BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN MATEO COUNTY OFFICE OF EDUCATION AND SAN MATEO UNION HIGH SCHOOL DISTRICT.	OAH CASE NO. 2013061131 ORDER DENYING MOTION FOR SANCTIONS

On July 31, 2013, Student filed with the Office of Administrative Hearings (OAH) a second joint request for continuance. The request was submitted by Student's counsel, Sheila L. Brogna, and contained her signature, as well as the signatures of the two attorneys for the San Mateo County Office of Education (County) and the San Mateo Union High School District (District). The parties requested that mediation, which was previously set for August 22, 2013, be set on August 19, 2013, and requested that OAH select prehearing conference (PHC) and hearing dates. On August 5, 2013, OAH denied this second request for a continuance as the mediation date requested by the parties was not a date on which OAH regularly conducts mediations and a PHC and hearing dates had already been calendared pursuant to the July 30, 2013 Order granting the initial joint continuance request.

On August 8, 2013, Timothy Fox, attorney for the County, filed a letter with OAH stating that his client was not a party to the second request for continuance filed by Ms. Brogna on July 31, 2013. It goes on to state that Mr. Fox had consulted with Jennifer A. Stalzer, attorney for the District, who informed him that the District also did not authorize the use of language in the July 31, 2013 request for continuance. The County's letter states that Ms. Brogna utilized the July 30, 2013 request for continuance, modified it, re-signed it, and submitted it as the July 31, 2013 second request without obtaining new signatures from either Mr. Fox or Ms. Stalzer.

Given the serious nature of the assertions made by the County, on August 19, 2013, OAH requested that Student file a response by August 23, 2013. Student filed a response on August 21, 2013. In his response, Student alleges that the County failed to serve him a copy of its July 5, 2013 Motion to Dismiss Issues and its August 8, 2013 letter referenced above. Student therefore requests that OAH issue an order of sanctions against the County. On August 21, 2013, County filed a reply to Student's response and request for sanctions. The County attached fax confirmation sheets in support of its claim that the County served Student with its Motion to Dismiss and Letter Re: Second Request for Continuance.

APPLICABLE LAW

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).)

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).)

"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

First, Student's counsel requests an apology from Mr. Fox presumably for "accusing" her of modifying the second request for continuance and suggesting that she had not properly obtained his signature. That all parties agreed to the actual requested date for a rescheduled mediation is not the issue. Rather, the manner of its submission and the representation by Student that the actual form as submitted was signed by all counsel is in dispute. Student's actions of writing additional information on the request for continuance, filing it with OAH with the original signatures of the respondents intended for the initial request, and adding a further request in the fax cover sheet regarding the prior selected hearing dates, all without seeking respondents' further signatures, is troubling.

Student's counsel does not deny that she modified the request for continuance document originally signed by the respondents by checking the box indicating this was now a "second" continuance request and writing in an explanation for the request. The County's attorney owes no apology. OAH expects all attorneys appearing before it and filing documents with this tribunal to adhere to the required standards of professionalism. This

includes ensuring that a joint request is truly jointly made, and that any changes are initialed or otherwise clearly referenced by all parties as something to which the parties are in agreement.

Student next requests that OAH sanction Mr. Fox for failing to serve him with the July 5, 2013 Motion to Dismiss and the County's August 8, 2013 letter regarding the second continuance request. Student did not file a formal motion with a specific request as to the amount of sanctions warranted nor include supporting evidence by way of a declaration under penalty of perjury. For this reason alone, Student's request could be denied.

However, in an attempt to re-direct the parties to focus their time and energy on the heart of the issues at stake in this matter, Student's request for sanctions is denied on the merits. Although the County filed fax transmission reports with OAH regarding the two filings in question, these reports are not accompanied by a declaration and by themselves do not prove that Student was properly served, as the destination facsimile number is not listed in full. Nevertheless, Student has not demonstrated that the County had ex parte communications with OAH by failing to serve him with its prior motion and letter or otherwise acted in bad faith by misrepresenting that it served Student with its' prior filings.

Student has failed to offer any evidence is support of his motion and the motion for sanctions is denied.

ORDER

Student's motion for sanctions is denied.

Dated: September 3, 2013

/s/
THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings