

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. 2014010591

ORDER FOLLOWING PREHEARING
CONFERENCE

On June 6, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Adeniyi A. Ayoade, Office of Administrative Hearings. F. Richard Ruderman, Attorney at Law, appeared on behalf of Student (Student). Cathy S. Holmes, Attorney at Law, appeared on behalf of the Elk Grove Unified School District (Elk Grove). 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 **June 16-19, 2014**, and shall continue day to day, Monday through Thursday at the discretion of the ALJ until the hearing is concluded. The hearing shall be held at **Elk Grove's offices located at 9510 Elk Grove Florin Road, Elk Grove, CA 95624**. The hearing shall begin at 9:00 a.m. and end at 5:00 p.m. each day, with the exception of June 16 when the hearing shall begin at 1:30 p.m., unless otherwise ordered.

Elk Grove shall ensure that the due process hearing location and room are accessible to all persons, and are appropriate for the hearing. The room shall meet OAH specifications, and at a minimum shall have separate tables capable of being moved into a courtroom configuration as follows: (1) one table for Student's representatives; (2) one table for Elk Grove's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. A room with one large conference table is not suitable. If a suitable location or room is not available for any of the hearing days, Elk Grove shall immediately notify OAH and the parties and propose a different location. Elk Grove is encouraged to make fresh water and tissue available in the hearing room at all times.

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 requested proposed remedies are as follows:

A. **ISSUES:**¹

- 1) Did Elk Grove deny Student a free appropriate public education (FAPE) from the 2011-2012 through the 2013-2014 school years, including extended school years and up to the date of hearing by:
 - a. failing to provide adequate assistive technology equipment and services;
 - b. failing to implement Student's goals;
 - c. failing to provide an adequate transition plan and transition goals;
 - d. failing to provide an adequate behavior support plan;
 - e. failing to accurately document present levels of performance;
 - f. failing to implement accommodations during extended school years;
 - g. failing to offer adequate extended school year services;
 - h. failing to implement transition plan;
 - i. failing to provide goals in all areas of needs;
 - j. failing to provide direct instruction in executive functioning;
 - k. failing to provide adequate speech and language therapy;

¹ The issues at the due process hearing are those that were alleged in Student's due process complaint (complaint) as clarified at the PHC. As necessary, the issues have been clarified and reframed for clarity, as set forth herein below. Any issue(s) that is not listed and/or permitted by this order shall be included only with an amendment to a due process complaint. The amendment shall comply with California Education Code section 56502, subdivision (e). The filing of an amended complaint will restart the applicable timelines for a due process hearing. (20 U.S.C. § 1415(c)(2)(E)(ii).)

1. failing to provide adequate occupational therapy services; and
 - m. failing to provide adequate placement?
- 2) Did Elk Grove procedurally deny Student a FAPE during the 2011-2012 through the 2013-2014 school years by:
- a. failing to provide parents with copies of IEP documents;
 - b. failing to provide an assessment plan;
 - c. failing to provide progress reports on goals;
 - d. failing to provide complete educational records within five days of written request; and
 - e. failing to adequately maintain education records?
- 3) Did Elk Grove fail to adequately assess Student in all areas of suspected disability by:
- a. failing to conduct an adequate behavior assessment;
 - b. failing to conduct an adequate assistive technology assessment;
 - c. failing to conduct a transition assessment, including adaptive skills;
 - d. failing to conduct an academic achievement assessment; and
 - e. failing to conduct an adequate speech and language evaluation in the area of articulation?

B. **ORDER TO CLARIFY ISSUES.** Due to the ongoing negotiations between the parties, and the representation by the parties that some of the issues that were originally presented in Student's due process complaint might have been resolved in settlement negotiations, the parties are ordered to meet and confer regarding the issues. After the meet and confer, Student shall file with OAH a statement of the remaining issues pending adjudication in this matter on or before June 16, 2014.² The statement of issues that is submitted to OAH shall clarify each remaining issue pending adjudication in this matter and: 1) identify the specific IEP's, programs or services, goals or objectives, supports or accommodations, or other

² Student need not file a statement of remaining issues if the case has been settled and OAH has issued a dismissal of the case prior to June 16, 2016

specific facts supporting each alleged denial of a FAPE to Student; and 2) identify the relevant time period(s) during which each denial of a FAPE occurred.

C. **PROPOSED REMEDIES.** As proposed remedies, Student seeks declaratory relief finding that Elk Grove denied Student a FAPE for the 2011-2012, 2012-2013 and 2013-2014 school years, including extended school years, and failed to adequately assess Student. Further, Students seeks an order from OAH directing Elk Grove to: 1) fund independent educational evaluations in the areas of behavior, assistive technology, transition and adaptive skills, academic achievement, speech and language and occupational therapy; 2) convene an IEP team meeting to develop goals and a transition plan for Student; 3) fund the attendance of the independent assessors at the meeting, and fund the attendance of Student's attorney at subsequent IEP team meetings for a year; 4) place Student in a non-public school; 5) provide Student with direct instruction in executive functioning, and needed accommodations and modifications; 6) provide compensatory education to Student; and 7) provide Student with such further relief deemed appropriate by the ALJ after the hearing.

3. Timely Disclosure of Witnesses/Exhibits. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits "at least" five business days prior to the hearing. The OAH's scheduling order dated January 21, 2014, ordered the production of lists of all witnesses and documents by an earlier date, namely, at least three business days prior to this PHC. As of the date of the PHC, both parties have disclosed their witnesses and exhibits through their respective PHC statements.

4. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties may use numbers or letters to identify exhibits. If numbers are used by both parties, each party shall place the letter "S" or "D" in front of the exhibit to designate if it is a Student or Elk Grove exhibit (for example, 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. 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. Exhibit binders shall be exchanged five business days prior to the hearing in accordance with Education Code section 56505, subdivision (e)(7), unless the parties agree to a later date.

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 good cause is shown as to why it was not previously exchanged. The parties shall be prepared to make such an offer of proof. The ALJ shall determine whether an exhibit is to be admitted into evidence. Only exhibits relevant to the issues previously stated in this order shall be admitted, unless used for impeachment purposes. The fact that an exhibit is placed in an exhibit binder does not guarantee its admission.

5. 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.

As of the day of the PHC, Student has identified and disclosed 23 witnesses including five experts, and Elk Grove has disclosed 18 witnesses. The parties are ordered to meet and confer regarding the schedule and order of witnesses. 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. Parties shall be prepared to make an offer of proof, if asked, as to why a specific witness' testimony is necessary. At the commencement of the hearing, each party shall provide the ALJ with a schedule of witnesses and a time estimate for each witness' direct and cross-examinations.

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. In the case of witnesses who have professional licenses and credentials, it is strongly recommended (but not ordered) that the party calling such witnesses be prepared to present copies of their *curriculum vita* (CV) or resume as exhibits, and exchange them with the other party.

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. 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. Such party 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.

8. Motions. Other than as included herein below, no pretrial motions are pending. 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 June 6, 2014.

Order Denying Request for Continuance: At the beginning of the PHC, the attorneys for the parties jointly requested that the PHC be continued and rescheduled for June 9, 2014, in order to afford the parties additional time to complete their

settlement negotiations. The request to continue the PHC is denied as good cause is not established for an additional continuance.³

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

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 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. At present neither party anticipates the need for special accommodation for any witness or party, or for interpreter services.

13. Order of Presentation of Evidence: Student filed this matter. Therefore, Student shall produce his evidence first. Where Student and Elk Grove intend to call the same person to testify, each party will examine the witness immediately after the other party, so the witness will only need to be called to the witness stand once.

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

15. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. If the parties believe a mediator may assist them in settlement negotiations, they should submit a request for mediation as soon as possible. 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.

³ A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice, unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. **In this matter, two prior continuance requests have been granted to the parties in order to enable them complete/finalize their settlement negotiations.**

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY BEFORE THE 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 SIMULATANEOUSLY 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 and 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: June 6, 2014

_____/s/
ADENIYI AYOADE
Administrative Law Judge
Office of Administrative Hearings