BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. SAN MATEO-FOSTER CITY SCHOOL DISTRICT.	OAH CASE NO. 2013020854 ORDER DENYING REQUEST FOR RECONSIDERATION

On February 25, 2013, Parents on behalf of Student (Student) filed a request for due process and mediation (Complaint) with the Office of Administrative Hearings (OAH), against the San Mateo-Foster City School District (District). On February 26, 2013, Student filed a motion for stay put.

On March 5, 2013, the undersigned administrative law judge issued an order denying Student's motion for stay put.

On June 3, 2013, OAH convened a prehearing conference and ordered that any motions following the prehearing conference shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made prior to or during this prehearing conference.

On June 4, 2013, Student filed a request for reconsideration of OAH's order denying Student's request for stay put. Student did not include a declaration establishing good cause why the motion was not made prior to or during the prehearing conference.[1] On June 5, 2013, the District filed an opposition to the request.

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. (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.)

[1] Student's request for reconsideration included an attached declaration by Student's counsel solely to authenticate copies of exhibits to the motion.

When reviewing the timeliness of a party's request for reconsideration, OAH will normally apply by analogy the California Code of Civil Procedure section 1008. This code provides the following in pertinent parts:

> (a) When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown.
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> (b) A party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. For a failure to comply with this subdivision, any order made on a subsequent application may be revoked or set aside on ex parte motion.
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> (d) A violation of this section may be punished as a contempt and with sanctions as allowed by Section 128.7. In addition, an order made contrary to this section may be revoked by the judge or commissioner who made it, or vacated by a judge of the court in which the action or proceeding is pending.
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> (e) This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section.
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> (h) This section applies to all applications for interim orders.

Code Civ. Proc., § 1008

DISCUSSION AND ORDER

Student's motion for reconsideration is not timely because it was received more than 90 days after issuance of the order denying Student's request for stay put. Statutory law prescribes no more than 10 days after service upon the party of written notice of entry of the

order for a party to submit a request for reconsideration. Consequently, Student's motion is denied as untimely.

Student's request for reconsideration is not accompanied by a sworn affidavit stating what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. (Code Civ. Proc., § 1008(a).) Moreover, Student's motion failed to include a declaration establishing good cause why the motion was not made prior to or during the prehearing conference, in violation of OAH's Order Following Prehearing Conference, dated June 3, 2013. Consequently, Student's motion is denied as procedurally defective.

Finally, in his request for reconsideration, Student has alleged no new facts, circumstances, or law justifying reconsideration. In his request, Student reasserts the same facts and circumstances included in his initial motion for stay put.

Student, again, complains that he is entitled to District reimbursement for speech and occupational therapy (OT) services as part of his stay put placement. Student contends that pursuant to a February 7, 2009 settlement agreement (Agreement), the District agreed to reimburse Parent for private speech and OT services. Pursuant to a March 13, 2012 IEP, the District stated it would no longer be paying for the private speech and OT service. Student asserts that Parent did not agree to this change to Student's educational program, and therefore the District is required to continue reimbursing Student for the private speech and OT services during the pendency of the present due process hearing.

However, the Agreement does not provide that the reimbursement for speech and OT services is part of Student's educational program, other than for a temporary and prescribed time frame. The Agreement provides the following:

> The District shall reimburse Parent in an amount not to exceed seven hundred dollars ($700.00) per week for educational services provided to Student for four (4) weeks during the 2008 ESY [extended school year], and for each week school is in session according to the District regular school calendar, from August 27, 2008 through February 28, 2009. Educational services *may* include speech therapy *or* occupational therapy, and social groups.
> (Italics added for emphasis.)

It is clear from the Agreement that reimbursement for educational services, which *may or may not* include speech and OT, was intended only to be temporary; from August 2008 through February 28, 2009. Further, whatever educational services this reimbursement actually provided compensated for past issues and was prescribed to expire just 21 days following the date of the Agreement. Consequently, such reimbursement does not provide the basis for a student's "stay put" placement. (*Verhoeven v. Brunswick Sch. Comm.* (1st Cir. 1999) 207 F.3d 1, 7-8; *Leonard v. McKenzie* (D.C. Cir. 1989) 869 F.2d 1558, 1563-64.) It

does not matter that the Agreement excludes reimbursement for speech and OT services from a stay put waiver, as Student is not entitled to such reimbursement as part of stay put under these facts.

Student, for the first time, cites to *Marcus I. v. Department of Education*, 868 F.Supp.2d 1015[2] (*Marcus I*) in his request for reconsideration. *Marcus I* is an inapplicable decision which existed at the time of Student's initial motion for stay put. Further, the stay put analyzed in *Marcus I* was an ongoing placement at a residential treatment facility, and not reimbursement for unspecific services for a temporary period of time. (*Marcus I. v. Department of Education*, 868 F.Supp.2d 1015.) Here, the Ninth Circuit's decision in *K.D. ex rel. C.L. v. Department of Education,* 665 F.3d 1110 (9th Cir.2011), is instructive for the proposition that the student's current educational program is not necessarily the program the student was receiving when the issue of stay put was raised. That case also involved a settlement agreement. The Ninth Circuit said, in that case:

> The dispute between the DOE [Department of Education] and K.D. centers on the effect, if any, of the March 2007 settlement on K.D.'s educational placement. K.D. argues that he was placed at Loveland by the settlement agreement, and that Loveland remained his current educational placement because he continued to attend school and he never accepted any of the subsequent IEPs offered by the DOE. In response, the DOE contends that the settlement agreement only required the DOE to pay K.D.'s Loveland tuition for the 2006-07 school year and did not make Loveland K.D.'s placement for purposes of the stay put provision. We agree with the DOE.

Id. at 1118.

Noting that "there was no favorable agency or district court decision agreeing with K.D.'s initial unilateral placement at Loveland," the Ninth Circuit held that "Loveland Academy is not K.D.'s stay put placement because the DOE only agreed to pay tuition for the limited 2006-07 school year, and never affirmatively agreed to place K.D. at Loveland." *Id.* at 1118, 1121. In so deciding, the court distinguished the one-year tuition reimbursement provided for by the settlement agreement from an indefinite stay-put placement:

> K.D.'s settlement agreement never called for "placement," and only required tuition reimbursement. This is not an insignificant semantic difference. Rather, it was logical for the DOE to settle the case by agreeing to pay tuition for a limited amount of time in order to avoid the costs associated with a full due process hearing. However, it does not follow that, by doing so, the DOE had conducted the detailed evaluation required to determine whether Loveland was the proper educational institution for K.D. under the IDEA.

Id. at 1119.

[2] Student mistakenly cited this case as Marcus I:868 F.Supp.2d.

Similarly, here, the Agreement never called for a placement but rather only required the District to provide reimbursement for unspecific services for a limited period of time. Consequently, Student's motion is denied as substantively defective.

For all of the foregoing reasons, Student's request for reconsideration is denied.

IT IS SO ORDERED.

Dated: June 06, 2013

/s/
PAUL H. KAMOROFF
Administrative Law Judge
Office of Administrative Hearings