

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2012100242

v.

FRESNO UNIFIED SCHOOL DISTRICT,

FRESNO UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2012100291

v.

PARENT ON BEHALF OF STUDENT.

ORDER DENYING CROSS MOTIONS
FOR SANCTIONS

On September 10, 2013, the special education due process hearing commenced. Student was represented by Roger Greenbaum, Attorney at Law, and the Fresno Unified School District (District) was represented by Sang-Jin Nam, Attorney at Law.¹ The hearing was convened, and due to a family emergency on the part of the administrative law judge (ALJ) assigned to the hearing, the hearing did not officially begin and was continued to September 11, 2013, when the undersigned ALJ began the hearing.

On September 11, 2013, the District filed a motion for sanctions with the Office of Administrative Hearings (OAH) against Mr. Greenbaum, based upon the District's contention that Mr. Greenbaum improperly spoke to the District representative regarding settlement. On September 11, 2013, Mr. Greenbaum sent several emails to OAH ostensibly in opposition to the District's motion for sanctions. Mr. Greenbaum was promptly notified to properly serve OAH with any opposition he may have to the District's motion for sanctions. During the hearing, Mr. Greenbaum was given an extension of time to properly file an opposition to the motion for sanctions.

On October 1, 2013, Mr. Greenbaum properly filed an opposition to the motion for sanctions and also a cross-motion to sanction Mr. Nam. Subsequent to Mr. Greenbaum's filing of his opposition and cross-motion, he filed a supplemental declaration in opposition to the motion for sanctions on October 7, 2013, a letter with OAH on October 9, 2013, and a

¹ Mr. Greenbaum subsequently withdrew from representation during the middle of the hearing. The hearing continued and Parent represented Student for the remainder of the hearing.

further supplemental declaration in opposition to the motion for sanctions on October 10, 2013. Mr. Nam did not file as response to the cross-motion for sanctions.

In general, the District requests that Mr. Greenbaum be sanctioned because Mr. Greenbaum spoke in an “increasingly aggressive” manner to the District representative and continued to do so after being told not to while Mr. Nam was out of the hearing room, but while another attorney from his firm was present,. Mr. Greenbaum denies the District’s contentions and further contends that he was following the instructions of the ALJ to engage in settlement discussions before the hearing reconvened on September 11, 2013. Mr. Greenbaum contends that he was not aggressive, that counsel for the District representative was in the room and at no time was there any indication that he was making the District representative uncomfortable. Mr. Greenbaum requests that Mr. Nam be sanctioned because, in general, because Mr. Nam brought the sanctions motion in bad faith.

APPLICABLE LAW

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. 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 successor to the California Special Education Hearing Office) 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.)

DISCUSSION

Here, both motions fail because neither party showed bad faith actions or tactics that were frivolous or solely intended to cause unnecessary delay. While Mr. Greenbaum may have chosen a better time to speak with the District and its counsel, competent counsel was present in the room. There was no allegation, and the evidence does not support the contention that any comments Mr. Greenbaum may have made amounted to bad faith actions that were frivolous and there was no delay caused by his remarks, intended or otherwise. As to Mr. Greenbaum’s motion that Mr. Nam be sanctioned for filing the original sanctions motion, Mr. Greenbaum supplied no evidence that the District’s motion was completely without merit or for the sole purpose to harass the other party. Further, there was no evidence that the intention of filing the motion was to cause delay.

ORDER

The motions of both parties for sanctions is denied.

Dated: December 23, 2013

/s/

MARGARET BROUSSARD
Administrative Law Judge
Office of Administrative Hearings