BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. TORRANCE UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013041191 ORDER DENYING MOTION FOR SANCTIONS

On April 29, 2013, Parents, on behalf of Student (Student), filed a Request for Due Process Hearing (complaint) naming the Torrance Unified School District (District) with the Office of Administrative Hearings (OAH). On May 14, 2013, the District filed a Notice of Insufficiency (NOI) as to Student's complaint, and requested that Student's compliant be dismissed due to insufficiency. Student filed an opposition on May 15, 2013. On May 15, 2013, OAH denied the NOI, finding Student's complaint to be sufficiently pled.[1]

On May 14, 2013, Student filed a Motion to Compel Classroom Observation in his current placement for a psycho-educational Independent Education Evaluation (IEE) by his assessor/expert in the 2012-2013 school year, supported by Student attorney's declaration and authenticated exhibits. On May 16, 2013, the District filed an opposition supported by exhibits. On May 21, 2013, Student filed a reply. On May 21, 2013, OAH granted Student's motion and ordered the District to permit the assessor/expert to observe Student in his current placement for purposes of a psycho-educational IEE within 14 days of the date of the order.

On August 5, 2013, Student filed a motion, with attached declarations, that requested sanctions against the District for engaging in frivolous and bad faith tactics in its filing of the NOI and refusing to permit the person conducting Student's IEE to observe Student at school. On August 8, 2013, the District filed an opposition, with attached declarations, and Student submitted a response on August 13, 2013, with attached declarations.

APPLICABLE LAW

In a special education due process matter, an Administrative Law Judge (ALJ) has the authority to award attorneys' fees under the Government Code and the California Code of Regulations. 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

[1] The order was served on May 21, 2013.

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.

(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.

That 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.

(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.

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.)

DISCUSSION

Student contends that the District's filing of the NOI was frivolous, done in bad faith and intended to harass Student. However, while a quick reading of Student's complaint should have indicated that it was sufficient and District's experienced counsel should know that a request to dismiss claims or proposed resolutions should be done through a separate motion to dismiss, not in the NOI, Student did not establish that the District's conduct was frivolous, done in bad faith and intended to harass. Further, a response to an NOI is not required as OAH reviews the complaint itself, and a party cannot supplement the complaint with a subsequent pleading, unless the party moves to amend the complaint. (*Student v. San Jose Unified School District* (July 16, 2013) Cal.Offc.Admin.Hrgs. 2013070150.) Finally, Student does not explain why he wanted nearly three months to request sanctions. Thus, Student failed to establish the grounds necessary for the imposition of sanctions.

As to the request for sanctions for failure to permit Student's assessor observe him, the factual and legal basis was already argued by the parties. While the order that granted Student's mention raised some concerns about the District's contention that it need not permit a private assessor's observation in the current school year if it permitted two observations by other private assessors in the prior school year, nothing in the May 21, 2013 order implied that the District's actions were frivolous, done in bad faith and intended to harass. As to the private assessor's inability to observe Student after the May 21, 2013 order, the failure appears to be due to miscommunication and the participants schedules. Accordingly, while Student failed to establish grounds that would warrant the sanctioning of the District, the District needs to ensure that the observation can occur soon.

ORDER

1. Student's motion for sanctions is denied.

2. By 5:00 p.m. on August 22, 2013, counsel for the District shall arrange with counsel for Student the observation by Jan Balcher, Ph.D., and to have that observation conducted by no later than September 16, 2013, based on Dr. Balcher's and Student's classroom availability solely.

Dated: August 16, 2013

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings