

BEFORE THE
OFFICE OF ADMINISTRATIVE
HEARINGS STATE OF CALIFORNIA

IN THE MATTER OF:
PARENTS ON BEHALF OF STUDENT,

v.

PERRIS UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2023100314

ORDER DENYING MOTION TO SHIFT OAH'S COSTS TO
STUDENT'S ATTORNEYS, AND PARTIALLY GRANTING
DISTRICT'S MOTION TO SHIFT ITS COSTS

JANUARY 18, 2023

PROCEDURAL BACKGROUND

On October 10, 2023, the Law Offices of Sheila C. Bayne, Esq., called the Bayne Firm, filed a request for due process hearing, called a complaint, on behalf of Student, naming respondent Perris Union High School District, called Perris Union. Pursuant to a Scheduling Order served by the Office of Administrative Hearings, called OAH, on the

parties on October 11, 2023, a videoconference prehearing conference, called the PHC, was set for November 20, 2023 at 10:00 a.m. The videoconference hearing was set for November 28, 2023, through November 30, 2023, beginning at 9:30 a.m. each day.

At 1:14 p.m. on Friday, November 17, 2023, one business day before the scheduled PHC, Administrative Law Judge, called an ALJ, Christine Arden, emailed three attorneys with the Bayne Firm, Student's counsel of record, specifically, attorneys Sheila Bayne, Robert Burgermeister, and Leroy Sumter, at their email addresses provided to OAH by Student, an evite containing the electronic link to the PHC scheduled for November 20, 2023 at 10:00 a.m. The ALJ concurrently emailed two of Perris Union's attorneys, and the ALJ herself, the same evite with an electronic link to the PHC. That PHC evite contained both an electronic link to the videoconference PHC, and a telephone number at which an attorney could call into the PHC if necessary.

ALJ Arden opened the videoconference PHC via Zoom at approximately 9:50 a.m. on November 20, 2023, by clicking on the electronic link provided in the PHC evite sent to all counsel, as well as the ALJ. Attorneys for Perris Union, Rebecca Diddams and Austin Jones, both appeared at the PHC before 10:00 a.m. on November 20, 2023. When no attorney appeared at the PHC on behalf of Student by 10:05 a.m., the ALJ requested attorney Diddams call Student's attorney. Diddams attempted to contact Student's attorneys via telephone at the sole phone number Diddams had for the Bayne Firm, but was unable to reach anyone at that phone number.

The ALJ then attempted to contact Student's counsel via telephone at two phone numbers OAH had for the Bayne Firm. However, the ALJ was not able to reach Student's counsel. A person who answered the ALJ's call at one of the phone numbers stated she worked for an answering service, not the Bayne Firm.

Per the ALJ's request, OAH's case manager assigned to this case also attempted to call the Bayne Firm. The case manager reached Jim Peters, a staff member with the Bayne Firm. However, Peters put the case manager on hold and never returned to the call. After being kept on hold for quite a while, the case manager's call was eventually disconnected. The case manager then attempted to call the Bayne Firm multiple additional times, but was unable to reach anyone at the Bayne Firm.

ORDER TO SHOW CAUSE

After waiting over 15 minutes for Student's attorney to join the PHC, the ALJ began the PHC on the record at 10:16 a.m. Because Student's counsel failed to appear at the PHC, the ALJ continued the PHC, and set a hearing on an Order to Show Cause, called an OSC, why this case should not be dismissed for failure to prosecute, and why OAH's costs incurred in connection with the November 20, 2023 PHC and the OSC should not be shifted to Student's attorneys. The hearing on the OSC was set for December 4, 2023. The ALJ further ordered if the case was not dismissed at the December 4, 2023 hearing on the OSC, the PHC would occur immediately thereafter. The ALJ ordered Student's attorneys to file a written response to the OSC. The ALJ also continued the hearing to December 12, 2023, through December 14, 2023, beginning at 9:30 a.m. each day.

Student filed its response to the OSC. That response stated Peter Collisson, the Bayne Firm attorney assigned to appear at the November 20, 2023 10:00 a.m. PHC in this case, mistakenly instead appeared at a videoconference PHC held in OAH case number 2023100415 before ALJ Rommel Cruz. Collisson sat through that entire PHC, which lasted about an hour, even though another attorney from the Bayne Firm represented

the petitioner at that PHC and ALJ Cruz announced the case caption and number at the beginning of the PHC. Perris Union also filed a response to the OSC, contending Collisson's conduct was so egregious it was not excusable.

At the OSC hearing held on December 4, 2023, attorney Sheila Bayne appeared on behalf of Student, and attorneys Diddams and Jones appeared on behalf of Perris Union. Both parties were given the opportunity to make further oral argument on the record regarding the OSC. The ALJ partially ruled on the OSC on the record by refusing to dismiss the case because to do so would unduly prejudice Student. The ALJ took under submission the portion of the OSC regarding whether OAH's costs incurred in connection with the November 30, 2023 PHC and the OSC should be shifted to Student's attorneys.

DISTRICT'S MOTION FOR SANCTIONS

On November 30, 2023, Perris Union filed its motion to shift the expenses it incurred in connection with the November 20, 2023 PHC, the OSC, and its motion, to Student. That motion is referred to as District's Motion for Sanctions. Student filed an opposition to District's Motion for Sanctions, contending Collison simply made a mistake and did not act intentionally. Perris Union filed a supplement to District's Motion for Sanctions, declaring under penalty of perjury that its attorneys billed an aggregate sum of \$3,328.50 for legal services provided by four attorneys in connection with the November 20, 2023 PHC, the OSC, and District's Motion for Sanctions.

Student filed an Opposition to Perris Union’s supplement to District’s Motion for Sanctions stating the amount of fees charged by Perris Union’s counsel was excessive. At the December 4, 2023, PHC both parties were given the opportunity to make further oral argument on the record regarding District’s Motion for Sanctions. The ALJ took District’s Motion for Sanctions under submission.

APPLICABLE LAW

In certain circumstances, an administrative law judge, known as the ALJ, presiding over a special education proceeding is authorized to shift expenses from one party to another, or to the Office of Administrative Hearings. (Gov. Code, §§ 11405.80, 11455.30; 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).)

Expenses may be ordered to be reimbursed either to OAH or to another party. With approval from the General Counsel of the California Department of Education, the ALJ presiding over the hearing may “order a party, the party’s attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel” to OAH (as the entity that is responsible for conducting due process hearings) as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.”

(Cal. Code. Regs., tit. 5, § 3088, subds. (a) & (e); see Gov. Code, § 11455.30, subd. (a).) An ALJ presiding over a hearing may, without first obtaining approval from the California Department of Education,

“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).)

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).)

“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.)

RULING ON OSC: OAH’S EXPENSES ARE NOT SHIFTED TO STUDENT’S ATTORNEYS

At the minimum, attorneys are expected to be familiar with the contents of their client’s PHC statements and complaints when appearing at a PHC. Collisson failed to

meet this rudimentary expectation because he was unable to even notice he attended the wrong PHC. Collison was clearly either ill prepared for the PHC in this case, or not paying attention in the PHC he mistakenly attended before ALJ Cruz, or both. It is unclear how Collison failed to recognize he was not appearing at the right PHC. Here, Collison's actions were frivolous, as they were completely without merit.

This is the first time that an attorney from the Bayne Firm has failed to appear at a PHC before this ALJ. Therefore, the ALJ, in exercising her discretion, hereby elects not to shift OAH's costs incurred in connection with the November 20, 2023 PHC and the OSC to Student's attorneys. However, the Bayne Firm should be aware if one of its attorneys engages in such careless and frivolous actions again, OAH may shift its costs to the Bayne Firm and its client in the future.

OAH's costs incurred in connection with the November 20, 2023 PHC and the OSC are not shifted to Student's attorneys. Therefore, the OSC regarding why OAH's costs incurred in connection with the November 20, 2023 PHC and the OSC should not be shifted to Student's attorneys is hereby discharged.

RULING ON DISTRICT'S MOTION FOR SANCTIONS: DISTRICT'S REASONABLE COSTS ARE SHIFTED TO STUDENT'S ATTORNEYS

Collison's actions on November 20, 2023, as described and explained in Student's response to the OSC, were totally and completely without merit. Therefore, as noted above, Collison's failure to appear at the November 20, 2023 PHC constitutes frivolous actions. Moreover, those frivolous actions directly caused Perris Union to incur attorneys' fees it would not have otherwise incurred. Therefore, District's Motion for Sanctions is

granted in part, and Perris Union's reasonable legal fees incurred in connection with the November 20, 2023 PHC, the OSC, and District's Motion for Sanctions are shifted to Student's attorneys.

ONLY REASONABLE FEES ARE SHIFTED TO STUDENT'S ATTORNEYS

The ALJ shall determine the reasonable expenses based upon a declaration setting forth specific expenses incurred as a result of the bad faith or frivolous 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).)

The aggregate amount of attorneys' fees Perris Union seeks to be shifted to Student is unreasonably high. According to Perris Union's Supplemental Briefing on the Motion for Sanctions, attorneys Jones, Diddams, Dee Anna Hassanpour and Anisha Asher, all provided legal services in connection with the November 20, 2023 PHC, the OSC, and District's Motion for Sanctions. It was duplicative, and not necessary or reasonable to have four attorneys provide legal services for those matters, which were not particularly

complex. Therefore, the fees charged for legal services provided by attorneys Hassanpour (\$1,008) and Asher (\$53) are duplicative, not reasonable, and are not shifted to Student's attorneys.

Jones' hourly rate is \$235 per hour. Diddams' hourly rate is \$265 per hour. Both those hourly rates are reasonable for the legal work performed. The amount of fees incurred for the services of attorney Diddams, who has taken the lead in all proceedings in this case, in the amount of \$1,139.50, is reasonable. The amount of fees incurred for the services of attorney Jones is reasonable, except for \$188 charged for .8 of an hour Jones took to prepare for the November 20, 2023 PHC, and \$117.50 charged for .5 of an hour Jones took to appear at the November 20, 2023 PHC. Since Diddams solely handled District's appearance at that PHC, Jones' preparation for and appearance at that PHC were not reasonable because those services were duplicative of Diddams' services. Therefore, only \$822.50 of the fees incurred by District for Jones' legal services are reasonable.

Consequently, a total amount of \$1,962 in attorneys' fees incurred by Perris Union is reasonable and shifted to Student's attorneys as sanctions for Student's attorneys' failure to appear at the November 20, 2023 PHC, and in connection with the OSC, and District's Motion for Sanctions. The Bayne Firm shall pay Perris Union \$1,962 within 30 days of the date this Order is issued. The Bayne Firm shall also file a notice with OAH within three business day of the date it pays Perris Union, indicating it has complied with this Order.

ORDER

1. OAH's costs incurred in connection with the November 20, 2023 PHC and the OSC are not shifted to Student's attorneys, and the OSC is hereby discharged.
2. Perris Union High School District's Motion for Sanctions is granted in part.
3. Perris Union High School District's reasonable attorneys' fees in the amount of \$1,962 are shifted to Student's attorneys of record in this case, the Law Office of Sheila C. Bayne. Student's attorneys shall pay that sum to Perris Union High School District within 30 days of the date this Order is issued. The Law Offices of Sheila C. Bayne shall file a notice with OAH within three business day of the date it pays Perris Union High School District that sum, indicating it has complied with this Order.
4. Failure to comply with this order may result in a civil judgment or finding of contempt.

IT IS SO ORDERED

Christine Arden

Administrative Law Judge

Office of Administrative Hearings