

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

DOWNEY UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2013090741

ORDER GRANTING DISTRICT'S
REQUEST FOR CONTINUANCE AND
SETTING PHC/HEARING AND
ORDER DENYING STUDENT'S
REQUEST FOR AN IEE

On December 13, 2013, District filed a request to continue the hearing dates for less than 30 days on the ground that its attorney and two District witnesses who were highly relevant to the issues alleged in the complaint were not available for a hearing starting December 31, 2013. District supported its requests with declarations showing an attempt was made to resolve the continuance with Student, the unavailability of Student's counsel until January 27, 2014, with references to particular pending OAH hearings, and the unavailability of the two witnesses until the first weeks of January at the earliest. On December 16, 2013, Student opposed the motion and requested that if the motion was granted, OAH should fund independent educational evaluations (IEE) under title 34 Code of Federal Regulations part 300.502(d) (2006) and Education Code section 56505.1, subdivision (e), both of which provide that during a hearing, a hearing officer may order IEE's at public expense "for purposes of the hearing." Student argues generally that District's reasons for a continuance are not "good cause." Student also argues he will be prejudiced because Student's family is funding his educational placement until the matter is resolved, Student's family generally relied on the hearing date, and Students' counsel was inconvenienced by scheduling multiple overlapping matters around the date of the hearing. Student did not oppose the motion on the ground of unavailability on the hearing dates requested by District and Student's opposition consisted only of argument without supporting factual declarations. As discussed below, District's request for a continuance is granted and Student's request for an IEE is denied.

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 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).)

OAH has reviewed the request for good cause and considered all relevant facts and circumstances. The request is granted. The unavailability of District's counsel, and the unavailability of two District witnesses demonstrates good cause, particularly when District is seeking a first continuance of less than 30 days and Student has not demonstrated unavailability on the dates requested by District.

To the extent Student argues he will be prejudiced because Student's parent is funding Student's education while the dispute is pending, Student has remedies. In particular, if Student prevails at hearing, Student may be entitled to compensatory education and reimbursement, possibly including interest. More importantly, Student's request for IEE's, addressed below, undermines his position that he will be prejudiced by a delay of less than 30 days. As a practical matter, the minimum time to conduct an assessment is over 30 days, and is more like the 60 days contemplated by the Education Code for district assessments. (See Ed. Code, §56302.1, subd. (a).) Student cannot logically argue that a delay of less than 30 days is prejudicial because of the expense to parents, while requesting a delay of 60 days or more, which will result in even more expense to parents. Under these circumstances, good cause exists to grant District's request for a continuance of less than 30 days.

All dates are vacated. This matter will be set as follows:

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| Mediation: | Not requested. |
| Prehearing Conference: | January 10, 2014 at 1:00 PM |
| Due Process Hearing: | January 27-30, 2014 at 1:30 PM first day, 9:00 AM other days, and continuing day to day, Monday through Thursday, as needed at the discretion of the Administrative Law Judge. |

IEE From Hearing Officer

Title 34 Code of Federal Regulations part 300.502(d) (2006) and Education Code section 56505.1, subdivision (e) address the right of a hearing officer to order an IEE at public expense during hearing. Neither provision provides a process or right for a party to a due process hearing to request such an IEE on their own motion prior to hearing as a remedy

for the party's perceived prejudice when a continuance is granted. (See 34 C.F.R. § 300.502(d) (2006); Ed. Code, § 56505.1, subd. (e).)

Instead, both provisions focus on the hearing officer's rights while conducting the hearing. In particular, the federal regulation contemplates that if "a hearing officer requests an independent educational evaluation *as part of a hearing* on a due process complaint" that it be at public expense. (34 C.F.R. § 300.502(d) [italics added].) Consistent with the federal regulation, the Education Code provides that, "during the hearing" the hearing officer may order an IEE "for purposes of the hearing" at public expense. (Ed. Code, § 56505.1, subd. (e).) Student provides no authority, and OAH is aware of none, that would convert a hearing officer's authority to order further assessments at public expense while considering the evidence, into a pre-hearing penalty or equitable remedy related to continuances.

Accordingly, Student request for a hearing officer IEE is denied.

IT IS SO ORDERED.

Dated: December 17, 2013

/s/

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