BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. NEWARK UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016100243 ORDER WITHDRAWING ORDER TO SHOW CAUSE; DENYING MOTION TO DISMISS; AND DENYING MOTION FOR SANCTIONS

On February 13, 2017, a telephonic hearing was held before Administrative Law Judge B. Andrea Miles, Office of Administrative Hearings, to address the order show cause as to why this matter should not be dismissed; Newark's motion to dismiss; and Newark's motion for monetary sanctions. Martha Millar, Attorney at Law, appeared on behalf of the Student. Jennifer Baldassari, Attorney at Law, appeared on behalf of Newark Unified School District. The hearing was recorded.

FACTUAL FINDINGS

In this matter, a PHC was scheduled for February 3, 2017. On February 2, 2017, Ms. Millar contacted OAH by telephone and indicated that Parent would be appearing at the PHC, because Ms. Millar had another PHC scheduled at the same time as the one in this case. Presiding Administrative Law Judge Margret Broussard contacted Ms. Millar and left a voice mail message stating that as the attorney of record, Ms. Millar was expected to appear at the PHC. Additionally, PALJ Broussard informed Ms. Millar that if is she was unavailable for the PHC due to a scheduling conflict, Ms. Millar needed to work with opposing counsel to request a continuance of the PHC. During the hearing, Ms. Millar indicated that she had not received PALJ Broussard's message.

At the time of the scheduled February 3, 2017 PHC, the undersigned attempted unsuccessfully to reach Ms. Millar by telephone several times. Newark's counsel informed the undersigned that she had been attempting to work with Ms. Millar on submitting a joint request to continue the PHC because the parties had reached an agreement and she was in the middle of writing the settlement agreement. However, Newark's counsel indicated she had been unable to submit the written request prior to the PHC because she had only received the email from Ms. Millar confirming her agreement to continue the PHC, a short time earlier. Based on counsel's representations, the PHC was trailed a brief period to allow the parties to submit their joint request for continuance of the PHC. Once, the written joint request to continue was received, the parties were informed telephonically by OAH that their request to

continue the PHC was granted, and that the PHC would be held on February 10, 2017, at 10:00 a.m. and hearing dates would remain as set.

On February 10, 2017, a telephonic prehearing conference was held before Administrative Law Judge B. Andrea Miles, Office of Administrative Hearings. Jennifer Baldassari, Attorney at Law, appeared on behalf of Newark Unified School District. At the start time of the PHC on February 10, 2017, the undersigned was unable to reach Ms. Millar by telephone and multiple voice mail messages were left for Ms. Millar. The PHC was trailed two times to allow Ms. Millar an opportunity to appear. At 10:45 a.m., a voice mail message was left for Ms. Millar indicating that due to her failure to appear at the PHC, an Order to Show Cause Hearing would be held on Monday, February 13, 2017. The due process hearing in this matter was scheduled to begin on February 14, 2017.

During the PHC, Newark's counsel made an oral motion to dismiss the matter for a lack of prosecution and a motion for monetary sanctions due to Ms. Millar's failure to appear at both scheduled PHC's. Additionally, Newark requested a brief continuance in this matter due to the absence of Student's counsel at the PHC; the scheduled hearing for the Order to Show Cause, Motion to Dismiss, and Motion for Sanctions that are scheduled for February 13, 2017; and because the parties are still in the process of resolving the case. Newark's motion to continue the due process hearing was granted. On February 10, 2017, Newark filed a written Motion for Sanctions. On February 13, 2017, Ms. Millar filed her response and amended response to Newark's motions.

During the hearing, Ms. Millar indicated that she had forgotten the February 10, 2017 PHC because she was occupied with the matters of another client, who was extremely distraught. At the time of the PHC, she involved in telephone call discussing the aforementioned client's concerns. She explained that she failed to appear at the February 3, 2017 because she was appearing in another PHC at that time. Further, she explained that she had been unclear on procedures for requesting a continuance for the PHC on February 3, 2017, and that she did not realize that Parent could not appear in her stead.

LEGAL CONCLUSIONS

Order to Show Cause and Motion to Dismiss

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).)

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. Millar is responsible for understanding and following OAH's procedures, including making all required appearances.

However, there is no evidence that Ms. Millar lacked the intent to prosecute the due process complaint that she filed with OAH despite her negligent behavior. Accordingly, the order to show cause is vacated and Newark's motion to dismiss is denied. All pending dates remain on calendar.

Newark's Motion for Monetary Sanctions

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.)

Ms. Millar's failure to appear at both PHC's resulted in a delay of the resolution of this matter and unnecessary legal expense for Newark. However, Ms. Millar's failures to appear were not the result of bad faith actions or tactic that were frivolous or solely intended to cause unnecessary delay. Instead, at this time,she has shown that her failures to appear to be the result of negligence. This is not to say that negligence is an appropriate excuse for her poor conduct, but at this time it does not satisfy the intent requirement of Government Code section 11455.30 and California Code of Regulations, title 5, section 3088. Therefore, Newark's motion for monetary sanctions is denied. However, Ms. Millar is hereby on notice that if such conduct occurs again, OAH may entertain imposing sanctions against her.

IT IS SO ORDERED.

DATE: February 16, 2017

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B. Andrea Miles
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B. ANDREA MILES
Administrative Law Judge
Office of Administrative Hearings