BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

MT. DIABLO UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NUMBER 2022120477

ORDER FOLLOWING PREHEARING CONFERENCE DENYING MOTION TO DISMISS AND GRANTING REQUEST FOR CONTINUANCE

DECEMBER 30, 2022

On December 30, 2022, Administrative Law Judge Cararea Lucier, Office of Administrative Hearings, held a video prehearing conference. The Administrative Law Judge will be referred to as an ALJ. The prehearing conference will be referred to as a PHC. Deborah Ettinger, Attorney at Law, appeared on behalf of Mt. Diablo Unified School District. Parent appeared on behalf of Student. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

On December 22, 2022, Student filed a motion to dismiss Mt. Diablo's complaint. On December 22, 2022, Mt. Diablo filed an opposition to Student's motion. On December 23, 2022, Student filed a motion to dismiss, or in the alternative, a motion to continue the PHC and due process hearing. On December 28, 2022, Mt. Diablo filed an opposition to Student's motion.

Student moved to dismiss the matter because Parent signed the assessment plan at issue, with conditions. In the alternative, Student moved to continue the hearing based on the unavailability of Parent and essential witnesses for the currently scheduled hearing dates. Mt. Diablo opposed the motion to dismiss the matter because it is requesting to assess the child without parental conditions but did not oppose a continuance. This is the first request for a continuance in this matter. The motions were timely filed three days prior to the PHC.

MOTION TO DISMISS

Mt. Diablo initiated this matter to determine whether it has the right to assess Student pursuant to an assessment plan dated November 3, 2022. Upon receipt of the due process complaint, Parent signed the assessment plan with conditions. Although OAH will grant motions to dismiss allegations that are facially outside of OAH's jurisdiction such as civil rights claims, section 504 claims, enforcement of settlement agreements, or incorrect parties, special education law does not provide for a summary judgment procedure. Here, the motion to dismiss is not limited to matters that are facially outside of OAH's jurisdiction. Factual disputes exist as to whether Mt. Diablo has the right to assess Student pursuant to the November 3, 2022 assessment plan, without

parental conditions. A determination of these factual disputes requires an evidentiary hearing. Accordingly, the motion to dismiss is denied.

MOTION TO CONTINUE

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. (Ed. Code, § 56505, subd. (f)(3); 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 or imposing conditions on the continuance; and any other relevant fact or circumstance. (Cal. Rules of Court, rule 3.1332(d).)

The request for continuance is granted for good cause, established by the unavailability of Parent and essential witnesses. All previously scheduled dates are vacated. The case shall proceed as follows:

The PHC will be held on January 13, 2023, at 1:00 PM. All other prehearing matters shall be addressed at the January 13, 2023 PHC. All prehearing motions must be filed three business days before the PHC.

The Due Process Hearing will be held on January 24, 2023, through January 26, 2023. The hearing will be conducted via telephone or videoconference and shall begin at 9:30 AM and end at 3:30 PM on all days, unless otherwise ordered. The hearing shall continue day to day at the discretion of the ALJ.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses, if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing "good cause" to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed.

SETTLEMENT

The parties shall immediately inform OAH in writing if they reach a settlement or otherwise resolve the dispute before the scheduled hearing. If the parties reach a settlement within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

If a full and final written settlement agreement is reached after 5:00 PM the day before the hearing, the parties shall leave a voicemail message regarding the settlement at (916) 274-6035. The parties should also leave contact information such as cellular phone numbers of each party or counsel for each party. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at https://www.applications.dgs.ca.gov/oah/oahsftweb.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages before the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement, the parties shall provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

FAILURE TO COMPLY

Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

Cararea Lucier

Cararea Lucier
Administrative Law Judge
Office of Administrative Hearings