BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2019041024
v.	ORDER DISMISSING STUDENT'S EXPEDITED DUE PROCESS MATTER FOR FAILURE TO PROSECUTE
GILROY UNIFIED SCHOOL DISTRICT.	

Student filed for due process on April 23, 2019. Student's request for due process explicitly requested expedited and non-expedited hearings. As the complaint raised both types of issues, the Office of Administrative Hearings issued a scheduling order setting both expedited and non-expedited hearing dates. The scheduling order noted an expedited hearing would occur within twenty school days from the date of the due process request and no continuances would be granted except in exceptional circumstances. On May 9, 2019, Student submitted a request to dismiss without prejudice Student's due process complaint pending board approval. The same day, OAH issued a dismissal for the non-expedited issue and Student's case manager left a voice mail for Student's counsel about the expedited issues.

Student's counsel failed to appear for the prehearing conference scheduled for May 13, 2019. That same day, the undersigned issued an order to show cause directing Student's counsel to address why his expedited due process case should not be dismissed for failure to prosecute and why OAH's costs should not be shifted to him after counsel failed to appear at the scheduled prehearing conference. Student's counsel responded on May 15, 2019. Student averred blame on OAH's case managers who failed to receive his dismissal. For evidence, Student submitted screen shots of Student's request to dismiss the non-expedited case pending board approval. Gilroy was permitted to respond if necessary, but not required and elected to not respond.

The parent of a student with a disability who disagrees with either a school's decision to change the student's educational placement as a disciplinary measure, or the manifestation determination may appeal by requesting a due process hearing. (20 U.S.C. § 1415(k)(3)(A)). An expedited hearing shall be held within 20 school days of the date the hearing is requested. A decision shall be made by the hearing officer within 10 school days thereafter. (20 U.S.C. § 1415(k)(4)(B).)

Student pled an expedited issue. The law requires, without exception, that expedited hearings commence within 20 school days of the hearing request. Accordingly, expedited issues are not subject to dismissal pending school board approval. Student's request to

dismiss his case pending board approval was granted as to the non-expedited issues only. OAH's case manager alerted Student's counsel to this procedural defect. Student's counsel had an opportunity to remedy their deficient case dismissal by notifying OAH of the board decision on May 9, 2019 and withdrawing both expedited and non-expedited issues. Counsel, again, had an opportunity to remedy the deficiency at the PHC on May 13, 2019, but failed to appear. Student's counsel further had an opportunity to remedy his deficiencies by withdrawing the issues as part of his response to the order to show cause; however, despite numerous opportunities to address the deficiency Student's counsel failed. It appears Student's counsel's failure to follow the proper procedure for dismissing expedited issues was not ill-intentioned. Accordingly, the expedited issues are dismissed without prejudice for failure to prosecute. Counsel is advised, however, that failing to appear at a prehearing conference can result in a matter being dismissed with prejudice.

COST SHIFTING

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).)

"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, there is no evidence of frivolous or bad faith tactics on behalf of Student's counsel. There is evidence Student's counsel fundamentally misunderstands the difference between an expedited and non-expedited issues and the timelines associated with each prayer for relief. Despite Student's counsel's lack of understanding, there is no evidence that Student engaged in frivolous or bad faith tactics. As a consequence, Student's expedited case will be dismissed without prejudice for his failure to prosecute but costs will not be shifted in this instance.

ORDER

Student's expedited due process issue will be dismissed without prejudice. All dates will be vacated.

IT IS SO ORDERED.

DATE: May 17, 2019

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