BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

SAN MARCOS UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021120803

ORDER RULING ON ORDER TO SHOW CAUSE, DISTRICT'S MOTION TO DISMISS STUDENT'S COMPLAINT WITH PREJUDICE, AND DISTRICT'S FIRST AND SECOND MOTIONS TO SHIFT FEES

APRIL 4, 2022

On March 21, 2022, Administrative Law Judge Christine Arden, Office of Administrative Hearings, held a hearing on an Order to Show Cause, and Prehearing Conference by videoconference. The Administrative Law Judge is called an ALJ. The Office of Administrative Hearings is called OAH. The prehearing conference is called a PHC.

Constance Zarkowski and Sheila Bayne, Attorneys at Law, appeared on behalf of Student. Madisyn Ukrainetz and Summer Dalassandro, Attorneys at Law, appeared on behalf of San Marcos Unified School District, sometimes referred to as District. The hearing was recorded. Based upon discussion with the parties, the ALJ issues the following order:

ORDER TO SHOW CAUSE WAS BROUGHT BECAUSE STUDENT FAILED TO FILE AN ACCURATE PHC STATEMENT

PROCEDURAL BACKGROUND

Student filed the complaint against San Marcos in this case on December 23, 2021. According to the complaint all issues alleged by Student in this action begin with an individualized education program, called an IEP, meeting dated November 5, 2021. See, Complaint at p. 6, ll. 6-8. On February 22, 2022, Student filed a 34-page PHC statement which failed to accurately state the issues alleged in the complaint. The issues stated in Student's February 22, 2022 PHC statement did not concern events beginning with the November 5, 2021 IEP. Instead, according to District, the issues stated in Student's February 22, 2022 PHC statement appeared to be identical to those alleged in a previous, now settled, case between Student and District, known as OAH Case No. 2021080151.

On February 25, 2022, a PHC was held in this case before ALJ Rita Defillipis. Attorneys Constance Zarkowski and Lynda Williams appeared on behalf of Student, and attorney Madisyn Ukrainetz appeared on behalf of San Marcos Unified School District. At that PHC San Marcos' attorney complained on the record that District was prejudiced because Student's February 22, 2022 PHC statement did not accurately state issues consistent with those alleged in the complaint. ALJ Defillipis noted on the record she

was also confused by Student's inaccurate statement of issues in Student's PHC statement. It was clear from statements made on the record that Student's counsel was not familiar with the contents of the complaint and/or Student's PHC statement dated February 22, 2022. ALJ Defillipis continued the PHC to March 14, 2022, and ordered Student to timely file a new corrected PHC Statement before the March 14, 2022 PHC. Student failed to comply with that order and did not file a new corrected PHC statement before the March 14, 2022 PHC.

On March 14, 2022, a PHC was convened in this matter before ALJ Christine Arden. The ALJ asked Student's attorney, Constance Zarkowski, why Student had not filed a new accurate PHC Statement before the March 14, 2022 PHC, as ordered by ALJ Defillipis. Student's attorney was unable to explain why Student had failed to comply with that order, but did recall Student's error being noted on the record at the February 25, 2022 PHC, and that ALJ Defillipis had ordered Student to file a corrected PHC statement before the March 14, 2022 PHC,

Student's attorney asked for San Marcos Unified School District's attorney to explain the nature of the deficiency with Student's PHC statement dated February 22, 2022. The ALJ stated on the record the issues presented in Student's PHC statement filed on February 22, 2022, were not consistent with the issues and facts alleged in the complaint. It was clear Student's attorney was again not familiar with the contents of Student's February 22, 2022 PHC statement, and/or the complaint.

At the March 14, 2022 PHC, because Student failed to comply with the ALJ Defillipis' Order, ALJ Arden set a hearing on an Order to Show Cause, called an OSC, as to why (1) Student's complaint should not be dismissed for Student's failure to comply with ALJ Defillipis' Order to timely file an accurate PHC Statement before the March 14,

2022 PHC; and (2) OAH's costs incurred in connection with March 14, 2022 PHC should not be shifted to Student. The ALJ set a briefing schedule for the OSC.

At the March 14, 2022 PHC, the ALJ further stated San Marcos Unified School District could file a motion to shift its attorneys' fees incurred in connection with the March 14, 2022 PHC to Student. The ALJ also set a briefing schedule for that motion if San Marcos Unified School District elected to file it. The March 14, 2022 hearing lasted 25 minutes.

On March 15, 2022, Student filed Student's response to OSC. That response did not provide a reasonable explanation as to why Student had failed to file an accurate PHC statement before the March 14, 2022 PHC. On March 15, 2022, San Marcos Unified School District filed its Motion to Shift Fees, called District's First Motion to Shift Fees. On March 16, 2022, San Marcos Unified School District filed one document that included its (1) reply to Student's response to OSC; (2) motion to dismiss Student's complaint with prejudice; (3) second motion to shift fees to Student, called District's Second Motion to Shift Fees; and (4) motion to continue hearing.

MARCH 21, 2022 PHC AND HEARING ON OSC AND DISTRICT'S FOUR PENDING MOTIONS

On March 21, 2022, attorneys for both parties presented oral arguments on the OSC, and on District's: First Motion to Shift Fees; motion to dismiss complaint with prejudice; Second Motion to Shift Fees; and motion to continue hearing. As of 1:00 PM on March 21, 2022, no Student oppositions to any of District's motions appeared in the OAH file. When the ALJ questioned Student's counsel why Student did not file oppositions, one of Student's attorneys, Sheila Bayne, stated Student had filed an opposition to District's First Motion to Shift Fees with OAH on March 16, 2022. San

Marcos Unified School District's attorney acknowledged Student had served her with Student's opposition to District's First Motion to Shift Fees. The ALJ then ordered Student to refile Student's opposition to District's First Motion to Shift Fees with OAH immediately following the March 21, 2022 hearing, so that the ALJ could consider it before ruling on District's First Motion to Shift Fees. Student filed that opposition with OAH at 1:46 PM on March 21, 2022.

RULINGS MADE ON THE RECORD AT THE MARCH 21, 2022 HEARING

After hearing arguments on the OSC and District's four pending motions, the ALJ ruled on the record on March 21, 2022, on a portion of the OSC and on three of District's pending motions. The ALJ discharged the portion of the OSC asking why Student's complaint should not be dismissed. The ALJ found such an extreme consequence for Student's attorneys' errors and failure to comply with ALJ Defillipis' February 25, 2022 Order, was not justified and would be unduly prejudicial to Student. Also on the record at the March 21, 2022 hearing, the ALJ denied Student's motion to dismiss Student's complaint with prejudice, finding that the District failed to meet its burden to justify such an extreme and prejudicial consequence to Student for his attorneys' errors, which were not intentional.

Also on the record at the March 21, 2022 hearing, the ALJ denied District's Second Motion to Shift Fees, finding it was confusing, vague, and appeared to be duplicative of the remedy sought in District's First Motion to Shift Fees. District's Second Motion to Shift Fees consisted of only three paragraphs, which cited law regarding an ALJs' authority to order sanctions and shift fees. No facts were provided to justify a shifting of additional attorneys' fees from District to Student. District's Second Motion to Shift Fees summarily stated it had incurred another $2,041 in attorneys' fees in preparing its Second Motion to Shift Fees and for appearing at the March 21, 2022

hearing. The motion was not supported by either a declaration sworn under penalty of perjury, or by counsel's argument on the record explaining: what legal tasks were undertaken, why those additional legal services were necessary, the number of hours billed and the hourly rate, and a description of the experience of the attorneys which justified the hourly billing rates. Because District failed to provide this requisite information it was impossible to determine what reasonable necessary expenses District incurred, as required by Cal. Code Regs., tit.1 § 1040(c). In denying District's Second Motion to Shift Fees the ALJ found District failed to meet its burden of proof on District's Second Motion to Shift Fees.

After conferring with counsel whether they preferred either a one-week or two-week continuance of the hearing, the ALJ granted in part, and denied in part, District's motion to continue hearing. The ALJ continued the hearing to April 12, 2022, through April 14, 2022. The ruling on District's motion to continue hearing was memorialized by a written Order dated March 25, 2022.

MATTERS TAKEN UNDER SUBMISSION ON MARCH 21, 2022

On March 21, 2022, the ALJ took under submission District's First Motion to Shift Fees. The ALJ also took under the submission the portion of the OSC that asked why OAH's costs for the March 14, 2022 PHC should not be shifted to Student. The March 21, 2022 hearing lasted 46 minutes.

IT IS WITHIN THE ALJ'S AUTHORITY TO ORDER SHIFTING COSTS TO EITHER OAH OR THE OPPOSING PARTY

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 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).)

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.)

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).) Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates or employees. (Code Civ. Proc., § 128.5, subd. (f)(1)(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.*) The courts shall vigorously use their sanction authority to deter improper actions or tactics. (Code Civ. Proc., § 128.5, subd. (g).)

RULING ON DISTRICT'S FIRST MOTION TO SHIFT ATTORNEY'S FEES TO STUDENT

District's First Motion to Shift Fees seeks an Order that Student pay its fees in the amount of $1,851.50. District's motion provided only the gross figure of $1,851.40, and no further information about the specific charges which comprised that charge for legal services. At the March 21, 2022 hearing the ALJ asked District's attorney which attorneys billed for services, their hourly rates, how many hours each attorney had billed, and the amount of litigation experience each billing attorney had. Attorney Ukrainetz, who took the lead on behalf of District at both the March 14, and 21, 2022 hearings, provided that information to the ALJ on the record. Attorney Ukrainetz stated three attorneys had billed time for the March 14, 2022 PHC appearance and in preparing District's First Motion to Shift Fees and District's reply to Student's response to the OSC. District failed to provide a convincing explanation as to why three attorneys were required to complete this work.

Attorney Ukrainetz, who has practiced special education litigation since she was admitted to practice law in California in December 2019, handled all matters on behalf of the District at both the March 14, 2022 and March 21, 2022 hearings. She billed a total of 3.6 hours at $205 per hour, which amounts to a total cost of $738, for her legal services required in connection with the March 14, 2022 PHC appearance, preparing District's reply to Student's response to the OSC, and preparing District's First Motion for Fees, preparing District's response to Student's reply to the OSC, and preparing to appear at the hearings. Only $738 of District's attorneys' fees constitute a reasonable amount of costs for legal services incurred on behalf of the District for those legal services. The services of three attorneys for these legal services was not reasonably necessary. Only the services of one attorney, Ukrainetz, were reasonably necessary.

Since Student was not able to provide any explanation why Student failed to file an accurate PHC statement, and comply with ALJ Defillipis' February 25, 2022 Order, and Student's attorney was not familiar with Student's PHC statement and/or the complaint at both the February 25, 2022 PHC and the March 14, 2022 PHC, Student's conduct is deemed to be in bad faith. There is no excuse to justify the egregious reckless errors committed by Student's attorneys in connection with Student's PHC statement. Moreover, attorneys are expected to be familiar with the contents of their client's PHC statements and complaints, when appearing at a PHC. It was clear Student's attorneys failed to do this at two PHCs. Also, Student's attorneys were not able to explain why they failed to comply with ALJ Defillipis Order that they file a new correct PHC statement before the March 14, 2022 PHC. Such inexcusable errors by Student's attorneys were unreasonable, delayed the proceedings, and directly caused San Marcos Unified School District to incur additional attorneys' fees in the reasonable amount of $738. Therefore, San Marcos Unified School District's First Motion to Shift Fees is granted in part, and denied in part. Consequently, District's attorneys' fees in the amount of $738 are shifted to Student.

RULING ON OSC WHY OAH'S COSTS SHOULD NOT BE SHIFTED TO STUDENT

The ALJ, in exercising her discretion, hereby elects not to shift OAH's costs incurred in connection with the March 14, 2022 PHC to Student. However, the law firm representing Student should be aware if it files another inaccurate PHC Statement, inconsistent with the issues and facts alleged in a complaint on another occasion, or if that firm fails to comply with an ALJ's Order, as it did in this case, or if the firm's attorneys appear at a PHC without being familiar with the complaint and PHC statement filed, OAH may shift OAHs' incurred costs to that law firm and its client in the future.

ORDER

Based upon the facts and authorities stated above, San Marcos Unified School District's costs in the amount of $738 are shifted to Student and Student's attorneys of record, the Law Firm of Sheila Bayne, for attorneys' fees District incurred in attending the March 14, 2022 PHC, preparing District's reply to Student's response to the OSC, preparing District's First Motion to Shift Fees, and appearing at the March 22, 2022 hearing on the OSC. Student and the Law Firm of Sheila Bayne shall reimburse San Marcos Unified School District the sum of $738, within 30 days of this Order. Failure to comply with this Order may result in a civil judgment or finding of contempt.

IT IS SO ORDERED.

Christine Arden

Christine Arden
Administrative Law Judge
Office of Administrative Hearings