BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

ROSEDALE UNION SCHOOL DISTRICT AND KERN HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2023090392

ORDER DENYING ROSEDALE'S MOTION TO DISMISS, OR TO CONTINUE PREHEARING CONFERENCE AND HEARING; AND DENYING STUDENT'S MOTION FOR SANCTIONS

SEPTEMBER 27, 2023

On September 15, 2023, Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Rosedale Union School District and Kern High School District as respondents. On September 18, 2023, Rosedale filed a notice of representation in this case. On September 20, 2023, Rosedale filed this motion to dismiss, or alternatively continue the prehearing conference and hearing, for Student's failure to properly serve the complaint. On September 22, 2023, Student

opposed the motion to dismiss and filed a motion for sanctions against Rosedale. Rosedale opposed the sanction motion on September 27, 2023.

SERVICE IN SPECIAL EDUCATION CASES

The applicable special education service regulation states:

> "Notwithstanding Government Code section 11440.20 of the APA, service of notice, motions, or other writings pertaining to special education due process hearing procedures to the California agency or nonprofit organization or entity that is responsible for conducting due process hearings and any other person or entity are subject to the following provisions:
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> (a) The notice, motion, or writing shall be delivered personally or sent by mail or other means to the agency or nonprofit organization or entity that is responsible for conducting due process hearings, person, or entity at their last known address, and, if the person or entity is a party with an attorney or other authorized representative of record in the proceeding, to the party's attorney or other authorized representative.
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> (b) Unless a provision specifies the form of mail, service or notice by mail may be by first-class mail, registered mail, or certified mail, by mail delivery service, by facsimile transmission if complete and without error, or by other electronic means as provided by regulation, in the discretion of the sender.

> (c) Service must be made by a method that ensures receipt by all parties and the agency or nonprofit organization or entity that is responsible for conducting due process hearings in a comparable and timely manner. (Cal Code Regs, tit. 5, § 3083, subd. (a).)

California Education Code, section 56502, subdivision (c)(1), states, in pertinent part, "the party or the attorney representing the party initiating a due process hearing by filing a written request with the Superintendent shall provide the other party to the hearing with a copy of the request at the same time as the request is filed with the Superintendent …"

MOTION TO DISMISS

Rosedale asks that OAH dismiss Student's complaint due to Student's failure to serve the complaint on Rosedale "when it was filed with OAH." Rosedale asserts Rosedale was not served with the document as stated in Student's proof of service. Rosedale argues that failure to serve the complaint on Rosedale, when the complaint was filed with OAH, is proven by the fact that it did not receive a copy of the complaint prior to OAH serving the scheduling order on September 18, 2023.

Alternatively, Rosedale asks that OAH deem the due process complaint filed as of September 19, 2023, apparently on the grounds that OAH received it after 5:00 PM on Friday, September 15, 2023. Student asks that OAH continue the dates of the prehearing conference and due process hearing due to the fact that Rosedale did not receive the complaint until September 19, 2023.

Student argues that service in the case complied with the legal requirements. Student contends service to Rosedale occurred by both facsimile and U.S. Mail on September 15, 2023 as stated in its proof of service.

Rosedale offers no evidence that the complaint was not served other than that the district did not receive a fax, and fails to offer legal authority supporting its interpretation of the application of the statutes and rules it quotes. The complaint was served at least by U.S. Mail on September 15, 2023, which meets the requirements of the applicable service regulation. (Cal. Code Regs., tit. 5, § 3083, subd, (a).) While California Education Code section 56502, subdivision (c)(1), requires the filing party to "provide the other party to the hearing with a copy of the request at the same time as the request is filed with the Superintendent," Rosedale offers no legal authority that service by mail, on the same day the complaint was filed, fails to fulfill this requirement.

Student's proof of service, however, lacks clarity. While Student lists telephone numbers and facsimile numbers for two recipients as part of their section of the document identifying the parties involved in the case, nowhere does the proof of service specifically identify the persons served via fax, or the date and time the document was faxed. This is in contrast to the section specifically identifying the parties and addresses used for service by mail.

Rosedale also fails to support its request for dismissal on the grounds that Student's service was improper. Rosedale cites no legal authority requiring multiple means of service of a due process complaint. Nor does Rosedale offer any legal authority requiring a means of service resulting in instantaneous receipt by an opposing party. Indeed, it would be difficult to ensure immediate receipt even if facsimile or emailed service were required, given unanticipated technological problems that can

arise. Rosedale offers no legal authority supporting the proposition that same day service by mail fails to meet the legal requirements.

REQUEST FOR CONTINUANCE

Rosedale asks that OAH deem the complaint filed on Tuesday, September 19, 2023, but it is unclear why. The motion quotes the OAH rule that a document received after 5:00 p.m. is deemed filed the next business day. However, in this case, the secure file transfer system marks Student's complaint as filed at 12:31 p.m. Furthermore, Rosedale cites no basis for deeming the complaint filed on Tuesday September 19, 2023, especially as Monday, September 18, 2023 would be the next business day after the Friday September 15, 2023 filing. It is possible that Rosedale is implying the date of its receipt from Student should control the complaint filing date. However, Rosedale offer no legal authority for this request, which would be a significant departure from the usual standard for determining the date of a complaint filing. In any event, OAH declines to act on a position not actually stated in Rosedale's moving papers.

Nor does Rosedale state good cause for continuing the prehearing conference and hearing dates based on Rosedale's asserted receipt of the complaint on September 19, 2023.

OAH must conduct a due process hearing and render a decision within 45 days of receipt of the due process notice unless an extension is granted. (34 C.F.R. § 300.515(a); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) In ruling upon a motion for continuance, OAH is guided by the provisions found within the Administrative

Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, rule 3.1332.) Generally, continuances of matters are disfavored. (Cal. Rules of Court, rule 3.1332(c).)

Rosedale cites no legal authority supporting a determination that a document, served by mail on a Friday, is extraordinarily delayed if received four days later. In fact, while not applicable in this administrative context, the fact that the Civil Code extends the time to act in civil cases by five days after U.S. mail service of a document, is instructive as to the fact that the judicial system generally accepts that service by mail could take up to five days when being delivered between addresses within the state of California. (See, Ca. Civ. Code § 1013, subd. (a).) OAH's docket notes also show that Rosedale was provided a courtesy copy of the complaint on September 18, 2023, which is not mentioned by Rosedale. Most importantly, however, Rosedale has made no showing of prejudice due to date it received the complaint.

The general rule in both federal and state forums is that purely technical violations of procedures, resulting in no prejudice, are not grounds for relief. (See, 34 C.F.R. § 300.513(a)(2), [prohibiting IDEA hearing decisions to be based on solely technical violations of the IDEA]; Ca Const., Art. 6 § 13. ["No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."].) Rosedale offers no evidence that it was prejudiced by receiving the complaint on September 18 or 19, 2023. Nor does Rosedale offer any other good cause for a continuance of the prehearing conference and hearing. The request for continuance is denied.

STUDENT'S SANCTION MOTION

In certain circumstances, a Special Education Division administrative law judge, known as an ALJ, is authorized to shift expenses from one party to another. (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."].)

An ALJ 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).)

"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.) However, the imposition of sanctions does require a showing that the actions were meritless *or* frivolous *and* that the action was pursued in bad faith. (*Campbell v. Cal Gard Sur. Services, Inc.* (1998) 62 Cal. App. 4th 563, 574, emphasis in the original.)

Student seeks sanctions on the grounds that Rosedale's motion to dismiss, or alternatively to continue the prehearing conference and hearing dates, was in "bad faith and/or frivolous and intended to cause unnecessary delay." Student asserts that Rosedale's motion was based on "pure speculation." However, this ignores the fact that Rosedale contends the faxes Student asserts were sent were not received. Most critically, however, Student fails to establish bad faith.

Student's assertion of bad faith was not accompanied by any evidence. Rosedale based their assertions regarding the lack of receipt of the complaint on their representation no school administrator contacted received a faxed copy of the due process complaint. That the complaint was not faxed, was, according to Rosedale, bolstered by the fact that the document did not arrive from Student's counsel until Tuesday, September 19, 2023.

While Student offered a document it asserts demonstrates the faxes were sent, Student offered no evidence that Rosedale received the faxed documents. Student's assumption that Rosedale had no basis for its concerns about the service is inaccurate. As previously discussed, Rosedale's failure to establish that the proof of service did not meet legal requirements failed to prove a basis for dismissal or for continuance. However, Student has failed to meet the burden of producing evidence proving bad faith. Nor did Student cite any legal authority supporting such a conclusion based on these facts.

ORDER

1. Rosedale's motion to dismiss is denied.

2. Rosedale's motion to continue the prehearing conference and hearing dates is denied. The case shall proceed on the schedule stated in the Scheduling Order.

3. Student's motion for sanctions is denied.

IT IS SO ORDERED.

Penelope Pahl

Penelope S. Pahl

Administrative Law Judge

Office of Administrative Hearings