

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SACRAMENTO CITY UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015010421

ORDER DENYING MOTION FOR
SANCTIONS

On October 26, 2015, Sacramento City moved for monetary sanctions and fee shifting to be imposed on Student for alleged bad faith conduct in making a false representation to OAH and in maintaining this matter as far as hearing. The procedural history of the action is set forth in a separate Order of this same date dismissing the matter with prejudice, and is incorporated by reference here. No reply has been received from Student.

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.
- (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

The Order to Show Cause issued October 7, 2015, required Father to demonstrate good faith in seeking representation for Student between May 15 and September 29, 2015. Part of Student's return to the Order to Show Cause is a handwritten note, dated June 2015, containing the telephone number of Michelle Ball, a Sacramento attorney. In context, this is reasonably read as a representation by Father that he contacted Ms. Ball in June 2015 seeking representation for Student in this matter. That would, if true, constitute part of a showing of due diligence.

Sacramento City's reply contains a declaration by counsel attaching an email from Ms. Ball stating that her office was contacted by Parents "in January (not July) of 2015, but no consultation ever proceeded." Any contact with Ms. Ball in January rather than June is irrelevant to Father's diligence, because it does not affect the time period that was the subject of the Order to Show Cause. Sacramento City's moving papers also assert that Student has caused it to prepare for hearing three times, and to appear for hearing on October 6, 2015, resulting in substantial unnecessary expenses in time, energy of personnel, and legal fees and expenses. Sacramento City concludes from these facts that Father has acted in bad faith and for the purpose of harassing the District both in making a deliberately false representation and in maintaining the due process action and taking it to hearing, and therefore should be liable for monetary sanctions and a shifting of attorneys' fees.

However, the record is not clear enough to support such an order. It contains no evidence about the circumstances of the preparation of the note recording Ms. Ball's telephone number, or even about the identity of its author. In light of the many difficulties in communication in this matter due to language and other factors, as set forth in the Order Dismissing Amended Complaint With Prejudice, the note may merely reflect misunderstanding or a simple mistake. Nor do Sacramento City's moving papers present persuasive proof that Father's motives in pursuing the matter and bringing it to hearing on October 6, 2015, were limited solely to harassing the district, or that the action is wholly without merit or frivolous.

Without further evidence, Sacramento City has not established that Father's implied assertion in the note concerning Ms. Ball that he contacted her in June 2015 is a deliberate falsehood, that his bringing or maintenance of the action has been in bad faith, or that the action is frivolous. Accordingly, the motion for sanctions and fee shifting is denied.

DATE: November 18, 2015

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings