BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. BERKELEY UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018020102 ORDER FOLLOWING PREHEARING CONFERENCE AND DENYING MOTION TO BIFURCATE AND GRANTING MOTION TO CHANGE VENUE

On June 4, 2018, a telephonic prehearing conference was held before Administrative Law Judge Cynthia Fritz, Office of Administrative Hearings. Betsy Brazy and Mitchell Chynette, Attorneys at Law, appeared on behalf of Student. Lenore Silverman, Attorney at Law, appeared on behalf of Berkeley Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on **June 12, 13, and 14, 2018**, and continuing day to day, at the discretion of the ALJ. The hearing shall take place at the Office of Administrative Hearings, 1515 Clay Street, Suite 206, Oakland, California 94612. The hearing shall begin at 9:30 a.m. the first day of the hearing 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.

Issues

1. The statute of limitations does not apply because:

a. Berkeley Unified School District withheld key information, procedural safeguards, for nearly a year from Parents;

b. Berkeley Unified School District misrepresented to Parents that they solved

Student's placement problem, preventing them from filing due process with OAH; and

c. alternatively, the statute of limitations extends to 2012 under *Avila* because Parents discovered on May 14, 2014, that Student was entitled to appropriate placement.

2. Did Berkeley Unified School District deny Student a FAPE during the 2012-2013 school year, by:

a. failing to respond to Parents' assessment request within 15 days; and

b. failing to assess Student (child find).

3. Did Berkeley Unified School District deny Student a FAPE during the 2013-2014 school year, by:

a. failing to assess Student in all areas of suspected disability including: autism; central auditory processing disorder; mental health; social emotional and assessments related to ADHD;

b. failing to design an appropriate program that included: peer social pragmatics; self-regulation; auditory processing and processing in a noisy environment;

c. failing to timely schedule and convene an impartial mediation; and

d. failing to timely file an IEP meeting.

4. Did Berkeley Unified School District deny Student a FAPE during the 2014-2015 school year by:

a. failing to assess Student in all areas of suspected disability including: autism; central auditory processing disorder; mental health; speech and language; and assessments related to ADHD;

b. failing to design an appropriate program that included: peer social pragmatics; behavior; and a transition plan individualized to Student; and

c. failing to create goals in social pragmatics and failing to have measurable goals in math and prioritizing tasks; and

d. failing to consider the continuum of placements.

5. Did Berkeley Unified School District deny Student a FAPE during the 2015-2016 school year by:

a. failing to assess Student in all areas of suspected disability including: autism; and central auditory processing disorder; and

b. failing to design an appropriate program.

6. Did Berkeley Unified School District deny Student a FAPE during the 2016-2017 school year by:

a. failing to assess Student in all areas of suspected disability including: autism; and central auditory processing disorder;

b. failing to design an appropriate program that included goals in reading, writing and math and failing to design a transition plan individualized to Student;

c. failing to protect Student from bullying and failing to provide a safe learning environment; and

d. failing to initiate due process to assert Berkeley Unified School District's placement as FAPE.

7. Did Berkeley Unified School District deny Student a FAPE during the 2017-2018 school year by:

a. failing to conduct timely triennial assessments;

b. failing to convene a timely triennial IEP meeting; and

c. failing to initiate due process to assert Berkeley Unified School District's placement as FAPE.

Resolutions

1. Berkeley Unified School District shall provide compensatory education.

2. Berkeley Unified School District shall reimburse Parents for tuition at Raskob Day School, Mentoring Academy, and Tilden Academy.

3. Berkeley Unified School District shall reimburse Parents for educational services from Carrie Blanche.

4. Berkeley Unified School District shall reimburse for educationally related mental health services.

5. Berkeley Unified School District shall reimburse for all independent assessments,

according to proof: $4,775 by Dr. Carina Grandison and $750 by Dimitra Loomos.

6. Berkeley Unified School District shall conduct independent vocational transition assessment.

7. Berkeley Unified School District shall convene an IEP meeting to design a free, appropriate education placement, considering recommendations from independent assessments. Dr. Grandison and Dr. Loomos and an independent transition specialist shall attend at the district's expense.

8. Berkeley Unified School District shall fund Student's private psychological services.

9. Berkeley Unified School District shall change Student's eligibility category to autism as primary eligibility with a secondary eligibility of SLD.

10. Berkeley Unified School District shall provide staff training from an independent agency on child find duties.

11. Any other remedy with OAH deems fil.

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"). All of a party's exhibits shall be Bates-stamped consecutively throughout the binder. 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.

Parties are encouraged to present resumes or curriculum vitae for each professional witness.

Berkeley Unified School District shall include a color copy of the school calendar for each school year in question and shall have witnesses available to testify as to any legend notations that might be unique to District.

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 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.

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.

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.

Each witness shall be called to testify only once, except for rebuttal purposes. All parties shall examine the witness on all issues when the witness is first called, except for purposes of the statute of limitations evidence. 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.

5. Meet and Confer. The parties are ordered to meet and confer no later than **June 8, 2018**, to discuss whether routine information can be the subject of stipulations to shorten the hearing by avoiding the necessity of testimony, particularly as to routine matters, and/or exhibits. The parties shall also discuss the order of witnesses and the length of witness testimony and be prepared to present the ALJ with a written joint witness list with time estimates and dates of expected testimony on the first day of hearing. Should agreement on a list not be reached, each party shall prepare separate lists and Student shall have witnesses available so the hearing can proceed promptly.

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.

Student's motion to allow Carrie Blanche, Christina Turneto and Dana Furtoran to appear via telephone or internet-based video testimony is granted. Student shall provide these witnesses with a complete exhibit binder from each party, 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. It is the responsibility of Student to set up and provide equipment for telephonic testimony. No witness will be heard by telephone unless all these requirements have been fulfilled.

If witnesses appear by video, it is the responsibility of Student to provide equipment, ensure that they can be properly recording, the screen is appropriately sized to see the witness, all exhibit binders are provided, and that the hearing room has sound equipment that allows everyone in the room to hear the witness. No witness will be heard by video testimony unless all these requirements have been fulfilled.

7. Electronic Recording of Hearing.

a. Audio Recording. Student's motion to make an audio recording of the hearing is granted, subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the recording will be turned on and off at the same time as the ALJ's recording, 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. Berkeley Unified School District desires to make such a recording, it shall move for leave to do so in advance of the hearing, and the same conditions shall apply.

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 bears the burden of proof and shall present its case-in-chief, followed by Berkeley Unified School District.

9. Motions.

Berkeley's Motion to Bifurcate: Berkeley Unified School District timely filed a motion to bifurcate. Student opposed the motion. Although no special education law or regulation addresses bifurcation of issues, the Office of Administrative Hearings generally looks to civil cases and the California Administrative Procedure Act for guidance. Government Code section 11507.3 provides that an administrative law judge on the judge's own motion or on motion of a party may order a separate hearing of any issue, including an issue raised in the notice of defense, or of any number of issues, in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition

and economy. Code of Civil Procedure section 598 contains a similar provision for civil trials. The court may make an order that the trial of any issue or any part thereof shall precede the trial of any other issue when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted.

Berkeley's Motion to Bifurcate is denied, however, all of statute of limitations evidence will be presented at the start of the due process hearing on June 12, 2018. Both parties are expected to be prepared to present statute of limitations evidence upon commencement of the hearing. After close of the statute of limitation evidence, the ALJ will make a bench ruling and then further detail the ruling in the written decision following the hearing.

The parties are ordered to file on **June 8, 2018**, a list of witnesses with estimated testimony timeframe for each witness for the statute of limitations evidence presented at hearing.

Berkeley's Motion to Change Venue: Berkeley Unified School District untimely filed a motion to change venue on June 4, 2018 at the time of the prehearing conference. Berkeley argued that they do not have an available room for the hearing at the district offices and requested that the hearing be moved to the Office of Administrative Hearings in Oakland which is approximately four miles away. Student filed a non-opposition to the change of venue.

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).) Berkeley's motion to change venue is granted.

Student's Motion for Protective Order to Exclude Student Testimony

Student made a motion to exclude Student from testifying at trial due to anxiety issues. The motion is untimely and no evidence was presented to show why Student cannot testify at trial, thus a ruling was not made at the time of the prehearing conference. Counsel stated that she is in the process of getting declarations from Student's doctors. At this time, Student's motion is denied without prejudice.

Student's Motion to Exclude Medical Counseling Notes

Student made at motion at the prehearing conference to exclude medical counseling notes from witnesses. It appeared at the prehearing conference that the parties could meet and confer on this issue, thus no ruling was made. At this time, Student's motion is denied without prejudice. Should a motion be made regarding this issue, it should be in writing, accompanied by a declaration establishing good cause as to why the motion was not made prior to the prehearing conference.

Student's Motion to Exclude District Representative from Hearing Witness Testimony

Student made a motion to exclude the district representative from hearing witness testimony without further explanation. The motion is untimely and no explanation was given as to why the district representative should be excluded from hearing. Thus, the motion is denied without prejudice.

Berkeley Unified School District will also send Student a response and file with OAH by **June 6, 2018**.

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 the prehearing conference of June 4, 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 or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

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

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

Should a party appear at the hearing and determine that accommodations are needed, contact the ALJ assigned to the case.

14. Hearing Closed To the Public. At the request of Student, 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 EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT https://www.dgsapps.dgs.ca.gov/oah/oahsftweb .

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.

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

IT IS SO ORDERED.

DATE: June 5, 2018

DocuSigned by:
Cynthia Fritz
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CYNTHIA FRITZ
Administrative Law Judge
Office of Administrative Hearings