BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF:

PARENT ON BEHALF OF STUDENT,

v.

LOMPOC UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2019041183

AND

LOMPOC UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT,

OAH CASE NUMBER 2019060788.

Order Following Prehearing Conference

On July 8, 2019, Administrative Law Judge Tara Doss, Office of Administrative Hearings, held a telephonic prehearing conference. The Administrative Law Judge will be referred to as an ALJ. The Office of Administrative Hearings will be referred to as OAH. Prehearing Conference is referred to as PHC.

Andréa Marcus, Attorney at Law, appeared on behalf of Student. Sarah Garcia, Attorney at Law, appeared on behalf of Lompoc Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on July 16, 17, and 18, 2019, and continue day to day at the discretion of the ALJ. The hearing shall begin at 1:30 PM on the first day of the hearing and at 9:00 AM on all other days, unless otherwise ordered.

HEARING LOCATION

The hearing will be held at 1301 North A Street, Lompoc, California 93438.

The parties must immediately notify all potential witnesses of the hearing dates, and must 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.

District facilities must fully comply 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. Districts are required to file written certification with OAH that the facilities District provides comply with these laws.

Lompoc Unified filed the required certification. Lompoc Unified shall notify OAH within three business days of the date of this Order if it is unable to provide facilities

that comply with the laws governing accessibility of government facilities to persons with disabilities.

Before the beginning of the hearing, Lompoc Unified must ensure that the hearing room is configured into a courtroom setting and contains:

- a table for Student and Student's representatives;
- a table for Lompoc Unified and its representatives;
- a table for the witness;
- a table for the ALJ, near an electrical outlet with a chair that adjusts to an appropriate height for typing at the table provided; and
- water and tissue available for the participants.

The same hearing room must be used for each day of hearing and must be available at least one hour before the beginning of the hearing each day. The hearing room must be locked following the hearing each night. Lompoc Unified must ensure the hearing room and access to it are in compliance with the all laws governing accessibility of government facilities to persons with disabilities.

Lompoc Unified must also ensure that one parking space is available on each hearing day for each of the following: the ALJ, Parents, Student's attorneys, District's attorneys, and witnesses.

ISSUES AND PROPOSED RESOLUTIONS

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 prehearing conference are:

ISSUES: STUDENT'S CASE

1. Did Lompoc Unified deny Student a free appropriate public education from April 26, 2017, until the date the complaint was filed, by failing to address Student's need for behavior support?
2. Did Lompoc Unified deny Student a FAPE from April 26, 2017, until the date the complaint was filed, by failing to assess Student in all areas of suspected disability?

STUDENT'S PROPOSED RESOLUTIONS

The resolutions requested by Student include:

- immediate placement in a residential treatment facility or, alternatively, intensive mental health support;
- appropriate behavior intervention; and
- compensatory education.

ISSUES: LOMPOC UNIFIED

Is Student entitled to independent educational evaluations at public expense although Lompoc Unified did not conduct assessments of Student?

LOMPOC UNIFIED'S PROPOSED RESOLUTION

An order determining that Lompoc Unified is not obligated to fund independent educational evaluations at public expense.

Lompoc Unified filed its response to Student's complaint on May 6, 2019. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

BINDERS

Exhibits must be pre-marked and placed in three-ring binders before the hearing. Exhibit binders must include a tab for each exhibit. Each binder must contain a detailed table of contents which clearly identifies the tabs and documents. The ALJ and witnesses must be able to easily turn to exhibit tabs and to turn pages in the binders. Multiple binders may be submitted if necessary.

TAB AND PAGE NUMBERS

The parties must place a letter followed by a number on each tab to identify each exhibit. Student must use the letter S before the number to identify Student's exhibits. Lompoc Unified must use the letter D before the number to identify its exhibits. For example, S-1 means Student's exhibit tab 1 and D-1 means Lompoc Unified's exhibit tab 1. Each page included in the parties' binders must be numbered consecutively from the first page of the first exhibit to the last page of the last exhibit in the binder. The parties may use a Bates-stamp type system for numbering, but this is not required.

CONTENT

Each exhibit must only include one document. Separate documents may not be combined into one exhibit. Emails or letters may be combined into one exhibit if they are part of a single chain of messages. Documents offered as evidence to support a request for reimbursement must be separated by the provider of the services and should be put in chronological order where possible. Exhibits in the binders should be in chronological order.

Parties should include 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 must exchange resumes not later than 24 hours before the witness is scheduled to testify.

Lompoc Unified's binder must include a color copy of the school calendar for each school year in question and must have witnesses available to explain the calendar, if necessary.

COPIES OF BINDERS

The parties must provide copies of their evidence binders to each other. This exchange is required by Education Code section 56505, subdivision (e)(7). Each party must bring two additional sets of the binders containing their exhibits to the hearing. One set will be used by the ALJ, and the other set will be used by witnesses. The parties may not provide exhibits to OAH before the hearing.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged will not be admitted into evidence at the hearing, unless the ALJ rules that it is admissible.

WITNESSES

Each party is responsible for producing their own witnesses unless otherwise ordered by the ALJ. Each party must 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. Neither party will be permitted to call any witnesses not timely disclosed, except for good cause shown, and at the discretion of the ALJ.

The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' 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 will 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 July 11, 2019. The parties must discuss the availability of witnesses, the order of witnesses, and the length of witness testimony. The parties should attempt to eliminate duplicate exhibits from their binders. The parties should discuss whether they agree on any facts, and can produce a written stipulation stating their agreement. The parties' stipulation to facts will shorten the length of time needed for the hearing.

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 these consolidated cases, Student will present Student's case-in-chief first, followed by Lompoc Unified.

WITNESS LISTS

The parties must give the ALJ a joint proposed witness list on the first day of hearing. The list should include dates and time estimates of each witness's expected testimony. The parties must consider breaks and lunch when developing the witness schedule. In the event an agreement cannot be reached, each party must prepare a separate written schedule. Lompoc Unified must have witnesses available in case there is no agreement. Before the hearing begins, 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. 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 time estimate of each witness's expected testimony.

SCOPE OF WITNESS EXAMINATION

Each witness will be called to testify only once, except for rebuttal purposes. All parties must examine witness on all issues when the witness is called to testify. Requiring a witness to appear only once takes precedence over the order in which a party presents their case-in-chief.

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 must request permission to do so before the hearing, unless the opposing party has agreed the witness may appear by telephone. The party offering the witness must provide the witness with a complete set of exhibit binders from all parties before the hearing. The binders must be exact paper copies of all of each party's exhibits. Electronic copies are not acceptable. The party offering the witness must

ensure the witness testifies from a private location with no other persons present. The party offering the witness must ensure the witness has telephone equipment that meets the following guidelines:

- allows clear testimony at a volume with clear transmission of what the witness is saying;
- allows the witness's testimony to make a clear recording; and
- allows the witness to hear objections and rulings.

Lompoc Unified must ensure the hearing room has telephone speaker equipment that allows everyone in the room to hear the witness, and allows the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

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 certain conditions. Such requests are routinely granted on the following conditions:

- the OAH recording is the only official recording;
- the parties must turn the 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;
- the recording device will be removed by the party recording during any recess where the party leaves the room;
- operation of the party's recording mechanism will not be allowed to delay the hearing;

- a party's recording may not be used to prepare the testimony of a witness in the hearing;
- the recording must not be shared with any non-party, possible witness, or through social media;
- the parties must not use the recording in any subsequent due process hearing;
- the recording is subject to the same confidentiality as the due process hearing; and
- the parties must dispose of the unofficial recording when the time for filing an appeal has passed, or, in the event of an appeal, when the time for submission of the record on appeal has passed.

Both parties' request to record the hearing is granted, subject to these conditions.

Video Recording

No party, witness or anyone else may make any video recording of any part of the proceedings. Any person doing so will be subject to sanctions.

Recordings as exhibits

Excerpts of an audio recording of an individualized education program team meeting must be transcribed and offered as documentary evidence. The portion of the audio recording transcribed must be provided to the opposing party with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcription does not have to be done by a certified court reporter. The party must include the electronic version of the excerpts of the audio recording with the transcript, at the ALJ's discretion, to allow the ALJ to listen to the recording as well as read the transcript.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures must present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

MOTIONS

Lompoc Unified filed a motion to dismiss Issue 1 in its complaint. Issue 1 sought permission to assess Student without parental approval. Lompoc Unified asserts that the issue has been resolved and therefore, its motion is considered a request to withdraw the issue. The request is granted.

No other prehearing motions are pending or contemplated. Any motion that was not filed three business days before the Prehearing Conference, 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 or resolutions are encouraged. Any proposed stipulation must be submitted to the assigned ALJ in writing.

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

Attorneys, the parties, and all witnesses must conduct themselves in a professional and courteous manner at all times. Cellular phones, recorders, and other noisemaking electronic devices must be shut off or set to vibrate during the hearing, unless the ALJ grants permission otherwise. No text messaging will be permitted while

the hearing is on the record. No food or drinks other than water will be permitted in the hearing room during the hearing.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

A party or participant to 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/Accommodations-at-OAH.

HEARING OPEN OR CLOSED TO THE PUBLIC

The hearing is closed to the public.

SETTLEMENT

The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties must 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 must 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 at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 4:00 p.m. the day prior to hearing, the parties must 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 attorney 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 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 must 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.

IT IS SO ORDERED.

DATED: July 8, 2019

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Tara Doss
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Tara Doss
Administrative Law Judge
Office of Administrative Hearings