BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF:

PARENT ON BEHALF OF STUDENT,

and

BELLFLOWER UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2021010480

OAH CASE NUMBER 2021050829

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE, DENYING MOTION FOR RECONSIDERATION, AND GRANTING REQUEST FOR MEDIATION AND CONTINUANCE

JULY 26, 2021

On July 26, 2021, Administrative Law Judge Cole Dalton, Office of Administrative Hearings, held a prehearing conference by videoconference. The Administrative Law Judge is called an ALJ. The Office of Administrative Hearings is called OAH. The prehearing conference is called a PHC.

Tania Whiteleather, Attorney at Law, appeared on behalf of Student. Ms. Whiteleather's office assistant, Patti Schiffner, also attended. Richard Brady, Attorney at Law, appeared on behalf of Bellflower Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

MOTION FOR RECONSIDERATION

On July 20, 2021, the undersigned ALJ issued an order denying the parties' joint request for continuance on the grounds the parties already received multiple continuances and failed to include with their motion a statement of facts and declaration showing good cause for the continuance. On July 21, 2021, the parties filed a motion for reconsideration.

APPLICABLE LAW

The Office of Administrative Hearings 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, generally within ten days. (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.)

DISCUSSION

The parties have not established that the July 20, 2021 Order should be reconsidered. The parties presented only facts and law known to them at the time they

filed their joint request for mediation and continuance. The parties provided no explanation for failing to provide such facts or supporting declarations in their original motion.

Student argued that OAH is required to allow the parties to mediate whenever requested. Student further argued that the request should be considered a first request to continue as she had not sought a continuance in OAH case number 2021050829, before that matter was consolidated with OAH case number 2021010480.

The parties, in their motion for reconsideration, rely on *Paul G. v. Monterey Peninsula Unified Sch. Dist.* (9th Cir. 2019) 933 F.3d 1096, *Aguirre v. Los Angeles Unified Sch. Dist.* (9th Cir. 2006) 461 F.3d 1114, and 20 U.S.C. Section 1415, subdivision (e) to support the proposition that they are "entitled to a mediation of due process issues at their request at any time." However, *Paul G.* and *Aguirre* merely state that parties to due process may pursue mediation. The Ninth Circuit does not impose a mandate that ALJs grant requests for mediation "at any time."

The IDEA mandates that procedures be established and implemented to *allow parties to resolve disputes through mediation*, so long as the process is voluntary and not used to deny or delay a parent's right to due process. (20 U.S.C. §§ 1415(e)(1) and (e)(2)(A)(i), (ii).) The IDEA does not mandate that mediation requests be granted "at any time." California law provides parties the right to request a mediation conference at any point during the hearing process, so long as mediation is not used to deny or delay a parent's right to due process hearing. (Educ. Code, § 56501(b)(2).) While a request for mediation can be made at any time, it cannot be granted where it is being made to deny or delay a parent's right to due process.

Nothing restricted the parties' right to request mediation in either of the matters consolidated herein. The parties had several months to request mediation before hearing. Specifically, the parties had since January 15, 2021 to request mediation in OAH case number 2021010480. The parties had since May 26, 2021 to request mediation in OAH case number 2021050829.

However, when the parties wait so long to request mediation that they also require a continuance of the due process hearing, they must demonstrate good cause for the continuance. Here, parties filed their joint request for mediation on July 20, 2021, seeking mediation on either August 18 or 25, 2021. Because the requested mediation dates conflicted with August 3 through 5, 2021 hearing dates, the parties also sought a continuance of the PHC and due process hearing.

A continuance request must be granted upon a showing of good cause. (Educ. Code, § 56505(f)(3).) The education code requires ALJs to apply California Rules of Court, Rule 3.1332 in making the good cause determination. Second and subsequent continuances may be granted for good cause at the discretion of the ALJ. (*Id.*) A request to mediate is one factor in the good cause determination when the parties request a continuance. The parties may demonstrate good cause through a recitation of facts supported by a declaration, which they did not do here.

The parties failed to demonstrate new facts or law. The motion for reconsideration was denied on the record, after oral argument.

HEARING DATES, TIMES, AND LOCATION

REQUEST FOR CONTINUANCE AND MEDIATION

After the motion for reconsideration was denied, the parties jointly moved to continue the prehearing conference and due process hearing. The parties requested mediation for the reasons stated in their motion for reconsideration and accompanying declaration as well as reasons stated in Bellflower's prehearing conference statement. Specifically, the parties are set for mediation on August 6, 2021 in two related federal cases. The parties intend to seek global settlement of existing claims, including these consolidated matters. After August 6, 2021, if these matters have not been settled, the parties seek mediation to resolve the issues before due process hearing. The parties acknowledged that Bellflower had, until recently, refused to engage in mediation.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (Ed. Code, § 56505, subd. (f)(3); Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance

on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance or imposing conditions on the continuance; and any other relevant fact or circumstance. (Cal. Rules of Court, rule 3.1332(d).)

The request for mediation and continuance is granted for good cause for the reasons stated on the record during the PHC. Because of the length of time this matter has been pending and the number of prior continuances, no further continuances will be granted, excepting exigent circumstances.

All previously scheduled dates are vacated. The case shall proceed as follows:

Mediation: August 18, 2021, 9:00 AM to 4:30 PM.

The mediation will be held by videoconference.

Prehearing Conference: August 23, 2021, at 10:00 AM.

The PHC shall be held by videoconference. All other prehearing matters shall be addressed at the August 23, 2021 PHC. All prehearing motions must be filed three business days before the PHC.

Due Process Hearing: August 31, 2021, September 1 and 2, 2021.

The hearing shall begin at 9:30 AM each day and generally end at 3:30 PM and continue day to day at the discretion of the ALJ, unless otherwise ordered. The parties anticipate it will take ten days to complete the hearing. Additional hearing dates will be discussed with the ALJ during the hearing.

HEARING LOCATION

OAH is authorized to conduct due process hearings by videoconference or telephone. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Based on state and federal guidance to address safety procedures due to the novel coronavirus, COVID-19, OAH will conduct the due process hearing by videoconference using the Microsoft Teams application. Unless otherwise ordered, participants are required to appear by videoconference using a webcam and Microsoft Teams.

The parties shall immediately notify all potential witnesses of the hearing dates and shall subpoena witnesses, if necessary, to ensure that the witnesses will appear to testify. A party's failure to notify or subpoena a witness to testify will not be considered good cause to continue the hearing. Instructions for issuing and responding to subpoenas and optional forms for subpoenas can be found on the website at https://www.dgs.ca.gov/OAH/Case-Types/Special-Education/Forms/Subpoenas?search=special%20education%20subpoena.

SETTLEMENT

The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately if they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 4:00 PM the day prior to hearing, the parties shall leave a voicemail message regarding the settlement at (916) 274-6035. The parties should also leave contact information such as cellular phone numbers of each party or counsel for each party.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received and processed 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. The assigned ALJ will check for messages before the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement, the parties shall provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

FAILURE TO COMPLY

The failure to comply with this Order may result in the exclusion of evidence or other sanctions.

ORDER INCLUDES ALL RULINGS

This Order includes all rulings made at the prehearing conference. Any discussion and conversation not referenced in this Order is not binding on the ALJ conducting the hearing and may not be relied upon by the parties. The parties should be aware that, at hearing, the ALJ conducting the hearing has discretion to reconsider any part of this Order.

IT IS SO ORDERED.

Cole Dalton

Cole Dalton
Administrative Law Judge
Office of Administrative Hearings