BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

GONZALES UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2022100267

ORDER DENYING MOTION TO SHIFT EXPENSES

DECEMBER 6, 2022

On November 16, 2022, Parents on behalf of Student and Gonzales Unified School District filed with the Office of Administrative Hearings, called OAH, and served on each other, the parties' prehearing conference statements. Student's prehearing conference statement included a list of Student's witnesses he intended to call at the due process hearing with descriptions of their general area of testimony.

On November 21, 2022, the undersigned Administrative Law Judge, called an ALJ, held a prehearing conference by video. Attorney Joshua Cruz appeared on behalf of Student. Attorney Roxana Khan appeared on behalf of Gonzales Unified. At the prehearing conference, the ALJ continued the due process hearing to begin on November 30, 2022. The ALJ ordered Student to upload his exhibits to the electronic evidence program by 5:00 PM on November 21, 2022. The ALJ did not issue an order

for the parties to provide each other another list of witnesses and their general area of testimony by 5:00 PM on November 21, 2022.

On November 28, 2022, Khan, on behalf of Gonzales Unified, filed a motion to exclude Student's witnesses. Gonzales Unified contended that Student failed to comply with Education Code section 56505, subdivision (e)(7), by failing to timely disclose Student's witnesses to Gonzales Unified by 5:00 PM on November 21, 2022, at least five business days prior to the hearing.

On November 28, 2022, Student filed an opposition to the motion and moved for sanctions against Khan. Student argues he timely provided Gonzales Unified with a list of his witnesses and a description of their general area of testimony in Student's prehearing conference statement filed with OAH and served on Gonzales Unified on November 16, 2022. Student contends Gonzales Unified's motion to exclude Student's witnesses was in bad faith and constituted frivolous litigation tactics on the part of Khan.

Student also contends Khan misrepresented the orders issued by the ALJ at the November 21, 2022 prehearing conference. Therefore, Student requests an order for Khan to reimburse Student for attorney fees incurred as a result of Khan's bad faith and frivolous tactics. Gonzales Unified did not file a response to the motion for sanctions against Khan.

On November 29, 2022, Student filed a Notice of Settlement Pending Board Approval. OAH vacated the hearing dates on November 29, 2022.

APPLICABLE LAW

In certain circumstances, an ALJ presiding over a special education proceeding is authorized to shift expenses from one party to another, or to OAH. (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).)

The terms actions and tactics are 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.*) The term 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

Here, Student'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. Sanctions in this matter are not necessary to ensure an orderly and timely hearing, as the hearing dates are vacated based on the parties' settlement pending the approval of the school board.

ORDER

Student's motion for sanctions is denied.

Rommel P. Cruz

Rommel P. Cruz
Administrative Law Judge
Office of Administrative Hearings