BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

MORGAN HILL UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021040203

ORDER DENYING MOTIONS FOR RECONSIDERATION, STRIKING SHELLEY WARE'S TESTIMONY, STRIKING PORTIONS OF MORGAN HILL'S CLOSING BRIEF, AND SANCTIONS

JULY 19, 2021

On April 5, 2021, Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Morgan Hill Unified School District. On May 24, 2021, the undersigned administrative law judge conducted the prehearing conference and ordered the hearing divided into two phases, phase one and phase two. Phase one constituted of the statute of limitations phase, Student's Issues 1(a) and 1(b), to determine whether Student may assert claims arising more than two years before the filing of the complaint. The parties were informed at the prehearing conference and

subsequently in the Orders Following Prehearing Conference dated May 24, and May 26, 2021, that after phase one of the hearing, the undersigned would announce the statute of limitations determination on the record and it would be explained in more detail in the written decision.

The undersigned administrative law judge heard this matter by videoconference on June 2, 3, 14, 15, 16, and 17, 2021. On June 14, 2021, the administrative law judge announced the statute of limitations determination, Student's Issues 1(a) and 1(b), and the time period at issue in the matter. The hearing then proceeded to phase two. On June 22, 2021, the undersigned ordered the parties to file closing briefs by July 6, 2021. On July 6, 2021, the record was closed, and the matter was submitted for decision.

On July 15, 2021, Student filed a motion requesting:

- to strike witness Shelley Ware's hearing testimony and all witness testimony in phase one of the hearing;
- reconsider the June 14, 2021 statute of limitations determination; and
- sanctions.

On July 16, 2021, Student file a second motion requesting to strike portions of Morgan Hill's closing brief. On July 19, 2021, Morgan Hill filed opposition to Student's motions and submitted Shelley Ware's declaration under penalty of perjury in support of Morgan Hill's opposition to strike her testimony, reconsideration, and sanctions.

STUDENT'S MOTION TO STRIKE SHELLEY WARE'S TESTIMONY IS DENIED

Student requests that the administrative law judge strike Ware's testimony from the record alleging that she committed perjury when another person whispered answers to her, and that a Morgan Hill staff member participated in the subornation of perjury.

Student maintains that the whispered answers and fast paced writing can be heard on Student counsel's personal recording of this matter, which demonstrates that another person was in the room with Ware during her video testimony and that her answers were coached. Student requests that Ware's testimony be stricken from the record and further requests that all witness testimony from phase one of the hearing be stricken, and the phase one determination be reconsidered with only documentary evidence. Morgan Hill denies that Ware was coached or assisted by another person and submitted Ware's declaration denying all of Student's allegations against her. She declared that she testified independently, honestly, and truthfully.

There are no provisions governing a motion to strike witness testimony in a special education hearing. Therefore, OAH looks to the California Code of Civil Procedure for guidance. Section 436 authorizes a court to strike "any irrelevant, false, or improper material inserted in any pleading . . . or any pleading not drawn or filed in conformity with the laws of this state, a court rule or an order of the court."

Ware testified in phase one of the hearing on June 14, 2021. At that time, Ware was placed under oath and questioned by the undersigned regarding where she was testifying from and if anyone else was in the room with her. Ware was also ordered to inform the undersigned if anyone entered the room during her testimony, and to only have the exhibits and no other documents with her while testifying.

During Ware's testimony, it did not appear that anyone was in the room with her, and the undersigned did not hear any whispering or writing that would indicate that someone may be in the room with her. As well, no party raised this concern at the time of Ware's testimony or at any time during the hearing.

Ware completed her testimony on June 14, 2021, and the hearing ended on June 17, 2021. Closing briefs were filed on July 6, 2021. At no time between June 14, 2021,

and July 6, 2021, did any party raise this concern. Student's counsel asserts that she became of aware of this concern on July 5, 2021, while drafting Student's closing brief. On July 6, 2021, closing briefs were filed and the record was closed. Student's counsel failed to raise this issue in Student's closing brief or request a continuance to file the brief. Instead, counsel raises this matter after the record was closed, 31 days after Ware's testimony, and 10 days after counsel concedes she discovered this information. Student's counsel explains that she was attending to a sick relative beginning July 7, 2021, that impeded her ability to file this motion earlier. Yet, Student counsel neither includes this information in her declaration nor accounts for the time between June 14, 2021, through July 6, 2021, that precluded her from discovering this information earlier, especially given the fact that the undersigned granted extra time to file closing briefs due to the July holiday. Therefore, the request is untimely.

Additionally, Student's counsel requests the undersigned rely on incomplete excerpts of Student's personal recording that counsel concedes is not the official recording. Further, Student's counsel lists a number of recording times during Ware's testimony where alleged whispering or writing occurred but fails to give any description of them. Since Student's counsel failed to produce her personal recording or a transcript of her personal recording regarding Ware's testimony, she did not meet her burden.

Moreover, Student's request for the undersigned to review the official recording is inappropriate as counsel's motion stems from information gleaned from her personal recording. Here, the administrative law judge granted Student counsel's request to record the hearing; however, the parties were informed that the administrative law judge's recording is the official record of the proceeding, not the parties' recordings. The undersigned is unaware of how the parties recorded the hearing, the equipment used, and the reliability of that equipment. Moreover, Student may request an

electronic verbatim record of the hearing proceedings from the official OAH recording of the hearing as authorized by law, under Education Code section 56505, subdivision (e)(4). This section provides the parties have the right to a written, or, at the option of the parents or guardians, electronic verbatim record of the hearing. However, Student failed to use the official recording in support of Student's motion, instead Student used a personal recording that counsel failed to submit. Thus, the undersigned is not obligated to review the official transcript, decipher what times coincide with counsel's personal recording, and what exactly counsel believes was said and at what time, since counsel failed to include the recording, transcript, or any description for most of the recording excerpts complained of, and failed to use the official record as evidence in support of the motion.

Further, ambient noise can be heard on the audio recordings which includes noise caused by people writing notes, people wrestling paper, turning pages, and talking to themselves. While the undersigned administrative law judge admonished the parties to mute their microphones if they were not testifying, questioning the witness, or objecting to testimony, Student's counsel failed to show that any of the alleged whispering or writing did not come from herself or anyone else participating in the video conference hearing. For these reasons, Student failed to meet the burden of proof in this motion.

Moreover, if Student could prove that Ware's testimony was coached by someone else, and have it stricken from the record, it would not change the outcome of the statute of limitations determination. Ware's testimony was corroborated by supporting documentation and other witness testimony. Further, Ware did not testify as to all aspects in the phase one portion of the hearing. Thus, the phase one determination was not based solely on Ware's testimony.

As such, Student's motion to strike Ware's testimony is denied. Further, Student's request to strike all of the testimony in phase one is also denied as Student provided no facts or argument to support this position.

STUDENT'S MOTION FOR RECONSIDERATION IS DENIED

Student requested that the ALJ reconsider the phase one statute of limitation's determination due to alleged inappropriate conduct of witness Shelly Ware and Morgan Hill. Morgan Hill denies the allegations and further argued that the statutory of limitations ruling is inappropriate for reconsideration.

OAH will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances, or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.) However, as discussed below, decisions are treated differently than rulings on motions.

Administrative agencies generally lack the power to order reconsideration of their decisions absent specific authority to do so. (*Olive Proration etc. Com. v. Agri. etc. Com.* (1941) 17 Cal.2d 204, 209; *Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407–408; *Bonnell v. Medical Bd. of California* (2003) 31 Cal.4th 1255, 1260.) Section 11521 of the Administrative Procedure Act authorizes a state agency to order reconsideration of its administrative adjudication, upon its or a party's application, as long as an order is issued within the time period for reconsideration applicable to the agency's decisions. The OAH decisions subject to Government Code section 11521 are not final when issued

but become effective after 30 days (absent other orders). (Gov. Code, § 11519, subd. (a).)

However, the Administrative Procedure Act (Gov. Code §§ 11340 *et seq.*) is only applicable in part to special education hearings. (*Poway Unified School District* v. *Student* (May 24, 2010) OAH Case No 2009100310.) Unlike the decisions subject to APA Section 11521, OAH decisions rendered in special education due process proceedings under the Individuals with Disabilities Education Act are not subject to reconsideration by a state agency but are instead final when issued. Any party wishing to contest the findings and decision in a special education due process proceeding may seek review by bringing a civil action in state or federal district court, within 90 days from the date of the ALJ's decision. (20 U.S.C. § 1415(i); 34 C.F.R. §§ 300.514 and 300.516 (2006); Ed. Code, § 56505, subd. (k).) Government Code section 11521, which authorizes reconsideration of certain OAH decisions is therefore inapplicable to special education decisions, and no other federal or state special education statutes or regulations provide for reconsideration of a decision issued following a special education due process hearing.

Here, Student's request for reconsideration is misplaced. First, Student seeks reconsideration of the administrative law judge's decision regarding the statute of limitations, Student's Issues 1(a) and 1(b) in this matter. The administrative law judge rendered an oral decision of these two issues after phase one of the hearing but explained, as previously described in the May 24 and May 26, 2021 Orders Following Prehearing Conference, that the determination would be further explained in the decision. Because there is no provision under the law for reconsideration of the decision or portions of the decision after a special education hearing, Student's motion for reconsideration is denied.

Second, as stated, Student failed to establish a basis for striking the testimony of Ware or any witness. Thus, even if the undersigned administrative law judge could reconsider the decision, Student's failed to establish any grounds to do so.

STUDENT'S MOTION FOR SANCTIONS IS DENIED

Student seeks sanctions against Morgan Hill for coaching Ware in her hearing testimony arguing that Ware's behavior amounts to perjury and Morgan Hill participation is the subornation of perjury. Morgan Hill opposes any sanctions award and denies any wrongdoing.

In certain circumstances, an administrative law judge presiding over a special education proceeding is authorized to 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. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088, subd. (e); 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 administrative law judge presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).) The administrative law judge shall determine the reasonable expenses based upon a declaration setting forth specific expenses incurred as a result of the bad faith conduct. (Cal. Code. Regs., tit.1 § 1040(c).) 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).) 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.)

The California Court of Appeal discussed what is required to impose sanctions under California Code of Civil Procedure section 128.5 in the case of *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635. In discussing what constitutes bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay, the court stated the action taken by the party or its attorney must be solely for the purpose of harassing an opposing party. Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit. There must also be a showing of an improper purpose, such as subjective bad faith on the part of the attorney or party to be sanctioned. (*Levy v. Blum*, *supra*, 92 Cal.App.4th at p. 635.)

As determined, Student failed to establish that Ware testified in the presence of others, was coached during her hearing testimony, or otherwise engaged in bad faith tactics. Student's counsel additionally failed to file a declaration in support of legal fees. Thus, Student's motion for sanctions is denied.

STUDENT'S MOTION TO STRIKE PORTIONS OF MORGAN HILL'S CLOSING BRIEF IS DENIED

The administrative law judge ordered closing briefs be filed with OAH on July 6, 2021. Both parties timely filed closing briefs. On July 16, 2021, ten days after closing

briefs were filed, Student filed a motion to strike portions of Morgan Hill's brief. In large part, Student's motion consisted of criticisms that the arguments throughout Morgan Hill's closing brief were unsupported, lacked foundation, opinion, legal conclusions, credibility findings, inaccurate factual misrepresentations, confusing, misleading, deceiving, and inaccurate, and requested that these portions of the brief should be stricken. Closing briefs are argument, not evidence, and Student failed to prove that Morgan Hill's closing brief was not purely argument as to its view of the evidence in the record.

Further, throughout the motion to strike, Student argued counter points to every topic that was requested to be stricken. As such, the motion to strike is primarily a reply brief to Morgan Hill's closing brief, which Student did not request or receive permission to file. To that extent, the motion to strike is improper, and its contents have not influenced the outcome of the decision in this matter. Accordingly, Student's motion to strike portions of Morgan Hill's closing brief is denied.

ORDER

1. Student's motion to strike Shelley Ware's hearing testimony, and any hearing testimony is denied.
2. Student's motion to reconsider the phase one hearing determination is denied.

3. Student's motion for sanctions is denied.
4. Student's motion to strike portions of Morgan Hill's closing brief is denied.

Cynthia Fritz

Cynthia Fritz

Administrative Law Judge

Office of Administrative Hearings