

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BANNING UNIFIED SCHOOL DISTRICT
AND RIVERSIDE COUNTY OFFICE OF
EDUCATION.

OAH CASE NO. 2011031346

ORDER DENYING MOTION TO
DISMISS AND DENYING STUDENT'S
MOTION FOR SANCTIONS

On March 25, 2011, attorney Sara Gapasin filed with the Office of Administrative Hearings (OAH) a due process hearing request (complaint) on behalf of Student against the Banning Unified School District (District) and Riverside County Office of Education (RCOE).

On April 29, 2011, attorney Jack B. Clarke, Jr. filed, on behalf of the District and RCOE, a motion to dismiss due to Student's parent's non-participation in a mandatory resolution session. On May 2, 2011, Student filed an opposition to the motion to dismiss and made a request for OAH to impose sanctions against the District and RCOE for engaging in bad faith litigation tactics. On May 3, 2011, the District and RCOE filed a reply brief.

APPLICABLE LAW

Resolution Session

A local educational agency (LEA) is required to convene a meeting with the parents and the relevant members of the Individualized Education Program (IEP) team within 15 days of receiving notice of the Student's complaint. (20 U.S.C. § 1415(f)(1)(B)(i)(I); 34 C.F.R. § 300.510(a)(1) (2006)¹.) The resolution session need not be held if it is waived by both parties in writing or the parties agree to use mediation. (34 C.F.R. § 300.510(a)(3).) If the parents do not participate in the resolution session, and it has not been otherwise waived by the parties, a due process hearing shall not take place until a resolution session is held. (34 C.F.R. § 300.510(b)(3).) If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented, the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the complaint. (34 C.F.R. §300.510(b)(4).)

¹ All subsequent references to the Code of Federal Regulations are to the 2006 version.

Sanctions

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

Motion to Dismiss

The District's and RCOE's motion, supported by sworn declaration of Ann Vessey, RCOE's Director of Special Education, indicates that the District and RCOE notified Parent and Student's counsel in writing of two attempts to schedule a resolution session and that Parent did not attend either meeting. Ms. Vessey also documented in her declaration telephone contacts she had with Parent to schedule the resolution session

Student contends in his opposition that his counsel never received a copy of the District's and RCOE's correspondence regarding the scheduling of the resolution session, even though the complaint requested that the District and RCOE contact Student's counsel when scheduling a resolution session. Student's opposition included a declaration from Sheila Gilbert, a legal assistant in Ms. Gapasin's law office, and Sylvia Parrales, a secretary in Ms. Gapasin's law office, that no letter from the District and RCOE was received regarding the scheduling of the resolution sessions. However, Student did not include a declaration from Parent that she did not receive the District's and RCOE's notices of the resolution sessions.

Student's parent is required to participate in a resolution session before a due process hearing may be commenced, and OAH has discretion to dismiss the matter if the parent refuses to participate in a resolution session and the district provides appropriate documentation supporting its motion to dismiss.

There has been no agreement to waive the resolution or proceed to mediation in lieu of the resolution session in this case. While a dispute exists whether the District and RCOE sent copies of the notices of resolution session to Student's counsel, the District and RCOE established that they made reasonable efforts to obtain Student's parent's participation in a resolution session prior to filing its motion to dismiss, and they documented those reasonable efforts in their motion to dismiss. However, Student has provided OAH with adequate reason for failing to participate in a resolution session within 30 days because of the confusion whether his counsel received notice of the resolution sessions. Therefore, the District's and RCOE's motion to dismiss Student's complaint is denied. The procedural

timelines in this matter shall be extended and a resolution session shall be held within 10 business days from the date of this order.

Sanctions

Student contends that the District and RCOE engaged in bad faith litigation tactics by contacting Parent directly to schedule the resolution session, and sending a copy of the resolution session notice to Student's counsel by regular mail, and not by facsimile transmission. The District and RCOE responded that service of the notice of the resolution session by regular mail was an appropriate method to notify Student's counsel of the resolution session. Further, the District and RCOE contend that the law permits the scheduling of the meeting directly with Parent, whose decision it is then to determine whether to have counsel attend the resolution session. Student did not establish that the District and RCOE engaged in bad faith litigation tactics by contacting Parent directly to schedule the resolution session and serving of the notices of the resolution session by mail is an appropriate method of service, although facsimile transmission may have negated this dispute. Accordingly, Student's motion for sanctions is denied.

ORDER

1. The District and RCOE's motion to dismiss is denied.
2. The parties are ordered to participate in a resolution session within 10 business days of the date of this order. The District and RCOE shall schedule the resolution session with Student's counsel.
3. The timelines for hearing established pursuant to title 20 United States Code section 1415(f)(1)(B) shall recommence on the date of this order.
4. All previously scheduled dates are vacated, and the parties are ordered to attend a telephonic trial setting conference on May 25, 2011, at 2:00 p.m. The parties shall be prepared to select dates for a prehearing conference and due process hearing at that time.
5. Student's motion for sanctions is denied.

Dated: May 5, 2011

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings