BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. VICTOR VALLEY UNION HIGH SCHOOL DISTRICT,	OAH CASE NO. 2012090744
PARENT ON BEHALF OF STUDENT, v. VICTOR VALLEY UNION HIGH SCHOOL DISTRICT	OAH CASE NO. 2012070653 ORDER DENYING MOTION TO FOR ATTORNEYS FEES

On April 30, 2013, District filed a Motion for a portion of Attorney's Fees and Costs, following OAH's April 8, 2013 Order Granting Student's Request for Dismissal With Prejudice.

On May 2, 2013, Student's parent filed her Opposition.

Procedural History

By way of background, on December 1, 2009, Student's parent filed OAH case number 2009120327. On March 16, 2010, the parties entered a settlement agreement which resolved all claims up to the date of execution.

On July 21, 2011, shortly after than settlement agreement expired, Student's parent filed OAH case 2011080031, which was consolidated with 2011080382. Those cases alleged 29 issues against the District. A lengthy hearing was held. On March 12, 2012, and March 26, 2012, ALJ Lehrman issued a Decision and Order and Corrected Decision. The Factual Findings, Legal Conclusions, Remedies, and Order covered the time period of April 6, 2010, through the end of the 2012 extended school year. That 100 page Decision was deemed to establish FAPE for the 2011-2012 regular school year and 2012 ESY. That Order was also deemed to set forth the stay-put placement in the event of a dispute between the parties, as follows:

ORDER

1. Student's placement for the 2011-2012 school year shall be his home high school unless the parties agree otherwise.

2. Student shall be mainstreamed at least 44% of his day.

3. For two periods daily for a core subject and an elective, District shall place Student in a collaboration model general education setting, with a general education teacher and a special education teacher providing push-in RSP support.

4. Student shall receive general education PE;

5. District shall place Student into a SDC for the balance of the school day for core subjects based upon state standards.

6. Except with regard to OT, the related services that were offered in the June 2, 2011, IEP shall be implemented, as follows: speech and language once a week for 30 minutes; counseling three times per month for 30 minutes; full-time 1:1 NPA aide services plus ten hours a month supervision, both from CIBA; ESY with these related services, and transportation.

7. The following modifications and accommodations shall be implemented: alpha smart software, a portable keyboard; a digilock for PE, extra time for assignments, tests and quizzes; use of graphic organizers; preferential seating; and prompting as necessary and consistent with goals.

8. The goals stated in the June 2, 2011, IEP were appropriate and shall be implemented. For those goals stating "Excel," District may replace "Excel" staff with general education teachers, RSP teachers and Student's NPA aide.

9. OT shall be provided by an NPA 45 minutes per week and shall address Goals numbered 1-2, 5 and 16-17.

10. Within 45 days of the date of this decision, District shall conduct a new FAA to target the behaviors of: physical aggression (including assaults, knocking over tables, throwing books; fighting); threats; insults (including teasing or name-calling); tantrums, disobedience (including refusal, defiance, or noncompliance); running away/bolting; blurting out in class; repetitive talk; trading (including giving away contraband, selling or stealing); lying; and inappropriate sexual conduct (including cursing, obscenities, profanity in oral or written form, and vulgarity or harassment toward females) which shall be completed and an IEP meeting convened within legally required timelines. At that IEP, the team will develop a BIP. Pending a new FAA and BIP, the UHS BSP shall be implemented.

11. If Mother does not consent to the FAA, the relief granted in this Decision shall be null and void.

12. For purposes of stay put, the above orders shall constitute Student's current educational placement.

Neither party appealed this Decision. After this Order was issued Student's parent re-enrolled Student in the District for three days, and Student attended school on April 10, 11 and 12, 2012. Immediately thereafter, Student's parent then disenrolled Student, alleging District was not in compliance with the Order because Student's behavior agency did not fill out her personal notebook of his daily behavior and place it in his backpack at the end of the

day. Student's parent instead enrolled Student in a private religious on-line independent study program.

The Consolidated Due Process Requests at Issue

On July 20, 2012 and September 24, 2012, Student filed the above captioned cases, which were consolidated by OAH on October 4, 2012. Between the two cases, Student raised 109 issues.

Simultaneously, Student's parent filed compliance complaints with the California Department of Education (CDE) and the Office of Civil Rights (OCR). Both CDE and OCR found District to be in compliance. However, Student's parent did not re-enroll Student in the District's program.

Student's parent's multiple motions, subpoenas, and motions to compel and motions for sanctions:

Student's parent filed the following motions in 2012

1. On August 10, 2012, Student's parent filed an opposition to District's motion to dismiss.
2. On August 21, Student's parent filed an objection to District's renewed motion to dismiss.
3. On August 22, Student's parent filed an amended objection.
4. On September 9, Student's parent filed an objection to District's notice of insufficiency.
5. On September 20, Student's parent filed a request for subpoenas.
6. On October 9, Student's parent filed an objection to OAH's consolidation.
7. On October 25, Student's parent filed a motion for contempt of court.
8. On October 31, Student's parent filed an objection to district's response.
9. On November 29, Student's parent subpoenaed ALJ Carla Garrett to the hearing.
10. On December 17, Student's parent filed objections to OAH's motion to quash.
11. In December, Student's parent subpoenaed a San Bernardino County Deputy District Attorney, which subpoena was subsequently quashed.

Student's parent filed the following motions in 2013

12. On January 16, 2013, Student's parent filed an opposition to the request for continuance made by District's new counsel of record.

13-20. In January and February, Student's parent served multiple subpoenas and subpoena duces tecum, multiple motions to compel, and motions for sanction against charter schools and employees of charter schools which student never enrolled in, and opposed multiple motions to quash by those schools.

21. On February 28, Student's parent filed an objection to a motion for official notice.

22. On March 13, Student's parent filed an objection to District's request to exclude evidence.

23. On March 19, Student's parent filed a motion to exclude District's supplemental evidence.

The March 6, 2013 PHC

On March 6, 2013, ALJ Deborah Myers-Cregar held the Pre Hearing Conference (PHC). In the PHC Order, the ALJ organized and consolidated 109 issues by timelines into issues (A) 1 through 28; (B) 1 through 5; (C)1 through 4; (D) 1 through 6;(E) 1 through 8; F 1; (G) 1 through 3; (H) 1; (I)1; (J) 1; (K) 1 through 4; and (L) 1. Of those issues, many were dismissed by the Student's parent at the PHC, by ALJ Myers-Cregar at the PHC due to their internal repetition, and by ALJ Castillo by his prior order. Other issues were dismissed by the ALJ because Judge Lehman's Decision covered the same issues and remedies as plead by Student's parent. Those issues were dismissed with prejudice, as set forth in the PHC Order. Official Notice is taken of that order, set forth below in italics:

A. PRIOR TO ALJ LEHRMAN'S MARCH 2012 DECISIONS AND ORDERS

A. Did District deny Student a FAPE prior to ALJ Lehrman's Order of March 2012, by:

1) Failing to hold an IEP meeting on October 2010 to discuss Student's need for tutoring? (Issue 1) This issue was dismissed by the ALJ, as it was covered by Judge Lehrman's Order.

2) Failing to use response to intervention? (Issue 2). This issue is dismissed by the ALJ because IDEA does not require the use of response to intervention.

3) Failing to provide Student with weekly Lakeview Middle School progress reports as agreed, including speech, occupational therapy, counseling, from August 2011 through March 2012? (Issues 3, 97, 99) Student's parent moved to dismiss this issue.

4) Failing to offer educational academic assessment and academic therapy between May 2010 through July 2011, and September 2010 through June 20, 2012? (Issues 6, 7, 80) These issues were dismissed by the ALJ, as it was covered by ALJ Lehrman's Order and ALJ Castillo's Order.

5) Failing to discuss student's progress towards his IEP goals, failing to include all areas of need in the IEP progress reports, from October 2010, and August 2011? (Issues 76, 77, 78) This issue is dismissed because it is covered by ALJ Lehrman's Order.

6) Failing to provide IEP progress notes from September 2011 through June 20, 2012? (Issue 79) This issue is dismissed because it is covered by ALJ Lehrman's Order, and by other issues already covered.

7) Failing to conduct a Career Assessment? (Issue 5) Student's parent moved to withdraw this request.

8) Failing to implement an agreement for 25 hours of SES in the April 18, 2011 IEP? (Issues 91, 103)

9) Failing to complete Student's 98 hours of tutoring which was owed pursuant to the April 18, 2011 IEP. (Issue 7) Issue 7, failing to complete student's 98 hours of tutoring, was dismissed by ALJ Castillo.

10) Failing to provide a full-time NPA aide, providing a District Aide between August 22, 2011 and March 26, 2012 who was not appropriately trained; by lying, misrepresenting, failing to implement, and verify, that Student had a one-to-one NPA aide and supervision hours on August 4, 2011, August 26, 2011, and December 2011, pursuant to the April 28, 2011 manifestation IEP, through the date of ALJ Lehrman's Order? (Issues 12, 13, 14, 1517, 17, 19, 20, 90, 92, 93)

11) Causing Student to be retained from advancing to Ninth grade? (Issues 52, 94)

12) Refusing to provide independent educational evaluations (IEE's) for psychological assessments from October of 2010 to September of 2012? (Issue 63)

13) Failing to follow the school psychologist recommendations of the May 21, 2010 assessment? This issue is dismissed by the ALJ because that was covered by Judge Lehrman's Decision. (Issues 64, 65)

14) Failing to implement an agreement to provide Student with services and accommodations, including an aide during the after school mentor program between October 2010 through September 2012, pursuant to unidentified IEPs? (Issues 66, 67, 68, 70, 71). Student's parent moved to dismiss everything before Student's Eighth grade year, 2010 through 2011.

15) Causing the NPA to not provide progress reports from October 2010 through July of 2011, and therefore Student didn't benefit from NPA? (Issues 8, 69) Student's parent moved to dismiss this issue at the PHC.

16) Failing to give Student a physical education assessment, have an aide during PE and to observe the locker room, October 2010 through August 2011? (Issues 72, 73, 74) Student's parent moved to dismiss this issue.

17) Failing to provide Student with an aide on the bus December 2010 through August 2011 during Eighth grade? (Issue 75) Student's parent moved to dismiss this issue.

18) Failing to use the UHS behavior plan between June 13, 2011 through July 2011? (Issues 9, 10) Student's parent moved to dismiss this issue.

19) Failing to use state standard curriculum during 2011 ESY? (Issue 11)

20) Failing to give Student homework and schoolwork assignments between January 2012 and March 2012? (Issue 21)

21) Failing to hold an IEP to offer tutoring and independent study from August 2011 through June 2012 when student received all failing grades? (Issue 86) Student's parent moved to dismiss this issue.

22) Failing to implement and provide student with services, an aide, aide supervision, and accommodations outlined in April 18, 2011 IEP from August 2011 through March 25, 2012, when Student was unilaterally placed? (Issues 87, 90, 91, 92, 93) Student's parent moved to dismiss this issue.

23) Failing to provide student with speech, occupational therapy, and counseling progress reports for discussion in Ninth grade, from August 20, 2011 through March 2012? (Issues 33, 97, 99) Student's parent moved to dismiss this issue.

24) Failing to recommend that Student's parent receive behavior training? (Issue 105) Student's parent moved to dismiss this issue.

25) Failing to assess Student, between September 10, 2010 through June 20, 2012, in all areas of suspected disability, including assistive technology, academics, motor, social and cognitive, career, educational therapy, therapeutic therapy, physical education, and a Functional Analysis Assessment? (Issues 60, 80, 81, 82) Student's parent moved to dismiss this issue with the exception of her May 2012 request for a recreation therapy assessment, which is incorporated below under the assessment section.

26) Failing to conduct an educational therapy assessment between August 2011 through March 2012, after student received all fails in ninth grade from August 2011, through March 12, 2012, and between April 2012 through June 2012? (Issues 83, 84) Student's parent moved to dismiss this issue.

27) Failing to restore, remediate, and rehabilitate Student's level of functioning, and to restore motor, social and cognitive function, develop coping skills, and integrate skills into community settings between October 2010 and August 2011?

(Issues 81, 82) This issue is dismissed because it is not a claim that Student was denied a FAPE.

28) Failing to provide accommodations at the Spring, 2011 California Modified Assessment (CMA)? See the Accommodations section below.

B. ALJ Lehrman's March 12 and March 26, 2012 Order and Student's three days of attendance April 10, 11, and 12, 2012

B. Did District deny Student a FAPE by not implementing ALJ Lehrman's March 12, and March 26, 2012, Order when Student was enrolled at Victor Valley High School on April 10, 11, and 12, 2012, by:

1) Not using ninth grade curriculum? (Issue 31)

2) Not providing accommodations in the form of preferential seating, a digilock for PE, and Alphasmart, a clean Cadet Core uniform, receiving homework, a course syllabus, coursework, receiving daily communication logs from the teacher and daily behavior logs from the aide? (Issues 8, 31, 33, 34, 35, 95, 96)

3) Not providing two periods of general education daily for core subjects and an elective, not placing Student in RSP and an SDC for the balance of the day for core subjects? (Issue 32)

4) Not providing related services of a full time NPA aide, speech, OT, and counseling? (Issue 32),

5) Not following the UHS behavior implementation plan? (Issue 32)

C. APRIL 2012 through July, 2012 unilateral placement

C. Did District deny Student a FAPE between April 2012 and July 2012, during his unilateral private placement by:

1) Failing to provide individualized instruction and related services, including an NPA aide, speech, OT, and counseling at the private school, between March 26, 2012 and July 21, 2012, when he was not enrolled in the District? (Issues 32, 46, 56, 88, 106)

2) Failing to conduct the FAA which Student's parent consented to in April 2012, when Student's parent enrolled Student in a private placement after April 13, 2012? And whether Student is entitled to an IEE at public expense? (Issues 27, 28, 29, 30,)

3) Disenrolling Student and threatening Student's parent that Student could not be dually enrolled in the District and in the unilateral private placement? (Issues 61, 88)

4) Failing to offer ESY for 2012, and failing to offer his NPA aide and supervision for ESY? (Issues 89, 100, 101)

D. MAY 4, 2012 IEP

D. Did District deny Student a FAPE at the parent-requested May 4, 2012 IEP by:

1) Predetermining the IEP when it offered Student placement and related services consistent with Judge Lehrman's Order? (Issue 35)

2) Denying meaningful parental participation, by not considering concerns that CIBA/Leafwing was not an appropriate provider because they and the district did not want to provide parent with daily log books? (Issue 35)

3) Failing to offer and provide special education services, a one-to-one NPA aide, accommodations, modifications, related services, at a different placement, such as the unilateral private placement and independent study? (Issues 35, 107, 108, 109)

4) Offering Student placement at his home school, consistent with Judge Lehrman's Order, but which was inappropriate due to violence, fighting and riots? (Issue 35)

5) Failing to consider parent's concern that Student's educational needs had changed, and that it should discuss and offer the more restrictive setting of independent study, private Christian school, and on line courses? (Issues 35, 107, 108, 109)

6) Failing to discuss what services and accommodations Student received on April 10, 11 and 12, 2012? (Issues 36 and 104)

E. May 24, 2012 Annual IEP

E. Did District deny Student a FAPE at the May 24, 2012 IEP team meeting by offering Student placement at Victor High School, Fourth grade curriculum, and related services consistent with Judge Lehrman's Order, instead of a different placement, by:

1) Failing to consider that Student's educational needs had changed and that he required independent study, use of a laptop, and ninth grade curriculum? (Issues 36, 37, 38, 39, 41, 42, 47, 51, 107, 108, 109)

2) Failing to consider parent's concerns and Student's progress at his private school and on line courses? (Issues 36, 37, 38, 39, 41, 47, 48, 55)

3) Failing to consider more restrictive placements, such as private school, charter schools, independent study, and on line high schools, before it offered Student placement at Victor Valley High School with fourth grade curriculum? (Issues 38, 41, 42, 43, 47, 55)

4) Failing to use current educational data, including new assessments and 'educational therapy assessments,' when it developed goals and present levels of performance determining Student was at the Fourth grade level, non-diploma track, and then retained him in the eighth grade instead of considering his credit recovery efforts? (Issues 36, 40, 41, 44, 47, 48, 52, 53, 83)

5) Failing to offer the RSP teacher, special education teacher and school psychologist to work in collaboration with Sunland, the on-line tutors, and general education teachers; with advancement to ninth grade with ninth grade curriculum for English language arts, science, math; accommodations, a full time NPA aide, 10 hours of NPA supervision, close notes, alpha smart software and keyboard, a digilock, and related services; and a daily parent communication log? (Issues 35, 38, 43, 41, 42, 43, 46, 47, 49, 50, 51, 52, 56, 57, 58)

6) Failing to discuss what services and accommodations Student received on April 10, 11 and 12, 2012? (Issues 36 and 104)

7) Failing to discuss career planning and training when Student was 14 years old? (Issues 38, 45) Student's parent moved to dismiss the career assessment issues.

8) Failing to change Student's NPA aide upon parent request? (Issues 54)

F. ACCOMODATIONS FOR CALIFORNIA MODIFIED ASSESSMENT (CMA)

F. Did District deny Student a FAPE during Spring 2011 and 2012 by:

1) Failing to provide Student with testing accommodations, including extra time and having the test read to him during CMA State testing. (Issues 62, 98)

G. SUMMER 2012 ESY

G. Did District deny Student a FAPE for Summer 2012 ESY by:

1) Failing to use State standards and offering an inappropriate placement and program consisting of a functional skills program at the Goodwill without an aide, instead of offering independent study and on line courses? (Issues 11, 38, 59, 89, 100, 101)

2) Failing to offer Student placement and related services for 2012 ESY at Student's home school? (Issues 89, 100, 101)

3) Failing to provide Student with ESY services when he was not enrolled in the District? (Issue 89)

H. FALL 2012

H. Did District deny Student a FAPE during Fall 2012 by:

1) Telling Student's parent that the only way Student could attend a district school in the fall of 2012 was by enrolling back into the District, after parent had unilaterally withdrawn Student and enrolled him in a private Christian school? (Issue 61, 88, 106)

I. SEPTEMBER 16, 2012 IEP

I. Did District deny Student a FAPE in September 2012 by:

1) Conducting an impartial AT assessment, when Student's parent requested an IEE (Issue 102)

J. OCTOBER 28, 2012

J. Did District deny Student a FAPE on October 28, 2012, by:

1) Failing to provide an aide at his private Christian school? (Issues 16, 17) Student's parent moved to dismiss this issue.

K. ASSESSMENTS

K. Did District deny Student a FAPE by failing to timely conduct and complete a:

1) Career Assessment? Student's parent moved to dismiss this issue. (Issue 60)

2) Assistive Technology Assessment? (Issues 60, 102)

3) Functional Analysis Assessment? (Issues 27, 28, 29, 60)

4) Recreation Therapy Assessment? (Issues 71, 72, 73, 74, 81, 82)

L. STUDENT RECORDS

L. Did District deny Student a FAPE from February through June 2012 by:

1) Denying him a free copy of his Student records? (Issues 22, 23, 24, 25, 26).

The Subject Due Process Hearing

On March 18, 19, 20, and 21, 2013, the Due Process Hearing was held on the above captioned consolidated cases. During the four days of hearing, Student's parent called and examined seven witnesses, and District called and examined one additional witness. Four of Student's parent's Exhibits were admitted, and 14 of District's Exhibits were admitted.

During each day of hearing, the ALJ sought clarification from Student's parent regarding the issues she raised in her consolidated complaints. Student's parent clarified the issues and requested dismissal of many issues. On March 21, 2013, Student's parent represented that the 8 remaining issues set forth below accurately represented the issues she intended to raise. The issues were memorialized in writing, and admitted into evidence as Student's Exhibit 66, which is set forth below in italics.

> *1) Whether District denied Student a FAPE by not implementing ALJ Lehrman's Order on April 10, 11, and 12, 2012, including placement, accommodations, and modifications, including not providing Student with coursework, homework, a daily parent communication logbook with updates on his functional behavior, a clean cadet corps uniform which fit him, Alphasmart software and a portable keyboard, and by not discussing what accommodations were provided to Student during the May 4 and May 24, 2012 IEPs.*
>
> *2) Whether District denied Student a FAPE during the May 4 and 24, 2012 IEPs when developing goals and objectives, and instead used old data and information, and did not consider parent concerns that Student required a current academic assessment.*
>
> *3) Whether District's placement offer at the May 24, 2012 IEP denied Student a FAPE and was inappropriate, in spite of ALJ Lehrman's Order, because Student required independent study, a charter school, an on-line school, educational therapy, tutoring, coursework, homework, a daily parent communication logbook with updates on his functional behavior, an after school program with accommodations and an aide, and career training; Whether Districts offer of Student's home school offered was inappropriate due to violence; and Whether District denied Student a FAPE because it didn't consider parent concerns and didn't discuss all available placements.*
>
> *4) Whether District denied Student a FAPE during April 10, 11, and 12, 2012, by using the CIBA- Leafwing NPA aide provider which Parent did not like because they did not provide her with the daily parent communication log book she wanted.*

5) Whether District denied Student a FAPE when it disenrolled him from its school after parent privately placed him in May 2012; Whether District denied Student a FAPE because it did not allow Student to be enrolled at the District and also at private Christian independent study home school; and Whether District denied Student a FAPE when it did not provide related services for Student's private Christian independent study home school placement; and Whether Student is entitled to compensatory education for the unilateral private placement at a Christian independent study home school.

6) Whether District denied Student a FAPE by not implementing ESY for 2012.

7) Whether District denied Student a FAPE by not providing 98 hours of tutoring pursuant to his April 18, 2011 IEP.

8) Whether District denied Student a FAPE between January 2012 and March 2012 by failing to give Student homework and schoolwork assignments.

The ALJ dismissed the following issue, under res judicata, based on ALJ Garrett's Stay Put Order and ALJ Lehrman's final Decision and Order.

1) Whether District denied Student a FAPE when it did not provide an NPA aide, and Student could not attend school from August 22, 2011 through March 26, 2012.

Consistent with the PHC Order of March 6, 2013, all issues which were dismissed by the Student's parent and the ALJ were dismissed with prejudice.

District's and Student's Parent's Motion to Dismiss

On March 21, 2013, the last day of hearing, District made an oral motion to dismiss the remaining issues with prejudice. In response, Student's parent requested a dismissal of Student's complaint in its entirety, without prejudice. In response, District requested that the dismissal be made with prejudice, and that OAH retain jurisdiction for appropriate further relief.

District argued that Student's issues were compliance complaint issues properly within the jurisdiction of CDE and OCR, and that Student's parent's compliance complaints been addressed by CDE and OCR with a finding that District was in compliance. District argued that Student's parent was also circumventing the orders and Decisions of ALJ Lehrman, set forth above, with specific remedies and stay put orders which were not appealed. District further argued that the complaint was frivolous, and unreasonable, because the original 109 issues, later, consolidated to 8 issues, were not properly brought under the IDEA. District argued that Student's parent brought numerous complaints, and that her pattern of filing complaints such as this one was an abuse of process, unreasonable,

without foundation, and brought for the purpose of harassment, causing unnecessary delay, and to increase the costs of litigation.

