

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENTS ON BEHALF OF STUDENT,

V.

ENTERPRISE ELEMENTARY SCHOOL DISTRICT.

OAH CASE NUMBER 2022020241

ORDER FOLLOWING PREHEARING CONFERENCE
GRANTING REQUEST FOR CONTINUANCE AND
MEDIATION, AND ORDERING STUDENT'S COUNSEL TO
SHOW CAUSE RE: SHIFTING COSTS

MARCH 21, 2022

On March 21, 2022, Administrative Law Judge Adrienne L. Krikorian, Office of Administrative Hearings 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.

No attorney appeared on behalf of Student. Student's counsel's secretary Patty Schiffner attended the PHC telephonically for the sole purpose of addressing Student's

counsel's availability on dates for a continued hearing. Attorney Kyle Raney appeared on behalf of Enterprise Elementary School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

STUDENT'S REQUEST FOR CONTINUANCE AND MEDIATION

Student filed a motion to continue the due process hearing and a request for mediation on March 16, 2022. The motion was timely filed three days before the prehearing conference. Enterprise filed a notice of conditional non-opposition on March 17, 2022. Student filed a supplemental declaration on March 17, 2022.

OAH issued the original scheduling order in this case on February 8, 2022, setting the prehearing conference for March 21, 2022, and the due process hearing for March 29 and 30, 2022. Student's counsel asserted in Student's March 16, 2022 request to continue that counsel was not available for the originally scheduled prehearing conference on March 21, 2022, or for the hearing dates of March 29 and 30, 2022, because of a prepaid vacation from March 17, 2022 through April 5, 2022. Student's counsel did not, however, offer an explanation in either of counsel's two declarations as to why counsel waited to file the unilateral request to continue until one day before counsel left for a pre-planned vacation, which rendered counsel unavailable for the prehearing conference and for any meaningful discussion with the ALJ and counsel for the parties regarding possible hearing dates.

Counsel for Enterprise agreed with Student's counsel to participate in mediation on May 9, 2022. However, the parties did not reach agreement before the prehearing conference on new hearing dates. Enterprise requested in its conditional non-opposition that the hearing be scheduled to be completed by June 10, 2022, when the school year ends. On the other hand, Student's counsel requested undefined dates after

June 13, 2022, excluding the first week of July. Neither party offered specific agreed-upon proposed dates for the continued hearing.

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).)

After discussion with Enterprise's counsel at the prehearing conference, and confirmation by Student's counsel's secretary, the request for continuance is granted for good cause based on the parties' desire to mediate before hearing. All previous hearing dates are vacated.

However, Student's request to continue the hearing to June 13, 2022, or thereafter, was not supported by good cause. Student's counsel did not credibly establish in either of the two declarations submitted in support of Student's request for continuance that counsel was not available in May 2022 after the mediation was completed. Accordingly, the mediation, prehearing conference and due process hearing will be scheduled as follows:

A videoconference mediation shall take place on May 9, 2022, from 9:00 a.m. to 4:30 p.m. The parties shall file, no later than two business days before mediation, a Participant Information Form with contact information for mediation participants.

The videoconference prehearing conference shall take place on May 13, 2022, at 10:00 a.m. Student shall file a PHC statement and a Participant Information Form no later than three business days before the PHC. All other prehearing matters shall be addressed at the May 13, 2022 prehearing conference. All prehearing motions must be filed three business days before the PHC or supported by a declaration establishing good cause for filing less than three days before the PHC.

The due process hearing shall take place by videoconference on May 24, 25, and 26, 2022, and continuing day to day as determined by the hearing ALJ. The hearing shall begin at 9:30 AM on all hearing days, 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.

ORDER TO SHOW CAUSE AS TO STUDENT'S COUNSEL

Student's counsel is ordered to show cause why costs incurred by OAH and by Enterprise, if Enterprise desires, should not be shifted to Student's counsel for counsel's failure to appear at the March 21, 2022 prehearing conference. OAH declines to order a showing of cause regarding dismissal at this stage of the case out of fairness to and consideration of Student.

Student's counsel shall file a declaration and authenticated supporting documentation **on or before 3:00 p.m. on April 11, 2022** establishing why Student's counsel 1) did not and or could not appear or arrange for substitute counsel to appear on Student's behalf at the March 21, 2022 PHC, 2) did not file a prehearing conference statement with OAH as ordered in the February 8, 2022 Scheduling Order; and 3) filed a unilateral motion to continue the due process hearing one day before leaving on an alleged two-week pre-paid vacation, where counsel would not be available by telephone or videoconference, without offering mutually agreed upon future hearing dates, thereby leaving OAH and opposing counsel no opportunity to avoid an appearance at the March 21, 2022 PHC.

Counsel for Enterprise may, if seeking reimbursement for costs, file a declaration and authenticated supporting documentation relating to reasonable costs incurred to prepare for and attend the PHC on March 21, 2022, **no later than 4:00 p.m. on April 4, 2022**.

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.

Adrienne L. Krikorian

Adrienne L. Krikorian

Administrative Law Judge

Office of Administrative Hearings