BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. MOUNTAIN VIEW-LOS ALTOS UNION HIGH SCHOOL DISTRICT.	OAH Case No. 2016050172 ORDER GRANTING REQUEST TO CONTINUE DUE PROCESS HEARING FOR ONE DAY

On August 17, 2016, Mountain View Los Alton Union High School District filed a request for a one day continuance of the due process hearing because Student failed to timely produce evidence he intended use during the due process hearing. On August 18, 2016, Student opposed the request arguing that it would disrupt Student's case, that the request is predicated on false information, that the motion is inconsistent with ALJ Miles's prehearing conference order, that the evidence was already in Mountain View's possession or could have been requested earlier, and that Student would be prejudiced because Mother would not be able to testify in person. On August 19, 2016, Mountain View submitted a reply to Student's opposition. The due process hearing is scheduled to start on August 23, 2016.

APPLICABLE LAW

Continuance

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have

stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

Evidence Disclosure Requirement

A party to a special education due process hearing is afforded the right to receive at least five business days prior to the hearing, a copy of all documents and a list of all witnesses and their general area of testimony that the other parties intends to present at the hearing. (Ed. Code, § 56505, subd. (e)(7).) Additionally, a party to a special education due process hearing also has the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing. (34 C.F.R. § 300.512(a)(3); Ed. Code, § 56505, subd. (e)(8).)

DISCUSSION

There is no dispute that Student failed to timely serve a copy of his evidence binder on Mountain View. The statutory deadline to disclose evidence was August 16, 2016, five business days prior to the hearing's scheduled start on August 23, 2016. Student's opposition establishes that the failure to timely disclose was not intentional. Rather, it resulted from poor planning by scheduling a late courier pick up, and a virtual comedy of errors including giving the documents to the wrong courier. This error was not discovered until just before 4:00 p.m. the day the evidence was required to be disclosed. Thereafter, Student's counsel took steps to mitigate the damage by offering to send the documents via electronic mail and scheduling an alternate delivery for the following morning. Despite these attempts, Mountain View was prejudiced by the late disclosure.

Mountain View's counsel, Laurie Reynolds, submitted a declaration establishing her intent to review Student's exhibit binder before meeting with her witnesses on August 17, 2017. These sessions were cancelled because Ms. Reynolds was not able to review Student's evidence. Both parties acknowledge that Student's evidence contains new documents not previously disclosed or in Mountain View's possession. The offer to email the documents after the close of business did not eliminate the prejudice as it required her to print, organize, and divide Student's exhibits before being reviewed. This was not Ms. Reynold's obligation.

Student's argument that Mountain View knew Student had documents not in its possession and should have asked for them sooner is unpersuasive. No prehearing discovery right exists in special education due process matters. This makes the five-day disclosure requirement particularly important where, like here, a party is receiving documents not in its possession or previously disclosed. Moreover, while Student asserted Mountain View could have requested the documents sooner, there is no indication in the opposition that such a request would have been granted.

Student also argues against a one day continuance because Mother is only available to testify in person on August 23, 2016, before returning to Denver. First, it must be

emphasized that responsibility for the delay rests entirely with Student. Student's counsel's declaration established that he waited until the proverbial 11th hour to have the documents delivered. The courier hired to transport the documents did not arrive at his office in San Francisco until nearly 4:00 p.m., one hour before they were due to be timely delivered in Oakland. This planning left no margin for error, even had the courier pick up gone flawlessly. Second, the dates for this hearing were scheduled over two months ago pursuant to the parties' joint request for a continuance. Nothing in this order precludes Student from making a motion to have Mother testify telephonically or seeking an alternate day when she is available to return to California.

The undersigned ALJ weighed the forgoing facts carefully in ruling on Mountain View's motion for a one day continuance. Consideration was given to alternatives to cure the prejudice to Mountain View. The law gives the authority to bar any evidence from being introduced at the hearing not timely disclosed (*See* 34 C.F.R. § 300.512(a)(3); Ed. Code, § 56505, subd. (e)(8).) Rather than granting Mountain View a one day continuance, all of Student's evidence could have been excluded. This would arguably have a catastrophic impact on Student's case.

Under the facts here, where the failure to timely disclose was not intentional and Student's counsel took steps to mitigate the impact, an order excluding all or even the portion of Student's evidence not previously disclosed, is not ordered. However, Mountain View established good cause for a one day continuance.

ORDER

1. Mountain View's motion for a continuance is granted.

2. August 23, 2016, is vacated as a hearing day.

3. The due process hearing is now scheduled to commence on August 24, 2016.

4. The ALJ presiding over the due process hearing will address whether an additional day is to be scheduled.

IT IS SO ORDERED.

DATE: August 19, 2016

DocuSigned by:
Joy Redmon
5155E4ECA68C4B1...

JOY REDMON
Administrative Law Judge
Office of Administrative Hearings