BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. OAKLAND UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017050854 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 NOT BE DISMISSED, AND CONTINUING PREHEARING CONFERENCE

On July 3, 2017, a telephonic prehearing conference was scheduled to be held before Administrative Law Judge Rebecca Freie, Office of Administrative Hearings. An attempt was made to convene the PHC. Lenore Silverman, Attorney at Law, appeared on behalf of Oakland Unified School District. Three attempts were made to contact Student's attorney, Margaret Roberts, at the telephone number shown on the request for due process hearing filed on Student's behalf. However, there was no answer, and there was no answering machine, or voicemail where a message could be left.

Prior to the commencement of the PHC, OAH contacted Oakland's attorney to ask why PHC statements had not been filed. OAH was unable to contact Student's attorney. Oakland's attorney advised OAH that the case had settled, the settlement had been approved by the governing board for Oakland, and she believed Student was to file a request for dismissal. Oakland then sent a copy of the signature pages for the settlement agreement, but there were no actual signatures for Oakland.

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. Robertson 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. Roberts is ordered to file a declaration with OAH no later than 5:00 p.m. on July 6, 2017, explaining her failure to appear at the PHC on July 3, 2017 and why she should not be ordered to pay costs of Oakland and the costs incurred by 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 1:00 p.m. on July 7, 2017, at which time Ms. Roberts will be permitted to present any other information to explain her actions.

Failure of Ms. Roberts 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. Oakland's attorney may participate in the order to show cause hearing, but is not ordered to do so. However, if Oakland wishes to seek cost shifting, the attorney must file a declaration and appear at the order to show cause hearing detailing such costs. The attorney should advise OAH in this regard. Otherwise, Oakland'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 3, 2017, and why costs should not be shifted no later than 5:00 p.m. on July 6, 2017.

2. An order to show cause hearing shall be convened telephonically by OAH at 1:00 p.m. on July 7, 2017. Student's attorney is ordered to appear.

3. The PHC is continued to July 7, 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 July 3, 2017.

DATE: July 5, 2017

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Rebecca Freie
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REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings