BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. MT. DIABLO UNIFIED SCHOOL DISTRICT AND CONTRA COSTA COUNTY OFFICE OF EDUCATION.	OAH Case No. 2019030484 ORDER FOLLOWING PREHEARING CONFERENCE

On May 24, 2019, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Charles Marson, Office of Administrative Hearings. Martha M. Watson, Attorney at Law, appeared on behalf of Student. Kimberly B. Schulist and Christine A. Huntoon, Attorneys at Law, appeared on behalf of the Mt. Diablo Unified School District. Sally J. Dutcher, Attorney at Law, appeared on behalf of the Contra Costa County Office of Education. 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 1936 Carlotta Drive, Concord, California 94519, in a room to be provided by Mt. Diablo. It shall take place on June 4, 5 and 6, 2019, and continue day-to-day thereafter 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, Mt. Diablo 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. Within two business days of the date of this order, Mt. Diablo shall file a certification that the facilities to be used for the hearing comply with those laws.

Prior to the beginning of the hearing, Mt. Diablo 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 Mt. Diablo's legal representative and special education representative; (3) a table for the County Office's legal representative and special education representative; (4) a table for the witness; and (5) a table for the ALJ near an electrical outlet. Mt. Diablo 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 has not been properly notified of the hearing date or properly subpoenaed, as applicable.

2. Issues and Proposed Resolutions.[1]

1. Did Mt. Diablo deny Student a free appropriate public education from February 22, 2019 to the beginning of hearing by disenrolling him?

2. Did Mt. Diablo deny Student a FAPE from February 22, 2019 to the beginning of hearing by failing to implement his IEP of April 27, 2018, as amended on October 30, 2018?

3. Did Mt. Diablo deny Student a FAPE and deprive Mother of meaningful participation in the IEP process by failing to provide legally sufficient prior written notice of its intent to disenroll Student?[2]

As resolutions, seeks an order answering the above questions in the affirmative and requiring Mr. Diablo and the County Office 1) to re-enroll Student in the District; 2) to reimburse Student's Mother for educationally related expenses according to proof; and (3) to provide compensatory education in the areas of academics and social, emotional and behavioral well-being according to proof.

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

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[1] The ALJ has clarified the second issue stated in Student's prehearing conference statement, 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.

[2] At the PHC, Student withdrew the claim in his PHC statement that Mt. Diablo and the County Office denied Mother meaningful participation in the IEP process by "failing to convene an individualized education program meeting before disenrolling Student."

shall contain a detailed table of contents. Each party shall serve an exhibit binder containing its respective exhibits on the other party or parties 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.

Parties are encouraged to present resumes or curricula vitae for all professional witnesses.

Mt. Diablo shall introduce a color copy of the school calendar for each school year in question and shall have witnesses available to explain any legend notations that might be unique to Mt. Diablo.

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 meet and confer by May 30, 2019, in order to reach agreement on a witness list for the first day of hearing. Mt. Diablo 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, Student requested the hearing and bears the burden of proof, and shall present his case-in-chief first, followed by Mt. Diablo and then the County Office.

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. 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. The parties' requests to make audio recordings of the hearing are granted subject to the following conditions: 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) Mt. Diablo's pending motion to bifurcate the hearing so that the potentially dispositive issue of residency could be heard first was denied. The residency issue is so predominant in the dispute, and the other issues so secondary, that the potential saving of hearing time if the secondary issues need not be heard is modest. The potential saving does not justify two hearings, two written decisions, and the additional time bifurcation would consume.

b) At present no other prehearing motions are pending or contemplated. Any motion filed after the day PHC statements were due shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made three days prior to the 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.

At present neither party anticipates the need for 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 Parent, the hearing will be closed to the public.

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 EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT https://www.applications.dgsapps.dgs.ca.gov/oah/oahsftweb.

Dates for hearing will not be cancelled until the letter of withdrawal has been received by OAH. If an executed settlement agreement is reached pending board approval, a letter indicating such with the agreement's signature page containing all required signatures must be submitted to vacate hearing dates and schedule a status conference. 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: May 24, 2019

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Charles Marson
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CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings