

[4] The District indicated that it has provided Student with all pupil records. Student indicated that she requested records on April 14, 2013 and received records on April 16, 2013. On April 16, 2013, Student noticed that she was missing a referral dated October 2012 and requested this from the District as well as a modified school schedule. Student has not received these two records.

Student is on notice of the District's objection, and at the time of hearing, the ALJ will consider any objections, weigh the equities, and determine if there is any prejudice to the District in admitting Student's expert report.

Student objects to the admission of the January 2013 settlement agreement on the grounds that it is not relevant. No determination of admissibility was made at the PHC and Student is entitled to renew her objection at hearing.

At the start of the hearing, the District shall provide the ALJ and Student's counsel with a current, official school calendar, and provide testimony during the hearing as to applicability of the calendar to Student's program and any school holidays.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists or discussed at the PHC and not previously exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

4. 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.

The District informed Student that her listed witness by the name of Maria Gomez is not a District employee and the District is not aware of the identity of this witness. The District objected to Ms. Hamann, the workability teacher, being called as a witness on the grounds of relevance. Student provided an offer of proof that this witness was present at the September 24, 2012 IEP team meeting and would testify as to Student's behaviors as discussed by the team and the implementation of the IEP. The District's motion to exclude Ms. Hamann as a witness is denied. The District is entitled to renew their objection to this or any witness at the time of hearing. Student objected and moved to exclude the testimony of Ms. Kappler. Student's motion is denied. Student is entitled to renew her objection to the testimony of this witness at the time of hearing.

The ALJ has determined that the first item to be addressed at hearing will be the findings made by the February 2013 manifestation determination review team. The ALJ will first determine whether evidence regarding any disability of the Student other than her ADHD is relevant and admissible based upon the findings of the manifestation determination review. At the order of the ALJ, the first witness shall be Student's primary witness regarding the findings of the February 2013 manifestation determination review. Student identified this witness as Abbe Jaffe Bird. The next witness will be the District's primary witness regarding the manifestation determination findings. The District identified this

witness as Mike Piette. The parties are encouraged to meet and confer as to the schedule of witnesses.

Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. 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 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.

5. Scope of Witness Examination. 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.

6. 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 requested that her expert Rebecca Branstetter and Jaswinder Baines be allowed to testify telephonically due to Ms. Branstetter's childcare issues and Psychologist Baines' travel from Sacramento. The District opposed the motion. Student's motion to allow her expert and Psychologist Baines to testify telephonically is denied. The testimony of these witnesses may be scheduled out of order to accommodate travel and child care needs. Student may renew her motion, supported by a declaration under penalty of perjury, regarding the necessity of each witness and her inability to personally attend the hearing.

7. Order of Presentation of Evidence. The order of presentation of evidence shall be as follows: Student shall produce her evidence first followed by the District. Where Student and the District intend to call the same witness, 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.

8. 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 prior to or during the prehearing conference of April 24, 2013.

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

10. 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.

11. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for interpreter services.

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

13. 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 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.

IT IS SO ORDERED.

Dated: April 23, 2013

/s/
THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings