

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

GRANDPARENT ON BEHALF OF  
STUDENT,

v.

JOHN SWETT UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2012040673

ORDER FOR ADDITIONAL  
INFORMATION ON MOTION TO  
DISMISS; AND ORDER DENYING  
MOTION FOR SANCTIONS

On April 17, 2012, Grandparent, on behalf of Student, filed a Due Process Hearing Request<sup>1</sup> (complaint) against the John Swett Unified School District (District) with the Office of Administrative Hearings (OAH). On April 27, 2012, the District filed a motion to dismiss, asserting that Grandparent did not have the legal authority to file the complaint against the District. On May 2, 2012, Student filed an opposition to the motion that asserted that Student's Mother had granted the Grandparent authority over Student's educational rights, including the right to file this matter. Student also sought sanctions against the District for filing a frivolous motion because the District had permitted Grandparent to consent to individualized education program (IEP) offers. On May 3, 2012, the District filed a reply as to the motion to dismiss and opposition as to the motion for sanctions.

APPLICABLE LAW

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.

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<sup>1</sup> A request for a due process hearing under Education Code section 56502 is the due process complaint notice required under title 20 United States Code section 1415(b)(7)(A).

(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*

Additional information is required before a ruling may be made on the pleadings as to motion to dismiss. The parties submitted contradictory documentation as to what legal authority, if any, Grandparent presently has to file the complaint in this matter. Accordingly, Student needs to submit from Mother a declaration under penalty of perjury that she has transferred her educational rights to Grandparent and that Grandparent has the legal authority to initiate and prosecute this action.

### *Motion for Sanctions*

Student contends that the District engaged in bad faith litigation tactics by misrepresenting the facts in its motion and that the District knows that Grandparent is authorized to initiate this action because the District has previously permitted Grandparent to participate in the development of and consent to Student's IEPs. However, Student did not establish that the District engaged in bad faith litigation tactics based on the evidence presented because of the conflicting documentation as to the scope of authority Mother had given Grandparent over Student's educational decision making. Accordingly, Student's motion for sanctions is denied.

## ORDER

1. By 5:00 p.m., on May 15, 2012, Student shall submit to OAH and the District a declaration from Mother, under penalty of perjury, that she has transferred her educational rights to Grandparent and that Grandparent has the legal authority to initiate and prosecute this action.
2. Student's motion for sanctions is denied.

Dated: May 8, 2012

/s/

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PETER PAUL CASTILLO  
Administrative Law Judge  
Office of Administrative Hearings