

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SACRAMENTO CITY UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015010421

ORDER DISMISSING AMENDED
COMPLAINT WITH PREJUDICE

PROCEDURAL HISTORY

This matter was filed on January 5, 2015, on behalf of Student, by Father without the assistance of an attorney. Parents are Spanish speakers and the complaint was filed in Spanish. On February 2, 2015, attorney Nicole Hodge Amey filed an appearance for Student. Ms. Amey filed an amended complaint on February 25, 2015. The matter was continued on April 13, 2015 at the parties' joint request to facilitate a mediation. The April 13, 2015 order continuing the matter stated: "No further continuances will be granted in this matter without exceptional good cause."

On May 15, 2015, just prior to a prehearing conference (PHC) scheduled for that day, Ms. Amey withdrew as Student's attorney and requested a continuance on Student's behalf so Father could find another attorney. At the PHC, Father requested a continuance of the hearing in order to seek another attorney to represent Student. On May 18, 2015, OAH granted that request and continued the matter to September 4, 2015, for the PHC. The May 18, 2015 order stated: "The ALJ intends for this continuance to be the final continuance in this matter."

At the PHC on September 4, 2015, Father requested an additional continuance of the hearing on the grounds that Student was undergoing assessment and that some witnesses might not be available for the upcoming hearing, then calendared for September 15, 2015. The request was denied, but on September 11, 2015, based on a new showing of need involving Parents' difficulty in preparing documents for hearing, Father's new request for a continuance was granted and the hearing was set for October 6, 2015. The September 11, 2015 order stated: "No further continuance will be granted in this matter."

On October 5, 2015, the day before the hearing, Father requested a continuance of the hearing on the ground that Parents lacked the education and experience to proceed to hearing on their own; that an attorney was examining documents in order to decide whether to represent Student; and that the attorney needed more time to complete that examination. Father's request attached a letter dated October 2, 2015, from Disability Rights California, stating that Father, in

requesting that the organization represent Student, gave them voluminous files on October 1, 2015; that they had not had time to examine those files; and that in the meantime they did not represent Student. On October 5, 2015, OAH denied the requested continuance.

This matter came on for hearing on October 6, 2015, before the undersigned ALJ. Father, through a Spanish interpreter, again requested a continuance to seek counsel, arguing that he was not competent to present Student's case by himself due to language and other difficulties. The motion was denied on the ground that Parents had had since May 15, 2015, to seek new counsel to represent Student. The parties made opening statements, and Father then testified on behalf of Student for approximately one and one half hours. Father's direct testimony at first was presented by narrative, but it soon became apparent that Father was incapable of confining his testimony to the subject matter of the complaint or focusing on the issues in a way that was useful for developing a record. The ALJ then attempted in several ways to structure Father's testimony through increasingly specific questions, but these attempts were unsuccessful. Father would testify briefly on the merits of the matters in the amended complaint, but then would diverge into other matters, and could not be re-focused on the subject of the hearing. His testimony was interspersed with repeated requests for further continuance to obtain counsel for Student, and repeated claims that he was incapable of proceeding to represent Student on his own.

When Sacramento City began its cross-examination of Father, Father refused to proceed, arguing again that he was incapable of presenting Student's case on his own and therefore required a continuance to obtain representation. Father again asked for more time to obtain counsel. Sacramento City again opposed the request on the ground that Father had had ample time to retain counsel between May 15, 2015 and the day of hearing and had not been diligent in attempting to do so.

This ALJ denied the request for a continuance and tentatively granted Sacramento City's motion for dismissal for failure to prosecute the matter, but notified the parties that whether the dismissal would be with or without prejudice would be the subject of an order to show cause. On October 7, 2015, an Order to Show Cause was issued requiring Father to set forth in a declaration under oath all his efforts to obtain representation for Student between May 15 and September 29, 2015, so that his diligence in seeking representation could be determined. Father filed a return to the Order to Show Cause on October 20, 2015. Sacramento City filed a reply to the Order to Show Cause on October 26, 2015, accompanied by a motion for monetary sanctions and fee shifting, which will be addressed in a separate order.

APPLICABLE LAW

A special education due process hearing must be conducted and a decision rendered within 45 days of the 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).)

No specific provision of special education law regulates whether dismissal of a special education due process complaint should be with or without prejudice. However, California practice in civil courts furnishes a useful analogy. Section 581 of the Code of Civil Procedure

allows a plaintiff to dismiss his or her complaint without prejudice “prior to the actual commencement of trial.” (Code Civ. Proc., § 581, subd. (c).) However, “[a]fter the actual commencement of trial,” a court must dismiss the complaint with prejudice unless the parties agree to a dismissal without prejudice or “on a showing of good cause.” (*Id.*, subd. (e).)

DISCUSSION

On May 15, 2015, after attorney Nicole Hodge Amey withdrew from representing Student, Father requested and obtained a continuance to find other representation for Student. The record now shows that Father was not diligent in doing so. Student’s return to the Order to Show Cause contains no declaration, and contains no description of any efforts to seek representation for Student between May 15, 2015 and the end of September 2015. The return contains a handwritten note dated June 2015 with the telephone number of attorney Michelle Ball of Sacramento, but no further description of any contact with Ms. Ball. Sacramento City’s reply contains a declaration by counsel attaching an email from Ms. Ball stating that her office was contacted by Parents “in January (not July) of 2015, but no consultation ever proceeded.” Any contact with Ms. Ball in January is irrelevant to Parents’ diligence in seeking counsel, because it preceded Student’s representation by Ms. Amey and does not affect the time period at issue here.

Student’s return also contains a handwritten note dated July 2015, containing the name and telephone number of the Hispanic Legal Center, but no further information about any contact with the Center. The declaration of counsel for Sacramento City states that the Center was unable to confirm or deny that any such contact was made.

The return also contains an August, 2015 letter from the Alta California Regional Center declining to represent Student’s sibling on the ground that he is not a customer of the Regional Center, but the letter relates only to the sibling, not Student.

The only adequately documented attempt made by Father to obtain representation for Student was his visit to Disability Rights California on October 1, 2015, three business days before the hearing, when he furnished to the organization voluminous documents as part of his request for representation. This last-minute effort cannot rectify Parents’ lack of due diligence during the preceding four and one half months.

By analogy to section 581, subdivision (e) of the Code of Civil Procedure, Student’s complaint must be dismissed with prejudice unless he can show good cause why it should be dismissed without prejudice. The hearing had commenced and was well underway when Father, for the final time, refused to proceed without representation. Sacramento City does not agree to a dismissal without prejudice, and has established by declaration that Student’s actions have caused it to prepare for hearing three times, and to incur a total of \$28,874.00 in direct expenses, not counting a number of indirect expenses such as the time and effort of its salaried personnel in preparing for hearing, obtaining substitutes, and the like. It would take a very substantial showing of good cause to expose Sacramento City to further expenses of this magnitude by dismissing the amended complaint without prejudice, and Student has not made such a showing.

In sum, the record shows that Father had from May 15, 2015 to October 5, 2016, to obtain representation for Student, and did not diligently attempt to do so. It shows that Father, as he argues, is not capable of presenting Student's case himself, and it shows that Father, after the beginning of the hearing, refused to proceed with presentation of Student's case in the absence of representation. The matter will therefore be dismissed with prejudice for failure to prosecute it.

ORDER

1. The Order to Show Cause issued October 7, 2015, is vacated and discharged.
2. This matter is dismissed with prejudice for failure to prosecute it.

DATE: November 18, 2015

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings