

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. 2014030356

ORDER DENYING MOTION FOR
SANCTIONS

On March 6, 2014, Parent on behalf of Student filed a request for due process hearing (complaint) with the Office of Administrative Hearings naming Oakland Unified School District (Oakland). After various motions and on June 17, 2014, Student filed a “Notice of Unavailability” for the period from June 21 through July 13, 2014.

On June 19, 2014, Oakland filed a motion to dismiss the request for due process. On July 11, 2014, Student moved for the imposition of monetary sanctions on Oakland for filing frivolous motions and for filing the motion to dismiss at a time inconsistent with the notice of unavailability and failing to withdraw it on demand. On July 13, 2014, Oakland filed an opposition.

APPLICABLE LAW

In a special education due process matter, an Administrative Law Judge (ALJ) has the authority to award attorneys' fees under the Government Code and the California Code of Regulations. Government Code section 11455.30 provides:

- (a) The presiding officer 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 as defined in Section 128.5 of the Code of Civil Procedure.

- (b) The order, or denial of an order, is subject to judicial review in the same manner as a decision in the proceeding. The order is enforceable in the same manner as a money judgment or by the contempt sanction.

That section is implemented by California Code of Regulations, title 1, section 1040, which provides:

(a) The ALJ may order a party, a party's 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.

(1) 'Actions or tactics' include, but are not limited to, the making or opposing of Motions or the failure to comply with a lawful order of the ALJ.

(2) 'Frivolous' means

(A) totally and completely without merit or

(B) for the sole purpose of harassing an opposing party.

(b) The ALJ shall not impose sanctions without providing notice and an opportunity to be heard.

(c) The ALJ shall determine the reasonable expenses based upon testimony under oath or a Declaration setting forth specific expenses incurred as a result of the bad faith conduct. An order for sanctions may be made on the record or in writing, setting forth the factual findings on which the sanctions are based.

A comprehensive discussion of the grounds for sanctions under Code of Civil Procedure section 128.5 is set forth in *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635-637. A trial court may impose sanctions under Code of Civil Procedure section 128.5 against a party, a party's attorney, or both, for "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." A bad faith action or tactic is frivolous if it is "totally and completely without merit" or if it is instituted "for the sole purpose of harassing an opposing party." (*Id.*, subd. (b)(2).) Whether an action is frivolous is governed by an objective standard: whether any reasonable attorney would agree it is totally and completely without merit. There must also be a showing of an improper purpose; i.e., subjective bad faith on the part of the attorney or party to be sanctioned. An improper purpose may be inferred from the circumstances. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

DISCUSSION

Student argues that two motions filed by Oakland merit the imposition of sanctions. First, he argues that Oakland "filed a meritless Motion to Strike evidence of Compliance Complaints." Student offers no further explanation or argument as to why any reasonable

attorney would regard that motion as totally and completely without merit, or made for the sole purpose of harassment. In the absence of any serious effort by Student to discharge his burden, as the moving party, of demonstrating that the motion is frivolous within the meaning of the law summarized above, the motion cannot be regarded as frivolous. A motion is not frivolous simply because it is denied.

Second, Student argues that a motion to dismiss filed on June 19, 2014, merits the imposition of sanctions because it was “meritless” and mischaracterized a resolution session as a mediation. Student makes no effort to distinguish between a motion that is merely without merit and one that is frivolous and made in bad faith, or to argue that the motion to dismiss falls in the latter category. Nor does Student argue that any error in characterizing a resolution session as a mediation was deliberate or made for an improper purpose. Finally, the motion to dismiss was based on Oakland’s claim that Student had waived his claims in a settlement agreement. Student’s argument that Oakland’s attorneys knew or should have known that “OAH’s jurisdiction is limited to special education, not the validity of contracts” glosses over the fact that contracts sometimes settle special education matters, and OAH is frequently called upon to interpret them in that context.

Finally, Student seeks sanctions for Oakland’s alleged attempt to harass Ms. Betsy Brazy, his counsel, by timing its motion to dismiss to conflict with Ms. Brazy’s temporary absence from her office. On June 18, 2014, Ms. Brazy filed a “Notice of Unavailability” stating that she would be unavailable “on June 21, 2014 through July 13, 2014” and that “scheduling matters during the above period will subject the party or counsel to sanction. Tenderloin Housing Clinic v. Sparks, 8 Cal.App.4th 299 (1992.)” On June 19, 2014, Oakland filed its motion to dismiss, described above.

On June 21, 2014, the first day of her alleged unavailability, Ms. Brazy wrote a letter to OAH stating that she would be unable to respond to the motion to dismiss due to her upcoming absence for matters relating to a family memorial service. Instead of simply requesting additional time to respond to the motion, she claimed she was entitled to an additional two business days after her return on July 13, 2014, by virtue of the filing of the notice of unavailability. She also demanded that Oakland withdraw its motion to dismiss or suffer this motion for sanctions. Oakland did not withdraw its motion to dismiss, and this motion for sanctions was then filed.

In her July 10, 2014 Order denying Oakland’s motion to dismiss, Administrative Law Judge Laurie Gorsline correctly observed:

While it is common practice in some communities for lawyers to file a “notice of unavailability” to block out dates when they will be unavailable, such notice has no legal effect on law and motion calendars and does not affect applicable time requirements. (*Carl v. Superior Court (Coast Comm. College Dist.)* (2007) 157 Cal.App.4th 73, 75.) However, it is considered harassment for attorneys to schedule matters knowing an opponent is unable to respond and

doing so can result in sanctions. (*Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299, 305.)

Ms. Brazy now seeks sanctions under the authority of *Tenderloin Housing Clinic, Inc. v. Sparks, supra (Sparks)*.

However, *Sparks* is nothing like this case. In *Sparks* the sanctioned party had scheduled three discovery motions for a period when it knew defense counsel would be unavailable, and refused to voluntarily reset the motions. It served eleventh-hour trial subpoenas on defendants in a case in which their trial testimony was not actually necessary or desired. It scheduled three depositions for the last two weekdays of defense counsel's vacation, and refused to continue depositions until the following Monday. It also failed to produce the most important of the three witnesses, after defense counsel returned early from abroad to attend the deposition. (*Sparks, supra*, 8 Cal.App.4th at pp. 301-303.) The Court of Appeal found that the party had “persistently exercised its right to discovery in a frivolous and oppressive fashion with an obvious intent to harass and inconvenience respondents and their trial counsel.” (*Id.* at p. 302.)

In this matter, by contrast, Oakland filed its motion to dismiss *before* the beginning of Ms. Brazy’s announced absence, and in time for her to respond at least initially by June 21, 2014, which she did. The motion to dismiss recognized Ms. Brazy’s notice of unavailability and stated: “The District takes no position on the timing of any opposition to this motion given that unavailability.” In light of that waiver of any objection to a late filing of opposition, Ms. Brazy did not even need to obtain from OAH an extension of time to respond to the motion. But if in an abundance of caution she desired such an extension, she could have sought it in her letter to OAH on June 21, 2014, rather than erroneously announcing that she was entitled to additional time to respond in reliance on her notice of unavailability, and threatening a motion for sanctions.

For those reasons, the record does not reveal any reason to believe that Oakland filed its motion to dismiss for the purpose of harassing Student or his counsel.

Oakland cannot be sanctioned simply for filing a motion that potentially conflicted with Ms. Brazy’s absence. As Judge Gorsline previously noted, a notice of unavailability has no legal effect on a tribunal’s calendar. An attorney obviously lacks the authority to suspend an opposing party’s litigation strategy by unilateral announcement. The imposition of sanctions for disregarding such a notice would in effect enforce it as legally binding even though it had no such status.

Finally, Ms. Brazy does not seek sanctions for the timing of the filing of the motion, but for Oakland’s failure to withdraw the motion when she demanded it. In her moving papers she makes no attempt to show that Student was entitled to have the motion withdrawn, rather than to have its resolution continued until she could respond.

The motion for sanctions is without merit and is DENIED.

DATE: July 22, 2014

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings