BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

MODESTO CITY SCHOOLS.

OAH CASE NUMBER 2022080550

ORDER GRANTING MOTION TO SHIFT COSTS FOR DELAYING DUE PROCESS HEARING

OCTOBER 25, 2022

On October 10, 2022, Modesto City Schools, called Modesto, filed a Motion for Sanctions against Student's attorney. Modesto argues Student's attorney acted unreasonably when the attorney was significantly late for the first day of the due process hearing on October 4, 2022. Modesto further argues Student's attorney delayed the hearing on October 6, 2022, when the attorney took a 15-minute break to contact Student's expert witness. Modesto is seeking sanctions in the amount of $837 to cover the cost of Modesto's legal fees expended as a result of Student's attorney delaying the hearing and in preparing the motion.

On October 13, 2022, Student filed an opposition to Modesto's motion. Student argues sanctions are not warranted because Modesto did not allege Student's attorney acted in bad faith, or in a frivolous way solely to cause unnecessary delay. Student further argues that the delay at the hearing was out of their control and due to Student's attorney not having the meeting link and having difficulty logging into the videoconference. Finally, Student argues Modesto would have incurred legal fees whether or not there was a delay, and thus, they did not suffer any harm.

ORDER SHIFTING COSTS IS WITHIN OAH'S AUTHORITY

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).)

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. 5, § 3088, subd. (a).) Absent exceptional circumstances, a law firm is held jointly responsible for violations committed by its partners, associates or employees. (Code Civ. Proc., § 128.5, subd. (f)(1)(C).)

"Actions or tactics" include, but are not limited to, making, or opposing motions or filing and serving a complaint. (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. (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.) An attorney may be sanctioned because they fail to call the court and opposing counsel to alert them of an inability to attend a hearing. (*Ibid.*) Such conduct is "discourteous...and not in good faith" and Section 128.5 "does not require willfulness to be an aspect of the [improper] actions or tactics." (*Id.*, at p. 702-703, citing *In Re Marriage of Gumabao* (1984) 150 Cal. App. 3d 572, 577.)

An order of sanctions is 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 must vigorously use their sanction authority to deter improper actions or tactics. (Code Civ. Proc., § 128.5, subd. (g).) 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).)

ORDER SHIFTING COSTS TO STUDENT'S ATTORNEY IS WARRANTED FOR THE HEARING DELAY ON OCTOBER 4, 2022

An order shifting costs to Student's attorney is warranted in this case due to the attorney's failure to follow OAH prehearing guidelines and lack of preparation, which delayed the due process hearing. Student's attorney's actions were avoidable, discourteous, and without regard to the value of OAH's and Modesto's time. Student's attorney's actions delayed the hearing and wasted resources, and thus, were not in good faith.

On September 26, 2022, OAH held a prehearing conference, called PHC, in this case and confirmed with the parties that the videoconference due process hearing would begin at 9:30 AM, on October 4, 2022. On September 27, 2022, OAH issued the Order Following Prehearing Conference to the parties. The PHC order included the dates and start time for the hearing. The PHC order also informed the parties of their obligation to file, with OAH, a Participant Information Form with current contact information for hearing participants, at least two business days before the first day of hearing.

Modesto filed its Participant Information Form on September 22, 2022. At 3:39 PM, on October 3, 2022, OAH emailed the invitation and link for the videoconference hearing to Modesto's attorney of record, Tilman Heyer, and Student's attorney of record, Shiela Bayne. OAH did not have an email address on file for Parent or Student.

At 8:21 PM, on October 3, 2022, Student filed a Participant Information Form that included contact information for five attorneys, Parents, and two witnesses. At 7:24 AM, on October 4, 2022, the first day of hearing, Attorney Bayne called OAH and requested that attorney Diana Renteria be given access to the electronic evidence system. At 9:30 AM, the undersigned Administrative Law Judge, called ALJ, signed onto the videoconference hearing. Attorney Heyer and Modesto's representative were present at the hearing. Neither Student's attorney, nor Parents were present. At 9:32 AM, OAH staff contacted the ALJ to inform the ALJ that Student's attorney Diana Renteria did not have the link to join the meeting. Attorney Renteria was not listed as attorney of record on any of Student's filings and had not previously appeared in the case.

At 9:35 AM, the undersigned ALJ emailed Attorney Renteria the hearing link to the email address on the Participant Information Form. At 9:42 AM, Attorney Renteria called OAH and requested that OAH send the meeting link to a different email address

not listed on the Participant Information Form. At 9:43 AM and 9:48 AM, respectively, the undersigned ALJ emailed Parents and Attorney Renteria the hearing link. At 9:50 AM, 20 minutes after the scheduled start time, Attorney Renteria joined the hearing. Parent did not join the hearing until 10:10 AM, 40 minutes after the scheduled start time. During discussion of Attorney Renteria's and Parent's late appearance, Attorney Heyer noticed that OAH used an incorrect email for Attorney Bayne in the initial meeting invitation. The ALJ confirmed the email for Attorney Bayne was incorrect. However, OAH's error did not excuse Student's attorney from following OAH's prehearing guidelines or from appearing at the due process hearing on-time.

The hearing began at 10:18 AM due to Student's attorney's and Parent's late appearance. On the record, the ALJ informed the parties that OAH would consider a Motion to Shift Costs due to Student's attorney's and Parent's late appearance.

Student's attorney failed to file a Participant Information Form at least two business days before the first day of hearing with correct contact information for the attorney appearing at hearing and Parents. Instead, Student's attorney filed the form the night before the first day of hearing. The delayed filing caused OAH staff and the ALJ to expend additional resources on the morning of hearing to troubleshoot Attorney Renteria's access to the electronic evidence, locate email addresses, and send the meeting link to Attorney Renteria and Parents. The delayed filing also caused Attorney Heyer, Modesto's representative, and the ALJ to wait for 40 minutes until Attorney Renteria, and ultimately, Parent joined the hearing. Further, Student's attorney's and Parent's late appearance delayed the hearing by 48 minutes.

For these reasons, Modesto's request to shift costs for 48 minutes of legal fees on October 4, 2022, and for two hours of legal fees preparing the Motion for Sanctions, is granted.

ORDER SHIFTING COSTS IS NOT WARRANTED FOR THE HEARING DELAY ON OCTOBER 6, 2022

Modesto's request to shift costs for a 15-minute break Student's attorney requested to contact Student's expert witness during the hearing on October 6, 2022, is denied. Student's attorney's request for a short break during hearing was reasonable and not in bad faith.

SHIFTING COSTS TO STUDENT'S ATTORNEY WILL DETER FUTURE BAD FAITH ACTIONS

Attorney Heyer filed a declaration under the penalty of perjury with Modesto's Motion for Sanctions. Attorney Heyer declared Modesto paid legal fees in the amount of $270 per hour, and that Attorney Heyer spent a total of two hours preparing the Motion for Sanctions and supporting declaration. When combined with the 48 minutes Attorney Heyer spent waiting for the due process hearing to begin on October 4, 2022, Modesto is entitled to attorney's fees for a total of two hours and 48 minutes, or 2.8 hours. At a rate of $270 per hour, Modesto is entitled to shift costs to Student's attorney in the amount of $756.

OAH waives any right to costs associated with the time the ALJ spent waiting for Student's attorney and Parent to appear at the due process hearing on October 4, 2022. OAH similarly waives any right to costs for preparing this Order.

ORDER

1. Modesto's Motion for Sanctions and request to shift costs is granted.

2. Within 30 days of this Order, Sheila Bayne and the Law Office of Sheila Bayne must pay, by certified check, Modesto City Schools, in the amount of $756.
3. These costs are imposed on Sheila Bayne, as the attorney of record in this case, and the Law Office of Sheila Bayne, jointly and severally. Neither Sheila Bayne, nor the Law Office of Sheila Bayne, may pass these costs on to Student or Parents.
4. Failure to comply with this Order may result in a civil judgment or finding of contempt.

Tara Doss

Tara Doss

Administrative Law Judge

Office of Administrative Hearings