BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. TEMECULA VALLEY UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016060613 ORDER FOLLOWING PREHEARING CONFERENCE FOR PHASE TWO OF BIFURCATED HEARING AND GRANTING CONTINUANCE OF PREHEARING CONFERENCE AND DUE PROCESS HEARING

On December 12, 2016, a 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. Motion to Continue, Hearing Dates, Times, and Location. Student made a motion to continue the hearing for Phase Two scheduled for December 20, 21 and 22, 2016 on the grounds that Parent and Student are unavailable to personally attend the hearing on those dates due to a prepaid vacation from December 16, 2016 through January 4, 2017, and Parent's prepaid nursing program scheduled for January 18, 2017 through February 22, 2017. District also moved for a continuance based on Parent's and Student's unavailability, objecting to Student's request to have Parent and Student appear electronically or by telephone. The parties agreed upon new dates for the PHC and due process hearing.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).)

Good cause having been demonstrated, the parties' motion to continue was granted as follows:

Mediation: Student requested a new mediation date; District did not oppose mediation, but could not agree to mediation at the PHC. If the parties agree to mediate, they shall contact OAH with an agreed upon mediation date.

Prehearing Conference for Phase Two: The telephonic prehearing conference for Phase Two is continued to **February 10, 2017 at 1:00 p.m**. OAH will initiate the call.

Due Process Hearing for Phase Two: The hearing for Phase Two shall take place on **February 22, 23, and 28, 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, 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, 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 failed to properly certify that the facilities used for this case comply with the law because the certification is not signed under penalty of perjury. **The local educational agency shall certify to OAH in writing signed under penalty of perjury that its hearing facilities comply with the law or notify OAH that it is unable to comply with this order by no later than December 19, 2016.**

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, Parents, Student's attorney, and District's attorney.**

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 for Phase Two are set forth in the Order Following Phase One of Bifurcated Hearing dated November 28, 2016. The proposed resolutions sought in Student's amended complaint are set forth in the prehearing conference order dated September 12, 2016.

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 not admitted during Phase One 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.

In the event of duplicate exhibits, the most legible version will be used. The parties shall meet and confer 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.

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. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7),

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).

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.

The parties shall meet and confer 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 regarding the one joint detailed hour-by-hour schedule**.

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.

During the Prehearing Conference, the parties were also ordered to meet and confer by **January 13, 2017 at 5:00 p.m.,** and identify the witnesses on the witness lists who cannot be produced at hearing without a subpoena and provide the witnesses contact information to opposing counsel so that subpoenas can be issued. As part of the meet and confer process, District's counsel shall inform Student's counsel as to whether the witnesses on Student's witness list are employed by or otherwise under the control of District and will be produced at hearing, and if not, shall provide Student's counsel with the last known contact information, including home and business addresses for that witness no later than **January 20, 2017 at 5:00 p.m.** 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(es) for purposes of attending the hearing and shall not be disseminated to any other person(s).

During the PHC, District agreed to accept service of a subpoena on behalf of witness Terri Cooper for the new hearing dates. As part of the meet and confer process, District's counsel shall advise Student's counsel by no later than **January 13, 2017** as to whether District has accepted service on behalf of the witnesses named in the subpoenas previously served on District and will produce such witnesses on the new hearing dates.

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. Student requested that Dr. David Libert appear by telephone or via Skype. The parties were ordered to meet and confer by **January 13, 2017** regarding Student's motion. Student's motion shall be addressed at the PHC on February 10, 2017.

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. **Prior to the hearing, the proponent of the witness shall provide the proposed witness with a complete set of duplicate copies of the exhibit binders from all parties, containing all of each party's exhibits and shall instruct the witness not to remove any documents from the exhibit binders. Duplicate marked and tabbed physical copies of the binders must be provided to the witness. Faxed or electronic copies are unacceptable**. District shall have sound equipment in the hearing room that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Unless otherwise ordered, **the witness shall testify on a land-line telephone while alone in a private room**. No witness will be heard by telephone unless all these requirements have been fulfilled.

7. Electronic Recording of Hearing.

a. Audio Recording. The ALJ shall record the hearing and the ALJ's recording is the only official record of the hearing. No person shall record or photograph the proceedings unless otherwise permitted by the ALJ.

Student's motion to record the hearing was granted at the PHC held on September 9, 2016. Counsel for the parties shall be permitted to make an audio recording 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 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.

Any recording made by counsel is not the official record and is permitted as a courtesy, unless otherwise ordered by the hearing 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. On December 9, 2016, District filed a Motion in Limine For Second Part of Bifurcated Hearing and Motion to Quash Subpoenas. Student shall file her opposition to the motions by **December 14, 2016**. The parties are ordered to meet and confer by **January 13, 2017** regarding the District's motions and to file with OAH a supplemental brief of no more than five pages regarding the issues in the motion they were unable to resolve. District's motions shall be addressed at the PHC on 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 to determine legal and factual stipulations, if any, to be submitted 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. 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

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

IT IS SO ORDERED.

DATE: December 12, 2016

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LAURIE GORSLINE
Administrative Law Judge
Office of Administrative Hearings