

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SANTA BARBARA UNIFIED SCHOOL  
DISTRICT AND SANTA BARBARA  
COUNTY OFFICE OF EDUCATION.

OAH CASE NO. 2012031007

ORDER VACATING STATUS  
CONFERENCE FOR ORDER TO  
SHOW CAUSE WHY CASE SHOULD  
NOT BE DISMISSED AND STUDENT  
ORDERED TO PAY EXPENSES

On March 23, 2012, Student filed a request for due process hearing (complaint). On March 27, 2012, the Office of Administrative Hearings (OAH) issued a scheduling order which set a prehearing conference (PHC) at 1:30 a.m. on May 7, 2012, and a due process hearing to commence on May 17, 2012. All parties filed PHC statements several days before the PHC. Student's attorney, Andrea Marcus faxed two additional PHC statements to OAH on May 7, 2012, one just before noon and another at 1:31 p.m.

OAH assigned Administrative Law Judge (ALJ) Rebecca Freie to the PHC and due process hearing on or about Friday, May 4, 2012. At 11:30 a.m. On May 7, 2012, Melissa Hatch, attorney for the Santa Barbara County Office of Education (County), filed a letter in which she disclosed that she and ALJ Freie were professionally acquainted and requested another ALJ be assigned to this case. Ms. Marcus received a copy of Ms. Hatch's letter.

Due to OAH's operational needs, the PHC on May 7, 2012 was trailed to 3:30 p.m. The OAH clerk assigned to this matter called the parties and informed them of the delay. At 3:28 p.m. ALJ Freie called Ms. Marcus's number. Her receptionist said she was not in, and would not give ALJ Freie another number where she could be reached. She told ALJ Freie that Ms. Marcus had left the office when she did not receive a telephone call to convene the PHC at 1:30 p.m. The receptionist claimed that the office had not received a telephone message from OAH. ALJ Freie confirmed with the OAH clerk that when he called Ms. Marcus shortly after 1:30 p.m. he received her office's voicemail/answering machine, and left the message concerning the PHC time change. He telephoned Ms. Marcus before 1:45 p.m. Ms. Marcus never telephoned OAH after 1:30 p.m. to ask why the PHC had not been convened.

ALJ Freie called Ms. Marcus's office at approximately 3:40 p.m. and told her receptionist that she needed to contact Ms. Marcus and tell her that if she was not available for the PHC at 4:00 p.m. it would proceed without her, and OAH would file an order to show

cause for Ms. Marcus' failure to appear. ALJ Freie told the receptionist that she would call back at 3:50 to get Ms. Marcus's telephone number where she could be reached. At 3:53 p.m., ALJ Freie contacted Ms. Marcus's office again and was told by the receptionist that she had left a message for Ms. Marcus, but Ms. Marcus had not returned the call.

At 4:00 p.m., the PHC commenced with the County and the Santa Barbara Unified School District. Ms. Hatch exercised a preemptory challenge requesting another ALJ be assigned to this case. The PHC was continued to 1:30 p.m. on May 9, 2012, to be presided over by another ALJ. On May 8, 2012, OAH issued Student an order to show cause why Student's case should not be dismissed and Student ordered to pay expenses for failing to appear at the PHC on May 7, 2012.

On May 11, 2011, Student timely filed a response to OAH's order to show cause. Student's response included a signed declaration from Ms. Marcus stating that on May 7, 2012, she was in her office and available for the PHC at 1:30 p.m. and did not receive the notification from OAH that the PHC would be trailed until 3:30 p.m. Ms. Marcus stated that she checked her phone for messages from OAH and finding none, waited by her phone until 2:45 p.m. Ms. Marcus then left her office to take a computer to the repair shop, assuming the PHC would be rescheduled. Ms. Marcus was aware of Ms. Hatch's earlier request that OAH assign another ALJ to this case. At 3:40 p.m., Ms. Marcus received a call on her cell phone from her paralegal informing her of ALJ Freie's attempts to contact her for the PHC. Ms. Marcus directed her paralegal to give ALJ Freie her cell phone number with an explanation that telephone reception was poor, why she was out of her office, and that it would take her an hour to return to her office. Ms. Marcus stated that she has terminated her paralegal's employment due to reasons unrelated to this case, but including the miscommunications with ALJ Freie on May 7, 2012.

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."].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

OAH is satisfied with Ms. Marcus' explanation regarding the circumstances surrounding her failure to participate in the PHC on May 7, 2012. The telephonic status conference and PHC scheduled for 3:00 p.m. on Monday, May 14, 2012, is hereby vacated.

Student's response to the order to show cause also included an amended complaint. OAH will address the amended complaint in a separate order.

IT IS SO ORDERED.

Dated: May 14, 2012

/s/

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TROY K. TAIRA  
Administrative Law Judge  
Office of Administrative Hearings