BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of : STUDENT, Petitioner, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	OAH CASE NO. N2006100463 **ORDER GRANTING MOTION TO DISMISS AND DENYING MOTION TO SHIFT EXPENSES**

On August 17, 2006, the Office of Administrative Hearings (OAH) received a due process complaint (Complaint) from advocate Victoria Baca, on behalf of Petitioner Student, naming the Los Angeles Unified School District (District) as the respondent. The Complaint identified five issues for hearing. OAH identified the matter as OAH Case No. N2006080556. On August 28, 2006, attorney Dean Adams, on behalf of the District, filed a Notice of Insufficiency (NOI) and a motion to dismiss. On September 1, 2006, OAH Administrative Law Judge (ALJ) John A. Thawley issued an order finding Student's Complaint insufficient in its entirety, and granting Student 14 days to file an amended Complaint. Judge Thawley wrote a full page describing how the Complaint failed to provide sufficient information for each of the issues; for example, regarding Issue 3, the order found that "the Complaint provides no information as which IEP the District did not comply with, how the District failed to comply with that IEP (which services were not provided), and why the Student required those services." The order also dismissed the Complaint's Issue 5 because it raised claims outside of OAH's jurisdiction in due process proceedings.

On September 15, 2006, Ms. Baca filed Student's Amended Complaint (Amended Complaint). The Amended Complaint repeated verbatim the language of the initial Complaint, with the addition of some brief, non-pertinent language to the proposed resolutions in Issues 1 and 2. On September 21, 2006, OAH ALJ Debra R. Huston issued an order finding Student's Amended Complaint insufficient in its entirety, and again granting 14 days to file another amended complaint. The September 21, 2006 order also again dismissed Issue 5 for lack of jurisdiction.

On October 10, 2006, OAH received from Ms. Baca Student's Second Amended Complaint (Second Amended Complaint). The content of the Second Amended Complaint was identical to that of the Amended Complaint, other than the addition of two sentences in Issue 1. Since the September 21, 2006 order required filing of a second amended complaint by October 5, 2006, the Second Amended Complaint was untimely. Accordingly, OAH closed Case No. N2006080556, and treated the Second Amended Complaint as a new request for hearing, identified as OAH Case No. N2006100463.

On October 18, 2006, OAH received the District's Motion To Dismiss And Motion For Sanctions And/Or To Place Expenses At Issue. The District argued that the Second Amended Complaint should be dismissed because it was filed more than 14 days after September 21, 2006, contrary to Judge Huston's order. The District further contended that OAH should order sanctions and/or place expenses at issue because the Student's refiling of identical issues that OAH had previously found insufficient constituted bad faith actions and frivolous tactics.

On November 3, 2006, OAH issued a Notice of Motion, notifying Student that any response to the District's motion for dismissal and sanctions must be received by OAH five business days the date of the Notice, for a due date of November 10, 2006. The Notice was served on Ms. Baca by both U.S. Mail and facsimile transmission. On November 17, 2006, OAH received Ms. Baca's untimely opposition to the District's motions. The opposition will not be considered because it arrived after the deadline.

APPLICABLE LAW

An order or decision issued by OAH constitutes a final administrative determination and is binding on all parties. (See Ed. Code § 56505, subd. (h).) Unless a court of competent jurisdiction orders otherwise, an OAH order remains in full force and effect, and is legally binding upon the parties. (Ed. Code § 56505, subd. (h), (k).)

An ALJ has the authority to shift expenses from one party to another, when a party acts in bad faith.[1] (Gov. Code section 11455.30 [hereinafter, section 11455.30]). Section 11455.30 provides that the 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

[1] This authority shall not be confused with the ALJ's authority to order contempt sanctions pursuant to title 5, section 3088 [hereinafter, section 3088]. Section 3088 treats contempt sanctions differently from sanctions shifting expenses from one party to another. Section 3088(c) requires that, "Prior to initiating contempt sanctions with the court, the presiding hearing officer shall obtain approval from the General Counsel of the California Department of Education [hereinafter, CDE]." Conversely, with regard to expenses, section 3088(b) specifically omits any requirement that an ALJ obtain approval from the CDE. Accordingly, section 3088(b) does not modify or limit the ALJ's authority when presiding over a special education hearing from shifting expenses from one party to another when a party has acted in bad faith.

> 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.

Cases applying California Code of Civil Procedure section 128.5 hold that a trial judge must state specific circumstances giving rise to the award of expenses and articulate with particularity the basis for finding the sanctioned party's conduct reflected tactics or actions were performed in bad faith and that they were frivolous, designed to harass, or designed to cause unnecessary delay. (*Childs v. Painewebber Incorporated* (1994) 29 Cal.App.4th 982, 996; *County of Imperial v. Farmer* (1998) 205 Cal.App.3d 479, 486.). Bad faith is shown when a party engages in actions or tactics that are without merit, frivolous, or solely intended to cause unnecessary delay. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.) However, the bad faith requirement does not impose a determination of evil motive, and subjective bad faith may be inferred. (*Id*., at page 702).

Additionally, California Code of Regulations, title 1, section 1040 provides in part:

> (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.

DISCUSSION

Motion To Dismiss

As noted above, Judge Huston's September 21, 2006 order found Student's Amended Complaint insufficient in its entirety, and dismissed Issue 5 for lack of jurisdiction. This order is legally binding on the parties, and remains in full force and effect. The Second Amended Complaint's addition of the two vague, general sentences to Issue 1 cannot reasonably be interpreted to address the insufficiencies of the Amended Complaint. Hence, Ms. Baca's refiling of the near-identical Issue 1 and the identical Issues 2 through 5 constitutes an attempt to circumvent the NOI process. (See 20 U.S.C. § 1415(b), (c).) Accordingly, the Second Amended Complaint is dismissed in its entirety.

Motion For Sanctions/Expenses

Refiling a complaint after the identical language has been determined insufficient constitutes a frivolous tactic that is completely without merit. The September 1 and September 21, 2006 orders informed Ms. Baca that the issues as stated were insufficient. The Amended Complaint's addition of brief language to Issues 1 and 2 clearly fails to address the insufficiencies identified in Judge Thawley's September 1, 2006 order. Likewise, the Second Amended Complaint's addition of the two vague, general sentences to

Issue 1 cannot reasonably be interpreted to address the insufficiencies identified in Judge Huston's September 21, 2006 order.

Nevertheless, out of an abundance of caution, the ALJ will not order Ms. Baca to pay the District's expenses. While still sorely lacking, the Amended Complaint's added language clumsily attempts to address some of the concerns Judge Thawley raised regarding the initial Complaint's Issues 1 and 2. Similarly, the Second Amended Complaint contains two new sentences which awkwardly attempt to address one of the narrow concerns Judge Huston raised regarding the Amended Complaint. While these meager attempts do not excuse Ms. Baca's conduct, they suggest that she did not entirely ignore the NOI orders.

However, Ms. Baca shall be on notice that her conduct in this matter has been improper, that she has only narrowly avoided an order to pay the District's reasonable expenses, and furthermore that repetition of such conduct will not be tolerated. While there is no evidence in the present record regarding what role the Student's parents played in deciding to refile the identical complaints, it is reasonable to hold Ms. Baca accountable for the pleadings she files. If it was the Student's parents who sought to refile the identical issues following issuance of the first NOI order, Ms. Baca should have informed them that OAH had already determined that the language of those issues was insufficient and required substantive amendment before refiling.[2]

ORDER

1. The District's motion to dismiss this case is granted. This case is dismissed.

2. The District's motion for sanctions and/or expenses is denied at this time.

Dated: November 20, 2006

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SUZANNE B. BROWN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division

[2] Moreover, such conduct simply delays the Student's right to have his claims heard in due process hearing, which could potentially cut off the Student's claims based upon the statute of limitations. Thus, such conduct appears contrary to the interests of the Student and his parents in pursuing their rights under special education law.