BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2018031005
v.	DISMISSAL WITH PREJUDICE FOR FAILURE TO PROSECUTE
SOLANO COUNTY OFFICE OF EDUCATION.	

On May 30, 2018, this matter came on for hearing pursuant to the Order Following Prehearing Conference issued April 23, 2018. Parent, who filed the complaint, did not appear. The ALJ dismissed the matter with prejudice for the reasons set forth below.

PROCEDURAL HISTORY

x. Parent is not an attorney, but she has represented her son in 13 previous due process proceedings before OAH since 2012. Official notice is taken of the pleadings and papers on file in those previous proceedings, which are identified in the margin.[1] As a result, Parent is thoroughly familiar with OAH's special education due process procedures, having invoked them many times in the course of these matters. In one of the previous matters (OAH No. 2017051304), this ALJ presided over a three-day due process hearing and personally observed Parent displaying extensive familiarity with the requirements of litigating special education due process matters before OAH as she vigorously represented her son.

x. Parent filed the instant complaint on March 23, 2018. On March 27, 2018, OAH set the matter for Prehearing Conference on April 23, 2018, and for due process hearing on May 2, 2018.

x. On April 20, 2018, Parent filed a Prehearing Conference Statement identifying 20 witnesses she intended to call at hearing. One of them was Katherine Reyes, described as "special education teacher (deaf and hard of hearing)." Another was Jennifer Simmons, a

[1] *Student v. Fairfield-Suisun Unified Sch. Dist. and Solano County Office of Educ.* (OAH Case Nos. 2012010272, 2012040652); *Student v. Fairfield-Suisun Unified Sch. Dist.* (OAH Case Nos. 2013070705, 2014110073, 2015060335, 2017080534); *Student v. Solano County Office of Educ.* (OAH Case Nos. 2015120311, 2016050225, 2017060276, 2017120238); *Fairfield-Suisun Unified Sch. Dist. v. Student* (OAH Case Nos. 2016050221, 2016100715, 2017051304.)

school psychologist for the Northern California Assessment Center for the Deaf and Hard of Hearing. Parent's PHC Statement did not indicate the order in which her witnesses would be called, or state that any witness would require any kind of accommodation for disability such as the assistance of American Sign Language interpreters.

x. During the prehearing conference on April 23, 2018, the ALJ and the parties discussed the hearing schedule, each side's proposed witnesses, and the need for accommodations for witnesses. Parent stated that Ms. Reyes was deaf and hard of hearing and would require ASL interpreters. Parent announced for the first time that she also intended to subpoena Tracy Husted as a witness and that Ms. Husted would also require ASL interpreters. Ms. Husted is a former teacher of Student but is no longer employed either by the Sonoma County Office of Education or by the Fairfield-Suisun Unified School District, the agencies that have long shared responsibility for Student's education. Ms. Husted had not been listed as a witness in Parent's PHC Statement.

x. As the parties and the ALJ were aware, arranging for ASL interpreters (who work in pairs) can be difficult, time-consuming and expensive. In the previous hearing (OAH Case No. 2017051304), the matter was heard on August 15 and 16, 2018, but had to be continued to October 3, 2017, for the final day of hearing due to difficulties in securing the commitments of appropriately credentialed ASL interpreters. At the April 23, 2018 PHC in this matter, therefore, the due process hearing was continued until May 30 and 31 and June 5, 2018, to confirm ASL interpreters for the witnesses who needed them.

x. The April 23, 2018 PHC was memorialized in a written Order Following Prehearing Conference issued the same day. After announcing the continued dates for the due process hearing, the Order provided:

> The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing good cause to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

Another part of the Order Following PHC provided: "Each party is responsible for procuring the attendance at hearing of its own witnesses." Parent was familiar with these provisions in the Order Following PHC and the duties they imposed, having seen them in previous orders several times.

x. The April 23, 2018 PHC Order also confirmed a ruling made orally at the PHC concerning the provision of ASL interpreters for the witnesses who needed them. It provided: "The witness Katherine Reyes will require ASL interpreters and will testify on May 30, 2018. If the witness Tracy Husted testifies, she will be allowed to testify only on May 30, 2018, while the ASL interpreters are present." OAH subsequently contracted with a

third party vendor for the presence of a pair of ASL interpreters on May 30, 2018, the first day of hearing.

