

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CAPISTRANO UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2012020302

ORDER TO SHOW CAUSE WHY
SANCTIONS SHOULD NOT BE
IMPOSED AND PARTIES ORDERED
TO PAY EXPENSES

On February 8, 2012, Justin Shinnefield, attorney for the Capistrano Unified School District (District), filed a Request for Due Process Hearing against Parent on behalf of Student (Student). On February 10, 2012, the Office of Administrative Hearings (OAH) issued a scheduling order that set the matter for mediation on February 23, 2012, prehearing conference (PHC) on March 7, 2012, and due process hearing on March 12, 2012.

On February 14, 2012, Michelle Ortega, attorney at law, filed a notice of representation of Student. OAH requires a party to file a PHC statement at least three business days prior to the PHC. Neither party filed a timely PHC statement. District filed their PHC statement the day prior to the PHC on March 6, 2012, and Ms. Ortega filed her statement the morning of the PHC on March 7, 2012.¹

The morning of the PHC, District filed a preemptory challenge as to Administrative Law Judge (ALJ) Hohensee. The matter was re-assigned to the undersigned ALJ and the PHC was trailed to 2 p.m. on the afternoon of March 7, 2012. At the PHC, Mr. Shinnefield appeared on behalf of the District and Ms. Ortega appeared on behalf of the Student. After hearing oral argument, the ALJ denied Student's motion to consolidate. The hearing date of Monday, March 12, 2012, was confirmed, and the time for hearing was continued from 9:30 a.m. to 1:30 p.m. to accommodate the ALJ's flight arrangements. Parties agreed to add Tuesday, March 13, 2012, as an extra hearing day given the later start on Monday.

OAH served counsel with the Order following PHC on March 8, 2012, by mail and a courtesy copy by facsimile. The order confirms the hearing dates of March 12, 2012, at 1:30 p.m., and March 13, 2012, at 9 a.m. The order additionally informs parties that dates for hearing will not be cancelled until a letter of withdrawal or signature page of a signed agreement has been received by OAH. The order states that if an agreement in principle is

¹ OAH received Student's PHC statement afer close of business on March 6, 2012.

reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ.

On Friday March 9, 2012, shortly after noon, Ms. Ortega called OAH and informed staff that the hearing would not be going forward and the District's attorney would be sending a withdrawal that afternoon. At 12:59 p.m., OAH received a faxed request from Ms. Ortega to dismiss the case. She indicated in her request that, "an assessment plan has been signed and executed by Parent." She further indicated that the District's sole issue was the request for an order to assess the Student, and therefore, this issue is moot "with the signing of the assessment plan" by parent. Ms. Ortega requested that OAH vacate all dates in connection with the District's filing.

OAH staff called Mr. Shinnefield's office on Friday, March 9, 2012 at 1:52 p.m. to inquire as to the status of the case. Mr. Shinnefield's office informed OAH that counsel had not received the paperwork he needed to move to dismiss the case. On Friday, at approximately 2:30 p.m., Presiding Judge (PJ) Varma inquired directly of Mr. Shinnefield, following a telephonic conference in an unrelated matter, as to the status of this case. Mr. Shinnefield indicated he would follow up and call OAH if he received the paperwork he needed in order to request a dismissal. At 4:53 p.m., OAH staff again called Mr. Shinnefield who again confirmed he had not received the signed assessment plan and was not in a position to request dismissal of District's case. Mr. Shinnefield indicated he would call the afterhours settlement line should he be in a position to withdraw his case prior to hearing.

There were no calls concerning this matter on OAH's afterhours settlement line over the weekend. On Monday morning, March 12, 2012, at approximately 8:30 a.m., PJ Varma contacted Mr. Shinnefield's office and was forwarded to Mr. Shinnefield's mobile phone. Mr. Shinnefield informed PJ Varma that neither he nor District had received the signed assessment plan and therefore, they could not withdraw the matter. Later that same morning, OAH staff called Mr. Shinnefield's office. OAH was informed that Mr. Shinnefield had still not received the signed assessment plan and the hearing was going forward. OAH staff left messages with both parties that the hearing was trailed until 3:00 p.m. The hearing time was pushed back to accommodate air travel for the ALJ who delayed her flight to await word of a dismissal, given Ms. Ortega's representations in her Friday message and letter.

Neither Ms. Ortega nor Parent appeared at hearing. Mr. Shinnefield appeared with Dr. Bejarano, District representative. Mr. Shinnefield informed the ALJ on the record that he made multiple attempts to obtain the signed assessment plan from Ms. Ortega. Despite emails and calls to Ms. Ortega, Mr. Shinnefield did not hear until approximately 11:30 a.m. on March 12, 2012, from Ms. Ortega's assistant, that parent had not yet signed the assessment plan due to difficulties opening an email attachment. Mr. Shinnefield indicated he received the signed assessment plan by email transmission at 1:26 p.m. on the day of hearing. Mere receipt of the assessment plan did not resolve District's request for an order that parent make Student reasonably available for all assessments, as outlined in its PHC statement. District requested that the matter trail for a 60-day period and that OAH maintain

jurisdiction and calendar a status conference. This request was denied and at that time, approximately 3:15 p.m., District withdrew their request for hearing.

Of great concern is Ms. Ortega's representation to OAH on Friday, March 9, 2012, that the assessment plan was signed as of that date. Equally troubling is her apparent failure to return calls and emails from District and her failure to follow the PHC Order of March 7, 2012. From the afternoon of March 9 through the afternoon of March 12, 2012, Ms. Ortega had no evidence that District had either withdrawn its hearing request or that OAH had dismissed the matter. From Ms. Ortega's office's communication with Mr. Shinnefield in the late morning of March 12, 2012, the undersigned assumed that Ms. Ortega, or her staff, were aware of OAH's message that the hearing was going to commence at 3:00 p.m. that afternoon. This knowledge should have been an additional alert to Ms. Ortega that OAH had not dismissed the action. Pursuant to the March 7, 2012 PHC order, Ms. Ortega had a duty to appear at the hearing or to seek a continuance. As a result of Ms. Ortega's failure to timely obtain parent's signature on the assessment plan, District was unable to move to dismiss their case. The ALJ was compelled to fly from Sacramento to Orange County and then drive to San Juan Capistrano, over 800 miles round trip, incur costs, and expend time in preparation for the due process hearing. OAH was precluded from calendaring this ALJ to cover other matters.

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, after receipt of the District's 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 or timely informing OAH that a settlement has been reached or a continuance sought.

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).) "Where litigation ... becomes clearly warrantless in its maintenance, it is the obligation of counsel to take charge and terminate the matter. It is unacceptable in these times of limited access to courts and accelerating cost of litigation to permit the continuance of frivolous actions simply because of the intransigence of a client." (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 708.)

Counsel for Student is hereby ordered to show cause why Student or counsel for Student should not be ordered to pay OAH's expenses for the March 12, 2012 due

process hearing. Counsel for Student is ordered to file a written response with OAH, supported by a signed declaration under penalty of perjury, no later than 5:00p.m. Monday, March 26, 2012, by facsimile transmission to (916) 376-6319. Counsel shall serve a copy of the response and declaration upon Mr. Shinnefield by facsimile. Counsel's written response and declaration shall address why OAH should not order Student or Student's counsel to pay OAH's expenses for the March 12, 20012, due process hearing. Any reply to the pleading shall be filed by 5:00 p.m. on Wednesday, March 28, 2012. **Ms. Ortega shall, at minimum, address why she did not appear for hearing on March 12, 2012, and when she received a signed assessment plan from her client.**

A telephonic status conference shall take place at 1:30 p.m. on Friday, March 30, 2012. OAH shall initiate the telephone call to the parties. Student shall be prepared to address why Student or Student's counsel should not be held to bear the costs incurred by OAH.

Due to Student and Student's counsel's delay tactics or bad faith actions, OAH staff and hearing personnel expended time and costs in preparation for and travel to preside at the due process hearing in this case, wherein Student or his representative failed to appear and District moved to withdraw its case, which supports a possible award of sanctions and costs. For these reasons, Student is ordered to show cause why sanctions and costs should not be imposed for the failure to timely secure the parent's signature on the assessment plan and provide this to District, failure to timely request a continuance of the matter to obtain the signed assessment plan, and any failures to comply the PHC Order issued on March 7, 2012.

ORDER

1. An Order to Show Cause as to Why the Student Should Not be Ordered to Pay Expenses is hereby issued. Student's Counsel must file a response along with a declaration under penalty of perjury no later than 5:00 p.m. on Monday, March 26, 2012.
2. A telephonic status conference is set for 1:30 p.m. on Friday, March 30, 2012.
3. Both counsel for District and Student shall be available and participate in a telephonic status conference on Friday, March 30, 2012, at 1:30 p.m.

Dated: March 16, 2012

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings