

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TEHACHAPI UNIFIED SCHOOL  
DISTRICT

OAH CASE NO. 2012040336

ORDER DENYING DISTRICT'S  
MOTION TO PLACE EXPENSES AT  
ISSUE AND FOR SANCTIONS

Student filed a due process hearing request on April 10, 2012 naming Tehachapi Unified School District (District) as respondent. The prehearing conference (PHC) was held in this matter on May 23, 2012 before Administrative Law Judge (ALJ) Adeniyi Ayoade. Nicole Hodge Amey, Attorney at Law, appeared on behalf of Student. Monica D. Batanero, Attorney at Law, appeared on behalf of District. The parties jointly moved to continue the hearing to mutually agreed-upon dates for the convenience of witnesses. ALJ Ayode issued a PHC order on May 24, 2012 continuing the hearing to August 27-31, 2012. The ALJ further ordered the parties to submit written briefs on or before 5:00 p.m. on August 6, 2012 addressing the applicability of the statute of limitations to the issues in Student's complaint. District timely complied with the PHC order. Student's brief was filed on August 8, 2012.

On August 20, 2012, Student moved for a continuance of the hearing on the grounds that counsel for Student had been unable to communicate with Mother for two months and that Parents required time to obtain new counsel. On August 21, 2012 District filed an opposition. The motion was denied on August 24, 2012 for failure to establish good cause to continue the due process hearing.

On August 24, 2012, attorney Nicole Hodge Amey filed a peremptory challenge, seeking to disqualify the undersigned ALJ, Stella Owens-Murrell, from hearing this case. According to the proof of service submitted with the document, it was sent by attorney Nicole Hodge Amey herself at 2:51 p.m. The undersigned ALJ was assigned to this hearing on August 20, 2012, and that information was available on OAH's website. The peremptory challenge was not timely and was denied.

On Sunday August 26, 2012 at 11:19 p.m., less than one day before the hearing, Student facsimile filed a notice of dismissal of Student's case. The notice was not received for posting by OAH until August 27, 2012 at 8:26 a.m.

On August 28, 2012 District moved for findings to place expenses at issue and for an award of sanctions on the grounds that the complaint was filed in bad faith, was unmeritorious, imprudent, and frivolous and filed for the purpose of harassing District. District also asserted that it is entitled to costs and expenses incurred in hearing preparation, scheduling of District personnel, and attorney's fees and costs incurred in preparation for hearing due to Student's last minute dismissal of the complaint. Student filed opposition to the motion on August 30, 2012

District also contended, citing to other due process cases not before the undersigned ALJ<sup>1</sup>, that attorney Nicole Hodge Amey has a history or pattern and practice of filing complaints and dismissing them the day prior to the start of the due process hearing. District further asserted that Ms. Hodge Amey has a practice of willfully disregarding orders issued by OAH, as in the instant case where she failed to timely comply with ALJ Ayoad's May 24, 2012 PHC order to file written briefs on the applicability of the statute of limitations.

As discussed below, District's motion for findings and for sanctions are denied.

#### APPLICABLE LAW

An ALJ is authorized to issue sanctions to shift expenses to a party acting in bad faith, or using tactics that are frivolous or solely intended to cause unnecessary delay to the other party and/or their attorneys. (Gov. Code, § 11455.30.) Sanctions may include reasonable attorneys' fees and expenses. (*Ibid.*) The authority of an ALJ to shift expenses in special education matters is further defined by the California Code of Regulations, title 5, section 3088. Section 3088 states:

- (a) Provisions for contempt sanctions, order to show cause, and expenses contained in Government Code sections 11455.10-11455.30 of the Administrative Procedure Act apply to special education due process hearing procedures except as modified by (b) through (e) of this section.
- (b) Only the presiding hearing officers may initiate contempt sanctions and/or place expenses at issue.
- (c) 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.
- (d) The failure to initiate contempt sanctions and/or impose expenses is not appealable.

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<sup>1</sup> District cited OAH Case No. 2012060648, OAH Case No. 2012080556, and OAH Case Nos. 20122050739/2011040320(consolidated for hearing) as other examples of Attorney Hodge Amey's alleged bad faith and frivolous conduct.

(e) The presiding hearing officer may, with approval from the General Counsel of the California Department of Education, order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel, to the California Special Education Hearing Office for the reasons set forth in Government Code section 11455.30(a). (Emphasis added).

A bad faith action or tactic is frivolous if, viewed objectively, it is "totally and completely without merit" or if it is instituted "for the sole purpose of harassing an opposing party." (See *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635-637.) To be sanctionable, 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

While Ms. Hodge Amey's timing in the dismissal of this case is suspect, District has not established that the literal 11th hour dismissal of the case was done in bad faith or amounted to tactics that were frivolous or solely intended to cause unnecessary delay to the other party and/or their attorneys. Unfortunately, late dismissal of cases going to hearing is one of the hazards of litigation. Moreover, as stated above in order for Ms. Hodge Amey's conduct to be sanctionable, 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. District's request for costs is denied because there is no evidence that the complaint was unmeritorious or was filed for the sole purpose of harassing District. Similarly there is no evidence that the act of dismissing the case less than one day before the start of hearing was done in bad faith to harass District or was done for an improper purpose. Accordingly, District's Motion is denied.

IT IS SO ORDERED

Dated: December 13, 2012

/s/

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STELLA OWENS-MURRELL  
Administrative Law Judge  
Office of Administrative Hearings