x. On April 25, 2018, Parent filed with OAH a request for several subpoenas, including a subpoena duces tecum for Ms. Husted that required from her both testimony and the production of a wide range of documents on May 30, 2018, the first day of the continued hearing. Parent did not request a subpoena for Ms. Simmons, whom she had described as her expert witness.

x. On May 4, 2018, an OAH Presiding Judge signed and issued the proposed subpoenas (including the subpoena for Ms. Husted), which were returned to Parent on May 8, 2018, by overnight delivery service, so that she could serve them. OAH issued the subpoenas and returned them for service by Parent pursuant to its standard procedure for issuing subpoenas, with which Parent was familiar, having utilized it on several previous occasions.

x. At 2:52 p.m. on May 29, 2018, the afternoon of the day before the hearing, OAH received from Parent a written request to continue the hearing on the ground that two of her witnesses were unavailable. The request for continuance was made on the following grounds:

> 1. My key witness Jennifer Simmons called this morning and is not available this week due to her having scheduled IEP's starting Wednesday, May 30, 2018, through Friday, June 1, 2018.
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> 2. My key witness Tracy Husted Subpoena Was Received from OAH Friday, May 25, 2018 due to the Holiday Monday May 28 2018 the estimated date that US Mail would be able to deliver to Ms. Husted would be 5/29 or 5/30.

x. Approximately one and one half hours after Parent's request for continuance was received, Presiding Administrative Law Judge Joy Redmon issued a written order denying it. Shortly before 4:34 p.m. on May 29, 2018, OAH Case Clerk Carla Caeser served that Order on Parent by U.S. Mail and also by email, using OAH's Secure e-File System, a method of service to which Parent had agreed on September 17, 2017 during a previous case, and through which she had routinely received and accepted service of OAH documents in this and earlier matters for several months.

x. On May 30, 2018, at 9:30 a.m., as scheduled in the April 23, 2018 Order Following PHC, the ALJ convened the due process hearing at its announced location, the Solano County Office of Education, 5100 Business Center Drive, Fairfield California 94534. Jan E. Tomsky, Attorney at Law, appeared for the Office of Education. The Office of Education was also represented by its Director, Marissa Huitt. Two witnesses – Katherine Reyes, the deaf-and-hard-of-hearing teacher, and Marianne Duncan, the Assistant Director of

the Office of Education – were present in compliance with the subpoenas for testimony Parent had previously served on them. Two ASL interpreters for whose services OAH had contracted were also present. The Office of Education distributed copies of many exhibits it intended to introduce, was prepared to defend against Parent's claim, and had obviously expended considerable time, expense, and resources in preparing to do so. However, Parent did not appear for the hearing and did not notify anyone that she did not intend to appear.

x. At approximately 9:45 a.m., the ALJ obtained Parent's cell phone number and reached her by telephone. Parent stated that she had not appeared because she did not know the outcome of her request for continuance. The ALJ informed her that the Presiding Judge had denied it the previous afternoon, and the Order denying it had been served on her before the close of business. The ALJ asked Parent whether she intended to appear, and Parent stated that she did not, because she did not have the two witnesses Simmons and Husted and also did not have undescribed documents. The ALJ informed her that the hearing would be terminated as a result of her nonappearance. The ALJ subsequently dismissed the matter with prejudice, on the record, for failure to prosecute it, and the hearing was adjourned shortly before 10:30 a.m.

APPLICABLE LAW AND DISCUSSION

State policy requires that plaintiffs prosecute actions with reasonable diligence, and authorizes dismissal if they do not. (Code Civ. Proc., §§ 583.130, 583.410, subd. (a)). The Individuals with Disabilities Education Act requires the completion of litigation with particular promptness. A party must request a hearing within two years of the date the party knew or should have known of the alleged wrongful action. (20 U.S.C. § 1415(f)(3)(C); Ed. Code, § 56505, subd. (l).) A hearing must be conducted and a decision rendered within 45 days after receipt of the due process complaint in the absence of a continuance, which may be granted only for good cause shown. (20 U.S.C. § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.510 (2006); Ed. Code, § 56502, subd. (f).) Congress and the Legislature unmistakably intended that special education matters be resolved speedily and with diligence.

No statute or regulation specifically governs the dismissal of special education due process matters with or without prejudice, but the Code of Civil Procedure contains useful analogies. Prior to trial, a plaintiff may dismiss his or her complaint, or any portion thereof, without prejudice. (Code Civ. Proc., § 581, subd.. (c).) After trial has begun, however, a court will dismiss a complaint, or any portion of it, with prejudice unless all parties consent to dismissal without prejudice or unless the court finds good cause for a dismissal without prejudice. (*Id.*, subd. (e).) This distinction is intended to protect litigants from having to endure more than once the effort and expense of preparing for trial and appearing ready to proceed.

In exercising its discretion to dismiss a matter with or without prejudice, OAH has generally allowed dismissal without prejudice before hearing but has required dismissal with prejudice once a hearing has begun. (See generally Student v. Poway Unified School District (OAH, March 12, 2013, No. 2012110589, Order of Dismissal, and cases cited.)

x. In this matter, Parent's conduct in failing to appear for the due process hearing she had demanded was entirely without justification. Her request for continuance, filed on the eve of hearing, was unpersuasive and not far from frivolous for a wide variety of reasons. Parent was required by the April 23, 2018 Order Following PHC to notify or subpoena her witnesses promptly upon receipt of the Order, which was issued that day. The request for continuance did not state when Parent had informed Ms. Simmons of the dates on which her testimony would be required. Ms. Simmons's proposed appearance was voluntary and did not require a subpoena. If Parent promptly notified Ms. Simmons of the dates on which she would be required to testify and Ms. Simmons nonetheless scheduled conflicting IEP team meetings and then waited until the day before the hearing to inform Parent of that fact, then neither Ms. Simmons nor Parent had acted with due diligence, and those facts did not constitute good cause for a continuance. If Ms. Simmons had scheduled conflicting obligations because Parent was dilatory in notifying her of the dates of the hearing, then Parent did not act with due diligence in obtaining the testimony of her witness. And Ms. Simmons's stated reason for being unavailable on May 30 through June 1, 2018, did not prevent her from testifying on June 5, 2018, which was also a scheduled hearing day.

x. OAH's records show that the subpoena for Ms. Husted, duly issued and ready for service, was sent to Parent by overnight delivery service on May 8, 2018. Parent's request for continuance did not explain how it could be that she did not receive it until Friday, May 25, 2018, which was too late to serve it in time for Ms. Husted's appearance on May 30, 2018, as required by the Order Following PHC. Nor did it explain why, if Parent had been without the required subpoena until two days before the hearing, she did not make any inquiry of OAH about its status or seek any relief from OAH earlier than she did.

x. Most importantly, Ms. Simmons and Ms. Husted were only two of Parent's 20 witnesses; Parent could have proceeded to present her other witnesses at the hearing on the scheduled days and made application at hearing for appropriate relief in the scheduling of the appearances of Ms. Simmons and Ms. Husted. No difficulty involving those two witnesses prevented Parent from proceeding to hearing as scheduled.

x. The facts recited above show that Parent was properly and timely served on the afternoon of May 29, 2018, with the order denying her request for continuance. In any event, it would not have mattered to this Order whether Parent was properly served with the order denying her request for continuance or not. As Parent knew, a party requesting a last-minute continuance of a hearing is expected to appear at the hearing if the request has not yet been ruled on, and to be prepared to proceed if the request is denied.

x. Parent's conduct in failing to appear at the hearing maximized the expenditure of time, money and other resources of everyone else involved in the proceeding, as she knew it would. She not only failed to appear; she failed to notify anyone that she would do so, and appeared content to leave everyone involved in the hearing waiting for her as long as they were willing to do so, including the opposing party, the witnesses she had subpoenaed, the ASL interpreters she had required, and the judge. Parent was aware that both the Office of

Education and OAH had invested considerable time and resources in organizing the hearing she requested, and was at minimum indifferent to the wasteful expenditure of those resources she caused by the unannounced, last-minute abandonment of her proceeding.

x. Given her history of litigation with the school district and the Office of Education, Parent is highly likely to refile her complaint, or something closely akin to it, and to cause all participants to bear the burden of preparation for litigation on the same issues again, unless prevented from doing so by a dismissal with prejudice. In these circumstances, the only wise exercise of discretion is to dismiss the proceeding with prejudice. The effective date of the order will be delayed for five business days in case Parent wishes to move for reconsideration of the decision to dismiss her complaint with prejudice.

ORDER

1. This matter is dismissed with prejudice, effective on June 7, 2018.

2. In the event Parent moves to reconsider this order, any factual assertion shall be supported by a declaration under penalty of perjury by a declarant with personal knowledge of the matters asserted and who could testify competently to such assertions.

DATE: May 31, 2018

DocuSigned by:
Charles Marson
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CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings