BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. CALIFORNIA DEPARTMENT OF EDUCATION.	OAH CASE NO. 2012030888 ORDER FOLLOWING PRE-HEARING CONFERENCE

On March 4, 2013, a recorded, telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Robert G. Martin, Office of Administrative Hearings (OAH). Student's Mother (Parent) represented Student. Attorney Len Garfinkel represented the California Department of Education (CDE).

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

1. Hearing Dates, Times, and Location. The hearing shall take place on March 11-13, 2013, beginning at 1:30 p.m. on March 11, and at 9:30 a.m. each day thereafter. The hearing shall take place at the Office of Administrative Hearings, 1350 Front Street, Suite 3005, San Diego, CA 92101.

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.

1. Issues. The issues at the due process hearing are those alleged in the due process complaint, as clarified by the parties and the ALJ at the PHC:

a. Whether the California School for the Deaf, Fremont (CSDF) denied Student a free appropriate public education (FAPE) by declining to assess student in May, 2010.

b. Whether the California School for the Blind, (CSB) denied Student a FAPE by declining to assess student in May, 2010.

2. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Student shall mark Student's exhibits using the numbers S1, S2, S3, etc., and the CDE shall mark its exhibits using numbers D1, D2, D3, etc. (or a similar prefix).

Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be sequentially Bates-stamped. Each exhibit binder shall contain a detailed table of contents. At the hearing, in addition to its own copy of its exhibits and the copy exchanged with the other party, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and an exhibit binder for use by witnesses (*i.e.*, each party should make at least an original and three copies of its exhibits to exchange and to use at the hearing). 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.

3. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. 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. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

Student intends to present the testimony of four witnesses: Parent, Debbie Lundquist, Dr. Carl Hiller, and Fred Feil, the last potentially to be called for the purpose of authenticating subpoenaed documents. Student has withdrawn the following witnesses previously identified in Student's PHC statement: Lynn Koeller, Josie Morris, William Clary, Joe Halcott, Kim Mihan, Scott Kerby, and Sean Surfas.

The CDE intends to present the testimony of six witnesses: Cathy Thoni , Maureen Reardon, Sharon Sacks, Ann Moxley, Lisa Viall and Tracy Kuerbis. Witness Ann Moxley's availability is uncertain.

4. Telephonic Testimony. Student requested that all of Student's witnesses except Parent be permitted to appear by telephone. The CDE requested that all of its witnesses be permitted to testify by telephone. All of the witnesses for both parties reside in Northern California except Parent and Dr. Carl Hillier, who reside in San Diego County.

Whether a witness may appear by telephone is a matter within the discretion of the ALJ. Cal. Code Regs., tit. 5, § 3082, subd. (g). Leave is granted for all of the witnesses residing in Northern California to appear by telephone. In addition, based on Parent's representation that Dr. Hillier is scheduled to be out of town on the hearing days except for a very brief period, leave is also granted for Dr. Hiller to appear by telephone. The OAH on March 4, 2013 issued subpoenas to Student directed to witnesses Debbie Lundquist, Dr. Carl Hillier and Fred Feil, to be completed and served by Student. Student's subpoenas shall advise each witness that the witness may testify via telephone. Student shall provide each of Student's telephonic witness a complete set of exhibit binders from all parties, containing all

of each party's exhibits, prior to the hearing. The CDE shall provide each of the CDE's telephonic witness a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing. No witness will be heard by telephone unless this requirement has been fulfilled.

5. Meet and Confer Regarding Witnesses and Possible Stipulations. The parties are ordered to meet and confer by March 6, 2013, regarding the schedule of witnesses and possible stipulations that might reduce or eliminate the need to present certain witnesses or documents. The parties shall coordinate the availability and order of testimony 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 discuss a time estimate of the length of each witness's direct examination testimony, and identify those witnesses the party intends to call, as opposed to witnesses the party may call, depending on the flow of the hearing and the evidence. Prior to the commencement of the due process hearing, the parties will submit to the ALJ a single joint list setting forth the telephone number of each witness who is to appear by telephone. 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 witnesses' testimony. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

6. Scope of Witness Examination. 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.

7. Timely Disclosure of Witnesses/Exhibits. The parties represented that, as of the PHC, they have exchanged their witness lists pursuant to Education Code section 56505, subdivisions (e)(7), which requires each party to disclose, at least five business days prior to the hearing a list of all witnesses and their general area of testimony that the parties intend to present at the hearing, and a copy of all documents, including all assessments completed by that date and recommendations based on the assessments, that the parties intend to use at the hearing. The parties further represented that they have agreed that each party will deliver to the other, by no later than March 5, 2013, binders containing a complete set of exhibits that the party intends to present at the hearing. Witnesses that a party has not identified as of the PHC, and documents that a party has not delivered by March 5, 2013 may be excluded at the request of the other party from introduction at the hearing. However, documents produced to Student in response to subpoenas submitted to OAH on February 19, 2013 and issued by the OAH on March 4, 2013 shall not be excluded on the grounds that they were not delivered to the CDE on or before March 5, 2013, but other relief may be granted as reasonably necessary to avoid prejudice to the CDE.

8. Order of Presentation of Evidence. As the party requesting the hearing, Student bears the burden of proof, and will present Student's evidence first at the hearing, followed by the CDE's presentation of evidence.

9. Motions. On oral motion of the CDE at the PHC, the ALJ ruled that OAH will not issue a subpoena to compel the testimony of Scott Kerby, Director of the CDE's State Special Schools and Services Division. Parent explained that Student in 2011 received a certificate of completion of high school, and Student wished to subpoena Mr. Kerby to testify on the issue of whether the CSDF and CSB accept enrollment applications from students who have received high school certificates of completion. However, such testimony would not be relevant to the issues of whether the CSDF and CSB denied student a FAPE by declining to assess Student in May 2010, and it would be unreasonable and oppressive to require the witness to appear for the purpose of providing irrelevant testimony. The parties did not anticipate bringing any other motions. In the event that any other motion is brought after this date, it 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 PHC.

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. 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 .

12. Special Needs and Accommodations. Student withdrew Student's request for an American Sign Language interpreter. Witnesses testifying remotely shall appear by speaker telephone only; no video capability will be provided. The final decision regarding Student's request to make an audio recording of the hearing shall be made at the hearing; provided, however, that the recording made by the ALJ shall be the sole official recording of the hearing for any and all purposes and that Student may only record during times when the ALJ announces "on the record."

Subject to objections based on relevance, lack of foundation, or other grounds, Student shall be permitted to utilize a measuring tape and audio tape of Student's voice in Student's presentation of evidence.

Each party represented that no other special accommodation is required for any witness or party.

13. Hearing Closed To the Public.

14. Settlement. The parties are encouraged to continue working together to complete 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 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 AND SHALL 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. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

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

IT IS SO ORDERED.

Dated: March 05, 2013

/s/
ROBERT MARTIN
Administrative Law Judge
Office of Administrative Hearings