BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019081120

ORDER TO SHOW CAUSE AS TO WHY STUDENT'S ATTORNEY SHOULD NOT BE ORDERED TO PAY COSTS FOR FAILING TO APPEAR FOR PREHEARING CONFERENCE, AND/OR WHY THE COMPLAINT SHOULD NOT BE DISMISSED, AND CONTINUING PREHEARING CONFERENCE

On December 2, 2019, a telephonic prehearing conference was scheduled before Administrative Law Judge Cynthia Fritz, Office of Administrative Hearings, known as OAH. The hearing was scheduled for 1:00 p.m. The undersigned ALJ attempted to convene the prehearing conference at 1:00 pm. Rachael Tillman, Attorney at Law, appeared on behalf of San Ramon Valley Unified School District. Two attempts were made to contact Ms. Foley, at the telephone number shown on the request for due process hearing filed on Student's behalf. However, there was no answer, and two messages were left, approximately ten minutes apart.

APPLICABLE LAW

If the parent and local education agency have not resolved the due process complaint within 30 days of the receipt of the complaint, OAH is required to issue a decision within the next 45 days, unless a continuance is granted for good cause. (20 U.S.C. § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.51; Ed. Code, § 56502, subd. (f).)

An ALJ presiding over a hearing may "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Gov. Code, § 11455.30, subd. (a); Cal. Code. Regs., tit. 5, § 3088, subd. (a).) An order to pay expenses is enforceable in the same manner as a money judgment or by seeking a contempt of court order. (Gov. Code, § 11455.30, subd. (b).)

"Actions or tactics" is defined as including, but not limited to, making or opposing motions or filing and serving a complaint. (Gov. Code, §11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(1).) "Frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party. (Gov. Code, § 11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(2).) "Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit [citations]." (*Levy v. Blum* (2001) 92 Cal.App.4th 625, 635.) In addition, there must be a showing of improper purpose. (*Ibid.*) A finding of "bad faith" does not require a determination of evil motive. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

DISCUSSION

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 resolution. Student's counsel's non-compliance with procedure and failure to participate put the timely resolution of this matter in doubt. As the attorney of record, Ms. Foley is responsible for understanding and following OAH's procedures, including making all required appearances. Failure to do so may result in the complaint being dismissed.

Ms. Foley is ordered to file a declaration with OAH no later than 5:00 p.m. on December 5, 2019, explaining her failure to appear at the prehearing conference on December 2, 2019, and why she should not be ordered to pay costs incurred by San Ramon and the Office of Administrative Hearings as a result of her failure to appear at the prehearing conference.

Failure of Ms. Foley to submit a declaration may result in a dismissal of this matter and other consequences, up to and including the shifting of costs. San Ramon may respond to the OSC by noon on Friday, December 6, 2019, but is not required to respond.

As a result of the delay caused by the failure to appear, this matter is continued. The prehearing conference is continued to December 9, 2019, at 3 PM.

The current due process hearing dates are continued to December 17, 2019, at 9:30 AM, and December 18, and 19, 2019, at 9:00 AM, and continuing day to day, as needed at the discretion of the Administrative Law Judge.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing "good cause" to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

IT IS SO ORDERED.

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Cynthia Fritz
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DATED: December 3, 2019

Cynthia Fritz
Administrative Law Judge
Office of Administrative Hearings