BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

ALTA LOMA SCHOOL DISTRICT.

OAH CASE NUMBER 2019091099

ORDER VACATING ORDER TO SHOW CAUSE REGARDING SANCTIONS AGAINST STUDENT'S ATTORNEY

MARCH 26, 2020

At the January 31, 2020 prehearing conference, which will be referred to as PHC, Administrative Law Judge Sabrina Kong of the Office of Administrative Hearings set an order to show cause hearing why Student's attorney, Tania Whiteleather, should not be sanctioned for not appearing for the PHC. Administrative Law Judge will be referred to as ALJ. Office of Administrative Hearings will be referred to as OAH. ALJ Kong ordered Student's attorney to file a statement by March 23, 2020 explaining why OAH should not sanction her. ALJ Kong also permitted Alta Loma School District's attorney to file a response by March 25, 2020. Alta Loma School District will be referred to as Alta Loma.

APPLICABLE LAW

In certain circumstances, the 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) & €; 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

On February 4, 2020, Ms. Whiteleather filed a statement under the penalty of perjury explaining that phone issues prevented her from participating in the January 31, 2020 PHC. Alta Loma filed a response on March 25, 2020 requesting sanctions against Ms. Whiteleather citing her pattern of non-appearances in two separate matters. Alta Loma also contends that Ms. Whiteleather's failure to contact OAH knowing that OAH scheduled a PHC in this matter also warrants sanctions. Alta Loma's requested that OAH shift Alta Loma's attorneys' fees for the PHC appearance, and responding and attending the order to show cause hearing to Ms. Whiteleather.

Based on Ms. Whiteleather's representation under the penalty of perjury that phone issues prevented her from participating in the January 31, 2020 PHC, the ALJ declines to sanction Ms. Whiteleather. The Order to Show Cause hearing regarding sanctioning Ms. Whiteleather is vacated. Alta Loma's request to shift expenses to Ms. Whiteleather is denied.

IT IS SO ORDERED.

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Sabrina Kong
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Sabrina Kong

Administrative Law Judge

Office of Administrative Hearings