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STATE OF KANSAS
BEFORE THE DIVISION OF WATER RESOURCES
KANSAS DEPARTMENT OF AGRICULTURE

In the Matter of the City of Wichita's	)	
Phase II Aquifer Storage and Recovery Project	)	**Case No. 18 Water 14014**
In Harvey and Sedgwick Counties, Kansas.	)	

Pursuant to K.S.A. 82a-1901 and K.A.R. 5-14-3a.

RENEWED MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY OF THE CITY

COMES NOW the Equus Beds Groundwater Management District Number 2 (hereinafter "the District"), by and through counsel Thomas A. Adrian of Adrian & Pankratz, P.A., Leland Rolfs of Leland Rolfs Consulting, and David Stucky, with its Renewed Motion in Limine to Exclude Expert Testimony of the City. In support of said Motion, Movant states as follows:

I. Background

1. The City of Wichita (hereinafter "the City") submitted "expert" "reports" on February 15, 2019.
2. On March 12, 2018, the City submitted to the Chief Engineer of the Division of Water Resources a proposal titled "ASR Permit Modification Proposal Revised Minimum Index Levels & Aquifer Maintenance Credits" (hereinafter "the Proposal"). To help support the Proposal, the City has developed a modified USGS Equus Beds Groundwater Flow Model (hereinafter "the Model").

3. On or about March 11, 2019, the District filed a Motion in Limine seeking to exclude those expert reports alleging that those reports merely contained redundant bullet points that reference different sections of the Model or different provisions in the Proposal.
4. On or about July 24, 2019, this Hearing Officer issued an Order addressing the District's Motion. The Hearing Officer ruled on the District's Motion by ordering the City to provide adequate "supplementation" to make the reports sufficient. Specifically, the Order indicated that the experts failed to specify "any individual expert's ... respective observations, opinions or conclusions." The Hearing Officer required supplementation because the failure to do so "could result in unfair surprise to other parties."
5. On August 23, 2019, the City filed supplemental expert reports. Notably, the City did not provide supplemental reports for Don Koci, Brian Meier, or Alan King.
6. None of the expert reports submitted by the City are signed.
7. The reports do include additional attachments, but these additional documents are not clearly labeled for easy reference.
8. The District has carefully reviewed those reports. Although the reports are longer and do now include attached tables, maps, figures, and exhibits, the reports still have many of the exact same deficiencies identified previously. For example, the expert reports fail to explain who gathered the data included in the attachments and whether the individual experts actually helped make calculations involving that data.

9. Further, the reports do not identify the rationale utilized by each expert in reaching conclusions or the specific conclusions reached by each expert. In sum, the reports do not correct the deficiencies identified in the Hearing Officer's Order. For example, Joe Pajor states that his expert opinion is based on "scientific analysis" and opines that "AMCs are the functional equivalent of existing recharge credits and serve the public interest by maintaining a fuller aquifer instead of requiring Wichita to create additional capacity in the aquifer." However, the report does not explain what scientific analysis Mr. Pajor performed to reach this conclusion or the legal reasoning employed. Daniel Clement, Paul McCormick, Luca DeAngelis, and Scott Macey all fail to fully document what scientific analysis each used. Don Henry does not explain in any fashion the calculations he performed to reach his conclusion that the City's Proposal will slow the migration of the Burrton Chloride Plume and also reduce the risk of impairment of wells adjacent to the City's wellfield. John Winchester explores the development of the Model but fails to explain if he has firsthand knowledge of this information. These are just a *few* examples. The District would be happy to provide an exhaustive list of the deficiencies if requested by the Hearing Officer.
10. The expert reports address subject matter outside the scope of the original expert reports. For example, the reports now contain critiques of the District's and Intervenors' expert reports.

II. Analysis

a. Standard

The rules governing the admissibility of expert testimony are recited in the Order of the Hearing Officer and in the District's Motion, and thus will not be repeated here. It is worth restating, however, that the proponent of expert testimony has the burden of establishing that the potential admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987). An administrative hearing officer may apply K.S.A. 60-226 to exclude expert testimony and such an application of this statute is within the hearing officer's purview as an administrative body acting in a quasi-judicial capacity, as required by K.S.A. 60-265. *See, e.g., Johnson v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 2003 U.S. Dist. LEXIS 9641 (D. Kan. May 27, 2003).

b. The City's Reports Do Not Comply with K.S.A. 60-226

The City's reports fail to meet the basic requirements of K.S.A. 60-226. At a fundamental level, all expert reports must be signed. None of the expert reports in this case are signed and should be excluded for this foundational reason.

c. The City's Expert Opinions Are Neither Helpful nor Reliable and Do Not Meet the Standard of K.S.A. 60-456

As argued previously, any proposed testimony still does not meet the reliability and helpfulness standards of *Daubert*. The City's experts have not explained their opinions or how they reached their opinions. No indication is given regarding whether a given expert helped gather data or personally applied the data to scientific modeling or calculations. Merely referencing the City's Model or the City's Proposal does not satisfy the standards of *Daubert*. The reports are replete with the much of the same general bullet points as the City's original expert reports, now loosely divided between the reports. Each expert must explain his or her

rationale and a summary of the grounds in reaching the stated conclusions. This did not occur. Further, the opinions need to be identified. The City's expert reports still merely reference portions of the Proposal or Model that each expert is familiar with. This simply does not qualify to meet the *Daubert* standard. Thus, the testimony of the City's experts must be excluded. Further, the expert reports are also still partially cumulative in nature. As indicated previously, if allowed by the Hearing Officer, the District can provide a more exhaustive list of noted deficiencies.

d. Any Opinions in the Supplemental Reports Outside the Scope of the Original Expert Reports Should Be Stricken

The supplemental reports render some new opinions completely outside the scope of the opinions rendered in the original expert reports. This should not be allowed. K.S.A. 60-226 also governs supplemental expert reports. Supplemental expert disclosures can be made to correct prior deficiencies or errors but *cannot* be used to furnish brand new opinions. *See* K.S.A. 60-226(b)(6)(D). Further, rebuttal expert reports critiquing a prior disclosure must be completed within 30 days of the prior disclosure. *See* K.S.A. 60-226(b)(6)(C)(ii). Any critiques of the District's and Intervenors' expert opinions should be stricken. Further, any new opinions offered by the City should be stricken. Alternatively, the District should be allowed to file rebuttal expert reports. Another solution would be to reopen the period allowed to take depositions of the City's experts.

e. The City Should Not Be Allowed to Use Alan King, Don Koci, or Brian Meier as Experts at the Hearing

The City did not supplement the expert reports of Alan King, Don Koci, or Brian Meier. At the very least, the City should be precluded from using these individuals as experts at the hearing.

III. Conclusion

For all the numerous reasons articulated above, Movant respectfully asks that the Hearing Officer grant its Renewed Motion in Limine excluding the expert testimony advanced by the City, for the ability of the District to file rebuttal expert reports, to alternatively take depositions of the City's experts, and for such other relief as the Hearing Officer deems just and equitable.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF FILING AND SERVICE

We, Thomas A. Adrian, Leland Rolfs, and David J. Stucky, do hereby certify that a true and correct copy of the above was served by (___) mail, postage prepaid and properly addressed by depositing the same in the U.S. mail; (___) fax; (_x__) email; and/or (___) hand delivery on the 10 day of October, 2019, to:

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Document (1)

1. *Johnson v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 2003 U.S. Dist. LEXIS 9641*

Client/Matter: -None-
Search Terms: Johnson v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 2003 U.S. Dist. LEXIS 9641
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

Neutral
As of: October 10, 2019 2:03 PM Z

Johnson v. Olathe Dist. Schs. Unified Sch. Dist. No. 233

United States District Court for the District of Kansas

May 27, 2003, Decided

CIVIL ACTION No. 02-2164-CM

Reporter
2003 U.S. Dist. LEXIS 9641 *; 2003 WL 21313960

BEN JOHNSON, by and through his parents and legal guardians, RON and SUSAN JOHNSON, Plaintiff, v. OLATHE DISTRICT SCHOOLS UNIFIED SCHOOL DISTRICT NO. 233, SPECIAL SERVICES DIVISION, Defendant.

Subsequent History: Summary judgment granted by *Johnson v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 2003 U.S. Dist. LEXIS 25272 (D. Kan., Dec. 9, 2003)*

Prior History: *Johnson v. Olathe Dist. Sch., 212 F.R.D. 582, 2003 U.S. Dist. LEXIS 1690 (D. Kan., 2003)*

Disposition: [*1] Plaintiffs' motion for additional testimony denied.

Core Terms

bifurcated, due process hearing, damages, plaintiffs', additional testimony, evaluations, code of civil procedure, disclosure, defendant argues, parties

Case Summary

Procedural Posture

Plaintiffs, a student and his parents, sought de novo review of administrative decisions made by defendant school board with respect to the student, who was allegedly entitled to special education services under the Individuals with Disabilities Education Act, *20 U.S.C.S. §§ 1400-1490*. Before the court was plaintiffs' motion for additional testimony under *20 U.S.C.S. § 1415(i)(2)(B)(ii)*.

Overview

Plaintiffs sought the admission of additional testimony from their expert regarding the school board's expert's report. The school board could not have anticipated that plaintiffs' expert's testimony would include commentary on its expert's report when the school board was not on notice that plaintiffs' expert had reviewed (or had even been asked to review) the report. Thus, the hearing officer's exclusion of that testimony under *Kan. Stat. Ann. § 72-973(a)(7)* was appropriate, and the court would not disturb the ruling. As to the plaintiffs' request to allow the parents to submit additional testimony regarding the issue of damages, the court was unable to determine whether the hearing officer bifurcated the issues. If the issues were bifurcated, and the issue of damages was not presented and ruled upon by the hearing officer, then that issue was not yet ripe for appellate review. If the issues were not bifurcated, then plaintiffs were barred from presenting new evidence regarding damages. In either event, the court would not allow additional evidence on the issue of damages.

Outcome
Plaintiffs' motion for additional testimony was denied.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Administrative Record > General Overview

Education Law > Students > Disabled Students > Due Process

Administrative Law > ... > Hearings > Evidence > General Overview

Administrative Law > ... > Evidence > Admissibility of Evidence > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

HN1[] Judicial Review, Administrative Record

The taking of additional evidence, as directed by 20 U.S.C.S. § 1415(i)(2)(B)(ii), is a matter left to the discretion of the trial court. The issue is whether the administrative record contains sufficient evidence to evaluate the hearing officer's decision. The term "additional" means "supplemental." Further, the reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency and evidence concerning relevant events occurring subsequent to the administrative hearing.

Administrative Law > Judicial Review > Administrative Record > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Courts > Court Personnel

Administrative Law > Agency Adjudication > Decisions > General Overview

Administrative Law > ... > Evidence > Admissibility of Evidence > General Overview

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Education Law > Students > Disabled Students > Due Process

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Public Health & Welfare Law > ... > Disabled & Elderly Persons > Agency Actions & Procedures > Appeals & Reviews

HN2[] Judicial Review, Administrative Record

In an Individuals with Disabilities Education Act, 20 U.S.C.S. §§ 1400-1490, action, a reviewing court reviews de novo all administrative decisions made by the hearing officer. The court does not use the substantial evidence standard typically applied in the review of administrative decisions, but instead conducts an independent review of the evidence contained in the administrative record, accepts and reviews additional evidence, if necessary, and makes a decision based on the preponderance of the evidence, while giving due weight to the administrative proceedings below.

Governments > Courts > Rule Application & Interpretation

HN3[] Courts, Rule Application & Interpretation

Kan. Stat. Ann. § 60-265 controls the application of the Kansas Code of Civil Procedure.

Governments > Courts > Rule Application & Interpretation

HN4[] Courts, Rule Application & Interpretation

See Kan. Stat. Ann. § 60-265.

Education Law > Students > Disabled Students > Due Process

Governments > Courts > Rule Application & Interpretation

HN5[] Disabled Students, Due Process

In an Individuals with Disabilities Education Act, 20 U.S.C.S. §§ 1400-1490, action, an application of Kan. Stat. Ann. § 60-226 is within the hearing officer's purview as an administrative body acting in a quasi-judicial capacity, as required by Kan. Stat. Ann. § 60-265.

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN6[] Procedural Matters, Rulings on Evidence

See Kan. Stat. Ann. § 72-973.

Governments > Legislation > Interpretation

HN7 **Legislation, Interpretation**

In determining the scope of a statute, courts look first to its language. If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

Evidence > ... > Procedural Matters > Objections & Offers of Proof > General Overview

HN8 **Disclosure, Mandatory Disclosures**

Under *Kan. Stat. Ann. § 72-973(a)(7)*, each of the parties to the due process hearing has the right to prohibit the presentation of any evidence at the hearing which has not been disclosed to the opposite party at least five days prior to the hearing. The statute is not limited to expert witnesses or their evaluations. Rather, this statute applies to all evidence the parties intend to present, including testimony of expert witnesses.

Administrative Law > ... > Hearings > Right to Hearing > Due Process

Education Law > Students > Disabled Students > Due Process

Administrative Law > Judicial Review > Reviewability > Preservation for Review

HN9 **Right to Hearing, Due Process**

When seeking review of a state administrative decision under *20 U.S.C.S. § 1415*, parties are required to raise every appropriate issue in the due process hearing in order to preserve those issues for appeal.

Counsel: For Ron Johnson, Susan Johnson, Plaintiffs: Jeffery A. Sutton, Jamison & Associates LLC, Kansas City, KS, LEAD ATTORNEY.

For Olathe District Schools, Unified School District No. 233, Defendant: Melissa D. Hillman, Norris, Keplinger & Hillman, L.L.C., Overland Park, KS, LEAD ATTORNEY. Michael G. Norris, Norris, Keplinger & Hillman, L.L.C., Overland Park, KS, LEAD ATTORNEY.

Judges: CARLOS MURGUIA, United States District Judge.

Opinion by: CARLOS MURGUIA

Opinion

MEMORANDUM AND ORDER

This case is an appeal seeking de novo review, pursuant to *20 U.S.C. § 1415(i)(2)(A)*, of administrative decisions made by the Kansas State Board of Education with respect to Ben Johnson, a student with autism, who is allegedly entitled to special education services under the Individuals with Disabilities Education Act ("IDEA"), *20 U.S.C. §§ 1400-1490*. Currently pending before the court is plaintiffs' Motion for Additional Testimony (Doc. 21), which plaintiffs have brought under *20 U.S.C. § 1415(i)(2)(B)(ii)*.

On July 23, 2001, a Hearing Officer conducted an administrative **[*2]** hearing regarding plaintiff Ben Johnson's Individual Education Plan (IEP) and concluded that the IEP was appropriate. Plaintiffs appeal from the Hearing Officer's ruling and, to that end, seek to introduce testimony that was not introduced at the administrative hearing. Specifically, plaintiffs ask the court to allow testimony from Dr. James A. Mulick, Ph.D., regarding his assessment of a report prepared by Dr. Vincent Barone, Ph.D.; the Hearing Officer excluded this testimony at the hearing. Plaintiffs also ask the court to allow testimony from plaintiffs Ron and Susan Johnson regarding the damages they allegedly incurred in providing plaintiff Ben Johnson with educational services in Spring 2001.

. Facts

o **Dr. Mulick's Testimony**

At the hearing, the Hearing Officer limited the scope of Dr. Mulick's testimony. Dr. Mulick is one of two experts retained by plaintiffs for the due process hearing; the other expert is Dr. Donald M. Baer, Ph.D. Plaintiffs disclosed the identities of both expert witnesses more than five days prior to the administrative hearing, as required by *Kan. Stat. Ann. § 72-973*. This disclosure - in regard to Dr. Mulick - consists of an affidavit which

[*3] purports to set forth the subjects about which plaintiffs engaged Dr. Mulick to render an opinion. The subjects outlined in the affidavit include the following: whether Dr. Mulick has ever testified as an expert witness in cases involving autism and applied behavior analysis, whether he is familiar with the scholarly work of Dr. Baer, whether he considers Dr. Baer to be an expert in applied behavior science, whether he considers Dr. Baer to be an expert on generalization of learning, and whether he believes Dr. Baer is qualified to develop a transition plan for a child with autism. In his affidavit, Dr. Mulick also comments on a 1999 report by the United States Surgeon General which, he claims, reinforces Dr. Baer's position as a pioneer in the field of applied behavioral science, and also comments on one theory of generalization in learning. Finally, Dr. Mulick states that he was previously retained by plaintiffs in May 2000 to provide an independent evaluation for plaintiff Ben Johnson in preparation for an earlier due process hearing on plaintiff Ben Johnson's behalf that took place in December 2000.

Dr. Mulick's affidavit does not indicate that Dr. Mulick reviewed the **[*4]** report prepared by Dr. Barone on October 30, 2000. [1] Dr. Mulick's affidavit does not set forth any opinion regarding Dr. Barone's report or the IEP Dr. Barone implemented for plaintiff Ben Johnson. Moreover, also absent from this affidavit is any reference that might indicate that Dr. Mulick conducted an independent analysis of plaintiff Ben Johnson's IEP in preparation for the July 23, 2001 due process hearing.

When Dr. Mulick testified at the due process hearing, plaintiffs **[*5]** attempted to elicit testimony regarding Dr. Mulick's opinions and criticisms of Dr. Barone's October 30, 2000 report. Defendant objected to the admission of such testimony because plaintiffs had not previously disclosed any of Dr. Mulick's opinions or criticism of Dr. Barone's report. The Hearing Officer granted defendant's objection pursuant to *§ 72-973*. Plaintiffs contend that the Hearing Officer, in sustaining defendant's objection, applied the procedural requirements of *Kan. Stat. Ann. § 60-226 (b) to § 72-973*. Plaintiffs argue that. *§ 60-226(b)* does not apply to the due process hearing because the Kansas Board of Education has not adopted the Kansas Code of Civil Procedure. Defendant argues that the record does not support plaintiffs' argument that the Hearing Officer applied any part of the Kansas Code of Civil Procedure. In the alternative, defendant argues that the Hearing Officer is allowed to adopt any part of the Kansas Code of Civil Procedure that is consistent with the administrative procedural requirements of the due process hearing.

o **Plaintiffs' Testimony Regarding Damages**

Plaintiffs also ask the court to allow additional testimony from plaintiffs **[*6]** Ron and Susan Johnson regarding the expenses plaintiffs allegedly incurred in providing plaintiff Ben Johnson with educational services in Spring 2001. In support of this request, plaintiffs argue that the Hearing Officer bifurcated the damages issue from the rest of the case, and, therefore, plaintiffs were not allowed the opportunity to present testimony regarding damages at the due process hearing.

Defendant asserts that plaintiffs never moved to bifurcate the issue of compensatory damages and that the Hearing Officer did not bifurcate the issue. Defendant points out that plaintiffs did not cite to the record in asserting that bifurcation occurred. Defendant argues that plaintiffs omitted the citation because there is no support to be found in the record.

. **Analysis**

HN1[↑] The taking of additional evidence, as directed by *20 U.S.C. § 1415(i)(2)(B)(ii)*, is a matter left to the discretion of the trial court. *Johnson ex rel. Johnson v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 212 F.R.D. 582, 585 (D. Kan. 2003)* (citations omitted). "The issue is whether the administrative record contains sufficient evidence to evaluate **[*7]** the hearing officer's decision." *Id.* This court construes the term "additional" to mean "supplemental." *Id.* Further, the reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency and evidence concerning relevant events occurring subsequent to the administrative hearing.

Id., (quoting *Town of Burlington v. Dept. of Educ., 736*

[1] There is a discrepancy between the Hearing Officer's Findings of Fact and plaintiffs' pending motion. The Findings of Fact indicate that this report was dated October 31, 2000, while plaintiffs' motion states the report was dated October 30, 2000. For purposes of this opinion, the discrepancy makes no difference. The court will use the date provided by plaintiffs, as it corresponds with the date at the top of Dr. Barone's report, which defendant attached as Exhibit 23 to its Response to Motion for Additional Testimony.

F.2d 773, 790-91 (1st Cir. 1984)). The court applies this standard for the admission of additional evidence in this case. Id.

o Admission of Additional Testimony from Dr. Mulick

Plaintiffs argue that the Hearing Officer improperly excluded Dr. Mulick's testimony regarding Dr. Barone's report. Improper exclusion of evidence is one of the factors set forth in *Town of Burlington*. HN2[↑] The court reviews de novo all administrative decisions made by the Hearing Officer. *See* O'Toole by and Through O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 698 (10th Cir. 1998). The "court does not use the substantial evidence **[*8]** standard typically applied in the review of administrative decisions," but instead conducts an independent review of the "evidence contained in the administrative record, accept[s] and review[s] additional evidence, if necessary, and make[s] a decision based on the preponderance of the evidence, while giving 'due weight' to the administrative proceedings below." Fowler by Fowler v. Unified Sch. Dist. No. 259, Sedgwick County, Kan., 900 F. Supp. 1540, 1544 (D. Kan. 1995).

Plaintiffs first argue that the Hearing Officer improperly excluded portions of Dr. Mulick's testimony by misapplying Kan. Stat. Ann. § 60-226, which requires full disclosure of the basis for and conclusions of expert evaluations which are to be offered at trial. Plaintiffs contend that the Hearing Officer's exclusion of the testimony was improper because § 60-226 is a part of the Kansas Code of Civil Procedure which plaintiffs claim should not have been applied in the due process hearing.

HN3[↑] Kan. Stat. Ann. § 60-265 controls the application of the Kansas Code of Civil Procedure. That statute provides:

HN4[↑] The provisions of this article shall apply only to actions **[*9]** and proceedings in the district courts, other than actions commenced pursuant to the code of civil procedure for limited actions and shall apply to original actions in the supreme court except:

* * *

(2) When any other such court or judicial or quasi-judicial body adopts by an order, which order is consistent with all statutes controlling its procedures, all or a part of this article for its own proceedings, either in a particular matter before it or in any matters generally.

Kan. Stat. Ann. § 60-265. Plaintiffs argue that the Kansas Board of Education has not expressly adopted the Kansas Code of Civil Procedure and that the Hearing Officer was not, therefore, empowered to apply any part of the Code to the due process hearing. Defendant argues that there is no support in the record for plaintiffs' contention that the Hearing Officer applied § 60-226 at all. Moreover, defendant argues, even if the Hearing Officer had applied parts of the Kansas Code of Civil Procedure, that application was within the Hearing Officer's purview as an administrative body acting in a quasi-judicial manner. Finally, defendant argues that, even if the Hearing Officer improperly **[*10]** applied the Kansas Civil Code of Procedure, the decision to exclude the testimony was, in any event, proper, and should not be disturbed.

The court finds that, if the Hearing Officer did indeed apply § 60-226, such HN5[↑] an application is within the Hearing Officer's purview as an administrative body acting in a quasi-judicial capacity, as required by § 60-265.

The record does not explicitly indicate whether the Hearing Officer applied § 60-226 when deciding to exclude portions of Dr. Mulick's testimony. The record merely indicates that the Hearing Officer interpreted Kan. Stat. Ann. § 72-973 as requiring disclosure of the opinions about which Dr. Mulick would testify. The court concludes that the Hearing Officer applied § 72-973, and not § 60-226, to Dr. Mulick's testimony. The court, therefore, moves to an analysis of the requirements set forth by § 72-973.

Plaintiffs argue that the Hearing Officer's ruling that the potential testimony and opinions must be disclosed five days prior to the due process hearing is stricter than that set forth in § 72-973, which governs those hearings. That statute states, in pertinent part:

HN6[↑] (a) Any due process **[*11]** hearing provided for under this act, shall be held at a time and place reasonably convenient to the parent of the involved child, shall be a closed hearing unless the parent requests an open hearing, and shall be conducted in accordance with rules and regulations relating thereto adopted by the agency. Such rules and regulations shall afford procedural due process, including the following

* * *

(7) the right of the parties to prohibit the presentation of any evidence at the hearing which has not been

disclosed to the opposite party at least five days prior to the hearing, including any evaluations completed by that date and any recommendations based on such evaluations;

Kan. Stat. Ann. § 72-973. Plaintiffs argue that, under § 72-973, they were not required to disclose the opinions Dr. Mulick would express because he did not complete an evaluation. "Evaluation," plaintiffs argue, has a highly technical meaning in this context, and Dr. Mulick did not create any document or opinion that would qualify as such. Plaintiffs do not contend that Dr. Mulick's opinions were disclosed prior to the hearing. Instead, they argue that such disclosure is not required under **[*12]** § 72-973.

Section 72-973 is not so limited in scope as the plaintiffs argue. HN7[↑] "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" United States v. Turkette, 452 U.S. 576, 580, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981) (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980)). In this case, the language of the statute is quite clear. HN8[↑] Each of the parties to the due process hearing has the right to "prohibit the presentation of *any evidence* at the hearing which has not been disclosed to the opposite party at least five days prior to the hearing." Kan. Stat. Ann. § 72-973(a)(7) (emphasis added). A plain reading compels the court to conclude that the statute is not limited to expert witnesses or their evaluations. Rather, this statute applies to all evidence the parties intend to present, including testimony of expert witnesses. While the last phrase of the statute specifically requires **[*13]** the disclosure of evaluations and recommendations based on the evaluations, the court finds that these are words of illustration, not limitation. [2]

While the legislative history is silent regarding **[*14]** the purpose of § 72-973(a)(7), the court finds that the purpose of this section, like other rules requiring disclosure of expert testimony and other evidence, [3] is one of notice. Dr. Mulick's affidavit sets forth specific tasks for which plaintiffs retained him. These tasks center largely around giving his opinion of plaintiffs' other expert, Dr. Baer. Two items that are conspicuously absent from his affidavit are any mention that he was asked to review Dr. Barone's report and any hint that he had formed an opinion regarding that report. Defendants could not have anticipated that Dr. Mulick's testimony would include commentary on Dr. Barone's report when defendants were not on notice that Dr. Mulick had reviewed - or had even been asked to review - the report. The Hearing Officer's exclusion of this testimony under § 72-973(a)(7) was appropriate, and the court will not disturb the ruling. Plaintiffs' Motion for Additional Testimony, as it relates to Dr. Mulick's testimony, is denied.

[*15] . Admission of Additional Testimony Regarding Plaintiffs' Damages

Plaintiffs ask the court to allow plaintiffs Ron and Susan Johnson to submit additional testimony regarding damages they allegedly incurred in providing educational services to plaintiff Ben Johnson during Spring 2001. Plaintiffs' sole argument supporting their request is that the Hearing Officer bifurcated the issue of damages and never allowed plaintiffs to present evidence on that issue.

Defendant argues that the Hearing Officer did not bifurcate the substantive issues from the damages issues. In support, defendant points to the fact that plaintiffs have not cited any support in the record for the factual contention that the Hearing Officer bifurcated the issues.

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[2] The legislative history lends further support to this conclusion by showing that the original paragraph 7 of this statute, added in 1978, did not contain this last phrase at all. The original section read:

(7) the right of the parties to prohibit the presentaiton of any evidence at the hearing which has not been disclosed to the opposite party at least five (5) days prior to the hearing;

K.S.A. § 72-973(a)(7) (1978). In 1999, the paragraph was amended to include the phrase, "including any evaluations completed by that date and any recommendations based on such evaluations . . ." Through this amendment, the legislature did not remove the requirement that all evidence be disclosed; it merely added the specific requirement that such disclosure include evaluations and recommendations.

[3] For example, Fed. R. Civ. P. 26(a)(2) "serves primarily to require disclosure of expert testimony early enough before trial to allow parties and counsel adequate time to prepare cross-examination, [and] confer with their own experts." *See* Dixon v. Certainteed Corp., 168 F.R.D. 51, 54 (D. Kan. 1996).

HN9[↑] When seeking review of a state administrative decision under 20 U.S.C. § 1415, parties are required to raise every appropriate issue in the due process hearing in order to preserve those issues for appeal. Coe v. Michigan Dept. of Educ., 693 F.2d 616, 618 (6th Cir. 1982). Therefore, if the issues were not bifurcated, plaintiffs are barred from presenting new evidence regarding their **[*16]** damages.

Defendant is correct in its assertion that Plaintiffs have not cited any portion of the record showing bifurcation. After reviewing the record, the court is unable to determine whether the Hearing Officer bifurcated the issues. While the court has found no reference that the issues were bifurcated, it has likewise found nothing to indicate that the issues were not bifurcated. Nothing in the Hearing Officer's Finding of Facts indicates that plaintiffs had an opportunity to present evidence regarding damages. If the issues were bifurcated, and the issue of damages was not presented and ruled upon by the Hearing Officer, then that issue is not yet ripe for appellate review. *See* Rocky Mountain Radar, Inc. v. F.C.C., 158 F.3d 1118, 1123 (10th Cir. 1998). If, on the other hand, the issues were not bifurcated, then plaintiffs are barred from presenting new evidence regarding damages. Coe, 693 F.2d at 618. In either event, the court will not, at this time, allow additional evidence on the issue of damages. If plaintiffs are successful in their substantive claims, and the court reverses and remands the case to the Hearing Officer, the Hearing **[*17]** Officer may make a determination regarding whether additional testimony is appropriate.

IT IS THEREFORE ORDERED that plaintiffs' Motion for Additional Testimony (Doc. 21) is denied.

Dated this 27th day of May 2003, at Kansas City, Kansas.

CARLOS MURGUIA

United States District Judge

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