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 DENYING REQUEST FOR CONTINUANCE

On November 14, 2016, the Office of Administrative Hearings issued an Order Following Prehearing Conference. The order identified four issues for hearing in this matter, all with several sub-issues. On November 17, 2016, two of the four issues were dismissed in their entirety and another issue was partially dismissed such that the only remaining issues were regarding the 2016-2017 school year. In order to determine whether these issues should be dismissed as well, the case was bifurcated so that evidence could be taken and a decision rendered regarding Elk Grove Unified School District's obligation to Student for the 2016-2017 school year. A July 2016 OAH decision between the parties allowed Elk Grove to assess Student without parental consent and absolved Elk Grove of its obligation to provide FAPE to Student if the assessment was not completed.

The hearing on the bifurcated issue is scheduled for November 22, 2016 and is likely to last less than one day. The matter will then be continued until a decision is issued on the threshold issue of Elk Grove's obligation to Student for the 2016-2017 school year, up through the date of the hearing. If the Administrative Law Judge determines that Elk Grove had an obligation to offer Student a free appropriate public education for the 2016-2017 school year, another prehearing conference will be scheduled and additional hearing dates ordered. If the ALJ determines Elk Grove did not have an obligation to offer Student a FAPE for the 2016-2017 school year through the date of the hearing, the remaining issues will be dismissed.

On November 21, 2016, the day before hearing, Student filed a motion to continue the dates in this matter. The motion to continue appears to state several reasons for the request: Parent is not available for hearing on November 22 because she is ill; two expert witnesses are not available on November 22; the attorney is not available during "most of the scheduled hearing dates"; and the dismissal of several issues has caused Student to change their witness list without sufficient notice. Student claims in his motion that the two expert witnesses, Dr. Paltin and Dr. Tackett will testify regarding whether Elk Grove is obligated to provide special education and related services as outlined in the previous OAH order.

There are two attached declarations to the motion to continue. The first is from Ms. Amey, the attorney of record. It states that she has personal knowledge of the facts except where stated on information and belief. It says nothing about her unavailability for hearing. It states that there has been a need to reschedule witnesses which causes prejudice with no specific information about any specific witness or what the prejudice would be. Ms. Amey also states that Parent is sick and must stay in bed and that she is receiving extra oxygen. She does not state that she knows this on information and belief. She does not state in her declaration how she has personal knowledge of Parent's current illness, whether Parent must stay in bed and that Parent is receiving oxygen. Finally, she states unequivocally that Parent is the "only one who can testify as to why she did not allow the EGUSD assessors to assess her son."

The other declaration is from Parent. It is signed by Parent, but it is unclear whether Parent actually read the declaration before she signed it because the first part of the declaration states she would testify if called and that she is the attorney of record for Student in this matter. The entire declaration is given little weight for this reason. Parent then states that she is sick with "flu like symptoms" and must stay in bed and rest for the rest of the week. She states that her doctor has explained to her that when she has cold or flu symptoms she needs to stay in bed and rest. She states that she has been diagnosed and treated for Pulmonary Hypertension. She provided, as an attachment, a note from a physician, dated February 11, 2016, stating she is under the physician's care for treatment of Pulmonary Hypertension. Finally, Parent states that she is the only one who can testify as to why she did not allow Elk Grove assessors to assess her son.

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. 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).) OAH 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).)

OAH has reviewed the request for good cause and considered all relevant facts and circumstances. The request is:

☒ Denied. All hearing dates and timelines shall proceed as calendared.

Student requested a continuance for four reasons. Each will be addressed individually.

1. Although the Motion contends that Ms. Amey is not available during most of the scheduled hearing dates, her declaration makes no mention of her unavailability. Further, during the prehearing conference Ms. Amey stated that she was available on November 22, 2016. At this time, this is the only hearing date calendared in this bifurcated matter. Therefore, the continuance is denied on this basis.

2. Although the motion contends that two expert witnesses are not available on November 22, 2016, there is no mention of their unavailability in any of the supporting declarations. Although the motion claims that they will testify about Elk Grove's obligation to offer Student a FAPE for the 2016-2017 school year, both the declarations of Ms. Amey and Parent specifically state that only Parent can testify about why Student was not made available for assessment by Parent, the only issue in this bifurcated hearing. Therefore, the continuance is denied on this basis.

3. Although the motion and Ms. Amey's declaration briefly discuss how the dismissal of some issues has impacted their witness list, good cause was not shown on this ground. Ms. Amey merely stated in her declaration that she did not believe that five days of hearing is still warranted and that there was not sufficient notice to reschedule witnesses for Thanksgiving week. However, she makes no specific claims regarding the unavailability of any specific witness and, more importantly, claims that only Parent can testify about whether Student was made available for assessment, thereby making clear that no other witnesses are necessary for Student. Elk Grove states that the witnesses they intend to call for the bifurcated matter are available.

4. As to the unavailability of Parent to testify, good cause for a continuance was also not shown. Parent has stated that she has a long-term health condition and provided a nine month old note from a physician attesting to her medical condition. Ms. Amey's declaration regarding Parent's medical condition is disregarded completely for a lack of personal knowledge.

   Parent did not ask for a continuance because she intends on attending the hearing, but because she is unavailable to testify at the hearing. However, Parent did not establish that her current flu-like symptoms were enough to prevent her from testifying at the hearing tomorrow and that she requires bed rest. Further, given the chronic nature of her medical condition, there is no assurance that she would be more able to testify at a later date. However, Parent will be allowed to testify telephonically at the hearing. If Parent testifies in person, she will have ample

time given for breaks, should she need them. If Parent chooses to testify by telephone, Ms. Amey should notify opposing counsel and OAH no later than 8:00 a.m. on November 22, 2016. If Parent testifies by telephone, Ms. Amey shall make sure that Parent has a working telephone nearby and that she is provided with a copy of any documentary evidence she will ask Parent to refer to during her testimony. Elk Grove will notify Ms. Amey by 8:15 a.m. if they intend to question Parent about any evidence in their binder so that Ms. Amey can make sure that Parent has a copy of that evidence as well. Parent should be prepared to testify at 10:00 a.m. whether in person or telephonically, should she decide to testify in this matter.

IT IS SO ORDERED.

DATE: November 21, 2016

DocuSigned by:
Margaret Broussard
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MARGARET BROUSSARD
Presiding Administrative Law Judge
Office of Administrative Hearings