BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

DOWNEY UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019060369

On August 26, 2019, Administrative Law Judge Judith L. Pasewark Office of Administrative Hearings held a telephonic prehearing conference. The Administrative Law Judge will be referred to as an ALJ. The Office of Administrative Hearings will be referred to as OAH.

Gabriella M. Torres, Attorney at Law, appeared on behalf of Student. Meagan M. Kinsey, Attorney at Law, appeared on behalf of Downey Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on September 4, 5, and 10, 2019, and continue day to day at the discretion of the ALJ. The hearing shall begin at 9:30 AM on the first day of the hearing and at 9:00 AM on all other days, unless otherwise ordered.

HEARING LOCATION

The hearing will be held at Downey Unified School District Administrative Offices, 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.

District facilities shall fully comply 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. Districts are required to file written certification with OAH that the facilities District provides comply with these laws.

Downey Unified School District filed the required certification. Downey Unified School District shall notify OAH within three business days of the date of this Order if it is unable to provide facilities that comply with the laws governing accessibility of government facilities to persons with disabilities.

Before the beginning of the hearing, Downey Unified School District shall ensure that the hearing room is configured into a courtroom setting and shall contain:

- a table for Student and his representatives;
- a table for Downey Unified School District's legal representative and special education representative;
- a table for the witness;

- a table for the ALJ, near an electrical outlet with a chair that adjusts to an appropriate height for typing at the table provided; and
- water and tissue available for the participants.

The same hearing room shall be used for each day of hearing and shall be available at least one hour before the beginning of the hearing each day. The hearing room shall be locked following the hearing each night. Downey Unified School District shall ensure that the hearing room and access to it are in compliance with the all laws governing accessibility of government facilities to persons with disabilities.

District shall also ensure that one parking space is available on each hearing day for each of the following: the ALJ, Parents, Student's attorneys, Downey Unified School District's attorneys, and witnesses.

ISSUES AND PROPOSED RESOLUTIONS

The issue at the due process hearing, and proposed resolutions, as alleged in the complaint and clarified by the parties and the ALJ during the prehearing conference are:

ISSUE

Did Downey Unified School District's May 6, 2019 individualized education program, known as an IEP, offer Student a free appropriate public education in the least restrictive environment?

PROPOSED RESOLUTIONS

The resolutions requested by Student include

- Determination that the May 16, 2019 IEP did not offer Student a free appropriate public education in the least restrictive environment.

- Placement in a public school special day class classroom with appropriate supports and services to address Student's unique needs.

- Review and modification of Student's IEP and behavior intervention plan to include the accommodations, supports and related services recommended by the independent educational evaluations.

- Compensatory education and related services.

- Downey Unified School District development and implementation of appropriate school discipline policies and procedures that include, but are not limited to, policies and procedures to ensure that staff can identify self-regulation strategies and certification in crisis prevention instruction.

- Mandatory training on least restrictive environment and behavior intervention plans for the special education department at Alameda Elementary School and Downey Unified School District.

Downey Unified School District filed its response to Student's complaint on June 17, 2019. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

BINDERS

Exhibits shall be pre-marked and placed in three-ring binders before the hearing. Exhibit binders shall include a tab for each exhibit. Each binder shall contain a detailed table of contents which clearly identifies the tabs and documents. The ALJ and

witnesses must be able to easily turn to exhibit tabs and to turn pages in the binders. Multiple binders may be submitted if necessary.

TAB AND PAGE NUMBERS

The parties shall place a letter followed by a number on each tab to identify each exhibit. Student shall use the letter S before the number to identify Student's exhibits. Downey Unified School District shall use the letter D before the number to identify Downey Unified School District's exhibits. For example, S-1 means Student's exhibit tab 1 and D-1 means Downey Unified School District's exhibit tab 1. Each page of each binder shall be numbered consecutively from the first page of the first exhibit to the last page of the last exhibit in the binder. Parties may use a Bates-stamp type system for numbering.

CONTENT

Each exhibit shall consist of one document. Separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Documents offered as evidence to support a request for reimbursement must be separated by vendor and should be internally chronological where possible. Exhibits in the binders should be in chronological order.

Parties should include 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, subdivision (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

Downey Unified School District's binder shall include a color copy of the school calendar for each school year in question and shall have witnesses available to explain the calendar if necessary.

COPIES OF BINDERS

The parties shall serve copies of their evidence binders on each other. This exchange is required by Education Code section 56505, subdivision (e)(7). Each party shall bring two additional sets of the binders containing their exhibits to the hearing. One set will be used by the ALJ, and the other set will be used by witnesses. The parties may not serve exhibits on OAH before the hearing.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

WITNESSES

Parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Parties shall make witnesses under their 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 timely disclosed except for good cause shown, 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. Education Code, section 56505.1, subd. (h), empowers the ALJ to set a reasonable limit on the length of the hearing after consideration of four factors. The first two factors are the issues to be heard and the complexity of facts to be proven. The second two factors are the ability of the parties or their representatives to present their respective cases and the parties' estimates of the time needed to present their cases.

MEET AND CONFER

The parties are encouraged to review and shorten their witness and exhibit lists before the hearing. Evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. The parties are ordered to meet and confer no later than September 3, 2019 at 5:00 p.m. The parties shall discuss the availability of witnesses, the order of witnesses and the length of witness testimony. The parties should attempt to eliminate duplicate exhibits from their binders. The parties may discuss whether they can produce a written stipulation stating basic facts to shorten the length of time needed for the hearing.

EVIDENCE PRESENTATION

In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In this case Student requested the hearing and Student's case-in-chief shall be presented first, followed by Downey Unified School District.

WITNESS LISTS

The parties shall give the ALJ a joint proposed witness list for the first day of hearing. The list should include dates and time estimates of expected testimony. In the event an agreement cannot be reached, each party shall prepare a separate written list. Downey Unified School District shall have witnesses available in case there is no agreement. Before the hearing begins, 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. The ALJ will finalize the witness schedule. Parties shall be prepared at the end of each day to discuss the witnesses to be presented the next day and the estimated time the testimony each witness is expected to take.

SCOPE OF WITNESS EXAMINATION

Each witness shall be called to testify only once, except for rebuttal purposes. All parties shall examine witness on all issues when the witness is first called. Requiring a witness to appear only once takes precedence over the order in which parties presents their case in chief.

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 request for leave to do so before the hearing, unless the opposing party has stipulated that the witness may appear by telephone. The party offering the witness shall provide the witness with a complete set of exhibit binders from all parties before the hearing. The binders must be exact paper copies of all of each party's exhibits. Electronic copies are not acceptable. The party presenting the witness shall ensure the witness testifies from a private location with no other persons present. The party offering telephonic testimony shall ensure that the witness has telephone equipment that allows clear testimony at a volume that allows clear transmission of what the witness is saying, allows the witness' testimony to make a clear recording, and allows the witness to hear objections and rulings. Downey Unified School District shall ensure that the hearing room has telephone speaker equipment that allows everyone in the room to hear the witness, and allows the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

Student's request to allow Britini Eseller to testify telephonically is granted provided all the stated conditions are met. The witness shall be informed of the privacy

rules pertaining to the information contained in the binders and of the proper procedure for disposal of the evidence binder following completion of the witness' testimony.

ELECTRONIC RECORDINGS

Audio Recording

Each party may make an audio recording of the hearing. The audio recording is subject to the ALJ's discretion and based upon certain conditions. Such requests are routinely granted on the following conditions:

- the OAH recording is the only official recording;
- the parties shall turn the recording device on and off at the same time that the ALJ is on and off the record to avoid recording conversations while off the record;
- the recording device will be removed by the party recording during any recess where the party leaves the room;
- operation of the party's recording mechanism will not be allowed to delay the hearing;
- a parties' recording may not be used to prepare the testimony of a witness in the hearing;
- the recording shall not be shared with any non-party, possible witness, or through social media;
- The parties shall not use the recording in any subsequent due process hearing;
- the recording is subject to the same confidentiality as the due process hearing; and

- the parties shall dispose of the unofficial recording when the time for filing an appeal has passed or, in the event of an appeal, when the time for submission of the record on appeal has passed.

Video Recording

No party, witness or anyone else may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

Recordings as exhibits

Neither party has proposed to introduce all or part of a recording of an individualized education program team meeting. The ALJ has discretion to admit or exclude evidence in the form of a recording. Any request to submit a recording shall be considered at the time of hearing. The ALJ may grant or deny the request, or grant the request subject to certain conditions. The party offering the recording must establish that all or a part of the recording is relevant.

Excerpts of an audio record of an individualized education program team meeting must be transcribed and offered as documentary evidence. The portion of the audio record transcribed shall be provided to the opposing party with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcription need not be done by a certified court reporter. Electronic recording of the excerpts of the audio record shall be included with the transcript, at the ALJ's discretion, to allow the ALJ to listen to the recording as well as read the transcript.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A

party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

MOTIONS

Student's request to change the venue of the due process hearing is denied. Student did not file a Motion to Change Venue, three days prior to the Prehearing Conference or provide a declaration indicating the need for such change of venue. Additionally, Student's unsupported request for a neutral location is outweighed by the burden of requiring all parties and witnesses to travel in excess of fifty miles each way to attend the hearing at the proposed alternate location.

Student's request to extend his complaint to include the May 10, 2019 IEP in his complaint and this hearing is denied. Student has not timely filed a Motion to Amend his complaint to include the May 10, 2019 IEP which was held after the filing of this current complaint.

No other prehearing motions are pending or contemplated with the exception of a possible Motion in limine addressing exhibits on Student's Exhibit List relating to a prior settlement agreement between the parties. Any motion that was not filed three business days before the Prehearing Conference, shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not timely filed.

STIPULATIONS

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

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, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless the ALJ grants permission otherwise. No food or drinks other than water will be permitted in the hearing room during the hearing.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

Neither party has requested the assistance of an interpreter or additional accommodations.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in a mediation or hearing may contact OAH at (916) 263-0880, or send an email to OAHADA@dgs.ca.gov as soon as the need is known. The e-mail should have "Request for Accommodation" in the Subject Line. Additional information concerning requests for reasonable accommodation is available on OAH's website at: https://www.dgs.ca.gov/OAH/Services/Page-Content/Office-of-Administrative-Hearings-Services-List-Folder/Accommodations-at-OAH.

HEARING OPEN OR CLOSED TO THE PUBLIC

The hearing is closed to the public at Student's request.

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 if 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. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 4:00 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.

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 before the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement, the parties shall provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

FAILURE TO COMPLY

The failure to comply with this Order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATED: August 26, 2019

Judith Pasewark

Administrative Law Judge
Office of Administrative Hearings

