BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHALF OF STUDENT, v. VACAVILLE UNIFIED SCHOOL DISTRICT,	OAH Case No. 2017060531
VACAVILLE UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH Case No. 2017040782 ORDER DENYING MOTION FOR SANCTIONS

On April 18, 2017, Vacaville Unified School District filed with the Office of Administrative Hearings a request for due process hearing naming Student. On June 5, 2017, OAH granted Vacaville's motion to amend its complaint. Vacaville's issues for hearing were whether its February 2017 occupational therapy, speech and language, augmentative alternative communication, and functional behavior assessments of Student met all legal requirements such that Student was not entitled to independent educational evaluations in these areas.

On June 9, 2017, Student filed a request for due process hearing naming Vacaville. Student identified the following issues for hearing: whether Vacaville denied him a free appropriate public education by failing to provide Parents copies of all educational records; failing to appropriately assess him in the areas of occupational therapy and speech and language; failing to provide Parents with training in the use of the Picture Communication Exchange System; and failing to ensure his para-educator was within arms' length of Student pursuant to his operative individualized education program. On June 16, 2017, OAH granted Student's motion to consolidate. After OAH granted the parties' joint request for a continuance and two further continuance requests by Student because of the unavailability of his counsel, this matter was scheduled for hearing December 5, 2017.

On December 6, 2017, OAH dismissed the consolidated matters pursuant to Student's December 1, 2017 notice of withdrawal of his complaint and Vacaville's December 4, 2017 notice of withdrawal of its complaint. On December 8, 2017, Vacaville filed a motion for sanctions against Student's counsel claiming that Student's counsel knew that his independent evaluators would not complete their evaluations until January 2018 and had no

intention to proceed to hearing as scheduled; had selected hearing dates for which Student's counsel was unavailable; and moved to amend Student's complaint for the improper purpose of delaying the hearing. Vacaville further asserts Student's counsel should be sanctioned for withdrawing Student's complaint and requests for independent evaluations two days prior to hearing which forced Vacaville to withdraw its complaint, and for ignoring OAH's order to meet and confer regarding the witness schedule, all of which caused Vacaville to incur costs preparing for hearing. The motion is supported by the sworn declaration of Vacaville's Counsel and copies of email correspondence between counsel.

Vacaville seeks attorney fees in the amount of $1,158 for time spent responding to Student's motion to amend, drafting a witness schedule, corresponding with Student's counsel about a continuance request, and reviewing Student's motion to continue. Vacaville asserts these hearing preparation activities are directly related to bad faith actions by Student's counsel. Vacaville further seeks reimbursement for the costs of a non-refundable roundtrip airline ticket from Ontario to Sacramento which it purchased for one of its witnesses in the amount of $287.96.

On December 13, 2017, Student's counsel filed an opposition supported by her sworn declaration and the declaration of her assistant. Student's counsel asserts that she did not schedule hearing for dates on which she was unavailable; intended to proceed to hearing until she withdrew Student's case; and filed motions to amend and to continue in accordance with the law in order to advance the interests of her client. Student's counsel avers she did not act in bad faith and that she was unable to meet and confer with Vacaville regarding a witness schedule due to her health and hearing schedule.

APPLICABLE LAW

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."].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

"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); 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. (*Levy v. Blum*, *supra*, 92 Cal.App.4th at p. 635.)

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 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).)

DISCUSSION

Procedural Status and Jurisdiction

A short summary of prior motions and orders provides context for the current motion for sanctions. The parties participated in a prehearing conference on November 17, 2017. During the PHC, Student's counsel represented that she did not anticipate filing any motions prior to hearing, although she might consider withdrawing some or all of Student's assessment claims. The November 17, 2017 Order Following Prehearing Conference ordered that any subsequent motion shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during the prehearing conference. Counsel were further ordered to meet and confer regarding the order of witnesses and projected length of testimony by November 29, 2017.

On November 22, 2017, Student filed a motion to amend with a proposed amended complaint seeking to add an issue regarding the appropriateness of Vacaville's behavior assessment and to raise the issue of whether Vacaville should have assessed Student in the area of physical therapy and/or orientation and mobility. Student failed to include a supporting declaration regarding the late filing of this motion. On November 29, 2017, OAH denied Student's motion to amend as Student failed to establish good cause as to why he delayed in bringing his motion as any further delay would run counter to the mandate of the Individuals with Disabilities Education Act for the prompt disposition of due process complaints.

On November 30, 2017, Student filed a motion for reconsideration, or in the alternative, a motion for a continuance because Student's experts would not complete their private assessments prior to January 2018. On December 1, 2017, OAH granted reconsideration but denied the requests to amend and to continue. Thereafter, the parties filed their notices of withdrawal of their respective complaints.

On December 6, 2017, OAH dismissed this consolidated matter pursuant to Student's notice of dismissal on December 1, 2017, and Vacaville's notice on December 4, 2017. Following dismissal, a party has the right to move for sanctions and seek costs for conduct occurring while the matter was pending. (Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal. App.4th 1152; West Coast Development v. Reed (1992) 2 Cal. App.4th 693.)

Analysis

Vacaville's motion fails to establish that Student's counsel engaged in bad faith actions that were frivolous or solely intended to cause unnecessary delay. Vacaville claims but fails to prove that Student's counsel intentionally selected dates for hearing for which she was unavailable or that she knew she would be withdrawing her case long before she did so. Student's counsel persuasively argues that following the PHC she was continuing to assess her client's situation and whether his experts might be able to testify on his behalf despite not having completed their assessments.

Vacaville's argument that Student's counsel should be sanctioned for moving to amend Student's complaint, moving for reconsideration and to continue the matter; failing to meet and confer regarding the witness schedule; withdrawing Student's complaint and having Parents withdraw their requests for independent educational evaluations just prior to hearing is not persuasive. Student's counsel determined a need to request leave to file an amended complaint to include additional issues which she initially overlooked. Vacaville claims but does not establish that Student's counsel acted in a manner that was improper and meant to harass Vacaville. The law specifically allows Student to move to amend his complaint five days prior to hearing. (20 U.S.C. § 1415(c)(2)(E)(i).) Student did so. Student was within his rights to seek reconsideration upon denial of his motion to amend, and to file for a continuance when it was clear his experts would not be ready to testify on his behalf. Student's counsel has a responsibility to pursue all motions that she has reason to believe are meritorious and would further her clients' interests.

Student was within his right to dismiss his complaint and withdraw his request for publically funded independent evaluations, even on the eve of hearing. That Vacaville had to prepare for a hearing only to have Student dismiss his complaint and withdraw his request for independent evaluations is not grounds for shifting its hearing costs to Student. Vacaville's dissatisfaction with needing to withdraw its own complaint and the possibility that Student will renew his requests for independent evaluations at a later date are not grounds for sanctions.

OAH expects counsel to comply with all of its orders, including an order to meet and confer regarding a witness schedule. Here, Student's counsel established that she was ill, had a medical appointment, and was engaged in another hearing during the time frame she was ordered to meet and confer with Vacaville's counsel. Even so, none of this excuses her non-compliance with OAH's order. However, the failure of Student's counsel to meet and confer regarding a witness schedule does not, in this case, meet the standard for imposing sanctions. Vacaville did not establish that the actions or inactions of Student's counsel were taken or not taken in bad faith and constitute grounds for imposing sanctions.

ORDER

Vacaville's motion for sanctions is denied.

IT IS SO ORDERED.

DATE: December 19, 2017

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Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings