BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. BUTTE COUNTY OFFICE OF EDUCATION, FOUR WINDS CHARTER SCHOOL, YUBA CITY UNIFIED SCHOOL DISTRICT, FEATHER FALLS UNION ELEMENTARY SCHOOL DISTRICT, AND IPAKANNI EARLY COLLEGE CHARTER SCHOOL.	OAH Case No. 2016040611 ORDER DENYING REQUEST FOR SANCTIONS

On May 20, 2016, Butte County Office of Education, Four Winds Charter School, Feather Falls Union Elementary School District, and Ipakanni Early College Charter School filed a request for sanctions against Student and his attorney pursuant to California Code of Civil Procedure section 128.5. This request is supported by their shared attorney's declaration under penalty of perjury. The moving parties allege that Student's attorney "unconditionally accepted an offer to settle the matter" and agreed to dismiss Feather Falls and Ipakanni from the case; that they relied on this representation and did not participate in the mediation scheduled by the Office of Administrative Hearings; that Butte County and Four Winds were, therefore, responsible for funding the full costs of the participation of their shared attorney at the mediation; and that Student's attorney withdrew her agreement to the settlement following an unsuccessful mediation with Butte County, Four Winds, and Yuba City Unified School District, and this action constitutes sanctionable, bad faith conduct.

On May 20, 2016, Student filed an opposition to the request for sanctions. On May 23, 2016, Student filed an amended opposition supported by a declaration under penalty of perjury of his attorney. Student's attorney alleges that she did not accept a settlement offer; that she informed respondents' counsel that the terms were not acceptable and did not provide consideration; and that neither she nor her client signed or entered into an agreement. Student's attorney argues she did not act in bad faith and further points out that at the time of the OAH mediation, neither Feather Falls nor Ipakanni were parties to the action as OAH did not grant Student's request to amend and add these additional parties until the following day.

APPLICABLE LAW

In certain circumstances, an administrative law judge 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).) "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).) "Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit [citations]." (*Levy v. Blum* (2001) 92 Cal.App.4th 625, 635.) In addition there must be a showing of improper purpose. (*Ibid.*) 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 (*Reed*).)

DISCUSSION

In this matter, OAH granted, on reconsideration, the request of Butte County, Four Winds, Feather Falls, and Ipakanni to deem Student's amended complaint filed as of May 18, 2018, the date OAH granted Student leave to amend the complaint and add Feather Falls and Ipakanni as parties. Therefore, Student's argument that Student should not be sanctioned for his attorney's conduct with regards to Feather Falls and Ipakanni prior to them obtaining

party status is well taken. As of May 17, 2016, the date of the scheduled mediation in this matter, neither Feather Falls nor Ipakanni had a right to participate in mediation as they were not parties to this action. Therefore, prior to being added as parties on May 18, 2016, Feather Falls and Ipakanni could not have suffered actionable harm in this matter at the hands of Student's attorney.

Additionally, the alleged sanctionable conduct as to all four respondents who are requesting sanctions occurred in the context of confidential settlement negotiations. The ALJ in this matter declines to consider an alleged verbal agreement to finalize a proposed settlement agreement to constitute an "action or tactic" as defined in Government Code section 11455.30, subd. (a) and the Code of Civil Procedure section128.5, subd. (b)(1). To do so would infringe on the confidentiality of settlement discussions. Discussions that occur during the mediation process shall be confidential. (20 U.S.C. § 1415(e)(2)(G); 34 C.F.R. § 300.368(b)(8); Cal. Code Regs., tit. 5, § 3086, subd. (b) [anything said and any admission made in the course of mediation is a confidential communication]; Evid. Code, § 1119, subd. (c) [all negotiations or settlement discussions in the course of mediation shall remain confidential]; see Evid. Code, § 1152 [inadmissibility of statements made in negotiation of offers to compromise].)

The motion for sanctions also fails as it did not establish that Student's counsel engaged in the alleged sanctionable conduct, namely, "unconditionally" accepting an offer to settle the matter on May 16, 2016. In the context of confidential settlement talks, it is hard to imagine how a party could produce sufficient evidence to establish that an action or tactic was made in bad faith. "To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision." (*Optimal Markets, Inc. v. Salant* (2013) 221 Cal. App. 4th 912, 925-926 citing *In re Cortez* (1971) 6 Cal.3d 78, 85–86, fn. omitted; see also, *Navarro–Ayala v. Nunez* (1st Cir.1992) 968 F.2d 1421, 1425 ["the decision about whether a litigant's (or lawyer's) actions merit the imposition of sanctions is heavily dependent upon the district court's firsthand knowledge of the case and its nuances..."].) Counsel for the four moving respondents attests that Student's counsel unconditionally accepted an offer to settle the matter; Student's counsel denies the same. OAH is not in a position to referee private settlement talks. The motion fails to establish that any sanctionable conduct occurred.

Even assuming Student's attorney represented that she and her client would execute a settlement agreement as to Feather Falls and Ipakanni, and that this constitutes an action or tactic, the request for sanctions fails as the moving respondents did not establish that Student's attorney acted in bad faith or that her actions were frivolous or solely intended to cause unnecessary delay. Failing to accept a settlement offer, even if such conduct is completely unreasonable, is not grounds for the imposition of sanctions. (*Reed, supra*, 2 Cal. App. 4th at 703-04.) "The power under section 128.5 to sanction bad faith "actions or tactics" cannot be applied where the only action or tactic is a defendant's decision to choose trial, rather than settlement, regardless of what subjectively motivated that choice." (*Triplett v. Farmers Ins. Exch.* (1994) 24 Cal. App. 4th 1415, 1425.) The authority to award sanctions

is discretionary. Given the facts of this case and the failure of the moving parties to meet their burden of proof, the undersigned ALJ declines to award the requested monetary sanctions for a perceived abuse of the mediation and settlement negotiation process.

ORDER

Butte County, Four Winds, Feather Falls, and Ipakanni's joint motion for sanctions is denied.

IT IS SO ORDERED.

DATE: May 27, 2016

DocuSigned by:
Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings