BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENTS ON BEHALF OF STUDENT,	OAH Case No. 2015050839
v.	ORDER DENYING DISTRICT'S MOTION TO DISMISS AND DENYING STUDENT'S MOTION FOR SANCTIONS
TEHACHAPI UNIFIED SCHOOL DISTRICT.	

On October 21, 2015, Tehachapi Unified School District filed with the Office of Administrative Hearings a Motion to Dismiss. Tehachapi contends that Student, through his attorney, had accepted a settlement offer. On October 26, 2015, Student filed an opposition to the motion and also moved that OAH issue sanctions and/or cost shifting against Tehachapi. On October 28, 2015, oral argument was heard.

Tehachapi's Motion to Dismiss

On October 16, 2015, Tehachapi, through its legal counsel, forwarded, by fax, a settlement offer pursuant to section 998 of the California Code of Civil Procedure and 1415(i)(3)(D) of Title 20 of the United States Code.[1] The offer included the following:

"This offer will remain open until it is revoked by the District. If this offer is acceptable, please provide a signed written statement acknowledging acceptance of this offer. I will then prepare a written settlement agreement which will be provided for Parents' signature incorporating the substantive terms delineated herein and then upon receiving the Parents' signature, it will be forwarded to the District Board of Trustees."

The cover sheet stated that the document attached was a settlement offer.

On October 19, 2015, Student's counsel, faxed a reply which stated: "I am writing this letter to provide you with a signed and written statement, acknowledging acceptance of your Confidential Offer of Settlement Pursuant to Rule 998, dated October 16, 2015."

[1] The settlement offer also referenced that it was being made pursuant to Rule 68 of the Federal Rules of Civil Procedure, Rule 408 of the Federal Rules of Evidence, and section 1152 of the California Evidence Code.

Later on October 19, 2015, Student's counsel sent an email to Tehachapi's counsel stating that Student rescinded the acceptance but "was still interested in the 998 offer but need(ed) to see the actual settlement agreement."

Rule 998 relates to a party offering to have the court enter a judgment against it in order to resolve pending litigation. The offer must include the terms and conditions of the judgment or award. If the 998 offer is accepted, it is then filed with the court clerk for entry of judgment. Here, the Tehachapi offer was not a complete offer as there were two contingencies. The first contingency was that Tehachapi's counsel was to prepare a settlement agreement which was to be signed by Student's parents. Thus, the offer did not contain the full terms and conditions of the offer. Secondly, the settlement was contingent upon acceptance of the written settlement agreement by the Tehachapi Unified School District Board of Trustees. Tehachapi's motion states that there were "no other provisions that needed to occur for there to be binding agreement" As demonstrated above, this was not true as there were two contingencies which still were to be met. Thus, the terms of Rule 998 were not met, and there was not a contract entered as this was an offer subject to contingencies. Tehachapi's motion to dismiss is denied.

Student's Motion for Sanctions

In his opposition, Student moves for OAH to impose sanctions or cost-shifting. Student contends that the motion to dismiss filed by Tehachapi was done in bad faith in that it was "wholly void of any legal support" which was designed as harassment to Student's family.

In certain circumstances, an administrative law judge presiding over a special education proceeding is authorized to shift expenses from one party to another, or to OAH. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; see *Wyner ex rel. Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly, [California Code of Regulations] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

Expenses may be ordered to be reimbursed either to OAH or to another party. With approval from the General Counsel of the California Department of Education, the ALJ presiding over the hearing may "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel" to OAH (as the successor to the California Special Education Hearing Office) as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Cal. Code. Regs., tit. 5, § 3088, subds. (a) & (e); see Gov. Code, § 11455.30, subd. (a).) An ALJ presiding over a hearing may, without first obtaining approval from the California Department of Education, "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." (Gov. Code, § 11455.30, subd. (a); Cal. Code. Regs., tit. 5,

§ 3088, subd. (a).) An order to pay expenses is enforceable in the same manner as a money judgment or by seeking contempt of court order. (Gov. Code, § 11455.30, subd. (b).)

California Code of Regulations, title 1, section 1040, 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.
>
> (b) The ALJ shall not impose sanctions without providing notice and an opportunity to be heard.
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> (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.

The California Court of Appeal discussed what is required to impose sanctions under California Code of Civil Procedure section 128.5, in the case of *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635. In discussing what constitutes bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay, the court stated the action taken by the party or its attorney must be solely for the purpose of harassing an opposing party. Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit. There must also be a showing of an improper purpose, such as subjective bad faith on the part of the attorney or party to be sanctioned. (*Levy v. Blum, supra*, 92 Cal.App.4th at p. 635; West *Coast Development v. Reed* (1992) 2 Cal.App.4th 463,702.)

Tehachapi's motion was caused by the confusion made by Student's counsel's October 19, 2015 letter accepting the settlement offer. Thus, the filing of the motion was designed to clarify the muddy situation as to whether there existed an agreement or not. Thus, the motion to dismiss was not frivolous and not made for the purpose of harassing the opposing party.

ORDER

1. Tehachapi's motion to dismiss is DENIED.

2. Student's motion for sanctions is DENIED.

DATE: November 2, 2015

/s/

ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings