BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARAMOUNT UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH CASE NO. 2013070575 ORDER DENYING STUDENT'S MOTION TO SHIFT COSTS

This matter was scheduled to begin its fourth day of hearing at 9:30 a.m., Monday, November 18, 2013, at the District's offices, before Administrative Law Judge (ALJ) Clifford H. Woosley of the Office of Administrative Hearings (OAH). District's attorney Angela Gordon had become ill and was unable to attend the hearing; she contacted Student's advocate Kimberly McClain and OAH. The hearing was continued, per Order of ALJ Woosley, to a telephonic status conference of 2:00 pm., November 19, 2013, at which time the parties agreed upon a date to conclude the due process hearing. The last day of hearing was December 5, 2013. The matter has been submitted for decision.

On December 2, 2013, Student's advocate filed a motion to shift costs, asserting that the District's attorney's conduct exhibited bad faith and was frivolous. Ms. McClain, Mother, and Student witness Rosa Paterson had appeared at the District's offices on the morning of November 19, 2013, thus, Mother incurred unnecessary costs when the last day of hearing was postponed.

Student's argument is twofold. First, Student asserts that District's counsel Angela Gordon was aware of her illness, early enough on the weekend before the Monday hearing, to arrange for another member of her 60+ member law firm to attend on District's behalf. Second, Student argues that Ms. Gordon's efforts to contact Student's advocate and OAH were inadequate, requiring Mother, the advocate, and the witness to appear out of an abundance of caution, because Ms. McClain had not heard directly from OAH.

On December 5, 2013, District filed its opposition, basically asserting that Student is not entitled to a shifting of costs because the conduct of District's counsel was not frivolous or in bad faith. The opposition is supported by Ms. Gordon's declaration under penalty of perjury and exhibits.

Ms. Gordon became ill on Sunday. In the early morning of November 18, 2013, she realized that she was too ill to attend the hearing.[1] At about 6:00 a.m., she called OAH's

[1] All times refer to Monday, November 18, 2013, unless otherwise stated.

"after-hours settlement" line and left a voicemail message that she was ill and could not attend the hearing. About 15 minutes later, Ms. Gordon emailed Student advocate to advise Ms. McClain of her illness and that she could not attend the hearing, indicating she left a message with OAH. She also called Ms. McClain and left a voicemail with the same information. She then emailed her client, the District.

At about 8:00 a.m., ALJ Woosley checked the OAH settlement line before leaving for the hearing. He confirmed with Ms. Gordon that she was too ill to attend the hearing; Ms. Gordon stated she contacted Ms. McClain. At approximately 8:15 a.m., ALJ Woosley contacted OAH in Sacramento, indicating that District's counsel was too ill to attend the hearing, that the hearing would not convene, and that he would be issuing a written order continuing the hearing. He instructed staff to contact Student's counsel.

Ms. McClain, Mother and Student's witness Ms. Peterson appeared at the District offices, despite Ms. McClain's acknowledgment that she had received Ms. Gordon's message. At 9:37 a.m., Ms. McClain called OAH, indicating that she was unaware of the hearing's cancellation. Ms. McClain further said, in her conversation with OAH staff, that she had called and left a message with OAH staff inquiring as to whether the matter was proceeding; she did not give a time. Not having heard anything more from OAH, she directed Mother and Ms. Peterson to appear.

APPLICABLE LAW

In a special education due process matter, the Government Code and the California Code of Regulations authorize an 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. 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]
>
> (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]

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[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.

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.
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> > (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.
>
> (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

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[4] Student 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.

The facts do not warrant a finding that the conduct of District's counsel amounted to "bad faith actions or tactics that [were] frivolous or solely intended to cause unnecessary delay." Nothing indicates that Ms. Gordon's illness and actions were "completely without merit" or "for the sole purpose of harassing an opposing party." Instead, the evidence establishes that Ms. Gordon was quite ill and that she attempted to contact Student's representative and OAH as quickly as possible when she realized that she was too sick to attend the hearing. Although illness may cause inconvenience to parties and courts, such unforeseen scheduling delays are part of the litigation process.

Student's assertion that Ms. Gordon should have known that she was too ill to attend and, therefore, should have arranged for the appearance of another counsel from her firm, fails for two reasons. First, it is pure speculation as to when Mr. Gordon should have determined she was too sick to attend the hearing. Second, Ms. Gordon was the only attorney from her firm that had represented the District's interests throughout the due process hearing. The District was entitled to representation and such representation would have been compromised if another attorney, without ample time to prepare, was required to attend the last day of a four-day hearing, during which the Student's proffered expert witness would be testifying.

ORDER

Student's motion to shift costs is denied.

Dated: January 8, 2014

/s/

CLIFFORD H. WOOSLEY
Administrative Law Judge
Office of Administrative Hearings