BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2019041024
v.	ORDER TO SHOW CAUSE AS TO WHY STUDENT'S EXPEDITED CASE SHOULD NOT BE DISMISSED FOR FAILURE TO PROSECUTE AND COSTS SHIFTED
GILROY UNIFIED SCHOOL DISTRICT.	

On April 23, 2019, Student filed a case raising both expedited and non-expedited issues. On April 24, 2019, a scheduling order was issued scheduling the prehearing conference for the expedited issues for May 13, 2019, at 10:00 a.m. On May 8, 2019, Student's counsel informed OAH settlement pending board approval was obtained in this matter. OAH vacated the non-expedited dates on May 9, 2019. The same day, OAH's case manager left Student's counsel a voice mail regarding the expedited case dates remaining on calendar pending a dismissal from Student. Alternatively, the matter would proceed as scheduled as expedited hearing dates cannot be vacated pending board approval.

No dismissal of the expedited issues was received. On May 13, 2019, the undersigned ALJ contacted convened the prehearing conference by calling Student's attorney at their telephone number on file with OAH at the appointed time of the prehearing conference. The undersigned left a message information Student's counsel she would make one more attempt to contact Student's counsel to convene the PHC. A second attempt to Student counsel's business line was made and a voice mail left; the undersigned also left a message on counsel's mobile line. Gilroy Unified School District's counsel was available at the appointed time.

In certain circumstances, an ALJ 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 v. Manhattan Beach Unified Sch. Dist*. (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly [Cal. Code Regs., tit. 5] § 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).)

With prior approval from the General Counsel of the California Department of Education, an ALJ may "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel" to OAH as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. (Cal. Code. Regs., tit. 5, § 3088, subds. (a) & (e); see Gov. Cod 11455.30, subd. (a).)

Without first obtaining approval from the California Department of Education, an ALJ 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).) A finding of "bad faith" does not require a determination of evil motive, and subjective bad faith may be inferred. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

Here, Student's counsel was informed the week prior that the notice of withdrawal was insufficient to dismiss the expedited due process hearing dates. Student's counsel made no effort to remedy the deficiency prior to the scheduled prehearing conference. At the appointed time of the prehearing conference, Student's counsel was unreachable at two different numbers. When contacted by OAH, Gilroy's counsel was reachable and ready to proceed.

By noon on Wednesday, Student's counsel is ordered to provide a written explanation to OAH as to why his case should not be dismissed for failure to prosecute and why OAH's cost should not be shifted to Student. Gilroy may file a response if desired, but no response is required.

The prehearing conference scheduled for 10 AM on Monday, May 13, 2019 is rescheduled to Friday, May 17, 2019 at 1 PM. Due process hearing dates on the expedited issues remains calendared.

IT IS SO ORDERED.

DATE: May 13, 2019

DocuSigned by:
Tiffany Gilmartin
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TIFFANY GILMARTIN
Administrative Law Judge
Office of Administrative Hearings