

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

OAKLAND UNIFIED SCHOOL
DISTRICT AND BERKELEY UNIFIED
SCHOOL DISTRICT.

OAH Case No. 2014080302

ORDER FOLLOWING PREHEARING
CONFERENCE

On September 22, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Charles Marson, Office of Administrative Hearings. F. Richard Ruderman, Attorney at Law, appeared on behalf of Student. Lenore Silverman, Attorney at Law, appeared on behalf of the Oakland Unified School District (Oakland) and the Berkeley Unified School District (Berkeley). 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 at the Office of Administrative Hearings, 1515 Clay Street, Suite 206, Oakland, CA 94612.¹ It shall take place on October 1, 2, 7, 8, and 9, 2014, and continue day-to-day thereafter, Monday through Thursday, at the discretion of the ALJ. On October 1, 2014, the hearing shall begin at 9:30 a.m. and end at 5:00 p.m., and on the remaining days the hearing shall begin at 9:00 a.m. and end at 5:00 p.m., 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.

¹ In anticipation of a possible settlement between Student and Oakland, Ms. Silverman is investigating the possibility of a change of venue to Berkeley. If that occurs, at a minimum the hearing room provided by Berkeley 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

2. Issues and Proposed Resolutions.

A. During the 2012-2013 school year, did Oakland deny Student a free appropriate public education by:

1. Failing to timely assess Student;
2. Failing to find him eligible for special education and related services;
3. Failing to offer him goals in all areas of need; and
4. Failing to provide him a substantively appropriate program of placement and services?

B. During the 2013-2014 school year, did Berkeley procedurally deny Student a FAPE by:

- 1, Failing to provide Parent an assessment plan within 15 days of her written request;
2. Failing to provide educational records within 5 days of written request;
3. Failing to convene an individualized education program team meeting at a time convenient for Parent;
4. Denying Parent meaningful participation in the IEP process;
5. Failing to make a clear offer of placement and services;
6. Failing to document the nature, frequency, or duration of IEP services;
7. Failing to conduct a manifestation determination meeting;
8. Failing to give Parents prior written notice of its reasons for failing to change Student's IEP on July 14, 2014;
9. Failing to provide adequate present levels of performance;
10. Failing to timely provide and fund an independent educational assessment; and
11. Failing to provide proper notice of suspension and recommendation for expulsion?

C. During the 2013-2014 and 2014-2015 school years (as stated more specifically below), did Berkeley substantively deny Student a FAPE by:

1. Failing to timely assess him (2013-2014);
2. Failing to timely find him eligible for special education and related services (2013-2014 and 2014-2015);
3. Failing to offer him goals in all areas of need (2013-2014);
4. Failing to provide him a substantively appropriate program of placement and services (2013-2014 and 2014-2015);
5. Failing to offer him counseling services (2013-2014 and 2014-2015);
6. Failing to offer him adequate accommodations and modifications (2013-2014 and 2014-2015);
7. Failing to provide him an adequate behavior support plan (2013-2014 and 2014-2015);
8. Failing to provide him with a safe learning environment (2013-2014 and 2014-2015);
9. Failing to protect him from bullying, thereby interfering with his access to education (2013-2014);
10. Failing to provide him with an appropriate transition plan, including workability (2013-2014 and 2014-2015);
11. Failing to provide him with adequate instruction in executive functioning (2013-2014 and 2014-2015);
12. Failing to offer an interim alternative placement (2013-2014);
13. Failing to implement his IEP (2013-2014)?
14. Failing to offer occupational therapy services (2014-2015); and
15. Failing to offer assistive technology equipment and services (2014-2015)?

D. During the 2013-2014 and 2014-2015 school years, did Berkeley deny Student a FAPE by:

1. Failing to conduct an educationally related mental health service evaluation;
2. Failing to conduct an assistive technology assessment; and
3. Failing to conduct a transition assessment?

As resolutions, Student seeks an order that Oakland and/or Berkeley (1) reimburse Parent for (a) the cost of an independent educational assessment by [redacted] and his attendance at the July 2014 IEP team meeting; and (b) educational costs incurred, including tutoring, counseling, and various therapies; (2) fund or reimburse Parent for independent educational evaluations in the areas of educationally related mental health services, assistive technology, and transition needs, and for the attendance of the assessors at the IEP team meeting(s) convened to review the assessments, develop goals and implement recommendations; (3) provide Student compensatory education in the form of individual tutoring, counseling services, assistive technology services and equipment, occupational therapy, and transition services; and (4) place Student in a small school setting such as a non-public school with access to general educational curriculum, mental health services, occupational therapy, and transportation.

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 in a way that makes clear the party offering it (such as "S1" or "D2"). 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. Each party shall serve an exhibit binder containing its respective exhibits on the other party by 5:00 p.m. on September 24, 2014, 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.

4. Witnesses.

a) Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or out of order. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement and listed below, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

b) Student has identified 31 witnesses to be called at the hearing, and the District has identified 15 witnesses. Some of the witnesses are listed by both parties. In light of the fact that five days have been scheduled for the hearing, examination of the number of witnesses proposed would make it difficult to complete the hearing as scheduled. Therefore, at the beginning of the hearing, each party shall serve on the other party and on OAH a tentative witness list, identifying the witnesses the party intends to call, as opposed to witnesses the party may call depending on the flow of the hearing and the evidence. Each revised witness list shall contain an estimate of the length of each witness's direct examination testimony. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for their testimony.

5. Scope and Order 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. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once, so the parties shall be required to establish their cases in chief during the first appearance of a witness.

6. Telephonic Testimony. At present no party intends to present a witness by telephone. A party seeking to present a witness by telephone shall move in advance for leave to do so; 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.

7. Electronic Recording of Hearing.

a. Audio Recording. At present no party intends to make an audio recording of the hearing. Any party that desires to make such a recording shall apply for leave to do so in advance from the ALJ and shall do so only on the 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. At present no prehearing motions are pending or contemplated. Any motion filed after this date shall be supported by a declaration under penalty of perjury

establishing good cause why the motion was not made prior to or during this 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 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.

12. 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. If the hearing is held in a room provided by Berkeley (see footnote 1, supra), Berkeley shall ensure that the hearing room and other facilities that will be used during the hearing comply with the Americans with Disabilities Act.

13. Hearing Closed To the Public. At the request of Parents, 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 five days or fewer than five days before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact 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 those portions of the signed agreement withdrawing the case, with signatures. 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.

Dated: September 24, 2014

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings