

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

PARENTS ON BEHALF OF STUDENT,

v.

MANHATTAN BEACH UNIFIED SCHOOL DISTRICT.

CASE NO. 2006100144

DECISION BY SETTLEMENT PURSUANT TO SECTION 2087 OF TITLE 5 OF  
THE CALIFORNIA CODE OF REGULATIONS

December 3, 2007

Steven Wyner, Esq., of Wyner & Tiffany, represented Student.

Christopher J. Fernandes, Esq., of Fagen Friedman & Fulfrost, represented the  
Manhattan Beach Unified School District (District).

PROCEDURAL HISTORY

On October 4, 2006, Student filed a Request for Due Process. On October 19, 2006, the District filed a Notice of Insufficiency asserting that Student's complaint did not meet the requirements of 20 U.S.C. § 1415(b)(7)(A). On October 26, 2006, the Special Education Division of the Office of Administrative Hearings for the State of California (OAH) issued a ruling finding Student's complaint partially insufficient and giving

Student leave to amend. On November 7, 2006, Student filed his First Amended Complaint. On November 22, 2006, the District filed another Notice of Insufficiency. On November 29, 2006, OAH found Student's First Amended complaint sufficient under 20 U.S.C. § 1415(b)(7)(A), and denied the District's motion to dismiss.

On or about May 8, 2007, counsel for the parties filed a Stipulation to allow Student to file a Second Amended Complaint. On May 29, 2007, OAH entered an Order Granting Joint Stipulation to Allow Student to File a Second Amended Complaint.

The matter was thereafter set for hearing scheduled to commence on September 26, 2007. A Pre-Hearing Conference was held on September 12, 2007, and an Order Following Pre-Hearing Conference was issued by Administrative Law Judge John A. Thawley on September 13, 2007 (Prehearing Conference Order).

## STIPULATION OF THE PARTIES

The parties, by and through their counsel of record, have agreed to settle this due process proceeding on the condition that OAH enters this Decision Pursuant to Section 3087 of Title 5 of the California Code of Regulations (Decision).

Upon entry of this Decision by OAH, all issues asserted by Student, or which could have been asserted by Student, in this due process proceeding, will be resolved, subject to the exceptions set forth below.

The District stipulates that upon entry of this Decision by OAH, Student shall have achieved a material alteration of the legal relationship between Student and the District, and should therefore be designated as a "prevailing party" in this due process proceeding. The Parties stipulate that determination(s) made pursuant to California Education Code section 56507(d) are not determinative of the degree to which Student

has succeeded in this matter. The District further stipulates that Student and his Parents may seek to recover reasonable attorneys' fees incurred in connection with this due process proceeding by filing a lawsuit in U.S. District Court or a California Superior-Court.

The parties have stipulated that they have not resolved, settled or waived, and the entry of this Decision does not resolve, settle or waive, the following issues, claims, and/or defenses (Unresolved Issues):

Any claims related to acts or omissions that occurred after June 21, 2007 (i.e., the last day of the regular school year 2006-2007), including, but not limited to, acts or omissions that occurred during the extended school year that occurred in June, July or August of 2007.

Any claims arising from the District's decision, made before June 21, 2007, to promote Student to 9th Grade and not retain him in 8th Grade.

Any claims related to the right of Student and his Parents to recover reasonable attorneys' fees as a "prevailing party" in this due process proceeding, including reasonable attorneys' fees and costs incurred in connection with any lawsuit filed to recover attorneys' fees incurred in this due process proceeding.

Any claims or defenses (other than jurisdictional claims or defenses), which may be asserted by the District to challenge or contest the reasonableness and/or amount of reasonable attorneys' fees and costs to which Student and his Parents are entitled under 20 U.S.C. § 1415(i)(3)(B), including, but not limited to, challenging the degree to which Student has succeeded in this matter.

The parties have stipulated that no party is barred from requesting a due process hearing, or filing or defending against a lawsuit instituted to resolve or adjudicate any of the Unresolved Issues.

The parties, by and through their counsel of record, stipulate to the entry of the following "Factual Findings," "Legal Conclusions," "Order," and designation of "Prevailing Party."

## FACTUAL FINDINGS

1. The Prehearing Conference Order identified Student's Issues for Hearing as limited to the following:
  - 2003-2004 School Year
    1. Did the District fail to assess Student in the area of assistive technology (AT)?
    2. Did the District fail to provide Student with a free, appropriate public education (FAPE) by:
      - a) failing to develop appropriate goals and objectives in the area of written expression?
      - b) failing to provide Student with the direct services needed to achieve his social-emotional and pragmatic goals and objectives?

- 2004-2005 School Year
  3. Did the District fail to assess Student prior to making a recommendation for a change in placement?
  4. Did the District fail to assess Student in the area of AT?
  5. Did the District fail to provide Student with a FAPE by:
    - a) failing to provide placement in the least restrictive environment (LRE)?
    - b) failing to develop appropriate goals and objectives in the area of written expression?
    - c) failing to make a good faith effort for Student to achieve his social-emotional and pragmatic goals and objectives?
  
- 2005-2006 School Year
  6. Did the District fail to provide Student with a FAPE by:
    - a) failing to develop appropriate goals and objectives in the area of written expression?
    - b) failing to perform a functional analysis assessment (FAA) and to develop a positive behavior intervention plan (BIP)?
    - c) failing to provide an emergency behavior report and to follow emergency intervention procedures (pursuant to Cal. Code Regs., tit. 5, § 3052)?

- d). failing to refer Student to the Department of Mental Health Services (DHMS)?
  - e). failing to implement portions of Student's behavior support plan (BSP)?
- 2006-2007 School Year
7. Did the District fail to provide Student with a FAPE by:
    - a) failing provide an appropriate placement that included the appropriate services and support?
    - b) failing to perform a FAA and develop a BIP?
    - c) pre-determining placement, and failing to allow meaningful parent participation, resulting in an offer of inappropriate placement?
    - d) failing to consider the results of an Independent Educational Evaluation (IEE) by Karen Schnee?
  2. The Prehearing Conference Order identified Student's Contentions as follows:
    - a) As to the 2003-2004 school year, Student asserts that he had a long history of struggling in the areas of written expression, but the District did not propose an AT assessment to assist him in that area. Instead, the District made accommodations and modifications to limit his written output. Student asserts that the written expression goals and objectives in his individualized education program (IBP)

failed to address important fifth grade writing content standards, such as expository, persuasive and descriptive writing, which were problem areas for him. Student claims that the triennial assessment reflected social-emotional concerns, and that his behavior was a problem. However, while his IBP included pragmatic and social-emotional goals, there was no service provider to help him meet those goals, nor did the District provide counseling services or social skills training groups.

- b) As to the 2004-2005 school year, Student contends that his placement was changed, without a reassessment, from a general education literature class to a resource specialist program (RSP) literature class, which was not the LRE. Student contends that, despite the fact that his IEP noted that writing was very laborious for Student, and he continued to struggle in the area of written expression, he was not assessed in the area of AT until February 2005. However, the AT assessment results were not discussed until an IEP meeting on May 26, 2005. Student also asserts that the written expression goals and objectives in his IEP failed to address important sixth grade writing content standards, such as narrative, expository, persuasive and descriptive writing, which were problem areas for him. In addition, the IEP did not contain a goal in the area of organizational patterns and comparing and contrasting information. Student claims that he did not meet the social-emotional goals from the December 2003 IEP, and anxiety and behavior remained a problem, yet he did not receive individual counseling or social skills training.

- c) As to the 2005-2006 school year, Student claims that he continued to struggle in the area of written expression. However, the written expression goals and objectives in his IEP failed to address important seventh grade writing content standards, and there was no indication as to whether he met the two sixth-grade goals in his IEP. Student asserts that he experienced escalating anxiety and an inability to perform academically. Student claims he was involved in an altercation on November 21, 2005, that his RSP teacher noted that he was hitting and grabbing classmates without any reason, yet his parents were not notified, nor did the District create an incident report or recommend that a FAA be performed, in order to create a BIP. Student claims that he was involved in a fight on December 2, 2005, where he continued to fight after a school security guard unsuccessfully tried to physically restrain him. District filed an incident report and suspended him for two days, but the District did not document the incident report appropriately, failed to hold an IEP team meeting, and failed to determine the need for a FAA to develop a BIP. Student also claims that the District failed to implement his BSP, for example, by failing to follow the steps outlined in the BSP to encourage him to remain in the classroom. Student also threatened suicide, which is part of the basis for his claim that the District should have referred him to the DHMS.
- d. As to the 2006-2007 school year, Student alleges that District personnel communicated via email prior to the IEP team meeting, determined that the District would offer a placement at Village

Glen, a non-public school (NPS), and refused to consider Student's parents' request for placement at the Center for Learning Unlimited. However, Student was not accepted at Village Gleij. As a result, Student attended a District school and "almost immediately began to experience problems." Student alleges that he engaged in problematic behaviors, which the District simply allowed - rather than consulting with a behavior expert. The District offered a different NPS, but Student's parents rejected the offer. Student claims that his behavior continued to escalate, but the District responded to Student's parents' requests for assistance by referring to the 2005 BSP. Student claims that the FAA done by the District did not adequately identify all of the antecedents to his inappropriate behaviors, and did not identify the functions of such behaviors. Student claims that the District decided to rely on the BSP, because his inappropriate behaviors did not warrant a BIP. Student's parents disagreed with the FAA and requested an IEE. The IBE recommended immediate ABA, but the District did not provide it. In addition, Student asserts that he was failing academically due to poor attendance, and that his handwriting deficits had "gone virtually ignored."

3. The Prehearing Conference Order identified Student's Proposed Resolutions, over the District's objection thereto, which was overruled in the Prehearing Conference Order, as follows: Student seeks reimbursement for all private educational services, including Lindamood-Bell and Autism Partnership; IEEs in all areas of educational deficit, including AT, academics (specifically writing and math), and a FAA to be conducted by Autism

Partnership or another independent behavioral consultant qualified to conduct a FAA; compensatory education to address Student's educational deficits, particularly in academics, behavior intervention, social skills, and emotional functioning, including District staff trained in Applied Behavioral Analysis (ABA), or an order for the District to contract with Autism Partnership for such staff; contract with Autism Partnership for consultation services; round-trip transportation to all of the non-public agencies that provide compensatory education; and prevailing party status.

## LEGAL CONCLUSIONS

4. Section 3087 of Title 5 of the California Code of Regulations provides that: "Notwithstanding Government Code section 11415.60 of the Administrative Procedure Act, a decision by settlement may be issued on terms the parties determine are appropriate so long as the agreed-upon terms are not contrary to the law:"
5. OAH does not have jurisdiction to determine the amount of reasonable attorneys' fees to which Student may be entitled.

## ORDER

1. Commencing November 26, 2007, the District shall provide Student with Compensatory Education by providing Student with (and paying for) either a private credentialed teacher or a District special education teacher, to be chosen by Parents in their sole and absolute discretion, to provide 1:1 instruction to Student to address his unique needs in the area of written

expression and any other area of academic deficit, for five (5) hours per week through the end of the extended school year that occurs in 2008 (2008 ESY).

2. Commencing November 26, 2007, the District shall provide Student with Compensatory Education by engaging the services of ATEC to train Student on an "Alpha Smart." ATEC shall determine the frequency and duration of such consultation and training.
3. Commencing November 26, 2007, the District shall provide Student with Compensatory Education by providing keyboarding and computer training to him on a computer. ATEC shall determine the frequency and duration of such training. Such training shall be provided by District staff qualified to provide, and experienced in providing, such instruction.
4. The District shall provide Student with Compensatory Education by reimbursing Student's Parents for the cost of sixty-six hours of social skills training, incurred between September 30, 2007 and the end of the 2009-2010 school year, to be provided one and a half (1½) hours per week or six (6) hours per month by a nonpublic agency to be selected by Parents in their sole and absolute discretion.
  - a. The hourly rate for such reimbursement shall be equal to the hourly rate paid by the Parents to the selected nonpublic agency, except that it shall not exceed \$65 per hour, for such services during the 2007-2008 school year.

- b. The District will provide Student with roundtrip transportation from his home and/or school (at his Parents' election) to the nonpublic agency selected by Parents to provide Student with social skills training.
  
- 5. The District shall provide Student with Compensatory Education by engaging (and paying for) a certified nonpublic agency (NPA) to provide behavioral intervention services as set forth below. The NPA: must be certified by the California Department of Education to provide behavioral intervention services; must have prior experience in conducting a "functional analysis assessment" (FAA); and, must not have provided services to Student, either privately or through the District, within the past four ( 4) years.
  - a. The NP A shall: conduct a FAA of Student in accordance with the provisions of Section 3052 of Title 5 of the California Code of Regulations; and, complete the FAA and deliver copies of the written assessment report to the District and the Parents on or before January 11, 2008.
  
  - b. The NPA shall develop a "behavioral intervention plan" in accordance with Sections 3001 and 3052 of Title 5 of the California Code of Regulations (BIP), which shall include, but not necessarily be limited to;
    - i. A summary of relevant and determinative information gathered from the functional analysis assessment;

- ii. An objective and measurable description of the targeted maladaptive behavior(s) and replacement positive behavior(s);
- iii. The individual's goals and objectives specific to the behavioral intervention plan;
- iv. A detailed description of the behavioral interventions to be used and the circumstances for their use, including the factors set forth in 5 C.C.R. Section 3052( d);
- v. Specific schedules for recording the frequency of the use of the interventions and the frequency of the targeted and replacement behaviors; including specific criteria for discontinuing the use of the intervention for lack of effectiveness or replacing it with a specified alternative;
- vi. Criteria by which the procedure will be faded or phased-out, or less intense/frequent restrictive behavioral intervention schedules or techniques will be used;
- vii. Those behavioral interventions which will be used in the home, residential facility, work site or other noneducational settings; and
- viii. Specific dates for periodic review by the IBP team of the efficacy of the program.

- c. The District shall schedule an IEP meeting to be held on or before January 18, 2008. The District shall ensure that the individual(s) responsible for conducting the FAA and preparing the BIP attends that IBP meeting.
  - d. In order to ensure the independence and integrity of the FAA, the parties shall provide each other with copies of all written documentation contemporaneously with their submission to the NPA for consideration in connection with the FAA, and shall refrain from making any recommendations to the NPA concerning the frequency, location and duration of 1:1 behavioral services, consultation and/or supervision to be provided by the NPA, and the qualifications which individuals must hold to provide such services.
  - e. Commencing January 28, 2008, the District shall implement the BIP as recommended by the NPA for a period of forty-four ( 44) weeks when school is in session (including the, extended school year (ESY) if Student's Parents elect to enroll him in ESY). The Parents are deemed to have consented in advance to the implementation of the BIP as proposed by the NPA. Nothing herein shall preclude a party from requesting a due process hearing to challenge the appropriateness of the FAA and/or the BIP; provided, however, no party shall request a due process hearing until the BIP has been implemented for thirty (30) school days.
6. The District shall provide Student with Compensatory Education and shall reimburse Student's Parents for educationally related expenses incurred on

or before June 21, 2007, by paying up to Sixty Five Thousand Dollars (\$65,000) to be used for Student's education in his Parents' sole and absolute discretion between the date that this Decision is entered by OAH, and August 31, 2009, as follows:

- a. To fund, within forty-five (45) calendar days of Parents' written request for funding, educational assessments and evaluations, educational instruction and remediation, behavior intervention services (including, but not limited to social skills training and counseling), educationally related materials and equipment (including, but not limited to, books, school supplies, computer hardware and software), "assistive technology services" (as that phrase is defined in 20 U.S.C. § 1401(2)), "related services" (as that phrase is defined in 20 U.S.C. § 1401(26)), and any transportation related to the foregoing.
  - b. To reimburse Parents for educationally related expenses incurred on or before June 21, 2007, and/or after the date of entry of this Decision, paid by them for assessments and/or evaluations of Student, educational instruction and remediation, behavior intervention services (including, but not limited to social skills training and counseling), educationally related materials and equipment (including, but not limited to, books, school supplies, computer hardware and software), "assistive technology services," "related services," and any transportation related to the foregoing.
7. The District shall reimburse Parents for educationally related expenses incurred consistent with Paragraphs 4 and 6 of this Order within forty –

five (45) calendar days of the District's receipt of appropriate evidence supporting the services provided and payment by Parents for such educationally related expenses (i.e., signed provider statements, canceled checks, paid invoices, and/or credit card receipts)

8. If Student or his Parents file a lawsuit to recover reasonable attorneys' fees incurred by them in connection with this matter in a U.S. District Court or a California Superior Court, the District shall not challenge the jurisdiction of such court to adjudicate such lawsuit.

## PREVAILING PARTY

Pursuant to California Education Code section 56507(d), Student is designated as a prevailing party in this due process proceeding.

## RIGHT TO APPEAL THIS DECISION

Pursuant to California Education Code section 56507(d), Student is designated as a prevailing party in this due process proceeding.

## RIGHT TO APPEAL THIS DECISION

The parties stipulate that neither party shall have the right to appeal this Decision. A hearing in this matter was not held. This Decision was prepared by the parties and submitted to OAH for review. Having reviewed and considered this Decision, the Presiding Administrative Law Judge has determined that the agreed upon terms to which the parties have stipulated, which are set forth herein, are not contrary to law.

SHERIANNE LABA

Presiding Administrative Law Judge

Special Education Division

Office of Administrative Hearings