

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENTS ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021120167

ORDER FOLLOWING PREHEARING CONFERENCE,
CONTINUING PREHEARING CONFERENCE AND HEARING,
AND DENYING MOTION TO EXCLUDE WITNESSES

FEBRUARY 15, 2022

On February 11, 2022, Administrative Law Judge Cole Dalton , Office of Administrative Hearings, held a prehearing conference by videoconference. The Administrative Law Judge is called an ALJ. The Office of Administrative Hearings is called OAH. The prehearing conference is called a PHC.

Parent appeared on behalf of Student. David Salazar, Attorney at Law, appeared on behalf of Long Beach. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

MOTION TO CONTINUE PREHEARING CONFERENCE AND HEARING DATES

During the PHC, the parties jointly requested a brief continuance of the PHC and hearing dates. The parties engaged in mediation on February 7, 2022, which resulted in the need to observe a placement offer that could not be conducted before the PHC due to illness of Long Beach staff. The parties sought a one-week continuance to conduct the observation and finalize settlement negotiations.

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).)

The ALJ has reviewed the request for good cause and considered all relevant facts and circumstances and finds that good cause exists for the parties' failure to file the

request for continuance three business days before the PHC. Here, the parties concede not requesting enough time between the mediation date and prehearing conference to allow for contingencies, such as the one that occurred. The parties believed they could conduct a school observation and finalize a settlement agreement before the PHC. The parties were not aware of Long Beach staff illness, which prevented them from conducting the observation this week or next week.

The ALJ also finds good cause for a brief continuance for the reasons stated on the record. This matter was only recently filed, on December 6, 2021, with hearing dates set in early February 2022. The first request for continuance in order to mediate set the hearing in late February 2022. There is no other means to address the problem giving rise to the request and the interests of justice are served by the continuance as OAH favors resolution of matters prior to hearing.

The request is granted for good cause. All previously scheduled dates are vacated. Given the parties request and OAH's calendar, the case shall proceed as follows:

The PHC is continued to February 25, 2022 at 1:00 p.m. by videoconference. All prehearing matters will be addressed at the February 25, 2022 prehearing conference, other than Student's motion to exclude witnesses, addressed below. All prehearing motions must be filed three business days before the PHC.

The due process hearing shall take place by videoconference on March 8, 9, and 10, 2022. The hearing shall begin at 9:30 AM each day and generally end at 3:30 PM, 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 appear to testify. A party's failure to notify or subpoena a witness to testify will not be considered good cause to continue the hearing.

MOTIONS

On February 10, 2022, Student filed, as part of her prehearing conference statement, a request to exclude all Long Beach witnesses from the hearing room except for a non-testifying representative. Student bases her motion, among other things, on 5 California Code of Regulations Section 3082, subdivision (c)(3) and Federal Rules of Evidence, Rule 615.

Upon motion of a party, and absent compelling circumstances to the contrary, an ALJ may exclude witnesses from the hearing. (5 Cal. Code of Regs § 3082, subd. (c)(3).)

Due process hearings need not be conducted according to technical rules of evidence and those related to witnesses. (5 Cal. Code of Regs. § 3082, subd. (b); Gov. Code, § 11513, subd. (c).) OAH relies by analogy on relevant portions of the California Evidence Code. California Evidence Code, Section 777, subdivision (a), allows the court to exclude from the courtroom any witness not under examination so that witness cannot hear the testimony of other witnesses. For parties that are not natural persons, such as school districts, an officer or employee designated by the entity's attorney is entitled to be present throughout other witness testimony. (See also, Federal Rules of Evidence, Rule 615, subd. (b).)

Both Evidence Code, Section 777 and Rule 615 recognize that a representative of an entity party has the right, equivalent to that of a natural person party, to be present during courtroom proceedings. Attorneys often require the presence of a party or

designee to consult with during the hearing. The party or designee has specialized knowledge of the subject matter involved in the hearing and can aid in the conduct of the litigation like parents aiding their attorneys.

Accordingly, Student's motion is denied.

SETTLEMENT

The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately if they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached 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. 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>.

If a full and final written settlement agreement is reached after 4:00 PM the day prior to 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.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received and processed 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

The failure to comply with this Order may result in the exclusion of evidence or other sanctions.

ORDER INCLUDES ALL RULINGS

This Order includes all rulings made at the prehearing conference. Any discussion and conversation not referenced in this Order is not binding on the ALJ conducting the hearing and may not be relied upon by the parties. The parties should be aware that, at hearing, the ALJ conducting the hearing has discretion to reconsider any part of this Order.

IT IS SO ORDERED.

Cole Dalton

Cole Dalton

Administrative Law Judge

Office of Administrative Hearings