BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2014100290
v.	FINAL ORDER GRANTING MOTION FOR SANCTIONS AGAINST STUDENT'S ATTORNEY
PANAMA-BUENA VISTA UNION SCHOOL DISTRICT.	

On October 6, 2014, Student filed a request for a due process hearing (complaint) naming Panama-Buena Vista Union School District (Panama). The complaint requested an expedited hearing based upon an allegation that Panama had inappropriately suspended Student, who was not then eligible for special education services, and changed his placement on September 11, 2014, in violation of title 20 United States Code section 1415(k). The complaint also stated claims that were not expedited. Student's attorney, Nicole Hodge Amey, signed the complaint. OAH issued a dual scheduling order and set the expedited hearing for November 4, 2014.

On October 24, 2014, District's counsel Stacy Inman filed a motion to limit time lines for the hearing issues, supported by her declaration under penalty of perjury, on the basis that Student had enrolled in Panama as a resident of the Panama on August 18, 2014, thereby limiting Student's claims from August 18, 2014 to the time the complaint was filed. The motion also established that Student had attended Bakersfield City School District for some period of time prior to his enrollment at Panama. Student did not oppose the motion.

Ms. Amey and Ms. Inman filed expedited prehearing conference statements on October 22, 2014 and October 27, 2014, respectively. The parties participated in a prehearing conference in the expedited portion of the case before Administrative Law Judge Alexa Hohensee on October 27, 2014. The ALJ and parties discussed Panama's motion to limit time lines during the prehearing conference, and the issues for the expedited hearing were limited to the expedited claim only. On October 31, 2014, Ms. Amey confirmed to OAH that the expedited hearing was going forward as scheduled. On November 3, 2014, at 9:15 a.m., Ms. Amey sent Ms. Inman an email asking her to agree to continue the expedited hearing for one day.

On November 3, 2014, at 2:09 p.m., Ms. Amey filed with OAH a request to dismiss the expedited portion of the case, supported by her declaration under penalty of perjury. Ms. Amey stated in her declaration that she had "just realized" that the facts did not meet the criteria for an expedited hearing. OAH issued an order dismissing the expedited issues and vacating the expedited hearing dates before the close of business on November 3, 2014.

Panama filed a motion for sanctions, supported by Ms. Inman's declaration under penalty of perjury and authenticated exhibits, on November 4, 2014. Ms. Amey filed an opposition on November 7, 2014, supported by a declaration under penalty of perjury. On November 10, 2014, Panama filed a reply to Student's opposition, also supported by a declaration under penalty of perjury by Ms. Inman. On December 1, 2014, OAH issued an order requesting additional information from Panama, and gave Ms. Amey until noon on December 5, 2014 to respond. Panama filed a supplemental declaration and authenticated itemized fee bill on December 3, 2014. Ms. Amey did not file a response.

On November 21, 2014, Student filed an amended expedited complaint. The amended expedited complaint was based in part on suspensions that occurred after the original expedited complaint was dismissed.

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. 1, § 1040; Cal. Code. Regs., tit. 5, § 3088; see *Wyner ex rel. Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly, [California Code of Regulations] § 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).) [1]

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. 1, § 1040; Cal. Code. Regs., tit. 5, § 3088, subd. (e).) The ALJ shall determine the reasonable expenses based upon a declaration setting forth specific expenses incurred as a result of the bad faith conduct. (Cal. Code. Regs., tit.1 § 1040(c).)

"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

[1] Section 3088 refers to "presiding hearing officers." However, the ALJ presiding over the hearing is the presiding officer. Government Code section 11405.80 states: "Presiding officer means the agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in an adjudicative proceeding." This section makes clear that an ALJ who presides in an adjudicative proceeding is the "presiding officer," a point confirmed in *Wyner v. Manhattan Beach Unified Sch. Dist., supra,* 223 F. 3d at page 1029, where the court stated, "Clearly, § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."

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

Here, Student's attorney filed the complaint on Student's behalf on October 6, 2014, asking for an expedited hearing under title 20 United States Code section 1415(k), on the ground that Panama had suspended Student, who was not then eligible for special education services, an unspecified number of times over an unspecified period, expelled and removed Student from his placement on September 11, 2014, and assigned him to a new school. OAH set the expedited PHC for October 27, 2014, and the expedited hearing was set for November 4, 5 and 6, 2014.

Ms. Amey requested Student's records from Panama on October 16, 2014, which she received on October 22, 2014; Student's mother and Ms. Amey's assistant, Ms. Zapeda, participated in a resolution session with Panama on October 17, 2014. On October 24, 2014, District filed a motion to limit timelines in which it established that Student had only enrolled in Panama on August 18, 2014, that he had been a resident of and attended Bakersfield City School District prior to his Panama enrollment, thereby raising the question of the scope of District's liability in the context of the entire complaint, which alleged facts back to the 2012-2013 school year. Those facts were discussed at the October 27, 2014 expedited PHC.

Ms. Amey's declaration in support of her November 3, 2014 motion to dismiss the expedited claims admitted that 1) she had not requested Student's records from Panama until more than two weeks after she filed the complaint, 2) she had not personally reviewed those records until after the October 27, 2014 PHC during which the timelines were discussed, and 3) she had concluded only after reviewing the records that Student was not entitled to an expedited hearing because he had not met the requirements of title 20 U.S.C. section 1415(k), and specifically he had not been suspended by Panama more than 10 days since his reenrollment in August 2014. In her opposition to the motion for sanctions, Ms. Amey stated that she reviewed Student's copies of records and was familiar with the facts before she filed the complaint, which raises the question of why she waited until the day before the expedited hearing to dismiss the expedited claim. She also unpersuasively attempts to shift the blame to Panama by asserting that, if Panama knew that Student was not entitled to an expedited hearing, Panama's counsel should have informed her of its position, thereby avoiding unnecessary legal fees.

Ms. Amey telephonically confirmed to OAH on October 31, 2014, that the expedited hearing was going forward as scheduled. She also met and conferred with Ms. Inman regarding exhibits. In reliance, Ms. Inman and the assigned ALJ both spent time in preparing for the expedited hearing on November 4, 2014.

Ms. Inman's declaration in support of her motion for sanctions credibly established that at 10:59 a.m. on November 3, 2014, Ms. Amey emailed Ms. Inman advising that she was requesting that Ms. Inman stipulate to continue the expedited hearing for one day because Ms. Amey had injured her hip. At 3:17 p.m., Ms. Inman received Student's Request to Dismiss the Expedited Portion of the hearing, which was filed with OAH at 2:09 p.m. The motion to dismiss did not reference any medical condition on Ms. Amey's part, but, instead, stated that Ms. Amey had reviewed Student's records after the prehearing conference, and she had "just realized" that the expedited claims had no merit because Panama had only suspended Student eight days. Ms. Amey did not say when she learned those facts or explain why she waited until the afternoon before the first day of the hearing to notify OAH and Ms. Inman.

OAH granted the partial dismissal, vacated the expedited hearing dates and issued the Order granting the partial dismissal at 4:31 p.m. on November 3, 2014. Subsequently, Ms. Amey filed an amended complaint in which she requested an expedited hearing based in part on suspensions that occurred after the original expedited complaint was dismissed.

As discussed above, the term "frivolous claims" includes those claims that are totally without merit. Here, Ms. Amey, an experienced attorney who has appeared before OAH for years and filed numerous special education due process cases, admits she received Student's records from Panama on October 22, 2014, five days before the original expedited prehearing conference, and she received Panama's motion to limit timelines advising her of Student's enrollment date three days before that prehearing conference. She claims that only after she reviewed Student's records provided by Panama did she realize that Student's expedited claim did not have merit. However, she admittedly did not review Student's records until after the prehearing conference, meaning she had requested the expedited hearing without ever determining that there was a basis for it and was not sufficiently prepared to discuss the expedited issues at the prehearing conference.

Ms. Amey had constructive if not actual notice on October 22, 2014 and October 24, 2014, that Student had enrolled at Panama in mid-August 2014, and he had not been suspended a sufficient number of days to support a claim for an expedited due process hearing when she filed the complaint. More importantly, at all times the facts about the number of days Student had been suspended were presumably within Ms. Amey's client's knowledge. Title 20 United States Code section 1415(k) is very clear on what facts give rise to an expedited hearing, and under what circumstances a student not then eligible for special education is entitled to the protections of section 1415(k). Ms. Amey's failure to exercise due diligence before and after she received Student's records on October 22, 2014 and District's Motion to Limit Timelines on October 24, 2014, supports a finding of bad faith based on frivolousness, particularly where, as in this case, she was on actual notice on and after October 22, 2014, that a potential problem existed with Student's expedited claim. Had she reviewed the records upon receipt, or even immediately following the PHC on October 27, 2014, when the expedited issue was discussed, she would have discovered that Student's expedited claims based upon his August 18, 2014 reenrollment at Panama were frivolous and without merit.

Instead, Ms. Amey participated in the PHC, later met and conferred with Ms. Inman about exhibits at hearing, confirmed to OAH that the expedited hearing was going forward, gave Ms. Inman an excuse on the day before the hearing for delaying the expedited hearing, and then waited until the eve of the expedited hearing before she notified Panama and OAH that she had "just realized" that Student's expedited claim had no merit.

Under these facts, Panama had no choice but to prepare for the hearing on the expedited claims set for November 4, 2014, thereby incurring costs. Panama seeks sanctions in the form of reimbursement of attorney's fees incurred by Ms. Inman from and after the time the complaint was filed. Ms. Inman states in her supplemental declaration that she billed Panama $10,782.10 in fees, based on an hourly rate of $211. Ms. Inman's billable rate of $211 an hour is reasonable particularly when considered in the context of Ms. Amey's hourly billing rate of $500, which she attested to in her declaration in support of her opposition to this motion. Further, Ms. Amey did not challenge the total amount of fees charged by Ms. Inman other than to claim in her opposition to the motion for sanctions that sanctions were not appropriate and that she was entitled to sanctions against Ms. Inman.

Under these facts and circumstances, sanctions against Student's counsel, Nicole Hodge Amey, are warranted. However, it is reasonable to assume that, once on notice of Student's complaint, Ms. Inman would have been required to become familiar with the case and engage in preliminary work to prepare the case for a resolution session, the expedited pre-hearing conference, and both the expedited and non-expedited hearing. That preparation can also be applied, in part, to the recently filed amended complaint. As such, it would not be reasonable to hold Ms. Amey responsible for 100 percent of the fees incurred by Panama.

The issues in the expedited portion of the original case were straightforward and defined at the prehearing conference. Student had the burden of proving at the expedited hearing only whether Student met the requirements of title 20 section 1415(k)(5)(b) to avail himself of the protections of section 1415(k), and his remedies were narrow and limited if he met his burden. The number of witnesses and documentary evidence required for that single issue were limited and should not have taken an extraordinary amount of time to prepare.

Even giving Ms. Amey the benefit of the doubt that she could not have determined the facts before filing, she was on notice of the defects in Student's case as of October 22, 2014. Accordingly, based upon all of the facts provided by both parties, Ms. Amey shall be sanctioned by reimbursing Panama for the fees incurred through Ms. Inman's services for preparing for the expedited hearing from October 23, 2014 through November 3, 2014.[2] Ms. Inman's supplemental declaration and billing statement does not specifically itemize how

[2] The time Ms. Inman billed on November 4, 2014, which included time for preparation of the motion for sanctions, is block-billed and does not break out the time spent on preparing the motion. Accordingly, that date will not be considered in the calculation for sanctions.

much time she spent on each task on each day during that time period. However, tasks billed for on October 30, October 31 and November 2, 2014 were specifically for preparing witnesses and preparing for the expedited hearing. Ms. Inman spent a total of 8.5 hours on those dates at the hourly rate of $211. Panama is therefore entitled to monetary sanctions against attorney Nicole Hodge Amey in the amount of $1793.50. Ms. Amey's request in her opposition that Panama or Ms. Inman be sanctioned for two hours of her time spent responding to the motion for sanctions is denied, in light of the award of sanctions in District's favor.

ORDER

1. Attorney Nicole Hodge Amey shall pay to Panama-Buena Vista Union School District the sum of $1,793.50 by certified check within 30 days of the date of this Order.

2. Failure to comply with this order may result in a civil judgment or finding of contempt.

DATE: December 9, 2014

/S/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings