BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. TEHACHAPI UNIFIED SCHOOL DISTRICT.	OAH Case No. 2015120889 ORDER DENYING PARTIES' RECIPROCAL MOTIONS FOR SANCTIONS

On May 16, 2016, Student filed a Motion for Sanctions against District seeking sanctions for District's conduct, stating that District's actions in seeking a continuance of the due process hearing were frivolous and in bad faith. Specifically, Student complained that District misrepresented the availability and roles of attorneys Darren Bogie and Kathleen LaMay for District's legal defense. District filed an Opposition to Student's Motion for Sanctions on June 27, 2016, opposing Student's request and seeking sanctions against Student for Student's filing of his Motion. Student filed a Reply to District's Opposition on July 1, 2016. As is discussed below, the motions are denied.

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 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.
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> (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 filed and served his due process complaint on December 23, 2015. On January 12, 2016, District filed and served its Response to Student's due process complaint, signed by attorney LaMay. On January 19, 2016, District filed and served a Notice of Representation, indicating that attorney Bogie was the attorney representing District. On January 20, 2016, District filed and served a joint request for continuance of the hearing and prehearing conference dates. The joint request was signed by attorneys Andrea Marcus and Darren Bogie, respectively.

The joint request for continuance was granted by the office of Administrative Hearings on January 20, 2016. The hearing was continued to April 11, 2016, and the prehearing conference to March 25, 2016.

On February 25, 2016, District filed and served a second Notice of Representation indicating that attorney LaMay would assume representation of the case for District.

On March 18, 2016, District filed a Motion seeking a continuance of the hearing date based upon the unavailability of attorney LaMay, who was placed on medical leave beginning Monday, March 21, 2016, and was not expected to be able to return to work until the latter part of April due to a medical leave of absence. On March 21, 2016, Student opposed District's Motion based upon prejudice to Student from further delay of the hearing, and the presumed availability of other attorneys to represent District at the hearing.

On March 23, 2016, District filed a Reply to Student's Opposition, signed by attorney Kyle Holmes, Student Legal Services general counsel. Attorney Holmes indicated that each of three other special education attorneys for Schools Legal Services was unavailable for the April 11, 2016 hearing date. Attorney Darren Bogie had hearings before the Public Employment Relations Board that directly conflicted with the hearing date. Attorney Stacy Inman was retiring at the end of March of 2016, and was thus unavailable the following month for the hearing. Attorney Kyle Holmes was expecting his first child to be born around the time of the hearing date.

On March 25, 2016, the prehearing conference was held, attended by attorneys Andrea Marcus and Kelly Kaesar for Student, and attorneys Darren Bogie and Kelly Lazerson specially appearing for District. Discussions were held regarding District's request for continuance.

On March 25, 2016, OAH issued an Order granting District's request for a continuance, finding that on balance there was good cause for District's Motion to Continue, and that Student would not be prejudiced due to the likelihood that the decision in this case will be issued during Student's summer break whether a continuance were granted or not. The hearing continued to May 16, 2016.

On May 16, 2016, the first day of hearing was initiated in Bakersfield, California. Ms. LaMay was unavailable to represent District as she remained on medical leave at that time. District was represented by attorneys Bogie and Lazerson due to attorney LaMay's unavailability. Student promptly served his request for sanctions based on attorney LaMay not representing District at hearing.

Here, District's actions in changing its attorney representatives were neither frivolous, nor in bad faith. As such, there is no basis for the award of sanctions sought by Student.

District's operational needs regarding representation for the hearing were reasonable under the circumstances as alleged in multiple declarations by the various attorneys involved. There is no evidence that attorney LaMay's medical leave situation was manipulated or arranged to delay or otherwise prejudice Student.

District also seeks sanctions from Student for Student's pursuit of sanctions against District. District's request is also denied as Student is not found to have engaged in frivolous actions or bad faith in his filing of the initial motion for sanctions. Student's pursuit of sanctions is not found to be for the sole purpose of harassing District or to be totally and completely without merit.

ORDER

1. Student's motion for sanctions is denied.

2. District's motion for sanctions is denied.

IT IS SO ORDERED.

DATE: August 04, 2016

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Ted Mann
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TED MANN
Administrative Law Judge
Office of Administrative Hearings