

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:	
BELLFLOWER UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2012060009 (Primary)
v.	
PARENT ON BEHALF OF STUDENT.	
PARENT ON BEHALF OF STUDENT,	OAH CASE NO. 2012060028 (Secondary)
v.	
BELLFLOWER UNIFIED SCHOOL DISTRICT	ORDER (1) FOLLOWING PREHEARING CONFERENCE AND (2) DENYING STUDENT'S MOTION FOR CHANGE OF VENUE

On January 7, 2012, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Alexa J. Hohensee, Office of Administrative Hearings (OAH). Eric Bathen, Attorney at Law, appeared on behalf of the bellflower Unified School District (District). Bruce Bothwell, Attorney at Law, appeared on behalf of Student. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on January 14-17, 2013, and continuing day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin each day at 9:30 a.m. and end at 5:00 p.m., with the exception of the first day of hearing, on which day the hearing shall begin at 1:30 p.m., unless otherwise ordered.

Counsel for both parties are ordered to make reasonable efforts to clear their calendars for the week of January 22, 2012, in order that, if the hearing in this matter is not completed by January 17, 2012, the hearing can continue day to day without interruption. This hearing will be given precedence over other due process hearings scheduled to begin before OAH after January 14, 2012. If counsel have an appearance before other tribunals, they should be prepared on the first day of hearing to provide the ALJ hearing the matter

with an accurate time estimate, in order that any delay in hearing this matter can be minimized to a few hours or a partial day. Counsel shall be prepared to discuss the need for additional days on the first day of hearing. Counsel shall meet and confer to review their respective calendars, and shall have discussed this issue with their respective clients, and be prepared to calendar additional days before the hearing begins.

The hearing shall take place at the District's offices located at 16703 Clark Avenue, Bellflower, California 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.

2. Issues and Proposed Resolutions. The issues at the due process hearing are listed below¹.

For the District:

(1) Whether District, in the individualized education program (IEP) of May 3, 2012: (a) offered Student a free appropriate public education (FAPE) in the least restrictive environment (LRE), and (b) is required to contract with the nonpublic agency (NPA) serving Student at the time of that IEP to provide behavior services in that IEP.

For the Student:

(2) Whether District denied Student a FAPE at the IEP team meetings of May 3, May 8 and May 11, 2012, by:

- (a) Failing to have a special education teacher present at each meeting;
- (b) Failing to identify the provider of behavior services;
- (c) Predetermining the placement offer;
- (d) Convening the May 11, 2012 meeting without the consent of Student's parents;
- (e) Failing to offer Student a specific placement at the May 11, 2012 meeting;
- (f) Convening a manifestation determination meeting at the May 8, 2012 meeting;
- (g) Failing to offer the closest general education placement to Student's home at the May 11, 2012 meeting;
- (h) Providing misinformation to Student's parents at the May 8, 2012 meeting regarding the impact of a manifestation determination;

¹ During the course of the PHC, both District and Student withdrew issues as stated in their respective due process hearing requests. The issues listed in this order are those remaining for hearing, and have been restated for purposes of clarity.

- (i) Failing to offer to conduct a functional behavior assessment after finding Student's behavior to be a manifestation of his disability;
- (j) Assigning school staff to follow Student throughout his school day without the consent of Student's parents;
- (k) Continuing Student's suspension from school after determining that his behavior was a manifestation of his disability; or
- (l) Assigning staff with insufficient training and supervision to implement Student's IEP.

3. 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, but shall place the letter "S" or "D" in front of the exhibit to designate if it is a Student or District exhibit (for example, "S-5, S-6, or D-1, D-2"). Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. 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 written declaration under penalty of perjury, and the ALJ rules that it is admissible.

4. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its 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. 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.

The parties are ordered to exchange amended witness lists, in light of the discussions and withdrawal of issues that took place during the PHC, no later than 5:00 p.m. on Wednesday, January 9, 2012. The parties are also ordered to meet and confer by 12:00 noon, on Friday, January 11, 2012 as to the schedule of witnesses, to coordinate the availability and order of testimony of witnesses, to ensure that there is a witness available to testify at all times during the hearing, and to ensure that the hearing is completed as scheduled.

The witness schedule will be finalized at the commencement of the due process hearing.

The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

The parties shall attempt to reach agreement on a witness list for the first day of hearing. The District shall have witnesses available in case agreement on a witness list is not reached. 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 time the testimony of each such witness is expected to take.

5. 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. If a witness is to be called by more than one party, the party first conducting cross-examination of that witness shall include in that examination all questions intended for the witness on direct examination, in order that each witness need only appear and testify once.

6. 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 move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. The proponent of the witness 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. The witness shall provide testimony over a clear telephone line, from a private location and without other persons present, in order to preserve the confidentiality of the proceedings. No witness will be heard by telephone unless all these requirements have been fulfilled.

7. Order of Presentation of Evidence. This matter is consolidated, and the District's matter has been designated as the primary case. The District will present its evidence first, followed by Student.

8. Motions. Student moves to change the location of the due process hearing to the OAH offices in downtown Los Angeles, contending that the current location is not a "neutral site" because the relationship between Student's parents and District is acrimonious, and the District offices are decorated with plaques and posters lauding the District's staff and programs. District opposes on multiple grounds, including the increased costs of driving and parking downtown, as well as the additional time the District staff who are witnesses would be away from the classroom. District offers to cover any plaques or posters that make Student's parents uncomfortable.

Due process hearings "shall be held at a time and place reasonably convenient to the parent or guardian and the child involved." (Ed. Code, § 56505, subd. (b); 34 C.F.R. 300.515(d).) "Reasonably convenient" does not mean that the hearing may be located anywhere a parent chooses. Due process hearings are generally scheduled in the offices of the school district as the pupil generally resides within the district's coverage area. If the parent requests an alternative location that appears reasonably convenient, the district may

show prejudice and the equities may be weighed. Due process hearings must be fair and conducted so that the parties can exercise their rights as provided for by law. (See Ed. Code § 56505, subds. (c) & (e).)

Student's motion is not supported by any detailed information or evidence, and at the PHC, Student's counsel did not identify any inappropriate conduct by District staff towards Student's parents beyond the allegations of procedural errors contained in Student's due process request. A due process hearing is an adversarial process, the nature of which cannot be avoided by a change of venue. Most school districts promote their staff and programs with public displays at their offices, and if Student's parents believe that any particular display at the hearing location is intended to discomfort them or to influence the hearing judge, they may raise their concerns at that time. If the ALJ finds merit in Student's contention, the ALJ can order such displays covered or removed for the duration of the hearing without a change of location.

OAH is a neutral agency retained by the State of California to hear special education disputes, and Student has not brought a challenge to the ALJ assigned to hear this matter for cause. Therefore, Student can expect a fair opportunity to present evidence and argument to make his case, and an impartial decision on questions of fact and law. Student has failed to establish a basis for concern about the neutrality of the hearing location, or that the currently assigned venue is inconvenient to Student or his Parents. Accordingly, the motion to change location is denied.

Any prehearing motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made prior to or during the prehearing conference.

9. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. The parties shall meet and confer regarding stipulations that will narrow the issues at hearing, particularly in light of District's representation that its offer of FAPE is embodied in the May 3, 2012 IEP, that it is not contending that the IEP calls for provision of behavior services by other than an NPA, and that the behavior intervention plan referenced in District's first amended request for due process hearing is no longer at issue. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

10. 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.

11. 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.

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

13. 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.

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

IT IS SO ORDERED.

Dated: January 09, 2013

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings