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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

A.V., a minor, by parent and Guardian
ad Litem, CONCEPCION VARELA,

Plaintiff,

v.

PANAMA-BUENA VISTA UNION
SCHOOL DISTRICT; RITA PIERUCCI,
(in her official capacity and as an
individual), JANET CLARK, (in her
official capacity), DARRYL POPE, (in
his official capacity and as an
individual), CINDY KOEPP-ROMERO,
(in her official capacity), PATRICK
CALLEY, (in his official capacity and as
an individual), JANE COTHERN, (in
her official capacity and as an
individual), BRITTANY GENTRY, (in
her official and individual capacity),
MATT HARPER (in his official
capacity), Does 9-20,

Defendants.

No. 1:15-cv-00246-MCE-JLT

MEMORANDUM AND ORDER

Through the present lawsuit, Plaintiff A.V. (“Plaintiff”), by his parent and guardian
ad litem, Concepcion Varela (“Plaintiff’s mother” or “Ms. Varela”), challenges various
actions taken by Defendant Panama-Buena Vista School District (“District” or “Panama”)
with respect to A.V.’s educational placement. Plaintiff has already pursued two special

1 education “due process” proceedings in accordance with the provisions of the Individuals
2 with Disabilities Education Act, 20 U.S.C. § 1400, et seq. (“IDEA”), to rectify what he
3 alleges were unlawful steps taken by the District against him. He now appeals adverse
4 decisions rendered by the Office of Administrative Hearings (“OAH”) following those
5 proceedings. In addition to IDEA violations, Plaintiff claims violations of § 504 of the
6 Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (“Section 504”) as well as claims for
7 discrimination and retaliation on the basis of disability and national origin under both
8 Section 504 and Title II of the Americans with Disabilities Act.¹

9 Presently before the Court is Plaintiff’s Motion for Summary Judgment—Appeal of
10 Administrative Hearing Decisions (ECF No. 116). As set forth below, that Motion is
11 DENIED and the appealed determinations made by the OAH are AFFIRMED.²

12 13 **BACKGROUND**³ 14

15 Plaintiff’s mother enrolled A.V. at the District’s Stonecreek Junior High School
16 prior to the first day of the 2014-15 school term. A.V. was twelve years old at the time of
17 that enrollment. On August 18, 2014, the first day of school, Ms. Varela provided the
18 District with a copy of A.V.’s most recent Section 504 plan along with a behavioral
19 support plan from the Bakersfield City School District (“BCSD”) where A.V. had
20 previously attended classes. The Section 504 and behavioral support plans were
21

22 ¹ In a related proceeding, Panama-Buena Vista Union School District v. A.V., et al., Case
23 No. 1:15-cv-01375-MCE-JLT, (“Related Case”) the District appealed that portion of one of the OAH
24 decisions decided against it. That appeal has been adjudicated by separate Memorandum and Order filed
25 in the Related Case.

26 ² Having determined that oral argument was not of material assistance, the Court ordered this
27 Motion submitted on the briefing in accordance with Local Rule 230(g).

28 ³ The facts in this section are derived from the allegations as set forth in Plaintiff’s Second
Amended Complaint, as augmented by additional facts drawn from the OAH’s decisions in this matter
attached as Exhibits A, B, and C to the Complaint and Amended Complaint. Citations to the Expedited
Hearing Administrative Record made in this Memorandum and Order are denoted as “E-AR”; references to
the Non-Expedited Hearing Administrative Record will be listed as “U-AR”.

1 apparently developed given A.V.'s medical diagnosis of Attention Deficit Hyperactivity
2 Disorder ("ADHD").

3 A.V. began to have behavioral incidents at school as early as August 21, 2014,
4 just three days after classes commenced. He was referred to the office that day for
5 provoking a fight with another student and for being combative. The District requested
6 A.V.'s student records from BCSD that day, and those records were obtained on
7 September 5, 2014. The records showed a history of multiple incidents during the
8 preceding school year that required discipline, including suspensions. E-AR 369-97.
9 BCSD conducted a psychoeducational evaluation of A.V. between February and April of
10 2013 and assessed his cognitive, academic, and social/emotional functioning. See ECF
11 No. 96-3. The report concluded that A.V. had average intelligence, that his academic
12 abilities ranged from average to high average, and that he was unlikely to be autistic. Id.
13 at p. 25. The report further concluded that although A.V. had "an apparent disorder in
14 one or more of the basic psychological processes," that disorder did not hinder his ability
15 "to acquire academic skills and function in a general education classroom." Id. BCSD
16 thereafter convened an Individualized Educational Plan ("IEP") meeting to consider and
17 discuss the results of the psychoeducational assessment and to determine whether A.V.
18 was eligible for special education and related services. Id. The IEP team concluded that
19 AV was not eligible. ECF 96-4 at p. 6.

20 On August 27, 2014, A.V. allegedly threatened to injure another student at
21 Stonecreek and was also purported to have bullied, intentionally harassed and
22 intimidated a group of students. This caused the District to suspend A.V. for two days.
23 That same day, however, the District held a Section 504 team meeting and developed a
24 Section 504 Accommodation Plan for A.V. Ms. Varela attended the meeting with the
25 assistance of a Spanish interpreter provided by the District and accompanied by an
26 educational advocate. At that time, the District believed that A.V.'s behaviors could be
27 addressed through accommodations in his Section 504 plan, and Plaintiff's mother
28 consented to the District's proposals in that regard. In addition, the District presented

1 and explained a general education behavior contract to Ms. Varela and to A.V., which
2 they signed and understood. Ms. Varela did not indicate at this time that her son had
3 any disability that would interfere with his ability to comply with the contract. There is
4 also no indication that she asked for a referral for special education at that time.

5 Despite A.V.'s behavior contract, he was referred to the office twice on
6 September 3 and 4, 2014, for poor attitude and profanity. In addition, on September 5,
7 2014, A.V. received five days of lunch detention for showing disrespect to another
8 student. Then, on September 11, 2014, after the District intervention counselor
9 observed A.V. grabbing a female student's buttocks, A.V. was suspended for an
10 additional three days, and the District scheduled a Section 504 "Manifestation
11 Determination" meeting for September 18, 2014.⁴ In the meantime, on September 15,
12 2014, Plaintiff's mother sent the District a handwritten letter in English requesting that
13 A.V. be assessed for eligibility for special education services. Thereafter, at the
14 September 18, 2014 meeting, the District's psychologist told Ms. Varela, who again
15 participated through a Spanish interpreter, that the District wanted to assess A.V. for
16 special education (it appears that the psychologist was not aware of Ms. Varela's recent
17 letter at that time). This was approximately twenty-two days following A.V.'s enrollment
18 in the District for the 2014-15 school year. Consequently, while the District initially
19 thought that A.V.'s behavior was not necessarily inconsistent with the behavior of many
20 seventh grade boys adjusting to junior high school, within about three weeks it
21 determined that he in fact needed to be further assessed for disability purposes.

22 After Plaintiff's mother told District staff that she thought A.V. did better with male
23 teachers and counselors, the District recommended that A.V. transfer to Thompson
24 Junior High School where more support from male staff members was available.
25 Ms. Varela consented to that transfer.

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27 ⁴ The purpose of a Manifestation Determination Hearing under the Rehabilitation Act is to
28 determine whether the offending behaviors arise from the student's identified disability, here ADHD, as
opposed to other sources.

1 A.V. began attending Thompson the following day, September 19, 2014. On
2 September 22, 2014, school psychologist Brittany Gentry generated a "Consent for
3 Assessment" of A.V.'s special education eligibility that included both a functional
4 behavioral assessment and an evaluation of any emotional disturbance and specific
5 learning disability. Ms. Gentry made that decision both because of Ms. Varela's
6 concerns and because she believed A.V.'s numerous defiant and inappropriate
7 behaviors made such an evaluation appropriate. According to the District, it mailed the
8 Consent for Assessment to Ms. Varela at her address of record and it was not returned.
9 The initial Consent form was generated in English because that was the language
10 Defendant's mother had used in her written letter requesting a special education
11 evaluation.

12 Nonetheless, in a subsequent Section 504 amendment meeting on October 7,
13 2014, which Ms. Varela attended, District Special Education Assistant Director Janet
14 Clark claims she provided Plaintiff's mother with, and reviewed, a Spanish language
15 version of the September 22, 2014 assessment. Ms. Clark and school psychologist Matt
16 Harper allegedly told Ms. Varela why the District wanted to perform an assessment of
17 her son, explaining that an evaluation was needed before determining what additional
18 supports and services A.V. might need. Plaintiff's mother declined to sign the Consent,
19 stating that she wanted to discuss it with her husband and would return it the following
20 day. When Ms. Varela failed to do so, the District sent another Consent for Assessment
21 form, also in Spanish, to her home address. That form was not signed and returned,
22 either.

23 Between August 21, 2014 and October 6, 2014, A.V. was suspended a total of six
24 school days. On October 2, 2014, for example, he was suspended for three days for
25 making sexual gestures towards a female student. Despite numerous efforts on the
26 District's part to obtain Ms. Varela's consent to special education assessment, she did
27 not sign the Consent form until January 6, 2015, nearly four months after the District
28 initially requested it and on the first day of A.V.'s expedited OAH hearing. Thereafter,

1 the District undertook comprehensive assessments of A.V. and convened an IEP team
2 meeting on March 2, 2015. The team ultimately determined that A.V. qualified for
3 special education and related services, under a primary disabling condition of emotional
4 disturbance and a secondary disabling condition of other health impairment.

5 On October 6, 2014, Plaintiff's mother, through her attorney, filed an expedited
6 due process hearing request with the OAH on grounds that A.V. was entitled to a special
7 education manifestation determination since he had suffered multiple class and school
8 removals as discipline for school behaviors. According to the request, Plaintiff's mother
9 had requested an evaluation on September 14, 2014, but the District had nonetheless
10 failed to afford her and A.V. their rights under the IDEA. A hearing on the expedited
11 claim was scheduled for November 4, 2014. Plaintiff's counsel filed a request to dismiss
12 the expedited claim the afternoon before the hearing was scheduled to commence,
13 however, on grounds that she had "just realized" that A.V. did not meet the criteria for an
14 expedited hearing since the District's records showed fewer than eleven days of
15 suspensions prior to October 6, 2014. This prompted the District, on November 4, 2014,
16 to move for sanctions on grounds that the expedited complaint was frivolous. On
17 December 10, 2014, the Administrative Law Judge ("ALJ") assigned by the OAH issued
18 sanctions in the amount of \$1,793.50 on grounds that had Plaintiff's counsel reviewed
19 the District's records prior to filing her request, she would have discovered that A.V. had
20 not been removed from school in excess of ten days by October 6, 2014. The sanctions
21 figure compensated the District's counsel only for her preparation for the expedited
22 hearing between October 23, 2014, when the ALJ reasoned that Plaintiff's counsel
23 should have been aware that A.V. had not been suspended for enough days to support
24 an expedited hearing request, and November 3, 2014, when Plaintiff's counsel actually
25 cancelled the hearing.

26 Despite Ms. Varela's continued failure to sign the needed Consent for special
27 assessment, her counsel filed, on or about November 22, 2014, an amended request for
28 due process which ultimately resulted in expedited and non-expedited decisions. The

1 expedited portions of her complaint in that regard⁵ take issue with the discipline A.V. had
2 received and the fact that his disabilities had not been adequately considered. Because
3 expedited claims have to be adjudicated in short order, the expedited claims were
4 determined first over a three-day hearing between January 6 and 8, 2015. The
5 expedited hearing focused on whether the District should have conducted IDEA
6 manifestation determinations prior to A.V.'s discipline, if it was deemed to have been on
7 notice beforehand that A.V. was a student with a disability.

8 The District was on notice that A.V. potentially had a disability when his mother
9 sent her assessment request on September 15, 2014. 20 U.S.C. § 1415(K)(5)(A).
10 Moreover, while school districts can discipline a disabled student, once the student has
11 been removed from school longer than ten days a "change in placement" is deemed to
12 have occurred which, in turn, requires that a manifestation hearing determination be held
13 to determine whether the underlying misconduct is related to the student's disability.
14 Both of these requirements are, however, subject to an exception. If the District provides
15 a request for assessment once a student is suspected of having a disability and if the
16 student's parent declines to allow an evaluation, the District no longer has a basis of
17 knowledge that the student is disabled until the parent provides the needed consent. *Id.*
18 at § 1415(k)(5)(C).

19 Following the expedited hearing, the ALJ found that because Plaintiff's mother did
20 not provide consent for assessment until after the disciplinary events occurred, it had no
21 obligation to provide IDEA manifestation hearings before the discipline was imposed.
22 Additionally, despite Ms. Varela's claim that her son should have been entitled to
23 protections on October 6, 2014, since he had been suspended in excess of ten days for
24 disciplinary-related issues at that point, the ALJ determined that due to partial days and
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26 ⁵ An expedited due process complaint is made pursuant to 34 CFR §§ 300.530 and 300.532 and
27 challenges, *inter alia*, discipline meted out to a disabled student that changes the student's placement. An
28 expedited hearing can also be requested for a manifestation determination that the student's offending
conduct was or was not caused by his or her disability. *See* 34 CFR § 300.530(e). A non-expedited
complaint, on the other hand, may generally challenge the provision of a Free and Appropriate Public
Education ("FAPE) to disabled students as guaranteed by the IDEA under 34 CFR §§ 300-507-300.516.

1 non-suspension absences the requisite eleven-day threshold had not been reached on
2 October 7, 2014, when the Spanish language Consent form was provided. Moreover,
3 the ALJ rejected Ms. Varela's claim, as both implausible and contrary to the testimony of
4 all the other witnesses, that she had not received any of the Consent forms until after
5 Plaintiff was expelled on or about November 14, 2014. Given that determination, the
6 ALJ determined that Plaintiff had no IDEA protection available prior to his expulsion,
7 either.

8 Plaintiff's second hearing, which encompassed his non-expedited claims, was
9 conducted later, between April 15, 2015, and April 17, 2015. That hearing adjudicated
10 claims that the District had failed to timely assess A.V. in all areas of suspected need for
11 special education placements, as well as claims that the District had deprived Ms. Varela
12 of the opportunity to meaningfully participate in A.V.'s IDEA program by failing to
13 translate disciplinary documents into Spanish. The hearing took place over the course
14 of three days between April 15, 2015, and April 17, 2015. The OAH's resulting decision,
15 dated June 11, 2015, was in A.V.'s favor to the extent the hearing officer concluded that
16 the District had sufficient information between August 18, 2014, and October 6, 2014, to
17 trigger its duty to assess A.V. for special education eligibility.⁶ Nonetheless, given
18 Ms. Varela's repeated failure to return the Consent form in a timely fashion once it had
19 been provided to her as delineated above, the hearing officer found that no IDEA child-
20 find obligation was breached after October 7, 2014. In addition, the hearing officer
21 rejected A.V.'s claim that the District had to translate all disciplinary documents from
22 A.V.'s cumulative file for Ms. Varela, or to provide Ms. Varela written explanations in
23 Spanish for each disciplinary event, in order to ensure her meaningful participation in the
24 IDEA process.

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26
27 ⁶ As indicated above, the ALJ's decision in that regard was separately appealed by the District in
28 the Related Case. By Memorandum and Order dated December 5, 2017, this Court overturned that
decision.

1 Plaintiff instituted the present proceeding on February 7, 2015, after the ALJ ruled
2 against him on or about January 23, 2015, on his expedited claims, and following the
3 sanctions order against Plaintiff's counsel on December 10, 2014. On August 28, 2015,
4 A.V. filed a First Amended Complaint which appealed, in addition to the OAH's
5 January 23, 2015, decision and the sanctions order, also the OAH's June 11, 2015,
6 decision on the non-expedited portions of Plaintiff's claim.

7 In now moving for summary judgment, Plaintiff seeks a reversal of the ALJ's
8 decision in the expedited hearing that he was not entitled to a manifestation hearing as
9 of October 6, 2014, or alternatively by November 14, 2014, prior to his expulsion. In
10 addition, Plaintiff seeks a ruling that the District denied him FAPE for the entire 2014-15
11 and 2015-16 school year by failing to properly provide a Consent form for his
12 assessment. Plaintiff also asks the Court to make a finding that the District had a duty to
13 either verbally translate, or translate in writing, his disciplinary records. Finally, Plaintiff's
14 counsel requests an order overturning the ALJ's imposition of sanctions against her.

15 16 STANDARD

17
18 In adjudicating an appeal from an administrative decision regarding the rights of
19 students with disabilities, the court is charged with receiving the record of the
20 administrative proceeding which, in essence, forms the undisputed facts of the case.
21 Though not a "true" motion for summary judgment, the appeal of an IDEA-based due
22 process hearing decision is properly styled and presented by the parties in a summary
23 judgment format. Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 892
24 (9th Cir. 1995). "[T]he procedure is in substance an appeal from an administrative
25 decision not a summary judgment." Id.

26 The standard for district court review under the IDEA is set forth in 20 U.S.C.
27 § 1415(i)(C), which provides as follows:

28 ///

1 In any action brought under this paragraph the court-- (i)
2 shall receive the records of the administrative proceedings;
3 (ii) shall hear additional evidence at the request of a party;
4 and (iii) basing its decision on the preponderance of the
evidence, shall grant such relief as the court determines is
appropriate.

5 This standard requires that “due weight” be given to the administrative
6 proceedings. Anchorage School Dist. v. M.P., 689 F.3d 1047, 1053 (9th Cir. 2012);
7 Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982). The amount
8 of deference so accorded is subject to the court’s discretion. Gregory K. v. Longview
9 Sch. Dist., 811 F.2d 1307, 1311 (9th Cir. 1987). In making that determination, the
10 thoroughness of the hearing officer’s findings should be considered, with the degree of
11 deference increased where said findings are “thorough and careful”. Capistrano Unified
12 Sch. Dist. v. Wartenberg, 59 F.3d 884, 892 (9th Cir. 1995), citing Union Sch. Dist. v.
13 Smith, 15 F.3d 1519, 1524 (9th Cir. 1994). Such deference is appropriate because “if
14 the district court tried the case anew, the work of the hearing officer would not receive
15 ‘due weight,’ and would be largely wasted.” Capistrano, 59 F.3d at 891.

16 Because of the deference potentially accorded the administrative proceedings,
17 complete *de novo* review is inappropriate. Anchorage School Dist. v. M.P., 689 F.3d at
18 1053.; Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 887 (9th Cir. 2001). Instead,
19 the district court must make an independent judgment based on a preponderance of the
20 evidence and giving due weight to the hearing officer’s determination. Capistrano,
21 59 F.3d at 892. After such determination, the court is free to accept or reject the hearing
22 officer’s findings in whole or in part. Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467,
23 1473-73 (9th Cir. 1993). In addition, a district conference must also grant deference to a
24 hearing officer’s findings where those findings “are based on credibility determinations of
25 live witness testimony.” J.S. v. Shoreline Sch. Dist., 220 F. Supp. 2d 1175, 1184 (W. D.
26 Wash. 2002).

27 While the petitioning party bears the burden of proof at the administrative level,
28 Schaffer v. Weast, 546 U.S. 49, 57 (2005), the party challenging an administrative

1 decision in federal district court has the burden of persuasion on his or her claim. Clyde
2 K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1399 (9th Cir. 2004).

4 ANALYSIS

6 **A. Because The District Lacked The Requisite Knowledge That A.V. Was 7 A Student With A Disability Prior To The Behavioral Incidents Giving 8 Rise To His Expulsion, A.V. Was Not Entitled To The Procedural 9 Protections Afforded Under The IDEA.**

9 Plaintiff claims that the ALJ erred by determining that he was not entitled to the
10 IDEA's procedural protection when subjected to disciplinary measures by the District,
11 either after October 6, 2014, or alternatively by November 14, 2014, shortly prior to AV's
12 expulsion on November 18, 2014. After reviewing the ALJ's decision along with the
13 administrative record, the Court does not find any such error.

14 A student not yet determined to be eligible for special education can claim the
15 IDEA's procedural protections, including a manifestation determination hearing, if the
16 local education authority, here the District, had a "basis for knowledge, that the student
17 was disabled before the behavior giving rise to a disciplinary action occurred." 20 U.S.C.
18 § 1415(k)(5)(A); 34 C.F.R. § 300.534(a). To the extent that a student with disabilities is
19 removed from school more than ten days in the course of such discipline, a
20 manifestation determination review is required inasmuch as removals exceeding that
21 length are deemed to constitute a "change in placement." 34 C.F.R. § 300.536.

22 In this matter, the critical issue is whether the District had the requisite "basis for
23 knowledge" of A.V.'s disability. To the extent that Plaintiff's mother requested that he be
24 evaluated for special education services by letter dated September 15, 2014, a basis for
25 knowledge exists. 20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.534(b). Nevertheless, the
26 District is not deemed to have knowledge if the parent has not allowed an evaluation of
27 the student. 20 U.S.C. § 1415(k)(5)(C); 34 C.F.R. § 300.534(c). What the District must
28 do is to make reasonable efforts to gain a parent's informed consent for such evaluation.

1 34 C.F.R. 300.300(a)(iii). As long as those reasonable efforts are made, a parent's
2 failure to consent to special education evaluation means that his or her child can be
3 disciplined in the same manner as students without disabilities who engage in
4 comparable behavior. 20 U.S.C. § 1415(k)(5)(D)(1); 34 C.F.R. § 300.534(d).

5 Plaintiff's mother's September 15, 2014 request for assessment, which was
6 handwritten in English (E-AR 401), triggered a fifteen-day period from that date within
7 which the District had to provide a Consent for Assessment. Cal. Ed. Code § 56321(a).
8 The evidence shows that the District provided Plaintiff's mother with the necessary
9 Consent for Assessment, in English, on September 22, 2014. E-AR 1156:1-5. Given
10 the fact that Plaintiff's mother had requested special assessment just a week earlier, in
11 English, it was not unreasonable for the District to have initially generated the Consent
12 for Assessment in the English language, particularly since Plaintiff's mother had
13 otherwise communicated with the District in English and continued to do so on many
14 occasions. E-AR 686:9-687:8; 727:25-728:23; 737:11-17; 748:15-750:24; 1157:20-
15 1158:8; 1295:18-1296:21; U-AR 611:13-17; 626:24-627:5; 945:2-5. In addition, after the
16 District determined that a Spanish language Consent was necessary at the Section 504
17 meeting on October 6, 2014, it provided both Spanish and English consent forms, both
18 by mail and delivered personally to Ms. Varela, all without success. Once the District
19 requested Consent from Ms. Varela, it no longer had a basis of knowledge that A.V. was
20 a child with a disability until his mother provided her Consent for Assessment. 20 U.S.C.
21 § 1415(k)(5)(C). Had Plaintiff's mother provided her Consent and permitted assessment
22 prior to November 14, 2014, when A.V. engaged in behaviors that ultimately resulted in
23 his expulsion from the District,⁷ he would have been entitled to a manifestation
24 determination hearing under the IDEA beforehand. Plaintiff's mother, however, did not
25 give her Consent until January 6, 2015, well after Plaintiff was expelled from the District.
26 Consequently, Plaintiff was not entitled to the protections of the IDEA before his

27 _____
28 ⁷ As of November 14, 2014, the District appears to concede that Plaintiff had been removed from
school for more than eleven days.

1 expulsion.

2 While Plaintiff appears to claim she never received a Consent for Assessment
3 before November 14, 2015, the ALJ found that claim to lack credibility. As the ALJ
4 observed:

5 Parent's testimony was particularly inconsistent regarding the
6 Consent for Assessment. She initially denied at hearing that
7 she had ever seen the document in English or Spanish, or
8 had it explained to her, including the English copy mailed on
9 September 22, 2014. During the October 7, 2014, 504
10 amendment meeting, [Special Education Assistant Director
11 Janet] Clark, who is a licensed school psychologist and board
12 certified behavior analyst, asked Parent about the Consent
13 for Assessment. Both Ms. Clark and [School psychologist
14 Matt] Harper testified that Parent stated at the meeting that
15 she had signed the Consent for Assessment but did not
16 believe she was required to return it. Parent did not explain
17 or refute Ms. Clark's and Mr. Harper's credible testimony.

18 Expedited Decision, Ex. B to Pl.'s Compl., ¶ 11.

19 Plaintiff was no more successful in credibly claiming that proceedings had not
20 been explained to her by the District in a manner she could understand. The ALJ's
21 Expedited Decision made this very clear:

22 Parent is fluent in the Spanish language, reads only a few
23 words in Spanish and English, and speaks and understands
24 some English. Parent's testimony that she never saw,
25 received or had explained to her, any of the documents from
26 Panama, was not credible. She denied ever receiving any
27 mail at her home address from Panama, even though she
28 received other mail at home. Numerous Panama witnesses
consistently and credibly testified that: Panama provided a
Spanish language interpreter for Section 504 meetings;
various Panama staff gave detailed explanations to Parent at
the meetings and occasionally spoke to her on the phone
after meetings, both in English and Spanish; a Spanish
speaking educational advocate accompanied Parent to the
Section 504 meetings; Panama gave Parent documents at or
after October 7, 2014, and explained documents at each
meeting; and Panama mailed copies of documents in English
and Spanish to Parent's address of record on at least four
different occasions without receiving them back as
undeliverable. Student offered no credible evidence to
establish that the assessment plans were never received.

29 Id. at ¶ 10.

30 ///

1 This Court will not revisit the credibility determinations made by the ALJ over the
2 course of a hearing lasting several days and entailing multiple witnesses. Moreover,
3 given the multiple Consent for Assessment forms both mailed to Plaintiff's mother and
4 delivered to her during the course of multiple meetings at which a Spanish language
5 interpreter was present and participated, her claim that she never received the
6 assessments is unpersuasive on its very face.

7 Plaintiff's allegation that the District failed to offer his mother the Consent for
8 Assessment "by means accessible to her" completely lacks merit under the
9 circumstances of this case. The District was required only to make reasonable efforts to
10 obtain the necessary consent from Plaintiff's mother, and the facts and testimony
11 presented demonstrate that the District went the extra mile, and then some, to do so, all
12 to no avail. Given that conclusion, and the fact that Ms. Varela did not return the
13 Consent for Assessment form until well after the disciplinary events leading to A.V.'s
14 expulsion occurred, under the IDEA the District was deemed to have been without
15 knowledge that A.V. was a student with a disability at all pertinent times prior to that
16 expulsion.

17 In addition, despite Plaintiff's claim to the contrary, he was not entitled to IDEA
18 protections as of October 6, 2014, when Plaintiff's counsel filed her original expedited
19 request for due process. Plaintiff appears to argue that because the District did not
20 provide Plaintiff with a Spanish-language Consent for Assessment form until October 7,
21 2014, and because A.V. had been suspended for in excess of ten days by October 6, his
22 IDEA protections were triggered because the District had not yet properly requested
23 assessment. Again, Plaintiff is wrong. Ms. Varela requested, in English, that her son be
24 evaluated for special education purposes by handwritten letter dated September 15,
25 2014. Within seven days, a period well within the fifteen-day period prescribed by the
26 California Education Code, the District generated a Consent for Assessment (also in
27 English) and sent it to Plaintiff's mother. This satisfied the District's Child Find obligation
28 with respect to Ms. Varela's September 15, 2014 request. Moreover, even if it did not,

1 the ALJ determined after examining all the evidence that A.V. had been suspended for a
2 total of only six days as of October 6, 2014. The Court declines to revisit that factual
3 determination, and believes it to be correct in any event. This means that even
4 assuming the District did not generate a proper Consent for Assessment form until
5 October 7, 2014, when forms in both English and Spanish were provided to Ms. Varela,
6 discipline resulting in excess of ten days of suspension still had not occurred before the
7 Consent for Assessment was unquestionably provided on October 7, 2014. It should
8 also be noted in connection with this determination that even Plaintiff's counsel
9 conceded that the District had not suspended A.V. for the requisite period as of
10 October 6, 2014 when she voluntarily withdrew her expedited request for due process
11 filed at that time for failing to meet the IDEA's prerequisites in that regard.⁸

12 **B. Because Plaintiff's Mother Failed To Return A Signed Consent For**
13 **Assessment To The District Until January 6, 2015, The District Did Not**
14 **Fail To Meet Its Child Find Obligation Under The IDEA Prior To That**
15 **Time.**

16 Because this contention has already been addressed in connection with the
17 preceding argument, any claim otherwise is also rejected as a basis for Plaintiff's appeal.

18 **C. The District Met Its Obligation To Ensure Plaintiff's Mother's**
19 **Involvement In The Disciplinary Proceedings Leading To A.V.'S**
20 **Expulsion; It Had No Duty Per Se To Translate All Disciplinary**
21 **Documents Into Spanish.**

22 Plaintiff correctly points out that "the informed involvement of parents" is central to
23 the IDEA and its requirement that disabled children receive a free and appropriate public
24 education. See Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524 (2007).

Consequently, protecting parental participation is deemed to be "[a]mong the [IDEA's]

25 ⁸ The Court recognizes that Plaintiff, in his reply papers, makes a completely new argument
26 (having not been made either in her complaint or in the moving papers for the present motion) that aside
27 from whether A.V. had been suspended for more than ten days as of October 6, 2014, he still had been
28 subjected to a "pattern of removal" under 34 C.F.R. § 300.536. Because this argument was not made until
Plaintiff's reply, it will not be considered because arguments first raised at that time are improper.
Eberle v. City of Anaheim, 901 F.2d 814, 817-18 (9th Cir. 1990) (new issue cannot be raised for the first
time in a reply brief); Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not
consider arguments raised for the first time in a reply brief").

1 most important procedural safeguards.” Amanda J. v. Clark County Sch. Dist., 267 F.3d
2 877, 882 (9th Cir. 2001). To that end, the law requires that local educational agencies
3 like the District “shall take any action necessary to ensure that the parent or guardian
4 understands the proceedings at a meeting, including arranging for an interpreter for
5 parents or guardians . . . whose native language is a language other than English.” Cal.
6 Ed. Code § 56341.5(i); see also 34 C.F.R. 300.322(3).

7 Meaningful participation in the special education request nonetheless is deemed
8 to have occurred when the parent is informed of the child’s problems, attends meetings,
9 expresses disagreement regarding conclusions reached with regard to special education
10 services, and requests revisions to a student’s special education services plan. N.L. v.
11 Knox County Schools, 315 F.3d 688, 693 (6th Cir. 2003); Fuhrmann v. East Hanover Bd.
12 of Educ., 993 F.2d 1031, 1036 (3rd Cir. 1993). Contrary to Plaintiff’s argument,
13 however, facilitating a parent’s ability to participate in the special education planning
14 process, and to provide consent for assessment, does not require that all disciplinary
15 documents be translated into the parent’s native language. The ALJ did not err when
16 she found no such duty.

17 Here, as explained above, it was initially reasonable for the District to have
18 provided its Consent for Assessment and notice of parents’ rights in English on
19 September 22, 2014. Additionally, beginning on October 7, 2014, the District also
20 ensured Ms. Varela’s ability to participate in the process through the Spanish language,
21 which it appears undisputed that she spoke fluently. The District met numerous times
22 both informally and formally to discuss A.V.’s issues. During most, if not all of those
23 meetings, Ms. Varela was either accompanied by a Spanish-speaking advocate or was
24 provided with interpreters or Spanish-speaking staff to aid in communication, or both.
25 E-AR 407; 408, 419; 420; 610:19-21; 614:11-24; 941:11-23. In this manner, even if one
26 accepts Ms. Varela’s argument that she was unable to read much in either English or
27 Spanish, her rights to participate in communication were nonetheless protected orally by
28 explanations provided in Spanish.

1 **D. Sanctions Against Plaintiff’s Attorney Were Properly Imposed.**

2 Although not specifically requested in Plaintiff’s Statement of Relief Requested
3 (See Pl.’s Mot, 5:19-23), Plaintiff nonetheless argues in his motion that the \$1,793.50 in
4 sanctions awarded by the ALJ in her Order of December 9, 2014 (Ex. A to Pl.’s Compl.)
5 be reversed. While conceding that the District’s records identified only six removal days
6 as of the time Plaintiff filed her expedited hearing request on October 6, 2014, Plaintiff
7 nonetheless appears to argue that because the District “falsified records” and was
8 “deceptive,” the sanctions award was improper.

9 This argument also misses the mark. The ALJ found no evidence of falsification,
10 and despite bare assertions to that effect Plaintiff provides no supporting evidence for
11 any such assertion, either. What the ALJ did find was that Plaintiff’s counsel 1) had not
12 examined the District’s records herself before filing her expedited claim on October 6,
13 2014; and 2) did nothing to cancel the hearing on the expedited claim, which had been
14 set for November 4, 2014, until the day beforehand despite having been on constructive
15 if not actual notice of the District’s records by approximately October 23, 2014.
16 December 9, 2014 OAH Decision, Ex. A to Pl.’s Compl., pp. 4-5. Given counsel’s failure
17 to dismiss her claim and cancel the hearing, despite that constructive notice, until just
18 before the hearing was scheduled to commence, the ALJ imposed sanctions against
19 Plaintiff’s counsel based upon time expended by the District’s lawyers between
20 October 23, 2014 and November 3, 2014. The Court does not find that determination to
21 be erroneous and consequently will not disturb the sanctions awarded.

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CONCLUSION

Based on all the foregoing, Plaintiff's Motion for Summary Judgment/Appeal of Administrative Hearing Decisions (ECF No. 116) is DENIED. The challenged OAH decisions are hereby affirmed. Since this matter is now concluded, the Clerk of Court is directed to close the file.

IT IS SO ORDERED.

Dated: January 8, 2018


MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE