BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

GILROY UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021010652

ORDER FOLLOWING ORDER TO SHOW CAUSE HEARING REGARDING SHIFTING COSTS TO THE PARTIES' ATTORNEYS

APRIL 20, 2021

On April 19, 2021, the Presiding Law Judge of the Office of Administrative Hearings, called OAH, set an order to show cause hearing as to why the parties' attorneys should not be sanctioned for failure to comply with OAH's April 12, 2021 Order Following Prehearing Conference. OAH ordered the parties to file a written response with OAH no later than 5:00 PM on April 19, 2021. Mr. Cruz did not file a written response regarding sanctions. Mr. Maisen filed an unsigned written response with OAH. Student filed a notice of settlement with OAH on April 20, 2021.

On April 20, 2021, Administrative Law Judge Kong held an order to show cause hearing as to why the parties' attorneys should not be sanctioned. Administrative Law Judge is called an ALJ.

Attorney Joshua Cruz, who represented Student, appeared at the order to show cause hearing. Other members of attorneys Cruz's firm were also present at the order to show cause hearing. Attorney Jeffery Maisen, who represented Gilroy Unified School District, appeared at the order to show cause hearing.

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.)

DISCUSSION

At the order to show cause hearing, Mr. Cruz explained that he was under the impression Mr. Maisen would file a joint explanation as to why sanctions should not issue. Both attorneys jointly filed a motion to reopen Caselines. Mr. Cruz requested that OAH consider this joint filing to reopen Caselines as an explanation why sanctions should not issue.

ALJ discussed with the attorneys that all OAH orders were by definition directives to take certain actions, and not mere suggestions. ALJ discussed with the parties the contents of the April 12, 2021 Order Following Prehearing Conference. This discussion

included the order to timely load proposed exhibits with Caselines, with which neither party complied. This discussion also included the order that all motions filed after the April 12, 2021 prehearing conference be accompanied by a declaration under the penalty of perjury why the motion was not timely filed three business days before the prehearing conference. Both attorneys filed motions after the prehearing conference, but none of the motions included a declaration explaining why the motion could not be filed three business days before April 12, 2021.

Both Mr. Cruz and Mr. Maisen explained that they were focused on completing settlement, and neglected to follow the orders set forth in the April 12, 2021 Order Following Prehearing Conference. ALJ explained that OAH's order must be followed to prevent waste of OAH resources and delays to the hearing if settlement does not materialize. Both attorneys requested that sanctions not issue and represented that each would follow OAH orders in the future.

Based on the representations of Mr. Cruz and Mr. Maisen to abide by OAH orders in the future, the ALJ declines to sanction either attorney. No sanctions shall issue. Neither Mr. Cruz, nor Mr. Maisen, shall be required to pay OAH's hearing preparation costs in this matter.

IT IS SO ORDERED.

Sabrina Kong

Sabrina Kong
Administrative Law Judge
Office of Administrative Hearings