

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENTS ON BEHALF OF STUDENT,

V.

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021100144

ORDER FOLLOWING HEARING ON ORDER TO SHOW
CAUSE, ORDER DISMISSING COMPLAINT BECAUSE OF
INACTIVITY, AND ORDER DENYING MOTION TO SHIFT
FEES

FEBRUARY 23, 2022

On October 4, 2021, Student filed a request for due process hearing with the Office of Administrative Hearings naming Sacramento City Unified School District. The Office of Administrative Hearings is referred to as OAH. The Administrative Law Judge is referred to as the ALJ.

PROCEDURAL HISTORY

OAH scheduled the initial prehearing conference, referred to as PHC, for November 15, 2021. Sacramento City Unified School District filed its prehearing conference statement on November 9, 2021. Student did not file a prehearing conference statement.

OAH issued electronic invitations for the PHC to Student's Parent, who is not represented by legal counsel, and Sacramento City Unified's attorneys. ALJ Jennifer Kelly convened the PHC as scheduled on November 15, 2021. Appearances were made on behalf of Sacramento City Unified. Parent did not appear. ALJ Kelly issued an Order to Show Cause, setting a videoconference hearing for November 19, 2021, where Parent may show cause why Student's case should not be dismissed for failure to diligently pursue the due process matter.

ALJ Kelly convened the videoconference hearing on November 19, 2021. Parent and Sacramento City Unified's counsel timely appeared. ALJ Kelly found that Parent demonstrated sufficient cause why the case should not be dismissed. ALJ Kelly issued a November 19, 2021 Order scheduling mediation, and continuing the prehearing conference to February 4, 2022 at 10:00 a.m. and the hearing to February 15, 16, and 17, 2022. The Order clearly stated that the parties were required to file their prehearing conference statements no later than three business days before the prehearing conference.

FEBRUARY 4, 2022, PREHEARING CONFERENCE

ALJ Rita Defilippis convened the prehearing videoconference at 10:00 a.m., February 4, 2022. Parent appeared, with an advocate. Sacramento City Unified's counsel appeared and peremptorily challenged ALJ Defillipis, pursuant to Government

Code section 11425.40, subdivision (d), of the Administrative Procedures Act, and California Code of Regulations, title 1, section 1034. Presiding Administrative Law Judge Joy Redmon granted the peremptory challenge and reassigned the prehearing conference to ALJ Clifford H. Woosley. OAH informed the parties that the videoconference was continued for 30 minutes to 10:30 a.m., February 4, 2022.

ALJ Woosley issued another email invitation to the parties and convened the PHC at 10:30 a.m., February 4, 2022. When Parent did not appear, ALJ Woosley again issued the email invitation to Parent. ALJ Woosley and Sacramento City's attorneys waited until 11:30 a.m. Parent did not appear for the conference. ALJ Woosley went on the record, stated that Parent did not appear at the PHC, and that Parent had not filed a prehearing conference statement as directed by ALJ Kelly's November 19, 2021 Order.

On February 4, 2021, ALJ Woosley issued an Order to Show Cause, setting a videoconference hearing for February 14, 2022, where Parent may show cause why Student's case should not be dismissed for failure to diligently pursue the due process matter. Also, if Parent demonstrated the matter should not be dismissed, the parties would then proceed with the prehearing conference.

The Order to Show Cause further directed Parent to file a prehearing conference statement prior to the February 14, 2022 hearing. The Order cautioned Parent that failure to timely file Student's prehearing conference statement would support a finding that Student did not diligently pursue this matter.

FEBRUARY 14, 2022, HEARING ON ORDER TO SHOW CAUSE

OAH issued email invitations to the parties for the February 14, 2022 Order to Show Cause hearing. ALJ Woosley convened the hearing at 3:00 PM, February 14, 2022. Attorneys Jennifer Baldasarri and Kaitlyn Tucker appeared on behalf of Sacramento City

Unified. Parent did not appear. After taking appearances on the record, ALJ Woosley informed Sacramento City Unified's attorneys that they would go off the record until Parent appears or 3:30 PM, whichever occurred first.

Parent did not appear and ALJ Woosley went back on the record, stating that Parent did not file Student's prehearing conference statement as directed by the Order to Show Cause. Further, Parent had not previously filed Student's prehearing conference statement, though required to do so, at the initial PHC of November 15, 2021, the November 19, 2021 hearing on the first Order to Show Cause, and at the February 4, 2022 PHC.

Parent has not diligently pursued this due process matter on behalf of Student, as evidenced by Parent's continued failure to file Student's prehearing conference statement, failure to appear at the continued PHC on February 4, 2022, and failure to appear at the February 14, 2022 hearing on the Order to Show Cause. Parent has not explained the inactivity. Therefore, all dates now calendared in this matter are vacated and the complaint is dismissed.

SACRAMENTO CITY UNIFIED'S MOTION FOR COSTS AND FEES

Sacramento City Unified filed a motion for fee shifting on February 18, 2022, with supporting declarations from its attorneys, Jennifer N. Baldassari and Kaitlyn Tucker.

In certain circumstances, an ALJ is authorized to shift expenses from one party to another. The ALJ may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses and 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 by California Code of Civil Procedure,

section 128.5. (Gov. Code, § 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; see *Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029.)

"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.)

Parent has apparently relied upon a special education "advocate," regarding the prosecution of the due process complaint, who has demonstrated actions or tactics which were frivolous and in bad faith. For example, the advocate attempted to appear for and represent Parent at the convening of the first February 4, 2022 prehearing conference, inappropriately protesting Sacramento City's exercise of its right to a peremptory challenge. (Cal. Code Regs., tit. 1, § 1034, subds. (a) & (b); Gov. Code, § 11425.40, subd. (d).) Further, since the filing of Student's complaint, this advocate has sent Sacramento City's attorneys approximately 250 emails, which were not directly related to Student's complaint.

In September 2017, the California attorney general issued an opinion, finding that a party to a special education due process proceeding is not entitled to lay representation. Only licensed attorneys may represent parties to special education due process. (100 Ops. Cal. Atty. Gen. 19, (2017).) OAH does not recognize lay advocates as authorized representatives.

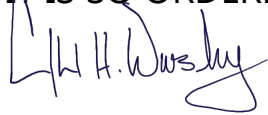
Government. Code, section 11455.30, subpart (a), empowers an ALJ to shift expenses and fees to “. . . a party, the party’s attorney or other authorized representative.” Parent’s advocate is not a licensed attorney and, therefore, is not an authorized representative. As such, the ALJ cannot order the advocate to pay the attorneys’ fees requested by Sacramento City.

Further, Parent should not be subjected to an order shifting expenses. The complaint does not appear, on its face, to be totally and completely without merit. Parent has already had Student’s due process complaint dismissed due to a failure to diligently pursue the matter. The failure to prosecute does not sufficiently support an inference of subjective bad faith on the part of Parent. Therefore, Sacramento City’s request for an order shifting fees is denied.

ORDERS

1. Parent, on behalf of Student, has failed to diligently pursue this matter.
2. All dates now calendared are vacated.
3. The complaint is dismissed.
4. Sacramento City Unified School District’s motion for fee shifting is denied.

IT IS SO ORDERED.

A handwritten signature in blue ink, appearing to read "Clifford H. Woosley", is written over the typed name.

Clifford H. Woosley

Administrative Law Judge

Office of Administrative Hearings