BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. VENTURA UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018040504 ORDER FOLLOWING PREHEARING CONFERENCE; DENYING DISTRICT'S MOTION TO CONSOLIDATE; GRANTING DISTRICT'S MOTION FOR A CONTINUANCE; AND DENYING STUDENT'S MOTION FOR SANCTIONS

On May 25, 2018, a telephonic prehearing conference was held before Administrative Law Judge Robert G. Martin, Office of Administrative Hearings. Attorney Andréa Marcus appeared on behalf of Student, and Parent participated in the PHC on Student's behalf. Attorney Melissa Hatch appeared on behalf of Ventura Unified School District. The PHC was recorded.

Based on the discussion of the parties, the ALJ ordered the following at the PHC:

1. District's Motion to Consolidate: Student filed this case on April 12, 2018. On May 24, 2018, District filed a motion to consolidate this case (Student's first complaint) with OAH Case No. 2018051110 (Student's second complaint). Student filed her second complaint naming District on May 22, 2018. The second complaint alleges District denied Student a free appropriate public education by failing to provide Student occupational therapy services from August 2017 to May 22, 2018, and, in the period after April 12, 2018, by failing to conduct a timely annual individualized education program team meeting, and failing to provide appropriate academic goals, services and supports.

Although no statute or regulation specifically provides a standard to be applied in deciding a motion to consolidate special education cases, OAH will generally consolidate matters that involve: a common question of law and/or fact; the same parties; and when consolidation of the matters furthers the interests of judicial economy by saving time or preventing inconsistent rulings. (See Gov. Code, § 11507.3, subd. (a) [administrative proceedings may be consolidated if they involve a common question of law or fact]; Code of Civ. Proc., § 1048, subd. (a) [same applies to civil cases].) However, the Education Code and the Individuals with Disabilities Education Act expressly provide that parents are not precluded from filing a separate due process complaint on an issue separate from a due process complaint already filed. (Ed. Code, § 56509; 20 U.S.C. § 1415, subd. (o).

The issues in Student's second complaint are separate from those in the first complaint. The first complaint only issues arising on or before April 12, 2018, and raises no issues regarding occupational therapy. The second complaint concerns only issues arising after April 12, 2018, plus occupational therapy. Accordingly, consolidation is not appropriate under the Education Code and IDEA. District's motion to consolidate was denied at the PHC.

2. District's Motion to Continue: On May 21, 2018, District filed a motion for an initial continuance of the June 5, 2018 hearing in this matter, on grounds that both District and Student counsel are scheduled to be in hearing on another matter on June 5, 6, 7, 12 and 13. District proposed that the hearing be continued to August 28-30, 2018. On May 23, 2018, Student filed Parent's declaration opposing District's motion, on grounds that a hearing in late August would be prejudicial to Student because, in the absence of a decision, Student would have to start the 2018-2019 school year without appropriate goals, supports and services. Student proposed a shorter continuance, to July 17-19, 2018.

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).)

Both counsel stated that trial of this matter could be completed in three days. District stated that many District employees would be off work over the summer, and District could not make them available without need for a subpoena. Student stated that Student preferred compelling District witnesses to appear pursuant to subpoena, rather than being made available by District without the need for subpoena. District and Student counsel were both available for hearing on July 17, 18, and 19, 2018.

Short continuances are favored over long ones, when feasible. Here, both counsel are available for hearing on July 17-19, 2018, and Student has stated her willingness to rely on subpoenas to compel the attendance of District employee witnesses at trial. Accordingly, hearing of this matter was continued at the PHC to July 17-19, 2018.

The parties expressed an interest in scheduling mediation prior to the continued hearing date, but were unsure of dates of mutual availability. The parties may file a joint request for mediation, with mediation to take place prior to the continued hearing date.

3. Student's Motion for Sanctions: Student made an oral motion at the PHC for an order sanctioning District's counsel, on grounds that District's motion had misrepresented that Student had previously communicated a willingness to continue this matter to dates within 90 days of the initial June 5, 2018 hearing date, but was now unwilling to agree to a continuance. District supported the representations in its motion with a sworn declaration submitting a May 15, 2018 e-mail from Student's counsel, indicating that Student would "be happy to continue the hearing within the 90-day timeframe," and a May 18, 2018 e-mail stating that Student "will not agree to a continuance the last week of August," but would agree to a hearing on dates previously proposed by District for mediation (i.e., July 17, 18 and 19, 2018). Student contended that "the 90-day timeframe" referenced in Student's May 15, 2018 e-mail was 90 days from the April 12, 2018 filing of the complaint, not 90 days from the initial hearing date, as District represented in its motion.

In certain circumstances, an ALJ presiding over a special education proceeding may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088, subd. (e); see *Wyner ex rel. Wyner v. Manhattan Beach Unified School Dist*. (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly, [California Code of Regulations] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

Here, there was no evidence District or its counsel engaged in actions or tactics that were frivolous or intended for purposes of delay, or that District's alleged misrepresentations were made in bad faith. The alleged misrepresentations concerning Student's communications, if true, were trivial, and the communications themselves were attached as exhibits to District's motion. District's interpretation of Student's May 15, 2018 e-mail as indicating a willingness to consider a continuance to a date within 90 days from the initial hearing date was reasonable. Student's argument that "the 90-day timeframe" referenced in Student's May 15, 2018 e-mail was meant to start with the April 12, 2018 filing of the complaint was less reasonable than District's interpretation, as it was inconsistent with Student's own May 18, 2015 email proposing a July 17, 2018 hearing date (i.e., 96 days after filing the complaint) and not asserted prior to Student's response to District's motion.

Student's oral motion for sanctions was denied at the PHC.

ORDER

1. District's motion to consolidate this case with Case Number 2018051110 is denied.

2. District's motion to continue this case is granted. The case shall proceed as follows:

   Prehearing Conference: July 2, 2018, at 10:00 a.m.

   Hearing: July 17, 18 and 19, 2018, and continuing thereafter day-to-day, Monday through Thursday, as needed at the discretion of the Administrative Law Judge. The hearing shall commence at 9:30 a.m. on July 17, 2018, and at 9:00 a.m. on all other days, unless otherwise ordered.

3. Student's motion for sanctions is denied.

IT IS SO ORDERED.

DATE: May 30, 2018

DocuSigned by:

ROBERT G. MARTIN
Administrative Law Judge
Office of Administrative Hearings