

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BERKELEY UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2014040781

ORDER TO SHOW CAUSE WHY
CASE SHOULD NOT BE DISMISSED;
CONTINUING AND SETTING
PREHEARING CONFERENCE AND
DUE PROCESS HEARING DATES

On April 15, 2014, Student filed a request for due process hearing (complaint) against the Berkeley Unified School District. On May 30, 2014, OAH granted Student's leave to amend the complaint, and the Amended Complaint was deemed filed on that date. On June 2, 2014, OAH issued a Scheduling Order setting a telephonic prehearing conference for July 14, 2014, and the due process hearing for July 24, 2014.

On July 11, 2014, pursuant to their joint request, OAH granted the parties' request to continue the prehearing conference and the due process hearing dates in order for the parties to have the opportunity to participate in mediation. Thus, the prehearing conference was continued to August 22, 2014, and the due process hearing to September 2, 2014. Mediation was also scheduled to take place on August 14, 2014.¹

On August 22, 2014, the undersigned attempted to convene the prehearing conference by telephone, and in the process made three telephone calls to the offices of Nicole Hodge Amey, the attorney for Student. Ms. Amey was unreachable during each attempted telephone call, which took place between 10:01 a.m. and 10:15 a.m.²

Jan E. Tomsy, attorney for Berkeley, was reached and was available for the prehearing conference. Because this is a Student's filed case, the undersigned deemed it inappropriate to hold the prehearing conference without the participation of Student's attorney. Therefore, the prehearing conference was continued.

¹ On August 13, 2014, the attorney for Student requested that the August 14, 2014 mediation be cancelled.

² Messages could not be left for Ms. Amey as her voicemail box was full.

ORDER TO SHOW CAUSE

If the parent and local education agency have not resolved the due process complaint within 30 days of the receipt of the complaint, OAH is required to issue a decision within the next 45 days, unless a continuance is granted for good cause. (20 U.S.C. § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.510 (2006); Ed. Code, § 56502, subd. (f).) Given the short time frames applicable to this case, it is critical that both parties follow orders issued by OAH and participate in advancing the matter to hearing. The burden of proof in this case is on Student. Student's failure to participate in the prehearing conference may indicate his intent to abandon his case. Absent receipt of notification from Student withdrawing his request for a hearing, or asking to dismiss his case, Berkeley faces investment of time and expenses in preparation for a hearing, and OAH is obligated to hold a hearing. In the alternative, if the parties have settled the case, the burden remains on Student to withdraw or seek dismissal of his case.

Student has not requested a continuance of the prehearing conference or the due process hearing date, and because OAH was unable to reach Student's attorney for the prehearing conference, it is unclear what Student intends to do with the pending case, or whether Student intends to proceed with the prosecution of this matter. Student will be provided an opportunity to establish if he intends to go forward with this case, and as such, **an Order to Show Cause is hereby issued in order for Student to establish that he intends to go forward with this case, and why this matter should not be dismissed.**

Therefore, Student is ordered to show cause in writing no later than August 29, 2014, at 10:00 a.m., why this matter should not be dismissed for failure to prosecute or advance the case for hearing against Berkeley. Student's attorney shall file a written response with OAH by 10:00 a.m. on August 29, 2014. In the response, Student's attorney shall address the questions of why she was not available for the August 22, 2014 prehearing conference and whether Student intends to proceed to a hearing in this matter. A copy of the response shall be served on counsel for Berkeley by mail or facsimile.

Should Student and/or Student's attorney fail, without cause, to timely file a response as ordered above, or to participate in the prehearing conference set below, OAH may dismiss this case without further notice. If Student files a response which establishes that Student intends to proceed to hearing, the administrative law judge at the prehearing conference will determine how the matter shall proceed forward. If Student fails to respond or fails to establish that he intends to proceed to hearing, OAH will dismiss Student's complaint. If Student has abandoned the case and no longer wishes to pursue it, he or his attorney shall file a notice of withdrawal with OAH.

ORDER SETTING PREHEARING CONFERENCE AND HEARING DATES

1. **The prehearing conference is reset, and shall take place on August 29, 2014, at 1:00 p.m.** During the prehearing conference, the parties shall be prepared to discuss

the status of the case, the issues, witnesses, and documentary exhibits for hearing, and whether Student's complaint should be dismissed.³

2. The September 2, 2014 due process hearing date is vacated. **The due process hearing in this matter shall take place on September 16-18, 2014, unless this matter is dismissed pursuant to the Order to Show Cause included herein.**

IT IS SO ORDERED.

DATE: August 22, 2014

/s/

ADENIYI AYOADE
Administrative Law Judge
Office of Administrative Hearings

³ Accordingly, Ms. Tomsky's August 22, 2014 request that Student's complaint be dismissed due to his attorney's failure to appear for prehearing conference, is denied at this time.