

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SOUTH PASADENA UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2011030964

ORDER GRANTING REQUEST FOR
RECONSIDERATION AND DENYING
MOTION FOR JOINDER

On May 4, 2011, the undersigned administrative law judge issued an order (Order) following a recorded telephonic hearing granting South Pasadena Unified School District's (SPUSD) motion for joinder adding the Los Angeles Unified School District (LAUSD) as a respondent to Student's complaint. Although the Order was issued and served on Student and SPUSD on May 5, 2011, the Office of Administrative Hearings (OAH) did not serve the Order on LAUSD until July 18, 2011.¹

On July 25, 2011, Presiding Administrative Law Judge (PALJ) Richard Breen held a recorded telephonic status conference. Attorney Pablo Esobar represented Student. Attorney Patrick Balucan represented LAUSD. SPUSD was not represented by its counsel, Adam Newman. Instead, Mr. Newman's assistant, Leslie Petty, attended on his behalf. PALJ Breen informed the parties that on July 22, 2011, OAH issued his decision in the consolidated OAH cases numbered 2010040050 and 2011030120 (the July 22, 2011 Decision)². In that decision, PALJ Breen analyzed in depth the issue of joinder of responding parties under IDEA. PALJ Breen advised the parties that, based upon the July 22, 2011 Decision and its analysis on joinder, OAH would no longer grant respondents' joinder motions, except under limited circumstances. PALJ Breen also informed the parties that, given the July 22, 2011 Decision, LAUSD would be permitted to file a motion for reconsideration of the May 4, 2011 joinder order. Ms. Petty did not object.

On July 27, 2011, LAUSD filed a motion for reconsideration of the Order. On August 1, 2011, attorney Adam Newman filed an opposition on behalf of SPUSD to the

¹ The proof of service of the Order, which was served on PUSD's attorney, Adam Newman, did not include LAUSD's name. Therefore, Mr. Newman presumptively had notice that LAUSD had not been served with the Order.

² The July 22, 2011 Decision followed a remand order from the District Court in *LACOE v. C.M* (C.D.Cal. April 22, 2011, CV 10-4702 CAS RCX) 2011 WL 1584314) (*C.M.*), which was cited parenthetically in the Order.

motion, alleging that the motion was untimely, not based upon new facts, circumstances or law, and that OAH has jurisdiction to grant joinder of respondent LEA parties. Neither the motion nor the opposition was supported by a declaration under penalty of perjury.

APPLICABLE LAW

Reconsideration

OAH will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.)

Joinder of Parties

Previously, OAH has applied the compulsory joinder rule contained in Code of Civil Procedure section 389 by analogy. As a result, some motions to join that were filed by respondent local educational agencies (LEA) were granted. However, upon further examination of the express provisions of the IDEA, the state regulations implementing the IDEA, and the policies behind the IDEA's procedural protections, OAH will now only grant motions by respondents to add other respondents under very limited circumstances.

As an initial matter, no express binding authority exists that mandates the application of Code of Civil Procedure section 389 to IDEA due process hearings in California. Section 389, subdivision (a) of the Code of Civil Procedure defines a "necessary" party as follows:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

On its face, Code of Civil Procedure section 389 applies to a "court" hearing an "action," not an administrative proceeding before a hearing officer. Code of Civil Procedure section 22 defines an "action" as "... an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense [emphasis added]." Thus, on

its face, Code of Civil Procedure section 389 does not apply to administrative hearings before OAH.

The Advisory Committee notes to Code of Civil Procedure section 389, stress that the rule was intended to further the interest of the party bringing a lawsuit in getting all relief to which it was entitled, and the interest of the public in avoiding repeat procedures about the same subject matter. (See 1973 Main Volume Advisory Committee Notes, West's Ann. Code Civ. Proc., § 389, *People ex rel. Lundgren v. Community Redevelopment Agency* (1997) 56 Cal.App.4th 868, 875 [citing 1973 Main Volume Advisory Committee Notes]; see also *Bank of California Nat. Assn. v. Superior Court* (1940) 16 Cal.2d 516, 520-524 [recounting history of common law joinder, either as a jurisdictional principle for "indispensable" parties, or to ensure fairness and avoid multiple actions as to "necessary" parties].)

In contrast to the intent of Code of Civil Procedure section 389, the IDEA specifically exempts parents from any requirement that they file all possible issues at one time in the same due process complaint. Instead, the IDEA permits a parent to file separate due process complaints on separate issues, even if a due process complaint is already on file. (20 U.S.C. § 1415(o); Ed. Code, § 56509.) The Administrative Procedure Act requires that OAH apply the above principle by expressly stating that, "The governing procedure by which an agency conducts an adjudicative proceeding is determined by the statutes and regulations applicable to that proceeding." (Gov. Code, § 11415.10, subd. (a).) Thus, if IDEA permits the filing of multiple, separate due process hearing requests, it is inconsistent to require a petitioning party to file all possible issues against all possible respondents to meet the public policy rationales underlying Code of Civil Procedure section 389's compulsory joinder rule.

As a further indication that joinder of multiple possible respondent agencies is not contemplated as part of an IDEA hearing, Government Code section 7586, subdivision (d) expressly prohibits LEA's from using IDEA due process procedures against each other, such that a school district can never be prejudiced by failure to join another school district because there is no right in an IDEA hearing to a cross-complaint between agencies. Instead, California law contains procedures for separate administrative proceedings to handle the issue of inter-agency disputes about funding. (Gov. Code, § 7585; Cal. Code of Regs., tit. 2, § 60600.) Thus, it is clear that both the IDEA and the state laws implementing it expressly reject the principle that a petitioning party must obtain all possible relief in one proceeding, and expressly reject the principle that a respondent agency can use an IDEA due process hearing to shift responsibility to another agency.

Permitting a respondent agency to join another educational agency for the purpose of vindicating the interests of the respondent agency is also inconsistent with the purpose of the IDEA's procedural protections. The Ninth Circuit Court of Appeals recently held that the IDEA, "establishes a private right of action for disabled children and their parents. It creates no private right of action for school boards or other local educational agencies apart from contesting issues raised in the complaint filed by the parents on behalf of their child." (*Lake Washington School District No. 414 v. Office of Superintendent of Public Instruction* (9th

Cir. 2011) 634 F.3d 1065, 1068 (*Lake Washington*).) In *Lake Washington*, the Ninth Circuit found that a school district had no standing to challenge the way IDEA procedural protections were applied in a state administrative hearing. In reaching its holding, the Ninth Circuit recognized that Congress intended the procedural safeguards in the IDEA to ensure that parents could enforce their children's right to a FAPE. (*Id.* at pp. 1067-1068.) Thus, it is consistent with *Lake Washington*, and the purposes behind the IDEA procedural protections, to find that compulsory joinder rules do not apply to IDEA due process hearings for the benefit of respondent educational agencies.

Further, consistent with *Lake Washington*, granting joinder on the motion of a respondent agency is inconsistent with the IDEA's timelines and may act to disadvantage students' families, many of whom are unrepresented. The IDEA expressly requires that a responding LEA be entitled to a resolution session within 15 days of the date the due process hearing request was filed. (20 U.S.C. § 1415(f)(1)(B); Ed. Code, § 56501.5.) The grant of a joinder motion by a respondent will result in an automatic delay to the hearing in order to afford any newly joined LEA the opportunity to attend a resolution session. Thus, applying civil compulsory joinder is inconsistent with the speedy resolution and alternative dispute resolution session required by IDEA. Moreover, compulsory joinder appears to be inconsistent with the informal hearing process envisioned by the IDEA, particularly when granting joinder at the request of a respondent would impose a burden of proof on the petitioning parent and student, who are frequently self-represented, and have no interest in presenting evidence to resolve what is likely to be a funding dispute between agencies. (See *Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] [establishing that the petitioning party has the burden of proof in an IDEA due process hearing].)

The only possible scenario under which state law implementing the IDEA expressly appears to allow joinder is apparently in matters involving related services providers, such as county mental health agencies or state agencies that are related service providers identified in an IEP. Government Code section 7586, subdivision (c), provides that all hearing requests that involve multiple services that are the responsibility of more than one state department shall give rise to one hearing with all responsible state or local agencies joined as parties. Because until recently California's system mandated that mental health services that are required for a FAPE be provided by county mental health agencies, Government Code section 7586 can be read to authorize joinder in cases where the provision of related services by a state agency other than the LEA is at issue. (See Gov. Code, § 7576.) Nothing in Government Code section 7586 can be read to authorize compulsory joinder of another LEA that may serve a student in the future, or had served a student in the past, when only the current LEA has been named by a student as the respondent.

Any reliance on *C.M.*, *supra*, is misplaced. *C.M.* is an unpublished order on a motion for summary judgment in the United States District Court, and as such, is not binding authority. Further, to the extent *C.M.* contains a discussion of the District Court's interpretation of the application of Code of Civil Procedure section 389 to administrative hearings in California, that discussion is *dicta*. The *C.M.* order lacks any citation to express authority mandating that OAH apply the Code of Civil Procedure when conducting IDEA

due process hearings. Moreover, the *C.M.* order ultimately did not order that a party be joined on remand, but instead ordered consolidation of two existing OAH matters. Accordingly, *C.M.* is not binding authority.

In sum, no express statutory authority exists for the application of compulsory joinder rules to California administrative hearings on IDEA issues if the motion is brought by a respondent agency for the purpose of trying to establish that another agency should be responsible for providing the student a FAPE. To the contrary, both the express provisions of IDEA, and the policies behind it, demonstrate that Code of Civil Procedure section 389 should not be applied at all. The only situation in which a respondent agency may seek to add another state or local agency as a respondent is when the student has requested a due process hearing over the provision of a related service (a.k.a. a designated instruction or service) in a particular individualized education program (IEP), that by law was the responsibility of a state or local agency, such as those administering the California Children's Services, or mental health services under the State Department of Mental Health. (Gov. Code, §§ 7575, 7576, & 7586.

DISCUSSION

Timeliness of Motion for Reconsideration

Due to a clerical error at OAH, LAUSD was not served with the Order until July 18, 2011, a fact that SPUSD's attorney should have been aware of upon receipt of the Order and its proof of service on May 5, 2011. PALJ Breen held a telephonic status conference on July 25, 2011. Student and LAUSD were represented by counsel. SPUSD chose not to have an attorney participate in the status conference. The parties had the opportunity to, and did, engage in a discussion with PALJ Breen of OAH's recently changed position on joinder of respondent LEAs. PALJ Breen invited LAUSD to file a motion for reconsideration of the Order given the delay in service of the Order on LAUSD and on the July 22, 2011 Decision.

LAUSD filed its motion for reconsideration of the Order within ten days after the Order was served on it, two days after the July 25, 2011 status conference and shortly after the issuance of the July 22, 2011 Decision, in which the legal basis for joinder of respondent LEAs under IDEA was discussed in detail. As PALJ Breen explained, that decision and its analysis of joinder under IDEA impacted OAH's position on the legal propriety of joinder in IDEA cases. Based upon all of the above circumstances, the motion for reconsideration was timely.

Reconsideration of Joinder Order

Here, SPUSD's motion seeks to join LAUSD, whom SPUSD contends owed Student a duty to provide a FAPE. However, Student's complaint makes no allegations against LAUSD, and, during hearing on the original joinder motion, Student's attorney objected to joinder, expressly stated that Student had made no allegations against LAUSD and did not

want to join LAUSD. Moreover, LAUSD was not a state or local agency providing related services under Student's IEP. As discussed above, SPUSD has administrative remedies available to it to resolve funding disputes between SPUSD and LAUSD. Accordingly, because Student has not named LAUSD as a respondent to the complaint, and does not wish to proceed to a due process hearing against it, SPUSD's motion must be denied without prejudice to its rights to seek contribution under other applicable administrative remedies.

ORDER

1. Student motion for reconsideration is granted.
2. On reconsideration of the May 4, 2011 Order, SPUSD's motion for joinder of LAUSD is denied.
3. The matter shall proceed to hearing as scheduled against SPUSD only.
4. LAUSD is dismissed as a party.

Dated: August 4, 2011

/s/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings