

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TEMECULA VALLEY UNIFIED
SCHOOL DISTRICT.

OAH CASE NO. 2011080092

ORDER GRANTING REQUEST FOR
RECONSIDERATION; GRANTING
MOTION TO AMEND; DENYING
MOTION FOR SANCTIONS; AND
DENYING MOTION TO DISMISS AS
MOOT

On August 2, 2011, Student filed a Request for a Due Process Hearing (complaint) against the Temecula Valley Unified School District (District). On August 25, 2011, the District filed a motion to dismiss. On September 2, 2011, the undersigned administrative law judge (ALJ) issued an order that granted the District's motion to dismiss.

On September 12, 2011, the District filed a motion that requested that the Office of Administrative Hearings (OAH) vacate its order dismissing Student's complaint due to its failure to properly serve a copy of the motion on Student. The same day, the District, re-filed its motion to dismiss.

On September 12, 2011, Student filed a request for reconsideration and to re-open Student's case because the District did not serve a copy of its motion to dismiss on Student. Student, concurrently, filed a motion for sanctions based on the District's failure to ensure that it properly served a copy of its motion, and a motion to amend the complaint. On September 13, 2011, the District filed a response that did not oppose Student's motion for reconsideration, opposed the motion for sanctions, and did not submit a response concerning the motion to amend.

APPLICABLE LAW

OAH will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.)

An amended complaint may be filed when either (a) the other party consents in writing and is given the opportunity to resolve the complaint through a resolution session, or (b) the hearing officer grants permission, provided the hearing officer may grant such permission at any time more than five (5) days prior to the due process hearing. (20 U.S.C. § 1415(c)(2)(E)(i).) The filing of an amended complaint restarts the applicable timelines for the due process hearing. (20 U.S.C. § 1415(c)(2)(E)(ii).)

In a special education due process matter, an 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

Reconsideration

Student alleges new facts, circumstances, or law in support of the request for reconsideration as the District admits it never served a copy of its August 25, 2011 motion to dismiss on Student. Therefore, Student's motion for reconsideration is granted, the September 2, 2011 order granting the District's motion to dismiss is vacated, and the case is reopened.

Motion to Amend Complaint

The motion to amend is timely and is granted because the matter is not close to hearing, the District did not oppose the request, and to allow new allegations that the District failed to appropriately assess Student and its individualized education program offer for the 2011-2012 school year does not provide Student with free appropriate public education. The amended complaint shall be deemed filed on the date of this order. All applicable timelines shall be reset as of the date of this order.

Sanctions

Student contends that the District engaged in bad faith litigation tactics by failing to ensure that it had successfully sent by facsimile transmission a copy of its motion to dismiss. While the District should have ensured successful facsimile transmission as its facsimile transmission logs established that the transmission was not successful, Student did not establish that the District engaged in bad faith conduct, frivolous tactics or intended to harass the opposing party. Accordingly, Student's motion for sanctions is denied.

Motion to Dismiss

The District asserts in its motion to dismiss that Student's complaint is barred by the parties' previous settlement agreement. Student's amended complaint includes additional facts that her claims are not barred by the terms of the settlement agreement. Because the amended complaint contains additional facts regarding the District's purported responsibility, its motion to dismiss is moot. Accordingly, the District's motion to dismiss is denied and the District may file a new motion to dismiss based on the allegations in the amended complaint.

ORDER

1. Student's request for reconsideration is granted.
2. The September 2, 2011 order granting the District's motion to dismiss is vacated, and the case is reopened. The complaint is reopened under the same case number.
3. Student's motion to amend is granted. The amended complaint shall be deemed filed on the date of this order. All applicable timelines shall be reset as of the date of this order.
4. Student's motion for sanctions is denied.
5. The District's motion to dismiss is denied a moot.

Dated: September 16, 2011

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings