BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2018040382
v.	ORDER TO SHOW CAUSE WHY PARTIES AND ATTORNEYS SHOULD NOT BE ORDERED TO PAY EXPENSES
SAN DIEGO COUNTY OFFICE OF EDUCATION.	

Pursuant to a discussion with the parties by Administrative Law Judge Sabrina Kong at an April 30, 2018 expedited prehearing conference, the expedited due process hearing was scheduled to proceed at 9:30 a.m. on May 8, 2017, and continuing day to day at 9:00 a.m. Expedited matters must, by federal and state statutes, begin within 20 school days after the request for expedited due process hearing is filed. May 8, 2018, was the 20th school day after Student filed his complaint and was the last day on which to begin the expedited due process hearing. The Office of Administrative Hearings calendared the expedited due process hearing and scheduled an ALJ for the expedited hearing on May 8, 9, and 10, 2018. At Student's request, OAH also scheduled a Spanish language interpreter for those three days.

During the April 30, 2018 expedited PHC, the ALJ discussed with the parties the issues for the expedited due process hearing. Based on that discussion and articulation of the issues as they were understood at that time, the ALJ made the following order, reflected in the Order Following Expedited Prehearing Conference (Expedited PHC Order), served on the parties on April 30, 2018:

> Student will file a brief with OAH, and serve on County Office of Education's attorney, by May 1, 2018 at 3:00 p.m. addressing whether the rest of the issues set forth in his PHC statement are duplicative of the two issues herein by May 1, 2018 at 3:00 p.m. County Office of Education will file a response with OAH, and serve on Student's attorney, by May 2, 2018 at 3:00 p.m. Both Student's brief and County Office of Education's response shall be no longer than five pages, double-spaced, 12 point font.

Student failed to file the required brief.

During the April 30, 2018 expedited PHC call, the ALJ expressly reviewed the settlement notification section of the Expedited PHC Order with Student's attorney, Jennifer Varga, and County's attorney, Sundee Johnson. The ALJ emphasized the

importance of complying with the PHC in the event of an after-hours settlement the day before the hearing, particularly as to leaving a message on the OAH settlement hotline and submitting the signature page of any settlement agreement and a letter withdrawing the expedited, or all, claims, as applicable. The PHC order served on the parties on April 30, 2018, stated in pertinent part (capital letters in original, bold italics added):

> [ ] Settlement. . . . ***The parties shall inform OAH in writing immediately*** should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.
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> IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED ***AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE*** REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY **EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT** https://www.dgsapps.dgs.ca.gov/oah/oahsftweb **.**
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> ***Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH***. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.
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> . . .
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> [ ] Failure to Comply with this order may result in . . . sanctions.

The PHC order also required County to assist the ALJ to ensure that the hearing room was configured into a courtroom setting.

On Friday, May 4, 2018, OAH called the parties' attorneys to inquire if the expedited due process hearing would go forward. Both attorneys' offices stated the case had settled and they were working on obtaining signatures on the agreement. Student's attorney's assistant stated Student's attorney would submit the required paperwork on Monday, May 7, 2018. OAH reminded her that the hearing was scheduled to begin on Tuesday, May 8, 2018. OAH notified the parties' attorneys the case was reassigned to ALJ Judith Pasewark.

On Monday, May 7, 2018, before 11:30 a.m., OAH notified both parties' attorneys any dismissal needed to be filed by 2:30 p.m. because the ALJ needed to travel to San Diego. At 4:45 p.m., Presiding ALJ Peter-Paul Castillo informed the parties' attorneys that ALJ Kara Hatfield was assigned the case and the parties needed to appear on the morning of Tuesday, May 8, 2018, at 9:30 a.m. as scheduled. County's attorney indicated she believed the case had settled and would track down what was going on.

Neither party called the settlement hotline on the evening of May 7, 2018, or the morning of May 8, 2018, to alert the ALJ that a fully executed written settlement agreement had been reached. Student's attorney did not contact OAH in writing or by telephone before the expedited hearing began at 9:30 a.m. on May 8, 2018.

County's attorney's assistant called OAH at 8:30 a.m. on May 8, 2018, and asked if OAH had received signature pages of the settlement agreement. OAH had not received any signature pages of a settlement agreement or a request by Student to withdraw the expedited claims, or the entire case. OAH reminded the assistant the parties had been directed to file papers by 2:30 p.m. the day before and still nothing had been filed, and the ALJ was en route to the hearing location. County's attorney's assistant stated she would file the signature pages she had at her office. At 8:41 a.m., County submitted copies of the signature pages of a settlement agreement, in counterparts. The signature page included the following paragraph of the agreement: "DISMISSAL WITH PREJUDICE: Upon full execution of this Agreement Petitioner hereby withdraws OAH Case No. 2018040382 in its entirety and requests that OAH dismiss this matter with prejudice." All of the signatures on the settlement agreement were dated May 7, 2018. Yet Student did not contact OAH to report the settlement, or withdraw the expedited claims or entire case.

The undersigned ALJ arrived at County's offices at 8:45 a.m., located the special education office (site maps on the property incorrectly identify the building and room number for the Special Education office), and requested access to the hearing room to set up for the hearing. County's Executive Director of Special Education, Cara Schukoske, was offsite and, when contacted by her assistant, did not believe the hearing was going forward due the settlement agreement. She offered to provide the ALJ the signature pages of the executed agreement. County did not have a room available for the hearing. County offered the undersigned ALJ a small conference room in which to set up the recording equipment for the hearing. The room could not be configured into a courtroom setting, and the undersigned ALJ set up the audio recording equipment.

Because OAH was not timely notified of the settlement agreement in accordance with the Expedited PHC Order and further instructions provided to the parties by OAH on May 7, 2018, the ALJ was required to: prepare for hearing after hours on May 7, 2018 (0.5 hrs); travel to the hearing site on May 8, 2018 (0.5 hrs[1]); locate the correct building and

[1] OAH exercised cost containment measures by reassigning the case to an ALJ who had already traveled to the San Diego area for another due process hearing, but about which OAH timely received notice of settlement.

room for Special Education, wait for County personnel to locate the Executive Director for information about where to set up for the expedited due process hearing, for which Presiding ALJ Castillo had directed the parties to appear, and set up the audio recording equipment (0.75 hrs). The California Department of Education is billed for the ALJ's time at $276 per hour. Also, the requested interpreter appeared for the expedited hearing, and OAH was charged for her appearance and cancellation fees for the next two days, at a total cost of $448 more than OAH would have been charged if the parties had complied with instructions to notify OAH immediately upon settlement and if the necessary paperwork had been submitted by 2:30 p.m. as instructed, or even by 5:00 p.m., on May 7, 2018.

By 9:30 a.m. on May 8, 2018, neither party had appeared for hearing. The undersigned ALJ opened the record for purposes of setting an Order to Show Cause re sanctions, with written order to follow, re-packed the audio recording equipment, and left County's premises at 10:25 a.m. (1.0 hr). The ALJ later traveled back to Los Angeles (2.5 hrs) and an order to show cause why the parties and their attorneys should not be ordered to pay expenses was prepared, reviewed and finalized (3.5 hrs).

Because Student and County did not comply with the Expedited PHC Order regarding notification of settlement, did not comply with OAH's instruction to submit the required paperwork by 2:30 p.m. to avoid the ALJ traveling to San Diego, did not comply with the Presiding ALJ's instruction to appear at the expedited hearing on the morning of May 8, 2018, and did not in any other manner communicate to OAH the parties' intention not to appear at and go forward with the expedited due process hearing as scheduled on the morning of May 8, 2018, the parties may be ordered to pay costs for failure comply with those orders.

APPLICABLE LAW

Under certain circumstances, an ALJ presiding over a special education proceeding is authorized to shift expenses from one party to another, or to OAH. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; see *Wyner ex rel. Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly, [title 5 California Code of Regulations] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."].) A party may be ordered to pay expenses of a party, or OAH as a result of "bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay . . . ." (Cal. Code Regs. tit. 5, § 3088, subd. (a); Govt. Code, § 11455.30, subd. (a).) A party may also be ordered to pay costs for failure or refusal, without substantial justification, to comply with an order of the presiding officer. (Govt. Code § 11455.10.) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

ORDER TO SHOW CAUSE

Student and County are ordered to show cause why the parties, Student's attorneys Megan Nunez and Jennifer Varga, and County's attorney Sundee Johnson should not be required to pay OAH's costs of the expedited due process hearing on May 8, 2018, including OAH travel expenses and interpreter costs related to that hearing. **Student and County are ordered to each file a written response with OAH by no later than 5:00 p.m. on May 29, 2018**. A copy of the response shall be served upon the other party. Neither party is expected to file a written reply brief to the other side's response.

The parties' responses shall address why they did not comply with the Expedited PHC Order regarding notification of settlement, did not comply with OAH's instruction to submit the required paperwork by 2:30 p.m. to avoid the ALJ traveling to San Diego, did not comply with the Presiding ALJ's instruction to appear at the expedited hearing on the morning of May 8, 2018 at 9:30 a.m., and did not in any other manner communicate to OAH the parties' intention not to appear at and go forward with the expedited due process hearing as scheduled on the morning of May 8, 2018. **Each party's written response shall address why OAH should not order Student, County and/or their attorneys to pay OAH's expenses for sending an ALJ and interpreter to the scheduled May 8, 2018 expedited due process hearing and OAH travel expenses related to this hearing, and for this Order to Show Cause.**

The Order to Show Cause hearing shall take place telephonically at 2:00 p.m. on June 1, 2018. Failure of Ms. Nunez or Ms. Varga, or Ms. Johnson to appear telephonically at the order to show cause hearing on June 1, 2018, may result in additional sanctions.

ORDER

1. An Order to Show Cause Why the Parties and Attorneys Should not be Ordered to Pay Expenses is hereby issued. Student and District must each file a response no later than 5:00 p.m. on Tuesday, May 29, 2018.

2. A telephonic order to show cause hearing shall be convened at 2:00 p.m. on Friday, June 1, 2018. OAH will initiate the call.

IT IS SO ORDERED.

DATE: May 10, 2018

DocuSigned by:
Kara Hatfield
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KARA HATFIELD
Administrative Law Judge
Office of Administrative Hearings