

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BEVERLY HILLS UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2014100958

ORDER FOLLOWING PRE-HEARING
CONFERENCE

On November 10, 2014, a prehearing conference (PHC) was held telephonically before Administrative Law Judge (ALJ) Robert G. Martin, Office of Administrative Hearings (OAH). David W. German, Esq. appeared on behalf of Student. Elizabeth Rho-Ng, Esq. appeared on behalf of Beverly Hills Unified School District. The PHC was recorded. Each party filed a PHC statement.

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

1. Hearing Dates, Times, and Location. The hearing is to commence on Wednesday, November 19, 2014, and continue on November 20 and 21, 2014, and continuing thereafter day to day, Monday through Thursday, as needed at the discretion of the Administrative Law Judge. The hearing shall begin at 9:30 a.m., on November 19, 2014 and at 9:00 a.m., on all other days unless otherwise ordered.

Student requested that the hearing take place at OAH's offices in Van Nuys, California, so that Student could have private meeting space for hearing preparation and confidential meetings with counsel. The IDEA and the Education Code require that due process hearings be conducted "at a time and place reasonably convenient to the parents and child involved." (34 C.F.R. § 300.515, subd. (d); Ed. Code §56505, subd. (b).) Convenience of the place of the hearing refers to the physical location of the hearing room, not the quality of available amenities. Moreover, even if the hearing were held at OAH's office, OAH neither has, nor would reserve, private meeting space for Student and counsel. Due process hearings are generally scheduled in the offices of the school district, as the pupil generally resides within the district's coverage area. The hearing location complies with IDEA, as it is being held at a place reasonably convenient to parent. Student's request is denied, and the hearing shall take place at Beverly Hills Unified School District, 255 S. Lasky Drive, Beverly Hills, CA 90212.

The District shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act

of 1973 (29 U.S.C. § 794 .), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

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. Issues. The issues to be resolved at the due process hearing, as alleged in the complaint and clarified by the parties and the ALJ at the PHC, are:

- a. Was Student's alleged sexual battery of another student caused by, or did it have a direct and substantial relationship to, Student's specific learning disability?
- b. Was Student's alleged sexual battery of another student the direct result of District's failure to implement Student's IEP?
- c. Did District violate Student's procedural rights by failing to consider all relevant information to determine if the alleged sexual battery was caused by, or had a direct and substantial relationship to, Student's specific learning disability, or was the direct result of the district's failure to implement Student's IEP?

The above issues are subject to amendment based on the ruling on Student's anticipated motion, discussed below, requesting that an additional issue be resolved at hearing; namely, whether District violated Student's procedural rights by failing to consider all relevant information to determine if Student committed the alleged sexual battery that was the subject of the manifestation determination.

2. Exhibits. Student as of the PHC had identified 10 exhibits that Student intended to present at hearing. District has identified five Exhibits that it intends to present at hearing. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Student shall mark Student's exhibits using the numbers S1, S2, S3, etc., and District shall mark its exhibits using numbers D1, D2, D3, etc. Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be sequentially Bates-stamped. Each exhibit binder shall contain a detailed table of contents. At the hearing, in addition to its own copy of its exhibits and the copy exchanged with the other party, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and an exhibit binder for use by witnesses (*i.e.*, each party should make at least an original and three copies of its exhibits to exchange and to use at the hearing). 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. Each party will include in its exhibits current resumes of its expert witnesses, and current resumes of any of its percipient witness whose education and employment are expected to be subjects of direct examination.

3. Witnesses. Student as of the PHC had identified 21 percipient witnesses and no expert witnesses that Student intended to present at hearing. District as of the PHC had identified 13 percipient witnesses, all of whom were also identified by Student. Each party is responsible for procuring the attendance at hearing of its own witnesses. District agreed that it would make witnesses under its control reasonably available to Student without the need for subpoena. The District will also inform Student of the identity of, and available contact information for, any witness identified by Student as an employee of the District who has left the District's employ, by 5:00 p.m. on Thursday November 13, 2014. The parties will 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.

4. Timely Disclosure of Witnesses and Exhibits. Education Code section 56505, subdivision (e)(7), requires each party to disclose, at least five business days prior to the hearing, a list of all witnesses and their general area of testimony that the parties intend to present at the hearing, and a copy of all documents, including all assessments completed by that date and recommendations based on the assessments, that the parties intend to use at the hearing. The parties are ordered to exchange final witness lists and exhibit binders by 5:00 p.m. on Wednesday, November 12, 2014. Witnesses and documents not disclosed on or before November 12, 2014 may be excluded at the request of the other party from introduction at the hearing.

Each party reserves the right to present additional witness and documents for purposes of rebuttal.

5. Telephonic Testimony. None requested.

6. Meet and Confer Regarding Witnesses and Possible Stipulations. The parties are ordered to meet and confer by no later than noon on Monday November 17, 2014 regarding the schedule of witnesses for the hearing. The parties are 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 discuss a time estimate of the length of each witness's direct examination testimony, and identify those witnesses the party intends to call, as opposed to witnesses the party may call, depending on the flow of the hearing and the evidence.

On the first day of hearing, before the first witness testifies, the parties shall provide the ALJ with one detailed hour-by-hour schedule of all witnesses expected to testify at the hearing, which list shall also include an estimate of time for each party's direct and cross-examination. 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 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 ALJ has discretion to limit the number of witnesses who

testify and the time allowed for witnesses' testimony. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

7. 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.

8. Motions. Student intends to file three motions: (1) a motion to include as an issue for hearing whether District violated Student's procedural rights by failing to consider all relevant information to determine if Student committed the alleged sexual battery that was the subject of the manifestation determination; (2) a motion for a continuance of the hearing dates in this matter, which District indicated it might join; and (3) a motion to enjoin District from expelling Student prior to OAH's decision in this expedited matter. Student will confirm with District no later than noon on November 11, 2014 whether Student will bring the motion to enjoin District. District on November 7, 2014 filed motion to preclude testimony by certain witnesses concerning whether conduct underlying the manifestation determination actually occurred, which District indicated would be amended to include a bar to such testimony by the alleged victim's father, and to preclude testimony by certain other witnesses on grounds that they have no firsthand knowledge of the events at issue and their testimony would be irrelevant.

Student shall file and serve Student's motions, and Student's response to District's motion, no later than noon on November 13, 2014. District shall file and serve its opposition to Student's motions by no later than noon on November 17, 2014. In the event that any additional motion other than a challenge to a newly-assigned ALJ for the hearing is brought after this date, it 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.

9. 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.

10. Recording of Hearing. District's request to audio tape the hearing is granted. Student may record the hearing if Student wishes. The recording by OAH shall be official record of the hearing and no stoppages of the hearing will be granted to accommodate the parties' recording, and parties must cease recording when the ALJ informs the parties that the matter is off the record. Failure to comply will cause the ALJ not to permit the offending to record the hearing.

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. None.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made known. Additional information concerning requests for reasonable accommodation is available on OAH's website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>.

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

14. Settlement. The parties are encouraged to continue working together to complete 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. 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 AND SHALL 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. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

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

IT IS SO ORDERED.

DATE: November 12, 2014

/s/

ROBERT MARTIN
Administrative Law Judge
Office of Administrative Hearings