

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. 2015070108

ORDER FOLLOWING PREHEARING
CONFERENCE

On October 19, 2015, a telephonic prehearing conference was held before Administrative Law Judge Lisa Lunsford, Office of Administrative Hearings. Kathryn Dobel, Attorney at Law, appeared on behalf of Student. Emily Segrue, 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 October 27 through October 29 and November 4, 2015,¹ and continuing day to day, Monday through Thursday, at the discretion of the ALJ. 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 hearing shall take place at the District's offices located at 1231 Addison Street, Berkeley, California 94702.

Berkeley, as the named local educational agency, 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 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. Berkeley is ordered to certify to OAH within two days of the date of this order that it will provide a facility that complies with the law.

Prior to the beginning of the hearing, Berkeley shall assist the ALJ to ensure that the hearing room is configured into a courtroom setting, including: (1) a table for Student and his representatives; (2) a table for District's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical

¹ Student's attorney requested the hearing not continue on Tuesday, November 3, 2015, due to the unavailability of both herself and Ms. Tomskey, who will be representing Berkeley at hearing. District's attorney did not oppose this request. Good cause having been found, the hearing shall continue on Wednesday, November 4, 2015.

outlet. District shall also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

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.²

Issue 1: During the 2013-2014, 2014-2015 and 2015-2016³ school years, including extended school years, did Berkeley deny Student a free appropriate public education by failing to timely assess in the area of educational therapy⁴ and provide one-to-one academic instruction in language arts by a qualified educational therapist?

Issue 2: During the 2013-2014 and 2014-2015 school years through May 19, 2015, did Berkeley deny Student a FAPE by failing to timely assess and provide individualized academic and related services in the areas of:

- a. speech and language; and
- b. assistive technology?

Issue 3: Did Berkeley deny Student a FAPE by failing to:

- a. assess the need for occupational therapy during the 2013-2014 and 2014-2015 school years through March 20, 2015;
- b. implement occupational therapy consultation services during the 2014-2015 school year; and

² The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party’s issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

³ District objected to the inclusion of the 2015-2016 school year in this issue. After argument from both parties was heard, the objection was overruled.

⁴ Student did not identify which type of assessment should have been conducted. However, Student appears to have been referring to academic skills as the area of need.

- c. offer adequate occupational therapy during the 2013-2014, 2014-2015 and 2015-2016⁵ school years?

Issue 4: Did Berkeley deny Student a FAPE by failing to develop appropriate goals:

- a. during the 2013 extended school year and 2013-2014 school year;⁶ and
- b. during the 2014-2015 school year,⁷ as set forth in Student's Due Process Complaint?

Student's Proposed Resolutions:

- a. Amendments to Student's IEP as set forth in Student's Due Process Complaint;
- b. Compensatory education, including one-to-one intensive services by Peg Bogle, Liz Isono, and Deborah McClosky; and
- c. Reimbursement for assessments, educational therapist instruction and tutoring, occupational therapy, and speech and language services.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall number exhibits in a way that clearly identifies the party offering the exhibit (for example "S-1" for Student or "D-1" for District). Each exhibit shall be internally paginated, by exhibit, or all pages of a party's exhibit binder shall be Bates-stamped or otherwise consecutively numbered. Each exhibit will consist of one document or short series of documents that are related (such as emails). Each exhibit binder shall contain a detailed table of contents. Each party shall serve an exhibit binder containing its respective exhibits on the other party 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.

⁵ Issues 1 through 3 were previously combined and presented by the parties as one issue in the PHC statements. Therefore, District's objection to the inclusion of the 2015-2016 school year applied to this issue as well.

⁶ Student's counsel could not sufficiently clarify this issue during the PHC. Therefore, Student is ordered to produce, on the first day of hearing, a statement identifying the specific goals and their alleged deficiencies.

⁷ District objected to the inclusion of the 2015-2016 school year and extended school years for 2013-2014 and 2014-2015. After argument from both parties was heard, the objection was sustained.

Each party is expected to comply with Education Code section 56505, subdivision (e)(7) and timely serve an exhibit binder containing its respective exhibits on the other party. 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. 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 ordered to meet and confer to develop a proposed joint witness schedule. The proposed schedule will be presented to the ALJ at the beginning of the hearing. Prior to commencing the hearing, the ALJ and the parties will discuss the proposed witness schedule and address scheduling issues for individual witnesses, before the schedule is finalized. The ALJ has discretion to limit the number of witnesses who testify and the length of their testimony, to ensure that this matter is concluded within the time allotted, based upon the parties' time estimates and the issue presented. Therefore, the parties are encouraged to review and shorten their witness lists prior to the hearing.

The parties shall provide resumes for each witness who testifies in their professional capacity. Those resumes shall be included in the parties' evidence binder as separate exhibits.

5. Order of Presentation of Evidence and Scope of Witness Examination. Student bears the burden of proof in this case. Student shall present her evidence first, followed by Berkeley. 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. 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.

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 and Berkeley indicated that at this time no witnesses are expected to testify telephonically.

7. Electronic Recording of Hearing.

a. Audio Recording. Neither party intends to record the hearing. However, if this changes, the party shall move for leave to do so in advance of the hearing. If the motion is granted, it shall be 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.

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. Motions. No 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 prior to or during the prehearing conference.

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

10. 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.

11. Conduct 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.

12. Special Needs and Accommodations. At present, neither party anticipates the need for any special accommodation or interpreter for any witness or party. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned case manager at (916) 263-0880 as soon as the need is made known. Additional information concerning a request 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. At the request of Student, the hearing will be closed to the public.

14. Settlement. The parties are encouraged to continue their attempts 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 settlement is reached within five or fewer days before 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 SETTLEMENT 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 CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY.

Dates for hearing will not be vacated until OAH receives a letter of withdrawal or signature page of the signed agreement. 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.

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

IT IS SO ORDERED.

DATE: October 20, 2015

_____/s/
LISA LUNSFORD
Administrative Law Judge
Office of Administrative Hearings