BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. BERKELEY UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017121014 ORDER DENYING CROSS-MOTIONS FOR SANCTIONS

Attorney Joshua Cruz filed this matter on behalf of Student on December 27, 2018. Attorney Lenore Silverman has represented Berkeley.

On February 12, 2018, Ms. Silverman filed a motion seeking to impose sanctions on Mr. Cruz for alleged bad faith misconduct during the events described below, and on February 16, 2018, Mr. Cruz filed an opposition and a cross-motion for sanctions to be imposed on Ms. Silverman for alleged bad faith misconduct arising out of those same events.

Procedural History

On February 12, 2018, the undersigned conducted a telephonic prehearing conference in this matter. Ms. Silverman could not appear due to a family emergency; Berkeley was represented instead by her colleague, Attorney Richard Yao. Near the outset of the PHC, Mr. Cruz moved for a continuance on the ground that Berkeley had not filed a response to his complaint. (see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200). The audio recording of the PHC shows that Mr. Cruz represented that he needed a continuance because Berkeley had not "filed" a response, and that he needed a response so "I'm not litigating the case blindly." He asserted that he had sent Ms. Silverman a request for a response two weeks ago and had not heard back from her. He asserted twice that he had not "received anything."

Mr. Yao could not explain the absence of a filed response. The ALJ therefore continued the matter and ordered the district to file a response.

The parties have now filed cross-motions for sanctions as a result of a dispute between them about whether Berkeley provided an adequate response to Mr. Cruz at a resolution session on January 22, 2018, well prior to the prehearing conference. Ms. Silverman declares, as part of Berkeley's motion for sanctions, that she handed the response to Mr. Cruz at that meeting and that he and his client read it there. She further alleges that Mr. Cruz took advantage of her absence at the PHC on February 12, 2018, because of a death in her family to obtain a continuance he had previously represented he would not agree to by

falsely claiming that Berkeley had not furnished a response. Her declaration attaches a letter to Student's attorneys dated January 22, 2018, that constitutes such a response, although it was not filed until February 16, 2018.

In his cross-motion, Mr. Cruz agrees that Ms. Silverman handed him "a letter," but declares that he "did not have time to review the document and did not take it with me due to an unanticipated change in the meeting time by Ms. Silverman." He also declares that he repeatedly requested of Ms. Silverman by email that a copy of the letter be emailed to him, but he did not receive a response.

Mr. Cruz also declares that the parties signed a confidentiality agreement with respect to the January 22, 2018 resolution session, and argues that Ms. Silverman should be sanctioned because she has violated that agreement in her sanctions motion by revealing statements made and actions taken at the confidential resolution session.

APPLICABLE LAW

In certain circumstances, an ALJ presiding over a special education proceeding is authorized to shift expenses from one party to another, or to OAH. (Gov. Code, § 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; see *Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly [Cal. Code Regs., tit. 5] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

The ALJ presiding at the hearing may order reimbursement either to OAH or to another party. With prior approval from the General Counsel of the California Department of Education, the ALJ presiding over the hearing may "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel" to OAH as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. (Cal. Code. Regs., tit. 5, § 3088, subds. (a) & (e); see Gov. Cod 1455.30, subd. (a).)

An ALJ presiding over a hearing, without first obtaining approval from the California Department of Education, 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).) A finding of "bad faith" does not require a determination of evil

motive, and subjective bad faith may be inferred. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

DISCUSSION

Berkeley's Motion for Sanctions

Ms. Silverman is correct in noting that the Individuals With Disabilities Education Act requires that a response be provided to parents (as opposed to "filed"). (See 20 U.S.C. § 1415(c)(2)(B)(i)(I).) However, Mr. Cruz is also correct that a panel of the Ninth Circuit has recently stated or held that the response must be "filed." (*M.C. v. Antelope Valley Union High Sch. Dist., supra*.) The new Ninth Circuit decision may constitute a substantial change in the conventional understanding of IDEA procedures, and its full ramifications have not yet been settled. A strict reading of *M.C., supra,* suggests that Berkeley might reasonably have been expected to have filed its response rather than simply handing it to Mr. Cruz. So Mr. Cruz had at least some justification for claiming at the PHC on the ground that the response had not been "filed."

On this record it is not possible to rule on the conflicting claims that Mr. Cruz did or did not review the response at the resolution session. It appears to be uncontested that he did not leave the session with the document. The pleadings do not establish whether Mr. Cruz knew, when he emailed Ms. Silverman for a copy, that she was absent from her office due to a family emergency. Ms. Silverman does not mention the emails. Due to these unresolved factual questions, sanctions are not appropriate, and Berkeley's motion will be denied.

Student's Motion for Sanctions

While Mr. Cruz is technically correct that he sought a continuance at the PHC on the ground that the response had not been "filed," his failure to mention anything about the document handed to him at the resolution session, his stated desire not to litigate "in the dark," and his repeated statement that he had not "received anything" had the effect of creating the misleading impression that Berkeley had done nothing at all to creae or communicate a response. Mr. Cruz knew Mr. Yao had not been at the resolution session and could not address what occurred there. It would have been far better for Mr. Cruz to have been forthcoming about the history now laid out in these motions so that the ALJ could have made an appropriate order.

In addition, Mr. Cruz's explanation of why he did not take the letter with him from the resolution session is both peculiar and unpersuasive. He declares he did not do so because Ms. Silverman had changed the time of the meeting. That is an obvious non sequitur; it explains nothing about why he would leave behind a formal document handed to him by opposing counsel in a proceeding required by law. If he had taken the letter with him, whether he thought it was an adequate response or not, these motions might have been avoided.

The parties' confidentiality agreement is not part of the record, and if Mr. Cruz did in fact engage in the misconduct Ms. Silverman alleges, there may be legal reasons excusing her from maintaining confidentiality with respect to Mr. Cruz's conduct and statements. It is not possible to decide that question on this record.

Because Mr. Cruz's conduct likely made a substantial contribution to this misunderstanding, sanctions will not be awarded to Student.

ORDER

1. Berkeley's motion for sanctions is DENIED.

2. Student's cross-motion for sanctions is DENIED.

DATE: February 23, 2018

DocuSigned by:
Charles Marson
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CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings