BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017030570
v.	ORDER TO SHOW CAUSE WHY MATTER SHOULD NOT BE DISMISSED AND WHY COSTS SHOULD NOT BE SHIFTED FOR FAILURE TO APPEAR AT THE PREHEARING CONFERENCE; AND ORDER CONTINUING THE PREHEARING CONFERENCE
SAN JOSE UNIFIED SCHOOL DISTRICT.	

On March 10, 2017, Student filed a request for due process hearing (complaint). On March 13, 2017, a scheduling order was issued and served on Student's attorney setting a prehearing conference for April 24, 2017, at 3:00 p.m.

On April 24, 2017, at 3:00 p.m., the undersigned ALJ telephoned Jennifer Whipple, Attorney at Law, who represents Student, so that the PHC could be convened. Ms. Whipple lists two telephone numbers on her pleadings, one a cellphone for telephonic hearings and the other for her office. The undersigned called both numbers and was forwarded to voicemail. She left a message on both numbers stating that she would trail the case to 3:30 p.m., and if there were no answer then an order to show cause would be filed. At 3:30 p.m., the undersigned again tried both numbers and there was no answer. The law office telephone number contained a recording that the call could not be completed because circuits were full. A message was left on the cellphone voicemail stating that the undersigned would be issue an order to show cause as to why this matter should not be dismissed for failure to prosecute, and also for shifting costs.

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. Whipple 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.

Ms. Whipple is ordered to file a declaration with OAH no later than 5:00 p.m. on April 26, 2017, explaining her failure to appear at the PHC on April 24, 2017 and why she should not be ordered to pay costs of San Jose and the costs incurred by the Office of Administrative Hearings. A telephonic order to show cause hearing shall be held at 10:00 a.m. on April 28, 2017, at which time Ms. Whipple will be permitted to present any other information to explain her actions. Failure of Ms. Whipple 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 any why costs should not be shifted on April 24, 2017, no later than 5:00 p.m. on April 26, 2016.

2. An order to show cause hearing shall be convened telephonically by OAH at 10:00 a.m. on April 28, 2017. Student's attorney is ordered to appear.

3. The PHC is continued to April 28, 2017, 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 April 24, 2017.

IT IS SO ORDERED

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DATE: April 25, 2017

DocuSigned by:
Rebecca Freie
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REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings