BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. WILLIAM S. HART UNION HIGH SCHOOL DISTRICT.	OAH CASE NO. 2013051148 **CORRECTED** ORDER ON MOTIONS TO ADMIT/EXCLUDE TRANSCRIPT EXCERPTS AS EVIDENCE[1]

On the last day of hearing in this matter, before administrative law judge (ALJ) Alexa J. Hohensee, Student sought leave to admit as rebuttal evidence excerpts of a transcript of Student's January 23, 2012 individualized education plan (IEP) team meeting. The William S. Hart Union High School District (District) objected on various grounds. The ALJ ordered a briefing schedule for the parties to meet and confer regarding the accuracy and relevance of the transcript excerpts, and for the parties to move to admit or exclude the excerpts as evidence. On November 4, 2013, the parties timely filed a joint statement of excerpts in issue, which shall be treated as Student's motion to admit these excerpts into evidence, and District filed a motion to exclude. On November 7, 2013, Student filed an opposition.

APPLICABLE LAW

In IDEA due process proceedings, any party shall be accorded the right "to present evidence and confront, cross-examine, and compel the attendance of witnesses." (20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.512(a)(2) (2006); Ed. Code, § 56505, subds. (e)(2) and (3).)

Due process hearings are conducted in accordance with regulations adopted by the California Department of Education (Ed. Code, § 56505(a)), and those regulations provide that:

> [Due process hearings] shall not be conducted according to the technical rules of evidence and those related to witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence

[1] This Order corrects an error in the November 26, 2013 order referencing the line and page numbers of those portions of Student's fifth proposed transcript submission admitted into, and excluded from, evidence. This Order, at page seven, corrects the error in the page and line reference as to the fifth proposed transcript submission, but makes no other changes.

> of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

(Cal. Code Regs., tit. 5, § 3082, subd. (b); see also Gov. Code, § 11513, subd. (c).) Further, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, although it is insufficient in itself to support a factual finding, and is often admitted as "administrative hearsay." (Cal. Code Regs., tit. 5, § 3082, subd. (b).) The ALJ hearing the matter has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (Gov. Code, § 11513, subd. (f).)

The function of rebuttal evidence is to explain or disprove an adversary's evidence. (*United States v. Schneiderman* (S.D. Cal 1952) 104 F.Supp. 405, 410.) Decisions concerning the use of rebuttal evidence lie within the sound discretion of the trial court. (*United States v. Pheaster* (9th Cir. 1976) 544 F.2d 353, 383.)

DISCUSSION

District's Blanket Objections

District objects to each of the excerpts on the following grounds: (1) inadmissible hearsay, (2) in violation of the best evidence rule, (3) without foundation, (4) irrelevant, (5) incomplete, (6) outside the scope of direct, and (7) prejudicial, as the witnesses have not had an opportunity to respond to the proposed rebuttal evidence.

At hearing, Student's counsel indicated that she was having difficulty setting up the audio recording for playback of specific statements into the record, and Student was ordered to submit transcript evidence of rebuttal statements in lieu of the actual audio recording. A briefing schedule was ordered for the parties to meet and confer on the evidence to be offered and proposed objections, and to verify the accuracy of the transcription. District has had ample time and opportunity to confirm that the excerpts are accurate renditions of the recorded statements, and has offered alternative versions of the excerpts where the accuracy is in dispute. The order provided District with an opportunity to submit transcript excerpts in response to those offered by Student. Multiple witnesses testified over many hours concerning the January 23, 2012 IEP team meeting, and sufficient testimony was taken to establish the admissibility of further statements from that meeting and to provide context. Accordingly, District's objection that only the audio recording is admissible evidence of the statements, and that the statements lack foundation and are incomplete, are overruled.

Each of the proposed excerpts include statements made at the January 23, 2012 IEP team meeting, which was addressed in detail at the hearing by many witnesses, including IEP team members Sharon Amrhein, Brenda Bennett, Rick Pendleton and Student's mother (Mother). Whether particular excerpts from the IEP team meeting are "outside the scope of direct" for these witnesses is not determinative of whether the statements are admissible. In addition, the testimony at hearing was sufficiently extensive that statements made during that

meeting do not require further testimony in order to put them in context for the trier of fact. Accordingly, District's blanket objections that the excerpts are outside the scope of direct and prejudicial are overruled.

District's inadmissible hearsay and irrelevant objections will be addressed in the analysis of the admissibility of each proposed submission.

Student's First Proposed Submission

The first excerpt includes a discussion between assistant principal Brenda Bennett and Mother about (i) the general education teacher and Mr. Pendleton having seated Student in the front row of the classroom to help Student focus and stop talking in class, and (ii) how reported instances of alleged bullying were investigated by Ms. Bennett or other school staff. Student contends that this excerpt speaks to the credibility of Mr. Flores regarding his testimony that Student was not bullied at Sierra Vista Junior High (Sierra Vista).

This evidence does not attack the credibility of Mr. Flores. It constitutes no more than Mother's understanding of accommodations made in Student's classrooms, and Ms. Bennett's recitation of, and comments on, the incident entries made by Mr. Flores in Student's discipline file, about which Mr. Flores testified in great detail. The offered statements consist of multiple layers of hearsay on events of which neither declarant has personal knowledge, and fails to meet even the relaxed standard for due process hearings of being the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. The statements are also irrelevant to the issue of whether or not Student was bullied at Sierra Vista, as the issue is whether the incidents meet the definition of "bullying" under the law, and not how it was characterized by Ms. Bennett. District's objections of inadmissible hearsay and irrelevant are sustained. This excerpt will be excluded from the evidence.

Student's Second Proposed Submission

The second excerpt consists of a statement by Ms. Bennett during a reading of Student's discipline report, where she characterizes a December 6, 2011 incident caught on video, and investigated by assistant principal Thomas Flores, as for the first time "a case where we truly see bullying" and putting Student "on people's radar." Student contends that Ms. Bennett's statement that the incident put Student on District's radar was an acknowledgement that incidents of bullying were in fact taking place, and discredits her testimony that bullying was not taking place.

This excerpted statement is arguably a prior statement by Ms. Bennett contrary to her testimony at hearing, offered by Student in rebuttal to prove the truth of Ms. Bennett's prior statement. Although the technical rules of evidence do not apply, they are sometimes useful to examine to determine whether particular evidence is relevant. A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement if: (i) the statement is inconsistent with the testimony at the

hearing (Evid. Code, § 1235), and (ii) the witness was also examined while testifying as to give him or her an opportunity to explain or deny the statement (Evid. Code, § 770). (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219 (*Johnson*).) The statement must in fact be inconsistent with that witness's hearing testimony, and testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event, unless a witness's claim of lack of memory amounts to deliberate evasion. (*Id.,* at 1219-1220.)

Here, Ms. Bennett was expressly questioned by Student at hearing about prior statements at the IEP team meeting in which she characterized the reported incidents in Student's discipline file as bullying, and she denied that she had done so. Ms. Bennett tempered her denial with an explanation that she might have adopted Parents' terminology at the meeting for purposes of clarifying Parents' understanding of the District's investigation of the incidents, and the proposed excerpt therefore has minimal, if any, adverse impact on her credibility. Nonetheless, the second proposed excerpt is admissible for purposes of attacking Ms. Bennett's credibility and establishing the truth of her prior statement. District's objections that the excerpt is inadmissible hearsay, and irrelevant, are overruled.

District's alternative transcription of one of Ms. Bennett's statements, which does not significantly vary from Student's transcription, will also be admitted into evidence for consideration with Student's second excerpt.

Student's Third Proposed Submission

The third excerpt consists of another statement by Ms. Bennett referring to the December 6, 2011 incident as when "we really see actual bullying" during a discussion with Student's parents (Parents), and Parents' complaints that other students were believed over Student. Student contends that Father's statements are not being offered for the truth of the matter asserted, but to prove that the statements were made at the IEP team meeting.

There was abundant testimony at hearing, by every member of the IEP team meeting who testified, that Parents felt Student's version of events had been treated dismissively, and that Parents disagreed with District's investigation conclusions and its characterization of the reported incidents as peer conflict rather than bullying. The proposed excerpt is not rebuttal evidence that either explains or disproves District's evidence. This excerpt is unnecessarily duplicative, and its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. Accordingly, the third proposed excerpt will not be admitted to the record as evidence for consideration in rendering a decision on Student's issues.

Student's Fourth Proposed Submission

The fourth excerpt consists of a statement by program specialist Sharon Amrhein explaining to Parents that one of the reported incidents involved students making fun of

Student and was investigated, and a statement by Ms. Bennett stating that two incidents involved name calling.

District argues that the fourth excerpt does not rebut the testimony of either Ms. Bennett or Ms. Amrhein. Student responds that this excerpt rebuts Ms. Amrhein's testimony that (1) bullying was not the reason Parents' called the January 2012 IEP team meeting, (2) Parents were placing Student in a therapeutic program because of difficulties Student was having at home, and (3) Parents' concerns about not returning Student to Sierra Vista had nothing to do with Student's safety.

The fourth proposed excerpt is in harmony with Ms. Amrhein's testimony. It does not address the Parents' reasons for calling the IEP team meeting, their reason for unilaterally removing Student from school, nor their concerns about returning Student to school. The fourth excerpt does not constitute rebuttal evidence, and will not be admitted into evidence.

Student's Fifth Proposed Submission

The fifth excerpt contains (i) statements by Student's father (Father) explaining what he believed happened to Student on campus, (ii) statements by Mother requesting that Student receive individual, rather than group, designated instructional services (DIS) counseling, and (iii) a statement by Student's special education teacher, Rick Pendleton, stating that as to knowledge of a psychiatrist's letter stating that Student was suicidal, he had a "vague memory of having a brief conversation or email from [Mother]. I can't state right now whether or not I've actually seen that letter. I don't remember seeing it."

District contends that the statements of Father are not rebuttal evidence, but an attempt to introduce non-witness testimony. As to the statement by Mr. Pendleton, District contends that it does not rebut the testimony of Mr. Pendleton at hearing. Student responds that this evidence is offered in rebuttal to Mr. Pendleton's testimony that he had not heard of, or seen, a letter from Student's psychiatrist stating that Student was suicidal.

At hearing, Mr. Pendleton was questioned by Student about a prior statement to the IEP team that he had perhaps seen or heard about the psychiatrist's letter. Mr. Pendleton testified that he didn't recall if he had made that statement, but if he had, it would have been about hearing about the letter, because he had not seen it prior to the IEP team meeting. The excerpt is consistent with this testimony, as Mr. Pendleton's prior statement does not admit seeing the letter, but that he had a "vague" memory about a "brief conversation or email" from Student's mother, without explanation regarding the content of the conversation or email. While the prior statement is admissible for purposes of attacking Mr. Pendleton's credibility, Mr. Pendleton's testimony and prior statement are essentially harmonious, and this excerpt would have no adverse impact. As the prior statement is not inconsistent, it is not admissible to establish the truth of the matter asserted in his prior statement.

The majority of the fifth excerpt, which includes the opinions of Student's father concerning events on campus, and his conclusions concerning Student's mental health based upon a letter from several months earlier, consists of the speculation by a non-witness without evidence of personal knowledge. It is not the type of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs, and is therefore inadmissible hearsay. The opinions of Student's father are also irrelevant to the issues.

District's objections to that portion of the excerpt setting forth Mr. Pendleton's statement are overruled to the extent tendered to attack Mr. Pendleton's credibility. District's objections that the remainder of the fifth excerpt is inadmissible hearsay, and irrelevant, are sustained.

Student's fifth proposed excerpt will be admitted into evidence from page 15, line 1, through page 15, line 6. The remainder of the excerpt will be excluded from evidence.

Student's Sixth Proposed Submission

The sixth excerpt is a statement by Ms. Amrhein that "hopefully, as we move forward" from the IEP team meeting, the team would be aware that Student had "real issues behind what he is feeling and what he is trying to express" if someone called him names or bothered him in PE. Student contends that this excerpt rebuts Mr. Pendleton's testimony that he was not aware of any bullying of Student taking place at Sierra Vista, and Ms. Amrhein's testimony that Parents felt comfortable enough by the end of the IEP team meeting to re-enroll Student at Sierra Vista, but kept him out merely to attend a therapeutic program.

This excerpt clearly refers to the incidents reported in Student's discipline file, addressed in great detail at hearing by multiple witnesses. It neither rebuts Mr. Pendleton's testimony, nor addresses the Parents state of mind in unilaterally removing Student from school. However, it is arguably relevant to District's conduct in addressing post-IEP team meeting incidents, and District's objections that the sixth excerpt is inadmissible hearsay, and irrelevant, is overruled. The District's alternative transcription, which does not significantly differ from Student's transcription, will be admitted with Student's sixth excerpt into evidence.

District's First, Second and Third Proposed Submissions

The seventh, eighth and ninth excerpts, submitted by District, include statements by Mother explaining to the IEP team that Student's triennial assessment had been completed in 2011 by Sulphur Springs School District. District submits this excerpt as evidence in rebuttal of Mother's testimony at hearing that she had been unaware that a triennial assessment of Student had been conducted in 2011.

There was a plethora of evidence presented at hearing that Mother was aware that triennial assessments of Student had been conducted by Sulphur Springs. The proposed excerpts are unnecessarily duplicative, and their probative value is substantially outweighed

by the probability that their admission will necessitate undue consumption of time. Accordingly, District's proposed excerpts will not be admitted to the record as evidence for consideration in rendering a decision on Student's issues.

ORDER

1. Student's proposed second, fifth (from page 15, line 1 through page 15, line 6, only), and sixth transcript excerpts, and the District's "Response re Accuracy" to those excerpts, will be admitted into evidence.

2. Student's proposed first, third, fourth, fifth (from page 12, line 1 through page 14, line 28) transcript excerpts, and District's first, second and third proposed transcript excerpts, will be excluded from evidence.

3. The admitted excerpts will be marked, collectively, as Student's Exhibit 52, and will be submitted into evidence in the same format as presented in the Petitioner's "Submission re January 23, 2012 IEP Transcript and District's Response" (the Submission), except that extraneous motion pages (including the cover page, district's responses to accuracy to Student's first, third and fourth excerpts, and proof of service) will be removed. Excerpts may be referred to with the same page and line numbers as in the Submission.

4. The excluded excerpts will be marked, collectively, as Student's Exhibit 53, and will be preserved in the record in the same format as in 3, above.

Dated: December 4, 2013

/s/
ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings