BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH CASE NO. 2013030286 AMENDED ORDER FOLLOWING PREHEARING CONFERENCE AND DENYING MOTION FOR CONSOLIDATION[1]

On April 3, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Margaret M. Broussard, Office of Administrative Hearings (OAH). Attorney Shawn Olson Brown appeared on behalf the West Contra Costa Unified School District (District). Mother appeared on behalf of Student and Parents (Student). The PHC was recorded.

Based on discussion with the parties, the following order is issued:

1. Motion to Consolidate: On March 11, 2013, District filed a request for due process (complaint) against Student. This matter is designated as OAH Case No. 2013030286. On March 26, 2013, Student filed a complaint against District. This matter is designated as OAH Case No. 2013031004. On March 29, 2013, Student filed a motion to consolidate case number 2013030286 with case number 2013031004. On April 2, 2013, District filed an opposition to that motion. On April 2, 2013, Student filed a reply to District's opposition.[2] Oral argument was heard at the PHC.

OAH will generally consolidate matters that involve a common question of law and/or fact and that involve the same parties, and when consolidation of the matters furthers the interests of judicial economy and will obviate potentially inconsistent rulings. While no statute or regulation specifically provides a standard to be applied in deciding a motion to consolidate special education cases, California statutes offer, by analogy, a standard appropriate to special education cases. Government Code section 11507.3, subdivision (a), provides that an administrative law judge "may" order pending administrative proceedings

[1] This order was amended to correct a typographical error and to remove a reference to Student's first name.

[2] Student filed an Opposition to District's Opposition to the Motion to Consolidate. This Opposition has been treated as a reply.

consolidated if they involve "a common question of law or fact . . .." California Code of Civil Procedure section 1048, subdivision (a), applies the same standard to the consolidation of civil cases.

In the instant case, Student's motion does not demonstrate good cause for consolidation. The due process request filed by Student contains many more issues than those contained in the District's due process request and would require the addition of many more days of hearing. District's case involves the discrete issue of whether it may complete its triennial psycho-educational and behavior assessments of Student without parental restrictions or conditions. In contrast, Student's case goes back several years involving applied behavior analysis (ABA) and other services and an alleged breach of a settlement agreement. Student's complaint also concerns a request for social cognition testing. The hearing in the District's case is set to start in one week. Student did not provide a satisfactory explanation for waiting until just six business days before the hearing to file the motion. It would not serve the interests of judicial economy to delay and lengthen the District's case at this time to litigate issues not related to its case. Accordingly, Student's motion for consolidation is denied.

2. Hearing Dates, Times, and Location: The hearing shall take place on April 8, 9, and 15, 2013. Unless otherwise ordered, the hearing shall begin at 1:30 p.m. on April 8, 2013, and at 9:00 a.m. on all other days. The hearing shall be held at **2465 Dolan Way, San Pablo, CA 94806. The hearing will take place in Room 2.**

3. Notice to Witnesses: The parties shall immediately notify their witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party without the need for a subpoena. A witness will not be regarded as unavailable for purposes of showing good cause to continue the hearing if the witness has not been properly notified of the hearing date or properly subpoenaed, as applicable. The District has agreed to make District witnesses available for the hearing without need for subpoena.

4. Issues: The issue for hearing is limited to that alleged in District's complaint.[3] The issue was discussed during the PHC, and is reframed and clarified below.

Is the District entitled to complete its triennial psycho-educational and behavioral evaluations of Student, to which Parents previously consented in the May 25, 2010 settlement agreement, without parental restrictions and conditions qualifying their consent?[4]

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[3] The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

[4] As discussed during the PHC, the restrictions and conditions referenced are the Parents' request to observe and listen to the assessment as it is performed and the Parents' request to approve the assessment tools to be used by District's assessors. The second issue

5. Exhibits: Exhibits shall be pre-marked by each party and placed in a three-ring exhibit binder prior to the hearing. The parties' exhibits shall be pre-marked using numbered tabs and accompanied by a detailed exhibit list. Student's exhibit list shall identify each exhibit by number and the designation "S" (e.g., S1), and the District's exhibit list shall identify each exhibit by number along with a "D" (e.g., D1). Any document over five pages in length shall be internally paginated. Each exhibit binder shall contain a detailed table of contents or list. Each party shall serve an exhibit binder containing its respective exhibits and list on the other party not less than five business days prior to the start of the hearing. [5] The parties have agreed to place the February 18, 2013 letter from Parent to District, consisting of 360 pages, in a separate binder. During the hearing, the parties may ask the ALJ to mark for identification only those pages, if any, which are relevant to the District's issue. The ALJ reserves the discretion to admit or deny the admission of any document into evidence.

At the hearing, the parties shall supply an additional exhibit binder containing their respective exhibits and lists for use by the ALJ, and another exhibit binder for use by the witnesses. In the event of duplicate exhibits, the most legible version will be used, unless otherwise ordered. The parties shall not serve exhibits on OAH prior to the hearing.

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 may not be admitted into evidence at the hearing unless it is supported by a declaration under penalty of perjury, and the ALJ rules that it is admissible

6. Witnesses: Neither party may be permitted to call any witnesses not disclosed under Education Code section 56505, subdivision (e)(7), except for good cause shown, supported by declaration under penalty of perjury, and at the discretion of the ALJ.

District has indicated that it will be calling three witnesses: Mr. Steve Collins, Dr. April Jourdan and Parent. Parent indicated that she will be calling seven witnesses: Mr. Steve Collins, Ms. Ora Anderson, Dr. April Jourdan, Ms. Liz Isono, Ms. Jenny Ogar, Ms. Shannon Riehle and herself. The District agreed to make Mr. Collins, Dr. Joudan, and Ms. Anderson available.

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raised in District's complaint concerns relief from providing Student a free appropriate public education (FAPE) if the Parents refuse assessment without the restrictions and conditions. During the PHC, the ALJ therefore determined this to be a proposed remedy, not a separate issue.

[5] Education Code section 56505, subdivision (e)(7). The law also provides that the ALJ has discretion to exclude testimony of witnesses or admission of documents that were not disclosed by the parties. (Ed. Code sections 56505, subd. (e)(8), and 56505.1, subd. (f).)

The District has agreed to attempt to secure for Student the availability of Jenny Ogar, SLP and Liz Isono, OTR/L. Counsel for District will notify Parent by 12:00 p.m. on April 4, 2013, if she cannot secure their voluntary appearance at the hearing. If their appearance cannot be secured, Parent will contact OAH on April 4, 2013 to obtain subpoenas.[6]

During the PHC, Parent moved to add a witness, name unknown, to her witness list. The witness was solely to authenticate a document that may be presented at hearing. The motion was denied, but Parent was informed that she may make a motion at hearing to have the witness testify in rebuttal, if necessary.

Prior to the due process hearing, the parties shall meet and confer informally to discuss their witnesses and arrange a witness schedule. At the commencement of the hearing, the ALJ and the parties will discuss the witness schedules, including the length of time anticipated for examination of each witness and any scheduling issues for individual witnesses. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for any witness's testimony. 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. Each party shall manage the number of witnesses so that the party's evidence will be presented within its approximate allocation of fifty percent of the total hearing time. The parties shall proceed efficiently in their questioning of witnesses and shall narrow their witness lists and their questions to witnesses to avoid unnecessary, cumulative, or duplicative testimony. The parties should bear in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

All objections as to the relevance of the witnesses' testimony are reserved for hearing.

7. 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).) During the PHC, neither party requested the telephonic testimony of a witness.

8. Order of Presentation of Evidence: District shall produce its evidence first. Where Student and District intend to call the same person to testify, each party will examine the witness immediately after the other party, so the witness will only need to be called to the witness stand once. 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 unless otherwise ordered.

9. Open Hearing: At the request of Student, the hearing shall be open to the public with an estimate of not more than five members of the public.

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[6] The testimony of Ms. Isono and Ms. Ogar will be limited to their experience with Parent during their recent assessments of Student in relation to the assessment process. The testimony will not include the results of the assessments they recently completed.

10. Motions: 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 this PHC.

11. Special Needs and Accommodations: No special accommodations were requested during the PHC.

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 turned off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ. Student's motion to record the hearing was granted subject to conditions placed on the record to ensure the recording device is turned off every time the ALJ goes off the record. In addition, OAH is responsible for the official recording of the hearing.

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

14. Settlement: The parties are encouraged to negotiate to reach a settlement 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. If a settlement is reached five business days or fewer before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact during business hours by telephone at **(916) 263-0880.**

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. IF A FULL AND FINAL SETTLEMENT IS REACHED AFTER 5:00 P.M. ON THE LAST BUSINESS DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT **(916) 274-6035,** AND SHALL ALSO LEAVE CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. OAH will check for messages the evening prior to the hearing and the morning of the hearing. If the settlement agreement has been executed but is subject to approval of the school board, the parties may file a motion for OAH to vacate the prehearing conference and hearing dates and set a telephonic status conference for a date following board approval.

IF A FULL AND FINAL SETTLEMENT HAS NOT BEEN CONFIRMED IN WRITING AND BY PHONE WITH OAH BY 9:00A.M. ON MONDAY, APRIL 8, 2013, ALL PARTIES WILL APPEAR AT HEARING.

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

IT IS SO ORDERED.

Dated: April 3, 2013

/s/

MARGARET BROUSSARD
Administrative Law Judge
Office of Administrative Hearings