BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: SAN DIEGUITO UNION HIGH SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2016100966 ORDER DENYING REQUEST FOR ATTORNEYS' FEES

On October 26, 2016, District filed a Request for Due Process Hearing (complaint), naming Parent on Student's behalf as respondent. On November 14, 2016, District submitted a request to withdraw its complaint.

On November 22, 2016, Student filed a motion for an order of attorneys' fees, arguing that District's withdrawal of the complaint and its prior actions with respect to the scheduling of the matter had been in bad faith. On November 28, 2016, District filed its response. District contended fee shifting was not appropriate because it did not engage in bad faith actions or tactics which were frivolous or solely intended to cause unnecessary delay. As discussed below, the Motion is denied.

APPLICABLE LAW AND DISCUSSION

In a special education due process matter, the Government Code and the California Code of Regulations authorize an Administrative Law Judge 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, subdivision (a), provides: "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."[1] California Code of Regulations, title 1, section 1040, subdivision (a) provides: "The ALJ may order a party, a party's representative or both, to pay reasonable expenses, including

[1] 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, and requiring that the California Department of Education first approve an ALJ's consideration of sanctions.

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."

California Code of Regulations, title 1, section 1040, subdivision (a)(2) defines "frivolous" as "totally and completely without merit" or "for the sole purpose of harassing an opposing party." 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.)

Here, Student failed to demonstrate that District engaged in bad faith actions or tactics that were frivolous, totally and completely without merit, for the sole purpose of harassing an opposing party, or solely intended to cause unnecessary delay, justifying an award of sanctions. Student argues that after District had requested continuances, failed to file required documents, and failed to respond to evidentiary motions filed by Student, District then withdrew the complaint. Student argues that these events prove District never intended to prosecute the matter.

District's lack of diligence in prosecuting the matter does not rise to the level needed to award sanctions. Neither the Individuals with Disabilities Education Act nor the California Administrative Procedures Act specifically address withdrawal of complaints in the context of sanctions. However, although not binding in special education matters, the Code of Civil Procedure provides guidance in this situation. Specifically, Code of Civil Procedure section 581, subdivision (c), states that a plaintiff may dismiss his or her complaint, or any portion thereof, with or without prejudice prior to the actual trial commencing. Student has offered no persuasive evidence that establishes that District's dismissal of its complaint before hearing entitles Student to an award shifting fees.

ORDER

Student's motion for attorneys' fees is denied.

DATE: December 7, 2016

DocuSigned by:
June Lehrman
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JUNE R. LEHRMAN
Presiding Administrative Law Judge
Office of Administrative Hearings