BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017020569
v.	ORDER GRANTING REQUEST FOR RECONSIDERATION; GRANTING MOTION TO AMEND AND DENYING MOTION TO DISMISS
BERKELEY UNIFIED SCHOOL DISTRICT AND NORTH REGION SELPA	

On March 28, 2017, the undersigned administrative law judge issued an order allowing Student to amend his due process complaint and denying Berkeley Unified School District's motion for sanctions. On March 29, 2017, Berkeley and North Region SELPA (collectively, Respondents) filed a motion for reconsideration of the order granting amendment and asked to dismiss the amended complaint with prejudice. On April 5, 2017, Student filed a reply to Respondents' motion, opposing the request for reconsideration. Respondents objected to the late filing of the opposition. No prejudice has been demonstrated to the moving parties by virtue of the late filing nor was a request for the opportunity to reply to Student's opposition made. Moving parties included a response to Student's primary opposition authority in their objection to the late filing. The objection to Student's opposition is overruled.

APPLICABLE LAW

There is no provision in special education law regarding reconsideration of orders issued by administrative law judges. 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.)

An amended complaint may be filed when either (a) the other party consents in writing and is given the opportunity to resolve the complaint through a resolution session, or (b) the hearing officer grants permission, provided the hearing officer may grant such permission at any time more than five (5) days prior to the due process hearing. (20 U.S.C.§1415(c)(2)(E)(i).) The filing of an amended complaint restarts the applicable timelines for the due process hearing. (20 U.S.C. §1415(c)(2)(E)(ii).) In the original

order on this matter, the motion to amend the complaint was found to be filed timely and the opportunity to amend was granted, the rescinded settlement agreement having been found to be legally rescinded prior to the necessary board approval.

DISCUSSION

Reconsideration of the order that allowed Student to file his amended complaint has been granted to address the arguments by Respondents related to *Frankel v. Board of Dental Examiners* (1996) 46 Cal.App.4th 534. Although normally a motion for reconsideration is only granted to address an argument that pertains to new law, in this case, it is granted to clarify the distinguishing factors of this case and the *Frankel* case.

Underlying Facts of the Motion

On February 13, 2017, Student filed a Due Process Complaint) with the OAH, naming Respondents. On March 8, 2017, Student filed a motion asking that the matter be dismissed, without prejudice and all dates in the matter be vacated. Student's motion states that the parties reached an agreement, which was subject to approval by Berkeley's school board. The motion also stated that after the anticipated school board approval, Student would request that the matter be dismissed with prejudice. On March 13, 2017, Division Presiding Administrative Law Judge Bob Varma issued an order vacating all dates in the matter and set a status conference with the parties for April 5, 2017. The matter was not dismissed because Student had specifically stated that the matter would be fully dismissed only after Board approval. Once a case is dismissed, OAH loses jurisdiction. Therefore, cases awaiting Board approval are not dismissed and hearing dates are vacated and settlement conferences set.

On March 21, 2017, Student, through his Parents, filed a motion to amend his complaint in this matter and noted in both the motion to amend and in a letter to Respondents and OAH dated March 20, 2017, that Student's Parents were rescinding their agreement to the settlement. The agreement, which had been signed by all parties, stated in multiple places that the agreement was not effective until approved by the District's Governing Board, but most specifically in paragraph 10, which states in its entirety: "Effective Date: This agreement shall be effective upon ratification by the District's Governing Board".[1] As of March 21, 2017, the agreement had not been approved by the District Governing Board.

On March 22, Respondents filed an opposition to the motion to amend and a request for sanctions. Student's motion to amend was granted on March 28, 2017, and Respondents' request for sanctions was denied. On March 29, 2017, Respondents filed a motion for reconsideration of the Order granting the motion to amend and, further, to dismiss the complaint with prejudice.

[1] The agreement also notes the agreement will not be effective until after Board approval in paragraphs 2(d) and 2(e).

Frankel v. Board of Dental Examiners

Respondents rely primarily on the case of *Frankel v. Board of Dental Examiners* (1996) 46 Cal.App.4th 534.[2] Essentially, Berkeley asserts that *Frankel* stands for the proposition that any time Board approval of a settlement agreement is required, it operates as a "condition subsequent" and, therefore, functions only as a release of the parties from their contractual obligations if it is not performed. The *Frankel* case is not analogous here.

The *Frankel* case concerned a licensure accusation settlement before the California Board of Dental Examiners that was settled by stipulation. Dr. Frankel was a California dentist who had been accused of mishandling prescriptions for controlled substances among other things. In order to avoid an "accusation" hearing to consider whether his license should be suspended or revoked along with other possible penalties, Dr. Frankel agreed to enter into a stipulation specifying that he would not contest the allegations against him, he admitted that the allegations warranted discipline, he agreed to not engage in the practice of dentistry for 30 days, and would be subject to five years of probation. Based on the stipulation, the hearing on the accusation against his license was taken off calendar.

The contract (stipulation?) included a statement that "[s]hould the Board of Dental Examiners, for any reason, fail or refuse to adopt this stipulation, it shall be of no force or effect as to either party." Implied in the agreement was an obligation to submit the stipulation to the Board of Dental Examiners to approve, as only the Board can decide accusations and impose discipline. (Bus and Prof. Code, § 1670.) The Board is not a party to a proceeding commenced by the filing of an accusation. In Accusation cases, the Board is charged with instituting disciplinary action against licensees when warranted. (Bus. & Prof. Code §101.6.) While there is no express authority in the regulatory structure to settle Accusation cases, the statutory scheme has been interpreted to give the Board the implied power to settle licensing disputes and to incorporate the settlement into a Board decision on the accusation and appropriate discipline. (*Frankel v. Board of Dental Examiners, supra,* 46 Cal.App.4th at p. 544.) The court determined that lack of approval would have relieved the parties of their obligations. (*Id*. At 544.)

In comparison, School Boards, or in this case SELPA Governing Boards, are parties to agreements settling due process complaints related to claims of violations of the special education laws. It is acknowledged that such Boards ultimately have authority to refuse to enter into a settlement agreement that has been negotiated by counsel and/or a special education or SELPA director. The language in this case acknowledges that, as a result, the agreement was not effective or final until the Board had approved it. Unlike with a Board policing a license, the validity of a settlement agreement in the special education

[2] Both sides also cite several prior OAH decisions, which they assert support their positions. OAH decisions, as they acknowledge, are not precedential.

context is conditioned upon approval of the Board as they are a party to the action. The court in *Frankel* acknowledged:

> It is true that, when 'two parties execute a contract with the understanding that the approval of a third party is necessary for the agreement to take effect, the contract is not complete until the third party has approved. Until that happens, neither party is bound by the agreement.' This is true, however, 'only where it can be said that reasonable persons would have understood that the agreement would *not* be effective when originally signed.'

(*Frankel v. Board of Dental Examiners, supra,* 46 Cal.App.4th at p. 549*, (*emphasis in the original*)* citing, *Santa Clara-San Benito, etc. Elec Contractor's Assn v. Local Union No. 332* (1974) 40 Cal. App. 3d, 431, 436; and Jacobs *v. Freeman, (1980) 104 Cal. App. 3d at 177, 189.)*

The School Board's responsibilities are also echoed in statute, stating "[N]o contract made pursuant to the delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board, the approval or ratification to be evidenced by a motion of the board duly passed and adopted." (Ed. Code, § 17604).

Here, the parties expressly acknowledged that the agreement in this case would not be effective until the Board approved it. Student entered into the agreement understanding that there was a risk that the Board might not approve it. Based on this understanding, the original agreement provided for Student to dismiss the case without prejudice prior to the agreement becoming effective upon Board approval in order to permit time before the then scheduled hearing dates for the Board to consider the agreement. The case only remained on file due to OAH's policy of prohibiting partial dismissals of cases. The agreement specifically stated in paragraph 2 that final dismissal of the matter with prejudice would only occur if the Board approved the settlement.

As the Board was a party to the case, neither party was bound by the agreement until it was approved by the Board. To make a determination that the agreement bound only Student when District could renege via a Board decision would be inequitable. Student was within his rights to decide not to proceed with a contract that was not final. As to the assertion that such a decision will have a chilling effect on future settlements, experience has shown that the fact that Boards sometimes refuse to approve settlement agreements regarding special education cases has not resulted in the diminishment of parties' willingness to engage in the settlement process in special education cases to date. The fact that the risk is reciprocal is simply neither new nor likely to change the settlement environment.

ORDER

Having reconsidered the March 28, 2017 order in light of further arguments by both sides, no change is made to the order previously issued. Respondents' motion to amend remains granted and the motion to dismiss the amended complaint with prejudice is denied.

IT IS SO ORDERED.

DATE: April 13, 2017

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Margaret Broussard
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MARGARET BROUSSARD
Presiding Administrative Law Judge
Office of Administrative Hearings