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 NUMBER 2019091113

ORDER FOLLOWING PREHEARING CONFERENCE

FEBRUARY 7, 2020

On February 7, 2020, Administrative Law Judge Cynthia Fritz, Office of Administrative Hearings, held a telephonic prehearing conference. The Administrative Law Judge is called an ALJ; the Office of Administrative Hearings is called OAH; and a prehearing conference is called a PHC.

LaJoyce Porter, Attorney at Law, appeared on behalf of Student. Lenore Silverman, Attorney at Law, appeared on behalf of Berkeley Unified School District, called Berkeley. Elizabeth Schwartz, Attorney at Law, was present with Ms. Silverman during the PHC. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on February 19 and 20, 2020, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM on the first day and at 9:00 AM on all other days, unless otherwise ordered. The ALJ vacated the February 18, 2020 hearing date. The parties anticipate it will take three to eight days to complete the hearing. Additional hearing dates will be discussed with the ALJ on the first day of hearing. The parties are on notice that their efficient use of hearing time will determine, among other considerations, whether additional days will be added.

HEARING LOCATION

The hearing will be held at 1515 Clay Street, Suite 206, Oakland, California 94612.

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.

Before the beginning of the hearing, Berkeley shall ensure that the hearing room is configured into a courtroom setting and shall contain:

- a table for Student and his representatives;
- a table for Berkeley's legal representative and special education representative;
- a table for the witness; and
- a table near an electrical outlet for the ALJ.

The same hearing room shall be used for each day of hearing and shall be available at least one hour before the beginning of the hearing each day. The hearing room shall be locked following the hearing each night. Berkeley shall ensure that the hearing room and access to it are in compliance with the all laws governing accessibility of government facilities to persons with disabilities.

ISSUES AND PROPOSED RESOLUTIONS

The issues at the due process hearing, and proposed resolutions, as alleged in the complaint and clarified by the parties and the ALJ during the PHC are:

ISSUES

1. Did Berkeley fail to provide Student a FAPE during the 2016-2017 school year, including extended school year by:

    a. failing to put Student in an appropriate placement:

    b. failing to provide speech and language services;

    c. failing to provide occupational therapy services;

    d. failing to provide appropriate reading remediation; and

    e. offering a Berkeley placement instead of a non-public school?

2. Did Berkeley fail to provide Student a FAPE during the 2017-2018 school year, including extended school year by failing to:

    a. provide a program designed to meet his unique needs, specifically related to placement and services; and

b. make any progress on his goals?

3. Did Berkeley fail to provide Student a FAPE during the 2018-2019 school year, including extended school year by failing to:

   a. design an appropriate program to meet his unique needs, by denying speech and language services;

   b. include a speech and language assessor at the individualized education program team meetings, called an IEP, on October 22, 2018, and March 21, 2019;

   c. complete a triennial evaluation and present it at the March 14, 2019 IEP team meeting;

   d. conduct a speech and language evaluation;

   e. conduct an occupational therapy evaluation;

   f. file for due process to get a determination that the March 14, 2019 assessment was legally compliant, or grant Student's request for an independent educational evaluation, called an IEE?

Student's issues numbered I, III, III, including all sub-parts, IV(a), V(a), and VI(g) in his due process hearing request dated September 30, 2019, and prehearing conference statement dated February 7, 2019, were dismissed on January 8, 2020, pursuant to the Order Granting In Part Berkeley's Motion to Dismiss.

At the prehearing conference, the undersigned ALJ took under submission whether Student's issues IV(c), V(d), and V(e) should be dismissed due to lack of jurisdiction. Student's issue IV(c), V(d), and V(e) allege a denial of FAPE for failure to

provide Student with a psychoeducational IEE and speech and language IEE. These IEEs were agreed upon pursuant to the August 18, 2016 settlement agreement between the parties. As stated in more detail in the undersigned's January 8, 2020 Order, these issues hinge on a determination that Berkeley failed to adhere to the terms of a settlement agreement. Student was given an opportunity to provide greater specificity orally during the PHC. After carefully considering both Student's complaint and oral argument, it is determined that Student failed to allege that any of the terms of the agreement were specifically required to provide FAPE to Student. Therefore, Student did not allege that the specific failures of Berkeley, outside the failure of the settlement agreement, caused a denial of FAPE. Additionally, Student failed to establish that the intent of the agreement was to offer a FAPE to Student prospectively. The terms of the settlement agreement were not intended to constitute a FAPE for Student. Thus, Student's issues IV(c), V(d), and V(e), are not asking OAH to make findings regarding the provision of FAPE to Student or regarding failures to follow the procedural requirements of the IDEA. Instead, the Student's due process request asks OAH to find a breach of the agreement and that the breach alone denies Student a FAPE. OAH does not have jurisdiction to enforce settlement agreements. For the reasons stated above, OAH does not have jurisdiction over Student's issues IV(c), V(d), and V(e). They are dismissed.

Based on the January 8, 2020, Order and current order dismissing issues IV(c), V(d) and V(e), the issues for hearing were renumbered for clarity.

PROPOSED RESOLUTIONS

The proposed resolutions requested by Student are summarized and include requests for a psychoeducational, central auditory processing, and occupational therapy IEEs, 3500 hours of compensatory education, placement at Phillips Academy with a non-public agency 1 to 1 aide, transportation to Phillips Academy, and attorney's fees.

Berkeley filed its response to Student's complaint on January 3, 2020. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

BINDERS

Exhibits shall be pre-marked and placed in three-ring binders before the hearing. Exhibit binders shall include a tab for each exhibit. Each binder shall contain a detailed table of contents which clearly identifies the tabs and documents. Binders should not be so full that the ALJ and witnesses cannot easily turn to the exhibit tabs and pages in the binders. Multiple binders may be submitted if necessary.

TAB AND PAGE NUMBERS

The parties must place a letter followed by a number on each tab to identify each exhibit. Student must use the letter S before the number to identify Student's exhibits. Berkeley must use the letter D before the number to identify Berkeley's exhibits. For example, S-1 means Student's exhibit tab 1 and D-1 means Berkeley's exhibit tab 1. Parties may either number each page within each tabbed exhibit or number each page in the binder consecutively beginning with the first page of the first exhibit through the last page of the last exhibit. For example, if there are 100 total pages in the binder the first page of the first exhibit is 1 and the last page of the last exhibit in the binder is 100.

CONTENT

Each exhibit must consist of one document. Separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Exhibits in the binders should be in chronological order.

Parties should include resumes or curriculum vitae for each witness who is expected to testify as an expert. Parties must exchange resumes not later than 24 hours before the witness is scheduled to testify and provide a copy to the ALJ before the witness testifies.

Berkeley's binder must include a color copy of the school calendar for each school year in question.

COPIES OF BINDERS

The parties must serve copies of their evidence binders on each other. This exchange is required by Education Code section 56505, subdivision (e)(7). Each party must bring two additional sets of their exhibit binders to the hearing. One set will be used by the ALJ, and the other set will be used by witnesses. The parties may not serve exhibits on OAH before the hearing.

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.

WITNESSES

Parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Parties shall make witnesses under their control reasonably available. The parties must schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party will be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Education Code, section 56505.1, subd. (h), empowers the ALJ to set a reasonable limit on the length of the hearing after consideration of four factors. The first two factors are the issues to be heard and the complexity of facts to be proven. The second two factors are the ability of the parties or their representatives to present their respective cases and the parties' estimates of the time needed to present their cases.

MEET AND CONFER

The parties are encouraged to review and shorten their witness and exhibit lists before the hearing. Evidence may be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. The parties are ordered to meet and confer no later than February 10, 2020, to discuss additional witnesses, exhibit lists, the availability of witnesses, the order of witnesses and the length of witness testimony. The parties should attempt to eliminate duplicate exhibits from their binders. The parties may discuss whether they can produce a written stipulation stating basic facts to shorten the length of time needed for the hearing.

EVIDENCE PRESENTATION

a. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In this case Student requested the hearing and bears the burden of proof. Student's case-in-chief shall be presented first, followed by Berkeley.

b. On the first day of hearing, The ALJ will only hear evidence pertinent to the statute of limitations and whether Student may assert claims arising more than two years before the filing of the complaint on September 30, 2019. First, Student will offer

his evidence of the reasons he believes the statute of limitations should be extended. Then, Berkeley will offer its evidence in favor of the application of the two-year statute of limitations. Student will have a brief period for rebuttal. The parties will then give oral concluding statements. Subsequently, the ALJ will announce a ruling whether Student may assert claims arising before September 30, 2017, and the time period at issue in the hearing. Thereafter, the parties will receive a short recess to determine changes to the witness order based on the ruling. The hearing will proceed as described in paragraph a, above. The statute of limitations ruling will be explained in the Decision. There is no break between the different portions of the hearings. Student's counsel should be prepared to have witnesses available to begin phase two of the hearing.

c. The parties are expected to be prepared for hearing. The number of additional hearing days relies upon the efficiency of the attorneys' presentation of evidence. Any delays that occur in the administration of the hearing due to not having witnesses available, untimely return from breaks, unfinished evidence binders, evidence binders not properly labeled or numbered, lack of sufficient copies of evidence, unnecessary submission of irrelevant and cumulative evidence, or other delays in the control of the parties, may affect the number of additional days ordered for the hearing.

WITNESS LISTS

The parties must provide a joint proposed witness list to the ALJ on the first day of hearing. The list should include dates and time estimates of expected testimony. In the event an agreement cannot be reached, each party shall prepare a separate written list. Student must have witnesses available in case there is no agreement. At the beginning of the 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. The ALJ will finalize the witness schedule. Parties must be

prepared at the end of each day to discuss the witnesses to be presented the next day and the estimated time for the testimony each witness.

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 request permission to do so before the hearing. The party offering the witness must provide the witness with a complete set of exhibit binders from all parties before the witness testifies. The binders must be exact paper copies of all of each party's exhibits. The party presenting the witness shall ensure the witness testifies from a private location with no other persons present. The party offering telephonic testimony shall ensure that the witness has telephone equipment that allows testimony at a volume that allows clear transmission of what the witness is saying, allows the witness' testimony to make a clear recording, and allows the witness to hear objections and rulings.

Student requested that the California Department of Education, known as CDE, investigators from Sacramento testify telephonically. Counsel also requested that electronic binders be transmitted instead of paper binders because her client cannot afford to send paper exhibit binders. The CDE investigators are not on Student's witness list and the parties were ordered to meet and confer regarding these witnesses as well as additional witnesses that Berkeley also wanted to add to its witness list.

Further, if Student's counsel can ensure that electronic copies of exhibits are tabbed exactly like the paper exhibit binders so that the witness can press on the electronic tab and pull up the exhibit, then electronic exhibits will be allowed. If the

electronic exhibits are a scan of the exhibits without any means to separate them by tab electronically, then they may not be used.

Berkeley requested telephonic testimony for Lisa Graham and Lisa Sweeny which was granted subject to any relevancy objections at hearing.

Any other requests for telephonic testimony will be determined on the first day of hearing. Witnesses who are granted telephonic testimony shall be informed of the privacy and confidentiality rules pertaining to the information contained in the binders and of the proper procedure for disposal of the evidence binder following completion of the witness' testimony.

ELECTRONIC RECORDINGS

AUDIO RECORDING

A party may request permission to make an audio recording of the hearing. Permission to make an audio recording is subject to the ALJ's discretion and based upon certain conditions. The conditions are:

- the OAH recording is the only official recording;
- the parties shall turn the recording device on and off at the same time that the ALJ is on and off the record to avoid recording conversations while off the record;
- the recording device will be removed by the party recording during any recess where the party leaves the room;
- operation of the party's recording mechanism will not be allowed to delay the hearing;

- a parties' recording may not be given, provided or played to a witness, or potential witness; and
- the recording is subject to the same confidentiality as the due process hearing.

The parties' requests to audio record the hearing are granted subject to the stated conditions.

VIDEO RECORDING

No party, witness or anyone else may make any video recording of any part of the proceedings.

RECORDINGS AS EXHIBITS

Student proposed to introduce all or part of a recording of an IEP team meeting. The ALJ has discretion to admit or exclude evidence in the form of a recording. Any request to submit a recording shall be considered at the time of hearing. The ALJ may grant or deny the request, or grant the request subject to certain conditions. The party offering the recording must establish that all or a part of the recording is relevant. The ALJ may request a transcript of the portion of the recording requested or have the party offering the recording to provide an exact identifiable portion of the recording the party seeks to admit. The identities of any person speaking on the portion of the tape being introduced must be established. An ALJ may allow the opposing party to offer additional portions of a recording to establish the context, or to rebut, the recording.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A

party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education. Documents offered as evidence to support a request for reimbursement must be separated by vendor.

MOTIONS

On February 4, 2020, Student filed a motion to bifurcate the issue regarding Student's entitlement to compensatory education. Student asserts that he was not provided with IEE's pursuant to the August 18, 2016 settlement agreement, and Berkeley failed to provide an IEE or file for due process related to triennial evaluations due in March 2019. Student asserts that since he was not properly assessed, the assessment issue should be determined first and IEEs ordered. Student further asserts that the information from the ordered IEEs will be necessary to prove Student's compensatory education remedies.

On February 5, 2020, Berkeley opposed Student's motion to bifurcate on the grounds that the motion does not promote judicial economy.

Federal and state laws pertaining to special education due process administrative proceedings do not contain a specific reference to the procedure for bifurcating issues at trial. The Administrative Law Judge has the discretion to bifurcate an issue raised in the pleadings, and hear it in a separate hearing, if doing so would be convenient, would result in judicial economy or would avoid prejudice to a party. (Gov. Code, §11507.3, subd. (b).) Generally, the Office of Administrative Hearings (OAH) will bifurcate a hearing where the resolution of the issue to be determined in the first hearing will determine whether the remainder of a hearing will be necessary. In this case, the request for

bifurcation is not timely and the request seeks the opportunity to have a second hearing for an issue that was not pled in the complaint.

The ALJ heard oral argument on the motion during the PHC and denied Student's motion to bifurcate the case. Generally, OAH will bifurcate a hearing where the resolution of a threshold question will determine whether the remainder of a hearing will be necessary. Bifurcation limiting parties or issues may further judicial economy.

Here, bifurcation will not serve the interests of judicial economy. This matter is almost four months old and Student is not attending school. Additionally, this is not a threshold question that would determine whether the remainder of the hearing would be necessary. As a result, bifurcation will not substantially limit or eliminate the need for the rest of the hearing. In fact, this will delay the proceeding and a determination regarding other substantive issues further. Moreover, the basis for the request appears to be a means to develop more evidence for hearing, which is not the appropriate standard for bifurcation. As a result, bifurcation will not substantially limit or eliminate the need for a hearing. Accordingly, Student's motion to bifurcate is denied.

Student contemplates filing a motion to amend the complaint. Any motion that was not filed three business days before the PHC, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

STIPULATIONS

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

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

Counsel, all parties, and all witnesses must conduct themselves in a professional and courteous manner at all times. Cellular phones must be shut off or set to vibrate during the hearing unless the ALJ grants permission otherwise.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

Student's counsel requested accommodations for the hearing and was directed to contact the OAH headquarters.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in a mediation or hearing may contact OAH at (916) 263-0880, or send an email to OAHADA@dgs.ca.gov as soon as the need is known. The e-mail should have "Request for Accommodation" in the Subject Line. Additional information concerning requests for reasonable accommodation is available on OAH's website at: https://www.dgs.ca.gov/OAH/Services/Page-Content/Office-of-Administrative-Hearings-Services-List-Folder/Accommodations-at-OAH.

HEARING OPEN TO THE PUBLIC

At Student's request, the hearing will be open to the public. The parties, should inform the ALJ if Student expects any group or members of the press to be present during the hearing. No one may record any part of the hearing, and all electronic devices must be off or silent in the hearing room unless permitted by the ALJ.

Parents should be aware that by opening the hearing, District employees who are not witnesses, or other people that Parents might not know, may attend the hearing. Persons disclosed on either party's witness list, with the exception of District's

representative, will be excluded from the hearing until their testimony has been completed. The parties shall immediately notify each other and OAH if they are aware that there will be media attending the hearing.

Government Code, section 11425.20 empowers the ALJ to order an open hearing to be closed or make other protective orders to the extent necessary or proper to ensure a fair hearing in the circumstances of the particular case. The ALJ may also exclude persons whose actions impede the orderly conduct of the hearing, restrict attendance because of the physical limitations of the hearing facility, or take other action to promote due process or the orderly conduct of the hearing. (Tit. 1, Cal. Code Regs., § 1030.)

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 if 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. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 4:00 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.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received and processed 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 before the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement, the parties shall provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

FAILURE TO COMPLY

The failure to comply with this Order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

Dated: February 11, 2020

DocuSigned by:
Cynthia Fritz
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Cynthia Fritz

Administrative Law Judge

Office of Administrative Hearings