BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. NEWARK UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016100243 ORDER FOLLOWING PREHEARING CONFERENCE; SETTING HEARING TO ADDRESS ORDER TO SHOW CAUSE HEARING AS TO WHY THIS MATTER SHOULD NOT BE DISMISSED, MOTION FOR SANCTIONS, AND MOTION TO DISMISS, GRANTING MOTION TO CONTINUE; AND SETTING MEDIATION, PREHEARING CONFERENCE, AND DUE PROCESS HEARING DATES

On February 10, 2017, a telephonic prehearing conference was held before Administrative Law Judge B. Andrea Miles, Office of Administrative Hearings. Jennifer Baldassari, Attorney at Law, appeared on behalf of Newark Unified School District. Student's attorney of record, Martha Millar, failed to appear. The PHC was recorded.

In this matter, a PHC was scheduled for February 3, 2017. On February 3, 2017, Ms. Millar notified OAH by telephone that Beatrice Millar would be handling the PHC on Student's behalf. Beatrice Millar was not listed as the attorney of record, nor was there any indication on prior documentation that she was a member of the law firm representing Student. Subsequently, Ms. Millar contacted OAH by telephone and indicated that Parent would be appearing at the PHC, because Ms. Millar had another PHC scheduled at the same time as the one in this case.[1] Presiding Administrative Law Judge Margret Broussard contacted Ms. Millar and left a voice mail message stating that as the attorney of record, Ms. Millar was expected to appear at the PHC. Additionally, PALJ Broussard informed Ms. Millar that if is she was unavailable for the PHC due to a scheduling conflict, Ms. Millar needed to work with opposing counsel to request a continuance of the PHC.

At the time of the scheduled PHC, the undersigned attempted unsuccessfully to reach Ms. Millar by telephone several times. Newark's counsel informed the undersigned that she had been attempting to work with Ms. Millar on submitting a joint request to continue the

[1] Ms. Millar made no representation that she was withdrawing as counsel in this case.

PHC because the parties had reached an agreement and she was in the middle of writing the settlement agreement. However, Ms. Baldassari indicated she had been unable to submit the written request prior to the PHC because she had only received the email from Ms. Millar confirming her agreement to continue the PHC, a short time earlier. Based on counsel's representations, the PHC was trailed a brief period to allow the parties to submit their joint request for continuance of the PHC. Once, the written joint request to continue was received, the parties were informed telephonically by OAH that their request to continue the PHC was granted and that the PHC would be held on February 10, 2017, at 10:00 a.m. and hearing dates would remain as set.

At the start time of the PHC on February 10, 2017, the undersigned was unable to reach Ms. Millar by telephone and multiple voice mail messages were left for Ms. Millar. The PHC was trailed two times to allow Ms. Millar an opportunity to appear. At 10:45 a.m., a voice mail message was left for Ms. Millar indicating that due to her failure to appear at the PHC, an Order to Show Cause Hearing would be held on Monday, February 13, 2017.

Newark's counsel made an oral motion to dismiss the matter for a lack of prosecution and a motion for sanctions. She asked that OAH shift the costs of her time and that of a senior attorney in her firm, to Student.

1. Setting of Hearing to Address Order to Show Cause Hearing, Newark's Motion for Sanctions, and Newark's Motion to Dismiss for Lack of Prosecution:

Under the reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004), a due process hearing must be conducted and a decision rendered within 45 days following a 30-day resolution period, after receipt of the due process notice, in the absence of an extension. (Ed. Code §§ 56502, subd. (f), and 56505, subd. (f)(3).) Given the short time frames applicable to this case, it is critical that the parties follow orders issued by OAH and participate in advancing the matter to hearing or resolution. The burden of proof in this case is on Student. Student will be provided an opportunity to establish if she intends to go forward with this case.

Under certain circumstances, an administrative law judge 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, [California Code of Regulations] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

A telephonic hearing to address the Order to Show Cause as to Why this Matter Should not be Dismissed for a Lack of Prosecution, Newark's Motion for Sanctions, and Newark's Motion to Dismiss Based on Lack of Prosecution shall take place at 3:00 p.m. on February 13, 2017. OAH will initiate the telephone call to each attorney of record.

The parties shall be prepared to discuss the status of the case and whether Student's complaint should be dismissed and sanctions ordered.

2. Newark's Motion for Continuance of PHC and Due Process Hearing: This matter is currently set for hearing on February 14, 2017. Newark requested a brief continuance in this matter due to the absence of Student's counsel at the PHC; the scheduled hearing for the Order to Show Cause, Motion to Dismiss, and Motion for Sanctions that are scheduled for February 13, 2017; and because the parties are still in the process of resolving the case. She represented that a written agreement has been provided to Student's counsel and that she is awaiting Parents' signatures on the settlement agreement.

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, 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).)

Newark established good cause to continue the PHC and the due process hearing. Therefore, both the due process hearing and the PHC are continued. This matter will be set as follows:

Telephonic Prehearing Conference:

Date: February 17, 2017

Time: 1:00 p.m.

Due Process Hearing:

Date: February 28, March 1, and 2, 2017, and continuing day to day, Monday through Thursday, as needed, at the discretion of the ALJ.

Time: 9:30 a.m. on February 28, 2017 and 9:00 a.m. on all subsequent days unless otherwise ordered.

3. Other Matters. All matters relevant to preparing for hearing, other than the Order to Show Case, Motion to Dismiss, and Motion for Sanctions, will be addressed at the PHC on February 17, 2017 (assuming this matter is not dismissed for failure to prosecute).

4. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing

immediately should they reach a settlement or otherwise resolve the dispute before the scheduled PHC and 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.

Dates for PHC and hearing will not be cancelled until a 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.

IT IS SO ORDERED.

DATE: February 10, 2017

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Andrea Miles
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B. ANDREA MILES
Administrative Law Judge
Office of Administrative Hearings