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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

HERMILA GARCIA-CARDENAS,  
Plaintiff,  
v.  
IMMIGRATION LEGAL SERVICES, APC,  
Defendant.

Case No. 1:13-cv-01065-AWI-SKO

**FINDINGS AND RECOMMENDATIONS  
THAT PLAINTIFF'S COMPLAINT BE  
DISMISSED**

(Doc. 1)

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**I. INTRODUCTION**

On July 12, 2013, Plaintiff Hermila Garcia-Cardenas ("Plaintiff") filed a complaint against Defendant Immigration Legal Services, APC ("Defendant"). (Doc. 1.) Plaintiff is proceeding pro se and in forma pauperis, asserting that Defendant failed to provide certain agreed-upon legal services to her parents. Plaintiff's complaint was dismissed with thirty days leave to amend. Plaintiff has failed to file an amended complaint. For the reasons set forth below, it is RECOMMENDED that this action be dismissed without prejudice to refile in state court.

**II. DISCUSSION**

Local Rule 110 provides that "[f]ailure of counsel or of a party to comply with these Rules or with any order of the Court may be grounds for the imposition by the Court of any and all sanctions . . . within the inherent power of the Court." District courts have the inherent power to control their dockets and "[i]n the exercise of that power they may impose sanctions including,

1 where appropriate . . . dismissal." *Thompson v. Housing Auth.*, 782 F.2d 829, 831 (9th Cir. 1986).  
2 A court may dismiss an action, with prejudice, based on a party's failure to prosecute an action,  
3 failure to obey a court order, or failure to comply with local rules. *See, e.g., Ghazali v. Moran*,  
4 46 F.3d 52, 53-54 (9th Cir. 1995) (dismissal for noncompliance with local rule); *Ferdik v.*  
5 *Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply with an order  
6 requiring amendment of complaint); *Carey v. King*, 856 F.2d 1439, 1440-41 (9th Cir. 1988)  
7 (dismissal for failure to comply with local rule requiring pro se plaintiff to keep court apprised of  
8 address); *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130-31 (9th Cir. 1987) (dismissal for failure  
9 to comply with court order); *Henderson v. Duncan*, 779 F.2d 1421, 1424-25 (9th Cir. 1986)  
10 (dismissal for failure to lack of prosecution and failure to comply with local rules).

11 In determining whether to dismiss an action for lack of prosecution, failure to obey a court  
12 order, or failure to comply with local rules, the court must consider several factors: (1) the public's  
13 interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the  
14 risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their  
15 merits; and (5) the availability of less drastic alternatives. *Pagtalunan v. Galaza*, 291 F.3d 639,  
16 642-43 (9th Cir. 2002); *see also Thompson*, 782 F.2d at 831; *Henderson*, 779 F.2d at 1423-24;  
17 *Malone*, 833 F.2d at 130; *Ferdik*, 963 F.2d at 1260-61; *Ghazali*, 46 F.3d at 53. "These factors are  
18 not a series of conditions precedent before the judge can do anything, but a way for a district judge  
19 to think about what to do." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217,  
20 1226 (9th Cir. 2006) (citation omitted).

21 Here, dismissal of Plaintiff's complaint is appropriate. In considering the first factor, "[t]he  
22 public's interest in expeditious resolution of litigation always favors dismissal." *Pagtalunan*,  
23 291 F.3d at 642 (citation omitted). Given Plaintiff's failure to file an amended complaint, the first  
24 factor weighs in favor of dismissing the action.

25 The second factor, the court's need to manage its docket, also weighs in favor of dismissal.  
26 "The court cannot manage its docket if it maintains cases in which a plaintiff fails to litigate his  
27 case. The court's limited resources must be spent on cases in which the litigants are actually  
28 proceeding." *Lopez v. Washington Mut. Bank, F.A.*, No. 1:09-CV-1838 AWI -JLT, 2010 WL

1 2629039, at \*1 (E.D. Cal. June 25, 2010).

2 As for the third factor, the risk of prejudice, the fact that a lawsuit is pending against a  
3 defendant who has not yet been ordered to respond "is not sufficiently prejudicial in and of itself  
4 to warrant dismissal." *Pagtalunan*, 291 F.3d at 642; *Yourish v. Cal. Amplifier*, 191 F.3d 983, 991.  
5 However, "[u]nnecessary delay inherently increases the risk that witnesses' memories will fade  
6 and evidence will become stale." *Pagtalunan*, 291 F.3d at 642. As such, any risk of prejudice to  
7 Defendant also weighs in favor of dismissal.

8 The fourth factor of public policy favoring disposition on the merits normally weighs  
9 against dismissal. *Id.* at 643. "At the same time, a case that is stalled or unreasonably delayed by  
10 a party's failure to comply with deadlines . . . cannot move forward toward resolution on the  
11 merits. Thus, [the Ninth Circuit has] also recognized that this factor lends little support to a party  
12 whose responsibility it is to move a case toward disposition on the merits but whose conduct  
13 impedes progress in that direction." *In re PPA*, 460 F.3d at 1228 (citation omitted). As such, this  
14 factor has little weight in cases such as this where the plaintiff essentially appears to be unable or  
15 unwilling to proceed with the action. *See id.*; *Lopez*, 2010 WL 2629039, at \*2.

16 Regarding the fifth factor, the availability of lesser sanctions, "[t]he district court abuses its  
17 discretion if it imposes a sanction of dismissal without first considering the impact of the sanction  
18 and the adequacy of less drastic sanctions." *In re PPA*, 460 F.3d at 1228. The court must consider  
19 the "feasibility of less drastic sanctions and explain why alternative sanctions would be  
20 inadequate," whether there was an "alternative methods of sanctioning or curing the malfeasance  
21 before ordering dismissal," and whether "the court warn[ed] the plaintiff of the possibility of  
22 dismissal before actually ordering dismissal." *Id.* at 1229 (citations omitted). Here, Plaintiff was  
23 expressly warned that dismissal would result from noncompliance with the Court's order. The  
24 Court's August 27, 2013, order stated that "[i]f Plaintiff fails to file an amended complaint or fails  
25 to cure the deficiencies identified . . . , the Court will recommend that the complaint be dismissed  
26 with prejudice." (Doc. 4, 5:2-4.) Under these circumstances, there is no alternative to dismissal.

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**III. CONCLUSION AND RECOMMENDATION**

For the reasons stated above, IT IS HEREBY RECOMMENDED that this case be dismissed for Plaintiff's failure to file an amended complaint pursuant to the Court's August 27, 2013, order. However, such dismissal should be without prejudice to re-filing the complaint in state court. *See generally Trew v. Int'l Game Fish Ass'n, Inc.*, 404 F. Supp. 2d 1173, 1179 (N.D. Cal. 2005).

These findings and recommendations are submitted to the district judge assigned to this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within twenty-one (21) days of service of this recommendation, any party may file written objections to these findings and recommendations with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge will review the magistrate judge's findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the district judge's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: October 29, 2013

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE