BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT

v.

GOLETA UNION SCHOOL DISTRICT.

OAH CASE NUMBER 2022020266

ORDER FOLLOWING PREHEARING CONFERENCE GRANTING REQUEST FOR CONTINUANCE AND ORDER DISMISSING CLAIMS

MAY 13, 2022

On May 13, 2022, Administrative Law Judge Chris Butchko, 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. Andrea Marcus, Attorney at Law, appeared on behalf of Student. Karen E. Gilyard, Attorney at Law, appeared on behalf of Goleta Union School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

On May 10, 2022, Student moved to continue the prehearing conference and due process hearing to allow completion of an assessment of Student by an independent assessor.

The motion was timely filed three days prior to the prehearing conference. Goleta Union opposed the motion on the grounds that it would delay the resolution of the matter and schedule the hearing for the summer months when Goleta Union's employees would be in recess.

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).)

Goleta Union agreed in February 2022 to fund an independent assessment of Student's needs in Speech and language. Student selected Karen Schnee, who began the assessment process shortly afterwards. Approximately three weeks ago, Student's counsel was unable to reach Ms. Schnee, who did not respond to emails or telephone calls and who continues to be unreachable. Student's Counsel believes the assessment will not be completed in time for hearing and expects that another assessor will have to be identified and contracted with to provide the assessment. Student's Counsel believes the independent assessment report is necessary to presentation of Student's case at hearing. Student seeks a continuance to allow a substitute assessment report to be prepared.

Goleta Union opposes the continuance because of the delay. Goleta seeks a timely due process hearing and states that it has expended a considerable amount of time, money and resources preparing for a start of hearing on May 24, 2022. Goleta Union further argues that Ms. Schnee cannot be an essential witness because she has not completed any assessment of Student and that any delay in the hearing dates would result in the hearing being held when most, if not all, or the district-employed witnesses will have scheduling issues due to the summer recess.

This matter was initiated on February 8, 2022, and originally scheduled for hearing on March 29, 2022. On March 15, 2022, the parties jointly moved for a continuance so that mediation could take place, and the hearing was rescheduled for May 24, 2022. Student's proposed continuance to mid-July 2022 would further delay the hearing, but the matter would be heard within six months of filing. Granting a continuance would not unduly delay resolution of the matter.

Student seeks continuance for good cause. Both Student and Goleta Union would have their understanding of Student's needs in speech and language improved by consideration of a report by an independent assessor. That assessor would likely be a necessary witness at hearing.

Goleta Union's objection to having the hearing commence in the summer months is unsupported by any authority suspending the ordinary progress of due process hearings during school recesses. In conversation at the rehearing conference, counsel for Goleta Union stated that the earliest possible start date that Goleta Union could manage for the hearing would be Tuesday, August 23, 2022: the day before the start of its 2022-2023 school year. Student was agreeable to that date, noting that it would allow additional time for the independent assessment to be completed.

Accordingly, the request for continuance is granted for good cause. All previously scheduled dates are vacated. After discussion with the parties, the ALJ settled on the following dates and times. The case shall proceed as follows:

Resumed Prehearing Conference: Friday, August 12, 2022, at 1:00 PM.

All other prehearing matters not discussed herein shall be addressed at the resumption of the prehearing conference. All prehearing motions must be filed three business days before the PHC. The parties may, but need not, file new prehearing conference statements.

Due Process Hearing: Tuesday, August 23, 2022, through Thursday, August 25, 2022.

The hearing shall begin at 9:30 AM on all days of hearing, unless otherwise ordered. The hearing shall continue day to day at the discretion of the ALJ.

OAH is authorized to conduct due process hearings by videoconference or telephone. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) OAH will conduct the due process hearing by videoconference using the Zoom or Microsoft Teams application. Unless otherwise ordered, participants are required to appear by videoconference using a webcam and the designated videoconference application.

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.

Nor further continuances will be granted due to any inability to obtain an assessor or assessment report. No further continuances will be granted absent extraordinary circumstances.

MOTION TO DISMISS

On May 10, 2022, Goleta Union filed a motion to dismiss counts 2, 3, and 4 from Student's due process hearing request. Those counts asserted violations of the federal Americans with Disabilities Act, California's Unruh Civil Rights Act, and of Section 504 of the federal Rehabilitation Act of 1974, respectively. Student did not file in opposition to the motion.

The purpose of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education", and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has the right to present a complaint "with respect to any matter relating to the

identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].)

The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) OAH does not have jurisdiction to entertain claims based on the American with Disabilities Act (42 U.S.C. § 12131, et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), Section 1983 of Title 42 United States Code (§ 1983), the Unruh Civil Rights Act (Civ. Code, § 51), or tort claims arising under federal or state law.

Accordingly, those claims cannot be heard here and will be dismissed. Claims 2, 3, and 4 of Student's due process are dismissed, and the matter will proceed solely on Claim 1.

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.

Chris Butchko

Chris Butchko
Administrative Law Judge
Office of Administrative Hearings