

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN MATEO-FOSTER CITY SCHOOL
DISTRICT.

OAH CASE NO. 2012050400

ORDER TO SHOW CAUSE WHY
STUDENT SHOULD NOT BE
ORDERED TO PAY EXPENSES

On January 14, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Rebecca Freie, Office of Administrative Hearings (OAH). The PHC was jointly scheduled by the parties at a mediation held in October 2012. Lenore Silverman, Attorney at Law, appeared on behalf of San Mateo-Foster City School District (District) for the PHC. Student's attorney, Susan Foley, did not appear.

OAH requires a party to file a PHC statement at least three business days prior to the PHC. The OAH record in this case shows that Student's attorney did not file a PHC statement with OAH for this PHC as previously ordered. On Thursday, January 10, 2013, OAH called Student's attorney's office and advised her that PHC statements were to have been filed no later than January 9, 2013. Friday, January 11, 2013, OAH called Student's attorney's office and left a message that the PHC would be going forward at 10:00 a.m. on January 14, 2013, notwithstanding the fact that Student had not filed a PHC statement.

On January 14, 2013, the ALJ attempted to contact Student's attorney for the PHC at 10:00 a.m., the time when the PHC was scheduled to begin, at 10:15 a.m., and at 10:30 a.m. Each telephone call was forwarded to voicemail, and messages were left advising Student's attorney that the PHC would be going forward at 10:30 a.m. whether or not she appeared.

Shortly before 10:00 a.m., the time when the PHC was scheduled to begin, Student's attorney sent a letter to OAH via facsimile requesting a continuance of the PHC and the due process hearing, and asking that OAH schedule a mediation session. The letter was not filed by OAH or discovered by the ALJ until 10:35 a.m. The attorney also stated that she would be unavailable at 10:00 a.m. for the PHC because she had a medical appointment.

APPLICABLE LAW

Under the Individuals with Disabilities Education Act (IDEA), 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.

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

When a party files a complaint pursuant to the IDEA, that party has a duty to prosecute the case which includes disclosing his/her witnesses and documentary exhibits and otherwise prepare for hearing by attending the mandatory prehearing conference. Student’s unilateral election to not file a PHC statement and participate in the PHC, and belated filing of a request for continuance, is disruptive of the OAH hearing process and resulted in OAH incurring costs for the ALJ’s preparation and conduct of the PHC without Student’s participation. This is not the first time Student’s attorney has failed to file a PHC statement prior to the PHC, and then requested a continuance by faxing a letter to OAH a few minutes before the time the PHC is to commence. Student’s attorney did so on December 12, 2012, in OAH Case No. 2012100922.

Student is ordered to show cause why Student’s counsel should not be required to pay OAH’s costs for failing to participate in the PHC on January 14, 2013. **Student is ordered to file a written response with OAH by no later than 5:00 p.m. on January 18, 2013,** by facsimile transmission to (916) 376-6319. A copy of the response shall be served upon the District by facsimile. The District is not expected to file a written response.

Student’s response shall address why his representative did not appear for the PHC on January 14, 2013. **Student’s written response shall address why OAH should not order Student to pay OAH’s expenses for the January 14, 2013, and for this order to show cause.**

The order to show cause hearing shall take place telephonically on January 23, 2013, at 11:00 a.m. Failure of Student’s representative to appear telephonically at the PHC on January 23, 2013, may result in additional sanctions.

Should Student fail, without excuse, to timely file a response as ordered above, or participate in the telephonic status conference, OAH may take further action, such as filing an order to show cause why the case should not be dismissed.

ORDER

1. An Order to Show Cause as to Why Student Should be Ordered to Pay Expenses is hereby issued. Student must file a response no later than 5:00 p.m. on Friday, January 18, 2013.
2. All dates in this matter shall remain as calendared, pursuant to the order following PHC which is being issued on this date.
3. A telephonic order to show cause hearing shall be convened at 11:00 a.m. on Wednesday, January 23, 2012.

IT IS SO ORDERED.

Dated: January 15, 2013

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings