

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2012030126

ORDER DENYING MOTION TO
DISMISS AND DENYING MOTION
FOR SANCTIONS

On March 5, 2012, attorney Tania Whiteleather filed with the Office of Administrative Hearings (OAH) a due process hearing request (complaint) on behalf of Student against the Long Beach Unified School District (District). On April 2, 2012, attorney Adam J. Newman filed, on behalf of the District, a motion to dismiss due to Student's parents' purported non-participation in a mandatory resolution session. On April 5, 2012, Student filed an opposition and also filed a motion for sanctions. The District has not filed a response to the motion for sanctions.

APPLICABLE LAW

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).) 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).)

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 requests that OAH grant its motion to dismiss because Parents did not ‘participate’ at the resolution session held on March 15, 2012. While Parent’s attended the meeting by phone, the District contends that Parents did not ‘participate’ because they stated in prior e-mails that they could not agree to any offer the District made at this resolution session because their attorney could not attend the meeting. Student contends that the District should not have convened the resolution session because it was not ready to make an offer as to all issues raised in the complaint because of a pending independent evaluation.

The key term in the District’s motion is ‘participation’ because an LEA may request that OAH dismiss a student’s complaint if the LEA has complied with Title 34 Code of Federal Regulations part 300.322, subdivision (d), but has not been able to secure parent participation. The District’s motion asserts that ‘participation’ is actively participating in the resolution session. However, ‘participation’ for the purposes of Title 34 Code of Federal Regulations part 300.510, subdivision (b)(4), means parent’s attendance at the resolution session.

Title 34 Code of Federal Regulations part 300.322, is entitled ‘Parent Participation’ and discusses an LEA’s obligation to ensure parental attendance at IEP team meetings, and the provision of interpreters. Accordingly, Title 34 Code of Federal Regulations part 300.510, subdivision (b)(4), use of ‘participation’ means the LEA’s attempts to get a parent to attend the resolution session, similar to getting a parent to attend the IEP team meeting, and if the parent does not attend the resolution session and the LEA has complied with Title 34 Code of Federal Regulations part 300.322, subdivision (d), the LEA may ask OAH to dismiss student’s complaint. Therefore, Parents in this matter ‘participated’ because they attended the resolution session and thus the District’s motion to dismiss is denied.

Sanctions

Student contends that the District engaged in bad faith litigation tactics by misrepresenting the facts in its motion and that the District was in fact the party that failed to actively participate at the resolution session. However, Student did not establish that the District engaged in bad faith litigation tactics based on the evidence presented because the parties’ conduct was based on trying to interpret a federal regulation with multiple interpretations. Accordingly, Student’s motion for sanctions is denied.

ORDER

1. The District’s motion to dismiss is denied.
2. The matter remains on calendared as scheduled.

3. Student's motion for sanctions is denied.

Dated: April 9, 2012

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings