BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

HUENEME ELEMENTARY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NUMBER 2023030299

# ORDER DENYING HUENEME ELEMENTARY SCHOOL DISTRICT'S MOTION FOR SANCTIONS

MAY 11, 2023

On March 9, 2023, Hueneme Elementary School District, called Hueneme, filed a due process hearing request with the Office of Administrative Hearings, naming Parent on behalf of Student. The Office of Administrative Hearings is called OAH.

On March 21, 2023, OAH issued an order granting the parties' joint request for videoconference mediation and continuance of due process hearing. The parties participated in mediation on May 5, 2023.

On May 9, 2023, Hueneme filed a motion for sanctions for Parent's alleged failure to comply with the terms of a resolution reached by the parties at mediation. The

motion for sanctions is supported by a declaration under the penalty of perjury from Attorney Kathleen Lamay.

Hueneme argues the parties reached an interim agreement during mediation on May 5, 2023, regarding the location and conditions of Student's assessment pursuant to a May 2022 assessment plan. Hueneme contends Parent unilaterally attempted to modify the terms of Student's assessment in email correspondence to Hueneme on May 8, 2023.

On May 9, 2023, Hueneme cancelled Student's assessment scheduled for May 12 and 16, 2023, based on Parent's alleged attempt to change the agreed upon assessment conditions. The motion for sanctions requests OAH to shift Hueneme's fees and costs to Parent and Parent's advocate Vikki Rice for attending the mediation, scheduling the assessments at a neutral location, and fees and costs incurred for filing the motion for sanctions.

On May 11, 2023, Student filed an opposition to Hueneme's motion for sanctions and a motion to continue the due process hearing. Student disputes that it changed the conditions of the assessment or that it refused to make Student available for the May 12 and May 16, 2023 assessments. Student's request for continuance of the due process hearing will be addressed at the May 12, 2023 prehearing conference in this matter.

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 [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).)

Section 3088 refers to "presiding hearing officers." 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". (*Wyner*, *supra,* 223 F. 3d at p. 1029.)

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).) 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 (*West Coast*).) 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).)

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).) An order of sanctions shall be limited to what is sufficient to deter repetition of the action or tactic or comparable action or tactic by others similarly situated. (Code Civ. Proc., § 128.5, subd. (f)(2).) If warranted for effective deterrence, an order may direct payment of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the action or tactic. (*Id.*)

"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); Cal. Code Regs., tit. 1, § 1040, subd. (a)(2); 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*, *supra*, 2 Cal.App.4th 693, 702.)

The issue of whether Parent complied with the terms of the parties' interim agreement is outside OAH's jurisdiction. (*Wyner*, *supra*, 223 F.3d 1026, 1030 [holding California Department of Education's compliance complaint procedure is proper avenue to address noncompliance with a settlement agreement].) Further, Hueneme failed to demonstrate that Parent and advocate Vikki Rice engaged in bad faith actions or tactics that were frivolous and totally and completely without merit, for the sole purpose of harassing an opposing party, or solely intended to cause unnecessary delay, justifying an award of sanctions.

The parties are admonished to refrain from disclosing communications, negotiations, or settlements discussions by and between them in the course of mediation. (Evid. Code, § 1119, subd. (c).) Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under the Evidence Code before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends. (Evid. Code, 1127.)

ORDER

Hueneme's motion for sanctions is denied.

IT IS SO ORDERED.

Jennifer Kelly

Jennifer Kelly

Administrative Law Judge

Office of Administrative Hearings