BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: STUDENT, v. NEWPORT-MESA UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013060620 ORDER DENYING MOTION FOR FINDING OF BAD FAITH TACTICS AND UNDUE DELAY OF PROCEEDINGS AND DENYING CROSS MOTION FOR SANCTIONS

On June 21, 2013, the Newport-Mesa Unified School District (District) filed a motion with the Office of Administrative Hearings (OAH) "for finding of bad faith tactics and undue delay of proceedings by Petitioner's counsel." On June 26, 2013, Student filed an opposition to the motion titled "Petitioner's opposition to frivolous motion by Daniel S. Harbottle and request for sanctions." On June 27, 2013, the District filed a response to Student's opposition.

APPLICABLE LAW

An administrative law judge (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, citing Code Civ. Proc., § 128.5.) Sanctions may include reasonable attorneys' fees and expenses. (*Ibid*.) The authority of an ALJ to shift expenses in special education matters is further supported by the California Code of Regulations, title 5, section 3088.

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." "Actions or tactics" is defined as including, but not limited to, making or opposing motions, filing and serving a complaint, or failing to comply with a lawful order of the ALJ. (Gov. Code, §11455.30, subd. (a); Code Civ.Proc., § 128.5, subd. (b)(1); tit. 1, Cal.Code Regs. §1040.) 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.) However, a finding of "bad faith" does not require a determination of evil motive, and subjective bad faith may be inferred. (*Ibid*.)

DISCUSSION

Background Facts

Student filed her initial due process complaint (complaint) on July 18, 2012, and was permitted to file an amended complaint (first amended complaint) on July 19, 2012. At all times relevant to this motion, Student has been represented by attorney Tania Whiteleather. The matter was initially scheduled for hearing beginning September 13, 2012. The parties jointly requested a continuance and OAH continued the hearing to December 17-20, 2012. On November 30, 2012, Student filed a motion to amend and a second amended complaint (second amended complaint). The motion was granted and all statutory timelines started over. The hearing was scheduled for January 30, 2013. On January 18, 2013, OAH reset the matter on its own motion to begin on February 6, 2013, because the ALJs were scheduled to be in training at the time of the hearing. On January 18, 2013, the parties filed a joint request for a continuance, and OAH granted the motion and ordered the hearing to begin on June 11, 2013.

The parties participated in a mandatory prehearing conference (PHC) on June 3, 2013. In the PHC order, the ALJ noted that "Student is considering whether to file a motion to continue the hearing due to the unavailability of Student's expert witness, Dr. Nancy Markel." The District contends that during the PHC, Student did not explain why Dr. Markel could not provide telephonic testimony and or explain why Student did not subpoena Dr. Markel to secure her availability when OAH continued the hearing in January 2013. Counsel for the parties participated in a series of written exchanges beginning on June 4, 2013, initiated when counsel for Student stated that Student was not prepared to go forward on June 11, 2013, and inquired about availability for alternate hearing dates. The parties could not agree on new proposed dates for hearing.

On June 4, 2013, the parties were required by law to exchange documentary evidence in preparation of the hearing on June 11, 2013. The District prepared and served its evidence, but Student did not. At no time did Student file a motion for continuance with OAH. The District wrote to Student on June 7, 2013, asking about witness order and scheduling. The District received no response from Student. On June 10, 2013, the day before the hearing was scheduled to start, Student withdrew her request for hearing. On June 11, 2013, Student re-filed virtually the same complaint as Student's previous second amended complaint with OAH as a new case.

District's motion for finding of bad faith tactics and undue delay of proceedings

The District asks that OAH determine that Student's last-minute withdrawal of the case and immediate refilling of the case by Student's counsel was a bad faith tactic and also that it was intended to cause unnecessary delay. Under the above authorities, the District's motion is denied.

The District acknowledges that a dismissal of pending litigation does not in itself establish bad faith. (Code Civ. Proc. §581(c)). However, the District contends that, given the fact that Student knew as early as June 4, 2013, that she was not prepared to go to hearing on June 11, 2013, and given her failure to move for a continuance or withdraw the case until the last day possible, the actions of Student's counsel do constitute bad faith tactics as the District continued to prepare for hearing because Student failed to timely withdraw the case when it became clear that the case would not go forward. The District is not seeking sanctions, but a "clear admonition" that the actions of Student's counsel were in bad faith.

There is no authority for OAH to determine, just for the sake of making the determination and not in the context of a request for sanctions, that a party's actions were in bad faith or were intended to cause unnecessary delay. Here, the District's failure to request sanctions defeats its motion. Therefore, the District's motion must be denied. However, the motion is denied without prejudice as the conduct of Student's counsel raises concerns.

Student's motion for sanctions against District's counsel

Student asks that sanctions be ordered against District's counsel for bringing what she terms the "frivolous" motion to determine bad faith tactics and unnecessary delay. This motion is denied as well.

While the District did not prevail on this motion, there is no evidence that the District's motion was frivolous or in bad faith. Further, the District correctly pointed out that there were numerous opportunities for Student's counsel to withdraw her case which would have lessened the burden of hearing preparation on the District. The District's frustration with the actions of Student's counsel are noted and reasonable. Student's counsel should note that had she withdrawn the case when she knew that she would not go forward to hearing, rather than delaying until the last day possible, it is likely these cross motions would not have been filed. Therefore, sanctions are not appropriate in this circumstance.

ORDER

The District's motion is denied without prejudice. The Students motion is denied with prejudice.

IT IS SO ORDERED.

Dated: July 2, 2013

/s/
MARGARET BROUSSARD
Administrative Law Judge
Office of Administrative Hearings