BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: ELK GROVE UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2016020899 ORDER FOLLOWING PREHEARING CONFERENCE, DENYING STUDENT'S PEREMPTORY CHALLENGE, DENYING STUDENT'S MOTION TO CHALLENGE THE ALJ FOR CAUSE, GRANTING IN PART STUDENT'S MOTION TO ALLOW TELEPHONIC TESTIMONY, DENYING STUDENT'S MOTION TO ALLOW VIDEO RECORDING IN HEARING ROOM, AND GRANTING MOTION TO ALLOW MEDIA IN HEARING ROOM SUBJECT TO CONDITION

On May 27, 2016, a telephonic prehearing conference was held before Administrative Law Judge Dena Coggins, Office of Administrative Hearings. Lauri Arrowsmith, Attorney at Law, appeared on behalf of Elk Grove Unified School District. James Peters, III, advocate, appeared on behalf of Student. The PHC was recorded.

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

1. Student's Peremptory Challenge. On May 27, 2016, Student filed a motion seeking to challenge the assignment of ALJ Coggins in this matter. Government Code section 11425.40, subdivision (d), establishes the criteria for disqualification of the presiding officer. A party is entitled to one peremptory challenge (disqualification without cause) to an ALJ assigned to an Office of Administrative Hearings hearing. (Cal. Code Regs., tit. 1, § 1034, subds. (a) & (b); Gov. Code, § 11425.40, subd. (d).) On April 19, 2016, Student filed a motion seeking to challenge a different ALJ, which was granted on the same day. Student is entitled to one peremptory challenge, which he exercised on April 19, 2016. Student's motion to challenge the undersigned ALJ without cause is denied.

During the PHC, Student asserted that he was challenging the undersigned ALJ for cause. An ALJ shall voluntarily disqualify herself and withdraw from any case in which there are grounds for disqualification, including disqualification under Government Code

section 11425.40. (Gov Code, § 11512, subd. (c).) Specific grounds for disqualification include bias, prejudice, or interest in the proceeding. (Gov. Code, § 11425.40.) Here, Student posits that his case may be prejudiced because he received notice of the reassignment of the matter to ALJ Coggins less than 10 minutes before it began, the ALJ has reviewed evidence in support of Student's prehearing motions, which may not be admitted into evidence at hearing, and the ALJ has already made prehearing orders in this case. The challenge does not establish any ground for disqualification of the ALJ under relevant law. The ALJ can be fair and impartial in the resolution of this matter. Accordingly, Student's challenge for cause is denied.

2. Hearing Dates, Times, and Location. The hearing shall take place on June 7, June 8, and June 9, 2016, and continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at Elk Grove's offices located at 9510 Elk Grove Florin Road, Elk Grove, CA 95624. 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, Elk Grove was to provide a facility for the hearing that fully complies 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. Elk Grove failed to certify that it would provide a facility for this case that complied with the law. Elk Grove shall inform OAH within two days of the date of this order it is able to certify that it will provide a facility that complies with the law.

Prior to the beginning of the hearing, Elk Grove shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (1) a table for Student and his representatives; (2) a table for Elk Grove's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Elk Grove shall provide drinking water and tissue to all parties, witnesses and the ALJ. The same hearing room shall be used for each day of hearing and shall be available at least one hour prior to the commencement of the hearing each day. The hearing room shall be locked following the hearing each night. Elk Grove shall ensure that the hearing room and access to it are in compliance with 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. The issues at the due process hearing, and the proposed resolutions, are listed below.

Issue 1: Is Elk Grove entitled to conduct assessments of Student pursuant to the January 12, 2016 assessment plan without Parent's consent?

Proposed Resolution: An order permitting Elk Grove to conduct the assessments proposed in the January 12, 2016 assessment plan.[1]

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties must not use the same color for their respective binders. 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 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. 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 and at the discretion of the ALJ.

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.

The parties shall attempt to reach agreement on a witness list for the first day of hearing. Elk Grove shall have witnesses available in case agreement on a witness list is not reached. Prior to the commencement of the due process hearing, 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, and the ALJ will finalize the witness schedule. Additionally, the parties shall be prepared at the end of each day of hearing to discuss the

[1] In Student's PHC Statement, he seeks resolution in this matter in the form of compensatory education, an independent assessment, reimbursement to Parent for educational costs and attorney's fees, among other things. The ALJ informed Student's representative that this matter is proceeding on a complaint filed by Elk Grove, and Student will not be entitled to a remedy based on Elk Grove's complaint. Student must file a separate complaint seeking the resolution he believes he is entitled.

witnesses to be presented the next day and the time the testimony of each such witness is expected to take.

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. 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. The proponent of the witness 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.

Student filed a written request for telephonic testimony of Parent, his experts, Fullerton School District witnesses, and California Department of Education witnesses appearing on his witness list. The specific witnesses that Student requests appear telephonically are identified below. Elk Grove waived filing a written response to Student's motion, and, instead, opposed the motion orally at the PHC as to Student's experts, Dr. Dian Tackett and David Paltin, and the witnesses employed by the California Department of Education. Elk Grove did not oppose the telephonic testimony of Fullerton School District employees, and did not object to Student's request for Parent to appear telephonically if she testified via teleconference, so that she could be seen during her testimony. Elk Grove did not request telephonic testimony of any witness at the PHC.[2]

Witnesses Student Requests Appear Telephonically

1. Parent
2. Dian Tackett, Ph.D.
3. David Paltin, Ph.D.
4. Deanna Scott, Director of Pupil Services (Fullerton School District)
5. Kellie White, preschool special education assessment counselor (Fullerton School District)
6. Lindsay Blum-Brown, speech and language pathologist (Fullerton School District)
7. Marilee Cosgroe, Director of Child Development (Fullerton School District)

[2] Elk Grove represented that Shannon Lillegark, who appears on Student's witness list, may be unable to appear in person at the hearing for personal reasons. Elk Grove indicated it may file a motion for telephonic testimony if this witness is called to testify.

8. Francis Ruiz, school psychologist (Fullerton School District)
9. Ms. Garcia, Sunset Lane Preschool classroom aide (Fullerton School District)[3]
10. Alicia David, Sunset Lane Preschool teacher (Fullerton School District)
11. Ms. Rosas, Sunset Lane Preschool classroom aide (Fullerton School District)
12. Brenda Ramos, general education teacher (Fullerton School District)
13. Jody Goodrich, school psychologist (Fullerton School District)
14. Natalie Cisneros, Student's individual instructional aide at Sunset Lane Preschool (Fullerton School District)
15. David Kopperud (California Department of Education)
16. Chris Drouin (California Department of Education)
17. John Hooper (California Department of Education)
18. Anita Keatin (California Department of Education)

Student provided sufficient information about Parent's health concerns to establish good cause to support his request that Parent appear telephonically at hearing, subject to the conditions discussed above in this section. Elk Grove's request that Parent appear via teleconference during testimony is denied. Elk Grove did not establish that Parent's appearance on video, as opposed to appearing telephonically, is necessary for purposes of sufficiently eliciting testimony from Parent. The motion for telephonic testimony of the other 17 witnesses, identified above, is taken under submission and will be addressed at hearing. Student should be prepared to provide an offer of proof as to the testimony of each witness appearing telephonically and evidence as to the reason the witness cannot physically appear at the hearing. Elk Grove has preserved its right to object to the testimony of any witness appearing telephonically. Any objections to a particular witness's testimony will be heard and ruled on at hearing.

7. Electronic Recording of Hearing.

a. Audio Recording. Student's motion to make an audio recording of the hearing is granted, subject to the following 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.[4] If Elk Grove desires to make such an audio recording, Elk Grove shall move for leave to do so in advance of the hearing, and the same conditions shall apply.

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

[3] Student was unaware of the full names of this witness as well as the witness identified as Ms. Rosas.

[4] Elk Grove did not oppose the motion, but requested an admonition that the audio recording not be shared with any witness prior to the witness's testimony. The motion was taken under submission, and will be ruled on at hearing.

subject to sanctions. Student moved to allow media coverage in the hearing room with the use of television and/or video cameras. As discussed below, Student has requested the hearing be open to the public. Therefore, members of the public are permitted to attend the hearing. However, the form of media coverage that will be permitted in the hearing room will be addressed at hearing directly with the media representative(s). Student's motion to allow the media's television and/or video cameras in the hearing room is denied.

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, Elk Grove is the petitioning party. Accordingly, Elk Grove shall present its case-in-chief, followed by Student.

9. Motions.

a. Motion to Quash. Student filed a motion to quash Elk Grove's subpoena seeking Parent's appearance at hearing based on Parent's health issues. Student withdrew the motion at hearing.

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 the prehearing conference of May 27, 2016[5].

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

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 shut off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

12. Special Needs and Accommodations. Student has requested the following accommodations for Parent: (1) the hearing room be located on the first floor; (2) unlocked

[5] Student's advocate represented that Student might file a separate complaint and move to consolidate the instant matter with the issues raised in his complaint in the near future. Elk Grove objected to the late filing of a complaint and motion to consolidate, and asked that Student be given a timeline in which to file the complaint. Elk Grove's motion is denied.

Student's advocate indicated that Student might retain an attorney prior to the commencement of the hearing. Elk Grove indicated it would object to Student's notice of representation so close to hearing as untimely. Student's advocate represented that if an attorney was retained by Student, Student may file motion for continuance of the hearing.

door to the building and to the hearing room; (3) a wheelchair; and (4) access to electrical outlet close to witness stand and counsel table. These accommodations requests have been forwarded to OAH's ADA Coordinator, who will respond to Student's directly through his advocate.

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/Accessibility.aspx.

14. Hearing Open/Closed To the Public. At the request of Student, the hearing will be open to the public.

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.

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

IT IS SO ORDERED.

DATE: May 31, 2016

DocuSigned by:

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DENA COGGINS
Administrative Law Judge
Office of Administrative Hearings