

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT,

OAH CASE NO. 2010040608

ORDER DENYING RECONSIDERATION
OF DISTRICT'S MOTION TO DISMISS

On November 9, 2010, District filed a Motion to Dismiss which is more properly characterized as a Motion for Reconsideration.

On April 6, 2010, Student's mother on behalf of herself and Student filed a due process hearing request in OAH Case Number 2010040608 (Student's Case). Student alleged numerous procedural and substantive denials of FAPE. Student's Case addressed the appropriateness of District's March 4, 2010 IEP offer, and the alleged deprivation of Mother's parental participation right. Student's Case also encompassed claims concerning previous IEPs offered and implemented during the 2009-2010 school year, including, goals and objectives developed for Student in the areas of sensory, auditory, and visual processing, and special education related services for the 2009-2010 school year, including speech and language, occupational therapy, resource specialist program support, physical therapy, assistive technology, and a transition plan.

On May 11, 2010, District filed a due process hearing request in OAH Case Number 2010050419 (District's First Case). On May 17, 2010, District filed a motion to consolidate both cases and continue the hearing dates. On May 26, 2010, OAH granted the consolidation, continued the consolidated matters and set the statutory deadline for issuing a decision to District's case.

On September 23, 2010, District filed a motion to dismiss Student's Case. District claimed that Student's case should be precluded under the doctrines of res judicata and collateral estoppel on the ground that the Honorable James L. Waltz of the Superior Court, County of Orange, State of California, by his statement of decision dated September 3, 2010, made a determination on the merits of the issues in Student's Case. Student opposed the motion on September 27, 2010, and District filed a reply to Student's opposition on September 29, 2010.

On October 14, 2010, District withdrew District's First Case.

A telephonic prehearing conference (PHC) was held on October 18, 2010 before Administrative Law Judge (ALJ) Eileen M. Cohn. Counsel for District and mother appeared on behalf of the parties. In addition, Father attended the PHC. Based upon District's withdrawal of District's First Case, the ALJ ordered Student's Case to proceed as a single action, on the timeline set by OAH's previous consolidation order. At the PHC, the ALJ also heard further argument on District's motion to dismiss. Although father was clear that he opposed mother's contention that Student should be placed in general education, he stated that subject to further review of the issues enumerated at the PHC, there were certain portions of Student's Case relating to past services, that he might not oppose. The ALJ denied District's motion. OAH issued the ALJ's prehearing conference order and order denying District's motion to dismiss on October 25, 2010.

On November 3, 2010, District filed a second due process hearing request (District's Second Case) seeking a declaration that its IEP offer of March 4, 2010, and March 31, 2010, particularly its offer to place Student in an SDC, constituted a free and appropriate public education (FAPE). That same day, it moved to consolidate District's Second Case with Student's Case.

On November 11, 2010, District filed the instant second motion to dismiss Student's Case. Like District's first motion to dismiss, the parental decision-making authority, as determined the Honorable James L. Waltz of the Superior Court, County of Orange, State of California, forms the basis of District's second motion to dismiss. In District's second motion to dismiss, District includes a minute order from Judge Waltz issued on October 21, 2010. In his minute order, Judge Waltz, refused to modify his September 3, 2010, statement of decision. Judge Waltz reiterated that the parents shared joint legal custody of Student, but that he temporarily awarded father the sole educational decision-making authority to implement the March 4, 2010, IEP as to the SDC placement offer (as opposed to mother's preferred general education placement). Judge Waltz maintained that his evidentiary hearing was "comprehensive" insofar as Student's placement. Judge Waltz clarified that his decision exclusively addressed the SDC placement and that he had not been asked to review "the many special education state and federal laws and applicable regulations (some referenced in the court's statement of decision) and test for school district compliance or examine any special education due process violations, as mother alleged." Judge Waltz reiterated that his temporary order was not intended to terminate Mother's rights or standing to pursue administrative remedies in Student's Case. Aside from introducing Judge Waltz's second ruling, which did not modify his first "temporary" ruling, District did not offer any new facts. District modified its legal theory supporting dismissal in its second motion to dismiss. District offered a 1999 administrative order from OAH's predecessor agency, where the hearing officer, denied the school district's motion to dismiss, stayed the action, with the caveat that either parent could pursue the complaint, and referred the parents the Superior Court for an order determining their respective educational decision-making rights.

At the time of this order, Student had not filed a response to District's second motion to dismiss.

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.)

DISCUSSION

District's current motion to dismiss is more properly characterized as a motion for reconsideration of the ALJ's order of October 25, 2010, denying its motion to dismiss as it is based upon the same facts as its first motion to dismiss. In this motion for reconsideration, District offers no new facts which justify a reconsideration of the ALJ's October 25, 2010, order. Father's disagreement with mother regarding District's proposed placement and Judge Waltz's statement of decision regarding parents' respective educational rights, were known at the time of District's first motion. Judge Waltz's subsequent minute order does not constitute new facts justifying reconsideration of the ALJ's order. On the contrary, in his October 21, 2010, minute order, Judge Waltz confirms his statement of decision and mother's right to proceed with Student's Case.

In the instant motion for reconsideration, District appears to assert that Student's case should not proceed until the Superior Court establishes which parent has final decision-making rights. District's assertion of a new legal theory also does not justify reconsideration or dismissal of Student's Case. District asserts that a 1999 administrative order from OAH's predecessor agency, provides the rationale for granting dismissal. (*Capistrano Unified School District v. Student* (1999) Seho No. 802-99). Like the facts supporting District's motion for reconsideration, this 1999 administrative order was available to District at the time it filed its first motion to dismiss. Its failure to utilize this nonbinding authority to assert a new legal theory, is not acceptable grounds for reconsideration. Furthermore, this 1999 administrative order does not support District's position. According to the portion of the order excerpted in District's second motion to dismiss, the hearing officer denied the school district's motion to dismiss and stayed the action. The hearing officer expressly provided that either parent may elect to proceed with the due process complaint at any time. The hearing officer referred the parents to the Superior Court to determine their educational decision-making rights. Here, Judge Waltz made a determination of parents' respective educational rights and, expressly authorized mother to proceed with her due process hearing request.

Furthermore, from father's statements at the PHC and in his pleadings to Judge Waltz, aside from Student's placement, father does not necessarily oppose the issues raised in Student's Case. Accordingly, District's motion for reconsideration, recast as a motion to dismiss, is denied, and the ALJ's order of October 25, 2010, denying District's first motion to dismiss remains in effect and unmodified by this order.

ORDER

1. District's Motion for Reconsideration recast as a Motion to Dismiss is denied.
2. The ALJ's October 25, 2010, order denying District's Motion to Dismiss remains in effect and unmodified by this order.

IT IS SO ORDERED.

Dated: November 10, 2010

/s/

EILEEN M. COHN
Administrative Law Judge
Office of Administrative Hearings