BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Matter of:<br><br>PARENT ON BEHALF OF STUDENT,<br><br>v.<br><br>BERKELEY UNIFIED SCHOOL DISTRICT. | OAH Case No. 2018030517<br><br>ORDER FOLLOWING PREHEARING CONFERENCE |

On July 27, 2018, a telephonic prehearing conference was held before Administrative Law Judge Rebecca Freie, Office of Administrative Hearings. Natashe Washington, Attorney at Law, appeared on behalf of Student. F. Sterling Elmore, Attorney at Law, appeared on behalf of Berkeley Unified School District. The PHC was not recorded. [1]

Based upon discussion with the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on July 31, and August 1, and 2, 2018, and continue day to day, at the discretion of the ALJ. The hearing shall take place at OAH's offices located at 1515 Clay Street, Suite 206, Oakland, California 94612. The hearing shall begin at 9:30 a.m. the first day and at 9:00 a.m. all other days, unless otherwise ordered.

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, and the proposed resolutions, are listed below.

[1] The ALJ did not turn on the recorder when the PHC was convened. The ALJ discovered that the PHC had not been recorded after the PHC had concluded. The ALJ then telephoned the attorneys again, and with their consent, and in their presence, recorded a statement reflecting the substance of the PHC. When ALJ finished, the attorneys agreed on the record that this recitation was an accurate description of what had occurred during the actual PHC, and this recording will be part of the record.

*Issues*

1) Did Berkeley deny Student a free appropriate education from March 13, 2016, to July 2017, by failing to assess Student in all areas of suspected disability, specifically emotional disturbance and mental health, upon Parent request.

2) Did Berkeley deny Student a FAPE from March 13, 2018 to July 2017, by failing to fulfill its child find obligations to Student and failing to assess her for emotional disturbance or mental health services?

*Proposed Resolutions*

1) Berkeley shall reimburse Parent for the cost of placement of Student in a residential treatment Center.

2) Berkeley shall provide Student with compensatory education in all areas of need in the amounts to be proven at hearing and according to such proof.

3) Berkeley shall provide any and all other remedies as deemed appropriate by the ALJ at hearing on this matter.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The exhibits shall be separated from one another by tabbed and numbered index pages. 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 binder shall be consecutively paginated or Bates-stamped, or each exhibit shall be internally paginated. 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 timely exchanged shall not be admitted into evidence at the hearing unless 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. Current Berkeley employees are considered to be under its control. 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 timely disclosed except for good cause shown, 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 shall attempt to reach agreement on a witness list for the first day of hearing. Berkeley shall have witnesses available in case agreement on a witness list is not reached. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, 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. Each witness shall be called to testify only once, except for rebuttal purposes. If both parties intend to call the same witness, they shall examine the witness on all issues when the witness is first called. 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. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear 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. 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. No witness will be heard by telephone unless all these requirements have been fulfilled.

Student asked that Erin Grover, who lives in Utah, be allowed to testify telephonically. Berkeley did not object. Student shall ensure that Ms. Grover has copies of all exhibit binders prior to her testimony.

7. Electronic Recording of Hearing.

a. Audio Recording. Both parties intend to make an audio recording of the hearing. Recording is subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the recorder will be turned on and off at the same time as the ALJ's recorder, in order to avoid recording conversations while off the record; and 3) that operation of the party's recording mechanism will not be allowed to delay the hearing.

b. Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

8. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Student is the petitioning party. Accordingly, Student shall bear the burden of proof and shall present its case-in-chief, followed by Berkeley.

9. Motions. On July 13, 2018, Berkeley filed a motion for a change of venue from Berkeley's administrative offices to OAH in Oakland. Student did not oppose the request. The motion was granted, since Berkeley established it does not have an appropriate facility where this matter can be heard. 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 three business days prior to the PHC of July 27, 2018.

10. 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.

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

12. 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 during the hearing unless permission to the contrary is obtained from the ALJ.

13. Special Needs and Accommodations. Neither party requires a foreign language interpreter, or any other accommodation, nor are the attorneys aware of any witnesses who require an interpreter or any other accommodation.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the mediation or hearing may contact the assigned calendar staff, identified in the scheduling order, at (916) 263-0880, as soon as the need is known. Additional information concerning requests for reasonable accommodation is available on OAH's website at https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing Open to the Public. At the request of Student, the hearing will be open 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.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER THE PHC, 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 EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT AND A LETTER WITHDRAWING THE CASE TO THE OAH AT https://www.applications.dgsapps.dgs.ca.gov/oah/oahsftweb . IF THE SETTLEMENT IS SUBJECT TO BOARD APPROVAL, THE LETTER SHALL CONTAIN THE DATE ON WHICH THE BOARD IS SCHEDULED TO CONSIDER THE SETTLEMENT AGREEMENT.

Dates for hearing will not be cancelled until the letter of withdrawal and 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 prior to the hearing.

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

IT IS SO ORDERED.

DATE: July 27, 2018

Rebecca Freie

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings