

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

FRESNO UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2012120631

ORDER GRANTING REQUEST FOR
CONTINUANCE AND SETTING NEW
DUE PROCESS HEARING DATES

The Fresno Unified School District (District) filed its request for a due process hearing (complaint) in this case on December 17, 2012. On December 18, 2012, the Office of Administrative Hearings (OAH) issued a scheduling order setting this matter for a due process hearing to begin on January 17, 2013, with a telephonic prehearing conference on January 9, 2013. On December 31, 2012, District filed a request to continue the dates in this matter based upon a due process hearing scheduling conflict with another case. On January 2, 2013, Parents, on behalf of Student, filed a reply to this motion conditioning their non-opposition to the motion on District's agreement to not oppose their motion for stay put during the continuance period.

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).)

District requests a continuance due to a scheduling conflict with another case set for hearing before OAH. In addition, District requests that the hearing be continued to the week of March 11, 2013, due to further scheduling conflicts with other cases before OAH. The

motion is accompanied by a declaration under penalty of perjury and multiple exhibits. On January 2, 2013, Student filed a separate motion for stay put, which will be ruled on separately after allowing District an opportunity to file a reply. Thus, Student's stay put issues and concerns have no direct bearing on this motion for a continuance unless they are relevant to establish prejudice, and District's motion for a continuance must be ruled on its own merits in light of the applicable law.

The OAH scheduling order mandates that the hearing in this case will continue "day to day, Monday through Thursday, as needed at the discretion of the Administrative Law Judge [ALJ]." The first scheduled hearing date is Thursday, January 17, 2013. Therefore, absent an order otherwise, based on District's estimate of a five-day hearing, the hearing would continue to January 22, 23, 24, and 28, 2013.¹

Conflict with Case Number 2012110106

District's motion and OAH's docket establish that District is now scheduled for hearing in OAH Case Number 2012110106, on January 23 and 24, 2013. In that case, filed by the District on November 1, 2012, the initial hearing date was December 4, 2012. District opposed the family's motion for a continuance of that date. On November 26, 2012, during a telephonic prehearing conference, the undersigned ALJ granted a continuance and set the new dates of January 23 and 24, 2013. Mr. Nam, District's counsel, was present telephonically during that conference. He now estimates that case will take four days, thus adding further hearing dates of January 28 and 29, 2013.

Student's opposition and accompanying exhibits argue that District's actions amount to improper harassment and animosity against the family. The animosity between the parties is troubling. It is noted, for example, that District was aware it had a hearing set in Case Number 2012110106 for the third week of January 2013, when it filed its complaint against Student on December 17, 2012. All District had to do was count the applicable timeline to realistically estimate when OAH would be required by law to set the hearing in this case, to note a probable conflict when it initiated the case. Moreover, following receipt of the December 18, 2012 scheduling order in the present case, counsel for the District was or should have been immediately aware of the scheduling conflict but did not file the motion for a continuance until December 31, 2012. Overall, however, Student did not establish that District's filings have been unreasonable or for an improper motive and the motion is timely. In addition, District's past adjudicated violations of special education law are not relevant to the present procedural motion.² Finally, Parents concede that a continuance would benefit them as they are involved in other legal matters with the District at this time and did not establish that Student would be prejudiced by a brief continuance.

¹ Monday, January 21, 2013, is a legal holiday and OAH is closed.

² OAH Expedited Decision dated April 16, 2012, and Decision dated June 22, 2012, in a prior case between the parties, bearing OAH Case Number 2012020842.

Weighing the equities, it is apparent that District cannot attend two hearings at the same time. Since the hearing dates in Case Number 2012110106 were set first, that hearing takes precedence over the present case. An ALJ from OAH will travel to Fresno for each hearing. In the circumstances of this case, judicial economy and conservation of resources are supported by setting the matter for consecutive days, rather than having the hearing start on January 17, 2013, and then be continued. Based on the foregoing, District's motion for a continuance is granted.

Other Scheduled Hearings

District represents that it has four other due process hearings scheduled before OAH from February 4 through March 4, 2013, rendering District staff and counsel unavailable (should the cases not settle), as follows:

- (1) By OAH consolidation and continuance order dated December 7, 2012, a hearing in OAH Case Numbers 2012110608/2012110688, beginning on February 5, 2013, and now estimated to take six days;³
- (2) By OAH scheduling order dated December 28, 2012, a hearing in OAH Case Number 2012120812, beginning on February 13, 2013, and now estimated to take three days;
- (3) By OAH continuance order dated November 16, 2012, a three-day hearing in OAH Case Number 2012100551, on February 19 through 21, 2013; and
- (4) By OAH continuance order dated November 16, 2012, a three-day hearing in OAH Case Number 2012100551, on February 26 through 28, 2013, now estimated to take four days through Monday, March 4, 2012.

First, it is noted that OAH will generally grant a continuance of the initial hearing date set by OAH to dates that are within 90 days of the first date. Here, District's request is the first continuance, and the proposal to begin the hearing on March 11, 2013, is well within 90 days of January 17, 2013. Second, the above date conflicts for February 2013 are verified in the OAH docket. Third, aside from Student's stay put concerns, Student did not submit any opposition to the proposed dates or offer any alternative dates. Since District is represented by a law firm, it did not establish that the District necessarily must use the same attorney in all of the above hearings. However, District administrative staff and its legal counsel are entitled time to reasonably prepare for and conduct each hearing. Based on the foregoing, District has shown good cause to continue the hearing to begin on Tuesday, March 12, 2013.

1. ☒ District's motion is granted. All dates are vacated. This matter will be set as follows:

³ The OAH docket shows that on December 5, 2012, counsel for the District signed a stipulated motion to consolidate and continue the cases for a hearing on February 5, 2013.

Prehearing Conference: March 4, 2013, at 1:30 PM

Due Process Hearing: March 12, 2013, at 9:30 AM,
March 13 and 14, 2013, at 9:00 AM,
March 19, 2013, at 9:30 AM, and
March 20, 2013, at 9:00 AM.

2. Mediation and Other Matters: The parties may meet and confer to set a date to voluntarily participate in mediation prior to the hearing and notify OAH. All other matters relevant to preparing for hearing, including clarification of issues and identification of witnesses and exhibits, will be addressed at the mandatory telephonic prehearing conference.

3. Notice to Witnesses: 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, as applicable.

4. Settlement: Dates for the prehearing conference and the hearing will not be cancelled until a letter of withdrawal or request for dismissal with the signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should attend the scheduled prehearing conference and the hearing unless different arrangements have been agreed upon by the assigned ALJ or otherwise ordered by OAH.

IT IS SO ORDERED.

Dated: January 3, 2013

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings