

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2014070965

v.

LINCOLN UNIFIED SCHOOL DISTRICT,

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2014060819

v.

LINCOLN UNIFIED SCHOOL DISTRICT.

ORDER FOLLOWING PREHEARING
CONFERENCE

On September 5, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Charles Marson, Office of Administrative Hearings. Student's Father appeared on behalf of Student. Anne M. Sherlock and Rebecca A. Feil, Attorneys at Law, appeared on behalf of the Lincoln Unified School District (Lincoln). Thomas Crocker, Lincoln's Director of Special Education, attended the PHC. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place at Brookside Farmhouse, 3225 Deer Park Drive, Stockton, California 95207 in a room to be provided by Lincoln.¹ It shall take place on September 17, 18, 22, 23, and 24, 2014, and continue day-to-day thereafter, Monday through Thursday, at the discretion of the ALJ. On September 17, 2014, the hearing shall begin at 9:30 a.m. and end at 5:00 p.m., and on the remaining days the hearing shall begin at 9:00 a.m. and end at 5:00 p.m., unless otherwise ordered.

¹ At a minimum, the hearing room shall have separate tables capable of being moved into a courtroom configuration, as follows: (1) one table for Student's representative; (2) one table for Lincoln's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. Lincoln shall ensure that the hearing room and other facilities that will be used during the hearing comply with the accessibility requirements of the Americans with Disabilities Act.

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.

A. Is the two-year statute of limitations inapplicable because Lincoln made specific misrepresentations to Student or Parents that it had solved the problem forming the basis of the due process request?

B. From June 13, 2012 to the present (or during the 2011-2012 school year if Student prevails on Issue A), did Lincoln deny Student a free appropriate public education by:

1. Failing to provide Student an adequate program and services during the 2011-2012 school year;
2. Failing to provide Student a timely and adequate transition plan;
3. Unlawfully “dis-enrolling” Student during either of the time periods June 15, 2012 to September 20, 2012, or December 19, 2012, to April 20, 2013;
4. Failing to provide Student an adequate program and services in the least restrictive environment during the 2012 extended school year; and/or
5. Failing to provide Student an adequate program and services during the 2013-2014 school year?

As resolutions, Student seeks an order requiring Lincoln to provide services by Lindamood-Bell Learning Processes; academic tutoring; tuition at Fusion Academy and transportation costs; some form of credit recovery; and extended school year.

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 in a way that makes clear the party offering it (such as “S1” or “D2”). 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. Lincoln shall serve an exhibit binder containing its exhibits on Student by 5:00 p.m. on September 10, 2014, in compliance with Education Code section 56505, subdivision (e)(7). Because of economic hardship, Student will be allowed to rely on the exhibits in the exhibit binder he served on Lincoln in *Parent v. Lincoln Unified School District* (2012) OAH case number 2012080271, but only to the extent that Lincoln is able, using its best efforts, to retrieve its copies of those exhibits. The parties also should be aware that, after inquiry, OAH does not have the evidence produced in that case, and it is still

the responsibility of Parent to supply an exhibit binder to the ALJ> At the hearing, Lincoln shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. Student shall use his best efforts to supply exhibit books containing copies of his exhibits (from OAH case number 2012080271) to 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.

4. Witnesses.

a) Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or out of order. Except as provided below, neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement and listed below, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

b) Student may use for his witness list the list of witnesses provided in the PHC statement filed on his behalf on March 11, 2013 in OAH case number 201208027, who are: Dr. Louise King; Susan Fugundes; Kelly Dextraze; Janet Petche; Debbi Holmerud; Joe Hancock; Kristina Conicia; Kelly Jensen; Dr. Shelly Moreira; Ryan Murray; Susan Holloway; Dana Dickerson; Mr. Robertson (teacher); Debra Miller; Mr. Hintz (teacher); Mrs. Mac-Dara (teacher); Stephanie Clendeain; Laura McCarthy; Polly Miech; Brian Gray; Zack Bowell; Kris Rodriquez; Leanne Wheeler (state homeless coordinator); Donald Ruhstaller; Van Cowell; Susan Lenz; Ted Bestolarides; Debby Dune; Bonnie King; George Conklin; Officer Dorsey; Marcelliz Ruiz.

c) Student has identified 33 witnesses to be called at the hearing, and the District has identified 21 witnesses. Some of the witnesses are listed by both parties. In light of the fact that five days have been scheduled for the hearing, examination of the number of witnesses proposed would make it difficult to complete the hearing as scheduled. Therefore, at the beginning of the hearing, each party shall serve on the other party and on OAH a tentative witness list, identifying the witnesses the party intends to call, as opposed to witnesses the party may call depending on the flow of the hearing and the evidence. Each revised witness list shall contain an estimate of the length of each witness's direct examination testimony. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for their testimony.

5. Order of Consideration of Issues and Scope of Witness Examination.

a. Student and Lincoln shall present their witnesses and evidence on Issue A (the statute of limitations) before any other witnesses or evidence. The ALJ will then rule on Issue A at the hearing in order to determine the allowable time period for evidence on the other issues.

b. With respect to all issues, Student shall present his witnesses first, followed by Lincoln's witnesses. 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, so the parties shall be required to establish their cases in chief during the first appearance of a witness.

6. Telephonic Testimony.

Lincoln's motion to allow Dr. Louise King-Bassett and Melissa Prettyman to testify by telephone is granted, subject to the conditions below. Any party seeking to present a witness by telephone shall move in advance for leave to do so; 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 hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Telephonic testimony will not be allowed unless these conditions are met.

7. Electronic Recording of Hearing.

a. Audio Recording. At present no party intends to make an audio recording of the hearing. Any party that desires to make such a recording shall apply for leave to do so in advance from the ALJ and shall do so only on the conditions 1) that OAH's recording is the only official recording; 2) that 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; and 3) that operation of the party's recording mechanism will not be allowed to delay the 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. Motions.

a. In its PHC statement, Lincoln moved to limit the issues and evidence to matters arising on or after June 13, 2012, two years before the filing of the request for due process hearing in the first of these consolidated cases. It also moved to exclude time periods within the two-year period during which Student was enrolled in a school in another

district. Ruling on both those motions was deferred until evidence can be taken at the hearing.

b. At present no other prehearing motions are pending or contemplated. Any 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 this prehearing conference.

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

10. 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.

11. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for the services of an interpreter.

12. Hearing Closed To the Public. At the request of Parents, the hearing will be closed to the public.

13. Settlement. The parties are encouraged to continue their attempts 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. If a settlement is reached five days or fewer than five days before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact by telephone at (916) 263-0880. IF A FULL AND FINAL SETTLEMENT 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, AND SHALL ALSO LEAVE CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY.

Dates for hearing will not be vacated until OAH receives a letter of withdrawal, or those portions of the signed agreement withdrawing the case, with signatures. 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.

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

IT IS SO ORDERED.

Dated: September 8, 2014

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings