

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2010020941

v.

RAVENSWOOD CITY SCHOOL DISTRICT,

RAVENSWOOD CITY SCHOOL DISTRICT,

OAH CASE NO. 2010040340

v.

PARENT ON BEHALF OF STUDENT.

ORDER DENYING STUDENT'S
MOTION TO SHIFT EXPENSES

Administrative Law Judge (ALJ) Rebecca P. Freie, Office of Administrative Hearings (OAH), conducted a due process hearing in this matter in East Palo Alto, California, on May 17-20, 24-27, June 3-4, and 7-9, 2010. On June 1, 2010, Student filed a motion to exclude evidence and a motion for sanctions against the District. On June 3, 2010, the ALJ deferred ruling on the motion to exclude evidence, and orally denied Student's motion for sanctions without prejudice. The parties were advised that if he wished, Student could file a motion for sanctions following the conclusion of the hearing.

On June 9, 2010, the ALJ advised the parties that if Student intended to file a new motion for sanctions, it must be filed no later than June 17, 2010, and the District would have three business days to file opposition to the motion after it was filed.¹ Student's motion and the District's response were timely filed. However, on June 24, 2010, Student filed a response to the District's opposition, and on June 24, 2010, the District filed a motion to strike Student's response. Student then filed a response to the motion to strike.

¹ Although Student filed a "Motion for Sanctions Against Ravenswood City School District," the motion is technically a request to shift onto the District expenses Student incurred during the course of the hearing due to the alleged "bad faith" actions of the District.

APPLICABLE LAW

Motion to Strike

There are no provisions governing a motion to strike in special education due process hearings. Therefore, OAH looks to the California Code of Civil Procedure for guidance. Section 436 of the Code of Civil Procedure authorizes a court to strike “any irrelevant, false, or improper material inserted in any pleading . . . or any pleading not drawn or filed in conformity with the laws of this state, a court rule or an order of the court.”

Motion to Shift Expenses

In certain circumstances, an 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).) “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.)

Student Records

Education Code section 56504 requires a school district to provide a student’s records to his parents or authorized representative within five business days of receiving that request. In addition, the IDEA requires parties in a due process hearing to exchange the evidence each intends to introduce at hearing no later than five business days prior to the hearing. (34 C.F.R. § 300.512(a)(3) (2006); Ed. Code, § 56505, subd. (e)(7).)

DISCUSSION

Motion to Strike

On June 9, 2010, the ALJ authorized Student to renew his motion to shift expenses by filing a written motion no later than close of business on June 17, 2010. The District was authorized to file an opposition to that motion within three business days after the motion was filed. However, Student was not authorized to file a response to the District's opposition to his motion to shift expenses. Accordingly, the District's motion to strike this response is granted. Student's response to the opposition was not considered in ruling on the motion to shift expenses.

Motion to Shift Expenses

Untimely Production of Student Records at the Due Process Hearing

When Mother retained legal counsel in October 2009, one of Student's attorneys sent a letter to the District requesting his records. The District responded to that request in a timely manner and provided the attorney with a package of documents. One of the documents it provided to the attorney was identified as a "Parent/Guardian Assessment Planning Form" dated April 4, 2007, which had been completed by Mother. The attorney thought the form might be part of a set of other documents, but the package did not contain any other documents dated April 4, 2007. The attorney subsequently asked the District to provide any other documents it had dated April 4, 2007, but none were produced.

Student's attorneys made additional requests for Student records. Each time, the District would direct personnel at Student's school, Edison-Brentwood Academy (Brentwood), a charter school, to copy all of the documents in Student's cumulative file that was maintained at Brentwood. In addition, District personnel would copy the documents in Student's special education file that was maintained in the offices of the Special Education Division. These copies were then sent to Student's attorneys.

Student filed his complaint on February 23, 2010. One of Student's issues was a request that the two year statute of limitations for filing due process complaints be waived to permit him to make claims prior to February 23, 2008.

In May 2010, the attorneys for the parties prepared evidence binders for the hearing, and timely exchanged them prior to the commencement of the hearing. Each party included some, but not all of Student's records in its respective evidence binder. The document dated April 4, 2007, was included in Student's binders, but the District did not include any documents from April 2007 in its evidence binder.

On May 25, 2010, during the course of the hearing, the District produced several documents dated April 4, 2007. These documents were relevant as to the issue concerning a

waiver of the two-year statute of limitations. The attorney for the District explained that the District had discovered a “dead” file concerning Student that was located at Brentwood, and these documents had been found in the file either that day, or the previous day. Student’s attorneys were provided with copies of those documents.

On May 25, 2010, after the District produced the newly discovered documents, Student’s attorneys were told that the ALJ would entertain a motion to continue the matter for a reasonable period to allow them to adequately prepare for the introduction of this new evidence. Student’s attorneys stated on the record that they would proceed without requesting a continuance.

On May 27, 2010, after the conclusion of the last day of hearing for that week, the District discovered another file at Brentwood pertaining to Student which contained many documents related to a December 17, 2007 meeting, as well as other documents. The District’s attorney sent copies of those documents to Student’s attorneys that night, as well as an email advising them as to what two district witnesses would testify to, based on the newly discovered information.

On June 1, 2010, Student filed a motion to exclude the documentary evidence that was located by the District the previous week. Attached to this motion was a motion for sanctions, in which Student requested that his attorneys be reimbursed by the District for fees and costs incurred in responding to the District’s untimely production of evidence during the hearing.

When the hearing resumed on June 3, 2010, the ALJ again invited counsel for the Student to request a continuance if they needed additional time to address this latest batch of documents. Again, the attorneys declined to do so.

The ALJ then denied Student’s motion to exclude evidence, and the motion for sanctions, without prejudice. The ALJ advised the parties that each newly discovered document produced on May 25 or May 27, 2010, would be considered separately, and at the end of the hearing a determination would be made as to whether each document would be admitted. When testimony concluded on June 8, 2010, the District asked that most of the late-discovered documents be admitted. This request was granted over the objection of Student’s attorneys.

On June 9, 2010, Student was advised that his motion for sanctions could be renewed, if he wished to do so, if it was filed no later than June 17, 2010. The District would then be given an opportunity to respond to the motion.

Facts Established at Hearing

The evidence from the due process hearing established that from January 2007 to November 2007, the District was without a Special Education Director. Further, although

the District had funding for six school psychologists, only three or four were then employed by the District. For much of 2007, Brentwood did not have an assigned school psychologist.

If a Student is assessed for special education, that assessment and all related documents are kept by the Special Education Division at the District's main office under lock and key. There are two sets of these special education files at the District's main office. One set of files contains the records of students who were assessed for special education and found ineligible by the IEP team, the records of students who have been exited from special education after receiving services, and the records of special education students who have moved from the District. The second set of files contains the records of students who are currently in special education.

The two separate files discovered at Brentwood during the course of the hearing were related to the special education assessment of Student. They should have been sent to the Special Education Division for safekeeping after Student was found eligible for special education in September 2008. There was no evidence as to exactly where at Brentwood each of the two files was found. There was no evidence that any personnel at either Brentwood, or at the District's main office intentionally withheld these two files from Student or his counsel.

Analysis

Costs may be shifted from one party to another for bad faith actions, or tactics that are frivolous or solely intended to cause unnecessary delay. The evidence surrounding the discovery and production of the documents in question does not support a finding that either the District, or its attorney, acted in bad faith, or used tactics that were frivolous or intended to cause unnecessary delay. Rather, the evidence showed that the District's attorney was diligent in trying to locate documents that should have been in Student's special education file, but were not. When those documents were eventually located, he immediately provided them to Student's counsel.

During the hearing, each time the District provided newly discovered documents to Student's attorneys, they were given the opportunity to request a continuance to better prepare for the introduction of the documents and the subsequent questioning of witnesses. However, the attorneys declined to avail themselves of this opportunity. There was no evidence that the District had withheld these documents, and then produced them at a later time as a delaying tactic.

Although the documents may have changed the case Student had initially prepared to try, Student was not prejudiced by the late production of new evidence. Rather, some of the documents supported Student's arguments related to the extension of the statute of limitations, and the District's failure to assess Student in a timely manner.

As is the case in all adjudicated proceedings, when new documentary evidence appears, a witness testifies, or rulings are made by the judge hearing the case, a party may

find that his case may be stronger or weaker than it appeared at the beginning of the hearing. However, this does not entitle a party to shift expenses to the other side simply because he is surprised by new evidence. Accordingly, Student's motion to shift expenses is denied.

ORDER

Student's motion to shift expenses is denied.

Dated: August 31, 2010

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings