

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TEMECULA VALLEY UNIFIED  
SCHOOL DISTRICT.

OAH CASE NO. 2011090949

ORDER TO SHOW CAUSE WHY  
SANCTIONS SHOULD NOT BE  
IMPOSED FOR FAILURE TO  
COMPLY WITH THE PRE HEARING  
CONFERENCE ORDER ISSUED  
MARCH 5, 2012

OAH is contemplating imposing monetary sanctions in the amount of \$2,077.10 or more, consisting of OAH's costs, for the parties' failure to comply the undersigned Administrative Law Judge's (ALJ) Pre Hearing Conference (PHC) Order issued on March 5, 2012, based upon the facts and the law set forth below.

On September 22, 2011, Student filed a Due Process Hearing Request (complaint), naming Temecula Valley Unified School District (District).

On March 5, 2012, a second telephonic PHC was held before ALJ Stella L. Owens-Murrell. Elias Economu, Attorney at Law, appeared on behalf of Student. Sarah Sutherland, Attorney at Law, appeared on behalf of District. OAH issued a PHC Order dated March 5, 2012 in which the hearing was scheduled to take place on March 14-16 and March 20-21, 2012 at the District's offices located at 31350 Rancho Vista Rd., Temecula, California 92592.

The order notified the parties of that if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880. The order further notified the parties of the requirement to call and leave a voice mail message regarding settlement at (916) 274-6035 if settlement is reached after 5:00 p.m. the day prior to the hearing. The parties were instructed to leave contact information such as a cellular phone number of each party or counsel for each party and to simultaneously fax the signature page of the signed agreement or a letter withdrawing the case to OAH at the facsimile line at 916 376-6319. Finally, the order specifically put the parties on notice that dates for hearing would not be cancelled until the letter of withdrawal or signature page of the signed agreement had been received by OAH. If an agreement in principle had been reached, the parties were instructed to plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ.

On March 13, 2012 OAH staff telephoned counsel for the parties and left voice mail messages requesting notification of the status of the case. The parties did not respond. Nor did the parties notify OAH telephonically or in writing that the matter was settled.

On March 14, 2012 the undersigned ALJ appeared at District's office prepared to commence the hearing. The ALJ was notified for the first time by District staff that the parties were not going to proceed to hearing and the case settled on March 8, 2012. The ALJ followed up with calls to OAH concerning notice of settlement and was informed that the parties had not complied with OAH's orders and had not responded to case status inquiries by OAH. As a result of the parties' failure to comply with the PHC Order dated March 5, 2012 OAH incurred substantial costs, consisting of the ALJ's time and travel costs. In addition, the ALJ could have been calendared elsewhere.

Government Code section 11455.30 provides:

- (a) The presiding officer 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 as defined in Section 128.5 of the Code of Civil Procedure.
- (b) The order, or denial of an order, is subject to judicial review in the same manner as a decision in the proceeding. The order is enforceable in the same manner as a money judgment or by the contempt sanction.

California Code of Regulations, title 1, section 1040, provides:

- (a) The ALJ may order a party, a party's 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.
  - (1) 'Actions or tactics' include, but are not limited to, the making or opposing of motions or the failure to comply with a lawful order of the ALJ.
  - (2) 'Frivolous' means
    - (A) Totally and completely without merit or
    - (B) For the sole purpose of harassing an opposing party.
- (b) The ALJ shall not impose sanctions without providing notice and an opportunity to be heard.
- (c) The ALJ shall determine the reasonable expenses based upon testimony under oath or a Declaration setting forth specific expenses incurred as a result of the bad faith conduct. An order for sanctions may be made on the record or in writing, setting forth the factual findings on which the sanctions are based.

The California Court of Appeal discussed what is required to impose sanctions under California Code of Civil Procedure section 128.5 in the case of *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635. In discussing what constitutes bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay, the court stated the action taken by the party or its attorney must be solely for the purpose of harassing an opposing party. Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit. There must also be a showing of an improper purpose, such as subjective bad faith on the part of the attorney or party to be sanctioned. (*Levy v. Blum, supra*, 92 Cal.App.4th at p. 635.) This subjective bad faith requirement does not impose a determination of evil motive, and subjective bad faith may be inferred. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

In the instant case, the record establishes that parties attended a telephonic PHC and were issued the Order Following PHC three days before settlement of the case at issue here. The PHC Order provided specific instructions to the parties and their counsel to notify OAH of settlement of the case if settled five days before hearing or the day before the hearing. They were also notified the case would remain on calendar if notice was not given. The parties failed to provide notice of the settlement. Moreover, failing to give the required notice was compounded by the parties' inexcusable failure to respond to OAH staff's telephonic requests for status of the case. OAH incurred the following expenses: 1) 2.5 hours of ALJ hearing preparation time at \$230.00 per hour; 2) 6 hours of ALJ travel time at \$230.00 per hour; 3) roundtrip mileage of 220 miles at \$.555 per hour for a total of \$122.10; and, 4) to be determined, hotel costs based on necessity to cancel hotel reservation after the penalty period.

Accordingly, the parties are ordered to appear and show cause why sanctions and costs should not be imposed for the failure to comply with the March 5, 2012 PHC Order. The parties are ordered to file written responses explaining why sanctions should not be imposed by the close of business on March 22, 2012. A telephonic hearing will then be held on Monday March 26, 2012 at 10:00 a.m., at which counsel for both parties are ordered to appear. Attorney Edwin Egelsee, name partner of the firm Augustin Egelsee, LLP, is also ordered to appear, as the complaint was filed under his name and he is presumed to have supervised the work of Mr. Economu.

IT IS SO ORDERED

Dated: March 15, 2012

/s/

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STELLA OWENS-MURRELL  
Administrative Law Judge  
Office of Administrative Hearings