BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LUCERNE VALLEY UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2015010716 ORDER FOLLOWING PREHEARING CONFERENCE

On April 3, 2015, a telephonic prehearing conference was held before Administrative Law Judge Marian H. Tully, Office of Administrative Hearings. Attorney Karen Key Brent appeared on behalf of Student. Attorney Vivian E. Billups appeared on behalf of Lucerne Valley Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on April 7, 8, and 9, 2015, and continue day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. on the first day and at 9:00 a.m. all other days unless otherwise ordered.

The hearing shall take place at District's offices located at 8560 Aliento Road, Lucerne Valley, California, 92356. District 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), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

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 issues at the due process hearing are:

a) Did District fail to adequately assess Student in all areas of suspected disability, particularly behavior, social/emotional development, academics, occupational therapy, physical therapy, adaptive physical education, and to conduct a self-help assessment?

b) Did District deny Student a free appropriate public education by failing to provide Student an individualized education program reasonably calculated to address Student's needs in the areas of behavior, counseling, sensory deficits and occupational therapy, adaptive physical education, and academics?

c) Did District deny Student a FAPE by failing to:

1) provide Parents prior written notice, a copy of the December 17, 2014 IEP report, home and school work missed during Student's absences;

2) timely complete assessments;

3) develop appropriate goals; and

4) implement the physical education program in Student's December 17, 2014 IEP?

d) Did District deny Student a FAPE by sending him home from school on January 15, 2015?

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, 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. 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.

District's binder was timely served on Student. Student shall, for the reasons set forth below in paragraph 9, serve Student's binder on District no later than 10:00 a.m. April 6, 2015. Each of Student's binders shall, in addition to the requirements for an index, consecutive pagination and divider tabs, include one sided copies that are right side up, and legible.

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.

4. Witnesses. 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 the ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

District has agreed to make Patricia Courtney and Cynthia McDonough available on the first day of hearing. These witnesses shall be available from 1:00 p.m. until 4:30 p.m. on April 7, 2015, unless otherwise ordered. 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. District shall have witnesses available in case agreement on a witness list is not reached.

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.

5. Scope of Witness Examination. 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.

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 from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the witness testify via a landline from a private location and 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. Neither party requested telephonic testimony from any witness at the PHC.

7. Timely Disclosure of Witnesses/Exhibits. The Parties timely disclosed witness and exhibit lists.

8. Order of Presentation of Evidence. As petitioner, Student shall proceed first.

9. Motions. On April 1, 2015 District filed a motion to exclude all of Student's documentary evidence and a supplemental motion for sanctions to shift expenses.

The motion to exclude documentary evidence was made on the grounds Student's counsel did not timely serve her evidence binder in compliance with Education Code section 56505, subdivision (e)(7) and the PHC Order issued on March 30, 2015. Section 56505, subdivision (e)(7) provides that the parties have a right to "a copy" of all documents at least five days before the hearing. The Order states "The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7)." The statute does not specify physical ("hard") copies. The PHC Order specifies hard copies and is binding on the Parties. Declarations submitted by counsel for both Parties demonstrate that Student served electronic copies on March 31, 2015, and physical copies on April 1, 2015. Neither the electronic nor the physical copies complied with PHC order. The Education Code gives District an enforceable right to copies. Electronic copies were sent five business days before the hearing. The failure to comply with the PHC Order is not a violation of the Education Code. The ALJ has discretion to sanction or exclude evidence for failure to comply with the PHC Order. The ALJ has considered the briefs and declarations of the parties and the statements made during the PHC. The exclusion of Student's documentary evidence is not called for given Student substantially complied with the Education Code and, under the circumstances, partially complied with the PHC Order. District's motion to exclude all documentary evidence is denied. Student is ordered to prepare a binder for District, a binder for the ALJ and a binder to be used by the witnesses. The binders shall be identical and prepared and served as described above in paragraph 3 above.

The motion to shift expenses was made on the grounds that the binder Student served on District was so "sloppy" and "haphazard" as to be conduct reflecting tactics performed in bad faith, frivolous, designed to harass, or to cause unnecessary delay under Government Code section 11455.30. The briefs and declarations of the parties and the statements made during the PHC demonstrated, at worse, a lack of attention and experience. Accordingly, District's motion to shift expenses is denied.

At present no other prehearing motions are pending or contemplated. Any prehearing motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made prior to or during the prehearing conference of April 3, 2015.

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. No recording of any kind is permitted.

12. Compensatory Education/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.

13. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for translation services.

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 at (916) 263-0880**,** the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made 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. 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. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: April 03, 2015

/S/

MARIAN H. TULLY
Administrative Law Judge
Office of Administrative Hearings