District argued that it substantially complied with ALJ Lehrman's order, and was found in compliance by both CDE and OCR.

District argued that Student's parent refused to give consent to a more current academic assessment. District argued that Student's parent disenrolled Student before it could complete other assessments.

District argued that the daily parent communication logbook was not part of ALJ Lehrman's order, and that at the IEP meeting of May 4 and May 24, the non-public agency behavior intervention supervisor discussed how Student exhibited maladaptive behavior when the daily parent communication logbook was placed in his backpack.

District argued that as a matter of law, it should prevail, based on ALJ Lehrman's order that Student's home school, a comprehensive high school, was the appropriate placement, and it followed her order.

District argued that the 98 hours of tutoring requested was offered in the 2010 settlement agreement which expired, and not the April 18, 2011 IEP as alleged, and that Student's parent was well aware of this.

District argued that as a matter of law, it was not required to give student homework.

The Order of Dismissal with Prejudice

On April 8, 2013, the ALJ ordered that the consolidated matters be dismissed with prejudice; and ordered that Student's parent not file further due process hearing requests on the same issues arising during the same time periods alleged in the dismissal pleading.

The ALJ based her order on the finding that Student's consolidated due process hearings requests were filed not long after Student's parent prevailed in a similarly lengthy due process hearing, which resulted in a detailed 100 page OAH order detailing what a free appropriate public education would be for Student going forward. Student's parent simultaneously pursued compliance complaints with the CDE and OCR for some of the same issues in the instant filings that required District to use a considerable amount of resources over many months, only to request dismissal after multiple days of hearing. Student's parent did not request dismissal of all claims until the fourth day of hearing was scheduled to begin, eight witnesses had testified, and numerous documents had been admitted into evidence. The Student's parent called seven witnesses, and District called one, who were either District employees or whose appearances were facilitated by the District, enabling them to testify during the school day. In light of the significant commitment of time and resources to address the same overlapping issues as in the earlier due process hearing requests and/or

Student's parent's compliance complaints, the order concluded that dismissal with prejudice was warranted.

District's Motion for Attorney's Fees

District contends that Student's parent's actions, itemized above, demonstrated bad faith, and constituted tactics which were frivolous and intended to cause unnecessary delay. District also contends that the ALJ's Order dismissing Student's consolidates cases with prejudice was tantamount to a determination that District was the prevailing party.

Student's parent contends that she never acted in bad faith, never prolonged or interfered with the due process hearing, and merely exercised Student's parent's right to challenge District's actions. Student's parent claims that District failed to prove there were overlapping issues with OCR. Student's parent contends District failed to substantially comply with ALJ Lehman's Order during the three days Student was enrolled by not providing him with an Alphasmart keyboard, the logbook that parent invented, and 98 hours of tutoring which was the product of a confidential settlement agreement. Student's parent explained that dismissal on the last day of hearing was requested because District threatened and harassed her by calling a school truancy officer to speak with her. Student's parent acknowledged that while she agreed to voluntarily dismiss many of her original 109 issues, she did not act with bad faith at any time.

Applicable law

After notice and an opportunity to be heard, OAH may order a party, attorney, or other authorized representative 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 by Code of Civil Procedure, section 128.5 (Gov. Code, §11455.30, subd. (a), Cal.Code Regs., tit. 1, §1040, subds. (a), (b).) Actions or tactics are defined as including, but not limited to, making or opposing motions, or the failure to comply with a lawful order of the ALJ. Frivolous is defined as totally and completely without merit, or for the sole purpose of harassing an opposing party. (Cal.Code Regs., tit. 1, §1040, subds. (a)(1), (2)(A), (B).) The ALJ shall determine the reasonable expenses based upon sworn testimony, or a declaration setting forth the specific expenses insured as a result of the bad faith conduct. The order for sanctions may be made on the record or in writing, setting forth the factual findings upon which the sanctions are based. (Cal.Code Regs., tit. 1, §1040, subd. (c).) Under the applicable statute and regulation, a party may bring such motions without an ALJ designation that they are a prevailing party.

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.) As the Court of Appeal held in that case:

> ... the bad faith requirement of section 128.5 [of the Code of Civil Procedure] does not impose a determination of evil motive. The concept of "harassment" includes vexatious tactics which, although literally authorized by statute or rule, go beyond that which is by any standard appropriate under the circumstances. We appear to be approaching a consensus on the morality of litigation tactics which requires that counsel, even if on technically correct legal ground, not take action which unreasonably or unnecessarily injures the opposing counsel or party.

Sanctions have been upheld when an attorney has made a frivolous pretrial motion by inventing a remedy that does not exist under the IDEA. (*K.S. v. Fremont Unified School Dist*. (N.D.Cal. 2008) 545 F.Supp.2d 995, 1009-1010.)

Under 20 U.S.C. section 1415, subdivision (i)(3)(i) (I), (II)and (III), the District Court may award reasonable attorney's fees to a prevailing party in an action or proceeding when the action was frivolous, unreasonable, or without foundation, against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable or without foundation, and when the Student's parent's complaint was presented for any improper purpose, such as to harass, delay, or to needlessly increase the cost of litigation.

Analysis

The pleadings for which the District seeks sanctions are part of a larger record in these matters of repeated filings, motions, and objections by Student's parent that substantially increased the District's litigation costs. However, there are several factors which indicate Student's parent did not bring them for an improper purpose. Most significantly, the Student's parent demonstrated a disorganized and unfocused representation of Student.

Here, Student's parent was not represented by counsel. While Student's parent was an experienced litigant who filed and defended multiple due process requests, her familiarity with special education laws was not well directed or focused. Student's parent's pattern of virtually continuous due process filings with OAH, and CDE and OCR compliance complaints demonstrated a zeal to vigorously assert her child's rights, however misdirected and unfocused. These facts do not demonstrate an improper motive.

ALJ Lehrman's March 2012 Corrected Decision and Order, over 100 pages long, found in favor of Student, and provided a very detailed Order that served as the stay-put order in the event of a dispute between the parties up through ESY 2012. While Student's parent enrolled Student in the District's program for only three days, then pursued simultaneous CDE, OCR compliance complaints and OAH due process complaints, she was acting within the rights afforded to her under the IDEA. Student's parent's filing of 109 issues, while repetitive and unfocused, did not demonstrate she filed for the improper purpose of harassing the District. Rather, it demonstrated sheer disorganization and inability to edit her thoughts. Student's parent's actions did not demonstrate a conscious disregard for the ALJ orders, or demonstrate a pattern of bad faith actions and frivolous tactics as contemplated by Code of Civil Procedure, section 128.5, Government Code, §11455.30, subdivision. (a), title 1, California Code of Regulations, §1040, subdivisions (a), (b), and (c).

When Student's parent filed and opposed 21 motions, including serving subpoenas on non-interested entities and persons, and seeking motions to compel and sanctions, and opposing the District's multiple motions to dismiss, she was acting within the rights afforded to parents under the IDEA. While Student's parent ultimately requested dismissal of her complaint on the fourth and final day of hearing, that request was not necessarily a concession that her complaints were meritless. Thus, Student's parent did not demonstrate unreasonable actions merely by filing and opposing motions. Rather, her actions demonstrate a vigorous and aggressive pursuit of her child's rights, however unfocused and misapplied.

Finally, OAH cannot determine District to be a prevailing party when the matter was dismissed prior to a Decision on the merits being issued, complete with Factual Findings and Legal Conclusions.

ORDER

1. District's Motion for a portion of Attorney's Fees and Costs is denied.

2. District's request for prevailing party status based upon OAH's prior dismissal with prejudice is denied.

IT IS SO ORDERED.

Dated: July 9, 2013

/s/
DEBORAH MYERS-CREGAR
Administrative Law Judge
Office of Administrative Hearings