

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

MORELAND SCHOOL DISTRICT.

OAH CASE NO. 2012050296

ORDER DENYING CROSS-MOTIONS  
FOR SANCTIONS AND/OR TO SHIFT  
EXPENSES

PROCEDURAL BACKGROUND

Student filed a request for due process (complaint) on May 4, 2012 (second case), naming the Moreland School District (District). On May 15, 2012, the District filed a notice of representation in this case and a motion for sanctions, requesting the Office of Administrative Hearings (OAH) shift expenses from the District to Student and/or his attorney. Student filed an opposition to the District's motion and a cross-motion for sanctions against the District on May 18, 2012. The District filed a joint reply to Student's opposition and opposition to Student's cross-motion for sanctions on May 22, 2012.

The District's motion is based on the following set of facts. Student filed a previous due process request in OAH No. 2012030194 (first case) on March 3, 2012. OAH scheduled the hearing in the case to start on May 1, 2012. The parties were unable to resolve the issues through settlement. Student requested permission from the District to permit his expert to observe Student at his District placement the week before the hearing. Although state-wide testing was ongoing at the time, the District agreed to permit the observation. Student subpoenaed various District employees for the May 1, 2012 hearing. The District expended significant time and resources preparing for the hearing. On April 30, 2012, the day before the hearing was to start, Student withdrew his case. Student filed the second case only four days later. The instant case is almost identical to the first case, save for an additional proposed resolution. Student served the District with a copy of the second case, but did not serve the District's counsel with a courtesy copy of the complaint.

The District acknowledges that the mere withdrawal by a party of its case immediately prior to the hearing is not, in and of itself, grounds for sanctions. Rather, the District states that Student's post-withdrawal conduct demonstrates the bad faith component necessary for awarding sanctions.

In his cross-motion for sanctions, Student asserts that the District's filing of a motion for sanctions was done in bad faith and to harass Student and his family, and therefore OAH

should sanction the District. For the following reasons, the District's and Student' respective motions for sanctions are denied.

## APPLICABLE LAW

In certain circumstances, an administrative law judge (ALJ) presiding over a special education proceeding is authorized to shift expenses from one party to another, or to OAH. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; see *Wyner ex rel. Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 [“Clearly, [California Code of Regulations] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge.”].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

Expenses may be ordered to be reimbursed either to OAH or to another party. With approval from the General Counsel of the California Department of Education, the ALJ presiding over the hearing may “order a party, the party’s attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel” to OAH (as the successor to the California Special Education Hearing Office) as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.” (Cal. Code. Regs., tit. 5, § 3088, subds. (a) & (e); see Gov. Code, § 11455.30, subd. (a).) An ALJ presiding over a hearing may, without first obtaining approval from the California Department of Education, “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.” (Gov. Code, § 11455.30, subd. (a); Cal. Code. Regs., tit. 5, § 3088, subd. (a).) An order to pay expenses is enforceable in the same manner as a money judgment or by seeking contempt of court order. (Gov. Code, § 11455.30, subd. (b).)

“Actions or tactics” is defined as including, but not limited to, making or opposing motions or filing and serving a complaint. (Gov. Code, §11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(1).) Filing a complaint without serving it on the other party is not within the definition of “actions or tactics.” (*Ibid.*) “Frivolous” means totally and completely without merit or for the sole purpose of harassing an opposing party. (Gov. Code, § 11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(2).) A finding of “bad faith” does not require a determination of evil motive, and subjective bad faith may be inferred. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702 (*West Coast* ).)

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.

California Code of Regulations, title 1, section 1040, 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.

The California Court of Appeal discussed what is required to impose sanctions under California Code of Civil Procedure section 128.5 in the case of *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635. In discussing what constitutes bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay, the court stated the action taken by the party or its attorney must be solely for the purpose of harassing an opposing party. Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit. There must also be a showing of an improper purpose, such as subjective bad faith on the part of the attorney or party to be sanctioned. (*Levy v. Blum, supra*, 92 Cal.App.4th at p. 635; *West Coast, supra*, 2 Cal.App.4th at p.702.)

## DISCUSSION

Like all petitioners filing due process hearing requests, Student is entitled to withdraw his complaint at any time. The District acknowledges that Student's withdrawal in and of itself is not sanctionable conduct. The District argues that refiling the complaint immediately after withdrawal and Student's failure to serve its attorney with a copy of the complaint is evidence of bad faith. However, the District does not provide any evidence or case law support for this argument. If a party may withdraw its complaint, then it may re-file it as well. To prevail, the District must show that Student was deliberately engaging in bad

faith tactics. However, there is nothing in the present record to support a finding that Student's withdrawal was in bad faith. It is the District's burden to demonstrate that Student's purpose was to harass the District. While the District has shown that it has been inconvenienced, it has failed to provide any support for its contention that Student's actions in withdrawing and then refiling his complaint was to harass the District. Likewise, while it would have been more professional of Student to serve District's counsel with a courtesy copy of the new complaint, Student was not required to do so. In any case, the District provided no evidence that it was prejudiced in any way by the delay in receipt of the complaint by its attorneys.

However, although the District has not persuasively demonstrated that Student's actions were for the purpose of harassing the District or for other impermissible bad faith motives in this case, this Order should not be read to imply that a petitioner can engage in constant filing, withdrawing, and re-filing of due process complaints. Those types of actions, without a compelling explanation, might very well give rise to a finding that the serial withdrawal and re-filing of a due process request was in bad faith. This Order merely finds that the circumstances are not present here.

Likewise, Student fails to provide persuasive support for his motion to sanction the District. Although it was the District's burden to demonstrate bad faith on Student's part and the District was unable to do so, Student's actions in withdrawing and then almost immediately refiling his complaint are questionable, particularly given Student's refusal in his pleadings to explain his actions. In his opposition to the District's motion, Student lists possible reasons a party might dismiss and then immediately re-file its complaint. Student then states that he will not state his reasons because to do so would somehow give the District a means to use those facts against him. Given the fact that Student withdrew his complaint on the eve of hearing and re-filed without giving any explanation as to what caused the situation, and due to the stated inconvenience to the District and its witnesses, Student has failed to demonstrate that the District had a bad faith motive in moving for sanctions. Although the District did not prevail on its motion, the circumstances are such that a motion for sanctions was not unreasonable. Additionally, although Student makes several allegations that the District's motion was only to cause further expense to Student and his family, Student provides no support for that contention other than his assertions. He has failed therefore to substantiate his contention that the District's motion was merely for purposes of harassment. Student's motion for sanctions against the District is therefore denied.

ORDER

1. The District's motion for sanctions against Student and/or his attorney is denied.
2. Student's motion for sanctions against the District is denied.

Dated: May 24, 2012

/s/

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DARRELL LEPKOWSKY  
Administrative Law Judge  
Office of Administrative Hearings