

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. 2014020468

ORDER FOLLOWING PREHEARING
CONFERENCE

On May 12, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Joy Redmon, Office of Administrative Hearings (OAH). Colleen Snyder, Attorney at Law, appeared on behalf of Student. Cathy Holmes, Attorney at Law, appeared on behalf of Elk Grove. The PHC was recorded.¹

Based on discussion of the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place at **9510 Elk Grove Florin Road, Elk Grove, CA 95624.**² It shall take place on May 28-29, and June 4-6, 2014, and continuing day to day, Monday through Thursday as needed at the discretion of the ALJ. On May 28, 2014, the hearing shall begin at 9:30 a.m. and end at 5:00 p.m., and on remaining days the hearing shall begin at 9:00 a.m. and end at 5:00 p.m., unless otherwise ordered.

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

¹ At the outset of the PHC, Ms. Snyder stated that Student may file an amended complaint. Ms. Holmes stated that Elk Grove may file a request for a due process hearing and seek that the complaints be consolidated. Those actions, however, have not yet occurred, so the PHC proceeded.

² At a minimum for the hearing, the room 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 the District’s representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. District shall ensure that all parties, witnesses and the ALJ have drinking water and tissue available to them and that the hearing room and other facilities which will be used during the hearing are accessible.

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 are listed below.

ISSUES

Issue 1: Did Elk Grove fail to conduct assessments that met all legal requirements by:

- a) failing to conduct an assessment by a credentialed teacher of the deaf and hard of hearing; and
- b) failing to conduct an appropriate psychoeducational evaluation?

Issue 2: Did Elk Grove procedurally deny Student a free appropriate public education (FAPE) during the 2013-2014 school year by:

- a) failing to include her in school-wide extracurricular events both during the school day and after school; and
- b) preventing her parents from communicating with other IEP team members; and
- c) failing to make a clear written placement offer; and
- d) failing to convene an IEP meeting within 30 days of enrollment in Elk Grove; and
- e) failing to develop an assessment plan within fifteen days of parent request?

Issue 3: Did Elk Grove deny Student a FAPE from March 2013 through the present, including the extended school years (ESY), by:

- a) offering placement in an autism special day class (SDC) that was not appropriate for Student; and
- b) failing to implement her IEP, specifically by failing to provide offered mainstreaming and consultation services in the areas of occupational therapy, speech and language, physical therapy, and nursing services; and
- c) failing to draft measurable goals in the area of sensory modulation, letter and numeral recognition, and phonemic awareness and

communication; and failing to draft goals in all areas of need including expressive language, receptive language, social interaction, and articulation; and

- d) failing to provide deaf/hard of hearing services, including an FM system; and
- e) failing to provide adequate and appropriate occupational therapy services; and
- f) failing to provide adequate and appropriate physical therapy services; and
- g) failing to provide appropriate speech and language therapy, including and auditory discrimination therapy and speech reception training; and
- h) failing to provide an appropriately training aide; and
- i) failing to provide adequate mainstreaming opportunities; and
- j) failing to develop a sensory diet; and
- k) refusing to allow her to attend her home school; and
- l) failing to provide her related services during ESY?

PROPOSED RESOLUTIONS

Resolution 1. Placement at CCHAT, a non-public school, with direct speech and language therapy, occupational therapy, physical therapy, deaf/hard of hearing services, nursing services, and assistive technology.

Resolution 2. Independent psychoeducational and deaf/hard of hearing evaluation and shall fund the assessors attendance at an IEP meeting convened to review the assessment results.

Resolution 3. Elk Grove will provide compensatory education in the areas of physical therapy, occupational therapy, assistive technology, deaf/hard of hearing services, and academics, in amounts according to proof.

Resolution 4. Elk Grove shall reimburse Student's parents for all educational costs incurred including speech and language therapy, educational tutoring and consultation, physical therapy, occupational therapy, social skills, deaf/hard of hearing

instruction/consultation, educational assessments, and transportation to and from such services.

Resolution 5. Other relief deemed appropriate by the Administrative Law Judge.

3. Motion to Dismiss: Elk Grove made a motion to dismiss Issue 2, subparts a and b on the ground that they raise discrimination claims outside the jurisdiction of OAH. Student opposed the motion. The motion to dismiss was denied on the basis that both subparts involve allegations of a denial of FAPE. Specifically, the allegation that Elk Grove failed to include Student in school-wide extracurricular activities involves mainstreaming which is alleged to be a component of Student's placement offer. The second subpart regarding Student's parents being denied an opportunity to speak with members of Student's IEP team involve a question of parental participation. It was ruled that both subparts raise issues of a denial of FAPE that fall within the jurisdiction of OAH to adjudicate.

4. 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 in a way that makes clear the party offering it (such as "S1" or "D2"). Each exhibit shall be internally paginated, by exhibit, or all pages of a party's exhibit binder shall be Bates-stamped or otherwise consecutively numbered. Each exhibit binder shall contain a detailed table of contents. Each party shall serve an exhibit binder containing its respective exhibits on the other party 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 included in the exhibit lists and not previously exchanged shall 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.

5. Witnesses.

a) Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or 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, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

b) The parties are ordered to meet and prepare a joint proposed witness schedule. The proposed witness schedule shall identify the witnesses the party intends to

call, as opposed to witnesses the party may call depending on the flow of the hearing and the evidence. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for their testimony.

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. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once, so the parties shall be required to establish their cases in chief during the first appearance of a witness.

7. Telephonic Testimony. A party seeking to present a witness by telephone shall move in advance for leave to do so; 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. Neither party requested telephonic testimony.

8. Electronic Recording of Hearing.

a. Audio Recording. The following conditions apply to any recording: 1) that OAH's recording is the only official recording; 2) that 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) the operation of 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.

9. Timely Disclosure of Witnesses/Exhibits. The parties are to comply with Education Code section 56505, subdivision (e)(7), that provides for disclosure of witnesses and exhibits "at least" five business days prior to the hearing.

10. Order of Presentation of Evidence. Student shall present her case first followed by Elk Grove. If a witness is to be called by both parties, counsel shall be prepared to ask their questions of the witness – direct and cross so as to prevent the need for the witness to be recalled.

11. Motions. The only pretrial motion that is currently contemplated is Elk Grove's motion for reconsideration of order regarding its motion to dismiss discussed herein. Any other 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.

12. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. 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.

14. 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.

15. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for translation services.

16. Hearing Open/Closed To the Public. At the request of the parent, 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 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 or the morning of the hearing.

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

IT IS SO ORDERED.

DATE: May 12, 2014

/s/

JOY REDMON
Administrative Law Judge
Office of Administrative Hearings