BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHALF OF STUDENT, v. SACRAMENTO CITY UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2013100405
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH CASE NO. 2013101109 ORDER GRANTING MOTION FOR RECONSIDERATION AND GRANTING LIMITED CONTINUANCE

On February 21, 2014, the undersigned Administrative Law Judge (ALJ) issued an order denying Student's motion for a continuance of the hearing in these consolidated cases that is set to begin on February 25, 2014. Later on the same date, Student filed a motion for reconsideration of the order, and Sacramento City Unified School District (District) filed an opposition to the motion.

APPLICABLE LAW AND DISCUSSION

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.)

Student's original motion for a continuance was filed on February 13, 2014, by attorney Daniel R. Shaw of Ruderman & Knox LLP, attorneys for Student. The motion was made on the grounds that Student's expert, Dr. Sanderson in Utah, was not likely to have his assessment of Student completed by the start of the hearing; and that her expert in California, Dr. Paula Solomon, was not going to be able to observe the District's proffered placements until the day before the hearing. Student's motion asserted that, following learning on or

about January 10, 2014, that District's school board had rejected a pending settlement agreement entered into between the parties on December 9, 2013, she made diligent efforts to prepare for hearing.

In the order denying Student's motion for a continuance, the ALJ found that the motion was not timely filed and was not accompanied by competent evidence to support the grounds for continuance made. For example, most of the attachments to the motion consisted of assessment and individualized education program (IEP) information relating to Student, only one declaration from Student's parent referenced a vague hearsay conversation with Dr. Sanderson, and emails showed Dr. Solomon would be able to view District's placements shortly before hearing. The ALJ also indicated that Student should have continued to prepare for hearing after the pending settlement was entered into, and that Student's rights to have an independent assessment and observations are not unlimited.

Reconsideration

Student's request for reconsideration is filed by attorney F. Richard Ruderman of the same law firm, and includes a declaration under penalty of perjury from him, as well as one from Dr. Solomon. This motion alleges new facts, circumstances, and/or law in support of the request for reconsideration. In particular, Mr. Ruderman's declaration establishes that he was Student's lead attorney when Student's complaint was filed in October 2013; that, beginning in January 2014, Mr. Ruderman was unable to remain as Student's lead attorney due to a serious medical condition and turned the matter over to Mr. Shaw in late January 2014. Mr. Ruderman's declaration also establishes, based on his years of experience in special education since 1991, that rejection by a school board of a written settlement agreement entered into by school districts and families is a rare event (four rejections, of which two boards reconsidered and settled). He indicated he had not and would not retain experts or continue preparing for hearing while awaiting board approval of a settlement to avoid incurring unnecessary additional expenses.

The request for reconsideration now includes a declaration under penalty of perjury from Dr. Solomon, which establishes that Mr. Ruderman requested her assessment and observation services on behalf of Student on January 23, 2014; she rearranged a heavy schedule, and obtained Parents' consent on February 4, 2014. She observed Student in Utah on February 17, 2014. Due to closed school days and the District's varying schedules for its proposed placements at George Washington Carver School and Sierra School, District will permit Dr. Solomon to finally observe these placements on February 24, 2014, but she will not have her written report completed until approximately March 3, 2014.

Based on Student's new information, her motion for reconsideration is granted and the ALJ will reconsider the order denying a continuance.

Grounds for Continuance

Student argues that she was entitled to rely on the pending settlement with the District and cease preparing for a hearing until she learned that the settlement was rejected. In light of Mr. Ruderman's declaration, this argument has some merit. Therefore that portion of the order which placed on Student an obligation to continue preparing for hearing after the settlement agreement was executed by the parties, pending board approval, is vacated. It is determined that Student's obligation to continue preparing for hearing, including scheduling of experts, arose when her attorneys learned of the board's rejection. Even so, since the real possibility of rejection existed, diligent preparation should have occurred prior to settlement.

Student filed her complaint on October 10, 2013, and had two months, until the December 9, 2013, execution of a written settlement agreement, during which Student should have prepared for hearing, including retention of experts and independent assessments, if any. Her motions make no mention of efforts toward hearing preparation during that time period. For example, when OAH granted the parties' joint request for an initial continuance on November 19, 2013, they asked for a hearing to begin on January 21, 2014, but OAH ordered it to begin on February 25, 2014, giving them an extra month. On believing they had settled the case in December 2013, it would have been understandable had Student placed experts on hold. Here, however, Student's motions establish that she did not begin to arrange for expert assessments or testimony until after rejection of the settlement in January 2014.

On January 10, 2014, Student notified OAH of the rejected settlement and requested a new hearing date. In that notice, Student asked to vacate a January 29, 2014 status conference on the settlement, and to set new hearing dates but did not specify any requested time frame. OAH complied and issued a scheduling order on January 13, 2014, that set the matter to begin on the same date as had been previously set, February 25, 2014.

Student's motion for reconsideration argues that OAH should treat her continuance request as an initial continuance and that to do otherwise after settlement rejection would constitute an abuse of discretion. However, Student had already received that initial continuance in November 2013, and has not established that she diligently prepared for hearing before the settlement. After the date of settlement, Student had no experts lined up to put on hold. She now establishes the illness of her attorney during January 2014, during which Student did not request to continue the hearing dates set on January 13, 2014. After Mr. Shaw took over as lead counsel, there is still no explanation for his delay until February 13, 2014, the day before the prehearing conference, to file a motion for a continuance.

Aside from the delay, Student's motion was denied primarily for lack of competent evidence as to the basis for the motion: the scheduling difficulties for two experts to conduct assessments and observations. While independent assessments do not trump the statutory timelines without a showing of good cause, here Student's motion is now supported by a detailed declaration from Dr. Solomon. Although it was previously not explained why her observation of District's placements the day before the hearing started was not adequate for her to be able to come into the hearing and testify, Dr. Solomon now explains she also

observed Student in Utah, and intends to complete her assessment in a written report with an estimated completion date of March 3, 2014. Student's motion for reconsideration also points out that she will be prejudiced if Dr. Solomon's written report is excluded from evidence under Education Code section 56507, subdivision (e)(7) because it would not be produced to the District at least five business days prior to the start of the hearing. However, exclusion of evidence is in the discretion of the ALJ.

Weighing all of the equities, given the school board's rejection of the settlement, the illness of Student's counsel, Dr. Solomon's scheduling difficulties, and evidentiary production requirements, Student is entitled to some relief. However, the form of that relief is not a one month's continuance to March 17, 2014, as requested. District has expended time and effort preparing for hearing as well and no lengthy continuance is warranted or granted. The interests of justice may be served by granting a short continuance and providing relief regarding the assessment exhibits. Student is therefore granted a one week continuance to complete hearing preparations and to submit any new assessments to District in order to have this matter litigated on the merits.

This matter was set for hearing as follows: beginning at 9:30 a.m. on Tuesday, February 25, 2014; at 9:00 a.m. on February 26 and 27; at 1:30 p.m. on Tuesday, March 4, at 9:00 a.m. on March 5 and 6; at 9:30 a.m. on March 11, and at 9:00 a.m. on March 12 and 13, 2014. During the prehearing conference, the parties represented that the hearing could probably be completed in less than eight and a half days, and these dates were set in an abundance of caution. Based on the foregoing, Student is granted a limited one-week continuance and related relief to accommodate her hearing preparation as set forth below.

ORDER

1. Student's motion for reconsideration is granted.

2. Student's motion for a continuance is granted on a limited basis.

3. The hearing dates of February 25 through 27, 2014, are vacated.

4. This matter will proceed to hearing as follows: at 1:30 p.m. on Tuesday, March 4;[1] at 9:00 a.m. on March 5 and 6; at 9:30 a.m. on March 11; at 9:00 a.m. on March 12 and 13; at 9:30 a.m. on March 25, and at 9:00 a.m. on March 26, and 27, 2014.[2] The hearing may continue thereafter, day to day, as needed at the discretion of the ALJ.

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[1] This half-day session was scheduled at Mr. Osher' request due to his schedule.

[2] The ALJ is unavailable to hear this case the week of March 17, 2014, due to a scheduling conflict. Scheduling difficulties of the parties, witnesses or attorneys may be addressed prior to, or at the outset of the hearing on March 4. 2014.

4. Student shall deliver any assessment reports from Dr. Sanderson and/or Dr. Solomon to District as soon as received from her experts, and may thereafter add them to her exhibit binder and move them into evidence during the hearing.

5. District retains the right to object to Student's new reports. In the event District establishes prejudice occasioned by Student's delayed production of such evidence, District will be entitled to a continuance to prepare evidence related to those reports.

DATE: February 24, 2014

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings