BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH CASE NO. 2012110589
v.	ORDER DENYING DISTRICT'S MOTION FOR MONETARY SANCTIONS
POWAY UNIFIED SCHOOL DISTRICT.	

At all times relevant herein, Mother appeared on behalf of Student, and Justin R. Shinnefield, Attorney at Law, appeared on behalf of the Poway Unified School District (District). The prehearing conference in this matter took place on January 23, 2013. The parties prepared and timely exchanged witness lists and exhibit binders. On February 4, 2013, the due process hearing in this matter commenced before Administrative Law Judge (ALJ) Clifford H. Woosley, in Poway, California. After agreeing upon the schedule of witnesses and hearing pretrial motions, one witness testified on direct and cross examination. At the conclusion of the first day of hearing, the District's counsel took ill. ALJ Woosley stated the hearing would go dark on February 5, 2013, permitting District's counsel to consult with his physician. Pursuant to a status conference with both parties on February 5, 2013, the hearing was continued to February 11, 2013.

On February 11, 2013, the hearing reconvened for the second day of hearing. Four witnesses testified and the matter was continued to the next morning. On February 12, 2013, the third day of hearing convened. Mother indicated that she was ill and awaiting a call from her doctor. ALJ Woosley recessed, providing Mother time to consult with her physician; thereafter, Mother stated that she could not continue with the hearing and required a few days to stabilize her health. ALJ Woosley continued the hearing to March 11 through 14, 2013; both parties later confirmed these dates as agreeable with their calendars. On February 27, 2013, OAH contacted both parties, who stated they intended to proceed with the continued hearing on March 11, 2013.

While driving to Poway to convene the fourth day of hearing on Monday, March 11, 2013, ALJ Woosley received a call for OAH in Sacramento stating that Mother had contacted staff earlier in the morning and stated she would not be attending the hearing and that she intended on dismissing the due process hearing request. ALJ Woosley stated that he would continue to Poway and convene the fourth day of hearing, unless a signed, written request to withdraw the due process was first received by OAH. At ALJ Woosley's direction, OAH staff informed the parties. At 9:15 a.m., OAH staff called ALJ Woosley and informed him that OAH received a signed, written request for dismissal from Mother. The request for dismissal stated that Student had no intention of pursuing the matter at a later date and recognized that the dismissal would likely be dismissed with prejudice. ALJ Woosley

directed OAH to inform the parties that the hearing would not be convened, the matter would be dismissed per the Student's request, and that District had 10 days to file any written request for sanctions as provided by the Administrative Procedures Act or any State or federal special education law or regulation.

By order dated March 12, 2013, ALJ Woosley granted Student's request to dismiss, directing that the dismissal be entered with prejudice, barring Student from filing any due process hearing request upon the same issues.

On March 15, 2013, District filed a Motion for Sanctions, seeking an order directing Student's representative, Mother, to pay the attorney's fees accrued the last few days before the scheduled reconvened hearing, pursuant to Government Code, section 114545.30. District argues that Mother's actions were in bad faith because she had consistently indicated her intent to proceed with the hearing, up to the end of business on Friday, March 8, 2013, and that Mother had made no attempt to contact District or its counsel before Mr. Shinnefield had travelled to the District offices, on Monday, March 11 2013, where he further prepared for the hearing's recommencement. District therefore seeks sanctions for the 8.5 hours of legal work accrued on March 10 and 11, 2013, in the total sum of $1,773.75.

On March 18, 2013, Mother filed an opposition, indicating that she and her husband (who travelled from his work on the east coast the previous week) vigorously prepared over the weekend, assembling documentation and outlining witness examinations for the recommencement of the hearing on Monday, March 11, 2013. However, she also described the weekend's increasing cascade of family health issues involving her and both of their children, which culminated with a telephone call at 6:45 a.m., Monday, March 11, 2013, informing them of a health emergency regarding their daughter. Father was going to have to fly to be with their daughter, who is in school on the east coast. Mother and her husband determined that dismissal of the matter would be best for Student and the family, generally.

As confirmed by OAH records, Mother called OAH at about 7:15 a.m., March 11, 2013, and left a message that she would not be appearing at the hearing. She called again at 8:05 a.m., when the OAH offices were opened and talked to the staff person assigned to this matter. Mother said that she was not appearing for the hearing and would be dismissing the due process. After talking to Judge Woosley, OAH staff contacted Mother and informed her that the hearing would convene as scheduled, unless she first filed an appropriate, executed request for dismissal. Mother did so, faxing the dismissal request to both OAH and Mr. Shinnefeld's offices at 8:35 a.m. Mother states in her opposition that she received a confirmation of receipt at the attorney's offices, but did not from OAH. She refaxed the dismissal to OAH, which was received at 9:05 a.m. The request for dismissal acknowledged that the dismissal would likely be with prejudice.

APPLICABLE LAW

In a special education due process matter, the Government Code and the California Code of Regulations authorize an Administrative Law Judge (ALJ) to issue sanctions that

shift expenses caused by a party acting in bad faith, or using tactics that are frivolous or solely intended to cause unnecessary delay.[1] 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. [2]
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> (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.[3]

This 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.
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> (2) 'Frivolous' means
>
> (A) totally and completely without merit or
>
> (B) for the sole purpose of harassing an opposing party.

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[1] In special education due process procedures, California Code of Regulations, title 5, section 3088 requires that the California Department of Education (DOE) first approve an ALJ's consideration of sanctions for contempt or for payment of expenses to the California Department of Special Education. However, the ALJ's authority to shift expenses per Government Code section 11455.30 is unabated.

[2] This section refers to "presiding hearing officers." The ALJ presiding over the hearing is the presiding officer. Government Code section 11405.80 makes clear that an ALJ who presides in an adjudicative proceeding is the "presiding officer," a point confirmed in *Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F. 3d 1026, 1029.

[3] California Code of Regulations, title 5, section 3088, modifies this subsection for special education proceedings, stating that the failure to impose a sanction for expenses is not appealable.

(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.[4]

This regulation incorporates the generally accepted grounds for sanctions under Code of Civil Procedure section 128.5. (See *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635-637.) California cases applying section 128.5 hold that a trial judge must state specific circumstances giving rise to the award of expenses and articulate with particularity the basis for finding that the sanctioned party's conduct reflected tactics or actions that were performed in bad faith, were frivolous, designed to harass, or designed to cause unnecessary delay. (*Childs v. Painewebber Inc.* (1994) 29 Cal.App.4th 982, 996; *County of Imperial v. Farmer* (1998) 205 Cal.App.3d 479, 486.) The purpose of the statute is not only to compensate, but it is also a means of controlling burdensome and unnecessary legal tactics. (*On the Cow Hollow Properties* (1990) 222 Cal.App.3d 1577.) There must also be a showing of an improper purpose. An improper purpose may be inferred from the circumstances. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

DISCUSSION

District identifies the improper conduct as Mother's continued representation up to the close of business on Friday March 8, 2013, that Student intended on prosecuting the due process, only to withdraw the action a few hours before the hearing was scheduled reconvene the following Monday at 11:00 a.m. District further claims that Mother knew she would not be prosecuting the matter before March 11, 2013, and was therefore obligated to inform District's counsel, even if it required Mother to contact Mr. Shinnefield over the weekend or by private phone. District argues that these actions exhibited bad faith, were frivolous, or were solely intended to harass or cause unnecessary delay.

However, Mother has convincingly demonstrated that she, with her husband, had intended to attend and pursue the due process hearing until the early morning hours of March 11, 2013. At that time, Mother and her husband concluded that unforeseen family circumstances had accumulated to the extent that it would be best for Student and the family to dismiss the proceeding, affirmatively waiving any intent to further pursue the due process issues. Evidence affirms that Mother used the OAH "settlement line" to leave a message before business hours and, thereafter, telephoned and spoke to staff a few minutes after the OAH office's opening. Within an hour, she filed and served a duly executed and appropriate request for dismissal. Though the timing was inconvenient to District, its counsel, and OAH, the circumstances do not support a finding that Mother's actions were totally and completely

[4] District did not include a declaration setting forth the expenses caused by the alleged bad faith conduct. However, this oversight is not the basis for the ruling herein.

without merit, were for the sole purpose of harassing District or Mr. Shinnefield, nor had an improper motive.

If Mother prosecuted the due process, District would have prepared for and participated in at least four more days of hearing, coordinating the production of numerous District employees for testimony. District would have had to present its defense, as well as prepare a closing brief, before the matter was submitted for decision, the outcome of which is always uncertain. OAH has dismissed this matter with prejudice, assuring that the issues could not be again raised. Thus, the District avoided further expense, with an outcome equivalent to the District prevailing on the merits in a decision issued following a full hearing.

ORDER

District's motion for sanctions is denied.

Dated: March 26, 2013

/s/

CLIFFORD H. WOOSLEY
Administrative Law Judge
Office of Administrative Hearings