

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

EVERGREEN SCHOOL DISTRICT.

OAH CASE NO. 2013080011

ORDER FOLLOWING PREHEARING
CONFERENCE GRANTING
CONTINUANCE OF HEARING

This matter is set for a due process hearing beginning on September 24, 2013. On September 16, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH). Attorney Beth C. Hopwood appeared on behalf of Student and Parent (Student). Attorney Laurie E. Reynolds appeared on behalf of the Evergreen School District (District). The PHC was recorded.

Based on discussion with the parties, the following order is issued:

1. Motion for Continuance: On September 12, 2013, District filed a request for a continuance of the hearing on the ground that the attorney for the District has a scheduling conflict with another due process hearing before OAH, bearing primary OAH Case Number 2013050430. On September 16, 2013, Student filed a reply not opposing the motion.

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, 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 Student on July 31, 2013. There have been no prior continuances of the due process hearing in this matter. District established cause for a continuance to the parties' next available hearing dates based on Ms. Reynold's scheduling conflict. Since the PHC was held on September 16, 2013, there is no need for another PHC unless OAH or the parties request to schedule one.

Based on good cause shown, the request for continuance is granted. All dates are vacated. This matter is set for the following dates and times:

Hearing:	October 21, 2013, at 1:30 p.m., October 22 through 24, 2013, at 9:00 a.m., and continuing day to day, Monday through Thursday, as needed at the discretion of the Administrative Law Judge.
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2. Hearing Location and Mediation: The hearing shall be held at the District's offices at 3188 Quimby Road, San Jose, California 95148.¹ In the event the parties wish to engage in voluntary mediation prior to the hearing date, they may meet and confer and request to schedule mediation with OAH at a mutually agreeable time and place.

3. Notice to Witnesses: The parties shall immediately notify their witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party without need for a subpoena. A witness will not be regarded as unavailable for purposes of showing good cause to continue the hearing if the witness has not been properly notified of the hearing date or properly subpoenaed, as applicable.

4. Issues: The issues for hearing are limited to those alleged in Student's request for due process (complaint). The issues were discussed during the PHC, and are reframed, reorganized, and clarified below.²

¹ 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

² 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).)

Issue 1: Beginning in fifth grade for Student's 2011-2012 school year, did the District deny Student a free appropriate public education (FAPE) by failing to assess him or appropriately assess him in the following areas related to his disability:

- (a) Academics;
- (b) Speech and language, including Student's audiology needs;
- (c) Assistive technology;
- (d) Mental health; and
- (e) Attention deficit hyperactivity disorder (ADHD)?

Issue 2: Beginning in fifth grade for Student's 2011-2012 school year, did the District deny Student a FAPE by failing to offer in his individual education programs (IEP's) appropriate special education and related services that addressed his following areas of unique need:

- (f) Central auditory processing disorder;
- (g) Speech and language deficits;
- (h) Functional skills;
- (i) Academic skills;
- (j) Attentional difficulties; and
- (k) Writing skills, including annual writing goals?

Issue 3: Did the District commit a procedural violation which denied Student a FAPE by failing to provide Parent a complete copy of Student's educational records after her request in April 2013?³

Proposed Resolutions and Defenses: Student's proposed resolutions and District's defenses were briefly discussed during the PHC. Student is directed to Paragraph 13 of this order regarding evidence for proposed remedies. District retains the right to present all relevant defenses during the hearing.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

³ During the PHC, Student agreed that language inserted into his description of Issue 3 in his PHC statement about a procedural prior written notice violation was inadvertent and should be disregarded.

⁴ Student's request for an order awarding attorney fees was stricken as beyond the jurisdiction of OAH.

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 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 witnesses listed in their respective PHC statements.

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

⁵ Education Code section 56505, subdivision (e)(7). This statute also requires disclosure of the parties' complete list of witnesses to each other by that date.

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 his 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: No special accommodations were requested during the PHC.

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 18, 2013

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings