

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CALIFORNIA MONTESSORI PROJECT-
ELK GROVE

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2012070210

ORDER VACATING PREVIOUS
ORDER GRANTING CONTINUANCE;
SETTING DIFFERENT MEDIATION,
PREHEARING CONFERENCE AND
DUE PROCESS HEARING DATES;
AND DENYING MOTION IN LIMINE

On July 6, 2012, the California Montessori Project – Elk Grove (CMP-EG) filed a request for due process hearing (complaint) against Student. The matter was scheduled for mediation on July 25, 2012; a prehearing conference on July 30, 2012; and a due process hearing starting on August 7, 2012, and proceeding from day-to-day until concluded.

On July 17, 2012, Parent, appearing in pro per on behalf of Student, requested a continuance of 60 days in order to obtain counsel, receive records from CMP-EG not yet disclosed, and adequately prepare for hearing.

On July 20, 2012, CMP-EG filed an opposition to the request for continuance, which was part of a larger document primarily titled a motion in limine. Due to technical difficulties with facsimile transmission and production that opposition was not available to the undersigned Administrative Law Judge (ALJ) until the end of the business day on July 23, 2012.

On July 23, 2012, unaware of CMP-EG's opposition, the undersigned issued an Order granting the continuance Parent sought. This Order is intended to vacate that July 23, 2012 Order, reconsider Parent's request in light of CMP-EG's opposition, and respond to CMP-EG's motion in limine.

APPLICABLE LAW

Continuances

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).) The Office of Administrative Hearings 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).)

Removal to Interim Alternative Educational Setting (IAES)

The Individuals with Disabilities Education Act (IDEA) affords a local educational agency (LEA) an expedited procedure for the temporary removal of student who is a danger to himself or others from his current placement. An LEA "that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing." (20 U.S.C § 1415(k)(3)(A).) A hearing officer shall "shall hear, and make a determination regarding" the LEA's claim and may order a change of placement to an IAES for 45 days if he or she determines "that maintaining the current placement of such child is substantially likely to result in injury to the child or to others." (20 U.S.C. § 1415(k)(3)(B)(i), (ii)(II).)

DISCUSSION

Parent's Request for Continuance

Parent's request sets forth good cause for a reasonable continuance in order that she may retain counsel. In it, Parent states that she has been speaking to attorneys about representing her and Student; one attorney has requested certain relevant records from CMP-EG but not yet received them; and, that as a consequence Student will not be prepared to contest CMP-EG's complaint on the current schedule.

CMP-EG's opposition states that a continuance should be denied because the dispute over Student's placement has become urgent. CMP-EG alleges that Student has become a danger to himself and others at school; that he is disrupting class; and, that parents of other students are demanding Student's removal to another setting.

The concerns raised by CMP-EG's opposition are substantial, but do not warrant outright denial of Parent's request. CMP-EG asserts that school begins on August 15, 2012. Even on the current schedule, the due process hearing scheduled to begin on August 8, 2012, will not result in a decision until weeks after school begins. And it cannot be assumed that CMP-EG will prevail in this matter and obtain the relief it seeks.

The complaint in this matter does not seek expedited relief. It is not filed under the provisions of the IDEA allowing for expedited hearing of a local educational agency's claim that a student must be moved to an interim alternative educational setting (IAES) on the ground that he is a danger to himself or others. (See 20 U.S.C. § 1415(k)(3)(B)(ii)(II).) Such a complaint would have afforded CMP-EG an expedited schedule not subject to continuances.

Even if CMP-EG can make a showing at hearing that Student is a danger to himself or others in his current placement, obtaining relief under the present complaint would not directly entitle CMP-EG to remove Student immediately from his placement. The complaint only alleges that on June 19, 2012, CMP-EG offered Student a placement at Sierra School, a non-public school, and seeks as relief only an order stating that its offer constitutes the offer of a free appropriate public education in the least restrictive environment.

In this non-expedited matter, Parent is entitled to a continuance upon a showing of good cause. CMP-EG does not dispute the importance of Parent's right to seek counsel, and asserts that it is "in the process of" gathering the educational records Parent seeks. but does not state when those records will be provided. The matter will therefore be continued for approximately 30 days to afford Parent an opportunity to obtain counsel, obtain necessary records, and prepare for hearing. However, in light of the urgent nature of CMP-EG's claims, any further request for continuance will be disfavored.

District's Motion in Limine

As part of its opposition to a continuance filed on July 20, 2012, and in a separately filed motion on July 25, 2012, CMP-EG asks that OAH issue an order allowing it to move Student to the Sierra School for 45 days as an IAES, on the ground that he has become a danger to himself and others in his present placement.

A motion in limine is not a proper procedure for seeking such relief. CMP-EG's motion, which is a mixture of factual claims and legal argument, seeks the resolution of extensive and apparently contested factual disputes which require hearing and cannot be resolved on motion. Such a resolution would effectively amount to the granting or denial of summary judgment, a procedure OAH is not authorized to employ. The statutory language quoted above, allowing a hearing officer to order a 45-day change of placement to an IAES, plainly contemplates that such an order be made only after hearing. (20 U.S.C. § 1415(k)(3)(B)(i), (ii)(II).)

The motion in limine is therefore denied, but CMP-EG may refile the substance of the motion in the form of a new request for an expedited due process hearing and in compliance with the pleading requirements for such a request.

ORDER

1. The Order Granting Continuance filed July 23, 2012, is vacated in its entirety.
2. This matter will be set as follows:

Mediation: August 28, 2012, at 9:30 AM
Prehearing Conference: Sept. 5, 2012, at 10:00 AM
Due Process Hearing: Sept. 11 - 13, 2012, at 9:30 AM and for further days
as deemed appropriate by the presiding ALJ

3. CMP-EG's motion in limine is denied without prejudice to the refileing of the substance of the motion as a separate request for an expedited due process hearing.

Dated: July 26, 2012

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings