BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: FAIRFIELD-SUISUN UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017051304 ORDER FOLLOWING PREHEARING CONFERENCE AND DENYING REQUEST FOR CONTINUANCE

On August 7, 2017, a telephonic prehearing conference was held before Administrative Law Judge Charles Marson, Office of Administrative Hearings. Jan E. Tomsky, Attorney at Law, appeared on behalf of the Fairfield-Suisun Unified School District. Mother appeared at the PHC on behalf of Student, but did not file a prehearing conference statement. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place at 2490 Hilborn Road, Fairfield, California 94534, in a room to be provided by Fairfield-Suisun. It shall take place on August 15 and 16, 2017, and continue day-to-day thereafter, Monday through Thursday, at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. on the first day of hearing and at 9:00 a.m. on 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 shall ensure that the facilities to be used for this case comply with the law, and shall file a certificate to that effect within two business days of 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 have tissue available to all parties, witnesses and the ALJ. Unless otherwise ordered, 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 at lunch breaks and following the hearing each night.

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. Issue and Proposed Resolution.

Does Fairfield-Suisun's April 10, 2017 offer to place Student in the Functional Academics Program at Armijo High School constitute an offer of a free appropriate public education, so that Fairfield-Suisun may implement it without parental consent?

As the resolution, Fairfield-Suisun seeks an order answering the above question in the affirmative.

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 in a way that clearly identifies the party offering it (such as "S1" or "D2"). 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. Each party shall serve an exhibit binder containing its respective exhibits on the other party or parties by 5:00 p.m. on August 8, 2017, 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.

4. Witnesses.

a) Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or 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.

b) The parties shall attempt to reach agreement on a witness list for the first day of hearing. Fairfield-Suisun shall have witnesses available in case agreement on a witness list is not reached. 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. 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 their testimony.

5. Scope and Order 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. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once, so the parties shall establish their cases in chief during the first appearance of a witness. 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. 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, Fairfield-Suisun requested the hearing and shall present its case-in-chief first, followed by Student.

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).) At present no party intends to present a witness by telephone. A 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 any witness appearing by telephone 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.

8. Electronic Recording of Hearing.

a) Audio Recording. At present no party intends to make an audio recording of the hearing. Any party that desires to make such a recording shall move in advance of the hearing for leave to do so, and any recording shall be subject to the following conditions that: 1) OAH's recording is the only official recording; 2) 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; 3) no part of the recording shall be played to any witness or potential witness while the hearing is proceeding; and 4) 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. Motions.

a). Motion for continuance. On August 1, 2017, Parent filed a request to continue the due process hearing on the ground that she is "currently suffering from a leg injury." On August 7, 2017, Fairfield-Suisun filed an opposition.

Parent's request is supported by a note dated July 31, 2017, with no letterhead signed by "Margie Di Felice P.A." It states that Parent was examined in the physician's assistant's office that day. The document is a form on which the box stating "Not able to return to work" is checked; the only personalized diagnosis is "In care for leg pain . . ." The note does not state that Parent has a leg injury.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

Parent has not shown good cause for a continuance. The diagnosis "In care for leg pain" establishes at most that Parent should not go to work on July 31, 2017. There is nothing to suggest that Parent will still be unable to attend the hearing on August 15, 2017, sixteen days after the examination. The note mentions leg pain but does not describe any injury, or any physical limitation any pain might impose, and does not mention any date after which Parent might return to work. It does not show any awareness of the physical requirements of attending a hearing, which may be different from the requirements of Parent's work.[1] The motion for continuance is denied without prejudice to its renewal on a

[1] At Fairfield-Suisun's request, official notice is taken of Parent's September 7, 2016 motion for continuance and September 8, 2017 medical note in support of that motion in *Student v. Solano County Office of Education*, OAH Case No. 2016050225. In that matter,

considerably more substantial showing of the reasons that Parent believes she cannot attend the hearing.

b) Other motions. At present no other prehearing motions are pending or contemplated. Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made prior to or during this prehearing conference.

10. 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.

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

12. 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.

13. Special Needs and Accommodations.

Parent requested that during the hearing she be allowed to sit or stand as needed to accommodate her leg pain. The request is granted. Parent will also be allowed to request a reasonable number of breaks or recesses for that same purpose.

At present neither party anticipates the need for any other special accommodation for any witness or party, or for the services of an interpreter. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk identified in the scheduling order, at (916) 263-0880, or the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 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.

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

Parent also sought a continuance of a hearing due to a leg injury. The moving papers supplied significantly more information than supplied here.

15. Settlement. The parties are encouraged to continue their attempts 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 five days or fewer than five days before the due process hearing is scheduled to begin, the parties shall immediately inform OAH of that fact 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 showing all required signatures 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.

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

IT IS SO ORDERED.

Dated: August 7, 2017

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Charles Marson
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CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings