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. 2014050208 (Primary)
DOWNEY UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH CASE NO. 2014041256 (Secondary) ORDER FOLLOWING PREHEARING CONFERENCE

On September 15, 2014, a telephonic prehearing conference was held before Administrative Law Judge Alexa J. Hohensee, Office of Administrative Hearings. N. Jane DuBovy, Attorney at Law, appeared on behalf of Student. Mary L. Kellogg, Attorney at Law, appeared on behalf of Downey Unified School District (District). The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on September 29-30 and October 1-2, 7-8 and 13-15, 2014, and continuing day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin each day at 9:00 a.m. and end at 5:00 p.m., with the exception of the first day of hearing, on which day the hearing shall begin at 1:30 p.m., unless otherwise ordered.

The hearing shall take place at the District's offices located at 11627 Brookshire Avenue, Downey, California 90241.

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 at Consolidated Hearing. The issues at the due process hearing are listed below:

Student's Case

(1) Did District deny Student a free appropriate public education (FAPE) within the applicable statute of limitations during the 2011-2012 school year by:

(a) Failing to convene individualized education program (IEP) team meetings when Student did not make anticipated progress;

(b) Failing to assess Student in all areas of suspected disability, particularly in the areas of psychoeducational, language and speech, assistive and augmentative communication, assistive technology, recreation therapy, adaptive physical education and functional behavior;

(c) Failing to include all required content in the June 2012 IEP document, including appropriate goals and statements of special education and related services offered;

(d) Failing to take into consideration Parents' concerns with regard to academics, behavior and communication at the June 2012 IEP team meeting;

(e) Predetermining the offer of placement in the June 2012 IEP;

(f) Failing to offer or provide special education, related services and support that met Student's unique educational needs, including in the areas of language and speech, augmentative alternative communication, assistive technology, occupational therapy, social skills instruction, recreational therapy and behavior intervention, including a research based intervention program utilizing a one-to-one aide; and

(g) Failing to offer an appropriate placement in the June 2012 IEP?

(2) Did District deny Student a free appropriate public education (FAPE) within the applicable statute of limitations during the 2012-2013 school year by:

(a) Failing to convene individualized education program (IEP) team meetings when Student did not make anticipated progress;

(b) Failing to assess Student in all areas of suspected disability, particularly in the areas of psychoeducational, language and speech, assistive and augmentative communication, assistive technology, recreation therapy, adaptive physical education and functional behavior;

(c) Failing to include all required content in the June 2013 IEP document, including appropriate goals and statements of special education and related services offered;

(d) Failing to take into consideration Parents' concerns with regard to academics, behavior and communication at the June 2013 IEP team meeting;

(e) Predetermining the offer of placement in the June 2013 IEP;

(f) Failing to offer or provide special education, related services and support that met Student's unique educational needs, including in the areas of language and speech, augmentative alternative communication, assistive technology, occupational therapy, social skills instruction, recreational therapy and behavior intervention, including a research based intervention program utilizing a one-to-one aide, and an extended school year; and

(g) Failing to offer an appropriate placement in the least restrictive environment in the June 2013 IEP?

(3) Did District deny Student a FAPE during the 2013-2014 school year by:

(a) Failing to convene individualized education program (IEP) team meetings when Student did not make anticipated progress;

(b) Failing to assess Student in all areas of suspected disability, particularly in the areas of language and speech, assistive and augmentative communication, assistive technology, recreation therapy, adaptive physical education and functional behavior;

(c) Failing to conduct a sufficiently comprehensive and appropriate psychoeducational assessment of Student in April 2014;

(d) Failing to include all required content in the October 2013 and April 2014 IEP documents, including appropriate goals and statements of special education and related services offered;

(e) Failing to take into consideration Parent-funded assessments or Parents' concerns with regard to academics, behavior and communication at the October 2013 and April 2014 IEP team meetings,

(f) Predetermining the offer of placement in the October 2013 and April 2014 IEP's;

(g) Failing to offer or provide special education, related services and support that met Student's unique educational needs, including in the areas of language and speech, augmentative alternative communication, assistive technology, occupational therapy, social skills instruction, recreational therapy and behavior intervention, including a research based intervention program utilizing a one-to-one aide, and an extended school year; and

(h) Failing to offer an appropriate placement in the least restrictive environment in the October 2013 and April 2014 IEP's?

District's Case

(4) Did the District offer Student a FAPE in the IEP of April 22, 2014?

(5) Were District's March and April 2014 assessments of Student in the following areas appropriate such that Student is not entitled to independent educational evaluations at public expense: (a) psychoeducational, (b) speech and language, (c) occupational therapy, (d) functional behavior, and (e) augmentative communication/assistive technology?

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"). 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.

The parties shall exchange resumes or curriculum vitae for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

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 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, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

The parties are ordered to meet and confer by 12:00 p.m. (noon) on Wednesday, September 24, 2014, as to the schedule of witnesses. The parties shall 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.

On the first day of hearing, the parties shall provide the ALJ with a detailed schedule which shall include an estimate of time for each side's direct and cross examination. Each witness will only be called once to testify, except for rebuttal purposes, and both parties shall examine the witness on all issues when the witness is first called. The District shall have witnesses available in case agreement on a witness list is not reached. 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.

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.

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 witnesses' testimony.

5. 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.

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. 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.

8. Order of Presentation of Evidence. This matter is consolidated. The order of presentation of evidence shall be as follows: Student's evidence followed by District's evidence; however witnesses to be called by both sides will be fully questioned on all issues whenever first called to the stand.

9. Motions. Student's request to allow recording of the due process hearing is granted subject to the following conditions: (1) The parties shall turn on and off the recording device at the same time that the ALJ is on and off the record; (2) the parties shall not play any part of the recording for a prospective witness; (3) the parties shall not publish or play any part of the recording for any purpose other than assisting in the representation and presentation of this due process hearing; (4) the parties will erase, or otherwise destroy, the recording after the hearing and all opportunities for appeal from any decision herein has been exhausted; and (5) the parties shall not use this recording in any subsequent due process hearing. The recording is not the official record and is permitted as a courtesy.

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 PHC of September 15, 2014.

The ALJ notified the parties at the PHC that she interpreted Education Code section 56505, subdivision (l), as jurisdictional. As a result, the ALJ tentatively ruled that the statute of limitations would bar claims in Student's due process hearing request arising prior to May 2, 2012, or more than two years from the filing date of Student's due process hearing request (complaint) on May 2, 2014, despite the parties' stipulation otherwise. In an abundance of caution, the ALJ ordered briefing on this issue as follows: Based upon representations of Student's counsel that a related complaint filed by Student in January 2014 had been settled prior to the filing of Student's current complaint, the parties shall meet and confer no later than 12:00 p.m. (noon) on September 17, 2014, to determine if any issues remain between the parties arising between January 2012 and May 2, 2014. If either party contends that the statute of limitations applicable to Student's current complaint extends beyond May 2, 2012, that party shall file a brief on that issue with OAH by fax no later than 12:00 p.m. (noon) on September 19, 2014. The ALJ will issue a ruling as to the statute of limitations in this matter no later than September 22, 2014.

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. 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.

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

14. Hearing Closed To the Public. The hearing will be closed to the public unless requested otherwise by the parent.

15. 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.

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

IT IS SO ORDERED.

DATE: September 15, 2014

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings