

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. 2014040781

ORDER FOLLOWING PREHEARING
CONFERENCE

On August 29, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Adeniyi A. Ayoade, Office of Administrative Hearings. Nicole Hodge Amey, Attorney at Law, appeared on behalf of Student. Michai Freeman (Parent) participated. Jan E. Tomskey, Attorney at Law, appeared on behalf of the Berkeley Unified School District. The PHC was not recorded. Based on discussion of the parties, the ALJ issues the following order:

1. **Order Dismissing Order To Show Cause Dated August 22, 2014.** The order to show cause issued by the undersigned on August 22, 2014 is dismissed. The attorney for Student has adequately explained why Student's case should not be dismissed and why she was not available for the August 22, 2014 PHC. Student established that he intends to prosecute and proceed to a hearing in this matter.

2. **Hearing Dates, Times, and Location** The hearing shall take place on **September 16-18, 2014**, and shall continue day to day, Monday through Thursday at the discretion of the ALJ until the hearing is concluded. The hearing shall be held at **Berkeley's offices located at 2020 BONAR STREET, BERKELEY, CA 94702**. The hearing shall begin at 9:00 a.m. and end at 5:00 p.m. each day, with the exception of September 16 when the hearing shall begin at 9:30 a.m., unless otherwise ordered.

Berkeley shall ensure that the due process hearing location and room are accessible to all persons including those with disabilities, and are appropriate for the hearing. The location and the hearing room shall also be wheelchair accessible. In addition, the room shall meet OAH specifications, and at a minimum shall have separate tables capable of being moved into a courtroom configuration as follows: (1) one table for Student's representatives; (2) one table for Berkeley's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. A room with one large conference table is not suitable. If a suitable location or room is not available for any of the hearing days, Berkeley shall

immediately notify OAH and the parties and propose a different location. Berkeley is encouraged to make fresh water and tissue available in the hearing room at all times.

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.

3. Issues and Proposed Resolutions. The issues at the due process hearing and the requested proposed remedies are as follows:

A. **ISSUES:**¹

- 1) During Student’s first grade year, did Berkeley deny Student a free appropriate public education by failing to provide him with an assistive technology device as recommended in his preschool assessment and identified in his individualized education programs?
- 2) Did Berkeley violate Parent's procedural rights by failing to provide Parent with prior written notice when Berkeley stopped providing assistive technology supports to Student during his first grade year?
- 3) During the 2012-2013 school year, did Berkeley deny Student a FAPE by:
 - a. failing to develop a plan to support Student’s transition from preschool to the elementary school;
 - b. violating Parent’s procedural rights by failing to include Parent in the planning of Student’s transition to a new school; and
 - c. failing to offer Student compensatory time to address his regression in the areas of behavior and academic after Student transitioned from preschool to kindergarten?

¹ The issues at the due process hearing are those that were alleged in Student’s amended due process complaint (amended complaint) as clarified at the PHC. As necessary, the issues have been clarified and reframed for clarity, as set forth herein below. Any issue(s) that is not listed and/or permitted by this order shall be included only with an amendment to the amended complaint. The amendment shall comply with California Education Code section 56502, subdivision (e). The filing of an amended complaint will restart the applicable timelines for a due process hearing. (20 U.S.C. § 1415(c)(2)(E)(ii).)

- 4) Did Berkeley's deny Student a FAPE when it failed to provide Student with a one-to-one aide during the 2013 extended school year?
- 5) Did Berkeley violate Parent's procedural rights by failing to provide Parent with prior written notice of its action to remove Student's one-to-one aide during the 2013 extended school year?
- 6) From April 15, 2012 to the present time, did Berkeley deny Student a FAPE by failing to assess him in the area of auditory processing?
- 7) During the 2012-2013 school year, did Berkeley deny Student a FAPE by failing to meet his unique needs in the areas of academics, speech and language, behavior and mental health?
- 8) During the 2013-2014 school year, did Berkeley deny Student a FAPE by failing to design a program to meet his unique needs in the areas of academics, speech and language, behavior and mental health and provide him with educational benefit?
- 9) During the 2013-2014 school year, did Berkeley violate Parent's procedural rights when it discontinued transportation services without providing prior written notice to Parent?
- 10) Did Berkeley violate Student and Parent's procedural rights by failing to provide Parent with a full and complete copy of Student educational records when requested by Parent in December 2013, February 2014, and March 2014?
- 11) Did Berkeley deny Student a FAPE by failing to timely complete the November 5, 2013 assessment of Student in the area of articulation?
- 12) Did Berkeley deny Student a FAPE by significantly impeding the Parent's rights to meaningfully participate in the IEP development process when Berkeley scheduled the September 19, October 7, and November 7, 2013 IEP team meetings for an hour, and thus failed to provide Parent adequate time to offer her input?
- 13) Did Berkeley deny Student a FAPE when it failed to identify the individuals responsible for implementing Student's goals and objectives 1-6, and 8-10 contained in the September 19, 2013 IEP?
- 14) Did Berkeley deny Parent's rights to meaningfully participate in the IEP process when it failed to properly craft Student's September 19, 2013 IEP?

- 15) Did Berkeley violate Parent's procedural rights and thus denied Student a FAPE when it denied Parent's request for pivotal response training for Student without providing prior written notice?

B. **PROPOSED REMEDIES.** As proposed resolution, Student requests an order from OAH directing Berkeley to: 1) comply with Student's IEP; 2) fund a trained one-to-one aide to assist Student in reaching goals and accessing his education; 3) provide Student with 30 hours in compensatory speech-language/articulation services; 4) fund pivotal response training for Student, and occupational therapy, neuropsychological, social-emotional, functional behavior analysis, an augmentative and alternative communication, central auditory processing, and hearing assessments; 5) fund and facilitate the enrollment, transition and placement of Student in a private or non-public school; 6) adopt assistive technology recommendations including use of an iPad at school and home; 7) fund applied behavior analysis therapy to address new behaviors; 8) fund transportation and training for 1:1 aide; 9) provide Parent with counseling to deal with Student's needs; 10) timely hold an IEP team meeting on a date that is convenient for Parent in order to develop a behavior plan for Student; 11) develop goals to meet Student's needs and assign proper licensed and credentialed staff to be responsible for implementing his goals; 12) provide monthly behavior progress notes and timely notify parent of new behaviors; 13) provide reimbursement for the costs of services that Parent have obtained for Student; and 14) ensure that Student is provided a FAPE.

4. Timely Disclosure of Witnesses/Exhibits. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits "at least" five business days prior to the hearing. The OAH's scheduling order dated June 2, 2014, ordered the production of lists of all witnesses and documents by an earlier date, namely, at least three business days prior to this PHC. As of the date of the PHC, both parties have disclosed their witnesses and exhibits through their respective PHC statements.

5. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties may use numbers or letters to identify exhibits. If numbers are used by both parties, each party shall place the letter "S" or "D" in front of the exhibit to designate if it is a Student or Berkeley's exhibit (for example, 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. 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. Exhibit binders shall be exchanged five business days prior to the hearing in accordance with Education Code section 56505, subdivision (e)(7), unless the parties agree to a later date.

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 good cause is shown as to why it was not previously exchanged. The parties shall be prepared to make such an offer of proof. The ALJ shall determine whether an exhibit is to be admitted into evidence. Only exhibits relevant to the issues previously stated in this order shall be admitted, unless used for impeachment purposes. The fact that an exhibit is placed in an exhibit binder does not guarantee its admission.

6. 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, and at the discretion of the ALJ.

As of the day of the PHC, Student has identified and disclosed 17 witnesses including five experts, and Berkeley has disclosed 29 witnesses. The parties are ordered to meet and confer regarding the schedule and order of witnesses. 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. Parties shall be prepared to make an offer of proof, if asked, as to why a specific witness' testimony is necessary. At the commencement of the hearing, each party shall provide the ALJ with a schedule of witnesses and a time estimate for each witness' direct and cross-examinations.

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. In the case of witnesses who have professional licenses and credentials, it is strongly recommended (but not ordered) that the party calling such witnesses be prepared to present copies of their *curriculum vita* (CV) or resume as exhibits, and exchange them with the other party.

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. 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. Such party 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.

9. Motions. Other than as may be included herein, no pretrial motions are pending. 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 or during the prehearing conference of August 29, 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 if possible.

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

12. Compensatory Education and 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 interpreter services, **except that** Student has requested that the hearing room be wheelchair accessible. **Berkeley shall therefore ensure that the proposed hearing location and room are wheelchair accessible.**

14. Order of Presentation of Evidence: Student filed this matter. Therefore, Student shall produce his evidence first. Where Student and Berkeley intend to call the same person to testify, each party will examine the witness immediately after the other party, so the witness will only need to be called to the witness stand once.

15. Hearing Closed To the Public. At the request of the Student, the hearing shall be closed to the public.

16. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. If the parties believe a mediator may assist them in settlement negotiations, they should submit a request for mediation as soon as possible. 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 BEFORE THE 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 and the morning of the hearing.

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

IT IS SO ORDERED.

DATE: August 29, 2014

/s/

ADENIYI AYOADE
Administrative Law Judge
Office of Administrative Hearings