

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 NO. 2014040078

ORDER FOLLOWING PRE-HEARING
CONFERENCE

Administrative Law Judge (ALJ) Marian H. Tully, Office of Administrative Hearings (OAH) held a telephonic pre-hearing conference (PHC) on May 16, 2014. Attorney Marcy Tiffany represented Student. Attorney Jordan Meyer represented Bellflower Unified School 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 May 22, 27, and 28, 2014, and continue day to day Monday through Thursday at the discretion of the ALJ. The hearing shall begin at 9:30 a.m., on May 22, 2014, and at 9:00 a.m., all other days unless otherwise ordered. The hearing shall take place at the District's offices located at Bellflower Unified School District, 16703 South 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 below.

Did District deny Student a free appropriate public education (FAPE), within the statutory period, by failing to:

a. Appropriately assess Student in the areas of speech and language and assistive technology/augmentative communication;

b. Develop appropriate goals in the areas of speech and language and behavior;

c. Provide appropriate related services in the areas of speech and language and behavior, specifically including a 1:1 aide and a behavior support plan;

d. Offer Student an appropriate placement?

Student's complaint alleged claims pertaining to Student's March 4, 2014 individualized educational program (IEP). Student withdrew claims based upon Student's March 4, 2014 IEP during the PHC.

Student seeks a speech and language assessment provided by a non-public agency, increased levels of speech and language therapy and behavior services, compensatory education in the areas of speech and language therapy and behavior services all to be provided by a non-public agency, and an order requiring District to develop appropriate goals for vocalization skills.

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 represent that they have served 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 shall meet and confer before the first day of hearing in order to delete duplicate exhibits from the exhibit binders. The parties shall not serve exhibits on OAH prior to the hearing.

Student's exhibit list includes audio recordings of IEP meetings dated December 11, 2013, and March 4, 2014. Student shall provide date/time specific descriptions, or written transcript, of any portions of an audio recording Student seeks to present at hearing to District such that District may present counter designations in like manner. At the hearing, the parties shall provide their designations and counter designations to the ALJ in a single edited recording or written transcript. The proponent of audio recorded evidence shall ensure that the sound quality of the recording allows everyone in the hearing to hear the recording, identify the speakers on the recording, and that the recording is clear and audible on the OAH record.

The parties shall exchange 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, subd. (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

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. The parties are ordered to meet and confer by May 20, 2014, as to the schedule of witnesses. On the first day of hearing, the parties shall provide the ALJ with a schedule which shall include the order of witnesses and an estimate of time for each side's direct and cross examination. Each witness will only be called once to testify, except for rebuttal purposes, and both parties shall examine the witness on all issues when the witness is first called. District shall make witnesses that are on both District's list and Student's list available in Student's case. 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.

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 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. 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 appear and testify only 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. The proponent of the witness shall ensure that the witness is testifying from a private location with adequate telephone reception and sound quality, and that the hearing room has sound equipment that allows everyone in the room to hear the witness and that the witness is able to hear objections and rulings, and that the telephonic testimony is clear and audible on the OAH record. No witness will be heard by telephone unless all these requirements have been fulfilled.

Student requested telephonic testimony from Janet Yi, on the grounds that Ms. Yi might be out of the country or on maternity leave during the hearing. District objected to

telephonic testimony from this witness. The parties agree that Ms. Yi is an important witness. Student's motion to allow Janet Yi to testify telephonically is denied without prejudice to raise the issue at hearing. Student failed to demonstrate that this witness would be unavailable.

District's oral motion, to which Student objected, to continue the due process hearing to an unspecified date at some time in the future so that Ms. Yi would be available to testify in person is denied. A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) Although good cause for a continuance may include a party's excused inability to obtain essential testimony there is no factual basis upon which to vacate scheduled hearing dates on the possibility that a witness might not be available in person. (See Cal. Rules of Court, rule 3.1332(c).)

7. Timely Disclosure of Witnesses/Exhibits. The parties have timely disclosed witnesses and exhibits as required by Education Code section 56505, subdivision (e)(7).

8. Motions.

District's Motion to Strike Federal and State Claims Not Based Upon the IDEA: District's PHC statement included a request that OAH strike all claims in the complaint that do not arise under the Individuals with Disabilities Education Act, including claims arising from Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) (Section 504), Section 1983 of Title 42 United States Code (Section 1983), No Child Left Behind and related state and federal statutes and regulations. District's request will be considered a motion to dismiss claims based upon those state and federal statutes and regulations. Student objects on the grounds that the allegations are included in order to exhaust administrative remedies and to avoid waiving any remedies that might be available under both the IDEA and the statutes and regulations cited.

OAH does not have jurisdiction to entertain claims based on Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) (Section 504), Section 1983 of Title 42 United States Code (Section 1983), No Child Left Behind and related state and federal statutes and regulations. Student's complaint alleges facts and includes a request for relief under these federal and state statutes. To the extent Student's complaint alleges claims arising under Section 504, Section 1983, No Child Left Behind and any related state and federal statutes and regulations, such claims are dismissed.

District's Motion to Dismiss Student's Complaint on the Grounds the Complaint is Not "Ripe" for Adjudication: District argues that the complaint should be dismissed because Student's triennial IEP team meeting is scheduled to occur on May 29, 2014, and the complaint seeks relief that would extend "considerably far into the future." The issues stated in paragraph 2 above are related to claims within the statute of limitations and based upon events that occurred before the complaint was filed. A party has the right to present a

complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) Accordingly, District’s motion to dismiss Student’s complaint is denied.

District’s Motion to Strike Allegations in Student’s Complaint: District moves to strike any allegations in Student’s complaint referencing settlement demands, offers or negotiations. Student objects. The complaint alleges that after Parent did not consent to an individualized education program, Student’s attorney attempted to resolve issues but was unsuccessful. The motion to strike is denied. The referenced language is not a settlement demand, offer, or negotiation.

Student’s Motion to Exclude Evidence: Student filed an Amended PHC Statement including an objection to District’s introduction of any documents or calling any witnesses not timely disclosed in District’s PHC statement and exchanged as required by Education Code section 56505(7). As set forth in paragraphs 3, 4 and 7 above, except for good cause shown, or unless used solely for rebuttal or impeachment, witness and exhibits not previously disclosed and/or exchanged shall not be admitted into evidence at the hearing unless good cause is supported by written declaration under penalty of perjury, and the ALJ rules that the evidence is admissible.

Electronic Recording of Hearing: Student’s counsel requests permission to make a personal audio recording for counsel’s exclusive use to prepare for hearing and closing argument. District does not object. The sole and official record of the hearing is the OAH recording during the hearing. Student’s counsel is permitted to make a personal audio recording for her use in representing Student. The recording shall be turned on and off at the same time the ALJ goes on and off the record in order to avoid recording off the record conversations. Operation of the party’s recording mechanism will not be allowed to delay the hearing. No delays will be allowed, or accommodations made, to facilitate personal recording. No other recording of any kind is permitted.

At present no additional prehearing motions are pending or contemplated. 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 of May 16, 2014.

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/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 Closed To the Public. The hearing will be closed to the public.

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 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.

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

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

IT IS SO ORDERED.

DATE: May 19, 2014

/s/

MARIAN H. TULLY
Administrative Law Judge
Office of Administrative Hearings