BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
SUMMIT PUBLIC SCHOOLS: DENALI,	OAH Case No. 2018070224
v.	ORDER FOLLOWING PREHEARING CONFERENCE
PARENT ON BEHALF OF STUDENT.	

On August 13, 2018, a telephonic prehearing conference was held before Administrative Law Judge Penelope Pahl, Office of Administrative Hearings. Megan Moore and Rachael Tillman, Attorneys at Law, appeared on behalf of Summit Public Schools-Denali. Valerie Mulhollen, Attorney at Law, 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 on August 28, 2018 at 9:30 a.m., and August 29 and 30, 2018 at 9:00 a.m., then continuing day to day at the discretion of the ALJ. The parties stipulated to a request for change of venue. That motion is GRANTED. The hearing shall take place at the Oakland Office of Administrative Hearings, 1515 Clay Street, Suite 206, Oakland, CA 94612. Please plan for additional time to go through the security procedures required for admission to the OAH offices and advise all witnesses of this requirement as well.

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. Pursuant to discussions with the parties during the prehearing conference, the issues to be determined at the due process hearing, and the proposed resolutions, are listed below:

Issues:

ISSUES TO BE HEARD:

1. May Summit-Denali assess Student pursuant to its March 7, 2018 assessment plan, including the diagnostic placement, without parental consent?

2. Does Summit-Denali's June 12, 2018 IEP offer, including its offer of placement, services and accommodations provide Student a free, appropriate public education in the least restrictive environment?[1]

DISMISSAL OF ISSUE NO. 3:

Summit-Denali articulated a third issue. That issue posed the question:

> "Is Summit-Denali required to provide Student with a free, appropriate public education when Parents have unilaterally placed Student in private school and do not wish to voluntarily return Student to the Charter School?"

Issue No. 3 is dismissed as neither state nor federal law give OAH jurisdiction to issue advisory opinions.

Proposed Resolutions

Summit-Denali seeks an order allowing them to assess without parental consent, including conducting a diagnostic placement or alternatively, an order that, if Parents fail to cooperate with the reassessment process as required by the order that Summit-Denali may, upon prior written notice to Parents and without further order of OAH, terminate its delivery of special education and related services to Student. Summit-Denali further seeks an order declaring their June 12, 2018 IEP an offer of a free, appropriate public education and that Summit-Denali may implement the IEP without parental consent.

Issue Review

The parties shall carefully review the issues set forth above to determine that, as written, they accurately capture the discussions and amendments agreed to during the Prehearing Conference. These are the issues to be tried at hearing. The parties were advised that if they believe the issues do not accurately capture the discussions, that party is to expeditiously raise the concern in writing. Any concerns raised will be discussed on the first day of the hearing.

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, 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 with consecutive bates stamping of exhibits preferred. Each exhibit binder shall contain a detailed table of contents. The parties

[1] Summit-Denali is reminded that all of the required components of their IEP offer must be proven in order to establish the offer is FAPE, despite the fact that only a few examples of the elements of an IEP offer are mentioned in the issue.

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 timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

Parties are encouraged to present resumes or curriculum vitae for each professional witness.

Summit-Denali shall include a color copy of the school calendar for each school year in question and shall have witnesses available to testify as to any legend notations that might be unique to their school.

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 timely disclosed except for good cause shown, and at the discretion of the ALJ.

5. Meet and Confer. The parties are encouraged to review and shorten their witness lists and lists of Exhibits 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. To that end, parties are ordered to meet and confer **no later than 3 p.m. on August 23, 2018,** to discuss whether routine information can be the subject of stipulations to shorten the hearing by avoiding the necessity of testimony, particularly as to routine matters, and/or exhibits. The parties shall also discuss the order of witnesses and the length of witness testimony. On the first day of hearing, the parties shall be prepared to present the ALJ with a written joint witness list with time estimates and dates of expected testimony for all witnesses the parties expect to call during the course of the hearing, except rebuttal witnesses.

Should agreement on a list not be reached, each party shall prepare separate lists and Student shall have witnesses available so the hearing can proceed promptly. 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.

6. 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. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

7. 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, Summit-Denali requested the hearing, bears the burden of proof, and shall present its case-in-chief first, followed by Student**.**

8. Telephonic /Video Testimony. Summit-Denali has requested that Eric Leubers testify by telephone. No objection to the telephonic testimony was voiced by Student. Whether a witness may appear by telephone or other electronic means 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 or video conference shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone or video conference.

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 instruct the witness as to the rules regarding maintenance of Student's privacy with regard to the documents provided. The proponent of the testimony shall also ensure that the room from which the witness is testifying has sound equipment that allows all hearing participants to hear and, if applicable, see the witness, and that the witness is able to hear objections and rulings. As the hearing will take place at OAH's offices, OAH shall ensure that the hearing room is equipped with adequate telephonic conferencing equipment that allows receipt of the transmitted telephonic testimony. No witness will be heard by telephone unless all these requirements have been fulfilled.

9. 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; 3) the recording device will be removed by the party recording during any recess where the party leaves the room; 4) that operation of the party's recording mechanism will not be allowed to delay the hearing; and 5) a private recording is not allowed to be used to prepare the testimony of an upcoming witness in the hearing. Should Summit-Denali request leave to record the proceedings, that request would be granted subject to the above-listed 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.

10. IEP Recordings. Summit-Denali has requested the opportunity to introduce a portion of an IEP recording at hearing. That request will be considered at the time of hearing subject to the following conditions: 1) It is preferable that a transcript **of the portion of the IEP recording being introduced** be prepared and submitted with a declaration authenticating the transcription[2]; 2) At the time the evidence is introduced, relevance of the portion of the IEP recording at issue must be established; 3) the exact portion (minutes) of the IEP recording the party seeks to admit must be identified; and 4) the person speaking on the portion of the tape being introduced must be established.

An opposing party is not precluded from seeking admission of additional portions of an IEP recording to establish additional context of comments subject to the above requirements.

Parties are not precluded from seeking admission of an entire IEP recording subject to establishment of relevance of the entire recording as well as meeting the other requirements listed above.

11. Motions. A motion to quash Summit-Denali's Subpoena Duces Tecum was filed on the morning of the Prehearing Conference. As Summit-Denali had not been given time to respond, ruling on this motion was deferred until receipt of Summit-Denali's written response to the motion which should be filed no later than August 16, 2018.

Summit-Denali stated that they would need to review the Prehearing Conference order to consider whether a motion was necessary in relation to the dismissal of Summit-Denali's Issue number 3.

No further pre-trial motions are anticipated by the parties. Any motion that was not filed by the date the Prehearing Conference statement was due, that is, 3 business days prior to the date of the Prehearing Conference, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

12. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged to promote hearing efficiency. Stipulations to routine foundational facts and avoiding duplicative exhibits are particularly favored. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

13. 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.

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[2] As discussed during the Prehearing Conference, a certified transcription of the portions of the IEP recording a party seeks to introduce is not required so long as the transcription provided can be established as reliable.

14. Special Needs Accommodations and Translation. Neither party has requested accommodations for any special needs. Neither party has requested a translator. 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 https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

16. Hearing Closed To the Public. At the request of Student, the hearing will be closed to the public.

17. 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 **EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT** https://www.applications.dgsapps.dgs.ca.gov/oah/oahsftweb.

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.

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

IT IS SO ORDERED.

DATE: August 13, 2018

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Penelope S. Pahl
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PENELOPE S. PAHL
Administrative Law Judge
Office of Administrative Hearings