

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

REDWOOD CITY ELEMENTARY
SCHOOL DISTRICT.

OAH CASE NO. 2012051055

ORDER DENYING MOTION TO
DISMISS

On May 24, 2012, Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH) naming Redwood City Elementary School District as respondent.

On September 6, 2012, Student's former counsel, Mr. Zatopa, sent OAH a withdrawal of Student's complaint, and OAH dismissed Student's complaint the same day.

On September 11, 2012, Parents sent OAH a letter, which was not served on District, stating that Parents were obtaining new counsel, and advising OAH that Student's complaint had been withdrawn without Parents' knowledge or permission. OAH issued an order resetting the prehearing conference and hearing dates the next morning, September 12, 2012.

On September 27, 2012, District filed a motion to dismiss Student's complaint with prejudice, contending that there is a signed settlement agreement between the parties. District also seeks sanctions against Parents for repudiating their agreement in an attempt to gain unfair advantage.

Motion to Dismiss and for Sanctions

District contends that Parents improperly communicated with OAH without notice to District, in violation of the prohibition in the Administrative Procedures Act (APA) against ex parte communications. District argues that the order resetting hearing dates should therefore be vacated. District also asserts that once the dismissal was filed, OAH lacked jurisdiction to issue a scheduling order. Lastly, District argues that Student's complaint should be dismissed with prejudice because there is a written settlement agreement between the parties. District also seeks sanctions against Parents for repudiating their agreement in an attempt to gain unfair advantage.

In support of its motion, District submits four of five pages of the altered settlement agreement with only the signatures of Parents (Ex. A), the withdrawal letter by Mr. Zatopa (Ex. B), the dismissal order by OAH (Ex. C), and an email exchange between Mr. Zatopa

and District's counsel, Claire Cunningham, dated September 5 through September 7, 2012, in which the District's counsel emphatically rejects the altered settlement document, stating "[t]his is NOT the language we agreed to....I trust you will immediately circulate the version we actually agreed to...." (Emphasis in original.) (Ex. D). District also submits the declaration of Ms. Cunningham stating that she spent eight hours drafting District's motion.

Analysis

District's own exhibits to its motion establish that there was no signed settlement at the time Student's former counsel, Mr. Zatopa, filed the withdrawal. Rather, as detailed in the email exchange between Mr. Zatopa and District counsel Claire Cunningham, Parents altered District's proposed agreement without Mr. Zatopa's knowledge, and it was forwarded to District, and the withdrawal filed, before Parents' alteration was discovered

The evidence submitted by District supports a finding that the withdrawal of Student's complaint was filed in error without Parents' permission. An attorney's retention does not authorize him to impair his clients' substantial rights without the clients' knowledge. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404.) Parents promptly notified OAH of the filing error, and the dismissal was properly set aside and the matter rescheduled for a prehearing conference and hearing.

Contrary to District's assertion, the OAH retained jurisdiction to set aside a voluntary dismissal entered as the result of error (see *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 254.), and to issue the subsequent scheduling order.

As to District's motion to dismiss on the grounds that a fully executed written settlement agreement between the parties exists, District's evidence of the agreement consists of (i) a partial copy of the purported agreement, that (ii) lacks all signatures required, and that, (iii) is contradicted by emails submitted by District expressly rejecting the proffered altered agreement. District's showing falls far short of establishing that there is a settlement agreement between the parties. If, and to the extent District continues to contend that this matter has been settled by a fully executed written settlement agreement, it may raise that defense at hearing.

District's motion for sanctions against Parent for repudiating their agreement is denied. District fails to submit evidence that there was an agreement between the parties, let alone that it was repudiated in bad faith. In addition, Ms. Cunningham's declaration lacks a reference to the hourly fee charged District, or information to establish that the rate is reasonable, and is insufficient to support District's request for monetary sanctions.

ORDER

1. District's motion to dismiss Student's complaint is denied.
2. All dates set for mediation, prehearing conference and hearing in this matter are confirmed.

Dated: October 08, 2012

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings