BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. DOWNEY UNIFIED SCHOOL DISTRICT,	OAH Case Nos. 2011050579 (Primary Case) and 2010100321
DOWNEY UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2011030557 ORDER FOLLOWING PREHEARING CONFERENCE OF APRIL 20, 2015, ON REMANDED ISSUES

On April 20, 2015, Administrative Law Judge Darrell Lepkowsky of the Office of Administrative Hearings held a telephonic prehearing conference in this case regarding the remand of a decision issued by the United States District Court for the Central District of California in Case No. CV-12-2285GW (SSx). Attorneys Patricia Valenzuela and Lauren-Ashley Caron, appeared on behalf of Student. Attorney Karen Gilyard appeared on behalf of the Downey Unified School District.

Based on discussion of the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on April 28, 2015, through April 30, 2015, and continuing day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall take place at Downey Unified's offices located at **11627 Brookshire Avenue, Downey, California, 90241.** The hearing shall start at **9:30 a.m. on April 28, 2014, and at 9:00 a.m.,** all other days, unless otherwise ordered.[1]

[1] At a minimum, the hearing room shall have four or more separate tables capable of being moved into a courtroom configuration with an electrical outlet near the ALJ's table. Downey Unified shall ensure that all parties, witnesses, and the ALJ have drinking water and tissue available to them, and that the hearing room and other facilities that will be used during the hearing are accessible in compliance with the Americans with Disabilities Act. Downey Unified shall also ensure that parking is available for all hearing participants.

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 on remand are listed below.

I. Additional testimonial and/or documentary evidence will be taken on the following issues:

Downey Unified's Issue:

a. Was Downey Unified unable to implement the portions of the Student's March 12, 2010 and September 21, 2010 IEP's to which Student's mother consented given the limited scope of her consent?

Student's Issues:

b. Did Student suffer a continuing loss of educational benefit until March 2013, based upon Downey Unified's delay in administering assessments to him in the areas of psycho-educational, occupational therapy, and speech and language?

c. Has Student suffered a continuing loss of educational benefit due to Downey Unified's failure to assess him in the areas of adaptive behavior, functional behavior, motor performance/physical fitness, and/or audiology?

II. Subsequent to the hearing on remand, the parties will file briefs addressing the following issues on remand, as well as the issues presented at the hearing:

d. Was the consent by Student's mother to the March 12, 2010 and September 21, 2010 IEP's clear and unambiguous?

e. If so, to what did she provide consent?

f. What portions of the consented to IEP's did Downey Unified fail to implement?

g. If District failed to implement any portions of the IEP's to which Student's mother consented, was its failure to implement material?

h. If the failure was material, what evidence in the record supports Student's claim of a loss of educational benefit and to what remedy is Student therefore entitled?

i. What evidence in the record supports Student's contention that his mother's ability to participate in his IEP process was impeded?

j. Should the ALJ have expanded the record to include additional testimony regarding Student's alleged continued loss of educational benefit?

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, but shall place the letter "S" or "D" in front of the exhibit to designate if it is a Student or District exhibit (for example, "S-5, S-6," or "D-1, D-2"). The parties are encouraged to prepare a joint exhibit binder containing their shared exhibits. 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. The parties shall ensure that all evidence is exchanged no later than five business days prior to hearing, 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 the ALJ rules that it is admissible.

4. Witnesses. The parties shall informally meet and confer by **5:00 p.m. on April 23, 2015**, to coordinate their witness production and schedules, and to attempt to **finalize a stipulation regarding the scope of IEP terms and/or assessments that Student contends Downey Unified delayed or failed to implement or administer.** At the commencement of the hearing, the parties will present their witness schedules, including the anticipated time for each witness's testimony. The parties shall be prepared to discuss any issues with the presentation of witnesses on the first day of hearing. 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. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. 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 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. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony, to

ensure that this matter is concluded within the time allotted, based upon the parties' time estimates and the issues presented.

5. Order of Presentation of Evidence and Scope of Witness Examination. This is a consolidated case. Student shall present his case-in-chief first. Where Student and Downey Unified 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. Only one round of redirect and/or re-cross examination will be permitted, unless otherwise ordered.

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.

7. Motions. *Audio Recording of the Hearing:* Student requested permission to audio record the hearing. It is within the discretion of the ALJ to permit the audio recording of a due process hearing. Both parties will be permitted to audio record the hearing on 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.

Student's Request to Sequester Witnesses: Student's request is granted, as to all non-party witnesses.

At present no other prehearing motions are pending or contemplated. Any prehearing 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 the prehearing conference of April 20, 2015.

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

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

or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ. The parties shall not eat in the hearing room while the ALJ is on the record.

10. Compensatory Education/Reimbursement. It is Student's burden to present admissible evidence of expenditures for which he is seeking reimbursement, or a stipulation to the amount of expenditures, as part of his case-in-chief. It is also Student's burden to present admissible evidence regarding the type, amount, duration, and need for any compensatory education or assessments he is seeking as a remedy.

11. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for interpreter services. Downey Unified shall ensure that the hearing room and other facilities that will be used during the hearing are accessible in compliance with the Americans with Disabilities Act.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made known. Additional information concerning requests for reasonable accommodation is available on OAH's website at http://www.dgs.ca.gov/oah/Home/Accommodations.aspx.

12. Hearing Closed To the Public. At the request of Student's mother, the hearing will be closed to the public. However, except for parties and legal representatives, witnesses will not be permitted in the hearing room until after they have testified.

13. 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 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 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. THE PARTIES SHOULD SIMULTANEOUSLY **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 or the morning of the hearing.

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

IT IS SO ORDERED.

DATE: April 20, 2015

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings