BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CAPISTRANO UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2015120782 ORDER FOLLOWING PREHEARING CONFERENCE

On January 8, 2016, a telephonic prehearing conference was held before Administrative Law Judge Marian H. Tully, Office of Administrative Hearings. Ernest Bell, Attorney at Law, appeared on behalf of Capistrano Unified School District (District). Eric Menyuk, Attorney at Law, appeared on behalf of Student. The PHC was recorded.

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

1. Motion to Continue. On December 23, 2015, OAH issued a Scheduling Order setting January 20, 2016, for a due process hearing. On January 4, 2016, OAH issued an Amended Order and Notice of Dual Hearing Dates. The amended scheduling order was issued to correct the notice to the parties of the dual dates in this matter. According to the Amended Order, the expedited and non-expedited issues shall be heard on January 20, 21 and 22, 2016.

On January 6, 2016, Student filed a motion to continue all dates in the dual matter until District has provided copies of Student's educational records. On January 7, 2016, District filed an opposition on the grounds there is no authority for a continuance of an expedited hearing and District has provided copies of Student's educational records. District's opposition is supported by a declaration from District's Special Education Legal Specialist. According to the declaration, a complete copy of Student's educational records was mailed to Student on January 6, 2016. On January 8, 2016, Student filed a reply to District's opposition. Student argues that educational records were delivered to Student's counsel on January 8, 2016, but that the records are incomplete.

Title 20 United States Code section 1415(k)(4)(B) states that an expedited hearing "shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing." Section 1415(k), which governs the procedures for expedited hearings in student discipline matters, contains strict timelines for an expedited hearing and does not have a provision that allows the parties to continue the

expedited hearing. Accordingly, Student's motion to continue the expedited hearing is denied.

Expedited Hearing Dates

The expedited hearing shall take place on January 20, and 21, 2016, and continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.

Hearing Dates on Non-expedited Issues

To the extent the matter involves non–expedited issues and Student's motion to continue is made as to issues which are not expedited, the hearing on the non-expedited issues is continued to dates agreed upon by the parties during the PHC. Accordingly, the hearing on the non-expedited issues shall take place on April 11 and 12, 2016, and continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall begin at 1:30 p.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.

Location

The expedited hearing on January 20 and 21, 2016 and the hearing on April 11 and 12, 2016, shall take place at the District's offices located at 33122 Valle Road, San Juan Capistrano, California 92675.

As ordered in the scheduling order, and the amended order, the named local educational agency shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 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 and certify, within five days of the scheduling order, that the facilities used for this case comply with the law. District has not filed a Local Education Agency Certification Form or a comparable certification. District shall inform OAH within two days of the date of this order it is able to certify that it will provide a facility that complies with the law.

Prior to the beginning of the hearing, District shall assist the ALJ to ensure that the hearing room is configured into a courtroom setting, including (1) a table for Student and his representatives; (2) a table for District's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet.

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. Issues and Proposed Resolutions. The expedited issues at the due process hearing, and the proposed resolutions, are:

a) Is Student's attendance at Wagon Wheel Elementary School substantially likely to result in injury to Student or others; and

b) Does Rossier Park School constitute an appropriate interim alternative educational setting for Student?

District seeks an order that Student's attendance at Wagon Wheel is substantially likely to result in injury to Student or others and that Rossier is an appropriate interim alternative educational setting for Student during the pendency of the non-expedited issues in this matter.

The non-expedited issues at the due process hearing, and the proposed resolutions, are:

c) Did District's October 27, 2015 functional behavior assessment meet the requirements of state and federal law; and

d) Did the IEP dated November 18, 2015, and amended December 11, 2015 constitute a free appropriate public education such that District may implement the IEP without Parents' consent?

District seeks an order that the October 27, 2015 functional behavior assessment met the requirements of state and federal law and that District offered Student a FAPE and may implement the IEP without Parental consent.

3. Pupil Records and Exhibits. District shall provide copies of pupil records, not previously provided, to Student by 5 p.m. January 11, 2016.

Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letter "S" or "D" in front of the exhibit to designate if it is a Student or District exhibit (for example, "S-5, S-6, or D-1, D-2"). Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7). At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible.

The parties shall exchange, and provide the ALJ a copy, of resumes or curriculum vitae for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

4. Witnesses. The parties have agreed to meet and confer by 5 p.m., January 12, 2016, as to the witnesses and exhibits for the expedited hearing. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

The parties shall attempt to reach agreement on a witness list for the first day of hearing. 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 ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subd. (h), empowers the ALJ presiding at a due process hearing to set a reasonable limit on the length of the hearing after consideration of all of the following: (i) issues to be heard, (ii) complexity of facts to be proven, (iii) ability of the parties or their representatives to present their respective cases, and (iv) estimates of the parties as to the time needed to present their respective cases.

5. Scope of Witness Examination. Each witness shall be called to testify only once, except for rebuttal purposes. 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. If a witness is to be called by more than one party, the party first conducting cross-examination of that witness shall include in that examination all questions intended for the witness on direct examination, in order that each witness need appear and

testify only once. Witnesses, other than the parties, may not be in the hearing room except when testifying.

6. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. The proponent of the witness shall provide the proposed witness with a complete set of exhibit binders with all of each party's exhibits prior to the hearing; shall arrange for the testimony to be taken in a private location with no other persons present; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

District's unopposed motion to allow Cindy King to testify telephonically is granted. The witness may testify by telephone provided all of the above conditions are met.

7. Electronic Recording of Hearing.

a. Audio Recording. Counsel may make an audio recording of the hearing for counsel's personal use, 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) operation of the party's recording mechanism will not be allowed to delay the hearing; 4) the recording will not be shared with or played to any potential witness; and is subject to the same confidentiality as the due process 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.

8. 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, District is the petitioning party. Accordingly, District shall present its case-in-chief, followed by Student.

9. Motions. No pretrial motions, other than motions in limine to exclude evidence, are pending or contemplated. Any motion, other than motions in limine to exclude evidence, filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during the prehearing conference of January 8, 2016.

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

11. 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.

12. Special Needs and Accommodations. Neither party requests an interpreter or any accommodations.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the mediation or hearing may contact the assigned calendar staff, identified in the scheduling order, at (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/Accommodations.aspx

13. Hearing Closed To the Public. The hearing is closed to the public.

14. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY **FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE at 916-376-6319.**

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall submit a request for a status conference and provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

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

IT IS SO ORDERED.

DATE: January 8, 2016

/s/
MARIAN H. TULLY
Administrative Law Judge
Office of Administrative Hearings