

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. 2015010203

ORDER FOLLOWING PREHEARING
CONFERENCE AND ORDER
DENYING MOTION TO
CONSOLIDATE

On February 13, 2015, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Joy Redmon, Office of Administrative Hearings. Attorney Lauri Arrowsmith appeared on Elk Grove's behalf. James Peters, III appeared on Student's behalf and attorney Guy A. Leemhuis listened to the PHC. The PHC was recorded.

Based on discussion with the parties, the ALJ issues the following orders:

Motion to Consolidate:

On February 11, 2015, Student filed a motion to consolidate this case with OAH Case No. 2014100698, a case filed by Student against Elk Grove. On February 12, 2015, Elk Grove filed an opposition to the motion to consolidate asserting that the two cases present distinct legal issues.

No statute or regulation specifically provides a standard to be applied in deciding a motion to consolidate special education cases. OAH generally consolidates matters that involve: a common question of law and/or fact; the same parties; and when consolidation furthers the interests of judicial economy by saving time or preventing inconsistent rulings. (See Gov. Code, § 11507.3, subd. (a) [administrative proceedings may be consolidated if they involve a common question of law or fact]; Code of Civ. Proc., § 1048, subd. (a) [same applies to civil cases].)

Here, Student's case includes procedural and substantive allegations regarding whether or not Elk Gove offered him a free appropriate public education for the 2014-2015 school year. Elk Grove's case includes the single issue of whether or not it has the right to assess Student without parental consent. Although the cases involve the same parties, they do not involve common questions of law or fact. Accordingly, consolidation is denied.

OAH Case No's. 2015010203 and 2014100698 will proceed independently. All dates currently scheduled in each case are to remain on calendar.

Motion to Continue:

During the PHC, Student made a motion to continue the due process hearing on two grounds. First, Student's advocate sustained an injury this week and the advocate's physician wants to reevaluate his condition before releasing him to work. Second, Student sought a continuance because his advocate and attorney of record are currently in a due process hearing in southern California. That hearing is scheduled to conclude on February 24, 2015, which is the first day scheduled in this due process hearing. Elk Grove opposed Student's motion to continue.

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). As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) The Office of Administrative Hearings considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

Student established good cause for a brief continuance based on the conflicting hearing date of February 24, 2015, with a case currently pending before OAH. Student's advocate's current health condition does not rise to the level of good cause, because his physician has not restricted his work beyond five days. Therefore, the motion to continue is granted and this matter is now set to proceed to hearing on February 26 and 27, 2015.¹

¹ Due process hearings are not typically scheduled to proceed on Fridays. The circumstances of this case, however, warranted scheduling this matter to proceed on Friday, February 27. The parties should expect to go forward that day; however, if another ALJ is assigned to hear this matter it will be within that ALJ's discretion to vacate that day of hearing.

Remainder of Issues Addressed at the PHC

1. Hearing Dates, Times, and Location. The hearing shall take place at **9510 Elk Grove Florin Road, Elk Gove, California, 95624**. It is scheduled for February 26 and 27, 2015, and day-to-day thereafter, Monday through Thursday, as needed and at the discretion of the ALJ. On February 26, 2015, the hearing shall begin at 9:30 a.m. and end at 5:00 p.m., and the remaining hearing days will be scheduled for 9:00 a.m. through 5:00 p.m. Elk Grove shall ensure that the facility for the hearing 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), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

The parties shall immediately provide hearing dates to proposed witnesses, and shall subpoena witnesses if necessary, to ensure their availability. Failing to properly notify or subpoena a witness does not constitute good cause for their unavailability.

2. Issue and Proposed Resolutions. The issue below was discussed at the PHC and reworded for clarity:

Issue: Is Elk Grove entitled to assess Student pursuant to the October 28, 2014, assessment plan without Parent's consent?

Proposed Resolutions: Elk Grove seeks an order permitting it to assess Student pursuant to the October 28, 2014, assessment plan utilizing its chosen assessors, outside of Parent's physical presence with the clarification that it will obtain parental input via rating scales and interviews.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall number exhibits in a way that clearly identifies the party offering the exhibit (for example "S-1" for Student or "D-1" for District). All pages of a party's exhibit binder shall be consecutively numbered. Each exhibit will consist of one document or short series of documents that are related (for example, an individualized education program shall have its own exhibit rather than a single exhibit for all IEP's). Each exhibit binder shall contain a detailed table of contents. At the hearing, each party shall supply an exhibit binder containing its exhibits for the ALJ, and a second exhibit binder for the 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.

Each party is expected to comply with Education Code section 56505, subdivision (e)(7) and timely serve an exhibit binder containing its respective exhibits on the other party. 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 will not be admitted into evidence at the hearing unless it is supported by a written declaration under penalty of perjury, and the ALJ rules that it is admissible.

4. Witnesses.

a) Each party is responsible for procuring their own witnesses; however, the parties shall make witnesses under its control reasonably available to the other party. Witnesses shall be scheduled in a way that avoids delays and minimizes or eliminates having to call a witness twice or out of order.

b) The parties are ordered to develop a proposed witness schedule. The proposed schedule will be presented to the ALJ at the beginning of the hearing. Prior to commencing the hearing, the ALJ and the parties will discuss the proposed witness schedule and address scheduling issues for individual witnesses, before the schedule is finalized. The ALJ has discretion to limit the number of witnesses and the length of their testimony.

5. Scope of Witness Examination. After the first direct and cross-examinations, each party will be permitted to question the witness on matters raised in the immediately preceding examination. Parties shall be required to establish their cases in chief (conducting both direct and cross) so that each witness only appears once.

6. Telephonic Testimony. A party must ask in advance if it intends to present a witness via telephone; if granted, the party shall provide the proposed witness with a complete set of exhibit binders from all parties, 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 requested that witnesses from Fullerton, California, be permitted to testify by telephone. Elk Grove reserved its right to object to these potential witnesses regarding the relevance of their testimony. Any objections regarding witnesses will be addressed during the hearing; however, if a witness from southern California is permitted to testify, the request for them to testify telephonically is granted subject to the limitation above regarding exhibit binders.

7. Electronic Recording of Hearing.

a. Audio Recording. At present, Student requests to record the due process hearing. The request is granted; however, the following conditions apply: 1) OAH's recording is the only official recording; 2) the recorder will be turned on and off at the same time as the ALJ's recording, to avoid recording conversations while off the record; and 3) operating 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. Motions. No motions are currently pending although Student asserted he may file a motion to dismiss. Any motion filed after the prehearing conference must be

accompanied by a showing of good cause as to why the motion was not made prior to the prehearing conference.

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

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. Any party seeking compensatory education shall provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

11. Conduct 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. At present Student indicated that his mother may need special accommodations for her testimony due to health issues. Student's advocate was instructed to contact OAH's ADA coordinator to assist coordinating accommodations for the hearing. Either Student's representative or his mother, and any other party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made known. Additional information concerning a request for reasonable accommodation is available on OAH's website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>.

13. Hearing Open To the Public. At Student's request the hearing will be open to the public.

14. 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. If a settlement is reached five days or fewer than five days before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact by telephone at (916) 263-0880. IF A FULL AND FINAL SETTLEMENT IS REACHED AFTER 5:00 P.M. THE BUSINESS DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035, AND SHALL ALSO LEAVE CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY.

Dates for hearing will not be vacated until OAH receives a letter of withdrawal, or those portions of the signed agreement withdrawing the case, with signatures. 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.

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

IT IS SO ORDERED.

DATE: February 13, 2015

/s/

JOY REDMON
Administrative Law Judge
Office of Administrative Hearings