BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN MATEO-FOSTER CITY SCHOOL DISTRICT.	OAH Case No. 2016090418 ORDER FOLLOWING PREHEARING CONFERENCE; SETTING ORDER TO SHOW CAUSE HEARING AS TO WHY THIS MATTER SHOULD NOT BE DISMISSED AND WHY STUDENT'S ATTORNEY SHOULD NOT BE ORDERED TO PAY EXPENSES; AND CONTINUING PREHEARING CONFERENCE ONLY

On February 6, 2017, a telephonic prehearing conference was held before Administrative Law Judge Theresa Ravandi, Office of Administrative Hearings. Student's attorney of record failed to appear. Lenore Silverman, Attorney at Law, appeared on behalf of San Mateo-Foster City School District.[1] The PHC was recorded.

On September 6, 2016, Naum Morgovsky, identifying himself as an "Attorney-in-Fact" for Student, filed a request for due process hearing with OAH naming San Mateo-Foster City. This matter was originally scheduled for hearing beginning November 1, 2016. On October 7, 2016, John J. Hartford, Attorney at Law, filed a "Notice of Joint Representation" indicating that he was the attorney for Student and Parent and would be representing them along with Advocate Morgovsky. Mr. Hartford remains the attorney of record for Student.

On October 20, 2016, OAH granted the parties' joint request to continue this matter and continued the hearing to December 28, 2016. On December 22, 2016, OAH granted San Mateo-Foster City's motion to continue all dates in this matter and scheduled a PHC for February 6, 2017, with a due process hearing to commence February 14, 2017.[2]

[1] Ms. Silverman's paralegal Lauren Thomas was also present.

[2] The PHC for February 6, 2017, was initially set for 10 a.m. On January 30, 2017, OAH sent counsel of record a Notice of Rescheduled Prehearing conference changing the PHC time to 1:00 p.m.

OAH requires a party to file a PHC statement at least three business days prior to the scheduled PHC. San Mateo-Foster City filed its PHC on December 20, 2016, in time for the initial PHC in this matter. Student's attorney of record has failed to file a PHC statement at all.[3]

On February 3, 2017, OAH staff telephonically informed both counsel of record that they would need to be available for and participate in the PHC on Monday at 1:00 p.m. On February 6, 2017, the ALJ attempted to reach Mr. Hartford for the PHC at the scheduled time of 1:00 p.m. at his number on file with OAH. Mr. Morgovsky answered this call and informed the ALJ that he, Mr. Morgovsky, was expecting to be called at a different telephone number. The ALJ asked for Mr. Hartford for the scheduled PHC. Mr. Morgovsky informed the ALJ that Mr. Hartford was ill and expected Mr. Morgovsky to appear for the PHC. The ALJ advised that Mr. Hartford, as attorney of record for Student, was expected to participate in the PHC. The ALJ asked if Mr. Hartford would be available for the PHC if the ALJ convened the PHC at a later time. Mr. Morgovsky then indicated that Mr. Hartford was unreachable. The ALJ advised Mr. Morgovsky that she would be issuing an Order directed to Mr. Hartford and ended the telephone call.

The ALJ convened the PHC with Ms. Silverman. San Mateo-Foster City's request that this matter be dismissed outright was denied without prejudice. Because Student filed this request for hearing, the ALJ deemed it inappropriate to review the issues in the case, because the participation of Student's attorney is necessary. Therefore, only the PHC was continued to Friday, February 10, 2017, at 10:00 a.m. As a result of the failure of Mr. Hartford to appear for the scheduled PHC, no PHC has been held and the matter remains scheduled for due process hearing on Tuesday, February 14, 2017. San Mateo-Foster City indicated, for the record, that it would no longer agree to a request to amend the complaint should Student file such a request.

ORDER TO SHOW CAUSE

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. 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.

Student's attorney is ordered to show cause why the above-captioned case should not be dismissed for his failure to participate, prosecute, or advance the case for

[3] Mr. Morgovsky submitted and signed a PHC statement as advocate for Student on February 3, 2017.

hearing. Student's attorney is ordered to file a written response with OAH by not later than 5:00 p.m. on February 8, 2017, by facsimile transmission to (916) 376-6319, and serve opposing counsel. Student's response shall address why counsel did not file a PHC statement or appear for the PHC on February 6, 2017, and whether he intends to go forward to hearing on February 14, 2017. If Student intends to proceed to hearing, Student's attorney shall file a PHC statement, signed by Student's attorney, and served on San Mateo-Foster City's counsel no later than three business days prior to the continued PHC.

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).) Student's written response shall address why OAH should not order Student's counsel to pay OAH's expenses for preparing for and attempting to conduct the February 6, 2017 PHC, and the time preparing this OSC.[4] A copy of the response shall be served on counsel for San Mateo-Foster City.

A telephonic status conference and PHC shall take place at 10:00 a.m., on Friday, February 10, 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. The hearing dates shall remain on calendar. **The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7), at least five business days prior to the scheduled hearing date of February 14, 2017, or risk having their evidence excluded.** If the ALJ determines that Student intends to proceed to hearing, and if this matter is not dismissed, the PHC will be conducted at that time. Should Student's attorney fail, without excuse, to timely file a response and PHC statement as ordered above, or participate in the telephonic status conference and PHC, OAH may impose sanctions and dismiss this case without further notice.

ORDER

1. An Order to Show Cause as to Why the Matter Should Not be Dismissed and Student' Attorney Ordered to Pay Expenses is hereby issued. Student's attorney of record shall file a response not later than 5:00 p.m., on February 8, 2017, and timely file a PHC statement.

[4] San Mateo-Foster City specifically reserved its right to file a motion for sanctions. Nothing in this order prevents San Mateo-Foster City from filing such a motion.

2. The attorneys of record for both parties shall appear at a telephonic status conference and PHC at 10:00 a.m., on February 10, 2017.

3. Should Student's Attorney fail, without excuse, to timely file a response and PHC statement as ordered above, or participate in the telephonic status conference and PHC, OAH may impose sanctions and dismiss this case without further notice.

4. The hearing dates of February 14-16, 2017, are confirmed.

DATE: February 6, 2017

DocuSigned by:
Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings