BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. LONG BEACH UNIFIED SCHOOL DISTRICT ,	OAH Case No. 2017120319
LONG BEACH UNIFIED SCHOOL DISTRICT , v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017081066 ORDER TO SHOW CAUSE WHY PARTIES AND COUNSEL SHOULD NOT BE ORDERED TO PAY EXPENSES

Pursuant to a discussion with the parties at the March 5, 2018 prehearing conference, the due process hearing in these consolidated matters was scheduled to proceed at 9:30 a.m. on March 13, 2018 and at 9:00 a.m. on March 14-15 and 20-22, 2018.

On March 12, 2018, the parties filed a joint request for the hearing to go dark on March 13, 2018, and to begin on March 14, 2018, because the parties were finalizing a settlement in principle. OAH granted the request, subject to the condition that the parties file notices of withdrawal, requests for dismissal or notice of settlement in their respective cases no later than 3:00 p.m. on March 13, 2018, or the hearing would proceed as scheduled on March 14, 2018. In addition, the PHC order provided in pertinent part (bold letters in original):

> Settlement....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 assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.
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> Failure to Comply with this order may result in...sanctions.

The ALJ reviewed the settlement notification section of the order with the parties at the March 5, 2018 PHC, and instructed them to call the settlement hotline if an agreement was reached anytime in the afternoon or evening on the day before the hearing. The PHC order also required District to ensure that the hearing room was configured into a courtroom setting.

At 3:49 p.m. on March 13, 2018, staff from the office of Student's counsel telephoned OAH and informed it that the parties were in the process of gathering signatures and would file a dismissal by 5:00 p.m. that evening. The parties fully executed a written settlement agreement of both Student's case and District's case on March 13, 2018, but did not file any paperwork with OAH that evening.

The parties did not file their paperwork by 3:00 p.m. on March 13, 2018. The parties did not file their paperwork, or call OAH with an update, before 5:00 p.m. on March 13, 2018. Once the settlement agreement was fully executed on March 13, 2018, neither party immediately notified OAH in writing; Student did not file a notice of settlement with a fully executed signature page, and District did not file a notice of dismissal. Neither party called the settlement hotline, on the evening of March 13, 2018 or the morning of March 14, 2018, to alert the ALJ that a fully executed written settlement agreement had been reached.

Because OAH was not timely notified of the settlement agreement, the ALJ was required to: review her preparation for hearing after hours on March 13, 2018 (0.75 hrs); travel to the hearing site on March 14, 2018 (1.75 hrs); sign in at the location, make arrangements for the bungalow designated for hearing to be unlocked, configure the hearing room because District had not done so, and set up the audio recording equipment (1.0 hrs). At 8:52 a.m. on March 14, 2018, minutes before the scheduled start of hearing, District filed a notice of dismissal of District's case, leaving Student's case to proceed to hearing. At 9:03 a.m., Student filed a notice of settlement with a fully executed signature page, but did not telephone OAH to alert them to the filing (0.25). At 9:30 a.m. the 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 signed out of school premises at 10:00 a.m. (0.75). Student filed a notice of withdrawal of Student's Case at 10:29 a.m. on March 14, 2018, almost one and a half hours after the scheduled start of the hearing. The ALJ traveled back to the OAH offices in Van Nuys (1.5 hrs) and this written order was prepared, reviewed and finalized (1.5 hrs). The California Department of Education is billed for the ALJ's time at $276 per hour.

Because Student and District did not comply with the conditional order granting the request to go dark on March 13, 2018, or with the PHC order regarding notification of settlement, and did not in any other manner communicate to OAH the parties' intention not to appear at and go forward with the due process hearing as scheduled on the morning of March 14, 2018, the parties may be ordered to pay costs for failure comply with those orders.

APPLICABLE LAW

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."].) A party may be order 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).) 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 District are ordered to show cause why the parties, Student's attorney Tania L. Whiteleather, and District's attorney Debra K. Ferdman should not be required to pay OAH's costs as to the due process hearing on March 14, 2018, includes OAH travel expenses related to that hearing. **Student and District are ordered to each file a written response with OAH by no later than 5:00 p.m. on March 28, 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 conditional order granting the request to go dark on March 13, 2018, or with the PHC order regarding notification of settlement, and did not notify OAH that they did not intend to appear at the March 14, 2018 due process hearing as scheduled. **Each party's written response shall address why OAH should not order Student, District and/or their counsel to pay OAH's expenses for sending an ALJ to the scheduled March 14, 2018 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 April 2, 2018. Failure of Ms. Whiteleather or Ms. Ferdman to appear telephonically at the order to show cause hearing on April 2, 2018, may result in additional sanctions.

ORDER

1. An Order to Show Cause as to Why the Parties and Counsel 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 Wednesday, March 28, 2018.

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

IT IS SO ORDERED.

DATE: March 14, 2018

DocuSigned by:
Alexa Hohensee
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ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings