BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. CUPERTINO UNION SCHOOL DISTRICT.	OAH CASE NO. 2013080697 ORDER FOLLOWING PREHEARING CONFERENCE

On October 7, 2013, a mandatory telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH). Father appeared on behalf of Student (Student). Attorney Rodney L. Levin appeared on behalf of the Cupertino Union School District (District). The PHC was recorded.

Based on discussion with the District, the following order is issued:

1. Hearing Dates, Times, and Location: The hearing dates are confirmed. The hearing shall take place on October 15 through 17, 2013, for a total of three days of hearing. Unless otherwise ordered, the hearing shall begin at 9:30 a.m. on October 15, and at 9:00 a.m. on all other days. The hearing shall be held at the District's offices at 1309 South Mary #250, Sunnyvale, California 94087.[1] The parties are directed to complete the hearing by the close of business on October 17, 2013. The hearing may continue day to day, Monday through Thursday, as needed at the discretion of the ALJ.

2. Notice to Witnesses: The parties shall immediately notify their witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. 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 without the need for a subpoena. A witness will not be regarded as unavailable for purposes of showing good cause to continue the hearing if the witness has not been properly notified of the hearing date or properly subpoenaed, as applicable.

[1] At a minimum, the hearing room shall have four or more separate tables capable of being moved into a courtroom configuration with an electrical outlet near the ALJ's table. The District shall ensure that all parties and the ALJ have drinking water and tissue available to them during the hearing.

3. (a) Issues: The issues for hearing are limited to those alleged in Student's request for due process hearing (complaint).[2] The issues were discussed during the PHC, and are reframed and clarified below.

Did the District's offer of educational placement at Cupertino Middle School deny Student a free appropriate public education (FAPE) because the District unilaterally predetermined Student's placement as follows:[3]

(1.) Before it made the offer at an individualized education program (IEP) team meeting on July 12, 2013; and/or

(2.) Before it made the offer in a letter on or about July 24, 2013?

(b) Defenses and Proposed Remedies: In general, the District defends that the July 2013 IEP team meeting was a continuation of an IEP team meeting on March 15, 2013. The District retains the right to present all relevant defenses at hearing. Student's complaint sets forth his proposed remedies, including placement in a private school, along with transportation, applied behavioral analysis (ABA) services after school hours, and other related services including a one-to-one aide, occupational therapy, and speech and language therapy services.

4. Exhibits: Exhibits shall be pre-marked and placed in a three-ring exhibit binder prior to the hearing. The parties' exhibits shall be pre-marked using numbered tabs and accompanied by a detailed exhibit list. Student's exhibit list shall identify each exhibit by number and the designation "S" (e.g., S1), and the District's exhibit list shall identify each exhibit by number along with a "D" (e.g., D1). Any document over five pages in length shall be internally paginated. Each exhibit binder shall contain a detailed table of contents or list. At the hearing, the parties shall supply an additional exhibit binder containing their respective exhibits and lists for use by the ALJ, and another exhibit binder for use by the witnesses. In the event of duplicate exhibits, the most legible version will be used, unless otherwise ordered. The parties shall not serve exhibits on OAH prior to the hearing.

The law requires each party to serve on the other party copies of their respective exhibits and a list of all witnesses, describing the general area of their testimony, not less than five business days prior to the start of the hearing.[4] The parties indicated that this

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[2] The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

[3] Student clarified during the PHC that no other aspect of the District's offer is at issue in this proceeding, including but not limited to related services such as a one-to-one aide or therapy services.

[4] Education Code section 56505, subdivision (e)(7). The law also provides that the ALJ has discretion to exclude testimony of witnesses or admission of documents that were

deadline was by the close of business on October 7, 2013, following the PHC. On the record, Student requested an agreement from the District to extend the deadline for his delivery until not later than 10:00 a.m. on October 8, 2013, due to printing problems. District only agreed to extend the deadline to 6:00 p.m. on October 7, 2013. In the absence of a stipulation from the District, the ALJ declined to alter the statutory deadline but explained to Father that, at hearing, the ALJ will require the District to establish prejudice occasioned by any delay in receiving Student's exhibits if it seeks to exclude them on that basis.

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 may not be admitted into evidence at the hearing unless it is supported by a declaration under penalty of perjury, and the ALJ rules that it is admissible.

5. Witnesses: At this time, Student and District intend to call most of the witnesses disclosed in their respective PHC statements. However, Student included Mr. Levin, the attorney for the District, on his witness list and Mr. Levin objected. Because the District has the right to retain Mr. Levin as their legal counsel, Student shall not be permitted to call Mr. Levin as a witness and require the District to retain another attorney. Student did not establish that the information he seeks to elicit from Mr. Levin regarding correspondence with Father could not easily be established by other means, including the testimony of Father, who is also listed as a witness.

Prior to the due process hearing, Student and the District will meet and confer to arrange the scheduling of the witnesses. At the commencement of the hearing, the ALJ and the parties will discuss the witness schedules, including the length of time anticipated for examination of each witness and any scheduling issues for individual witnesses. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for any witness's testimony. 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. Each party shall manage the number of witnesses so that the party's evidence will be presented within its approximate allocation of fifty percent of the total hearing time. The parties shall proceed efficiently in their questioning of witnesses and shall narrow their witness lists and their questions to witnesses to avoid unnecessary, cumulative, or duplicative testimony. The parties should bear in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

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).) Neither party requested the telephonic testimony of any witness. A party seeking to present a witness by telephone shall move in advance for leave to do so with an explanation of the reasons for

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not disclosed by the parties pursuant to Education Code sections 56505, subdivision (e)(8), and 56505.1, subdivision (f).

the request. If OAH grants the request, the party requesting the telephonic testimony 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 testimony of the witness. In addition, if the request is granted, the District shall ensure that the hearing room has a speaker telephone with adjustable volume control and a long telephone cord, so that the telephone can be placed close to all parties to ensure the ability to hear and record the testimony of the witness and the witness to hear objections and rulings.

7. Order of Presentation of Evidence: Student shall present his evidence first. Where Student and the District intend to call the same person to testify, each party will examine the witness immediately after the other party, so the witness will only need to be called to the witness stand once.

8. Closed Hearing: At Student's request, the hearing shall be closed to the public.

9. Motions: 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 this PHC.

10. Special Needs and Accommodations: No special accommodations were requested during the PHC.

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 turned off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ. During the PHC, Student requested permission to record the hearing and the District did not object. Both parties are permitted to record the hearing provided they adhere to the ALJ's directions, including ensuring that the recording device is turned off every time the ALJ goes off the record. OAH shall maintain the official recording for the hearing.

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. Any party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

13. Settlement: The parties are encouraged to negotiate to reach a settlement 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 business days or fewer before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact during business hours by telephone at **(916) 263-0880.**

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. IF A FULL AND FINAL SETTLEMENT IS REACHED AFTER 5:00 P.M. ON THE LAST BUSINESS 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. OAH will check for messages the evening prior to the hearing and the morning of the hearing.

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

Dated: October 8, 2013

/s/
DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings