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

AMENDED ORDER SHIFTING EXPENSES TO STUDENT'S ATTORNEY FOR FAILURE TO APPEAR AT PREHEARING CONFERENCE

On August 28, 2019, Student filed a request for due process hearing naming San Ramon Valley Unified School District.

On December 2, 2019, Student's attorney, Susan Foley, failed to appear at the scheduled prehearing conference, called PHC.

On December 3, 2019, the undersigned administrative law judge, also known as the ALJ, ordered Student's attorney to show cause as to why she should not be ordered to pay costs for failing to appear for the PHC or why the complaint should not be dismissed. Additionally, Student's counsel was ordered to file a declaration to the order to show cause no later than December 5, 2019.

On December 5, 2019, Student's attorney filed a declaration explaining that she failed to appear at the PHC due to a calendaring error.

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, the Office of Administrative Hearings, known as 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).)

A failure to appear may result in dismissal of a complaint. Additionally, in certain circumstances, an ALJ, presiding over a special education proceeding is authorized to shift expenses from one party to another, or to the Office of Administrative Hearings. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; see *Wyner ex rel. Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly, [California Code of Regulations] § 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).)

Expenses may be ordered to be reimbursed either to OAH or to another party. With approval from the General Counsel of the California Department of Education, the ALJ presiding over the hearing 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 the entity that is responsible for conducting due process hearings) 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. Code, § 11455.30, subd. (a).) An ALJ presiding over a hearing may, without first obtaining approval from the California Department of Education, "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

Here, the ALJ sought approval to shift expenses. Approval was received by the General Counsel of the California Department of Education. (Cal. Code. Regs., tit. 5, § 3088, subd. (e).)

Student's attorney has been warned two previous times in the last four months regarding her failure to appear at PHCs. On August 5, 2019, Student's attorney failed to appear at the PHC and was ordered to show cause for her non-appearance by August 12, 2019. Student's attorney timely filed a declaration explaining that she believed that her late-filed motion to continue the PHC and due process hearing had been granted, although no ruling had been made. Further, she explained that she was out of the state

and did not have cellular service at the time of the PHC. Although the undersigned ALJ acknowledged her explanation was inadequate, no sanctions or shifting of costs was ordered. Instead, Student's counsel was placed on notice for sanctions of future non-appearances. The August 12, 2019 Order Following Order to Show Cause, case number 2019060968, stated: "Counsel is on notice in this case and all further cases that an assumption that a case is continued without receiving notice from the Office of Administrative Hearings as such will not be permitted to subvert sanctions in the future."

On November 4, 2019, Student's attorney failed to appear at a PHC and was ordered to show cause. On November 6, 2019, Student's attorney filed a declaration explaining that she had misjudged the time needed to execute a settlement agreement which she had expected to be finalized before the PHC. This misjudgment had resulted in her being unavailable for the PHC. In the Order Following Order to Show Cause, case number 2019070533, dated November 8, 2019, the ALJ did not dismiss the case or shift costs but stated "OAH will consider this a one-time occurrence. Student's counsel is put on notice that she is expected to follow OAH scheduling orders at all times."

Student's attorney has been given previous warnings regarding repeated non-appearances at PHCs and continues to violate OAH procedures. Additionally, Student's attorney has been ordered to show cause on prior occasions for her non-appearance at prehearing conferences dating back to 2013. Counsel's repeated failure to appear at PHCs amounts to unnecessary delay and expense by the opposing party and OAH.

Accordingly, Student's attorney is ordered to pay the amount of $695.00, a total of 2.5 hours, at a rate of $278, which includes 30 minutes of PHC preparation, 15 minutes in attempts to convene the PHC, 45 minutes drafting the Order to Show Cause, and 60 minutes drafting the Order Shifting Expenses for Failing to Appear at the Prehearing Conference.

Student's attorney is ordered to pay the amount of $695.00 to OAH within 45 days of the date of this order. Ms. Foley must bear the burden of the cost, $695.00, and shall not shift the cost to her client.

IT IS SO ORDERED.

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Cynthia Fritz
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DATED: December 19, 2019

Cynthia Fritz
Administrative Law Judge
Office of Administrative Hearings