

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

OAKLAND UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2012040848

ORDER DENYING MOTION FOR  
SANCTIONS

On August 20, 2012, a prehearing conference (PHC) was conducted in this matter by Administrative Law Judge (ALJ) Theresa Ravandi with the Office of Administrative Hearings (OAH). Attorney LaJoyce L. Porter appeared on behalf of Student and attorney Lenore A. Silverman appeared on behalf of the Oakland Unified School District (District). The PHC was recorded. Student's counsel failed to file a PHC statement in accord with the July 5, 2012 scheduling order. As stated in the scheduling order, OAH requires each party to file a PHC statement at least three business days prior to the PHC. Student filed a letter with OAH on August 15, 2012 indicating that the parties agreed to extend the date for filing and exchange of PHC statements to Friday, August 17, 2012. Student did not file her PHC statement prior to the PHC. During the PHC, Student was ordered to file her PHC statement, identifying in writing her witnesses and list of exhibits, by close of business on August 21, 2012. The parties further agreed to a late exchange of evidence binders to occur no later than Monday, August 27, 2012.

Student filed her PHC statement at 5:09 p.m. on August 21, 2012.<sup>1</sup> On August 22, 2012, the Oakland Unified School District (District) filed a motion to exclude any evidence not listed in Student's PHC statement.<sup>2</sup> On August 22, 2012, Student filed a response to District's motion to exclude along with a request for a continuance. Attached to Student's response were numerous documents relating to confidential settlement negotiations between the District and Student, including the District's ten-day settlement offer. On August 23, 2012, the District filed an opposition to Student's request for continuance and a request for

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<sup>1</sup> OAH considers the close of business to be 5:00 p.m., the time that OAH closes its offices. Student did not provide an explanation for her failure to timely comply with the PHC order.

<sup>2</sup> Per the PHC Order, the ALJ will rule on this motion at the beginning of the hearing.

sanctions due to Student's counsel's disclosure of confidential settlement negotiations.<sup>3</sup> The District requested that all confidential attachments be removed and destroyed. On August 23, 2012, Student filed a response apologizing for submitting confidential settlement documents and requesting that OAH not order sanctions. On August 27, 2012, OAH issued an order affirming that Student's attachments relating to confidential settlement discussions were placed under seal and had not been reviewed by the undersigned ALJ.

## APPLICABLE LAW

Generally, an ALJ has the authority to subject a person to the issuance of two types of sanctions: contempt and shifting of 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 initiate contempt sanctions or 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 successor to the California Special Education Hearing Office) 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) & (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"

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<sup>3</sup> On August 28, 2012, the District filed a second request for sanctions based upon Student's counsel's failure to abide by OAH's orders and refusal to adhere to the procedural requirements of the Individuals with Disabilities Education Act (IDEA). This second motion for sanctions will be addressed at hearing.

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.)

The California Court of Appeal discussed what is required to impose sanctions under California Code of Civil Procedure section 128.5 in the case of *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635. In discussing what constitutes bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay, the court stated the action taken by the party or its attorney must be solely for the purpose of harassing an opposing party. Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit. There must also be a showing of an improper purpose, such as subjective bad faith on the part of the attorney or party to be sanctioned. (*Levy v. Blum, supra*, 92 Cal.App.4th at p. 635.) This subjective bad faith requirement does not impose 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

The ALJ has the ability, and responsibility, to control due process proceedings under the IDEA similar to those in a civil or criminal action before other tribunals. Student's counsel committed a serious breach of her professional and ethical obligations to maintain the confidentiality of settlement documents. Student's counsel is admonished to take all necessary steps to ensure that such a breach will not happen again.

Student's counsel takes responsibility for her breach of confidentiality and admits that the settlement documents should not have been filed with OAH and that they were attached through mistake or inadvertence. She claims she was not thinking and was frustrated with the numerous pleadings filed in this matter. Her contention that she acted without thinking and out of frustration with having to respond to another motion in this matter, which interfered with her attempts to complete her PHC statement, does not excuse her unprofessional behavior nor her ongoing failure to timely file a complete PHC statement.

The District has not demonstrated that Student's counsel acted in bad faith for the purpose of harassing the District or causing unnecessary delay, or that the District suffered any prejudice. The District must show that Student's counsel was deliberately engaging in bad faith tactics. There is nothing in the present record to support such a finding.

The District's motion for sanctions has merit and Student's counsel is strongly admonished to adhere to the highest level of professional conduct and abide by all statutory rules and regulations governing special education proceedings and settlement negotiations, as well as orders of this tribunal. Student's counsel's act of attaching confidential settlement negotiations to her response indicates a serious lapse in judgment and is deeply troubling to the ALJ. However, her actions do not rise to the level of bad faith. An award of sanctions is an equitable remedy and the ALJ may consider if any prejudice has resulted. Here, the ALJ

immediately recognized the nature of Student's attachments and turned them over to the acting presiding judge who immediately took steps to ensure that all confidential documents were placed under seal. The District's request for sanctions is denied.

ORDER

The District's motion for sanctions is Denied.

Dated: August 29, 2012

/s/

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THERESA RAVANDI  
Administrative Law Judge  
Office of Administrative Hearings