BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

CUPERTINO UNION SCHOOL DISTRICT.

OAH CASE NUMBER 2019060968

ORDER VACATING HEARING DATES, DENYING MOTION TO CONTINUE, AND ORDERING STUDENT TO SHOW CAUSE WHY STUDENT'S ATTORNEY SHOULD NOT BE ORDERED TO PAY COSTS FOR FAILING TO APPEAR AT THE PREHEARING CONFERENCE, AND WHY STUDENT'S COMPLAINT SHOULD NOT BE DISMISSED.

ORDER TO SHOW CAUSE

On August 5, 2019, a telephonic prehearing conference was scheduled for 1:00 PM, before Administrative Law Judge, Cynthia Fritz, Office of Administrative Hearings, called OAH.

The undersigned administrative law judge attempted to convene the prehearing conference at 1:00 PM. Eliza McArthur, Attorney at Law, appeared on behalf of Cupertino Union School District. Two attempts were made to contact Student's attorney, Ms. Susan 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. Ms. McArthur provided an alternate phone number for Ms. Foley which was also called twice, with no answer, and a message left.

Prior to the commencement of the prehearing conference, on August 2, 2019, the parties jointly filed a request to continue the prehearing conference and due process hearing dates in order to mediate the case. At the time of the scheduled prehearing conference, a ruling had not yet been made on the motion to continue.

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 administrative law judge 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 in the PHC 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. If a party files a request for a continuance with OAH, but has not received an order from OAH granting the continuance, the party must assume that the matter will proceed as scheduled and be prepared to participate.

Ms. Foley is ordered to file a declaration with OAH no later than 3:00 PM on August 12, 2019, explaining her failure to appear at the prehearing conference on August 5, 2019, and why she should not be ordered to pay costs incurred by Cupertino and OAH as a result of her failure to appear at the prehearing conference. Failure of Ms. Foley to submit a declaration a may result in a dismissal of this matter and other consequences, up to and including the shifting of costs.

All prehearing conference and due process hearing dates are vacated and will be determined after August 12, 2019.

JOINT MOTION FOR CONTINUANCE

August 2, 2019, the parties jointly filed with OAH a request to continue the prehearing conference and due process hearing dates, in order to mediate the case. This is the first continuance request in this matter.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (Ed. Code, § 56505, subd. (f)(3); Cal. Rules of Court, rule 3.1332(c).)

OAH considers all relevant facts and circumstances in ruling on a request for continuance, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance or imposing conditions on the continuance; and any other relevant fact or circumstance. (Cal. Rules of Court, rule 3.1332(d).)

OAH has reviewed the request for good cause and considered all relevant facts and circumstances. The request is denied. Any prehearing motion needs to be filed three business days before the prehearing conference, absent good cause. Here, the parties filed the motion for continuance on August 2, 2019, one business day before the prehearing conference, and failed to establish good cause in its motion as to why it was untimely filed. Because the scheduled prehearing conference was not convened, no evidence was presented to establish good cause at that time. Thus, the motion to continue the matter is denied without prejudice.

ORDER

1. Student's attorney shall file a declaration under penalty of perjury explaining her failure to appear at the prehearing conference on August 5, 2019, and why costs should not be shifted, and/or the case dismissed, no later than August 12, 2019, at 3:00 PM.
2. The prehearing conference and due process hearing dates are vacated.
3. The parties' motion to continue the matter is denied without prejudice.

DATED: August 6, 2019

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Cynthia Fritz
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Cynthia Fritz
Administrative Law Judge
Office of Administrative Hearings