BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH CASE NO. 2013120159
v.	ORDER FOLLOWING PREHEARING CONFERENCE; AND ORDER DENYING REQUEST FOR TELEPHONIC TESTIMONY
BERKELEY UNIFIED SCHOOL DISTRICT.	

On January 24, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Adeniyi A. Ayoade, Office of Administrative Hearings (OAH). Deborah R. Jacobson, Attorney at Law, appeared on behalf of Student (Student). Jan E. Tomsky, Attorney at Law, appeared on behalf of the Berkeley Unified School District (District). The PHC was recorded. Based on discussion with the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on **January 28-30 and February 4, 2014,[1] and continue day to day, Monday through Thursday at the discretion of the ALJ.** The hearing shall be held at the Berkeley Adult School located at **1701 San Pablo Avenue, 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 January 28 and February 4, 2014 when the hearing shall begin at 9:30 a.m., unless otherwise ordered. **After the PHC, this matter has been reassigned to ALJ Theresa Ravandi as the hearing ALJ.**

District shall ensure that there is an appropriate room available for the due process hearing. The room shall meet OAH specifications, and at a minimum, the room 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 District'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 room is not available for any of the hearing days, District shall immediately notify OAH and the parties and propose a different location. Fresh water and tissue shall be 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.

[1] At the hearing, the parties may request that Friday, January 31, 2014, bet set as a due process hearing date rather than February 4, 2014.

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 requested proposed remedies are as follows: [2]

a) **ISSUES**

1) From February 2013 to November 2013, did District deny Student a free appropriate public education (FAPE) by failing to timely locate, identify, or evaluate her pursuant to District's affirmative Child Find obligations?

2) Did District deny Student a FAPE by failing to find her eligible for special education and related services under the eligibility category of specific learning disability at the November 4, 2013 individualized education program (IEP) team meeting?

3) Did District deny Student a FAPE by failing to allow Parents meaningful participation in the decision making process at the November 4, 2013 IEP team meeting?

b) **PROPOSED REMEDIES**. As proposed remedies, Student seeks an order from OAH directing District to: 1) find Student eligible for special education and related services; 2) convene an IEP team meeting to develop an IEP for Student relating to her needs for specialized academic instruction and related services; and 3) reimburse parents or provide Student with 120 hours of Lindamood-Bell program/academic instruction, and 50 hours of occupational therapy services through an independent therapist of Parents' choice, as compensatory education to Student.

3. 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 December 4, 2013, ordered the production of lists of all witnesses and documents by an earlier date, namely, at least three

[2] The issues at the due process hearing are those alleged in Student's due process complaint (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 a Due Process 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).)

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.

4. 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 District 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.

5. 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 9 witnesses, and District has disclosed 16 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's 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.

6. 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.

7. Motions. Other than as discussed herein below, 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 January 24, 2014. Student's motion for telephonic testimony is addressed as follows:

i. Order Denying Motion for Telephonic Testimony. Student moved to have Dr. Barbara L. Mercer Ph.D. testify by telephone on the grounds that Dr. Mercer's schedule as a supervising physiologist is busy, and that she would be uncomfortable seeing certain District staff at the hearing. District opposed the motion on the ground of prejudice, arguing that because Dr. Mercer is a key expert witness for Student they should be allowed to fully confront and cross-examine her, and that their right to do so would be impaired if she is allowed to testify by telephone. Thus, District contends that Student's motion be denied.

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. Here, Student's failed to establish that Dr. Mercer's busy schedule as a supervising psychologist presents any actual conflict that would prevent Dr. Mercer from testifying in person. In addition, while Student asserts that Dr. Mercer may be uncomfortable seeing some of District's staff at the hearing, Student failed to establish that Dr. Mercer would be unable to attend the hearing in person due to her schedule. Due to the importance of Dr. Mercer's testimony to Student's case, District's need to confront and cross-examine her, and the ALJ's need to personally observe the witness' demeanor and make credibility determinations, Student's motion is denied. Dr. Mercer's "busy schedule" alone is not an adequate reason to deprive District of its right to fully confront Dr. Mercer in person regarding her proposed testimony at the hearing. Accordingly, Student's motion to have Dr. Mercer testify telephonically is denied.

8. 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.

9. 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.

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

12. Order of Presentation of Evidence: Student filed this matter. Therefore, Student shall produce her evidence first. Where Student and District 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.

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

14. 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 SIMULATANEOUSLY 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.

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

IT IS SO ORDERED.

Dated: January 24, 2014

/s/

ADENIYI AYOADE
Administrative Law Judge
Office of Administrative Hearings