

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

ELK GROVE UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021090707

ORDER FOLLOWING PREHEARING CONFERENCE
GRANTING MOTION TO DISMISS IN PART, GRANTING
MOTION ON SETTLEMENT AGREEMENT, GRANTING
REQUEST FOR CONTINUANCE

NOVEMBER 08, 2021

On November 8, 2021, Administrative Law Judge Brian H. Krikorian, Office of Administrative Hearings, referred to as OAH, held a telephonic prehearing conference. The Administrative Law Judge will be referred to as an ALJ. The prehearing conference will be referred to as a PHC. Sheila Bayne, Attorney at Law, appeared on behalf of Student. Jack Clarke, Jr., Attorney at Law, appeared on behalf of Elk Grove Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

MOTION TO DISMISS STUDENT'S REQUEST TO PAY COMPENSATION

Student filed a request for due process with OAH, referred to as a complaint, on September 22, 2021. The complaint sought adjudication of eight issues and several remedies. Included in the complaint was language that could be interpreted to be seeking monetary damages from Elk Grove Unified, as a result of its conduct and violations of the Student's and Parent's "constitutional rights." Elk Grove Unified moved to dismiss the request for monetary damages based upon matters not within OAH's jurisdiction or remedies unavailable to Student. Student opposed the motion, arguing it is requesting only remedies within OAH's jurisdiction.

OAH does not have jurisdiction to entertain claims based on Section 504 of the Rehabilitation Act of 1973 (Section 504) (29 U.S.C. § 701 et seq.); Section 1983 of Title 42 United States Code (Section 1983)/the Americans with Disability Act (ADA) (Title 42 U.S.C. §§ 1201, et seq.)/ or Title VI. OAH also does not have jurisdiction over broad constitutional or civil claims, or to award monetary damages for those claims. Accordingly, Elk Grove Unified's motion to dismiss any claims related to those statutes is granted, as well as any claims seeking monetary damages for those claims. This ruling does not limit Student's rights to seek compensatory education, reimbursement and other remedies allowed by the Individuals with Disabilities Education Act, referred to as the IDEA.

MOTION TO DISMISS CLAIMS RELATED TO SETTLEMENT AGREEMENT

The parties entered into a settlement agreement, with the effective date of June 22, 2020. The settlement agreement contained a waiver of any and all claims that pre-dated the June 22, 2020 effective date. Elk Grove Unified moved to dismiss any claims

covered by the waiver. Student has opposed the motion but concedes that any claims that existed prior to June 22, 2020 are excluded by the waiver.

Elk Grove Unified's motion is granted. To the extent any of the issues set forth in Student's complaint seek adjudication of claims that existed prior to June 22, 2020, those claims are dismissed. All issues are limited to claims that existed after June 22, 2020. This order does not bar Student from arguing that the May 2020 individualized education program, referred to as an IEP, as modified in the June 22, 2020 Settlement Agreement, was implemented improperly after June 22, 2020.

MOTION TO CONTINUE

Elk Grove Unified moved to continue the prehearing conference and due process hearing based upon the grounds that Student's case is not ripe and that Elk Grove Unified's counsel has a calendar conflict with another hearing during the week of November 15, 2021. Student opposed the motion on the grounds that the issues are ripe for adjudication and that there is insufficient good cause to grant a continuance.

Elk Grove Unified argued that it has been attempting to arrange an annual IEP meeting with Student and Parents since early September 2021. Elk Grove Unified states that a meeting is scheduled on Friday, November 12, 2021, two business days before the hearing. One purpose of that meeting is to determine if compensatory education will be provided by the IEP team for distancing learning during the COVID-19 shutdowns. Student argued that this is tantamount to a settlement discussion and not grounds for a continuance.

Elk Grove Unified also argued that its counsel has calendar conflicts for the following weeks, due to other OAH hearings. Elk Grove Unified requests a continuance

to January 18, 2022. Student opposed the continuance, arguing that conflicting hearings do not constitute good cause to continue the matter.

The motion was timely filed three days prior to the prehearing conference. 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).)

Calendar conflicts, alone, do not constitute good cause. OAH matters are often continued, settled or dismissed before hearing. Absent evidence that Elk Grove Unified's counsel is currently in a hearing and will be in hearing during the week of November 15, 2021, the motion is denied on that ground.

Regarding the IEP meeting scheduled for November 12, 2021, Elk Grove Unified has provided sufficient evidence to establish that the results of this meeting may likely have a substantive impact on Student's issues, including whether Elk Grove Unified addressed regression as a result of providing virtual instruction. While the meeting will not eliminate all the issues, it will likely affect the evidence presented, witness testimony, and the remedies sought by Student. For that reason, good cause exists for a short continuance.

The request for continuance is granted for good cause. All previously scheduled dates are vacated. The case shall proceed as follows:

Prehearing Conference: November 29, 2021 at 3:00 PM.

All other prehearing matters shall be addressed at the November 29, 2021 prehearing conference. All prehearing motions must be filed three business days before the PHC.

Due Process Hearing: December 7, 8 and 9, 2021

The hearing shall begin at 9:30 AM by videoconference, 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.

A handwritten signature in black ink, appearing to read "Brian H. Krikorian". The signature is fluid and cursive, with the first name "Brian" being more prominent.

Brian H. Krikorian

Administrative Law Judge

Office of Administrative Hearings