BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. ILEAD LANCASTER CHARTER SCHOOL.	OAH Case No. 2018040772 ORDER WITHDRAWING ORDER TO SHOW CAUSE; AND ORDER DENYING CROSS-MOTIONS FOR SANCTIONS

PROCEDURAL BACKGROUND

On June 12, 2018, the Office of Administrative Hearings issued an order to show cause why costs should not be shifted to Student or Student's attorney based on motions for sanctions filed by iLead Lancaster Charter School on May 29 and May 30, 2018. On July 2, 2018, Administrative Law Judge Darrell Lepkowsky conducted the OSC hearing. Leon Ozeran, Attorney at Law, appeared on behalf of Student. He was joined by paralegal Rimma Yuryeva. Heather Edwards, Attorney at Law, appeared on behalf of Charter. The ALJ recorded the hearing.

Student filed a request for due process hearing (complaint) on April 17, 2018, with OAH naming Charter. As paraphrased, Student alleged that Charter denied him a free appropriate public education by:

1. Failing to conduct and complete his psychoeducational assessment within 60 days;

2. Failing to conduct and complete a full assessment in the areas of speech, occupational therapy, and social/emotional;

3. Failing to hold an IEP team meeting to review his assessments within statutorily required time frames;

4. Failing to have a speech and language therapist or an occupational therapist attend the April 13, 2018 IEP team meeting;

5. Denying Parent meaningful participation at the individualized educational program team meeting held on April 13, 2018; and

6. Failing to follow applicable timelines for assessing Student in the areas of psychoeducational, academics, social/emotional, speech, and occupational therapy.

As a remedy for these violations, Student requested an Order that Charter conduct the assessments and hold an IEP team meeting prior to June 15, 2018, with all required IEP team members present.

On April 18, 2018, OAH issued a scheduling order setting the matter for a telephonic prehearing conference on June 1, 2018, and for hearing on June 12, 2018. The order directed the parties to file prehearing conference statements by no later than May 29, 2018.

Charter filed a response to Student's complaint on April 26, 2018. Charter did not file a notice of insufficiency or motion to dismiss Student's complaint.

On May 23, 2018, Student filed a request to dismiss his case, using an OAH form. Student indicated as the reason for dismissal that Charter had complied with Parent's requests after Student filed the request for a due process hearing. The OAH form states: "I hereby request that the Office of Administrative Hearings dismiss this matter. I have sent a copy of this letter to all the named parties in this matter notifying them of my request to dismiss." The request to dismiss was signed and dated by Student's attorney on May 23, 2018. Student did not file a separate proof of service.

Charter's First Motion for Sanctions

On May 29, 2018, at 3:50 p.m., Charter filed a motion for sanctions against Student and his attorney. Charter contended that sanctions were warranted because Student's complaint was frivolous and filed in bad faith. Charter contended that instead of informing it that occupational therapy and speech and language therapy assessments were omitted from Charter's February 8, 2018 assessment plan at the time Parent signed the plan, or even at the IEP team meeting held on April 13, 2018, to discuss the assessments that were done, Student filed his complaint on April 17, 2018. Charter also alleged that Student filed his complaint before the 60 days to hold an IEP team meeting to discuss his assessments had expired, taking into account Charter's spring break.

Charter's Supplemental Motion for Sanctions

At the same time it filed its motion for sanctions, Charter timely filed its prehearing conference statement. The following day, on May 30, 2018, Charter filed a supplement to its motion for sanctions, supported by a declaration of its attorney. Charter stated that approximately an hour after it filed its PHC statement, it received an email from Student's counsel stating that Student had filed a request to dismiss his case. The email included a copy of Student's May 23, 2018 request to dismiss his case. Charter's attorney stated that her office did not receive a copy of the request to dismiss prior to the May 30, 2018 email from Student's attorney. Charter asked that Student be sanctioned for its failure to serve Charter with Student's request to dismiss, which resulted in Charter unnecessarily filing its

PHC statement, as well as the motions for sanctions. Charter failed to include any information or declarations detailing the financial costs it incurred in filing the pleadings.

