BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

MORGAN HILL UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020120801

ORDER DENYING STUDENT'S REQUEST FOR RECONSIDERATION; AND MORGAN HILL UNIFIED SCHOOL DISTRICT'S REQUEST FOR SANCTIONS

MARCH 29, 2021

On February 22, 2021, the undersigned Administrative Law Judge issued an Order Dismissing Student's Case Without Prejudice. On March 22, 2021, Student filed a motion for reconsideration. On March 25, 2021, Morgan Hill Unified School District filed an opposition, and Request for Attorney's Fees.

APPLICABLE LAW

The Office of Administrative Hearings will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when

the party seeks reconsideration within a reasonable period of time, generally within ten days. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.)

In certain circumstances, an Administrative Law Judge presiding over a special education proceeding is authorized to 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 as defined in Section 128.5 of the Code of Civil Procedure. (Gov. Code, §§ 11405.80,11455.30; Cal. Code. Regs., tit. 5, § 3088, subd. (e); 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."].) 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).)

Government Code § 11455.30(a) provides, in relevant part, that, "[t]he presiding officer may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in California Code of Civil Procedure § 128.5." "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).) Filing a complaint without serving it on the other party is not within the definition of "actions or tactics." (*Ibid.*) "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.)

The California Court of Appeal discussed what is required to impose sanctions under California Code of Civil Procedure section 128.5 in the case of *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635. In discussing what constitutes bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay, the court stated the action taken by the party or its attorney must be solely for the purpose of harassing an opposing party. Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit. There must also be a showing of an improper purpose, such as subjective bad faith on the part of the attorney or party to be sanctioned. (*Id.* at p. 635.)

DISCUSSION

Student's counsel's request was not filed within a reasonable time after the initial Order was issued. Student waited 30 days, well beyond the reasonable 10-day period. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.)

Moreover, Student offers no new facts, circumstances or law to support reconsideration.

At the February 22, 2021 Prehearing Conference, both counsel answered ready for the due process hearing scheduled for March 2, through March 4, 2021.

Student's counsel did not file a pre-hearing conference statement identifying her witnesses and exhibits. Morgan Hill timely filed a prehearing conference statement and raised a statute of limitations defense on numerous issues.

At the Prehearing conference, the ALJ discussed bifurcating the first day of hearing, March 2, and addressing whether eight issues should barred by the statute of limitations and therefore be dismissed. Student's counsel wanted to avoid bifurcating the hearing, and spontaneously asked to orally amend Student's due process request to make some corrections. The ALJ denied the impromptu oral motion to amend the complaint because it was not timely, it was not in writing, it was not accompanied by a proposed amended complaint, and it did not give proper notice given to opposing counsel.

After the ALJ denied the oral motion to amend the due process request, Student's counsel requested a two-week continuance of the hearing so that she could amend the complaint and request another continuance of that hearing. Student did not have a proposed due process complaint ready to file. The ALJ determined there was no good cause to continue the hearing. Student's counsel stated on the record she would withdraw her complaint and refile a new complaint. The ALJ agreed to dismiss Student's without prejudice.

In her moving papers for reconsideration, Student's counsel claims the ALJ was not impartial and did not allow her to explain her position during the 25-minute prehearing conference. Those claims are unfounded. At the beginning of the prehearing conference, Student's counsel answered ready for the due process hearing, actively participated in discussions, and within 25 minutes, voluntarily chose to withdraw her due process hearing request on the record. The ALJ granted her request without prejudice. Since that time, Student's counsel had the opportunity to file a new due

process request with a newly assigned case number and with corrected dates but has not done so. Student's counsel's request seeking an Order to undo her own withdrawal is frivolous. The ALJ acted impartially when she scheduled the bifurcated due process hearing and denied oral motions which did not comply with the IDEA and the prehearing conference orders.

As to Morgan Hill's motion for attorney's fees and sanctions, Morgan Hill failed to establish the requisite findings that would establish an award its favor. Attorneys' fees and sanctions may be awarded when the actions tactics involve bad faith, are frivolous or are solely intended to cause unnecessary delay, or solely for the purpose of harassing an opposing party. Those factors are not present here.

Rather, Student's counsel demonstrated a lack of preparation and organization when she was not prepared to go forward with the due process hearing with bifurcated issues, and withdrew the complaint at the prehearing conference. Student's counsel demonstrated a lack of preparation seeking to reverse that decision and revive the prior older due process complaint, unaltered, and without changes, without filing a corrected complaint in a new action. Student's moving papers confused the issues and the legal standards allowing the amendments of due process complaints. Student's attempt to orally amend the complaint at the prehearing conference, and the failure to rewrite and correct the complaint 30 days later, demonstrated a lack of preparation and organization. These factors did not demonstrate an improper purpose and did not reach the level of subjective bad faith on the part of Student's counsel.

ORDER

Student has not established the February 22, 2021 Order should be reconsidered. The motion for reconsideration is denied. Morgan Hills' motion for attorney's fees and sanctions is denied.

IT IS SO ORDERED.

Deborah Myers Cregar

Deborah Myers-Cregar
Administrative Law Judge
Office of Administrative Hearings