BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

CUPERTINO UNION SCHOOL DISTRICT.

OAH CASE NUMBER 2025090479

ORDER FOLLOWING EXPEDITED PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE; ORDER DENYING STUDENT'S MOTION FOR SANCTIONS; ORDER DENYING STUDENT'S MOTION TO COMPEL CUPERTINO TO PLACE STUDENT IN EXTENDED LEARNING OPPORTUNITIES PROGRAM

SEPTEMBER 30, 2025

On September 29, 2025, Administrative Law Judge Jennifer Kelly, Office of Administrative Hearings, held an expedited 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.

Parent appeared on behalf of Student. Attorneys Jennifer Nix and Anisha Asher appeared on behalf of Cupertino Union School District, called Cupertino. 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 expedited due process hearing will take place on October 7, through 9, 2025 and continue day to day at the discretion of the ALJ. 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 three 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.

EXPEDITED ISSUES AND PROPOSED RESOLUTIONS

An individualized education program is called IEP. A free appropriate public education is called FAPE.

Pursuant to discussions with the parties during the PHC, the ALJ has clarified the statement of some issues and re-ordered the issues 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. No change in substances has been made.

Parent informed the ALJ he had to leave the PHC by 1:30 PM to pick-up Student from school. Parent requested that the PHC be continued to 4:00 PM on September 29, 2025, or to September 30, 2025, and that the due process hearing be completed at 12:00 PM each day. The ALJ advised Parent that his requests could not be accommodated because of the requirement expedited due process hearings be completed pursuant to statutory guidelines. Parent left the PHC at approximately 2:00 PM. The ALJ had sufficient information to clarify the issues for the expedited due process hearing. The ALJ completed the PHC with Cupertino's attorneys present.

A party must immediately file a written request for relief if the issues as stated in this Order do not reflect their understanding of the issues clarified at the PHC or otherwise object to any stated issue. Any objections will be addressed on the first day of hearing. The ALJ may request further clarification of the issues on the first day of hearing.

The issues at the due process hearing, and proposed resolutions, as alleged in the complaint and clarified by the parties and the ALJ during the PHC are:

ISSUES:

1. Did Cupertino have a basis of knowledge between June 5, 2025, and September 12, 2025, that Student was a child with a disability before the behavior that precipitated the disciplinary action occurred?
2. Did Cupertino violate section 1415(k) of title 20 of the United States Code by failing to hold a manifestation determination following more than 10 days of removals from Student's educational placement, including the extended learning opportunities program and informal suspensions between June 5, 2025, and September 12, 2025?

PROPOSED RESOLUTIONS

The resolutions requested by Student include an order compelling Cupertino to allow Student to participate in the extended learning opportunities program and extended learning opportunities immersion program and a range of accommodations and services to allow Student to participate in various school activities.

OAH has not received a copy of Cupertino's response to Student's complaint. Cupertino 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. Cupertino must use the letter D before the number to identify Cupertino's exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Cupertino'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.

Cupertino'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 October 1, 2025, by 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, Cupertino shall inform Student which proposed witnesses are Cupertino's employees. Cupertino shall also identify the

witnesses on Student's list that require a subpoena. Cupertino may agree to accept service for a witness under Cupertino's control or provide Student with the witness's most recent contact information. Student has identified approximately 90 witnesses to testify at the due process hearing. As part of the meet and confer process, Student shall inform Cupertino of the name of each witness, their occupation or role in Student's educational program, and the relevance of their testimony to the expedited issues.

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 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 Cupertino, 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.

Cupertino's request to make an audio recording of the hearing is granted. Student also may audio record the hearing subject to the foregoing conditions.

VIDEO RECORDING

No party, witness or anyone else may videorecord any part of the proceedings or stream live through any means. Video recording of the due process hearing shall be subject to sanctions.

RECORDINGS AS EXHIBITS

Recordings may not be uploaded electronically without the ALJ's permission. The ALJ has discretion to admit or exclude evidence in the form of a recording. Any request to submit a recording shall be considered at the time of hearing.

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.

MOTIONS

STUDENT'S MOTION FOR SANCTIONS FOR FAILURE TO CONVENE RESOLUTION SESSION

On September 24, 2025, Student filed a motion to issue sanctions against Cupertino based on its failure to timely convene a resolution session following the filing of Student's complaint on September 12, 2025. On September 29, 2025, Cupertino filed

an opposition to Student's motion for sanctions. Cupertino conceded it did not hold a resolution session on the grounds it has defended multiple due process hearing cases filed by Student and holding a resolution session would be unproductive.

A local educational agency is required to meet with the parents and Student's relevant individualized education program team members within 15 days of receiving Student's complaint. (20 U.S.C. § 1415(f)(1)(B)(i)(I); 34 C.F.R. § 300.510(a)(1) (2006).) The meeting, called a resolution session, can be waived in writing by both parties or if they agree to use mediation. (34 C.F.R. § 300.510(a)(3).) If the parents do not attend the resolution session, and it is not waived, there is no due process hearing until the resolution session is waived or held. (34 C.F.R. § 300.510(b)(3).)

Here, it is undisputed that Cupertino did not engage in a resolution session or obtain a written waiver from Student's parent following the filing of Student's complaint on September 12, 2025. A parent's request for an expedited due process hearing triggers both the 15-day timeline for resolution sessions and the 20-day timeline for expedited hearings. Cupertino is ordered to engage in a resolution session with Parent or obtain a written waiver from Parent at its earliest opportunity, but in no event later than the PHC in the non-expedited due process hearing scheduled for October 13, 2025, at 10:00 AM.

In certain circumstances, an ALJ presiding over a special education proceeding is authorized to shift expenses from one party to another, or to OAH. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; see *Wyner ex rel. Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly, [California Code of Regulations] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

Expenses may be ordered to be reimbursed either to OAH or to another party. The ALJ presiding over the hearing may "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel" to OAH – as the entity that is responsible for conducting due process hearings – as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay," and, "including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Cal. Code. Regs., tit. 5, § 3088, subds. (a) & (e); Gov. Code, § 11455.30, subd. (a).)

An order of sanctions shall be limited to what is sufficient to deter repetition of the action or tactic or comparable action or tactic by others similarly situated. (Code Civ. Proc., § 128.5, subd. (f)(2).) If warranted for effective deterrence, an order may direct payment of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the action or tactic. (*Id.*) The courts shall vigorously use their sanction authority to deter improper actions or tactics. (Code Civ. Proc., § 128.5, subd. (g); see also *Letter to Irby* (Office of Special Education Programs, U.S. Department of Education, February 12, 2010) [OSEP suggested a school district's remedy for frivolous claims or conduct could include a reduction of the prevailing student's attorney's fees award, or shifting the school district's attorney's fees to the student's attorney or parent].) In determining what sanctions, if any, should be ordered, the court shall consider whether a party seeking sanctions has exercised due diligence. (Code Civ. Proc., § 128.5, subd. (f)(1).) There is a dearth of caselaw defining the "due diligence" requirement.

"Actions or tactics" is defined as including, but not limited to, making or opposing motions or filing and serving a complaint. (Gov. Code, §11455.30, subd. (a);

Code Civ. Proc., § 128.5, subd. (b)(1).) "Frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party. (Gov. Code, § 11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(2).) Frivolous, and totally and completely without merit, has been interpreted to mean "any reasonable attorney would agree such [challenged conduct] is totally devoid of merit." (*Karwasky v. Zachay* (1983) 146 Cal.App.3d 679, 681, citing *In re Marriage of Flaherty,* 31 Cal.3d 637, 649–650.)

A finding of "bad faith" does not require a determination of evil motive, and subjective bad faith may be inferred. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.) "Bad faith" actions or tactics are those where the action taken by the party or its attorney was solely for the purpose of harassing an opposing party or causing unnecessary delay. (*Levy v. Blum* (2001) 92 Cal .App. 4th 625, 635.)

Student failed to establish Cupertino's failure to hold a resolution session was a bad faith action or tactic. The circumstances do not indicate Cupertino's intention to harass Parent, or unnecessarily delay the case. Further, Student failed to establish any loss resulting from the failure to timely convene the resolution session. Therefore, Student's established neither bad faith, nor harm; and his request for sanctions is denied.

STUDENT'S MOTION TO COMPEL CUPERTINO TO ALLOW STUDENT TO ATTEND THE EXTENDED LEARNING OPPORTUNITIES PROGRAM

On September 25, 2025, Student filed a motion to compel seeking an order requiring Cupertino to allow Student to attend the extended learning opportunities program. Student argues that Cupertino banned Student from attending this program on August 13, 2025, or required Parent to pick-up Student early on Tuesdays and Wednesdays. Student further argues Cupertino engaged in "excessive policing targeted

at the parent and Student" on August 14, 2025, by having a police officer escort Parent and Student from the campus.

Cupertino filed an opposition to Student's motion on September 29, 2025. Cupertino interpreted the motion to compel as a motion for stay put. Cupertino argued that Student did not establish that attendance in the extended learning opportunities program was part of Student's last consented to IEP, or if Student has an operative IEP.

California provides children enrolled in kindergarten through sixth grade with access to comprehensive afterschool and intersessional expanded learning opportunities. (Ed. Code, § 46120, subds. (a) & (b).) This program is called the expanded learning opportunities program. (Ed. Code, § 46120, subd. (a)(2).) This program does not change the length of a student's school day, but rather provides "opportunities to engage pupils in enrichment play, nutrition and other developmentally appropriate activities." (Ed. Code, § 46120, subd. (g)(1).)

Special education law does not provide for a summary judgment procedure to resolve issues prior to hearing. The issue of whether Student required this program to receive a FAPE is a mixed question of fact and law that requires an evidentiary hearing. Therefore, Student's motion to compel Cupertino to allow Student to attend the expanded learning opportunities program is denied.

CUPERTINO'S MOTION TO DISMISS

On September 22, 2025, Cupertino filed a motion to dismiss. On September 25, 2025, Student filed an opposition to the motion.

OAH did not rule on Cupertino's motion to dismiss at the PHC. The ALJ will take this matter under submission and issue an order prior to expedited due process 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 a 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 CLOSED TO THE PUBLIC

The hearing is closed to the public. Special education hearings are closed to the public unless Student requests the hearing to be open to the public.

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 PHC. 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.

Jennifer Kelly

Jennifer Kelly
Administrative Law Judge
Office of Administrative Hearings