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 No. 2016040358
DOWNEY UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT,	OAH Case No. 2016020526
DOWNEY UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2016031078 ORDER FOLLOWING PREHEARING CONFERENCE

On August 26, 2016, a telephonic prehearing conference was held before Administrative Law Judge Chris Butchko, Office of Administrative Hearings. Karen Gilyard, Attorney at Law, appeared on behalf of Downey Unified School District. Bruce Bothwell, Attorney at Law, appeared on behalf of Student. The PHC was recorded.

Based upon discussion with the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on September 13-15 and 20, 2016, and continue day to day at the discretion of the ALJ. The hearing shall take place at the Downey Unified School District offices located at 11627 Brookshire Avenue, Downey, CA 90241. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.

As ordered in the scheduling order, the named local educational agency shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the

Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. The named local educational agency certified that the facilities used for this case comply with the law. The local educational agency shall inform OAH within two days of the date of this order if it is unable to comply with this order.

Prior to the beginning of the hearing, District shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (1) a table for Student and his representatives; (2) a table for District's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. District shall provide drinking water and tissue to all parties, witnesses and the ALJ. The same hearing room shall be used for each day of hearing and shall be available at least one hour prior to the commencement of the hearing each day. The hearing room shall be locked following the hearing each night. District shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

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, and the proposed resolutions, are listed below.

District's Issues are:

1) Does the offer of placement and services arrived at through the individualized educational program team meetings of March 23, May 15, June 5, June 23, and September 30, 2015, offer Student a free and appropriate public education in the least restrictive environment?

2) Was District's May 11, 2015 psychoeducational assessment of Student by Kathi Thompson appropriately conducted?

Student's issues are:

1) Regarding District's March 23, May 15, June 5, June 23, and September 30, 2015 offer of placement and services:

A) Did District fail to conduct an appropriate psychoeducational assessment because it failed to assess Student for autism-related disorders?
B) Was District's offer of placement of student in a general education classroom with 190 daily minutes of specialized academic instruction

insufficient to meet Student's behavioral, communicative, and academic needs?

C) Did District fail to meet Student's needs for behavioral therapy for his maladaptive behaviors and delayed social skills?

D) Was District's offer of 90 minutes per week of individual speech and language therapy insufficient to support Student's significant communication deficits?

E) Was District's offer of 45 per week of individual occupational therapy insufficient to meet student's sensory processing, fine motor, and gross motor needs?

F) Did District fail to offer appropriate goals in communication, occupational therapy, behavior, academics, and social skills?

G) Did District's failure to invite an appropriate general education teacher to any of the IEP team meetings deprive Parent of the right to meaningful participation in the IEP process?

2) Regarding District's March 23, 2016 IEP offer of placement and services:

A) Did District fail to find that Student qualified for special education benefits under the eligibility category of autism and thereby deny him appropriate services to meet his unique needs? [1]

B) Was District's offer of placement of student in a general education classroom with 190 daily minutes of specialized academic instruction insufficient to meet Student's behavioral, communicative, and academic needs?

C) Did District fail to meet Student's needs for behavioral therapy for his maladaptive behaviors and delayed social skills?

D) Was District's offer of 90 minutes per week of individual speech and language therapy insufficient to support Student's significant communication deficits?

E) Was District's offer of 45 per week of individual occupational therapy insufficient to meet student's sensory processing, fine motor, and gross motor needs?

[1] Student was granted leave to amend his complaint to add this issue by order dated May 23, 2016. Due to error, Student's prehearing conference statement did not propose a separate issue statement for the new issue. At the conference, the ALJ stated that he believed that issue 1A) referenced Student's new allegation that District should have assessed him for autism. Student stated that he wanted to be sure that the prehearing conference order reflected the fact that he had presented a claim of entitlement to a finding of eligibility under autism, as expressed in the recent Ninth Circuit authority *Timothy O. v. Paso Robles Unified School District* (2016) 822 F.3d 1105. Although that case does not seem to be directly on point on that issue (see *Timothy O*., 822 F3d. at 1117, n. 17), other authority supports the claim, and it has been included here. (*E.M. v. Pajaro Valley Unified School District*, (9th Cir 2014) 758 F.3d 1162, 1175.)

F) Did District fail to offer appropriate goals in communication, occupational therapy, behavior, academics, and social skills?

District seeks an order stating that parent must consent to the implementation of District's March 23, 2016 offer of free and appropriate public education or forgo special education services from District, and a finding by OAH that the May 11, 2015, psychoeducational assessment of Student was appropriately conducted such that District is not obligated to provide an independent educational evaluation at public expense.

Student seeks a placement in a 1:1 year-round educational setting with scientifically validated services, reimbursement to parents for an independent psychoeducational assessment and privately-funded therapy services, and compensatory educational therapy services, year-round non-public agency individual behavior services, year-round non-public agency speech therapy, and year-round non-public agency occupational therapy.

3. Exhibits. 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"). 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 serve their evidence binders on each other 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. 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. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, 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.

The parties have agreed to meet and confer to coordinate the availability and order of testimony of witnesses to ensure that there is a witness available to testify at all times during the hearing, and to ensure that the hearing is completed as scheduled. 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 parties shall prepare and present to the ALJ a written schedule for each day of hearing at the start of each day's proceedings.

5. Scope of Witness Examination. Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. 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.

6. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., title 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. No parties are currently expected to testify telephonically.

7. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) As this is a consolidated matter, each side bears the burden of proof for the claims it asserted. As the party filing first, District shall present first. The witnesses who are to be called by more than one party will first be examined by District's counsel. After their direct testimony, Student may present them for direct testimony on its behalf and for any cross-examination. Each side will then have the opportunity for further questioning, limited in scope as set forth in Item 5, above.

8. Motions. No pretrial motions are pending or contemplated. 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.

9. 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.

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

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. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the mediation or hearing may contact Noe Fajardo, the assigned calendar staff, at (916) 263-0880, as soon as the need is known. Additional information concerning requests for reasonable accommodation is available at http://www.dgs.ca.gov/oah/Home/Accommodations.aspx

13. Hearing Closed To the Public. The hearing will be closed to the public.

14. 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.

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

IT IS SO ORDERED.

DATE: August 29, 2016

DocuSigned by:
Chris Butchko
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Chris Butchko
Administrative Law Judge
Office of Administrative Hearings