

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

STANISLAUS UNION SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2013050308

ORDER FOLLOWING PREHEARING
CONFERENCE DENYING MOTION
FOR A CONTINUANCE

This matter is set for hearing on September 23 through 26, 2013. On September 16, 2013, a telephonic prehearing conference (PHC) in this matter was held before Administrative Law Judge Deidre L. Johnson (ALJ), Office of Administrative Hearings (OAH). Attorney S. Diane Beall appeared on behalf of the Stanislaus Union School District (District). Attorney Roger A. Greenbaum appeared on behalf of Student and Parents (Student). The PHC was recorded.

1. Motion for Continuance: On September 13, 2013, at or after the start of the scheduled PHC in this case, Student filed a written request for a continuance of the due process hearing on multiple grounds. District was ordered to file any written opposition by the morning of September 16, 2013, and the PHC was continued to the afternoon of the same date. Later in the afternoon of September 13, 2013, Student filed an amended declaration and motion. On September 14, 2013, Student faxed a superseding motion which was filed by OAH on September 16, 2013. On September 16, 2013, Student filed a “further amended” motion.¹ District filed an opposition.

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. (34 C.F.R. § 300.515(a); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) In ruling upon a motion for continuance, OAH is guided by the provisions found within the Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, rule 3.1332 .) OAH considers all relevant facts and circumstances,

¹ There is no proof any of Mr. Greenbaum’s motions were served on Student’s family. Beginning with the September 14, 2013 motion, Student’s requests include a motion in the alternative to withdraw as counsel of record. That motion is addressed by separate order.

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).) Generally, continuances of matters are disfavored. (Cal. Rules of Court, rule 3.1332(c).)

This case was filed by District on May 9, 2013. On May 29, 2013, OAH granted Student's previous motion for a continuance and set the matter for a due process hearing to begin on August 12, 2013, with a prehearing conference on August 5, 2013. That motion was based in part on Father's unsubstantiated call up to duty on May 25, 2013, in connection with his civilian employment with a private company that provides "on call" services to a United States (U.S.) Marine Corps base in San Bernardino County, California. In addition, Student's sibling was scheduled for surgery in July 2013. The written order noted as follows:

However, Parent's unsworn assertions do not sufficiently establish good cause for a lengthy delay to extend the hearing dates to October 2013. Parents may request an additional delay by submitting a sworn declaration with sufficient facts to justify a lengthy delay, including a copy of official documents such as a letter from father's command or military orders to verify his current status.

On August 5, 2013, prior to the start of the PHC on that date, Student filed a second motion for a continuance on multiple grounds. OAH granted the motion based on the representation that Father was unavailable to assist Student's counsel to prepare for the due process hearing during much of July 2013 due to his employment. OAH set the matter for hearing for four days beginning September 23, 2013, and continuing day to day, Monday through Thursday, as needed at the discretion of the Administrative Law Judge. The undersigned ALJ issued a written order which noted as follows:

While Student is provided this additional opportunity to prepare for hearing with assistance of her Parents and counsel, and to have Parents present at the hearing, **no further continuances will be granted without a substantial showing of good cause.** It is incumbent upon Father to immediately notify his private employer and the U. S. Department of Defense, and/or the U.S. Marine Corp., where appropriate, that he is a party to a California administrative due process action that will proceed to hearing on the dates assigned below. Just as any other employed parent of a child with a disability who has a due process hearing, Father may make arrangements for a leave of absence, vacation, or other relief from his employment obligations in order to prepare for and attend Student's hearing
[Emphasis added.]

Student's present motion for a continuance is predicated upon six grounds set forth in the final version of the motion, none of which establishes good cause for a continuance. First, Student claims that Father "has been largely unavailable the past two months to assist counsel." Second, Student claims that Father will be unavailable for the hearing next week, again due to his employment. Student's motion is accompanied by a declaration under penalty of perjury from Student's counsel, based solely "on information and belief," that Father's employment "severely limited" his availability through half of July and most of August 2013 to assist counsel to prepare for hearing, and that Father is unavailable for the hearing next week. However, there is no evidence to support this assertion. Father did not submit any documentation as to any attempts to arrange with his employer to be available either to prepare for or attend the due process hearing. In addition, Father failed to appear for an appointment with Mr. Greenbaum on September 2, 2013, without adequate explanation. Father is not the sole custodial parent of Student and there is no showing made why Student's Mother may not represent her interests at hearing. In addition, District's opposition establishes both that Mother speaks some English, and that Father has been actively involved in Student's education at her nonpublic agency (NPA) site, documented by numerous emails from Father in July, August and September 2013, suggesting that his unavailability is selective. In the face of the ALJ's warning that a substantial showing would be required, Student's motion for a continuance on these grounds is denied based on a lack of evidence to support the motion.

Student's third, fourth and fifth reasons for requesting a continuance relate to Mr. Greenbaum's involvement in another special education due process hearing before OAH, bearing primary OAH Case Number 2012100242. Counsel represents that he has been "fully engaged" in the preparation for and litigation of that matter in Fresno, "to the point of exhaustion of physical, financial and intellectual resources. . . ." However, counsel has not presented medical grounds for a continuance. The Fresno hearing was conducted on September 10 through 13, was continued to September 17 through 19, 2013, and may continue thereafter at the discretion of the ALJ to complete the case. Counsel claims reliance on statements made by another ALJ (Judge Charles Marson) during a prehearing conference for the Fresno case on August 23, 2013, to the effect that the Fresno case would take precedence over the present case. However, OAH, due to its operational needs, assigned another ALJ to hear the Fresno case, and such comments during a PHC in the Fresno case did not constitute an order granting Student a continuance in the present, unrelated case in Modesto. Here, District's case has been pending since May 2013, and Student has already received two continuances that afforded her Parents over four months to prepare for hearing.

Finally, Counsel's claim that it is not possible for him to adequately represent Student and Parents if the hearing is next week may be a contractual issue relevant to his motion to withdraw as attorney of record from the family, but does not establish good cause for a continuance. In fact, District established that Student's attorney filed an appearance in the Fresno case on August 22, 2013, several weeks after he appeared at the August 5, 2013, PHC in the present case, in which he received actual notice from the undersigned ALJ of the hearing dates of September 23 through 26, 2013. Counsel therefore accepted that case at a time when his availability to represent both clients within the scheduled timeframes was

questionable. Indeed, Counsel admitted he had hoped to obtain a longer continuance of the Fresno matter than that which he obtained. In the present case, District has already made witness arrangements for the hearing next week, including substitute teachers. In addition, as seen by the issues below, District's contention that Student's current placement is inappropriate is entitled to be heard without undue delay.

Student's sixth reason for a continuance avers that there are various means available to alleviate prejudice to the District. However, Student's proposed delays to November or December 2013 would grant Student the lengthy continuance that was denied in May and August 2013. In addition, Student has not proposed any definite dates that are workable for both parties. For example, Student's sibling has a due process hearing with the District starting on October 21, 2013, represented by Mr. Greenbaum. During the PHC, Counsel proposed postponing the sibling's hearing and substituting the present case, without any information as to the family's consent to this idea, involving another child whose status is unknown. Counsel for the District is unavailable for significant periods of time through November 15, 2013, due to scheduling conflicts. Finally, Student's proposal for a November or December 2013 hearing date is not accompanied by any assurance that Father will make arrangements to assist Student's attorney to prepare for, or will attend the hearing. District is entitled to proceed to hearing without spending more time and effort to again prepare for hearing at an unknown time in the future. Based on the foregoing, Student's motion for a continuance is denied.

2. Hearing Dates, Times, and Location: The hearing dates are confirmed. The first day of hearing scheduled to begin on Monday, September 23, 2013, is vacated to accommodate Mr. Greenbaum's travel from Sebastopol to Modesto. The hearing shall take place on September 24 through 26, 2013, for a total of three days of hearing. The hearing shall begin at 9:00 a.m. and end at 4:00 p.m. daily unless otherwise ordered. The hearing shall be held at the District's offices at 2410 Janna Avenue, Modesto, California 95350.²

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. Issues: The issues for hearing are limited to those alleged in District's request for due process (complaint). The issues are reframed, reorganized, and clarified below.³

² At a minimum, the hearing room shall have four or more separate tables capable of being moved into a courtroom configuration with an electrical outlet near the ALJ's table. The District shall ensure that all parties and the ALJ have drinking water and tissue available to them during the hearing.

³ The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Here,

Issue 1: Was District's April 11, 2013 triennial assessment of Student in compliance with all legal requirements and appropriate?

Issue 2: In connection with District's April 11, 2013, individualized education program (IEP) team meeting, was Student no longer eligible for special education and related services?

Issue 3: If so, is District entitled to an order permitting District to exit Student from District's special education program and discontinue the provision of special education and related services to Student because she no longer qualifies for such services?⁴

5. Exhibits: Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties' exhibits shall be pre-marked using numbered tabs and accompanied by a detailed exhibit list. Student's exhibit list shall identify each exhibit by number and the designation "S" (e.g., S1), and the District's exhibit list shall identify each exhibit by number along with a "D" (e.g., D1). Any document over five pages in length shall be internally paginated. Each exhibit binder shall contain a detailed table of contents or list. Each party shall serve an exhibit binder containing its respective exhibits and list on the other party not less than five business days prior to the start of the hearing.⁵

At the hearing, the parties shall supply an additional exhibit binder containing their respective exhibits and lists for use by the ALJ, and another exhibit binder for use by the witnesses. In the event of duplicate exhibits, the most legible version will be used, unless otherwise ordered. The parties shall not serve exhibits on OAH prior to the hearing.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged may not be admitted into evidence at the hearing unless it is supported by a declaration under penalty of perjury, and the ALJ rules that it is admissible.

6. Witnesses: Prior to the due process hearing, the parties shall informally meet and confer to formulate their witness schedules. At the commencement of the hearing, the parties will present the witness schedules. The ALJ and the parties will discuss the witness schedules, including the length of time anticipated for examination of each witness and any scheduling issues for individual witnesses. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for any witness's testimony. The parties shall

District's original third issue is now the first issue, as assessment problems are generally handled first.

⁴ District's third issue is actually in the nature of a proposed resolution or remedy.

⁵ Education Code section 56505, subdivision (e)(7).

schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Each party shall manage the number of witnesses so that the party's evidence will be presented within its approximate allocation of 50 percent of the total hearing time.

The parties shall proceed efficiently in their questioning of witnesses and shall narrow their witness lists and their questions to witnesses to avoid unnecessary or duplicative testimony. The parties should bear in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

At the present time, Student and District each intend to call most or all witnesses listed in their PHC statements.⁶

7. Telephonic Testimony: Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5 § 3082, subd. (g).) The parties did not request the telephonic testimony of any witness during the PHC. A party seeking to present a witness by telephone shall move in advance for leave to do so with an explanation of the reasons for the request. If OAH grants the request, the party requesting the telephonic testimony shall provide the proposed witness with a complete set of exhibits from all parties, containing all of each party's exhibits, prior to the testimony of the witness. In addition, if the request is granted, the District shall ensure that the hearing room has a speaker telephone with adjustable volume control and a long telephone cord, so that the telephone can be placed close to all parties to ensure the ability to hear and record the testimony of the witness and the witness to hear objections and rulings.

8. Order of Presentation of Evidence and Scope of Examination: Student shall produce her evidence first. Where Student and District intend to call the same person to testify, each party will examine the witness immediately after the other party, so the witness will only need to be called to the witness stand once. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination unless otherwise ordered.

9. Closed Hearing: The hearing shall be closed to the public unless Student requests otherwise.

10. Motions: Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during this PHC.

11. Special Needs and Accommodations: In an abundance of caution, OAH will order an interpreter for Mother to translate to and from English and Pashto.

⁶ On September 16, 2013, Student filed a PHC statement as ordered by OAH in May and August, and again on September 13, 2013.

12. Conduct of Counsel and Hearing Room Decorum: Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other electronic devices shall be turned off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

13. Compensatory Education/Reimbursement: Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. Any party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

14. Settlement: The parties are encouraged to negotiate to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. If a settlement is reached five business days or fewer before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact during business hours by telephone at **(916) 263-0880**.

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. IF A FULL AND FINAL SETTLEMENT IS REACHED AFTER 5:00 P.M. ON THE LAST BUSINESS DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT **(916) 274-6035**, AND SHALL ALSO LEAVE CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. OAH will check for messages the evening prior to the hearing and the morning of the hearing.

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

Dated: September 17, 2013

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings