BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: STUDENT, v. TEMECULA VALLEY UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016060613 ORDER FOLLOWING SECOND PREHEARING CONFERENCE FOR PHASE TWO OF BIFURCATED HEARING

On February 10, 2017, a second telephonic prehearing conference for Phase Two of bifurcated hearing was held before Administrative Law Judge Laurie Gorsline, Office of Administrative Hearings. Wendy Housman, Attorney at Law, and Theresa Sester, Advocate, appeared on behalf of Student. Sarah Sutherland and Amy Rogers, Attorneys at Law, appeared on behalf of District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing for Phase Two shall take place on **February 22, 23, 28 and March 1, 2017**, and continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at **31350 Rancho Vista Road, Room 1304, Temecula, California 92592**. 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.

As ordered in the scheduling order and at the prehearing conference held on December 12, 2016, 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.A. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. The named local educational agency certified that the facilities used for this case comply with the law. The local educational agency shall inform OAH within two days of the date of this order if it is unable to comply with this order.

The hearing room shall be available to the ALJ one hour before the scheduled hearing, and shall be secured and locked at the end of each hearing day. The same hearing room shall be used for each day of hearing, unless otherwise ordered. 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. District shall ensure that

drinking water and tissue are available to all parties, witnesses and the ALJ. District shall also ensure that one parking space is available on each hearing day for each of the following: the ALJ, Parent, Student, Student's attorneys, and District's attorneys.

During the remainder of the due process hearing, District shall make available to Student and her representatives a private room within reasonable proximity to the hearing room.

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 for Phase Two. The issues for Phase Two of the due process hearing, and the proposed resolutions, are listed below:

Issues:

(3) Did District deny Student a free appropriate public education by failing to hold an individualized education program team meeting between June 4 and June 6, 2014 to discuss Student's Summary of Performance?

(4) Did District deny Student a FAPE by failing to provide prior written notice between June 4 and June 6, 2014 before exiting Student from special education?

(5) Did District deny Student a FAPE by improperly awarding Student a high school diploma and exiting her from special education at the end of the 2013-2014 school year?

Proposed Resolutions sought by Student in Prehearing Conference Statement:

(1) A determination that Student was denied a FAPE;

(2) Rescission of Student's high school diploma and reinstatement of her rights to receive special education until age 22;

(3) Compensatory transition services in the form of funding for a two-year placement at College Living Experience, or other post-secondary education and related services from a non-public school or non-public agency until Student turns 22 years old, including transportation; and

(4) Compensatory mental health counseling in the form of funding for 50 hours of psychological services through a provider selected by Parent.

Supplemental Brief: Because Student was unable answer certain questions posed by the ALJ at the prehearing conference regarding the Phase Two issues, **Student is ordered to file a supplemental brief by no later than February 21, 2017 at 8:30 a.m.**[1] with the following information: (1) the legal authority for Student's claim that an IEP was required to be held to discuss the summary of performance prior to Student's graduation; (2) the legal authority for Student's claim that even if Student met all of the requirements to graduate, District was not permitted to exit Student from special education; and (3) which graduation requirement(s) Student contends she did not meet and the legal authority which specifies it as a graduation requirement. Student's brief shall be no more than five pages.

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. 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 shall not serve exhibits on OAH prior to the hearing.

The parties' exhibit binders shall include all of the exhibits admitted during Phase One of the hearing and such documents shall be marked with the same exhibit numbers used during Phase One. All additional exhibits shall begin with the next exhibit number in order for both parties. In Student's case, Student's first new exhibit shall be numbered S-57; District's first new exhibit shall be numbered D-23.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. To the extent practicable, all new exhibits shall be in chronological order.

The parties shall exchange resumes for each witness who is expected to testify as to their professional credentials.

District shall include as part of its exhibits the school calendar(s) for all of the years at issue.

If the parties intend to rely on IEP's, the parties shall attach all pages of the IEP(s), including copies of all actual signatures on the IEP(s) and all typewritten or handwritten notes or comments, if any, written on the IEP(s).

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[1] At the PHC, Student was ordered to file her supplemental brief by no later than February 20, 2017; however, Monday, February 20, 2017 is a state holiday. Therefore, Student shall file her supplemental brief no later than **February 21, 2017 by 8:30 a.m.**

In the event of duplicate exhibits, the most legible version will be used. The parties shall meet and confer by **no later than February 17, 2017 at 5:00 p.m.** to delete duplicate exhibits from the exhibit binders. The parties are not required to renumber exhibits if they delete exhibits after the exchange of documents.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and/or the ALJ rules that it is admissible. Education Code section 56505, subd. (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been timely exchanged.

4. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. 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.

The parties shall comply with Education Code section 56505 (e)(7). 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/or at the discretion of the ALJ. Education Code section 56505, subd. (e)(8), affords each party the right to prohibit the introduction of any evidence at the hearing that has not been timely disclosed.

On the first day of hearing before the first witness testifies, the parties shall provide the ALJ with **one joint detailed hour-by-hour schedule** of all witnesses expected to testify at hearing, which list shall also include an estimate of time for each party's direct and cross-examination and identify which party is calling each witness as part of her/its case-in-chief. Counsel shall meet and confer each day of hearing to revise the witness schedule as needed.

The parties shall meet and confer by **February 17, 2017 at 5:00 p.m.** as to the schedule of witnesses and coordinate the availability and order of witnesses to ensure that there is a witness available to testify at all times during the hearing and to ensure that the hearing is completed as scheduled. **The parties shall also meet and confer by no later than February 17, 2017 at 5:00 p.m. regarding the one joint detailed hour-by-hour schedule of witnesses.**

To the extent such witnesses are permitted to testify regarding the remaining issues in Phase Two[2], District agreed to accept service of the subpoenas and will produce at hearing, the witnesses named in the subpoenas issued by Student on or around December 1, 2016, including, Terri Cooper, Julianne Dickson, Wendy Ellis Smith, Breck Smith, Brian Navarro,

[2] District has filed a motion in limine and a motion to quash to preclude certain evidence and witnesses from testifying in Phase Two, which will be addressed by a separate order.

Preston Beach, and District's Custodian of Records. Student is not required to issue new subpoenas for these witnesses for the new hearing dates.

The parties shall meet and confer by no later than **February 17, 2017 regarding Ms. Cafaro.** To the extent Student intends to call Ms. Carfaro as a witness in light of the ALJ's ruling on District's motion in limine[3], District shall advise Student by no later than **February 17, 2017 at 5:00 p.m.** whether it will produce Ms. Cafaro at hearing without a subpoena and whether it will accept service of a subpoena on behalf of Ms. Cafaro. If District will not produce Ms. Cafaro at hearing or accept service of a subpoena on her behalf, to the extent that District has not already done so, District shall provide Ms. Cafaro's contact information, including home and business addresses, to opposing counsel **no later than February 17, 2017 at 5:00 p.m.** so that a subpoena can be issued. Any contact information provided by District shall be used by Student's counsel for the limited purpose of issuing subpoenas or for contacting the witness for purposes of attending the hearing and shall not be disseminated to any other person(s).

Each witness will only be called once to testify, except for rebuttal purposes, and all parties shall examine the witness when the witness is first called. District shall have witnesses available in case agreement on a witness list is not reached. 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 each witness is expected to take.

The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear such evidence. 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, and all parties shall examine the witness on all issues when the witness is first called. 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. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear 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).) Student requested that Dr. David Libert appear at hearing by telephone or via Skype. District opposed Student's request. Student's request was denied. Student agreed to and has been

[3] See footnote 2.

aware of the Phase Two hearing dates since the December 12, 2016 prehearing conference. At that time, the parties were instructed to inform their witnesses of the new hearing dates and Student failed to make an adequate showing as to why Dr. Libert should be permitted to testify by telephone.

7. Electronic Recording of Hearing.

a. Audio Recording. As previously ordered with respect to Phase One of this matter, counsel for both parties shall be permitted to make an audio recording subject to the following conditions: 1) OAH's recording is the only official recording and counsel is permitted to record the hearing as a courtesy, unless otherwise ordered; 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 recording mechanism will not be allowed to delay the hearing; 4) such recording shall be for counsel's personal use only and only for review and preparation of the hearing; 5) the recording device shall be turned on only when the ALJ states that the matter is on the record, and shall be turned off when the ALJ states that the matter is off the record; 6) no part of the recording shall played for any witness or prospective witness, and the contents of the recording shall not be disseminated in any form to anyone other than counsel for the parties; 7) the recording shall not be used in any subsequent due process hearing or other proceeding; and 8) the parties/counsel shall destroy the unofficial recording shall destroy the unofficial recording upon the earlier of the following: (a) upon settlement of this matter, (b) dismissal of this case, or (c) within 90 days of issuance of the ALJ's decision in this case. No other person shall record or photograph the proceedings unless otherwise permitted by the ALJ.

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, Student is the petitioning party. As such, Student shall present its case-in-chief, followed by District, subject to paragraph 5 above.

9. Motions. Student made a motion to have Parent and Student excused from attending the first day of hearing on February 22, 2017 on the grounds that the Parent is attending a prepaid nursing course. District did not oppose the motion. Student's motion was granted. District filed a motion in limine and a motion to quash which will be addressed by a separate order. There are no other pretrial motions are pending or contemplated. Any motion 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 February 10, 2017.

10. 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.

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

The parties shall meet and confer by no later than **February 17, 2017 at 5:00 p.m.** to determine legal and factual stipulations, if any, to be submitted in writing, at hearing.

12. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off during the hearing unless permission to the contrary is obtained from the ALJ. There shall be no texting permitted while the hearing is in session.

13. Special Needs and Accommodations. Student requested permission to use the hearing room as a meeting room for Student and her representatives during the lunchbreak. Student's request was denied; however, District was ordered to provide a separate meeting room for Student and her representatives as set forth in paragraph 1 above.

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/Accessibility.aspx.

14. Hearing Open To the Public. Pursuant to the prior request of Student, the hearing will be open to the public. With the exception of Parent, Student, Student's advocate, and District's representative, all witnesses shall be excluded from the hearing room until such time as the witnesses' testimony, including rebuttal testimony, has been completed. However, if Student intends to call Ms. Sester as a percipient witness, Ms. Sester will be required to testify first. To avoid any disruption of the hearing, observers shall only be permitted to enter the hearing room before the hearing begins each day and during breaks in the proceedings. District shall provide seating for at least five observers.

15. 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 parties settle the matter 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. OAH will not cancel the hearing dates without this information.

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

IT IS SO ORDERED.

DATE: February 15, 2017

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LAURIE GORSLINE
Administrative Law Judge
Office of Administrative Hearings