

August 29, 2014

VIA EMAIL AND CERTIFIED MAIL

James T. Johnson III, Administrator
Focused Monitoring and Technical
Assistance Unit Three
California Department of Education
1430 N Street, Suite 2401
Sacramento, CA 95814

Certified Mail #: 7012 2920 0002 3908 4430

RE: Pending Corrective Actions Issued to Berkeley Unified School District

Dear Mr. Johnson:

On behalf of Disability Rights Education and Defense Fund (DREDF), and its Parent Training and Information Unit (PTI), I am writing to request information about your July 1, 2014, letter to Superintendent Evans in the Berkeley Unified School District (BUSD). A copy of that letter is enclosed. Because the letter requires BUSD to make comprehensive reforms to its special education policies and regulations by September 29, 2014, we want to know what actions California Department of Education (CDE) is taking to ensure *all necessary* reforms are being made. We also take this opportunity to inform you of numerous specific concerns we have about BUSD's special education policies and practices that we believe need to be reformed through this process and without delay.

We understand that the corrective actions were issued following CDE's review of a recent OAH decision regarding alleged Child Find violations by BUSD, where the Administrative Law Judge (ALJ) noted, as quoted in your letter:

Berkeley's preferred manner of addressing student needs was to first convene a student study team meeting, before initiating a special education referral. Adherence to this protocol of steering families towards the student study team process, and Berkeley's offer of such a meeting, did not discharge its child find duty as to Student. Further, it raises a serious question as to Berkeley's global child find policies and procedures in terms of ensuring that staff are aware of legal requirements and supported in their individual duties. The fact that teachers do not refer students for special education assessment calls into question Berkeley's internal child find training.

OAH Decision No. 2013120159 at 30 (March 17, 2014) (enclosed). The ALJ further chastised BUSD, adding that "[t]he fact that teachers do not refer students for special education assessments calls into question the efficacy of Berkeley's internal child find training." *Id.*

As you know, the federal Office of Special Education Programs (OSEP) has consistently stated that pre-assessment interventions do not exempt LEAs from their IDEA Child Find obligations. In January 2011, OSEP released Memorandum 11-07.¹ This guidance emphasized that SEAs and LEAs have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of a Response to Intervention (RTI) strategy. Both RTI and SST meetings are pre-assessment strategies for children struggling academically and behaviorally. Because NR SELPA Policy No. 6500 *requires* this type of delay, we urge CDE to closely monitor how BUSD corrects its child find policies and procedures and how it trains its staff. Specifically, we urge CDE to actively ensure the following:

- The District should revise its Child Find policies and procedures to explicitly recognize that BUSD staff has an obligation, and parents have a right, to make direct referrals for special education assessment that may not be deferred by SST meetings.
- The District should ban its use of inappropriate requirements to make/accept assessment referrals, including waiting for students to first fail, waiting for parents to initiate assessments, and failing to help parents put referrals in writing.
- The District should be required to reform its exclusionary eligibility policies, especially regarding dyslexia. 34 C.F.R. § 300.8(c)(10). Please see the OAH decision cited above. Current BUSD Interim Special Education Director, Lisa Graham, testified that dyslexia in and of itself did not constitute an IDEA-eligible processing disorder. OAH Case Number 2013120159 at 24. The ALJ made note of this "mistaken" opinion at the conclusion of her opinion. *Id.* at 40. Based on information we have received from other parents, this appears to be BUSD policy.
- With respect to the training you have required, the District should provide not only a "training agenda" and "list of participants, including their names and titles"

¹ Office of Special Education Programs (OSEP) No. 11-07, *A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA)* (2011). Available at: <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf> (last visited August 28, 2014).

as you have required, but *a complete set of training materials for all teachers and relevant staff regarding all mandated policy reforms*, for prior review and approval by CDE.

Further Compliance Concerns

We urge CDE to closely monitor how BUSD addresses the following in the mandated policy reforms and follow up training:

- A. Determining eligibility under each condition listed in 34 C.F.R. § 300.8, including dyslexia, and ensuring determinations are by IEP team decision, not predetermination of school team.
- B. Conducting appropriate assessments, including Independent Educational Evaluations.
- C. Providing prior written notice, including all legally required elements.
- D. Ensuring timely provision of all student records upon request.
- E. Ensuring proper consideration of parent input and the input of independent experts in all points along IEP process, conducting proper IEP meetings, providing translation services for meetings and documents.
- F. Using adequate data (formal and informal) in determining specialized education and related service needs, including physical, behavioral (especially functional behavioral assessments, behavioral intervention plans and behavioral service plans) and mental health services, social skills support, Applied Behavior Analysis (ABA) services, assistive technology, 1:1 aides, and providing appropriately trained aides.
- G. Developing a continuum of services and placement options to keep students in District /SELPA settings and their least restrictive environment (LRE), including the provision of appropriately trained, consistent 1:1 paraprofessionals and aides to students who need them in order to benefit from their education in the LRE.
- H. Making proper placement decisions, including placements in the LRE, private and residential placements as needed.
- I. Ensuring individualized determinations pursuant to mandatory IEP processes for Berkeley High Small School assignments.
- J. Ensuring delivery of IEP services in charter schools to which BUSD is the LEA.
- K. Ensuring appropriate transition planning and service delivery, which includes proper evaluation, goals and services aimed at meaningful outcomes based on students' evaluations and post high school plans.
- L. Ensuring compliant disciplinary practices, including suspension, manifestation determinations and expulsion.
- M. Ensuring strict compliance with legal requirements regarding restraint and seclusion.

- N. Offering and providing effective Positive Behavioral Intervention Services (PBIS) by all staff across all settings to promote use of positive methods of addressing problem behaviors and instill pro-social behaviors among all students.
- O. Ensuring compliant interdistrict transfers.
- P. Ensuring that general education teachers and any other appropriate staff are aware of and compliant with IEPs.
- Q. Providing individualized interventions when students are struggling to incur credits or attend their general education courses, as opposed to using one-size-fits-all online computer courses like Cyber High.

As you can see, this is a long list. We call your attention to these specific areas because we have received numerous complaints from affected families in BUSD over the last several years and our staff has been busy providing related advocacy services to redress these failures and oversights by BUSD. We would like to provide you with further information as needed and offer to meet with you and District representatives in person at your earliest convenience to elaborate on these concerns. Thank you in advance for your attention and a prompt response. Please contact me directly with any questions you may have.

Sincerely yours,



Larisa Cummings, Staff Attorney

Encs.

cc: Donald Evans, Superintendent, Berkeley Unified School District
Kay Altizer, Acting Special Education Director, Berkeley Unified School District
Lisa Graham, Interim Special Education Director, Berkeley Unified School District
Martha Shultz, Director, North Region Special Education Local Plan Area
Anamaria Loya, U.S. Department of Education, Office for Civil Rights
Deborah R. Jacobson, Esq.



CALIFORNIA
DEPARTMENT OF
EDUCATION

COPY
TOM TORLAKSON *mailed 7/2/14*
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

July 1, 2014

Donald Evans, Superintendent
Berkeley Unified School District
2020 Bonar Street, Suite 321
Berkeley, CA 94702

Dear Superintendent Evans:

Subject: Office of Administrative Hearings Case Number: 2013120159
Student Name: [REDACTED]

The California Department of Education, Special Education Division, has reviewed the aforementioned Office of Administrative Hearings (OAH) decision dated March 17, 2014. A re-examination of the due process hearing decision revealed Berkeley Unified School District violated procedural and/or substantive federal and/or state law pertaining to the education of students with disabilities, including California *Education Code (EC)* sections 56301 and 56302.

Specifically, Berkeley was aware that the student was frequently absent in kindergarten and first grade, suffered from anxiety, and then did not regularly attend the weekly independent study lessons for which the district agreed to enroll her. The OAH Administrative Law Judge stated in his decision:

"Berkeley's preferred manner of addressing student needs was to first convene a student study team meeting, before initiating a special education referral. Adherence to this protocol of steering families towards the student study team process, and Berkeley's offer of such a meeting, did not discharge its child find duty as to Student. Further, it raises a serious question as to Berkeley's global child find policies and procedures in terms of ensuring that staff are aware of legal requirements and supported in their individual duties. The fact that teachers do not refer students for special education assessments calls into question the efficacy of Berkeley's internal child find training."

EC Section 56301 states:

(a) All children with disabilities residing in the state, including children with disabilities who are homeless children or are wards of the state and children with disabilities attending private, including religious, elementary and secondary

schools, regardless of the severity of their disabilities, and who are in need of special education and related services, shall be identified, located, and assessed and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services as required by Section 1412(a)(3) and (10)(A)(ii) of Title 20 of the United States Code. A child is not required to be classified by his or her disability so long as each child who has a disability listed in Section 1401(3) of Title 20 of the United States Code and who, by reason of that disability, needs special education and related services as an individual with exceptional needs defined in Section 56026.

In addition, the parents contacted the special education department regarding the referral process, yet the student was not assessed until at least six months later, and after the parent informed the District that the student was being privately assessed.

EC Section 56302 states:

A local educational agency shall provide for the identification and assessment of the exceptional needs of an individual, and the planning of an instructional program to meet the assessed needs. Identification procedures shall include systematic methods of utilizing referrals of pupils from teachers, parents, agencies, appropriate professional persons, and from other members of the public. Identification procedures shall be coordinated with school site procedures for referral of pupils with needs that cannot be met with modification of the regular instructional program.

In order to correct these findings, the Berkeley Unified School District must complete the following corrective actions:

1. By September 29, 2014, the District shall provide updated Board adopted Special Education Policies (BP) and Administrative Regulations (AR). Acceptable evidence should include a copy of the BP and ARs with the adoption date, agenda(s), and minutes of the Board meeting(s) when the policies and regulations were adopted.
2. By September 29, 2014, the District shall review and revise the child find policies, processes and procedures, used by the District in order to ensure compliance with state and federal law, and shall provide a copy to the CDE.

Donald Evans, Superintendent
July 1, 2014
Page 3

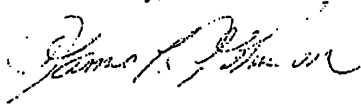
3. By September 29, 2014, the District shall provide evidence it has conducted a training for appropriate general and special education staff and administrators. The training shall cover California *Education Code (EC)* sections 56301 and 56302. Acceptable evidence should include the training agenda and a list of participants, including their names and titles.

Evidence of required corrective actions shall be sent to:

**James T. Johnson III, Administrator
Focused Monitoring and Technical Assistance Unit Three
California Department of Education
1430 N Street, Suite 2401
Sacramento, CA 95814
916-327-6966 Phone
916-327-8878 Fax**

If you have any questions regarding this letter, please contact Shirley Sekeres, Education Programs Consultant, by phone at 916-322-0377 or by e-mail at ssekeres@cde.ca.gov.

Sincerely,



James T. Johnson III, Administrator
Focused Monitoring and Technical Assistance Unit Three
Special Education Division

JTJ:ss

cc: Martha Shultz, Director, North Region Special Education Local Plan Area
Kay Altizer, Special Education Director, Berkeley Unified School District

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2013120159

v.

BERKELEY UNIFIED SCHOOL
DISTRICT.

DECISION

On December 2, 2013, Student filed a request for a due process hearing (complaint) with the Office of Administrative Hearings (OAH), naming Berkeley Unified School District (Berkeley).

Administrative Law Judge (ALJ) Theresa Ravandi heard this matter in Berkeley, California, on January 28-30 and February 4-5, 2014.

Deborah Jacobson, Attorney at Law, represented Parents and Student. Parents attended each day of hearing. Student was not present.

Jan E. Tomsy, Attorney at Law, represented Berkeley. Kay Altizer, Berkeley's Executive Director of Special Education attended the first week of hearing with the exception of the afternoons of January 28-29, 2014. Lisa Graham, program supervisor, attended as Berkeley's representative at that time as well as on February 4-5, 2014, in Ms. Altizer's absence.

At the conclusion of the hearing, the matter was continued to March 3, 2014, to afford the parties an opportunity to submit written closing briefs. The record closed with the parties' timely submission of closing briefs and the matter was submitted for decision.

ISSUES

1. From February 2013 to November 2013, did Berkeley deny Student a free appropriate public education (FAPE) by failing to timely locate, identify, or evaluate her pursuant to its affirmative child find obligations?

receiving educational benefit.³⁶ Student's report cards documented her progress. None of Student's teachers identified her as a child in need of special education. Ms. Macdonald persuasively established that Student did not require special education at the time of the IEP team meeting or at the time of hearing because she demonstrated the skills to independently perform consistent with grade level standards; Student was performing at and often exceeding grade level expectations during her second grade year.

71. Ms. Lee and Ms. Smith, based upon their assessments and observations, likewise established that Student did not require special education in order to receive educational benefit. Parents maintained that Student's need for special education was due to her failure to achieve commensurate with her superior intellect and that her academic and reading skills did not match her potential and were holding her back. Even so, Student would not be expected to test higher than the grade level curriculum to which she had been exposed, and she had limited exposure to the curriculum due to her frequent absences.

Parental Participation at the November 2013 IEP Team Meetings

72. The IEP team initially met on November 4, 2013, for two hours.³⁷ All required Berkeley members were in attendance along with Parents, their advocate Lara Forest, Dr. Owen-Wilson, and Dr. Dimitrova. Ms. Lee prepared a detailed psycho-educational report to present to Student's IEP team. In her report she listed the criteria for specific learning disability, and an analysis of why Student did not meet the criteria based upon her assessment. She was surprised at how well Student performed and was doing in her second grade class in contrast to what she had learned from Parents, and in light of Student's frequent absences even during the assessment process. Ms. Lee was clear in her report and persuasive in her testimony that the purpose of her report was to share information with the IEP team for the consideration of all members in determining eligibility, Student's need for services, and planning for success. She was clear that the IEP team as a whole determined whether or not Student was eligible for special education.

73. Ms. Lee provided Parents a draft copy of her report a day or two prior to the November 4, 2013 IEP team meeting. Parents also received draft copies of Berkeley's academic testing, occupational therapy and assistive technology reports by November 1 2013. Although Parents had requested the opportunity to review the reports even earlier than they received them, they did not request that the meeting be delayed to a later date.

74. Berkeley team members did not meet in advance of the IEP team meeting to determine Student's eligibility, but they had questions about the legal criteria for determining

³⁶ Student did not prove her contention that any academic benefit was a result of her participation in Parent funded reading programs during summer 2013 and winter 2013-2014.

³⁷ This was a rescheduled date to accommodate Dr. Owen-Wilson.

a specific learning disability, including the impact of Student's poor school attendance, lack of math and reading instruction, and the significance of a diagnosis of dyslexia in determining the existence of a processing disorder. In response to their questions, Ms. Graham provided Berkeley team members with references to the education code and the criteria for specific learning disability prior to the IEP team meeting.³⁸ Ms. Graham's opinion was that dyslexia in and of itself did not constitute a processing disorder. It is reasonable to conclude that in responding to legal questions, Ms. Graham shared her interpretation of the law with Berkeley team members.

75. Berkeley's psycho-educational report addressed the first question to be answered, namely whether Student met eligibility criteria. Therefore, Ms. Lee discussed her report and eligibility criteria first pursuant to standard practice. Parents questioned Ms. Lee about her findings and pointed out errors such as Ms. Johnston being identified as a Berkeley Arts teacher. They had no questions for Susan Deutsch, assistive technology specialist, or for Ms. Rudel who both briefly presented their reports. Parents, their advocate, the assessor and therapist all participated in the discussion of Berkeley's findings and conclusions, although agreement was not reached. Ms. Forest questioned how the school would assist Student to perform to her full potential. Parent discussed Student's background and school refusal issues, and in her own words, she disagreed "passionately" with Berkeley's conclusions.

76. Dr. Owen-Wilson presented her report last. She acknowledged that Berkeley team members listened, considered, and responded to information she presented. Due to the many questions posed, she was not able to completely discuss her findings. Even so, Parent did not request additional time for Dr. Owen-Wilson to address the team. Dr. Owen-Wilson did not attend the reconvened IEP team meeting or request that it be rescheduled to allow for her attendance.

77. Although Dr. Dimitrova felt as though Berkeley did not ask for her input, she acknowledged that the team listened to her as she discussed Student's regulatory and early attachment issues, learning disability and related stress, and need for support. Berkeley team members heard for the first time that Student was reporting to her therapist that she could not read. Parent report of the severity and frequency of Student's school refusal was also new information that did not match Berkeley's knowledge and experience of Student at school.

³⁸ Ms. Graham has been a special education program supervisor for seven years, the last three years with Berkeley. She has worked in the field of special education in various capacities for the past 14 years. Ms. Graham is a national board certified teacher and holds clear administrative services and multiple subject elementary level teaching credentials, as well as a level II educational specialist instructional credential in the field of deaf and hard of hearing. She earned a master's degree in organization and leadership from the University of San Francisco in California in 2006.

first identifying the source of Student's anxiety (i.e. academics or separation). Therefore, that Student's anxiety may have been triggered by the transfer of her best friend to another school, or that her school refusal might have been a learned behavior reinforced by rewards such as Parental attention, or that Student did not display any anxiety at school did not relieve it of its child find duty. Berkeley had an affirmative duty to assess Student to discover why she was not attending.

16. Berkeley's preferred manner of addressing student needs was to first convene a student study team meeting, before initiating a special education referral. Adherence to this protocol of steering families towards the student study team process, and Berkeley's offer of such a meeting, did not discharge its child find duty as to Student. Further, it raises a serious question as to Berkeley's global child find policies and procedures in terms of ensuring that staff are aware of legal requirements and supported in their individual duties. The fact that teachers do not refer students for special education assessments calls into question the efficacy of Berkeley's internal child find training.

17. In March 2013, Berkeley authorized Student's participation in independent study even though it knew this program would not provide instruction comparable to that delivered in its first grade classrooms. Further, Berkeley knew that Student did not engage in or attend to her weekly instructional meetings. Student is not required to first fail before Berkeley's child find duty arises, and Berkeley's position that Student was still making adequate progress did not relieve it of its fundamental duty to assess. Berkeley agreed that Student's educational performance was adversely affected by her excessive absences and removal from the classroom setting. Once on notice of Student's alleged school refusal and anxiety, and her concerning behaviors during her weekly independent study sessions, Berkeley was obligated to start the assessment process independent of any request from Parent and regardless of the fact that Parent did not provide a written diagnosis of Student's alleged anxiety disorder. Berkeley had an obligation to refer Student for a special education assessment by the end of March 2013, and it did not do so. Therefore, Student met her burden of proof that Berkeley procedurally violated the IDEA by failing to timely assess her for eligibility.

18. In order to be entitled to substantive relief, Student must also demonstrate that as a result of Berkeley's failure to fulfill its child find duties, she was deprived of educational benefit, her right to a FAPE was impeded, or Parents' ability to participate in the decision making process was significantly impeded. As determined by this Decision, Student did not establish that she is eligible for special education services as a student with a specific learning disability.⁴³ Therefore, Student did not prove a substantive denial of a FAPE and no award of educational services is warranted.

⁴³ Student solely alleged eligibility under the category of specific learning disability. No findings are made as to whether Student may be eligible pursuant to another qualifying condition.

53. Ms. Graham held the opinion that dyslexia could not constitute a processing disorder. It is reasonable to conclude that in responding to Berkeley team members' questions about the criteria for specific learning disability prior to the IEP team meeting, she shared her interpretation of the law and opinion on dyslexia. However, team members are not prohibited from meeting in advance of the IEP team meeting or from discussing and forming opinions about the topic at hand. What is prohibited is attending the meeting with a mindset that they have already determined the eligibility question. Student did not prove this. At least one Berkeley team member held the opinion prior to the IEP team meeting that dyslexia was not a processing disorder. However mistaken as this opinion may be, Student did not establish that Berkeley predetermined eligibility and was not open to Parent input. In conclusion, Student did not prove that Berkeley denied Parents their participatory rights.

ORDER

All relief sought by Student is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student substantially prevailed as to Issue One. Berkeley prevailed as to Issues Two and Three.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: March 17, 2014

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings