BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. ELK GROVE UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016100772 ORDER FOLLOWING PREHEARING CONFERENCE

On November 14, 2016, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Charles Marson, Office of Administrative Hearings. Nicole Hodge Amey, Attorney at Law, and James D. Peters, III, paralegal, appeared on behalf of Student. Lauri A. Arrowsmith, Attorney at Law, appeared on behalf of the Elk Grove Unified School District. 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 on November 22, 2016, at 9:30 a.m., at the Office of Administrative Hearings, 2349 Gateway Oaks Drive, Suite 200, Sacramento, California 95833. It shall continue at Elk Grove's District Office, 9510 Elk Grove-Florin Road, Elk Grove, California 95624, on November 29 and 30, and December 1 and 2, 2016, and continue day-to-day thereafter, Monday through Thursday, at the discretion of the ALJ. The hearing shall begin on November 29, 2016, at 9:30 a.m., and at 9:00 a.m. on all subsequent days, unless otherwise ordered.

As ordered in the scheduling order, Elk Grove shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 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 certified that the facilities to be used for this case comply with the law, and shall promptly file a certificate to that effect.

Prior to the beginning of the hearing days set at the District office, 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 have tissue available to all parties, witnesses and the ALJ. Unless otherwise ordered, 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 at lunch breaks and following the hearing each night.

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.

1. Did Elk Grove deny Student a free appropriate public education during the 2014-2015 school year and extended school year by:

a. failing to offer or provide him an interim individualized education program comparable to his last agreed-upon and implemented IEP from the Fullerton School District within 30 days of his enrollment in Elk Grove in September 2014;

b. failing to include Parent in discussions concerning Student's interim IEP following his enrollment in Elk Grove;

c. failing to notify Parent of an IEP team meeting on October 1, 2014, and failing to give adequate notice to Parent of an IEP team meeting on October 17, 2014;

d. allotting only one hour for the October 17, 2014 IEP team meeting;

e. failing to schedule an IEP team meeting within sixty days of the effective date of the Settlement Agreement of March 1, 2015;

g. failing to provide speech and language services for two thirty minute sessions per week in an individual setting and two thirty minute sessions per week in a group setting from September 2014 to May 26, 2015;

h. reducing Student's speech and language services without an appropriate assessment;

i. reducing Student's speech and language services below the level that Student required to receive a FAPE; and/or

j. unilaterally removing Student from his Kindergarten program and placement without completing formal assessments and without Parent's consent?

2. Did Elk Grove deny Student a FAPE during the 2015-2016 school year

and extended school year by:

a. failing to provide Student a clear written offer of FAPE;

b. failing to conduct an IEP team meeting within 30 days of Parent's July 17, 2015 written request?

c. excusing required IEP team members from the January 12, 2016 IEP team meeting without Parent's agreement;

d. failing to consider the views and recommendations of Dr. Paltin at the January 12, 2016 IEP team meeting;

e. terminating the January 12, 2016 IEP team meeting before the scheduled end time;

f. refusing to consider Parent's views at the April 27, 2016 IEP team meeting;

g. terminating the April 27, 2016 IEP team meeting too early; and/or

h. convening the May 26, 2015 IEP team meeting without Parent?

3. Did Elk Grove deny Student a FAPE during the 2016-2017 school year and extended school year by:

a. failing to have an IEP in place for Student at the beginning of the school year; and/or

b. failing to provide Student a clear written offer of FAPE?

4. Did Elk Grove deny Student a FAPE from September 2014 to the date of the filing of Student's complaint by:

a. failing to assess Student in the area of pragmatic speech and language;

b. failing to assess Student to determine possible special education eligibility because of autism;

c. offering assessment plans that proposed to conduct intellectual and cognitive testing of an African-American student that is forbidden by federal courts;

d. failing to offer appropriate goals to address Student's needs in the areas of:

1) expressive, receptive, and pragmatic speech and language;

2) reading comprehension;

3) toileting;

4) behavioral deficits;

5) social skills;

6) movement; and/or

7) transitions?

e. failing to offer an IEP that met Student's needs in the areas of:

1) expressive, receptive, and pragmatic speech and language;

2) behavioral deficits;

3) comprehension of directions; and/or

4) social skills?

As resolutions, Student seeks:

a.. compensatory education according to proof;

b. assessments in the areas of expressive, receptive, and pragmatic speech and language; reading comprehension; toileting; behavioral deficits; social skills; movement; and transition needs;

c. conducting of IEP team meetings after 12:00 PM, in the presence of Parent, and with accommodations required by the Americans with Disabilities Act and related laws;

d. training of district staff;

e. a one-to-one ABA-trained aide;

f. an IEP team consisting of all new members; and

g. reimbursement for Dr. Paltin's attendance at an IEP team meeting and all other educational costs.[1]

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 clearly identifies 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. Each party shall serve an exhibit binder containing its respective exhibits on the other party or parties by 5:00 p.m. on November 15, 2016, 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 timely exchanged shall not be admitted into evidence at the hearing unless 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. Neither party shall be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

b) 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.

c) 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

[1] Student's proposed resolutions span 12 pages of single-spaced text and are not set forth here in the same detail. The list above is not meant to exclude any resolution requested in those pages.

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 and Order 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. 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 establish their cases in chief during the first appearance of a witness. 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.

6. 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, Student requested the hearing and shall present his case-in-chief first, followed by Elk Grove.

7. 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).) Student has filed a motion to allow certain witnesses by telephone (see No. 9.b., below). A 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 any witness appearing by telephone 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.

8. Electronic Recording of Hearing.

a) Student's request to make an audio recording of the hearing is granted subject to the following conditions: 1) OAH's recording is the only official recording; 2) 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; 3) no part of the recording shall be played to any witness or potential witness while the hearing is proceeding; and 4) operation of the party's recording mechanism will not be allowed to delay the hearing. Should Elk Grove desire to make such a recording, it shall request leave to do so in advance and, if leave is granted, shall be subject to the same conditions.

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.

9. Motions.

a) Student's opposition to Elk Grove's pending motion to dismiss issues

shall be filed by the close of business on November 14, 2016.

b) On November 14, 2016, Student filed a motion to allow television and/or video cameras in the hearing, and a motion to allow certain witnesses to testify by telephone. Elk Grove shall respond to those motions by noon on November 16, 2016. Student will file any replies by noon on November 17, 2016.

c) Student shall file, by the close of business on November 16, 2016, his motion pertaining to the legal authority of Mr. Peters to represent him at the hearing in Ms. Amey's absence. Elk Grove shall file any response to that motion by the close of business on November 17, 2016.

d) 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.

10. Compensatory Education and 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.

Parent has requested certain accommodations at the hearing. That request has been referred to OAH's ADA coordinator and will be resolved before the hearing.

At present neither party anticipates the need for special accommodation for any witness or party, or for the services of an interpreter. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk identified in the scheduling order, at (916) 263-0880, or the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 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/Accommodations.aspx.

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

15. 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. In addition, if a settlement is reached five days or fewer than five days before the due process hearing is scheduled to begin, the parties shall immediately inform OAH of that fact 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 showing all required signatures 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.

Dated: November 14, 2016

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings