

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2011100230

v.

PITTSBURG UNIFIED SCHOOL DISTRICT,

PITTSBURG UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2012010726

v.

PARENT ON BEHALF OF STUDENT.

ORDER DENYING REQUEST FOR
CONTINUANCE

On March 22, 2012, the parties filed separate requests to continue the due process hearing in this matter. Both parties seek continuance on the grounds that Student has undergone an independent educational evaluation (IEE) and the resulting assessment report will not be available until the week of the currently scheduled hearing. This order addresses both continuance requests.

APPLICABLE LAW

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. (34 C.F.R. § 300.515(a); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) In ruling upon a motion for continuance, the Office of Administrative Hearings (OAH) is guided by the provisions found within the Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, rule 3.1332.) Generally, continuances of matters are disfavored. (Cal. Rules of Court, rule 3.1332(c).)

DISCUSSION AND ORDER

Student filed this matter in October 5, 2011. The Pittsburg Unified School District (District) filed its case on January 25, 2012. The parties have previously been granted

continuances and allowed to amend the complaint. The currently requested continuance of this matter to May 21, 2012, would put a written decision more than eight months from the filing of Student's case. That is not consistent with the mandate of a speedy resolution.

The conduct of Student's counsel, Natashe Washington, and District's counsel, Jan E. Tomsky, is troubling. The recently-denied continuance request by District is material to the current motion and bears summarizing. On March 15, 2012, District filed a request for continuance. In the request, Ms. Tomsky acknowledged that OAH expects matters with one hearing date to go day-to-day until completed. She requested a continuance in this matter because she had another matter set to start the day before the hearing date in this matter. That may have constituted good cause. However, upon examination of the OAH file in the "conflicting" matter, OAH discovered that the other matter had been continued on March 19, 2012, upon request of the parties. Therefore, no conflict existed and the request to continue was denied. Ms. Tomsky had a duty to apprise the parties and OAH that the facts underlying the basis for her March 15, 2012 continuance request had materially changed. Ms. Tomsky failed to do so.

OAH expects parties to meet and confer prior to filing motions to continue. There is no indication that the parties met and conferred prior to the filing of the March 15, 2012 continuance request by District. It appears that the parties did not meet and confer after the filing of the request as well. Had they done so, Ms. Washington could have been informed that Ms. Tomsky's conflict had resolved. Ms. Washington, in her current request to continue, states that she learned this week that a crucial assessment report would not be prepared in time for the currently- scheduled hearing. Had counsel met and conferred after the filing of District's March 15, 2012 motion or once Ms. Tomsky's conflict went away, District would have been aware of Student's need for a continuance.

Ms. Washington is equally to blame for the situation the parties find themselves in. Ms. Washington asserts that she only found out this week that the assessment report would not be ready in time. Her pleadings and declaration are vague as to exactly when she knew. However, her statement that had she known Ms. Tomsky's conflict had resolved, she would have filed her own motion, indicates that she knew of her own need for a continuance while District's March 15, 2012 motion was still pending. On March 20, 2012, prior to ruling on the motion, OAH staff contacted Ms. Washington's office and left a message asking if she would respond to District's motion. Ms. Washington chose to decline the opportunity to be heard.

Ms. Washington now asserts that she assumed that OAH would grant Ms. Tomsky's request to continue and therefore, she did not file her own motion or respond to District's motion. Ms. Washington assumed that because Ms. Tomsky had a conflict, OAH would grant the request. However, as discussed herein, Ms. Tomsky's conflict was resolved. Ms. Washington also assumed that because the matter required more than one day, OAH would grant District's March 15, 2012 request. However, District asked for a continuance due to counsel's conflict, not because the matter required more than one day. By making such

assumptions, Ms. Washington assumed the risk of getting an unfavorable ruling when she declined to be heard.

Ms. Washington further asserts that she was unaware that OAH expects matters to proceed day-to-day, until completed, until the March 21, 2012 prehearing conference. Ms. Washington's assertion is unpersuasive. When OAH sets the initial hearing date, it is the responsibility of the parties to meet and confer about additional hearing dates and to propose alternate hearing dates if necessary. Here, the parties filed prehearing (PHC) conference statements in which they indicated more than one day of hearing was required. However, neither party stated that they were unavailable (except for District's separate motion of March 15, 2012) to begin on March 27, 2012, and proceed day-to-day. It was Student's duty to state in the PHC statement that Student felt a continuance was required because the matter would take more than one day. To interpret calendaring as Student desires would mean that PHCs are merely trial setting conferences. Furthermore, it is disingenuous for Ms. Washington to state she was unaware that matters proceeded day-to-day until March 21, 2012. Ms. Tomsy's motion of March 15, 2012, clearly referenced the policy. Therefore, giving Ms. Washington the greatest benefit of the doubt, she was aware on March 15, 2012, of OAH's policy. Continuances are granted on a case-by-case basis and parties take a risk of denial when they proceed to a PHC without providing any indication in their PHC statement, or a supplemental statement, that they will be making a motion to continue.

On March 22, 2012, Student filed the instant request to continue on the grounds that a report, crucial to Student's case, would not be available in time for the hearing. District did not oppose the request or file a non-opposition. Instead, District filed its own motion contending that a continuance was warranted because Student should be allowed to present the report into evidence. It is interesting that District's counsel appears to be actively assisting Student in preparing Student's case. Regardless, neither party has indicated they are unavailable for hearing from March 27 to 30, 2012. If Student continues to believe that the IEE is necessary to be presented at the hearing, Student can make a motion at the hearing. If the ALJ finds merit to the request, there are options available for the ALJ to consider. It is not uncommon for witnesses and evidence to be taken out of order in due process hearings. Here, the parties can present their respective cases on the days currently scheduled and then reconvene once Student's report is available and District has been given at least five business days to prepare a defense to the report. Accordingly, the parties did not establish good cause and the request to continue is denied.

IT IS SO ORDERED.

Dated: March 23, 2012

/s/

BOB N. VARMA
Presiding Administrative Law Judge
Office of Administrative Hearings