

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

FRESNO UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2012110106

FINAL ORDER GRANTING
CONTINUANCE AND SETTING NEW
DUE PROCESS HEARING AND
PREHEARING CONFERENCE DATES¹

Hearing in this matter began on January 23, 2013, at the Professional Development Center of Fresno Unified School District (District) in Fresno, California, before Administrative Law Judge Deidre L. Johnson (ALJ), Office of Administrative Hearings (OAH). On January 22, 2013, Student filed a request for a continuance based on two grounds: (1) a directive issued to Student's mother (Parent) to stay away from all District campuses and facilities; and (2) unspecified health problems. Despite District's stay away directive, Parent appeared at the hearing. Attorney Sang Jin Nam appeared for the District.²

During the hearing, only prehearing motions and issues were handled on the record and the substantive hearing did not begin because Student's motion for a continuance was granted. This written order summarizes the orders placed on the record, and supplements those orders as necessary for the parties to go forward and prepare for the continued hearing.

1. Continuance: 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

¹ OAH staff inadvertently served an unauthorized draft of this order and the title therefore reflects that this is the final order.

² District's co-counsel Melody Hawkins was also present with Mr. Nam. In addition, Patrick Sigala, a member of the Special Education Community Advisory Committee to the District, appeared with Parent, along with Student's father.

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).)

This was Student's third request for a continuance based on Parent's unspecified health problems. In each of OAH's prior orders denying her request, OAH provided guidance on the information Parent is required to present to establish good cause for a continuance based on a medical condition. Parent did not present any evidence of any specified medical condition accompanied by any documentation. Student's motion was therefore denied on that ground.

District's stay away directive was personally served on Parent on Friday, January 18, 2013, prior to the start of this hearing. The undersigned ALJ scheduled the hearing dates of January 23 through 25, 2013, during a prehearing conference (PHC) on November 26, 2012, at which both Parent and District's counsel were present by telephone. In addition, District specified the location for the hearing at its Professional Development Center, a District facility. The ALJ issued a written PHC order specifying those dates, along with the District facility location, which was duly served on District on November 27, 2012. District also participated in another PHC on January 7, 2013, at which time the hearing dates and location were confirmed. District therefore had full knowledge of the hearing dates and location when it issued the stay away directive to Parent.

During the hearing, the ALJ expressed concerns about the chilling effect District's stay away directive appeared to impose on Parent's federal and state due process rights to fully attend and participate in the hearing. In that regard, District argued that Parent's involvement in a separate personnel matter with the District, as a District employee subject to disciplinary action, was not intended to impair or impede her participation in this hearing, and Parent was permitted to enter the facility for the hearing. That argument was not accompanied by any evidence and was not persuasive. In evaluating substantive prejudice to Student, the ALJ noted that Parent had failed to follow OAH orders in preparation for the hearing prior to January 18, 2013, including several PHC orders. However, Parent established that she feared action by law enforcement officers as she entered the facility for the hearing, and no one from the District informed her of any exemption from the stay away order for the hearing. In light of these fundamental due process concerns, District stipulated to Student's request for a continuance. In weighing the equities, the interests of justice are served by a continuance and Student therefore established good cause to continue the matter to the District's next available hearing dates as follows:

TELEPHONIC PREHEARING CONFERENCE

DATE: **March 27, 2013**
TIME: **1:30 p.m.**

OAH will initiate the telephone calls to telephone numbers designated by the parties.

DUE PROCESS HEARING

DATES & TIMES: .April 9, 2013, at 9:30 a.m.
April 10 and 11, 2013, at 9:00 a.m.
The parties will reserve Friday, April 12, 2013, if another day of hearing is necessary.

PLACE: Fresno USD
Professional Development Center
1833 E Street
Fresno, CA 93706

2. Stay Away Exemption: District shall immediately issue and serve on Parent written documentation of an exemption from its present and any relevant future stay away directives to permit Parent's full attendance and participation in the due process hearing in the present case on the above dates, and on any dates to which they may be continued, including but not limited to any other mediation and hearing dates scheduled by OAH.

3. Change of Hearing Venue: During the hearing, Student requested a change of venue for the hearing to a neutral location. Student's motion was granted. The current location site at District's facility remains in this order temporarily. District shall make arrangements for an independent, neutral hearing site in a room with moveable tables and all other criteria required by OAH for hearing, and serve written notice of the location on OAH and Parent. Parent reserves the right to file a motion objecting to the proposed site. **However, District shall still issue the Stay Away Exemption ordered above in any event to forestall future problems because future venue changes may become necessary.**

4. Mediation and Other Matters: The parties may meet and confer to set a date to voluntarily participate in mediation prior to the hearing and notify OAH. All other matters relevant to preparing for hearing, including clarification of issues and identification of all witnesses and exhibits, will be addressed at the next PHC.

5. Notice to Witnesses: 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, as applicable.

6. Prehearing Conference Statement: Each party is required to submit a PHC Statement, which shall be filed at least **three business days prior to the PHC** with OAH. The PHC Statement may be filed with OAH by facsimile transmission at (916) 376-6319, and must be served on the other party. The parties need not mail a hard copy of any

document sent by facsimile transmission. The parties shall not send by mail or facsimile transmission copies of documentary evidence intended for the due process hearing to OAH. The PHC Statement shall include the following:

- a. Any concern or clarification regarding the issues and proposed resolutions for the case as set forth in the Order Following Prehearing Conference issued by the undersigned ALJ and dated January 8, 2013;
- b. The name of each witness the party may call at the due process hearing and a brief summary of the subject of the expected testimony of the witness;
- c. The name and address of each expert witness the party intends to call at the hearing and a brief summary of the subject of the expected testimony of the witness;
- d. A list of documentary evidence that the party intends to present, and a description of any physical or demonstrative evidence; and
- e. The need for an interpreter or other special accommodation at the due process hearing, and whether Student requests an open or closed hearing.

7. Prehearing Motions: All prehearing motions shall be served upon the opposing party and filed with OAH prior to the PHC. If a party wishes to oppose a motion, such opposition must be received by OAH no later than three business days after service of the motion.

8. Settlement: If the parties reach settlement in this matter, OAH shall be notified as soon as possible. Notification shall be in writing, but need not include the entire contents of the settlement agreement. It shall be sufficient to provide a page that identifies the nature of the document and participants and the signature page with each participant's signature. A request for dismissal based on settlement of all issues that is submitted by the party who requested the hearing shall also suffice. The matter shall remain on calendar and shall not be dismissed until OAH receives the proper notification.

IT IS SO ORDERED.

Dated: January 24, 2013

/s/
DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings