BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN JOSE UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018031172 ORDER TO SHOW CAUSE AS TO WHY STUDENT'S ATTORNEY SHOULD NOT BE ORDERED TO PAY COSTS FOR FAILING TO APPEAR FOR PREHEARING CONFERENCE AND/OR WHY STUDENT'S COMPLAINT SHOULD BE DISMISSED, AND CONTINUING PREHEARING CONFERENCE

On July 27, 2018, a telephonic prehearing conference was scheduled before Administrative Law Judge Cynthia Fritz, Office of Administrative Hearings. The hearing was originally scheduled for 1:00 p.m. but due to a preemptory challenge, the hearing was rescheduled to 2:00 p.m. When the PHC was initially convened by the challenged ALJ, Student's attorney, Susan Foley was present and was aware of the challenge. She was told that OAH would call back to tell the parties who was now assigned to the case, and when the PHC would be reconvened. OAH did this, leaving a message for Ms. Foley who did not answer her phone.

The undersigned ALJ attempted to convene the PHC at 2:00 p.m. Jeffrey Maisen, Attorney at Law, appeared on behalf of San Jose Unified School District. Two attempts were made to contact Ms. 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.

Prior to the commencement of the PHC, on July 27, 2018, Student filed a letter with OAH requesting a continuance of the PHC to next week, advising that the case was settled pending board approval, and parties were gathering the appropriate signatures on a settlement agreement.

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 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.)

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 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 5:00 p.m. on July 31, 2018, explaining her failure to appear at the PHC on July 27, 2018 and why she should not be ordered to pay costs incurred by San Jose and the Office of Administrative Hearings as a result of her failure to appear at the PHC. A telephonic order to show cause hearing shall be held at 3:00 p.m. on August 3, 2018, at which time Ms. Foley will be permitted to present any other information to explain her actions.

Failure of Ms. Foley to submit a declaration and appear at the order to show cause hearing may result in a dismissal of this matter and other consequences, up to and including the shifting of costs. The PHC is continued and shall immediately follow the order to show

cause hearing. San Jose's attorney may participate in the order to show cause hearing, but is not ordered to do so. However, if San Jose wishes to seek cost shifting, the attorney must file a declaration and appear and the order to show cause hearing detailing such costs. The attorney should advise OAH in this regard. Otherwise, San Jose's attorney shall be contacted telephonically by OAH following the order to show cause hearing.

ORDER

1. Student's attorney shall file a declaration under penalty of perjury explaining her failure to appear at the PHC on July 27, 2018, and why costs should not be shifted no later than 5:00 p.m. on July 31, 2018.

2. An order to show cause hearing shall be convened telephonically by OAH at 3:00 p.m. on August 3, 2018. Student's attorney is ordered to appear.

3. The PHC is continued to August 3, 2018, and shall begin immediately following the order to show cause hearing, should Student's attorney provide an acceptable explanation for her failure to appear at the PHC on July 27, 2018.

IT IS SO ORDERED.

DATE: July 27, 2018

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Cynthia Fritz
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CYNTHIA FRITZ
Administrative Law Judge
Office of Administrative Hearings