On June 12, 2018, OAH issued an order to show cause why Charter's expenses should not be shifted to Student and/or Student's attorney. Student timely filed a response and opposition on June 25, 2018. Student stated that his complaint was not frivolous. Student also stated that his attorney's office mailed a copy of his May 23, 2018 request for dismissal to the office of Charter's attorney, albeit not addressed to the attorney of record. Student included a copy of the proof of service sent with the mailing, which indicates mail service on Charter's attorney's office on May 23, 2018. Student also asked that sanctions be levied against Charter for its failure to give proper notice to Student of its intent to file a motion for sanctions. Student did not include any declarations in support of its opposition or its motion for sanctions.

Charter timely filed a reply to Student's opposition on June 29, 2018. Charter contended, inter alia, that Student's production of a proof of service at this late date is questionable.

APPLICABLE LAW

In certain circumstances, an administrative law judge 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).)[1]

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).) The ALJ shall determine the

[1] Section 3088 refers to "presiding hearing officers." However, the ALJ presiding over the hearing is the presiding officer. 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," a point confirmed in *Wyner v. Manhattan Beach Unified Sch. Dist., supra,* 223 F.3d at page 1029, where the court stated, "Clearly, § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."

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).)

"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.)

DISCUSSION

In its original motion for sanctions, Charter contended that Student's entire complaint was frivolous. It stated that it did meet applicable timelines to hold an IEP team meeting to complete and discuss Student's assessments, and that Student should have been aware of that. However, Charter did not provide supporting evidence to substantiate that claim. It did not include a copy of the signed assessment plan in its motions, did not include a copy of the school calendar, and did not include a declaration that contained that information. It therefore has not demonstrated that Student's allegations relating to a failure to meet statutory time frames were frivolous.

Charter further contended that Student improperly alleged a failure to include speech and language and occupational therapy assessments in Charter's original assessment plan. Charter contends that Student unethically failed to alert Charter to the omission before Student filed his complaint, particularly since Charter agreed to do the assessments once it was informed of the omission when Student filed his complaint. However, Charter does not cite to any authority in support of the contention that a petitioning party is required to inform the respondent of its intent to file for due process to permit the respondent to remedy the issues before the complaint is filed. There is no requirement under the Individuals with Disabilities Education Act or corresponding state education statutes similar to Code of Civil Procedure section 364, subdivision (a), which requires 90 days' notice of intent to sue a health practitioner for negligence. Since no such requirement exists, Student's failure to engage in some type of pre-filing alternative dispute resolution is not subject to sanctions.

Finally, Student raised two issues in his complaint that Charter did not specifically address in its motion for sanctions. Since they were not addressed, there is no basis for finding the issues frivolous.

Charter filed a supplement to its motion to sanctions based on Student's alleged failure to serve Charter with his request to dismiss his case. Charter did not receive the request to dismiss until after it had filed its PHC statement on May 29, 2018, six days after Student filed his request to dismiss with OAH. In his opposition to Charters motions for sanctions, Student attached a copy of a proof of service dated May 23, 2018, which Student

stated was included with the copy of his request to dismiss sent to Charter's attorney by United States mail. At the hearing on the order to show cause, Ms. Yuryeva, who prepared and mailed the request for dismissal and proof of service, explained the events surrounding her preparation of the proof of service and how she mailed it to Charter along with a copy of the request to dismiss. Although Charter unfortunately did not receive the mailing, there was no reason to doubt the Ms. Yuryeva's statements. Therefore, sanctions against Student are not warranted for the alleged failure to timely serve Charter with the request to dismiss Student's case.

Finally, Student requested sanctions against Charter for its failure to give notice of its intent to file its motion for sanctions. There is no administrative requirement for Charter to give notice, and no way for Student to have remedied a failure to have served Charter, had it not done so. Student has not proven grounds for sanctioning Charter, and his motion for sanctions is denied.

ORDER

1. The June 12, 2018 order to show cause as to why Charter's expenses should not be shifted to Student or Student's attorney is hereby withdrawn.

2. The parties' cross-motions for sanctions are denied.

DATE: July 3, 2018

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Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings