

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF:
PARENT ON BEHALF OF STUDENT,

and

MT. DIABLO UNIFIED SCHOOL DISTRICT,
OAH CASE NUMBER 2021090436
OAH CASE NUMBER 2021080274
OAH CASE NUMBER 2021080654

ORDER GRANTING MOTION TO UNEXPEDITE HEARING
AND DENYING REQUEST FOR SANCTIONS

SEPTEMBER 22, 2021

On August 6, 2021, Parent on behalf of Student fled a Request for Due Process, called complaint, with the Office of Administrative Hearings, called OAH, in case number 2021080274, naming Mt. Diablo Unified School District. On August 23, 2021, Mt. Diablo filed a complaint with OAH in case number 2021080654. naming Student. On September 15, 2021, Student filed a second complaint with OAH in case number 2021090436, naming Mt. Diablo. On September 21, 2021, OAH consolidated these cases, setting case number 2021090436 as the primary case.

On September 16, 2021, based on Student's request to expedite issues asserted in the complaint for OAH case number 2021090436, OAH issued an Order Scheduling Dual Hearing Dates for Expedited and Non-Expedited Prehearing Conference and Due Process Hearing, and Mediation. The Scheduling Order set this matter for expedited mediation on September 29, 2021, expedited prehearing conference on October 4, 2021, and expedited hearing for October 12, 2021, through October 14, 2021.

On September 17, 2021, Mt. Diablo filed a motion to unexpedite this matter, to vacate the expedited dates, and for sanctions. On September 22, 2021, Student filed a response.

APPLICABLE LAW

EXPEDITED HEARINGS

A parent of a child with a disability who disagrees with any decision by a school district regarding a change in educational placement of the child based upon a violation of a code of student conduct, or who disagrees with a manifestation determination made by the district, may request and is entitled to receive an expedited due process hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).) All subsequent references to the Code of Federal Regulations are to the 2006 version.) An expedited due process hearing before OAH must occur within 20 school days of the date the complaint requesting the hearing is filed. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2).) The procedural right to an expedited due process hearing is mandatory and does not authorize OAH to make exceptions or grant continuances of expedited matters. (*Ibid.*) A matter can only be unexpedited or continued if no issue is alleged that is subject to an expedited hearing, if the student withdraws the issues in the complaint that triggered the expedited hearing, or if the student elects to challenge the change of placement

under title 20, section 1415, subdivision (b)(6)(A) and not subdivision (k). (*Molina v. Bd. of Educ. of Los Lunas Schools* (D.N.M. 2016) 157 F.Supp.3d 1064, 1068-1071.)

SANCTIONS

In certain circumstances, an 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.)

DISCUSSION

EXPEDITED HEARING

Student requests that OAH expedite two issues, identified under issue A in Student's complaint for OAH case number 2021090436. Specifically, Student asserts that Mt. Diablo removed Student for over 10 days during the 2021-2022 school year, because of Student's behaviors related to his disability. Student also asserts that Mt. Diablo failed to determine that Student's behavior constituted special circumstances and were the result of his disability.

Student's complaint alleges, based upon various grounds, that Mt. Diablo failed to offer Student an appropriate placement in light of his behaviors and disability, thereby denying Student a free appropriate public education, called FAPE. In particular, Student asserts that he is unable to physically attend school because of COVID-19 related restrictions, and that he is unable to benefit from remote instruction. However, Student's complaint fails to allege that Mt. Diablo made a decision to change Student's educational placement based upon a violation of a code of student conduct, or that Parent disagrees with a manifestation determination made by the district. Moreover,

Student's claim that he was removed from his educational placement for over ten days stems from Mt. Diablo's provision of remote or hybrid learning for all students because of the COVID-19 pandemic, and not specifically for Student as a result of a violation of a code of student conduct. Finally, there is no prior or pending disciplinary action against Student that would trigger an expedited hearing.

Consequently, Mt. Diablo demonstrated that no expedited issues were alleged in the complaint and that an expedited hearing is not required. Student's allegations that Mt. Diablo denied him a FAPE can be addressed in the non-expedited hearing.

In sum, Student does not allege facts that constitute an appeal pursuant to Section 1415(k)(3), and thus that the mandatory provisions of Section 1415(k)(4)(B) for an expedited hearing do not apply. (*Molina, supra*, 157 F.Supp.3d 1064, 1068-1071.) Accordingly, the expedited hearing dates will be vacated.

SANCTIONS

Mt. Diablo requests sanction or for the ALJ to shift expenses to Student, or Student's attorney, because the complaint for OAH case number 2021090436 incorrectly described claims as expedited, thereby causing Mt. Diablo to incur legal fees to file a motion to unexpedite. Mt. Diablo asserts Student was estopped from requesting the expedited issues because OAH, in an August 17, 2021 Order Granting Motion to Unexpedite Hearing, unexpedited similar issues included in Student's complaint for OAH case number 2021080274.

While Student's expedited issues were similar in both complaints, they were not identical. Significantly, Student's present expedited issues pertain to the 2021-2022 school year, whereas the issues alleged in case number 2021080274 related to the 2019-2020 and 2020-2021 school years.

Moreover, Mt. Diablo's motion fails because only the ALJ who is presiding over the matter may place expenses at issue. (Cal. Code Regs., tit. 5, § 3088, subd. (b).) The ALJ in this matter declines to do so as such sanctions are not necessary to ensure an orderly and fair hearing.

ORDER

1. Mt. Diablo's motion to unexpedite this matter is granted.
2. The expedited mediation and hearing dates for this matter are vacated.
3. The unexpedited matter shall proceed as set in OAH's September 16, 2021 Scheduling Order, unless otherwise ordered.
4. Mt. Diablo's motion for sanction is denied.

IT IS SO ORDERED.


Paul H. Kamoroff (Sep 23, 2021 07:50 PDT)

Paul H Kamoroff

Administrative Law Judge

Office of Administrative Hearings