BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2016110439
v.	ORDER FOLLOWING PREHEARING CONFERENCE
ELK GROVE UNIFIED SCHOOL DISTRICT.	

On March 14, 2017, a telephonic prehearing conference was held before Administrative Law Judge B. Andrea Miles, Office of Administrative Hearings. Dina Harris, Attorney at Law, appeared on behalf of Elk Grove Unified School District. Dr. Robert Closson, Advocate, appeared on behalf of Student. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place March 21, 22, 23, and 28, 2017, and continuing 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, California 95624.[1] 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 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. The named local educational agency failed to certify that it would provide a facility for this case that complied with the law. The local educational agency 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 assist the ALJ to ensure that the hearing room is configured into a courtroom setting, including (1) a table for Student and his

[1] During the PHC, Elk Grove indicated that it may be requesting to move the hearing to an alternate location to accommodate observers, since Student has elected to have the hearing open to the public. Elk Grove was directed to submit a request for change of hearing location as soon as it because aware of the alternate location.

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 also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

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. Issue and Proposed Resolution. The issue at the due process hearing, and the proposed resolution, are listed below.

Issue: Did Elk Grove's September 29, 2016 individualized education program[2] offer Student a free appropriate public education such that Elk Grove may implement the offered IEP without parental consent?

Proposed Resolution: Elk Grove seeks an order from OAH finding that Elk Grove's September 29, 2016 individualized education program offered Student a free appropriate public education and allowing Elk Grove to implement that IEP without parental consent.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties have agreed to use Elk Grove's evidence binders as the joint evidence binders. Elk Grove has already provided Student with a binder containing its proposed exhibits. The parties shall use numbers to identify exhibits. Each exhibit shall be internally paginated, or all of parties' exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. At the hearing, the parties shall supply an exhibit binder containing the joint exhibits for use by the ALJ, and a second exhibit binder for use by witnesses.

The parties shall serve their proposed exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). The parties may not serve exhibits on OAH prior to the hearing. In the event that Student wishes to add any exhibits to the joint evidence binder, hard copies of those exhibits need to be provided to Elk Grove's counsel in accordance with Education Code section 56505, subdivision (e)(7). The exhibits need to include evidence tabs that follow the numbering order of exhibits as currently established in the joint evidence binder. Additionally, those exhibits need to be internally paginated and follow the same type of page numbering system as those exhibits already included in the joint evidence binder.

[2] The IEP team meetings regarding this IEP offer began on May 25, 2016.

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.

Elk Grove identified the witnesses it intends to call at hearing in its amended PHC statement. During the PHC, Student identified the witnesses he intends to call at hearing. The following is a list of those witnesses:[3]

a. Student's mother

b. Student

c. Kit D'Arezzo, Program Specialist with Elk Grove

d. Charlie Hill, Board Certified Behavior Analyst with Elk Grove

e. Steve Looper, Principal of McKee Elementary School

f. Maureen Makarowski, School Psychologist with Elk Grove

g. Traci Parker, Teacher with Elk Grove

h. Doug Phillips, Director of Special Education/Special Education Local Plan

i. Bill Tollestrup, Director of Special Education/Special Education Local Plan

j. Robyn Pollero, Speech and Language Pathologist with Elk Grove

k. Diana Thomas-Garner, School Psychologist with Elk Grove

l.. Brooke Warren, Program Specialist with Elk Grove

m. Sara Zettel, Inclusion Specialist with Elk Grove

n. Tracy Wanous, Special Education Teacher with Elk Grove

[3] During the PHC, Elk Grove informed Student that Ms. Tozaj was no longer employed by Elk Grove and that it was unaware if the paraeducators listed by Student as potential witnesses were employees of Elk Grove.

o. Cherry Aims, Paraeducator

p. Ms. Manuella, Paraeducator

q. Armando, Paraeducator

r. Ann Mc Pherson, Paraeducator

s. Christy Tozaj, former Program Specialist with Elk Grove

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 are order to meet and confirm to discuss any witness issues and to 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 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. Neither party requested that any witness appear telephonically. 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. No witness will be heard by telephone unless all these requirements have been fulfilled.

7. Electronic Recording of Hearing.

a. Audio Recording. Both parties' motions to make an audio recording of the hearing are 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

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

9. Motions. No pretrial motions are pending or contemplated. 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 March 14, 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.

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

13. Special Needs and Accommodations. A certified Romanian interpreter will be provided for Mother at the hearing. Additionally, any party or participant to this case, such as a witness, requiring reasonable accommodation to participate 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 Will Be Open 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: March 14, 2017

DocuSigned by:
B. Andrea Miles
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B. ANDREA MILES
Administrative Law Judge
Office of Administrative Hearings