BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2022080544

ORDER DENYING MOTION FOR SANCTIONS

DECEMBER 9, 2022

On August 17, 2022, Student filed with the Office of Administrative Hearings a due process hearing request, called a complaint, naming San Francisco Unified School District as respondent. The Office of Administrative Hearings is called OAH.

On November 21, 2022, San Francisco filed a motion for sanctions of $31,500 to be imposed on Student and Student's counsel. No breakdown of how San Francisco's counsel allocated time on this matter was provided in the motion or counsel's declaration. The facts upon which the motion is based are as follows:

On September 1, 2022, or 15 days after Student filed the complaint, San Francisco filed a notice of insufficiency as to the entire complaint. OAH found three of the claims in Student's complaint sufficient, but determined that the remaining 13 claims were

insufficient, primarily on the grounds that the incorrect school district was referenced in the body of the complaint, time periods were not sufficiently specified, and the complaint contained no allegations of an exception to the statute of limitations for otherwise time-barred claims.

On September 3, 2022, Student informed San Francisco that Student was willing to proceed to a resolution session on the three claims found sufficient, and to agree to mediation and a continuance of the due process hearing. Student asked for dates San Francisco representatives were available. San Francisco proposed dates many months later, and on September 13, 2022, Student responded that the proposed dates were so far in the future it made more sense for Student to amend and get earlier dates for hearing from OAH.

Student filed a first amended complaint on September 14, 2022. San Francisco filed a notice of insufficiency as to Student's entire first amended complaint 14 days later on September 28, 2022. On October 5, 2022, OAH determined Issues 1, 4, 7 11, 13 and 14 sufficient, but the remaining nine claims insufficient because it was unclear if Student sought an exception to the statute of limitations on those claims. Student was granted 14 days to amend, until October 19, 2022.

The same day the Order Determining Sufficiency was served, on October 5, 2022, San Francisco inquired if Student would file a second amended complaint. On October 10, 2022, San Francisco inquired about dates for a resolution session. Student responded on October 10, 2022 that Student would propose resolution session dates, but preferred to have an operative complaint in place before doing so.

On October 17, 2022, close to the date prehearing conference statements were due for the due process hearing on the amended complaint, but within the time for a

second amendment, San Francisco inquired if Student would be filing a second amended complaint. Student responded that same day that Student was "regrouping," and unsure whether another amended pleading would be filed.

On October 19, 2022, San Francisco emailed Student to complain about having to prepare statements for the prehearing conference, called a PHC. Student promptly responded the same day that Student intended to amend the complaint.

Student filed a second amended complaint on October 19, 2022. On October 24, 2022, San Francisco emailed Student's counsel seeking proposed dates for a resolution session and a continuance of the hearing, and informed Student that it would be filing another notice of insufficiency. On October 27, 2022, San Francisco emailed Student again about proposed dates for a resolution session and continued hearing dates.

On November 3, 2022, 14 days after Student filed the second amended complaint, San Francisco filed a notice of insufficiency challenging the sufficiency of the entire second amended complaint. San Francisco also emailed Student on November 3, 2022, inquiring again about a resolution session and continued hearing dates.

The last email offered in support of San Francisco's request for sanctions is dated November 7, 2022, in which San Francisco offered November 10, 2022 as a resolution session date. The notice of insufficiency was still pending.

In an Order dated November 8, 2022, OAH found Issue 7 of the second amended complaint insufficiently pleaded, but the remaining 14 issues sufficient.

In certain circumstances, an administrative law judge, known as 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 [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) and (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).) 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.)

Here, San Francisco has made absolutely no showing of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. Student's responses to San Francisco were always polite. Student amended the complaints within timelines permitted by OAH's Orders. Student informed San Francisco when Student was considering amendment, and promptly notified San Francisco when it had decided to amend.

Student made clear to San Francisco in September 2022 that Parent was willing to participate in a resolution session after an operative pleading was in place. San Francisco's barrage of emails in October and November 2022 seeking a resolution session date after some of Student's claims had been found insufficient is more demonstrative of San Francisco acting in bad faith in disregard of Student's reasonable request to wait for the pleading to be final prior to scheduling a resolution session to resolve the issues. This is particularly true of its October 24, 2022, email seeking a resolution session while simultaneously indicating that San Francisco would be filing another notice of insufficiency.

At most, the email chains attached to the sworn declaration of San Francisco's counsel show that Student was not following San Francisco's preferred schedule. San Francisco would unfairly characterize Student's timely filed amendments as causing delay, although San Francisco routinely waited 14 to 15 days to file its notices of insufficiency, repeatedly leaving Student uncertain for weeks at a time as to whether the current complaint would be operative. San Francisco made no showing that Student at any point intended to cause unnecessary delay.

San Francisco prevailed on its first notice of insufficiency due to a poorly written complaint. However, a significant number of Student's claims survived San Francisco's subsequent notices of insufficiency, including all but one of 15 claims in the second amended complaint. In light of the Orders finding Student's claims sufficient, San Francisco cannot make a showing that Student's complaints were completely without merit or for the sole purpose of harassing an opposing party.

There was no urgency to conduct a resolution session on San Francisco's part. Each amendment reset the timeline for conducting a resolution session, and Student clearly indicated to San Francisco that Parent would participate in a resolution session once a pleading was no longer challenged.

Student's amended complaints merely sought to clarify Student's claims. There was no showing that preparation of each of San Francisco's prehearing conference statements, including notice of witnesses it intended to call and evidence it would seek to admit in defense of Student's surviving claims, was a wasteful use of counsel's time.

Even if some of Student's conduct was found to be sanctionable, which it was not, San Francisco has made an award of sanctions impossible by failing to provide an itemized billing statement demonstrating the allocation of attorney time and costs. San Francisco's motion to recover every penny spent in defense of claims OAH found sufficient is unreasonable, and itself borders on frivolous.

More disturbingly, instead of providing evidence of actual charges, San Francisco seeks sanctions not only for all hours billed, but at an "appropriate" rate of $700 per hour. It is impossible to determine from the sworn declaration of San Francisco's counsel the hourly rate that San Francisco was charged for representation in this matter.

However, it would be bad faith conduct on the part of San Francisco if it were to attempt to shift costs to Student that it had not itself incurred.

For the multiple reasons stated above, San Francisco's motion for sanctions is denied.

This Order renders moot San Francisco's motion for a ruling on its motion for sanctions, filed November 29, 2022, after this matter was dismissed. No separate Order will be issued on that motion.

IT IS SO ORDERED.

Alexa Hohensee

Alexa Hohensee
Administrative Law Judge
Office of Administrative Hearings