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 2020011090

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE

MAY 01, 2020

On May 1, 2020, Administrative Law Judge Cararea Lucier, Office of Administrative Hearings, held a prehearing conference by videoconference. The Administrative Law Judge is called an ALJ; the Office of Administrative Hearings is called OAH; and a prehearing conference is called a PHC.

Hamlet Yarijanian, Attorney at Law, appeared on behalf of Student. Marcia P. Brady, Attorney at Law, appeared on behalf of Bellflower Unified School District. 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 May 12, 2020, though May 14, 2020, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM each day and generally end at 3:30 PM, unless otherwise ordered. The parties anticipate it will take three days to complete the hearing. Additional hearing dates will be discussed with the ALJ during the hearing.

HEARING LOCATION

OAH is authorized to conduct due process hearings by videoconference or telephone. (5 C.C.R. § 3082, subd. (g).) Based on state and federal guidance to address safety procedures due to the novel coronavirus, COVID-19, OAH will conduct the due process hearing by videoconference using the Microsoft Teams application. Unless otherwise ordered, participants are required to appear by videoconference using a webcam and Microsoft Teams.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses, if necessary, to ensure that the witnesses will appear to testify. A party's failure to notify or subpoena a witness to testify will not be considered a showing good cause to continue the hearing.

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 PHC are:

ISSUES

1. Whether Bellflower denied Student a free appropriate public education, commonly referred to as a FAPE, by failing to refer Student for an assessment of a suspected disability in the area of educationally related mental health services.
2. Whether Bellflower denied Student a FAPE by failing to appropriately assess Student in the area of psychoeducation on April 18, 2018.
3. Whether Bellflower denied Student a FAPE, by failing to refer Student for an assessment of a suspected disability in the area of speech and language.
4. Whether Bellflower denied Student a FAPE, by failing to provide Student speech and language as a related service to help support her communicative and pragmatic goals pursuant to Student's April 18, 2018, IEP.
5. Whether Bellflower denied Student a FAPE from January 28, 2018, through April 18, 2018, by not providing Student with goals reasonably calculated to ensure meaningful educational benefits.
6. Whether Bellflower denied Student a FAPE from January 28, 2018, through April 18, 2018, by failing to call an IEP team meeting to revise the goals and services.
7. Whether Bellflower denied Student a FAPE in the April 18, 2018, IEP, as amended on October 3, 2018, by failing to offer her the following, which were needed to sufficiently provide Student with some educational benefit:
    a. appropriate present levels of performance;
    b. appropriate goals in the areas of:

i. social emotional;

ii. transition; and

iii. functional skills; and

c. adequate services in the areas of:

i. counseling;

ii. transition; and

iii. functional skills.

PROPOSED RESOLUTIONS

The resolutions requested by Student include for Bellflower to fund a placement at an appropriate placement or school including private schools and non-public schools; for Bellflower to reimburse Student's parent $5,000 for the independent psychoeducational assessment completed by Abbe Barron, Ph.D.; for Bellflower to reimburse Student's parent $2,650 for the independent Speech and Language assessment completed by Susan Hollar; for Bellflower to fund an independent educationally related mental health services assessment; for Bellflower to fund 200 hours of Speech and Language compensatory services by a non-public agency; for Bellflower to conduct an appropriate and comprehensive transitional assessment; and for Bellflower to fund 320 hours of compensatory academic services by LindamoodBell or a comparable researched based, peer reviewed program.

Bellflower filed its response to Student's complaint on February 19, 2020. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

Each party shall file one copy their exhibits with OAH at 2349 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833, by noon on the Friday before the first day of

hearing. The parties shall also upload their exhibits electronically according to the instructions provided.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged as required by Education Code section 56505, subdivision (e)(7) shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

PAPER COPIES OF EXHIBITS

The paper copies of exhibits shall be shall be pre-marked and bound or placed in three-ring binders before filing with OAH. The exhibits shall contain a detailed table of contents which clearly identifies tabs and the document page numbers.

TAB AND PAGE NUMBERS

The parties must place a letter followed by a number on each tab to identify each exhibit. Student must use the letter S before the number to identify Student's exhibits. Bellflower must 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. Parties may either number each page within each tabbed exhibit or number each page in the binder consecutively beginning with the first page of the first exhibit through the last page of the last exhibit. For example, if there are 100 total pages in the binder the first page of the first exhibit is 1 and the last page of the last exhibit in the binder is 100.

CONTENT

Each exhibit must 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. Exhibits should be in chronological order.

Parties should include resumes or curriculum vitae for each witness who is expected to testify as an expert.

Bellflower's exhibits must include a copy of the school calendar for each school year in question.

ELECTRONIC COPIES OF EXHIBITS

Electronic copies of the exhibits filed with OAH shall be filed by noon on the Friday before the first day of hearing. The electronic copies must be an exact duplicate of the paper copies filed with OAH. OAH will issue a separate Order Setting Procedures for Filing Exhibits Electronically that includes instructions for how to file exhibits electronically.

WITNESSES

The parties shall serve their list of witnesses on each other in compliance with Education Code section 56505. No party shall be permitted to call any witnesses not timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

Parties are responsible for ensuring that all participants are familiar with and follow the Instructions for Joining the Online Due Process Hearing provided with this Order. Participants that have not previously used the MS Teams platform, may also find informative videos available like the one at this link from Microsoft: https://support.office.com/en-us/article/join-a-teams-meeting-078e9868-f1aa-4414-8bb9-ee88e9236ee4.

The parties are responsible for ensuring that witnesses join the virtual hearing room at the designated date and time to testify. Witnesses are required to join the due

process hearing by computer and appear by videoconference unless they do not have the necessary computer equipment. In that situation, the ALJ may permit the witnesses to appear by audio only or by telephone. "Audio only" means using a computer without webcam. Witness ability to attend the hearing by videoconference shall be discussed at the start of the hearing.

Parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Both Parties shall make witnesses under their control reasonably available.

In its Prehearing Conference Statement and during the PHC, Bellflower raised objections to Bellflower staff participating in the hearing, such as that teachers were engaged in distance learning and may not want to appear in a due process hearing via video conferencing.

The California Department of Education explicitly permitted the use of a video or telephonic hearing in California Code of Regulations, title 5, section 3082, subdivision (g). The procedures created by OAH for video hearings comply with Education Code, section 56505, subdivision (e), and California Code of Regulations, title 5, section 3082, subdivision (g). Additionally, OAH has established new subpoenas to compel the attendance of witnesses to testify via videoconference or telephone, and to produce documents. Limits imposed by collective bargaining agreements regarding school district personnel do not apply to a witness subpoenaed to testify as they are commanded by law to appear to testify by OAH, or face sanctions for failure to appear.

Bellflower is hereby ordered to make all district witnesses on Student's witness list available for hearing via video conference. If Bellflower fails to comply with this Order, Bellflower shall be sanctioned as follows: (1) Bellflower shall be prohibited from

cross-examining Student's witnesses that are not on Bellflower's witness list; (2) Failure of Bellflower to make its witnesses available may be considered a violation of Student's procedural rights under Education Code, section 56505, subdivision (f); and (3) All evidentiary inferences will be presumed in favor of Student pursuant to Evidence Code sections 604 and 606.

The parties must schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party will 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 may 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 no later than 5:00 PM on Friday, May 8, 2020, to discuss scheduling witnesses and how much time each witness will take. The parties shall discuss any issues pertaining to the parties, counsel and witnesses appearing by videoconference for hearing and electronically viewing exhibits during the

hearing. The parties should attempt to eliminate duplicate exhibits from their hearing exhibits. The parties shall discuss whether they can produce a written stipulation as to pertinent facts, contentions, resolutions and authenticity and admissibility of documents to shorten the length of time needed for the hearing.

As part of the meet and confer process, Bellflower shall inform Student which proposed witnesses are district employees. Bellflower shall also identify the witnesses on the respective witness lists that require a subpoena, and agree to accept service.

UPDATED PARTICIPANT INFORMATION FORM

Both parties shall have an ongoing obligation to ensure that the information on the Participant Information Form filed with OAH is current, and shall file an updated Form as necessary. The ongoing obligation to ensure that the Participant Information Form filed with OAH is current does not change the parties' statutory obligation to timely disclose their witnesses to the other party(s) at least five business days prior to hearing. The parties must file an updated Participant Information Form to inform OAH of any changes, additions, or deletions, and include the required information no later than 5:00 PM at least two business days before the first day of hearing.

Any contact information provided by Bellflower shall be used by Student for the limited purpose of issuing subpoenas or for contacting the witness(es) for purposes of attending the hearing and shall not be disclosed to any other person(s).

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 Student

requested the hearing and bears the burden of proof. Student's case-in-chief shall be presented first, followed by Bellflower, unless the ALJ orders otherwise.

WITNESS LISTS

The parties must provide a joint proposed witness list to the ALJ on the first day of hearing. The list should include the first and last name of the witness, which party(s) are calling the witness to testify, and include dates and time estimates of each witness' expected testimony. In the event an agreement cannot be reached, each party shall prepare a separate written list. Student must have witnesses available in case there is no agreement.

At the beginning of the hearing, the ALJ and the parties will discuss the length of time anticipated for each witness and scheduling issues for individual witnesses. The ALJ will finalize the witness schedule. Parties must be prepared at the end of each day to discuss the witnesses to be presented the next day and the estimated time for the testimony each witness.

SCOPE OF WITNESS EXAMINATION

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

AUDIO ONLY OR TELEPHONIC TESTIMONY

Whether a witness may appear by audio only or telephone instead of videoconference 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 audio only or telephone shall request permission to do so before the hearing. Any party seeking to present a witness who cannot access exhibits electronically must inform the ALJ at the beginning of the hearing.

ELECTRONIC RECORDINGS

AUDIO RECORDING

A party may request 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. The conditions are:

- the OAH recording is the only official recording;
- participants shall not use Teams to record the hearing;
- the parties shall turn their 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;
- operation of the party's recording mechanism will not be allowed to delay the hearing;
- a parties' recording may not be given, provided or played to a witness, or potential witness; and
- the recording is subject to the same confidentiality as the due process hearing;
- use of the chat function in the videoconference is prohibited and shall not be part of the official record;
- participants shall not take screenshots of the videoconference, or share or publish any portion of the videoconference or audio recording.

Both Party's request 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 or stream live through any means.

RECORDINGS AS EXHIBITS

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. Documents offered as evidence to support a request for reimbursement must be separated by vendor.

MOTIONS

During the PHC, Bellflower raised objections and concerns regarding video due process hearings. Neither the United States Department of Education nor the California Department of Education have issued official notice suspending special education due process hearings in response to the Covid-19 pandemic. None of the Executive Orders from the California Governor has suspended administrative hearings as non-essential. Also, in response to Executive Order N-38-20, that on March 30, 2020 that Chief Justice Tani G. Cantil-Sakauye suspended any rule of court that prevented the use of technology to conduct judicial proceedings to protect the health and safety of all participants. As such, the hearing will proceed via video conference as described in this Order, and OAH's General Order for Due Process Hearings and Mediations and Closure of Public Counters, which was served on the Parties on April 22, 2020.

Additionally, during the PHC Bellflower moved for a continuance. Any request for a continuance must be made in writing to OAH. Any motion that was not filed three business days before the PHC 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, resolutions and authenticity and admissibility of documents are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in writing prior to the start of the hearing.

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

All participants to the videoconference should observe the same decorum as in an in-person due process hearing. Counsel, all parties, and all witnesses must conduct

themselves in a professional and courteous manner at all times. Cellular phones, telephones and computer notifications must be shut off or set to silent during the hearing unless the ALJ grants permission otherwise. Counsel, parties, and witnesses shall appear from a private location, unless otherwise ordered. Participants should take reasonable efforts to minimize background noise maintain adequate room lighting. Use of virtual background images are at the discretion of the ALJ. Witnesses are prohibited from reading exhibits, documents, notes, text messages, telephones or computers while testifying, unless permitted to do so by the ALJ. Parties, counsel and witnesses are prohibited from passing notes to, exchanging electronic messages with, or signaling the witness in any way while the witness is testifying.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

A Spanish speaking language interpreter is required for the testimony of Student's grandmother. OAH will provide the interpreter. Student shall inform OAH by noon of May 6, 2020, when Student's grandmother will testify so OAH may order the 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 OR CLOSED TO THE PUBLIC

The hearing is closed to the public. Special Education hearings are closed to the public unless Student requests the hearing to be open to the public.

Student's counsel requested the opportunity to discuss with Student's family whether they wanted to open the hearing to the public. An ALJ may 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.) 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. Currently, amid COVID-19 concerns, all hearings are being conducted via videoconference without observers present or participating in the videoconference. In the event Student elects to open the hearing to the public, OAH will provide the hearing recording upon request.

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 4:00 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 and processed 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.

DocuSigned by:
Cararea Lucier
761F5E42057B4A1...

Cararea Lucier

Administrative Law Judge

Office of Administrative Hearings