BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2022020679

ORDER DENYING REQUEST FOR RECONSIDERATION

APRIL 11, 2022

On April 5, 2022, Administrative Law Judge Deborah Myers-Cregar presided over the first day of hearing in this matter. An Administrative Law Judge is referred to as an ALJ. Megan Kinsey, counsel for San Bernardino City Schools, brought an oral motion to exclude the testimony of two identified expert witnesses, Dian Tackett and Laurel Rexon. The ALJ reserved the ruling until after the lunch hour to allow Robert Burgermeister, counsel for Student, to respond.

On April 5, 2022, at 1:30 p.m., the ALJ discussed a tentative ruling based upon the witnesses' failure to respond to the subpoenas and Student's failure to bring a motion to quash those subpoenas. The ALJ allowed Student's counsel Burgermeister the opportunity to respond to these discovery issues. Student's counsel first represented

that the two experts had not yet been hired, and had not yet reviewed any documents, and had no affirmative obligation to respond to the subpoena.

Student's counsel Burgermeister further explained the expert witnesses who had not yet been hired were relying entirely on the uploaded exhibits, and had no other independent documents or reports, and represented there was no communication between them and Student's counsel.

Counsel Burgermeister challenged when the witnesses had been served with the subpoena duces tecums, and when they received the Notice to Consumer. Student's counsel claimed there was not sufficient time to bring a motion to quash the subpoena.

Counsel Kinsey for San Bernadino City Schools reported the dates of the Notice to Consumer and the Subpoena Duces Tecum were served on counsel and on the expert witnesses, which were timely.

The ALJ confirmed the two expert witnesses had not uploaded any responses into Case Center as required by the Prehearing Conference Order.

Student's representations and arguments did not address the expert witnesses' failure to comply with discovery. On April 5, 2022, the ALJ issued an order excluding the two expert witnesses.

On April 8, 2022, Student 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

Student brings a motion for reconsideration of the Order to exclude Student's two expert witnesses, incorrectly titled request for reconsideration of order granting continuance of the due process hearing, written by Sheila Bayne, with the supporting declaration of Sheila Bayne, who was not trial counsel.

Student's motion argues the Administrative Law Judge did not allow Student's counsel to argue against the motion to exclude the two expert witnesses, the manner of service, the dates of service, whether service was proper, whether prejudice would result, and failed to cite legal authority to issue discovery sanctions.

San Bernardino City Schools represented the Notices to Consumer and the Subpoena Duces Tecum were properly served, and the discovery request was not responded to. San Bernardino City Schools asserts this information is necessary to prepare for the examination of Student's expert witnesses.

The hearing ALJ has authority to issue a discovery sanction to exclude expert witnesses as a discovery sanction. Trial court judges have the discretion to issue evidence preclusion orders. As with civil discovery, the Administrative Procedure Act's, known as the APA, statutes provide for graduated discovery sanctions. Discovery abuse, even if egregious, does not justify imposition of nonstatutory sanctions in the absence of violation of court order compelling response.)*Podiatric Medical Board of California v. Superior Court* (2021) 62 Cal.App.5th 657.)

The March 25, 2022 Prehearing conference and the PHC order issued detailed the prehearing procedures and explained rules regarding discovery and compliance with discovery orders.

Student offers no new facts, circumstances or law. to support reconsideration.

Student's counsel Sheila Bayne wrote the motion and filed a declaration, but she was not present at the hearing and did not argue the motion to exclude the testimony of the two witnesses. Student's motion and supporting declaration is confusing because it contains many mistakes, and is written as a request for reconsideration of a continuance request of the due process hearing, which did not occur. Student's paragraph numbers repeat and includes information about an alleged request for continuance and an older, male student, beginning with the second paragraph four, on page eight, through paragraph 10, on page nine. Student's memorandum of points and authorities claims the ALJ allegedly granting a request for continuance, which did not occur. Ms. Bayne's motion and declaration refers to a different ALJ and a different student and claims that during this alleged continuance request, this ALJ referred to the female preschool student as a male student who had matriculated. The ALJ notes that did not occur.

Significantly, Student did not provide a supporting declaration from either of her two expert witnesses explaining circumstances about not being served, not being able to file a motion to quash, or an explanation why documents had not been uploaded into Case Center as required by the hearing ALJ. Student's arguments are not supported by a declaration and are not persuasive.

ORDER

Student has not established the April 5, 2022 Order should be reconsidered. The motion for reconsideration is denied. All dates set in this matter are confirmed.

IT IS SO ORDERED.

Deborah Myers Cregar

Deborah Myers-Cregar
Administrative Law Judge
Office of Administrative Hearings