BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH CASE NO. 2014100698
v.	ORDER DENYING DISTRICT'S MOTION TO DISMISS AND ORDER DENYING STUDENT'S REQUEST FOR MONETARY SANCTIONS
ELK GROVE UNIFIED SCHOOL DISTRICT.	

On October 17, 2014, Parent filed a Due Process Hearing Request (complaint) on behalf of Student, with the Office of Administrative Hearings (OAH), against Elk Grove Unified School District (District).

On November 14, 2014, Lauri Arrowsmith, Best Best and Krieger LLP, filed District's motion to dismiss Student's due process request due to Parent's failure to participate in a mandatory resolution session. On November 19, 2014, James D. Peters, III, of the Law Office of Guy A. Leemhuis, filed Student's opposition to District's motion to dismiss and, further, moved that District and its counsel be ordered to pay monetary sanctions.

District's motion to dismiss is supported by the Declaration of Director of Special Education William Tollestrup and Student's Opposition and Motion is supported by the Declaration of Parent; both filings include multiple exhibits.

District's Motion to Dismiss

APPLICABLE LAW

A local educational agency is required to convene a resolution meeting with the parents and the relevant members of the Individualized Education Program (IEP) team within 15 days of receiving notice of the Student's complaint. (20 U.S.C. § 1415(f)(1)(B)(i)(I);[1] 34 C.F.R. § 300.510(a)(1) (2006).) The resolution session need not be held if it is waived by both parties in writing or the parties agree to use mediation. (§ 1415(f)(1)(B)(i)(IV); 34 C.F.R. § 300.510(a)(3) (2006).) There are no provisions of law that allow a parent or an LEA to unilaterally waive the resolution meeting. (71 Fed. Reg. 47602, No. 156 (Aug. 14, 2006.)

[1] All statutory citations are to Title 20 United States Code unless otherwise indicated.

The resolution session may not include the district's attorney unless the parent is accompanied by an attorney (20 U.S.C. § 1415(f)(1)(B)(i)(III); 34 C.F.R. § 300.510(a)(1) (2006)).

If the parents do not participate in the resolution session, and it has not been otherwise waived by the parties, a due process hearing shall not take place until a resolution session is held. (34 C.F.R. § 300.510(b)(3) (2006).) If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented, the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the complaint. (34 C.F.R. § 300.510(b)(4) (2006).)

DISCUSSION

By letter of October 23, 2014, Mr. Tollestrup wrote Parent and offered two dates for the mandatory resolution session – October 28 or 29, 2014. He asked if she had a time preference for the resolution session.

By letter dates October 24, 2014, Mr. Peters responded and stated the Parent would be participating in a resolution session on October 29, 2014, at 11:00 a.m., along with "non-attorney staff from our law firm," by telephone. Mr. Peters is employed by the Law Offices of Guy A. Leemhuis; he is not an attorney.

District's attorney, Ms. Arrowsmith, responded by letter of October 28, 2014, seeking Parent's personal attendance at the resolution session. District offered to accommodate Parent with a resolution time and date that would enable her to personally appear. Neither District, nor its counsel received a response before the October 29, 2014 resolution session.

At 11:00 a.m., October 29, 2014, Mr. Tollestrup called the Law Offices of Guy A. Leemhuis and was connected to Mr. Peters. Parent identified herself and did not otherwise speak during the telephonic conference call. Mr. Peters represented that he was ready to participate in the resolution session with his client, and that his client was unable to personally appear due to health reasons. In her declaration, Parent stated that she was willing to participate in the resolution session. The session concluded.

Later in the day of October 29, 2014, Ms. Arrowsmith wrote a letter to attorney Leemhuis and Mr. Peters indicating it was District's belief that Parent did not actually participate in the telephonic resolution session and, as such, proposed additional dates and times for a resolution session. District offered to provide appropriate accommodations to enable Parent's personal presence, including traveling to Parent's home.

On October 30, 2014, Ms. Arrowsmith received a fax letter from Mr. Peters dated October 28, 2014, which purported to be a response to Ms. Arrowsmith's October 28, 2014 letter. Mr. Peters restated that Parent would participate in the resolution by phone.

On October 30, 2014, Ms. Arrowsmith received an emailed letter from Mr. Peters, dated October 29, 2014. Mr. Peters stated it was Student's position that the resolution session had taken place and that District was not entitled to "another." Ms. Arrowsmith responded by indicating District's concern that Parent did not participate and, further, inquired as to whether Parent is being legally represented at the resolution session, considering Mr. Peters involvement in the teleconference.

Student's parent is required to participate in a resolution session before a due process hearing may be commenced, and OAH has discretion to dismiss the matter if the parent refuses to participate in a resolution session and the district provides appropriate documentation supporting its motion to dismiss.

As District acknowledged in its order, a parent may participate in a resolution session via telephone. District indicated a desire to have a personal resolution session with Parent, and offered various accommodations. However, as affirmed by Parent's declaration, she was on the phone for the October 29, 2014 teleconference, had chosen to be represented by the Leemhuis law firm and Mr. Peters, and was willing to participate as Mr. Peters thought appropriate.

The code allows dismissal only when the District was unable to obtain the participation of the parent in the resolution meeting. Though the IDEA contemplates more personal, direct parental participation than that which occurred here, Parent was on the phone for the resolution session. She chose not to substantively and personally discuss the issues. Parent's conduct in this regard was not the refusal to participate, contemplated by the statutes and regulations, which would support a dismissal of the due process. The District's motion to dismiss is denied.

Student's Motion for Sanctions

Student's representative, Mr. Peters, claims that the conduct of District and its counsel, in making the motion to dismiss, was frivolous and in bad faith. Therefore, Student seeks monetary sanctions. As discussed below, Student's motion is denied.

APPLICABLE LAW

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, subsection (a), provides that the presiding officer may order a party or the party's attorney 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.

This section is implemented by California Code of Regulations, title 1, section 1040, which defines frivolous or delaying "actions or tactics" as being 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.)

DISCUSSION

The correspondence demonstrated District's desire to personally meet with Parent at the resolution session. District was willing to accommodate the Parent, including going to her home. Mr. Peter's letters were either ambiguous or argumentative, contributing to confusion surrounding the resolution meeting.

Mr. Peters' role in the resolution session was unclear. State and federal law does not contemplate the presence of attorneys at the resolution session but, instead, envisions a meeting between the local educational agency and parents unencumbered by legal representation. Here, Mr. Peters was at the resolution session and spoke on behalf of Parent, who participated by identifying herself as being on the phone for the conference.

Mr. Peters is not an attorney, but an employee of the Leemhuis law firm. He is referred to as a paralegal on the complaint, a special education advocate, and the executive director of the law firm's special education law division. Parent states that she hired Mr. Leemhuis and Mr. Peters, of the Leemhuis law firm, to represent her. District was unclear as to whether Parent was being legally represented at the October 29, 2014 telephonic conference and, thereafter, sought a resolution session with Parent's personal participation. District also inquired as to the status of Parent's legal representation at the resolution meeting, because District needed to make an informed decision as to bring counsel to the resolution meeting .

Mr. Peters' conduct at the resolution session could be interpreted as representing Parent, like legal counsel. Parent stated as much in her declaration. Therefore, since District did not have counsel at the resolution session and believed Mr. Peters' conduct was that of an attorney, District asserted that a resolution session did not occur on October 29, 2014, and made the motion to dismiss after Mr. Peters declined to reschedule.

Mr. Peters was not an attorney and his telephonic appearance at the October 29, 2014, was not the same as Parent being represented by counsel. However, given the ambiguous nature of Mr. Peters' role, District's and its counsel's conduct was not totally and completely without merit. Such conduct did not amount to tactics or actions that were performed in bad faith, frivolous, designed to harass, or designed to cause unnecessary delay. The Student's motion for sanctions is denied.

ORDER

1. The District's motion to dismiss is denied.

2. Student's motion for sanctions is denied.

DATE: November 24, 2014

/s/
CLIFFORD H. WOOSLEY
Administrative Law Judge
Office of Administrative Hearings