

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

ROSEVILLE JOINT UNION HIGH
SCHOOL DISTRICT .

OAH CASE NO. 2013060883

ORDER FOLLOWING PREHEARING
CONFERENCE

On November 18, 2013, a telephonic prehearing conference (PHC) was held before Presiding Administrative Law Judge (ALJ) Bob N. Varma, Office of Administrative Hearings (OAH). F. Richard Ruderman, Attorney at Law, appeared on behalf of Student and Parents (Student). Heather M. Edwards, Attorney at Law, appeared on behalf of the Roseville Joint Union High School District (District). 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 December 4 through 6, and 9 through 10, 2013, and continuing day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin each day at 9:00 a.m., with the exception of December 4, 2013, when it shall begin at 9:30 a.m. and December 9, 2013, when it shall begin at 1:30 p.m., unless otherwise ordered. The hearing shall take place at District's offices located at 1750 Cirby Way, Roseville, CA 95661, subject to the ruling on a pending motion for change of venue, discussed further below.¹

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.

¹ The hearing room shall be capable of being set up similar to a courtroom setting with one table for Student and his representatives; one table for District and its representatives; one table for the witness; and one table, near an electrical outlet, for the ALJ. District shall ensure that tissues and water are provided for all parties and witnesses.

2. Issues and Proposed Resolutions. The issues at the due process hearing are those set forth in Student's complaint, PHC statement, discussed and modified at the PHC , and listed below.²

a) *Issue No. 1:* Did District deny Student a free appropriate public education (FAPE) during the 2012-2013 school year by failing to:

1. timely provide an appropriate educational placement in the least restrictive environment (LRE);
2. provide an appropriate reading program;
3. provide appropriate accommodations and modifications;
4. provide measurable goals in all areas of need;
5. provide assistive technology;
6. provide an appropriate transition plan; and
7. implement Student's individualized education program (IEP)?

b) *Issue No. 2:* Did District deny Student's procedural rights, thereby resulting in a denial of FAPE during the 2012-2013 school year by:

1. failing to maintain notes of the IEP team meetings;
2. failing to include parental input in the IEP development process;
3. providing false information to parents concerning diploma requirements;
4. failing to timely conclude IEP team meetings and failing to provide a clear offer of FAPE;
5. failing to provide an assessment plan within 15 days of request; and
6. failing to provide progress reports on goals?

c) *Issue No. 3:* Did District deny Student a FAPE for the 2013-2014 school year by failing to:

1. provide an appropriate reading program;
2. provide adequate accommodations and modifications;
3. provide measurable goals in all areas of need;
4. provide assistive technology;

² While some sub-issues appear general as set forth herein, they are limited to the specific violations alleged in Student's complaint.

5. provide an appropriate transition plan; and
 6. provide placement in the LRE?
- d) *Issue No. 4: Did District deny Student a FAPE by failing to adequately assess Student by:*

1. failing to timely conduct an assistive technology assessment;³
2. failing to conduct a speech and language evaluation;
3. failing to conduct a transition assessment; and
4. failing to conduct a reading assessment?

e) *Proposed Resolutions:* Student lists a number of proposed resolutions, subject to proof at hearing, which include compensatory education; independent educational evaluations; review of those evaluations at an IEP team meeting; development of goals, a transition plan, and accommodations and modifications; provision of prospective services to address Student's reading issues; accommodations pertaining to registration process; provision of a quiet room; staff training; and, development of a communication system between District and Parents.

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. The parties shall serve their evidence binders on each other 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 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

³ At the PHC the parties disclosed that since the filing of the complaint, Student has been assessed for assistive technology. Therefore, this sub-issue is now limited only to the timeliness of the assessment. Furthermore, this issue does not concern whether District's subsequent assistive technology assessment was appropriate.

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 PHC statement except for good cause shown, supported by a written declaration under penalty of perjury, and at the discretion of the ALJ.

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 are ordered to meet and confer by **November 27, 2013**, as to the schedule of witnesses. The parties have agreed 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 parties shall attempt to reach agreement on a witness list for the first day of hearing. 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 witness is expected to take.

By 5:00 p.m. on December 2, 2013, each party shall serve on the other party and on OAH a tentative witness list, including a time estimate of the length of each witness's direct examination testimony, and notations as to 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 cross-examination of 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 witnesses' testimony.

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. Witnesses that appear on the disclosure list of both parties shall be questioned when first called so as to eliminate the need to have the witness return during the other party's case in chief.

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. No witness will be heard by telephone unless all these requirements have been fulfilled. Neither party anticipates the need for telephonic testimony.

7. Timely Disclosure of Witnesses and Exhibits. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits “at least” five business days prior to the hearing. The parties have complied with the disclosure requirements through their PHC statements. The parties shall comply with the service of exhibits by ensuring that they have served the other party with their exhibits by November 25, 2013.

8. Order of Presentation of Evidence. Student shall present his case first, followed by District.

9. Motions. At the PHC the following motions were heard and decided as follows:

Request to Recuse ALJ

On November 18, 2013, District filed a request for the undersigned to recuse himself from this matter on the grounds that the undersigned and Student’s counsel had at one time been partners in the same law firm. Student opposed the motion at the PHC.

An ALJ may be disqualified for bias, prejudice, or interest in the proceeding. (Gov. Code, § 11425.40, subd. (a).) The following, without further evidence of bias, prejudice, or interest, are not by themselves grounds for disqualification: 1) the ALJ is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group; 2) the ALJ has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding; or 3) the ALJ has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding. (Gov. Code, § 11425.40, subd. (b).)

In other words, to disqualify an ALJ for cause, a factual showing of actual bias or prejudice is required. (See *American Isuzu Motors, Inc. v. New Motor Vehicle Board* (1986) 186 Cal.App.3d 464, 472.) For example, in order to be a basis for disqualification, the financial interest of the ALJ in the outcome of the case must be direct, personal, and substantial, rather than slight. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1031.) Similarly, personal involvement in the case by the ALJ or familial connections may warrant disqualification based solely on the probability of bias. (See *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170-1173.) However, in most other cases, including claims of bias arising from the hearing officer’s personal or political views, disqualification will not occur absent a showing of actual bias. (*Haas, supra*, at p. 1032.)

Here, the undersigned was in a professional partnership with Student’s counsel from 1997 to 1999. As stated at the PHC, since that time the undersigned has had no personal relationship with Student’s counsel and has not engaged in any professional relationship or association other than professional interaction as an ALJ presiding over matters in which Student’s counsel may represent other students. The professional association of Student’s

counsel and the undersigned is sufficiently removed in time and District did not establish any bias by the undersigned towards or against any party or counsel in this matter. Accordingly, the motion was denied.

Motion to Change Venue

On November 13, 2013, District filed a motion to change the venue of this hearing from 1750 Cirby Way, Roseville, CA 95661, to 2501 Woodcreek Oaks Blvd., Roseville, CA 95661. Student's counsel requested further time to discuss the motion with Parents. The ruling on the motion was deferred, and Student was given until November 21, 2013, to file a response and District was given until November 22, 2013, to file a reply.

No other pretrial motions are pending or contemplated. Any 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 PHC of November 18, 2013.

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

11. 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.

12. Compensatory Education or 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.

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

14. Hearing Open or Closed To the Public. The hearing will be closed to the public. Should Parents desire to open the hearing to the public, Student must inform OAH and District immediately.

15. 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 AND SIGNED 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 FROM THE FILING PARTY 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 from the filing party 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.

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

IT IS SO ORDERED.

Dated: November 19, 2013

/s/

BOB N. VARMA
Presiding Administrative Law Judge
Office of Administrative Hearings