BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019051216

ORDER FOLLOWING PREHEARING CONFERENCE

On August 23, 2019, Administrative Law Judge Robert G. Martin of the Office of Administrative Hearings held a telephonic prehearing conference. The Administrative Law Judge will be referred to as an ALJ. The Office of Administrative Hearings will be referred to as OAH. The telephonic prehearing conference will be referred to as a PHC.

Hamlet Yarijanian, Attorney at Law, appeared on behalf of Student. Marcia Brady, Attorney at Law, appeared on behalf of Bellflower Unified School District, which will be referred to as Bellflower. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on September 10, 11 and 12, 2019, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM on the first day of the hearing and at 9:00 AM on all other days, unless otherwise ordered.

HEARING LOCATION

The hearing will be held at Bellflower's offices located at 16703 South Clark Avenue, Bellflower, CA 90706.

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.

Bellflower's facilities shall fully comply 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 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. Districts are required to file written certification with OAH that their facilities comply with these laws.

Bellflower filed the required certification. Bellflower shall notify OAH within three business days of the date of this Order if it is unable to provide facilities that comply with the laws governing accessibility of government facilities to persons with disabilities.

Before the beginning of the hearing, Bellflower shall ensure that the hearing room is configured into a courtroom setting and shall contain:

- a table for Student and his representatives;
- a table for Bellflower's legal representative and special education representative;
- a table for the witness;
- a table for the ALJ, near an electrical outlet with a chair that adjusts to an appropriate height for typing at the table provided; and
- water and tissue available for the participants.

The same hearing room shall be used for each day of hearing and shall be available at least one hour before the beginning of the hearing each day. The hearing room shall be locked following the hearing each night. Bellflower shall ensure that the hearing room and access to it are in compliance with the all laws governing accessibility of government facilities to persons with disabilities.

ISSUES AND PROPOSED RESOLUTIONS

The issues at the due process hearing, and proposed resolutions, as alleged in the complaint and clarified by the parties and the ALJ during the prehearing conference are:

ISSUES

1. Did Bellflower fail in its "child find" obligation from May 29, 2017 to the filing of the complaint, by failing to identify Student as a child with a disability potentially requiring special education, and failing to conduct a comprehensive psycho-educational assessment of Student, when Student's academic and behavior struggles indicated that Student was in need of special education services?

2. Did Bellflower deny Student a free appropriate public education by failing to provide Parent a special education assessment plan within 15 days of receiving Parent's August 21, 2018 email regarding Parent's requests for assistance to get Student an individualized education program?

PROPOSED RESOLUTIONS

Student's proposed resolution is an order from OAH that directs Bellflower to fund an independent comprehensive psychoeducational evaluation of Student and fund 240 hours of compensatory education for Student from a non-public agency, and provides such other and further relief as the hearing judge may deem just and proper.

EXHIBITS

BINDERS

Student anticipated presenting approximately 16 exhibits at hearing. Bellflower anticipated presenting approximately 35 exhibits at hearing. Before the hearing, each party shall pre-mark its Exhibits and place them in three-ring binders for use at the hearing. Exhibit binders shall include a tab for each exhibit. Each binder shall contain a copy of all documents, including all assessments completed by that date and recommendations based on the assessments, that the parties intend to use at the hearing. Each binder shall also contain a detailed table of contents which clearly identifies the tabs and documents. The ALJ and witnesses must be able to easily turn to exhibit tabs and to turn pages in the binders. Multiple binders may be submitted if necessary.

TAB AND PAGE NUMBERS

The parties shall place a letter followed by a number on each tab to identify each exhibit. Student shall use the letter S before the number to identify Student's exhibits. Bellflower shall use the letter D before the number to identify Bellflower's exhibits. For example, S-1 means Student's exhibit tab 1 and D-1 means Bellflower's exhibit tab 1. Each page of each binder shall be numbered consecutively from the first page of the first exhibit to the last page of the last exhibit in the binder. Parties may use a Bates-stamp type system for numbering.

CONTENT

Each exhibit shall consist of one document. Separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Documents offered as evidence to support a request for reimbursement must be separated by vendor and should be internally chronological where possible. Exhibits in the binders should be in chronological order.

Parties should include resumes or curriculum vitae for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

Bellflower's binder shall include a color copy of the school calendar for each school year in question and shall have witnesses available to explain the calendar if necessary.

COPIES OF BINDERS

The parties shall serve copies of their evidence binders on each other at least five business days before the hearing, as required by Education Code section 56505, subdivision (e)(7). The parties shall exchange copies of their exhibit binders on or before 5:00 PM on Tuesday, September 3, 2019. Each party reserves the right to present additional documents for purposes of rebuttal or impeachment. In addition to their own copy of their exhibit binder, and the copy exchanged with the other party, each party shall bring two additional sets of the binders containing their exhibits to the hearing. One set will be used by the ALJ, and the other set will be used by witnesses. The parties may not serve exhibits on OAH before 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.

WITNESSES

Student anticipates presenting approximately nine percipient witnesses at hearing, and no experts. Bellflower anticipated presenting approximately 18 percipient witnesses, five of whom are also expected to testify as expert witnesses. Each party is responsible for producing its own witnesses unless otherwise ordered by the ALJ. Parties shall make witnesses under their 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.

The parties shall serve copies of their final witness lists on each other at least five business days before the hearing. This exchange is required by Education Code section 56505, subdivision (e)(7). The parties shall exchange copies of their final witness lists on

or before 5:00 PM on September 3, 2019, 2019. By 5:00 p.m. on Wednesday, September 4, 2019, Bellflower will inform Student of the identity, and available contact information (including last known address), of any witness identified by Student as an employee of Bellflower who is no longer a Bellflower employee. Neither party shall be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subd. (h), empowers the ALJ to set a reasonable limit on the length of the hearing after consideration of four factors. The first two factors are the issues to be heard and the complexity of facts to be proven. The second two factors are the ability of the parties or their representatives to present their respective cases and the parties' estimates of the time needed to present their cases.

MEET AND CONFER

The parties are encouraged to review and shorten their witness and exhibit lists before the hearing. Evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

The parties are ordered to meet and confer on Thursday, September 5, 2019 at10:00 AM to discuss the schedule of witnesses for the hearing, and to review their exhibit lists and eliminate duplicate exhibits from the exhibit binders to be used at hearing. The parties may also discuss whether they can produce a written stipulation stating basic facts to shorten the length of time needed for the hearing.

Bellflower's counsel for the hearing will place the telephone call to Student's counsel to initiate the meet and confer. The parties shall coordinate the availability and

order of testimony of witnesses to reach agreement on a witness list for the hearing, ensure that there is a witness available to testify at all times during the hearing, and ensure that the hearing is completed as scheduled. The parties shall discuss a time estimate of the length of each witness's direct examination testimony, and identify those witnesses the party intends to call, as opposed to witnesses the party may call, depending on the flow of the hearing and the evidence.

EVIDENCE PRESENTATION

In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In this case Bellflower requested the hearing and Bellflower's case-in-chief shall be presented first, followed by Student's case.

WITNESS LISTS

On the first day of hearing, before the first witness testifies, the parties shall provide the ALJ with a joint, written, hour-by-hour schedule of all witnesses expected to testify at the hearing. The list shall include an estimate of time for each party's direct and cross-examination. If the parties cannot agree on a witness schedule, each party shall prepare a separate written list, and Bellflower shall have witnesses available to testify. The ALJ and the parties will review the expected duration of direct and cross-examination of each witness, and discuss any scheduling issues for individual witnesses before finalizing the expected witness schedule. The parties shall be prepared at the end of each day of hearing to discuss the witnesses for the next day, and the time the testimony of each such witness is expected to take. The parties shall meet and confer each day of hearing to revise the witness schedule as needed, and provide a revised written copy of the schedule to the ALJ at the start of each hearing day.

SCOPE OF WITNESS EXAMINATION

Each witness shall be called to testify only once, except for rebuttal purposes. All parties shall examine witness on all issues when the witness is first called. Requiring a witness to appear only once takes precedence over the order in which parties presents their case in chief.

TELEPHONIC TESTIMONY

Neither party requested permission to offer 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 request for leave to do so before the hearing, unless the opposing party has stipulated that the witness may appear by telephone. Wen telephonic testimony is permitted, the party offering the witness must provide the witness with a complete set of exhibit binders from all parties before the hearing. The binders must be exact paper copies of all of each party's exhibits. Electronic copies are not acceptable. The party presenting the witness must ensure the witness testifies from a private location with no other persons present. The party offering telephonic testimony must ensure that the witness has telephone equipment that allows clear testimony at a volume that allows clear transmission of what the witness is saying, allows the witness' testimony to make a clear recording, and allows the witness to hear objections and rulings. The party providing the hearing room must ensure that the hearing room has telephone speaker equipment that allows everyone in the room to hear the witness, and allows the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

ELECTRONIC RECORDINGS

Audio Recording

Each party requested permission to make an audio recording of the hearing. Permission to make an audio recording is subject to the ALJ's discretion and based upon certain conditions. Such requests are routinely granted on the following conditions:

- the OAH recording is the only official recording;
- the parties shall turn the recording device on and off at the same time that the ALJ is on and off the record to avoid recording conversations while off the record;
- the recording device will be removed by the party recording during any recess where the party leaves the room;
- operation of the party's recording mechanism will not be allowed to delay the hearing;
- a parties' recording may not be used to prepare the testimony of a witness in the hearing;
- the recording shall not be shared with any non-party, possible witness, or through social media;
- the parties shall not use the recording in any subsequent due process hearing;
- the recording is subject to the same confidentiality as the due process hearing; and
- the parties shall dispose of the unofficial recording when the time for filing an appeal has passed or, in the event of an appeal, when the time for submission of the record on appeal has passed.

Each party's request to make an audio recording of the hearing is granted, subject to these conditions.

Video Recording

No party, witness or anyone else may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

Recordings as exhibits

Neither party proposed to introduce all or part of a recording of an individualized education program team meeting. The ALJ has discretion to admit or exclude evidence in the form of a recording. Any request to submit a recording shall be considered at the time of hearing. The ALJ may grant or deny the request, or grant the request subject to certain conditions. The party offering the recording must establish that all or a part of the recording is relevant. The ALJ may request a transcript of the portion of the recording requested or have the party offering the recording to provide an exact identifiable portion of the recording the party seeks to admit. The identities of any person speaking on the portion of the tape being introduced must be established. An ALJ may allow the opposing party to offer additional portions of a recording to establish the context, or to rebut, the recording.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

MOTIONS

No prehearing motions are pending or contemplated. Any motion that was not filed three business days before the Prehearing Conference, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

STIPULATIONS

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

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, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless the ALJ grants permission otherwise. No food or drinks other than water will be permitted in the hearing room during the hearing.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

Neither party requested an interpreter.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in a mediation or hearing may contact OAH at (916) 263-0880, or send an email to OAHADA@dgs.ca.gov as soon as the need is known. The e-mail should have "Request for Accommodation" in the Subject Line. Additional information concerning requests for reasonable accommodation is available on OAH's

website at: https://www.dgs.ca.gov/OAH/Services/Page-Content/Office-of-Administrative-Hearings-Services-List-Folder/Accommodations-at-OAH.

HEARING OPEN TO THE PUBLIC

At Student's request, the hearing will be open to the public. The parties should inform the ALJ if Student expects any group or members of the press to be present during the hearing. No one may record any part of the hearing, and all electronic devices must be off or silent in the hearing room unless permitted by the ALJ.

Parents should be aware that by opening the hearing, Bellflower employees who are not witnesses, or other people that Parents might not know, may attend the hearing. Persons disclosed on either party's witness list, with the exception of Bellflower's representative, will be excluded from the hearing until their testimony has been completed. The parties shall confer at their September 5, 2019 telephonic meet and confer as to the seating requirements for members of the public. The parties shall immediately notify each other and OAH if they are aware that there will be media attending the hearing.

Government Code, section 11425.20 empowers the ALJ to order an open hearing to be closed or make other protective orders to the extent necessary or proper to ensure a fair hearing in the circumstances of the particular case. The ALJ may also exclude persons whose actions impede the orderly conduct of the hearing, restrict attendance because of the physical limitations of the hearing facility, or take other action to promote due process or the orderly conduct of the hearing. (Tit. 1, Cal. Code Regs., § 1030.)

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 if 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. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 3:00 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.

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 before the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement, the parties shall provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

FAILURE TO COMPLY

The failure to comply with this Order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATED: August 23, 2019

DocuSigned by:

Robert G. Martin
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Administrative Law Judge
Office of Administrative Hearings