

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 TO SHOW CAUSE WHY
CASE SHOULD NOT BE DISMISSED
AND STUDENT ORDERED TO PAY
EXPENSES

Student filed his request for due process hearing (complaint) with the Office of Administrative Hearings (OAH) on March 23, 2012. On March 27, 2012, 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. There appears to be no discernable difference in any of the PHC statements filed by Student, other than the addition of the words, "First Amended" to the caption on the last PHC statement faxed to OAH.

OAH assigned 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 (SBCOE), filed a letter in which she disclosed that she and the undersigned were professionally acquainted, and had recently had communication concerning a personal matter. Ms. Hatch indicated that Ms. Marcus and the District's attorney had been sent copies of the letter. The undersigned had intended to inform the parties of this at the PHC.

Due to OAH's operational needs, the PHC in this matter was trailed to 3:30 p.m. The OAH clerk assigned to this matter to called the parties and informed them know of the delay in the start time for the PHC. 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. 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 he received her office's voicemail/answering machine, and left the message concerning the PHC time change. He telephoned Ms. Marcus before 1:45. Ms. Marcus never telephoned OAH after 1:30 to ask why the PHC had not been convened.

ALJ Freie called back Ms. Marcus's office at approximately 3:40 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 it would proceed without her, and OAH would file an OSC re sanctions against Ms. Marcus. 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 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, the PHC commenced with Ms. Hatch and Ms. Kellogg. The PHC was recorded. ALJ Freie explained the absence of Ms. Marcus, and then proceeded to explain that even before receiving Ms. Hatch's letter she had intended to disclose her professional relationship and recent contact with Ms. Hatch, but she felt it would not affect her ability to fairly judge the matter. She then asked if either party wished to exercise a preemptory challenge, and Ms. Hatch did so. The PHC was then concluded so that Ms. Hatch could file her written preemptory challenge which was granted, and the PHC was continued to 1:30 a.m. on May 9, 2012, to be presided over by another ALJ.

ORDER TO SHOW CAUSE

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.

Student is ordered to show cause why the matter should not be dismissed or Student's counsel required to pay OAH's costs for failing to participate in the PHC on May 7, 2012. **Student is ordered to file a written response with OAH by no later than 5:00 p.m. on May 11, 2012,** by facsimile transmission to (916) 376-6319. A copy of the response shall be served upon the other parties by facsimile. Student's response shall address why his representative did not appear for the PHC on May 7, 2011. Failure of the representative to appear telephonically at the PHC on May 9, 2012, may result in additional sanctions including the dismissal of Student's case. Other parties are not expected to file a written response.

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).) **Student's written response**

shall address why OAH should not order Student to pay OAH's expenses for the May 7, 2012 PHC, and this order to show cause.

A telephonic status conference and PHC shall take place at 3:00 p.m. on Monday, May 14, 2012. OAH shall initiate the telephone call to the parties. The parties shall be prepared to discuss the status of the case and whether Student's complaint should be dismissed. If the other parties do not wish to participate in this status conference, they may notify OAH and shall be excused from participation. All currently set dates for the PHC and due process hearing shall remain on calendar. **Should Student fail, without excuse, to timely file a response as ordered above, or participate in the telephonic status conference, OAH may dismiss this case without further notice.**

ORDER

1. An Order to Show Cause as to Why Case Should not be Dismissed and Student Ordered to Pay Expenses is hereby issued. Student must file a response no later than 5:00 p.m. on May 11, 2012.
2. All dates in this matter shall remain as calendared.
3. A telephonic status conference shall be convened at 3:00 p.m. on Monday, May 14, 2012.

IT IS SO ORDERED.

Dated: May 8, 2012

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings