BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LIBERTY UNION HIGH SCHOOL DISTRICT.	OAH Case No. 2017090367 ORDER DENYING MOTIONS TO SHIFT COSTS AND FOR SANCTIONS

On September 11, 2017, Parent on behalf of Student filed a Request for Due Process Hearing (complaint) naming Liberty Union High School as respondent. Student filed an amended complaint on September 18, 2017. On October 3, 2017, Liberty filed a Motion to Dismiss all issues in the complaint occurring prior to September 11, 2015 asserting the statute of limitations barred the asserted issues and also challenging the substance of the assertion, seeking immediate dismissal of issues that included disputed questions of fact. Liberty's Motion to Dismiss was denied. Liberty then filed a Motion for Reconsideration asserting the denial of their motion did not follow "OAH pattern and practice". That motion was denied.

On October 23, 2017, Student filed a motion seeking cost shifting and sanctions against Liberty for filing both of the motions referenced above. Student asserts that the fact that Liberty did not file reply briefs following the briefs Student filed in opposition to the motions indicates the motions were frivolous as the failure to file a reply brief was indicative of Liberty's knowledge that their motion was unjustified and "a strategy to consume and waste the resources of Student, Student's counsel and OAH." Student also asserts that the filing of the motions "was frivolous, abusive, and sanctions should be applied to the full cost and attorney fees incurred in responding to the motions." In a declaration, Student's counsel states various sums incurred in the filing of the motion for sanctions, and the oppositions to the motion to dismiss and the motion for reconsideration. No basis for the computation of the sums was provided and no time records detailing the time devoted to the efforts were included in Student's filing.

On October 23, 2017, Liberty filed an opposition to the motion for sanctions asserting that Student's counsel "has a practice of filing motions for sanctions when a school district does not succeed in a motion." Liberty went on to assert that this practice was abusive itself. While such an assertion is concerning, it was made without supporting evidence. Liberty did not address the substance of Student's motion other than to assert that its previously denied motions were "based on cogent and supported factual and legal arguments" and that it was

"the District's right to zealously advocate for its position through the practice and conventions of the law."

APPLICABLE LAW

Authority of Administrative Law Judge to Shift Costs or Sanction

In certain circumstances, an administrative law judge (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. An ALJ presiding over a hearing may, "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).)

Standards Supporting Sanctions

In determining whether a motion or other action by a party meets the standards supporting sanctions, the nature of the actions or tactics are considered and the events are scrutinized to determine whether they are frivolous. "Actions or 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).) "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.)

STUDENT'S REQUEST FOR SANCTIONS

Motions for sanctions should be reserved for the most extremely objectionable conduct. While zealous advocacy is always expected, what is zealous must also be tempered by actions that are meritorious and soundly grounded in the law.

A motion to shift costs and/or for sanctions is not granted in this case. The law requires a showing of an improper purpose with facts, not merely a conclusory assertion.

Student has not made a showing of improper purpose. On this record, Liberty will not be required to reimburse Student for fees incurred in responding to Student's motion to dismiss, or for reconsideration or in filing for sanctions.

The Student's motion for sanctions is DENIED.

IT IS SO ORDERED.

DATE: October 25, 2017

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Penelope S. Pahl
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PENELOPE S. PAHL
Administrative Law Judge
Office of Administrative Hearings