BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. FRANKLIN-MCKINLEY SCHOOL DISTRICT.	OAH Case No. 2015091005 ORDER DISMISSING EXPEDITED PORTION OF CASE AND ORDER TO SHOW CAUSE FOR FAILURE TO APPEAR AND WHY STUDENT'S ATTORNEY AND DISTRICT'S ATTORNEY SHOULD NOT BE ORDERED TO PAY COSTS ASSOCIATED WITH THE PREHEARING CONFERENCE

On October 23, 2015, a telephonic prehearing conference was held before Administrative Law Judge Jamie Errecart, Office of Administrative Hearings. Frances Valdez, Attorney at Law, appeared on behalf of Franklin-McKinley School District. The PHC was recorded.

On October 22, 2015, Student filed a document requesting to vacate all dates in this matter because the expedited and non-expedited parts of the matter had settled and also requested that a trial setting conference be set. Attached to the letter were signature pages from a settlement agreement which had the signature of Parent, Student's attorney and the attorney for Franklin-McKinley. There was no signature by Franklin-McKinley. No order was issued regarding this request.

Attempting to convene the PHC, the ALJ made multiple attempts to contact Attorney Jennifer Whipple, Student's attorney. The initial call was placed at 10:00 a.m., the time originally set for the PHC, to the number listed on the Complaint. The line was picked up by a receptionist, but the receptionist was unable to connect the call to Ms. Whipple. The ALJ then located a different number for Ms. Whipple. The ALJ left a message for Ms. Whipple on that number. The ALJ then attempted to contact Deborah Ettinger, the Attorney identified on the Response to the Complaint dated October 5, 2015. Ms. Ettinger was out of the office due to a death in the family. ALJ Errecart continued the PHC to 1:00 p.m. The ALJ placed another unanswered call to Ms. Whipple to notify Ms. Whipple that the PHC was continued to 1:00 p.m.

At 1:00 p.m., the ALJ attempted to contact Ms. Whipple, and was connected directly with Ms. Whipple's voicemail. The ALJ left another message that notified Ms. Whipple that

the PHC was on calendar and would go forward. The ALJ also called the phone number listed on the pleading, and left another message with a receptionist. The ALJ then attempted to contact Ms. Ettinger. The ALJ was connected with Ms. Valdez, who appeared for Ms. Ettinger, on behalf of Franklin-McKinley. The ALJ asked Ms. Valdez whether she had any other number to contact Ms. Whipple. Ms. Valdez represented that she had no alternate number for Ms. Whipple.

The ALJ went on the record to begin the prehearing conference.

Order to Dismiss Expedited Issues in Complaint:

On October 22, 2015, Student notified OAH in writing that the parties reached a final settlement agreement in both the expedited and non-expedited portions of the case. Student requested that all current dates be vacated and the matter set for a trial setting conference on the earliest available after November 10, 2015. At the time of the scheduled PHC, Student's request was outstanding. All parties were still required to appear at the PHC, since the Parties did not receive notice that the dates were vacated. Moreover, Student improperly requested that all dates be vacated based on a settlement agreement that was not fully executed. OAH will only vacate dates and set a status conference when a fully executed settlement agreement requires school board approval. At the PHC, Student's request to vacate the dates set associated with the expedited portion of the complaint was denied.

An expedited due process hearing before OAH must occur within 20 school days of the date the expedited complaint is filed. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2) (2006).) The procedural right to an expedited due process hearing is mandatory and does not authorize OAH to make exceptions or grant continuances of expedited matters. (*Ibid.*) In sum, a matter can only be unexpedited or continued if no issue is alleged that is subject to an expedited hearing, or if the student withdraws the issues in the complaint that triggered the expedited hearing.[1]

Given the short time frames applicable to expedited matters, it is critical that parties follow orders issued by OAH so that matters are decided within statutorily prescribed time frames. Student did not diligently pursue this matter and did not appear at the PHC. Given Ms. Whipple's failure to adhere to OAH's Orders and the short time frame applicable to expedited hearings, Student's expedited issues set forth in the Complaint are dismissed.[2]

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[1] On October 9, 2015, OAH issued an Order that denied District's request to vacate the expedited hearing dates. The Order stated "[t]he expedited hearing shall proceed as scheduled pursuant to the September 25, 2015 Scheduling Order *unless Student expressly withdraws the expedited issues in writing*." (emphasis added.)

[2] This Order has no impact on the non-expedited portions of the case.

Order to Show Cause For Failure to Appear and Why Cost-Shifting Should Not Be Ordered

Student's attorney failed to appear at the originally set PHC as well as the continued PHC. Franklin-McKinley's attorney failed to appear at the originally scheduled PHC. The failures to appear are a direct violation of OAH's Order[3].

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).)

Student's attorney and Franklin-McKinley's attorney are ordered to show cause in writing no later than Wednesday, October 28, 2015, at 5:00 p.m., as to why each of them failed to appear at the originally scheduled PHC and why Student's attorney failed to appear as well at the rescheduled PHC. Both attorneys shall also address why they should not be required to pay OAH's costs associated with the PHC's. OAH will issue a written order.

The PHC for the unexpedited portion of the hearing will proceed as currently scheduled, unless a fully executed settlement agreement is provided to OAH with a request to dismiss the case, or a fully executed settlement agreement is provided to OAH with a request to set a status conference because the agreement is pending board approval and OAH grants such requests.

IT IS SO ORDERED.

DATE: October 26, 2015

/s/

JAMIE ERRECART
Administrative Law Judge
Office of Administrative Hearings

[3] Student's attorney, Ms. Whipple, also failed to appear for a prehearing conference on September 28, 2015, in OAH matter 2015080500.