BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. DUBLIN UNIFIED SCHOOL DISTRICT,	OAH Case No. 2018010982
DUBLIN UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017120716 ORDER FOLLOWING PREHEARING CONFERENCE

On April 2, 2018, a telephonic prehearing conference was held before Administrative Law Judge Tiffany Gilmartin, Office of Administrative Hearings. Parent appeared on behalf of Student. Jan Tomsky, Attorney at Law, appeared on behalf of Dublin Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. At the outset of the hearing, Dublin made a motion to move the location of the hearing to a nearby district location. Parent was heard on the issue and had no objection. Dublin's motion to move the location to the Nielsen Education Center, 7500 Amarillo Road, Dublin, CA 94568 was granted. The hearing shall take place on April 10-12, 2018, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. 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. The parties requested additional hearing days be added. A determination regarding whether additional days are needed, and if so, which days is within the discretion of the ALJ and will be determined at the hearing.

As ordered in the scheduling order, the Dublin shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 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. Dublin certified that the facilities used for this case comply with the law. Dublin 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.

Preliminary Matter

On February 15, 2017, a Decision was issued in OAH Case No. 2016080413. In that case, Dublin filed a due process hearing complaint against Parent seeking a determination on one specific issue. Specifically, whether Dublin could transition Student from aide and behavior services provided by a nonpublic agency to aide and behavior services provided by Dublin as offered in the individualized education program that resulted from the IEP team meeting of January 25, 2016, continued on March 18, 2016, and May 5, 2016.

As part of the decision process, the ALJ evaluated the IEP for both procedural and substantive compliance with the IDEA. The Decision held, among other things, that Dublin denied Student a FAPE due to the lack of clarity in Dublin's placement offer that deprived Parents the right to meaningfully participate in the IEP development process. Additionally, the Decision further held that Dublin failed to meet its burden to establish the appropriateness of its offered goals, services, and placement, and therefore, Dublin's offer was not deemed an offer of FAPE. Moreover, the ALJ addressed the metaphor of an IEP as a puzzle and while a Parent may attack one discrete element of an IEP, because the Parent's challenge may be whether the denial of that discrete area denies a Student a FAPE, the converse is not true for a district because when one piece of the puzzle is removed, a FAPE does not exist. The Decision was not appealed by either party.

As contained in the issues below, Student now seeks a determination that Dublin failed to offer and provide Student a FAPE through the January 24, 2016, IEP that was at issue in the prior case. As to issue one, in Parent's complaint, Parent asserts the doctrine of

collateral estoppel precludes further re-litigation of this issue, and thus, the Parent should automatically be awarded all requested remedies in her complaint for the 2015-2016 school year. Dublin disputes Parent's collateral estoppel argument as to remedies. Dublin, however, agrees re-litigating the issue is not appropriate.

Under the doctrine of collateral estoppel, once a tribunal has decided an issue of fact or law necessary to its judgement, that issue may not be re-litigated in a suit on a different cause of action involving a party to the first case. The doctrine of collateral estoppel applies to administrative proceedings. (*Pacific Lumber Co. v. State Resources Control Board* (2006) 37 Cal.4th 921, 944 (citing *People v. Simms* (1982) 32 Cal. 3d 468, 479-480).) The doctrine serves many purposes, including relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, and, by preventing inconsistent decisions, encouraging reliance on adjudication. (*Allen v. McCurry* (1980) 449 U.S. 90, 94 [101 S.Ct. 411, 66 L.Ed.2d 308]; *Levy v. Cohen* (1977) 19 Cal.3d 165, 171; see *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 798.)

Thus, in areas where the ALJ made factual findings and legal conclusions that issue will not be re-litigated; however, upon a reading of the decision and a review of Parent's complaint, it is apparent only one issue has been sufficiently decided to have the doctrine of collateral estoppel apply. Specifically, "Making an unclear offer in the January 25, 2016 IEP, preventing parents from meaningfully participating or enforcing the IEP." This finding is binding on both parties and will not be re-litigated in the instant case. A final determination on Parent's remaining issues; however, was not reached because the ALJ merely determined Dublin failed to meet its burden to establish FAPE. Accordingly, they will remain pending Parent's presentation of her case-in-chief and a final determination by the ALJ.

However, Parent's argument that collateral estoppel entitles her to an automatic determination and remedies is also incorrect. Parent is still required to meet the burden of proof to establish affirmative that Dublin's offer failed to offer and provide Student a FAPE as to each of her remaining contentions in Issue 1 for the 2015-2016 school year.

After review of the prior OAH decision and oral argument from both parties during the PHC, the Issues in this matter are as follows[1]:

Student's case

1. Did Dublin deny Student a free appropriate public education in the 2015-2016 school year, from January 24, 2016, through the extended school year by:

[1] Dublin's counsel requested an opportunity to be heard on this issue after the prehearing conference order was issued. Counsel's request was granted and both parties will have an opportunity to be heard on this issue on the first day of hearing.

a. Failing to offer or provide appropriate supports, services and goals as required under the IDEA to meet Student's unique needs in order for Student to make meaningful progress in the January 25, 2016 IEP.

b. Failing to offer placement in the least restrictive environment in the January 25, 2016 IEP.

c. Failing to develop measurable annual goals designed to meet Student's needs that result from her disability to enable her to be involved in and make progress in the general education curriculum;

d. Failing to offer or provide appropriate supports, services and goals for ESY, as required under the IDEA, to meet Student's unique needs in order for Student to make meaningful progress;

e. Failing to offer RSP and RTI; and

f. Failing to provide or offer a one-to-one aide in ESY.

2. What, if any remedy, is Student entitled to for Dublin's failure to make a clear offer in the January 23, 2016, IEP that prevented parents from meaningfully participating in the IEP process as determined in OAH Case No. 2016080413.

3. Did Dublin deny Student a free appropriate public education in the 2016-2017 school year by:

a. Failing to provide or offer appropriate supports, services and goals as required under the IDEA to meet Student's unique needs in order for Student to make meaningful progress in the January 23, 2017 IEP.

b. Failing to offer placement in the least restrictive environment in the January 23, 2017 IEP.

c. Making an unclear offer in the January 23, 2017 IEP, preventing parents from meaningfully participating or enforcing the IEP;

d. Failing to develop measurable annual goals designed to meet Student's needs that result from her disability to enable her to be involved in and make progress in the general education curriculum;

e. Failing to provide or offer appropriate supports, services and goals for ESY, as required under the IDEA, to meet Student's unique needs in order for Student to make meaningful progress;

f. Failing to offer RSP and RTI; and

g. Failing to provide or offer a one-to-one aide in ESY.

4. Did Dublin deny Student a free appropriate public education in the 2017-2018 school year by:

a. Failing to provide or offer appropriate supports, services and goals as required under the IDEA to meet Student's unique needs in order for Student to make meaningful progress in the January 23, 2018 IEP.

b. Failing to offer placement in the least restrictive environment in the January 23, 2018 IEP.

c. Making an unclear offer in the January 23, 2018 IEP, preventing parents from meaningfully participating or enforcing the IEP;

d. Failing to implement the IEP of January 23, 2017 by failing to have inclusion support from August 15, 2017 to October 17, 2017

e. Failing to develop measurable annual goals designed to meet Student's needs that result from her disability to enable her to be involved in and make progress in the general education curriculum;

f. Failing to provide or offer appropriate supports, services and goals for ESY, as required under the IDEA, to meet Student's unique needs in order for Student to make meaningful progress;

g. Failing to offer RSP and RTI; and

h. Failing to provide or offer a one-to-one aide in ESY.

5. Failing to "fund or file" are required by the IDEA after Parent's March 4, 2016 IEE assessment for inclusion supports request.

As resolution, Parent requests:

1. Student does not meet the criteria for eligibility under the category of intellectual disability.

2. Dublin shall fund the May 2, 2016 inclusion evaluation prepared by Dr. Paula Gardener.

3. As compensatory education, Dublin shall fund the evaluation prepared by Dr. Carina Grandison in March 2018.

4. As compensatory education, Dublin shall fund an updated evaluation of Dr. Grandison.

5. Dublin shall fund an updated inclusion evaluation by Dr. Gardener that includes recommendations for Student's inclusion.

6. Dublin shall place Student in general education on an IEP with appropriate supports, services, RSP, RTI, as recommended by Dr. Gardener and Dr. Grandison.

7. Dublin shall be required to fund Dr. Gardener to do a thorough review of Dublin's policies and training for inclusion of disabled student tin the general education classroom (least restrictive environment.)

8. Dublin shall be required to fund Dr. Gardener to train district employees to appropriately include Student, with the duration, extent and amount of such training to be recommended by Dr. Gardener.

9. As compensatory education, Dublin will continue to fund the NPA aide who has worked with Student for the 2015-2016, 2016-2017, and 2017-2018 school years.

10. An award of attorneys' fees and costs.

11. A ruling that Parents are the prevailing party; and

12. Any and all appropriate remedies as supported by law.

District's case:

1. Does Student qualify for special education under the category of intellectual disability?

2. Was Dublin's 2017 psychoeducational assessment appropriate, such that Student is not entitled to an IEE at public expense?

3. Does Dublin's January 2018 IEP offer Student a FAPE?

As proposed resolutions, Dublin requests:

1. OAH issue an order finding that Student qualifies for special education under the category of intellectual disability.

2. OAH issue an order finding its January 2017 psychoeducational assessment was appropriate and Parents are not entitled to an IEE at public expense.

3. OAH issue an order finding Dublin offered Student a FAPE in January 2018, and Dublin is entitled to implement the IEP over Parents' objection.

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 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 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. Parent will notify Dublin by noon on Wednesday, April 4, 2018 of Dublin employees she intends to call in her case-in-chief so Dublin can arrange for their presence or notify Parent for the need to subpoena them.

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 attempt to reach agreement on a witness list for the first day of hearing. The District shall have witnesses available in case agreement on a witness list is not reached. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, 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.

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., 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.

Parent made a motion to allow B.J. Freeman to testify telephonically. Dublin objected to Parent's request. Parent's motion to allow B.J. Freeman to testify telephonically is granted. Parent shall provide B.J. Freeman with a complete exhibit binder from each party, containing all of each party's exhibits, prior to the hearing. Dublin shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness.

Mother also indicated Father may have to appear telephonically as he will be out of the country. District had no objection provided Parents provide evidence of Father's unavailability.

7. Electronic Recording of Hearing.

a. Audio Recording. Parent's motion to make an audio recording of the hearing is granted, subject to 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. At their discretion, Dublin may record the hearing as well.

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. 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].) Here, this is a consolidated case, and each party bears the burden of proof as to the issues it pled. Dublin was the first filed matter; therefore, Dublin will present its case-in-chief first. Upon completion of Dublin's case, Parents will present their case-in-chief.

9. 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.

10. 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.

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

12. 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.

13. Special Needs and Accommodations.

Parent requested a translator be made available for the anticipated testimony of the maternal grandmother. Parent requested a Mandarin translator. Parent shall provide the anticipated date of grandmother's testimony and OAH will provide the Mandarin translator.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the mediation or hearing may contact the assigned calendar staff, identified in the scheduling order, at (916) 263-0880, as soon as the need is known. Additional information concerning requests for reasonable accommodation is available on OAH's website at https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing Closed To the Public. At the request of Student, the hearing will be closed to the public.

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 EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT https://www.dgsapps.dgs.ca.gov/oah/oahsftweb .

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: April 5, 2018

DocuSigned by:
Tiffany Gilmartin
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TIFFANY GILMARTIN
Administrative Law Judge
Office of Administrative Hearings