BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matters of: ORINDA UNION SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT,	OAH Case No. 2018090025
PARENT ON BEHALF OF STUDENT v. ORINDA UNION SCHOOL DISTRICT.	OAH Case No. 2018110674 ORDER DENYING MOTION TO CONSOLIDATE

Orinda filed its complaint in this matter on August 31, 2018, seeking a declaration that its offer of an individualized education program for Student's 2018-2019 school year constituted the offer of a free appropriate public education, and an order allowing it to implement that program without Parent's consent.

The due process hearing in this matter was first scheduled to begin on October 11, 2018. On October 9, 2018, at Parent's request, OAH continued the hearing to October 16, 2018. On October 15, 2018, again at Parent's request, OAH continued the hearing to October 17, 2018.

The due process hearing began on October 17, 2018, and proceeded for a second day on October 18, 2018. The matter was then continued for further hearing to October 24, 2018.

On October 22, 2018, Parent filed a third request for continuance, this time on the ground that she had fired her attorneys and needed time to find another attorney who could represent her and her son at the continued hearing. Also on October 22, 2018, Student's counsel of record filed a request to be relieved as counsel for Student.

On October 23, 2018, OAH relieved Student's attorneys of further representation of Parent and Student, and continued the matter to December 4, 5 and 6, 2018, so that Parent could obtain new counsel. The order granting that continuance provided:

> The hearing will resume from the point at which it recessed on October 18, 2018. The first two hearing days will not be repeated. [¶] Any attorney retained to

represent Student should be aware that no further request for continuance will be entertained if it is based either on Parent's inability to retain counsel, or counsel's need for additional time to prepare for hearing.

On October 25, 2018, Attorney Geralyn M. Clancy filed a notice that she now represented Parent and Student in Orinda's case (No. 2018090025).

On November 15, 2018, Student filed a new request for due process hearing. The new request alleged that Orinda denied Student a FAPE in the school year 2018-2019 in a variety of ways, including many of the ways alleged by Student in the first two days of hearing in Orinda's case. OAH designated Student's new filing Case Number 2018110674, and set it for prehearing conference on December 28, 2018, and due process hearing beginning on January 9, 2018.

On November 15, 2018, Student also filed a motion to consolidate his newly filed case with the District's case, in which two days of hearing have already been held. In the motion, Student does not seek a continuance of the District's matter, which is scheduled to resume on December 4, 2018. On November 20, 2018, Orinda filed an opposition to the motion to consolidate.

APPLICABLE LAW

Although no statute or regulation specifically provides a standard to be applied in deciding a motion to consolidate special education cases, OAH will generally consolidate matters that involve: a common question of law and/or fact; the same parties; and when consolidation of the matters furthers the interests of judicial economy by saving time or preventing inconsistent rulings. (See Gov. Code, § 11507.3, subd. (a) [administrative proceedings may be consolidated if they involve a common question of law or fact]; Code of Civ. Proc., § 1048, subd. (a) [same applies to civil cases].)

DISCUSSION

Student seeks consolidation in order to re-litigate the first two days of hearing that have already been held in Orinda's case. He does not overtly admit to that purpose, but it is undeniable from the relief he seeks.

Student asserts that his previous counsel "did not provide competent and effective representation of Student's interests at hearing." He then asserts:

> As a result, Student has had very limited opportunity to conduct proper examinations of the witnesses who have provided testimony to this point and to identify witnesses who would provide highly relevant testimony regarding the issues raised.

Student concludes that he will be greatly prejudiced if he is not allowed to "conduct proper examinations" of the witnesses who have already testified, and to call new witnesses not revealed or scheduled in the previous two days of hearing.

Student's argument is unpersuasive for a wide variety of reasons. He assumes, without citing any authority, that there is some legal right to the effective assistance of counsel in a special education due process hearing. As Orinda correctly points out, that right is limited to criminal matters and does not extend to a civil administrative hearing. (See *Jones v. Glickman* (9th Cir. 1998) 142 F.3d 443.)

Student's argument that his previous counsel did not provide him competent and effective assistance in the first two days of hearing is a bare assertion unaccompanied by any example, illustration or further argument. As such, it cannot discharge the moving party's burden to show that his motion has merit.

`Student is unable to cite any precedent for consolidation of a newly-filed case with a case in which the hearing is already well underway. For many of the reasons that follow, it is unlikely that such a precedent exists.

Student makes the further bare assertion that he will be greatly prejudiced if not allowed to re-litigate the first two days of hearing, but does not explain why that would be true. Student has previously had ample opportunity to assert the arguments made in his new complaint, and has avoided doing so. In *Student v. Orinda Union School District*, OAH Case No.2018070628 (filed July 12, 2018), Parent made essentially the same allegations as are now made in Student's most recent filing (No. 2018110674). It was in response to that earlier complaint that Orinda filed the instant matter on August 31, 2018. Student successfully moved to consolidate those two matters, but then voluntarily dismissed its own complaint (No. 2018070628)[1] as hearing approached. Student's new filing largely revisits the allegations Student previously dismissed.

In addition, although no ruling is made or intended here, it is likely that some or all of the arguments Student asserts in his new complaint can be made in defense against Orinda's claim that it offered Student a FAPE for the current school year. Student's claim of serious prejudice is thus without apparent merit.

Student asserts that consolidation will further judicial economy, but just the opposite is true. Allowing Student to re-litigate the first two days of hearing would waste the extensive time, resources, and effort expended by Orinda, the witnesses and the tribunal in preparing for and conducting those two days of hearing. It would also introduce unpredictable complexities into the remainder of the hearing when evidence duplicated, contradicted, or embellished upon previous testimony. If, for example, Orinda objected that a particular question by Student's new attorney had already been asked and answered in the first two days of hearing, would Student be entitled to pursue it anyway?

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[1] Official notice is taken of the pleadings on file in OAH Case No 2018070628.

Student asserts that consolidation would avoid inconsistent judgments. But that assumes that, if consolidation is denied, Student would be able to re-litigate in the later proceeding the issues earlier decided in the District's case. Student does not explain how that could be consistent with the doctrines of claim preclusion (res judicata) and issue preclusion (collateral estoppel).

Student's motion to consolidate does not address, or even appear to recognize, many of the consequences of the consolidation he seeks. It is nearly certain that consolidation would delay resolution of the District's case, which has been delayed too often already. Orinda seeks to implement an educational program for Student for the school year 2018-2019, much of which has already gone by. Further delay would threaten to undermine any meaningful relief to which Orinda might be entitled in this school year.

Consolidation would also shortcut and frustrate the usual pre-hearing procedures that would normally occur in Student's new case. Student seeks consolidation but not a continuance, which means that he contemplates that his case will begin on December 4, 2018, at the same time Orinda's case resumes. There are only six business days remaining between the date of this ruling and the resumption of that hearing.

Orinda has a statutory right to file a notice of insufficiency as to Student's new complaint within 15 days of receiving it, which would be due by November 30, 2018. Orinda would be entitled to a considered ruling on that notice, which could not be made by December 4, 2018. Orinda also has a statutory duty to file a response to Student's new complaint within 15 days of its receipt, which would be pointless so close to hearing. And Orinda is obligated by law to offer and hold a resolution session within 15 days of receiving the complaint. Unless the parties agree in writing otherwise (which has not occurred here), holding the resolution session is mandatory, and pretrial procedures do not commence until that time has passed.. (20 U.S.C. § 1415(f)(1)(B).)

OAH has a statutory obligation to offer the parties a meaningful opportunity to mediate, which would be impractical in the next six business days. OAH must also conduct a prehearing conference at which the issues in the new case are analyzed and set forth, witnesses are announced, and preliminary rulings on pretrial motions made. The parties are required to file prehearing conference statements, and any motions, three business days before that conference occurs. Holding an adequate prehearing conference would be either difficult or impossible in the next six business days. And determining what issues Student's new complaint raises is not a simple matter; Student asserts that the issues are "the same" as in the District's case, while Orinda argues there are issues in Student's new complaint that are not involved in its own case. In addition, both parties have the obligation to exchange exhibits and witness lists five business days before the hearing, a deadline that is now only two business days away if consolidation were to be granted.

In sum, the remedy Student seeks is impractical and would impose extremely onerous burdens on both Orinda and this tribunal. Such an imposition is wholly unjustified in order to remedy the alleged consequences of Parent's own decision to retain her previous attorneys.

For all of the above reasons, Student's motion to consolidate is DENIED.

IT IS SO ORDERED.

DATE: November 21, 2018

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Charles Marson
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CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings