

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MAGNOLIA ELEMENTARY SCHOOL
DISTRICT,

v.

GUARDIAN ON BEHALF OF STUDENT.

OAH CASE NO. 2014050832

ORDER GRANTING MOTION TO
SHIFT EXPENSES AND DENYING
MOTION TO AWARD MONETARY
SANCTIONS

On June 18, 2014, Magnolia School District, through its attorney, Deborah Cesario, filed with the Office of Administrative Hearings a motion for shifting expenses and contempt and monetary sanctions. On July 3, 2014, Guardian on behalf of Student (Student), filed with OAH an opposition to the motion and a motion to strike evidence. Student is represented by the Special Education Law Firm (SELF). The pleadings list Student's counsel of record as Jennifer Guze Campbell, Vanessa Jarvis, and Amanda Selogie. On July 8, 2014, Magnolia filed a reply to Student's opposition and opposition to Student's motion to strike.

BACKGROUND

On May 14, 2014, Magnolia filed a Request for Due Process Hearing (complaint) naming Student as respondent. The main gist of the complaint was that Magnolia had offered Student a free appropriate public education and that it should be permitted to implement its triennial individualized education program (IEP), which was developed in March 2014 and amended in April 2014. On May 23, 2014, Student filed his response to the complaint. The prehearing conference was held on June 2, 2014 and the hearing on June 10-11, 2014, without the attendance of Student or his counsel. Magnolia's motion is based upon actions stemming from attempts of Student's counsel to obtain a continuance of the hearing.

On May 28, 2014, SELF filed a motion to continue the due process hearing scheduled for June 10, 2014 until September 2014 on the grounds that attorney Amanda Selogie of SELF, who attended Student's April 24, 2014 IEP, was not available to attend mediation. No mention was made of any communication between SELF and opposing counsel. In fact, on May 27, 2014, Ms. Cesario forwarded an email to Randy Colon, a SELF legal secretary, responding to SELF's request to continue the mediation scheduled for May 29, 2014 and the

June 10, 2014 hearing. Ms. Cesario noted: “Moreover, the hearing is scheduled for June 10th, and due to the nature of our dispute, and the upcoming summer break, my client does not agree to continue the due process hearing scheduled for June10.” SELF’s failure in its motion to continue to mention Magnolia’s opposition to continuing the due process hearing was misleading and disingenuous.¹

On June 2, 2014, Magnolia Elementary School District filed an opposition to Student’s motion on the grounds that Magnolia did not desire to mediate the matter and desired to proceed to hearing as scheduled. Magnolia attached to its opposition affidavits from Erica Boatman, a legal secretary, and Ms. Cesario that a representative from SELF had been informed on May 27, 2014, by phone as well as in the email, that Magnolia opposed continuing the hearing.

On June 2, 2014, the undersigned denied Student’s motion for continuance. Also, on June 2, 2014, OAH conducted a telephonic prehearing conference in which neither SELF or anyone else appeared on behalf of Student. The undersigned telephoned the SELF office at approximately 1:03 p.m. and was informed that all of the attorneys were out to lunch. After waiting on hold for in excess of seven minutes, it appeared that the connection was lost. The undersigned made two attempts, between 1:15 and 1:20 p.m., to reconnect with SELF, but no one answered the telephone. The PHC was conducted and an order was issued on June 3, 2014.

On June 5, 2014, Student filed a motion for reconsideration of request for continuance and, in the alternative, a motion to continue the hearing. The motion was addressed to the Presiding Administrative Law Judge and contended that ALJ Helfand’s order failed to cite any factual grounds for the denial of the motion and alleged that the real reason for the denial was that SELF had failed to attend the PHC. In its reconsideration request, SELF admitted that Magnolia had “responded that Petitioner had no intention of rescheduling the mediation and no intention of mediating prior to the original hearing date of June 10, 2014.” Student also claimed that SELF “attorneys have several scheduling conflicts during the dates of the hearing, including federal trial preparation and numerous IEP meetings at the end of the school year.” No details of these scheduling conflicts were provided. Additionally, Student contended that OAH had failed to rule timely on its motion to continue and to timely schedule the mediation. Attached to the reconsideration motion was a declaration by Ms. Jarvis. Ms. Jarvis confined her declaration as to her non-attendance at the June 2, 2014 PHC. Ms. Jarvis did not refer to any conflicts or other pressing firm business which would have prevented her from attending the hearing as scheduled.

¹ Ms. Cesario also suggested that Student send her a settlement offer if they were interested in settling the case. To date, Student has not responded.

On June 4 and 5, 2014, Ms. Cesario attempted to arrange for a conference to discuss witness scheduling as required in the June 3, 2014 PHC order. On June 5, 2014, Ms. Jarvis objected to being served Magnolia's documentary evidence by email. She also noted that Student would renew his motion to continue on grounds that Ms. Jarvis was unavailable due to trial preparation and working on an appeal brief. In another email that day, Ms. Jarvis refused to confer pursuant to the PHC order "[s]ince its (sic) likely that through a continuance we won't be having a hearing as presently scheduled."

On June 6, 2014, OAH denied Student's request for reconsideration and new motion for continuance by written order. The request for reconsideration was denied on the grounds that Student alleged no new facts, circumstances, or law in support of the request for reconsideration. As to the second motion for continuance, OAH denied the motion on the ground that there was no merit to claims that there was "delay" in ruling on the original continuance request or in scheduling the original mediation date.² Thus, the "delay" argument was frivolous. As to SELF's claim of unavailability, OAH ruled:

Student fails to set forth sufficient grounds to delay the hearing. Student presented no facts in support of his contention that there "several scheduling conflicts." Student has been represented by three attorneys as indicated in the pleadings filed by Student. Additionally, Student could have raised the same argument in his original motion. The failure to do so infers that Student's counsel is only using this argument as a pretext to delay the scheduled due process hearing. Accordingly, Student's motion for continuance is DENIED.

On June 10, 2014, the hearing commenced at 9:30 a.m. as scheduled. No one appeared on behalf of Student. At 9:45 a.m., Noe Fajardo, an OAH staff member, telephoned SELF, at the request of the ALJ, to inquire whether anyone was going to appear on behalf of Student. Mr. Fajardo spoke with Vanessa Jarvis, a SELF attorney, who stated that no one would appear on behalf of Student because all SELF attorneys were in other hearings. In their opposition, Student had an opportunity to state what mediations (as stated in their reconsideration motion) or OAH hearings that SELF was involved. A check of the OAH calendar did not show that SELF was participating in any OAH hearings or mediations that day. Thus, these statements were false.

MOTION TO STRIKE OPPOSITION

² OAH issued the order denying the May 27, 2014 motion within three business days of its receipt. Student offered no reason as to how the scheduling of the original mediation date was delayed.

OAH inadvertently filed Magnolia's motion for sanctions on July 7, 2014, although it had been properly filed on June 18, 2014 and served on SELF on that date. Student's opposition was due to be filed on June 23, 2014. Thus, Student's opposition and motion to strike evidence, filed on July 3, 2014 was untimely. Student did not request leave to file his opposition late nor did he cite any reason why the filing was untimely. In its reply to Student's opposition, Magnolia requests that OAH strike Student's opposition. Although the opposition was filed late, Magnolia fails to cite how it is prejudiced. Thus, Magnolia's motion to strike the opposition is DENIED.

MOTION TO STRIKE EVIDENCE

In his motion to strike evidence, Student contends that Magnolia failed to authenticate the documentary evidence attached to its motion for sanctions. Student utilized a chart in which it objected to several portions of exhibits D, E, J, K, and L. Exhibits D, J, and K are communications between SELF and Ms. Cesario. Exhibit D and L are declarations of Ms. Cesario. On July 8, 2014, Magnolia opposed Student's motion to strike and included a declaration from Ms. Cesario authenticating each of the exhibits pursuant to Evidence Code section 1401. Student's motion to strike evidence is DENIED.

SHIFTING OF EXPENSES

APPLICABLE LAW

Generally, an ALJ has the authority to subject a person to the issuance of two types of sanctions: (1) contempt (Government Code sections 11455.10 and 11455.20) [hereinafter, sections 11455.10 and 11455.20]; and, (2) the shifting of expenses from one party to another, when a party acts in bad faith. (Government Code section 11455.30 [hereinafter, section 11455.30]). Here, it is most appropriate to address this matter pursuant to the ALJ's authority to shift expenses under Section 11455.30.

Under Section 11455.30, the presiding officer 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 as defined in Section 128.5 of the Code of Civil Procedure [hereinafter, CCP section 128.5].³ The order, or denial of an order, is subject to judicial review in the same manner as a decision in the proceeding. The order is enforceable in the same manner as a money judgment or by the contempt sanction. California cases applying section 128.5 hold that a trial judge must state specific circumstances giving rise to the award of expenses and articulate with particularity the basis for finding the sanctioned

³ Frivolous means totally and completely without merit or for purposes of harassment of the opposing party. (Civil Code, § 128.5 sub. (b).)

party's conduct reflected tactics or actions that were performed in bad faith and that they were frivolous, designed to harass, or designed to cause unnecessary delay. (*Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 996; *County of Imperial v. Farmer* (1998) 205 Cal.App.3d 479, 486.). Bad faith is shown when a party engages in actions or tactics that are without merit, frivolous, or solely intended to cause unnecessary delay. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.) However, the bad faith requirement does not impose a determination of evil motive, and subjective bad faith may be inferred. (*Id.*, at page 702).

The authority of an ALJ to subject a party, its attorney or other authorized representative to contempt sanctions or shifting of expenses is modified for special education hearings. (5 Cal. Code of Regs., title 5, § 3088) [hereinafter, section 3088]). Section 3088 states:

(a) Provisions for contempt sanctions, order to show cause, and expenses contained in *Government Code sections 11455.10-11455.30* of the Administrative Procedure Act apply to special education due process hearing procedures except as modified by (b) through (e) of this section.

(b) Only the presiding hearing officers may initiate contempt sanctions and/or place expenses at issue.

(c) Prior to initiating contempt sanctions with the court, the presiding hearing officer shall obtain approval from the General Counsel of the California Department of Education.

(d) The failure to initiate contempt sanctions and/or impose expenses is not appealable.

(e) The presiding hearing officer may, with approval from the General Counsel of the California Department of Education, order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel, to the California Special Education Hearing Office for the reasons set forth in *Government Code section 11455.30(a)*.

(Emphases added).

Under the Individuals with Disabilities Education Act (IDEA), a due process hearing must be conducted and a decision rendered within 45 days following a 30-day resolution period, after receipt of the due process notice, in the absence of an extension. (Ed. Code §§ 56502, subd. (f), and 56505, subd. (f)(3).) Given the short time frames applicable to this

case, it is critical that the parties follow orders issued by OAH and participate in advancing the matter to hearing.

Under 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. 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.”].) A party may be ordered to pay expenses of another party, or OAH 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, subd. (a).) A party may also be ordered to pay costs for failure or refusal, without substantial justification, to comply with an order of the presiding officer. (Govt. Code § 11455.10.) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

DISCUSSION

Here, SELF engaged in actions which were in bad faith as these actions were designed to cause undue delay and the motions were frivolous. In its initial motion for continuance, SELF was disingenuous by not informing OAH that Magnolia had opposed any continuance of the hearing date. Student’s motion for reconsideration was frivolous as it failed to cite any new grounds. Again, SELF was disingenuous in claiming that the denial of the motion was without grounds because the PHC order very clearly stated grounds for the denial of the motion - that Magnolia, in its opposition, had stated that it did not desire to mediate the matter.

Student’s contention in his second motion for continuance that there were delays in the initial scheduling of the mediation or in the ruling denying Student’s original continuance motion was without merit factually or legally. SELF failed to set forth any details of scheduling conflicts. Preparation for an appellate brief, a future trial or hearing, or IEP team meetings are not proper grounds for a continuance.

Student was represented by three attorneys of record. All three are licensed attorneys and are capable of representing Student. In fact, SELF’s excuse to Ms. Cesario for its inability to mediate the case as scheduled was that Ms. Selogie was unavailable and she was most familiar with the case. That does not explain why another attorney could not have appeared. On the firm’s website, Ms. Campbell’s biography states that she has “30 years of exceptional legal experience” including over 20 years of advocating for kids and others.” Ms. Campbell has appeared before this ALJ in hearing on a prior occasion and did a more than adequate job. As for attendance at IEP team meetings, SELF employs educational advocates who could attend those in lieu of an attorney who is engaged in a hearing. In fact in this matter, Student had been represented at the March IEP team meetings by an attorney

from SELF, Mark Allen, and Jim Campbell, an educational advocate from SELF. Ms. Selogie and Jim Campbell represented Student at the April 24, 2014 IEP team meeting. Also interestingly, Ms. Jarvis neglected to mention in her declaration attached to the motion for reconsideration that she was unavailable for hearing because of preparation for a federal case, a claim set forth in the motion itself. Additionally, Ms. Jarvis' comment on the day of the hearing to an OAH staff person that no firm attorneys were available due to other hearings and mediations was a total falsehood. Such action amounts to bad faith.

The motives of SELF are very apparent. Guardian objected to Student being placed in a new placement which was to commence at the beginning of the 2014-2015 school year. SELF's attempt to continue the hearing to September would delay a final resolution in this case well past the beginning of the school year and prevent Magnolia from implementing the new placement to start the new school year. Thus, SELF's actions were designed to cause undue delay.

In summary, SELF has been disingenuous to OAH, has attempted to cause undue delay, and has made motions for continuance and reconsideration that were frivolous. Thus, Magnolia's request to shift expenses is hereby GRANTED.

EXPENSES

In its motion, Magnolia seeks to have expenses shifted in the amount of \$7,421.50. Magnolia seeks the sum of \$946.50 for four and four-tenths hours spent on opposing the initial motion for continuance; 12.3 hours and \$2,716.00 for preparing the opposition to the motion for reconsideration-continuance; six-tenths of an hour in the amount of \$133.00 for time spent on attempting to set up the meet and confer per the PHC order; and 13.2 hours in the amount of \$2,904.00 in preparing the motion for sanctions. The times spent on these matters were billed by three attorneys, Ms. Cesario, Karen Anderson, and Summer D. Dalessandro, at a rate of \$225.00, \$210.00, and \$220.00, respectively.

As to the expenses sought, Student contends that the amount sought is unreasonable given the complexity of the pleadings. Student, in particular, questions the 12.5 hours in preparing the opposition to Student's motion for reconsideration, and in the alternative for continuance, and the 16.4 hours in preparation this motion for sanctions. Student also claims that the failure to provide detailed billing statements prevents determination if any of the claimed time was duplicative. Student does not contend that the hourly rate claimed is unreasonable.

In reviewing the cost bill submitted, costs in the amount of \$4,817.50 are reasonable. The breakdown is as follows:

Opposition to first continuance motion: total of three hours in an amount of \$652.50;

Opposition to motion to reconsider/continuance: total of seven hours in an amount of \$1,550.00;

Time spent communicating to set up conference per PHC order: sixth-tenths of an hour at \$135.00;

Preparation of the motion for sanctions: 11.2 hours in the amount of \$2,480.00.

ORDER

1. Magnolia's motion for shifting expenses is GRANTED as to the SELF law firm and attorneys Jennifer Guze Campbell and Vanessa Jarvis, only. The SELF law firm, and attorneys Jennifer Guze Campbell and Vanessa Jarvis, are directed to pay to Magnolia the sum of \$4,817.50 within 10 days of this order.

2. Magnolia's motion to strike the opposition of Student to its motion for shifting costs and sanctions is DENIED.

3. Student's motion to strike evidence is DENIED.

DATE: July 9, 2014

/s/

ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings