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. 2018060213 ORDER FOLLOWING PREHEARING CONFERENCE

On July 13, 2018, a telephonic prehearing conference was held before Administrative Law Judge Penelope Pahl, Office of Administrative Hearings. Epiphany Owens, Attorney at Law, appeared on behalf of Elk Grove Unified School District. Student's mother appeared on behalf of Student.

Student's father was contacted on the phone number provided to OAH shortly after 10 a.m.. He did not answer. A message was left indicating that the hearing was scheduled to begin at 10:00 a.m. and would be continued to 10:15 a.m.. The message went on to inform Father that if he was not available for the previously noticed prehearing conference at 10:15 the PHC would proceed without him. Father was reached at 10:15 a.m. but informed the ALJ off the record that he was a police officer called into work unexpectedly and was actually in the middle of an arrest. Although he was willing to be placed on hold he was unsure if he would be able to participate when all parties were reached as he would be required to complete the processing of the arrest. When the undersigned returned to him to conference the calls, he was not on the line. The PHC date had been scheduled and confirmed during the June 15, 2018 PCH in which Father participated. The July 13, 2018 PHC went forward without Father. The PHC was recorded.

Based upon discussion with the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. As determined at the time of the first Prehearing Conference on June 15, 2018, the hearing shall take place on July 24, 2018 beginning at 9:30 a.m. and on July 25 and 26, 2018 beginning at 9:00 a.m. unless otherwise ordered. The hearing shall take place at James McKee Elementary School, 8701 Halverson Drive, Elk Grove, CA 95624.

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. Elk Grove shall inform OAH within two days of the date of this order if it is unable to comply with this order.

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.

Prior to the beginning of the hearing, 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 tissue to all parties, witnesses and the ALJ. 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.

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& Proposed Resolutions

A. ISSUES

1. Was District's Functional Behavior Assessment appropriate such that Student is not entitled to a Functional Behavior Assessment IEE at public expense?

2. Was District's Occupational Therapy Assessment appropriate such that Student is not entitled to Occupational Therapy Assessment IEE at public expense?

3. Was District's Speech and Language Assessment appropriate such that Student is not entitled to Speech and Language Assessment IEE at public expense

B. PROPOSED RESOLUTIONS:

1. District's proposed resolution is that OAH issue a ruling in the affirmative as to each issue stated.

3. Exhibits. Each party must disclose a copy of any document, (called an "Exhibit"), that they plan to submit as evidence during the hearing. Exhibits shall be pre-marked by placing the exhibit in a three-ring binder with a tab that says S-1, S-2. S-3, etc; or D-1, D-2, D-3 etc. These tabs will designate whether it is a Student or Elk Grove exhibit. Each page of each exhibit shall have a page number; or all of a party's exhibits may be

Bates-stamped with consecutive bates stamped numbers throughout the binder of exhibits if preferred. Each exhibit binder shall contain a detailed table of contents describing the documents in the binder with listings such as "S-1: January 15, 2017 IEP"; S-2: Email from Ms. Smith to Mother re: Occupational Therapy Assessment; S-3: September 12, 2017 Assessment Plan". (See Special Education Handbook for additional details regarding how to prepare an exhibit binder.) Each party shall create 4 copies of their evidence binders.

The parties shall serve one of the evidence binders created, which should also contain a copy of their witness list, discussed below, on each other in compliance with Education Code section 56505, subdivision (e)(7) which requires that a party serve a copy of their witness list and exhibits on the opposing party no later than *five business days prior to the beginning of the hearing* . This means the documents and witness list must be received by the opposing party on or before this date. **It was agreed on the record that the exchange of evidence must be completed by 5 p.m. on July 17, 2018**.

On the first day of hearing, each party shall supply two of the exhibit binders containing the evidence to the ALJ. One will be used by the ALJ during hearing and the other is for reference by the witnesses in the event a party has questions for a witness about a document that is proposed for admission into evidence. The parties may not serve exhibits on OAH prior to the hearing.

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.

Elk Grove 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 Elk Grove.

4. Witnesses.

Each party is responsible for procuring the attendance at hearing of its own witnesses. Parties must notify or subpoena witnesses as necessary. Each party shall make witnesses under its control reasonably available.

Each party must prepare a witness list that lists the names of each witness the party intends to call of its own behalf; the date and time the party anticipates that the witness will testify; and the anticipated amount of time it will take the party to question the witness. 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. **Student's witnesses will be called after Elk Grove's witnesses as Elk Grove has the burden of proof. Therefore, Student should plan to begin calling witnesses on the afternoon of the second day of hearing.**

Neither party shall be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

On the first day of hearing, 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 amount of time the testimony of each witness is expected to take. Witnesses shall wait outside the hearing room until it is their turn to testify unless otherwise ordered by the ALJ.

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, keeping in mind that the scope of allowable rebuttal is very limited. 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, Elk Grove requested the hearing, bears the burden of proof, and shall present his case-in-chief first, followed by Student.

8. Telephonic /Video Testimony. 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 make a motion requesting leave to do so in advance, unless the opposing party has agreed that the witness may appear by telephone or video conference. The person calling the witness shall provide the witness testifying by telephone 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 or video 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.

Live video conferencing will be allowed only if 1) a specific request has been made in advance for leave to present live video testimony; 2) adequate equipment is available; and 3) the ability to transmit the necessary signal is reliable. Should video conferencing become burdensome or time consuming, the testimony shall proceed via telephone.

No witness will be heard by telephone or video conference unless all of these requirements have been fulfilled.

9. Electronic Recording of Hearing.

a. Audio Recording. Both parties' motions 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.

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. Any request to introduce a portion of an IEP recording 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. This transcript, which must include a notation of the minutes relevant to the issues being heard, must be disclosed by the deadline for evidence disclosure; 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. Mother has indicated that she may request a continuance of the hearing. Any motion that was not filed the prehearing motion deadline of July 10, 2018, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not filed by the deadline in addition to establishing good cause for the request made in the motion. Evidence will be required in support of any motion for continuance.

Mother's Request to Appear at Hearing via Telephone. At the time of the Prehearing Conference, Mother requested the opportunity to appear at the July 24, 2018 hearing via telephone. Mother's cell phone connection for the Prehearing Conferences has been difficult to hear at times. During the July 133, 2018 PHC, Mother stated she could not hear the ALJ or opposing counsel on more than one occasion. On occasion when the ALJ has tried to call Mother's cell phone a loud buzzing sound has pulsated repeatedly requiring

multiple calls to be made to Mother's telephone line to establish a connection. Mother stated during the Prehearing Conference that she had no land line option for contacting her. Appearance by telephone would impede Mother's ability to participate in the hearing as well as impeding the ALJ's ability to hear her and ensure she was hearing all participants. Mother's request to appear by telephone was denied.

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 Accommodations and Translation. Neither party has requested an interpreter be available for the hearing.

Mother has indicated she may need to request accommodations for her own special needs. A party or participant to this case, including a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar staff, Richard Biala, 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.

14. Hearing Open To the Public. At the request of Student, the hearing will be open to the public. All observers shall conduct themselves in a respectful manner, appropriate to the importance of the matter being considered.

15. 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.

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

IT IS SO ORDERED.

DATE: July 16, 2018

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