

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

v.

MONTEBELLO UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2015050560

ORDER DISMISSING STUDENT'S  
COMPLAINT WITHOUT PREJUDICE

On July 31, 2015, at 10:00 a.m., Administrative Law Judge Clifford H. Woosley initiated a telephonic hearing on the Order to Show Cause re Dismissal of this action for Student's failure to diligently prosecute his complaint. The ALJ called Student's attorney, Hans Gillinger, to convene the hearing; Mr. Gillinger's voicemail answered; ALJ Woosley said he would call back, giving counsel time to be available for the OSC hearing. ALJ Woosley called Mr. Gillinger a second time, about 45 minutes after the first attempt, and was again transferred to Mr. Gillinger's voicemail. ALJ Woosley left a message, stating the hearing on the OSC would proceed with District. Student did not appear. Attorney Carlos Gonzalez appeared on behalf of District. The hearing was recorded.

APPLICABLE LAW

The IDEA requires speedy resolution of complaints. Under the IDEA, parties must request a hearing within two years of the date they knew or should have known of the alleged wrongful action. (Code Regs § 300.511(e).) The parties must be given an opportunity for an impartial due process hearing, Code Reg§ 300.511(a). Subject to the 30 day stay after the complaint, or amended complaint if filed, and continuances based upon good cause, a final decision must be reached and mailed to the parties within forty-five days. (Code Regs §300.515).

Although it is always preferable to resolve actions on their merits (Cal. Civ. Proc. Code § 583.130.), dismissal without prejudice is warranted where, among other things, a party fails to proceed with due diligence.

DISCUSSION

Student has failed to diligently participate in, prosecute, and advance his complaint. On April 30, 2015, attorney Hans Gillinger, on behalf of Student, filed a request for an expedited due process hearing naming Montebello Unified School District. On May 19,

2015, the Office of Administrative Hearings issued an Order granting Student's request to withdraw the expedited portion of Student's complaint. On June 3, 2015, Student's attorney filed a request to cancel the June 4, 2015 mediation. On June 5, 2015, OAH granted the parties' joint request to continue the mediation to June 18, 2015, the prehearing conference to July 27, 2015, and the hearing to August 3 – 6, 2015; Mr. Gillinger signed the stipulation on behalf of Student.

On June 12, 2015, OAH left a voicemail message with Mr. Gillinger, asking him to confirm the June 18, 2015, mediation. Having not heard from Mr. Gillinger, OAH again telephoned and left a message for Mr. Gillinger on June 16, 2015, asking him to contact OAH and confirm the mediation. OAH did not hear from Mr. Gillinger.

District's attorney Carlos Gonzalez confirmed the mediation. OAH assigned Administrative Law Judge Judy Pasewark to the June 18, 2015 mediation. ALJ Pasewark prepared and travelled to the District's offices for the mediation. Mr. Gonzalez, a District representative, and Student appeared; Mr. Gillinger did not. The mediation was cancelled.

At about 3:25 p.m., June 18, 2015, Mr. Gillinger telephoned OAH and said his calendar did not reflect the mediation, which he had just realized before calling. Mr. Gillinger said he would contact opposing counsel to arrange for a new mediation date. Mr. Gillinger did not thereafter contact OAH.

Mr. Gonzales stated that Mr. Gillinger contacted him on June 18, 2015, following the cancelled mediation, saying he was going to talk to his client about a new mediation date and get back to Mr. Gonzales. Mr. Gonzales did not thereafter hear from Mr. Gillinger.

OAH's scheduling order required the parties to file prehearing conference statements three (3) business days prior to the PHC. Here, the PHC statements were due no later than the close of business on July 22, 2015. Mr. Gonzales timely filed District's PHC statement. Mr. Gillinger did not file a PHC statement on behalf of Student.

ALJ Woosley telephoned Student's attorney, Mr. Gillinger, at 1:00 pm, July 27, 2015, to convene the scheduled prehearing conference. OAH has only one phone number for Mr. Gillinger, which is the same number listed with the State Bar. The call went to Mr. Gillinger's voicemail. ALJ Woosley left a message, stating the purpose of the call and indicating that he would call back in 15 minutes to convene the PHC. ALJ Woosley informed Mr. Gonzalez, who was available, that the PHC would be continued for 15 minutes to give Mr. Gillinger an opportunity to be present.

At 1:15 pm, July 27, 2015, ALJ Woosley called Mr. Gillinger and was again directly transferred to voicemail. ALJ Woosley left a second voicemail, indicating that the PHC would proceed with the District's attorney. ALJ Woosley further informed Mr. Gillinger that an Order to Show Cause would issue, setting a telephonic conference date to determine why this matter should not be dismissed because of Student's failure to prosecute.

On July 28, 2015, OAH issued an Order to Show Cause re Dismissal For Failure to Prosecute, setting the OSC hearing for 10:00 a.m., July 31, 2015. The OSC Order cautioned Student's counsel that if Student did not appear at the OSC hearing, the matter would be dismissed. OAH duly served the OSC Order on Student's attorney Mr. Gillinger, as well as District's counsel. On July 31, 2015, ALJ Woosley twice attempted to contact Student's attorney Mr. Gillinger for purposes of convening the hearing on the OSC re Dismissal, leaving voicemails messages regarding the purpose of the call. Unable to reach Mr. Gillinger, ALJ Woosley proceeded with the hearing on the OSC with Mr. Gonzalez, who appeared on behalf of District. During the hearing, Mr. Gonzalez represented that he had not heard from Mr. Gillinger since June 18, 2015, the day of the scheduled mediation at which Mr. Gillinger failed to appear. Mr. Gonzalez said he had tried to contact Mr. Gillinger a number of times, but received no response.

The Student, though his counsel of record, has failed to diligently participate in, prosecute, or advance the matter. Accordingly, all dates are vacated and this matter is dismissed, without prejudice.

IT IS SO ORDERED.

DATED: August 03, 2015

/s/

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CLIFFORD H. WOOSLEY  
Administrative Law Judge  
Office of Administrative Hearings