BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. BERKELEY UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018020102 ORDER DEFERRING RULING ON STUDENT'S MOTION FOR PROTECTIVE ORDER

On June 7, 2018, Student filed a Motion for Protective Order seeking to prevent Berkeley Unified School District from calling Student as a witness at hearing. This motion is supported by the sworn declarations of Student's Counsel, her treating psychiatrist, and her counselor. Berkeley did not file a response.

APPLICABLE LAW

Evidence Code Section 350 states, "No evidence is admissible except relevant evidence." Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible person are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or stature rule which might make improper the admission of the evidence over objections in civil action. (Govt. Code §11513 (c).) The presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (Govt. Code §11513 (f).)

Under Evidence Code section 240, subdivision (a)(3), an individual may be determined to be unavailable as a witness if she is unable to attend or to testify at the hearing because of then-existing physical or mental illness or infirmity. The code further clarifies,

> Expert testimony establishing that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a).

(Evid. Code, § 240, subd. (c) [the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010]; *In Re Daniela G.* (May 29, 2018, A152434) 2018 WL 2411006.)

DISCUSSION

Student is 18 years old. Her diagnoses include autism, depressive disorder, and anxiety disorder. Berkeley has listed Student as a potential witness in its prehearing conference statement. Student brings her motion pursuant to the California Code of Civil Procedure, specifically those provisions governing witness protections from testifying at depositions, and responding to interrogatories, requests for production, and requests for admissions, all based on a showing of unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. (Civ. Pro. Code, §§20 25.420, subd. (b), 2030.090, subd. (b), 2031.060, subd. (b), and 2033.080, subd. (b).) These provisions are not applicable to OAH in due process proceedings, though at times OAH will look at related provisions from the Code of Civil Procedure, the Evidence Code, or other related statutes for guidance.

Student's treating mental health professionals have provided sworn declarations that it would be detrimental to Student if she were compelled to testify in these proceedings in person or telephonically. Student further contends that given the number of other witnesses that Berkeley intends to call, Student's testimony would not be necessary nor could she provide relevant testimony based on personal knowledge of many of the issues for hearing.

A ruling on Student's motion will be deferred until the time of hearing. If Berkeley seeks to call Student as a witness, Berkeley should be prepared to provide an offer of proof as to the relevance and scope of her testimony. Student should be prepared to have her treating professionals available should the administrative law judge allow Berkeley to examine them with regards to their declarations, or in the event the ALJ decides that their testimony may be needed to address what if any supports should be in place in the event Student is required to testify.

IT IS SO ORDERED.

DATE: June 13, 2018

DocuSigned by:
Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings