

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SANTA MONICA-MALIBU UNIFIED
SCHOOL DISTRICT.

OAH CASE NO. 2013050568

ORDER GRANTING IN PART
DISTRICT'S REQUEST FOR
CONTINUANCE AND SETTING
PHC/HEARING

On June 13, 2013, District filed a motion to continue all dates in this matter. The reasons given were unavailability of District's special education director from June 24, 2013 through July 11, 2013 due to a pre-arranged vacation, unavailability of District's attorney from July 11, 2013 through July 22, 2013 due to a prearranged vacation, District's involvement in other due process matters in July, a conflict with other mediation dates on June 20, 2013 (now moot because District cancelled mediation and this order is issuing after that date anyway), and a general assertion of unavailability of District's employees due to summer break. District established that it made efforts to find mutually agreeable dates with Student. Student opposed the motion on June 17, 2013, on the alternative grounds that either good cause did not support the continuance, or the grounds stated did not provide good cause to continue the matter into the beginning of the next school year. District filed a reply on June 17, 2013, in which District's attorney stated he would be representing District in this matter. Student filed a final reply on June 18, 2013. As discussed below, the request will be granted, but solely on the ground of unavailability of District's counsel, such that the matter will be set for hearing beginning July 29, 2013.

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 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).)

Under the IDEA, the 45 day timeline for hearings is not automatically tolled by a school district's closure for the summer. (See OSEP, *Letter to Cox* (June 22, 2012) 112 LRP 35009 [“. . . when a due process hearing is requested under 34 CFR §§300.507 through 300.516, the SEA is required to meet applicable timelines, whether or not the school division operates a summer school program.”].)

OAH has reviewed the request for good cause and considered all relevant facts and circumstances. The request is granted, solely on the ground of the temporary unavailability of District's Special Education Director and counsel, but not to the dates requested by District. All dates are vacated.

As an initial matter, Student is correct that District's summer closure is not in and of itself good cause for a continuance. As OSEP stated in *Letter to Cox*, the IDEA does not contain any language that can be construed to toll the due process hearing decision timelines merely because a school district is closed. Moreover, District's assertion of witness unavailability is not supported by any specific showing that particular individuals are outside the reach of OAH's subpoena power, and all parties, including District, have the right to subpoena necessary witnesses for hearing if required. (See Ed. Code, § 56505, subd. (e)(3); Cal. Code of Regs., tit 5, § 3082 (c)(2) [all parties have a right to “compel” the attendance of necessary witnesses and “the hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) . . . upon a showing of reasonable necessity.”].) If District's personnel are unwilling to appear, then the refusal would support a showing of “reasonable necessity” for either District or Student to subpoena the witnesses' attendance. Finally, OAH has taken notice that on May 30, 2013, in consolidated case numbers 2013051152 and 2013040629, District stipulated to set a hearing on its own due process filing on July 23, 2013, and to date has not raised the unavailability of its personnel as a reason that hearing cannot go forward. Thus, District did not show good cause for a continuance due to District's summer break.

As to the ground of unavailability due to the pre-paid, pre-arranged vacations of the District's Special Education Director and counsel, District showed good cause for a short continuance only, and not a continuance resulting in the hearing occurring after the start of the school year. Based on the declarations attached to the moving papers and replies, District established that its counsel is on vacation until July 22, 2013, and is currently scheduled for hearing in consolidated OAH case numbers 2013051152 and 2013040629, beginning July 23, 2013. Accordingly, this matter will be continued to the first available week after July 23, 2013, a result which balances Student's right to a hearing within IDEA timelines, with the principle that continuances must only be granted for good cause. OAH does not contemplate further continuance requests, as Student has strenuously argued that Student and Parents would be prejudiced by further delay. This matter will be set as follows:

Mediation: Mediation is voluntary and nothing in the moving papers or replies shows that the parties have agreed to attend mediation. The parties may request mediation on any Tuesday through Thursday by providing OAH one week's notice of the mutually agreed date.

Prehearing Conference: July 19, 2013 at 3:00 PM
[The PHC is being set with sufficient time prior to hearing to issue and serve any necessary subpoenas, and both parties shall be prepared to discuss which witnesses require subpoenas.]

Due Process Hearing: July 29, 2013 to August 1, 2013, at 1:30 PM the first day, and 9:30 AM other days, and continuing day to day, Monday through Thursday, as needed at the discretion of the Administrative Law Judge.

IT IS SO ORDERED.

Dated: June 20, 2013

/s/

RICHARD T. BREEN
Presiding Administrative Law Judge
Office of Administrative Hearings