

Student, BNF Parent	§	BEFORE A SPECIAL EDUCATION
	§	
V.	§	HEARING OFFICER
	§	
INGRAM INDEPENDENT	§	
SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

DECISION AND ORDER OF SANCTIONS

I.
Statement of the Case

Petitioner, Student, by his next friend, Parent brought this action against Respondent, Ingram Independent School District pursuant to the Individuals with Disabilities Education Act (hereafter "IDEA"), as amended by the IDEA Amendments of 1997 (20 U.S.C. §1400 *et seq.*), to challenge Ingram ISD's failure to provide Student with: (1) a remedial reading program; (2) appropriate tutorial services; (3) appropriate computer software for his home computer; (4) outside counseling services; and (5) instructional modifications during the 2002-2003 and 2003-2004 school years. On the day prior to the scheduled hearing, Petitioner filed a Motion to Dismiss this matter without prejudice. Thereafter, Ingram ISD filed a Motion for Sanctions against Petitioner and his legal counsel requesting dismissal of Petitioner's claims with prejudice and attorney's fees for allegedly pursuing a frivolous and vexatious due process claim. This decision and order addresses Ingram ISD's Motion for Sanctions.

II.
Procedural History

Petitioner initiated this action by filing a request for a due process hearing on February 27, 2004 with the Commissioner of Education for the State of Texas. This was the fourth filing of this hearing request by Petitioner. Petitioner was represented in this matter by his legal counsel, Mr. Christopher Jonas. Ingram ISD was represented in this matter by its legal counsel, Ms. Susan Morrison. By agreement of the parties, this matter was scheduled for hearing on May 24 and 25, 2004. On Sunday, May 23, 2004, Petitioner sought to non-suit and dismiss this matter without prejudice. On Monday, May 24, 2004, Ingram ISD filed a Motion to Dismiss on the Merits and a Motion for Sanctions.

III.
Findings of Fact

Taking official notice of the filings and records of TEA Docket Nos. 335-SE-0603, 084-SE-1103, 169-SE-0104 and 219-SE-0204, I make the following findings of fact:

1. This is the fourth filing of this case by Petitioner.
2. The initial filing was on June 23, 2003 and assigned TEA Docket No. 335-SE-0603. It was dismissed and non-suited without prejudice by Petitioner on

October 31, 2003, prior to the expiration of the IDEA's regulatory five-business-day disclosure deadline.¹

3. Four days later, on November 4, 2003, Petitioner refiled the same case under TEA Docket No. 084-SE-1103. At the joint request of the parties, this second due process hearing request was set for hearing on January 27 and 28, 2004. On January 16, 2004, prior to the expiration of the five-business-day disclosure deadline, Petitioner's counsel dismissed and non-suited this second hearing request.²
4. On January 20, 2004, Petitioner refiled the same hearing request under TEA Docket Number 169-SE-0104. A new hearing date was set and Petitioner's counsel was cautioned in writing that any future dismissals or non-suits of this proceeding with a subsequent refiling of the same case could result in appropriate sanctions being entered against Petitioner for abuse of the hearing process.
5. On February 25, 2004, prior to the expiration of the IDEA's five business day disclosure deadline, Petitioner' counsel filed a motion seeking to dismiss without prejudice this third hearing request.
6. Two days later, on February 27, 2004, Petitioner refiled the same hearing request, being the fourth and this current hearing request.
7. Petitioner's third dismissal request was abated and a hearing was set on March 8, 2004 to determine if sanctions should be rendered against Petitioner or his counsel for abuse of the hearing process. At the hearing, Petitioner's counsel gave as justification for the numerous continuances, dismissals and refilings, his inability to locate an expert to conduct an evaluation of *** in the areas of reading and written expression. Based on this explanation, I declined to enter any sanctions against Petitioner or his legal counsel. However, I admonished Petitioner's counsel that no further dismissals and refilings of this proceeding would be allowed, except under extenuating circumstances, without sanctions being imposed for abuse of the hearing process. Petitioner's counsel was also instructed to act diligently and timely in obtaining the expert opinion needed for the hearing. Additionally, at the request of Petitioner's counsel, this matter was set for hearing on May 24 and 25, 2004, specifically to allow Petitioner's counsel ample time to obtain the expert report.

¹ A party is dissuaded by state regulation from dismissing a special education due process hearing within the five-business-day disclosure deadline and then refiling the same or similar case within one year. In such situations, absent good cause or agreement of the parties, the regulation makes the disclosure deadline in the subsequent due process hearing the same date as the disclosure deadline in the hearing that was dismissed or non-suited. *See*, 19 Tex. Admin. Code §89.1180(h).

² Rule 162 of the Texas Rules of Civil Procedure provides that at any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit. Additionally, 19 Tex. Admin. Code §89.1180(h) allows a party to request a dismissal or non-suit of a due process hearing to the same extent that a plaintiff may dismiss or non-suit a case under Rule 162 of the Texas Rules of Civil Procedure.

8. There is no indication in the record that Petitioner or its counsel used due diligence in locating an expert to conduct an evaluation of Student in the areas of reading and written expression.
9. On Sunday, May 23, 2004, the day prior to the scheduled hearing, Petitioner's counsel filed his fourth Motion to Dismiss without prejudice.
10. On Monday, May 24, 2004 Ingram ISD filed its Motion to Dismiss, which included a Motion to Dismiss on the Merits and a Motion to Dismiss with Sanctions.³
11. I abated Petitioner's Motion to Dismiss this matter without prejudice and scheduled a telephone conference call with counsel wherein they were given the opportunity for an oral hearing on Respondent's Motion to Dismiss and Motion for Sanctions. Counsel declined this opportunity and requested that matter be considered by written submission. After reviewing the Motion to Dismiss on the Merits, I questioned whether such a Motion was tantamount to a Motion for Summary Judgment. Accordingly, I abated the submission deadline for considering Respondent's Motion to Dismiss on the Merits and I gave Petitioner's counsel until Friday, May 28, 2004 at 5:00 p.m. to file Petitioner's written response to Respondent's Motion to Dismiss with Sanctions. Respondent's counsel was given until June 1, 2004 to file its reply brief and argument. Additionally, I requested the parties to brief, among other matters, the extent of sanction authority granted to hearing officers in the State of Texas; whether a dismissal of a due process hearing with prejudice as a sanction would be allowed under the IDEA; and whether Respondent's Motion to Dismiss on the Merits constituted a Summary Judgment Motion.
12. Petitioner's counsel failed to file any brief or response in this matter. Respondent's counsel timely filed its response.
13. In its Motion for Sanctions, Respondent requests that sanctions be rendered against Petitioner and his counsel for abusing the hearing process by engaging in repeated filings and dismissals of the same case and for filing groundless and frivolous requests for hearings. Respondent seeks dismissal of this matter with prejudice and reasonable attorney's fees. Additionally, Respondent requests a finding that Petitioner unreasonably protracted the final resolution of the issues in controversy and that Petitioner be required to hereafter notify Ingram ISD in writing of any complaints about ***'s educational programming prior to filing an IDEA due process hearing.
14. Petitioner and his counsel engaged in sanctionable conduct by filing and dismissing the same special education due process request on four separate occasions as a means to manipulate the hearing settings and abuse the hearing process. This manipulation of the hearing process was willful, intentional and purposeful and due to the dilatory tactics of Petitioner and his counsel.

³ Although a plaintiff may have the right to dismiss or non-suit a case under Rule 162 of the Texas Rules of Civil Procedure, such a dismissal does not prejudice the right of an adverse party to be heard on a pending Motion for Sanctions, attorney's fees or other costs.

15. Petitioner and his counsel's conduct in filing and dismissing the same special education due process request on four separate occasions is contrary to the public interest of expeditiously completing special education due process hearing, interferes with the sensible management of the docket system and hearing process and prejudiced the rights of Ingram ISD.
16. A dismissal with prejudice is the appropriate sanction to impose on Petitioner and his counsel in this matter in that there exists a direct relationship between the offensive conduct of multiple filings and dismissals of this action and the sanction of a dismissal with prejudice. This sanction prevents Petitioner from further abusing the hearing process through subsequent filings of this action.
17. Petitioner unreasonably protracted the final resolutions of the issues in controversy in this hearing by filing and dismissing this matter on four separate occasions.

IV.

Discussion

Authority of Texas Special Education Hearing Officer's to Impose Sanctions

There are two principal issues in this case. The first involves the nature and scope of the sanction authority granted to special education due process hearing officers in the State of Texas. The second involves a determination as to whether Petitioner and/or Petitioner's legal counsel committed a sanctionable offense within the administrative hearing process and if so, what type of sanction is appropriate to address the offensive conduct.

Special education due process hearings are governed by the IDEA and its implementing federal regulations. *See*, 20 U.S.C. §1415(f) and 34 C.F.R. §§300.507-300.510. They set forth the general framework for the hearing process and identify the basic rights granted to participants in these proceedings. The IDEA, through the grant of federal funds to the States, obligates the States, through their educational agencies, to ensure, among other matters, that they fully develop and implement due process hearing systems commensurate with the requirements of the IDEA. *See*, 20 U.S.C. §1412(a)(6). Although the IDEA and its implementing regulations establish the general framework for the hearings, it is left to the States to develop and incorporate into their due process hearing systems detailed and supportive regulations governing such matters as subpoena authority, discovery and sanctions. These procedural matters have been left to the discretion of the individual states, to the extent that their hearing procedures do not conflict with the IDEA and its implementing regulations.⁴

In Texas, the Texas Education Agency has been given the statutory mandate to develop and modify as necessary a statewide design, consistent with federal law, for the delivery of educational services to children with disabilities. Tex. Educ. Code §29.001. As part of its

⁴ An administrative agency charged with executing a statute has primary responsibility for determining the scope of its authority. Regulations adopted by an agency to implement its statutory mandate can be set aside only if the agency has exceeded its statutory authority or if its regulation so far departs from the statutory purpose that it can be stigmatized as "arbitrary or capricious" or an "abuse of discretion" or otherwise not in accordance with law. *Western Coal Traffic League v. United States*, 694 F.2d 378 (5th Cir. 1982), on rehearing 719 F.2d. 772, *certiorari denied* 104 S.Ct. 2160, 466 U.S. 953, 80 L.Ed.2d. 545.

statewide plan, the Agency has implemented a one-tier hearing system in accordance with the IDEA that uses impartial hearing officers who are not employees of the Texas Education Agency. 19 Tex. Admin. Code §89.1151(b). Additionally, the Agency has promulgated rules governing special education due process hearing in Texas. *See*, 19 Tex. Admin. Code §§89.1151-89.1191. One such rule grants hearing officers the authority to administer oaths; call and examine witnesses; rule on motions, including discovery and dispositive motions; determine admissibility of evidence and amendments to pleadings; maintain decorum; schedule and recess the proceedings from day to day; *and make any other orders as justice requires, including the application of sanctions as necessary to maintain an orderly hearing process.* *See* 19 Tex. Admin. Code §89.1170 (b). This grant of sanction authority to special education hearing officers is not otherwise defined in the Agency's Rules. Consequently, there is no regulatory guidance as to the nature or scope of this sanction authority, nor are there any procedures established for determining when and under what circumstances sanctions should be applied. However, the Agency has made applicable to these proceedings, the Texas Rules of Civil Procedure, except as modified or limited by the provisions of 34 C.F.R. §§300.507-300.514, 300.521, or 300.528 or the provisions of the Agency's Rules (19 Tex. Admin. Code §§89.1151-89.1191). *See*, 19 Tex. Admin. Code §89.1185(d). The Texas Rules of Civil Procedure contain three Rules that authorize sanctions against parties and their attorneys for various infractions. One is for discovery abuses (Rule 215), one is for filing frivolous claims and pleadings (Rule 13), and one is for failing to serve the opposing party with copies of pleadings and motions (Rule 21b). Only Rule 215 and Rule 13 are applicable to this proceeding.

Rule 215 of the Texas Rules of Civil Procedure identifies the types of sanctions available to the courts for abuse of the discovery process by counsel and/or parties. These include: (1) an order denying further discovery; (2) an order charging all or a portion of the costs of the discovery to the disobedient party or attorney; (3) an order that matters regarding which the order was made or any other designated facts shall be taken to be established; (4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters into evidence; (5) an order striking pleadings or parts thereof, staying further proceedings until an order is obeyed or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party; (6) an order treating as contempt of court the failure to obey; and (7) an award of reasonable expenses, including attorney's fees. Tex. Rules of Civil Proc., Rule 215.2(b)(1)-(8).

I find that Rule 215 of the Texas Rules of Civil Procedure, which specifies the types sanctions available to address discovery abuses, has been incorporated into and made applicable to special education due process hearings by Agency rule, to the extent that such sanctions comport with the IDEA and its implementing federal and state regulations.

Additionally, Rule 13 of the Texas Rules of Civil Procedure authorizes a court to make a "contempt of court" finding and render those sanctions available under Rule 215 any time a party brings a fictitious suit or files a fictitious pleading or makes statements in a pleading they know to be groundless and false, for purposes of securing a delay of the trial of the cause. I also find that 19 Tex. Admin. Code §89.1185(d) incorporates into and makes applicable to these proceedings Rule 13 of the Texas Rules of Civil Procedure, which governs both the filing of fictitious suits and pleading and making groundless and false statements in pleadings for purposes of securing a delay of the trial of the cause.

Through the incorporation of Rule 215 and Rule 13 of the Texas Rules of Civil Procedure by the Texas Education Agency as part of the special education due process hearing procedures in

Texas, special education hearing officers have been conferred the authority to impose those sanctions described in Rule 215, as necessary to maintain an orderly hearing process, to the extent that such sanctions do not violate the IDEA or its implementing federal and state regulations. 19 Tex. Admin. Code §89.1180(f). Moreover, hearing officers have been empowered with even broader sanction authority under their mandate to "make any other orders as justice requires" as long as such orders are necessary for maintaining an orderly hearing process. I also find that hearing officers acting in their quasi-judicial capacity, like courts, have those inherent powers necessary to protect the integrity of the hearing process. *See Webb v. Dist. of Columbia*, 146 F.3d. 964 (D.C. Cir. 1998), 331 U.S.App.D.C. 23, on remand 189 F.R.D. 180; *Simon v. Najon*, 71 F.3d. 9 (1st Cir. 1995), on remand 951 F.Supp. 279. Such orders may include, where appropriate, other types of sanctions more specifically designed to address abuses of the administrative hearing process.

Accordingly, I find that the Texas Education Agency has conferred upon its special education due process hearing officers the authority to impose those sanctions contained in Rule 215 of the Texas Rules of Civil Procedure, as limited herein, and other types of sanctions as necessary for maintaining an orderly hearing process, to the extent such sanctions are not inconsistent with the administrative process, the IDEA and its implementing federal and state regulations.

Concomitant with this finding is that not all of the Rule 215 sanctions are available to special education hearing officers. I find that special education hearing officers do not have the authority to make "contempt of court" determinations in these administrative proceeding. In this regard, I find that the Rule 215 was promulgated by the Texas Supreme Court for implementation in the District and County Courts of the State of Texas in recognition that such Court's already had "contempt of court" powers. Without express statutory or regulatory authority granting special education hearing officers such powers, I decline exercise a power of contempt for which the Agency may lack specific delegation and enforcement authority.

Additionally, I find that special education due process hearing officers do not have the authority to award attorney's fees or charge costs against an offending party for sanctionable conduct in these administrative proceedings. Although the IDEA does not specifically address the sanction authority of special education due process hearing officers, it also does not grant to special education due process hearing officers the authority to order attorneys fees or costs to prevailing parties in special education due process hearings. Instead, the IDEA has reserved such authority to the state and federal district courts as part of their quasi-appellate jurisdiction. *See* 20 U.S.C. §1415(i)(3). Additionally, the IDEA gives the state and federal district courts the right to not only review the record of the administrative proceeding but to also hear additional evidence at the request of a party and to grant such relief as the court determines appropriate. 20 U.S.C. §1415(i)(2)(B). Accordingly, IDEA envisions that issues concerning attorney's fees and costs of the proceeding would be adjudicated in the Courts, not in the special education administrative hearings. Accordingly, based on the absence of any express statutory or regulatory authority, coupled with the IDEA's recognition that only Courts may determine attorney's fees and cost issues in these proceedings, I decline to recognize that special education hearing officers in the State of Texas have the authority to award attorney's fees or costs as sanctions for abuses of the administrative process.⁵

⁵ In Texas, Administrative Law Judges with the State Office of Administrative Hearings have statutory authority to impose appropriate sanctions similar to those described in Rule 215 of the Texas Rules of Civil Procedure. This includes the ability to charge all or any part of the expenses of discovery against the offending party or its representative. Tex. Gov't Code §2003.0421. However, in most types of

Requested Relief

Ingram ISD's Motion to Dismiss contains two Motions seeking relief. The first involves a Motion to Dismiss on the Merits, with supporting affidavits. In this Motion, Ingram ISD claims that this case should be dismissed with prejudice because the evidence contained in its supporting affidavits establishes that Ingram ISD provided Student with a free appropriate public education. Specifically, Ingram ISD argues that it provided to Student appropriate tutorial services; compatible software for his computer; appropriate modifications, including taped texts; and appropriate counseling services. Ingram ISD also alleges that it has proven that the parents' allegations were without merit.⁶ Ingram ISD contends that Student's educational performance is too high and successful to maintain a complaint against the school district and that if any procedural errors existed, they were *de minimus* in nature and would not result in a prevailing decision for Petitioner.

I decline to address the merits of this case through Respondent's Motion to Dismiss. I find that this aspect of its Motion is, in effect, a Motion for Summary Judgment in that it seeks a finding on the merits of the case based on supporting evidentiary affidavits and documents.⁷ I also find it was not timely filed. On March 9, 2003, by agreement of the parties, this matter was set for hearing on May 24 and 25, 2004. To be timely filed, a summary judgment motion must be filed and served on the opposing party at least twenty-one days before the time specified for hearing. Tex. Rules of Civil Proc., Rule 166a. Ingram ISD had at least 75 days prior notice of the hearing date and failed to file and set a hearing date on its Motion during that time period. Moreover, I note that the material information contained in its Motion and affidavits was readily available to Ingram ISD throughout this proceeding and that this Motion for Summary Judgment could have been timely filed.

Even assuming it is appropriate to determine the relative merit of Petitioner's case for sanction purposes, I note that Student's contested IEP is not attached to Respondent's Motion. Without evidence of Student's IEP, I am unable to conclude, as requested by Respondent, that his IEP was appropriate or that Petitioner's case lacked merit. Accordingly, I decline to rule on the merits of Petitioner's case and deny Respondent's Motion to Dismiss on the Merits.

Respondent's also seeks as sanctions, a dismissal of this matter with prejudice and an award of attorney's fees. In this Motion, Ingram ISD claims that the conduct of Petitioner's counsel was unreasonable in that he failed to show due diligence in preparing this case for hearing. Respondent points out, correctly, that Petitioner's counsel failed to include an expert in his list of witnesses for the May 24, 2004 hearing, despite previously having given that reason for

administrative proceedings, this authority does not include the ability to award attorney's fees. *See* Op. Atty Gen. 2002 No. JC-0495. However, there are certain types of hearings, such as Public Utility Commission hearings, where the ALJ's have been given statutory sanction authority to punish a party for contempt to the same extent as a district court and to order a party to pay reasonable expenses, including attorney's fees. Tex. Gov't Code §2003.049.

⁶Respondent cites to *Adam J., bnf Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003) for the proposition that procedural defects, if any, do not constitute a violation of the right to a free appropriate public education unless they result in the loss of educational opportunity.

⁷In its Supplemental Motion, Respondent couches its Motion to Dismiss on the Merits as falling under Rule 165a of the Texas Rules of Civil Procedure, which governs dismissals of cases for want of prosecution. I decline to dismiss this case for want of prosecution since Petitioner has requested a dismissal of the case prior to the scheduled hearing date. Accordingly, Rule 165a of the Texas Rules of Civil Procedure is not applicable to this particular proceeding.

the prior dismissals and refilings. Additionally, Respondent contends that the pleadings of Petitioner's counsel are frivolous and groundless and should be dismissed with prejudice pursuant to Rule 13 of the Texas Rules of Civil Procedure and Section 9.012(e) of the Texas Civil Practices and Remedies Code.⁸ Respondent also seeks an award of attorney's fees against Petitioner's counsel as sanctionable conduct for his dilatory tactics and manipulation of the hearing process and for failing to advise the family that the case was frivolous.

Sanctionable Conduct

I find that Petitioner and his counsel engaged in sanctionable conduct in this matter. I find that Petitioner and his counsel dismissed and refiled the same case on four separate occasions solely to manipulate hearing process and the hearing date because of their lack of due diligence in seeking and obtaining an expert evaluation and report of Student. Their dilatory tactics and lack of preparation caused Ingram ISD to incur the expenses and inconvenience associated with having to prepare for hearing on four separate occasions. This conduct also resulted in the Texas Education Agency incurring additional expenses in having to docket these refilings and in reassigning these cases. It also incurred the costs associated with the hearing process itself, including the undersigned hearing officer having to conduct multiple prehearing conferences to identify the issues for hearing and in setting new hearing dates. This offensive conduct interfered with the parties' rights to an expeditious hearing on the merits as envisioned by the IDEA and denied the parties an orderly hearing process.

Appropriate Sanctions

Since special education due process hearings are governed by both federal and state statutes and regulations, I look to both Texas case law and federal case law to derive the proper standards for determining the appropriate sanctions to impose in this proceeding. For purposes of this hearing, the applicable state and federal standards are harmonious.

Under Texas law, to determine whether the requested sanction of a dismissal with prejudice is appropriate, a court or hearing officer must determine whether imposing such a sanction would be "just" under the circumstances. *See TransAmerica National Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). A permissible sanction should be no more severe than required to satisfy a legitimate purpose. When determining whether the sanction to imposed is "just", a court or hearing officer must consider two factors. First, is whether there is a direct relationship between the offensive conduct and the sanctions. *TransAmerica*, 811 S.W.2d at 917. Under this principle, a court or hearing officer must attempt to determine if the offensive conduct is attributable to the attorney, the party, or both. *Id.* This second principle generally requires a court or hearing officer to first test the effectiveness of lesser sanctions before entering "death penalty" sanctions. *Id. at 918* A "death penalty" sanction amounts to an adjudication of a cause without examining the merits of the case. Therefore, this sanction should be employed when a party's hindrance of the discovery or hearing process justifies a presumption that his claims or defenses lack merit. *Jones v. Andrew*, 873 S.W.2d 102 (Tex. App. - Dallas 1994, no writ). In addition, constitutional due process precludes the imposition of sanctions that determine the merits of a case unless the abuse justifies a legal presumption that the disobedient party's claim or

⁸ Although the Texas Education Agency has not incorporated Section 9.012(e) of the Texas Civil Practices & Remedies Code into these proceedings, the sanctionable conduct described therein (groundless and fictitious lawsuits) would also be recognized as sanctionable conduct under the general grant of sanction authority given hearing officers, it being a part of their responsibility to maintain an orderly hearing process.

defenses lack merit. *Id.*; *See also, Kugle v. DaimlerChrysler*, 88 S.W.3d 355 (Tex. App. - San Antonio 2000, writ denied).

Under federal law, in determining whether a sanction of dismissal or default is appropriate, the federal courts weigh five factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the opposing party; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997).

Additionally, courts are instructed to determine if there is willful misconduct or bad faith in the course of the litigation. When there is bad faith conduct in the course of litigation that could be adequately sanctioned under applicable rules, then courts ordinarily rely on the rules rather than their inherent powers, but if in informed discretion of the court, neither statute or rules are up to the task, a court may safely rely on its inherent powers. *Chambers v. NASCO, Inc.*, 111 S.Ct. 2123, 501 U.S. 32, 115 L.Ed.2d. 27, rehearing denied 112 S.Ct. 12, 501 U.S. 1269, 115 L.Ed.2d. 1097.

In applying these respective standards to the case at hand, I find that a dismissal with prejudice is appropriate. Mindful that the IDEA gives parents a right to a hearing (20 U.S.C. §1415(f)(2) and (h); 34 C.F.R. §300.509), Petitioner has had four opportunities to exercise this right and has failed to do so. In this regard, I find that both Petitioner and Petitioner's counsel were involved in and responsible for the multiple dismissals and refilings of this action. The record indicates that it was counsel's lack of diligence in obtaining an expert report that was the cause of the dismissals and refilings and that Petitioner knew or should have known that such dismissals and refilings were taking place and adversely affecting the hearing process. Moreover, Petitioner's counsel was previously cautioned of the possible consequences of any further attempts to delay the hearing by dismissing and refiling this action and failed to heed this warning. Petitioner was afforded ample opportunity to obtain the expert report and to proceed to hearing, but failed to do so. Accordingly, in applying both the federal and state standards, I find that the conduct of Petitioner's counsel was willful, intentional, in bad faith and sufficiently egregious as to justify the "death penalty" sanction of a dismissal with prejudice. It is the totality of the filings and dismissals coupled with the most recent dismissal despite the prior warning, along with counsel's lack of diligence in obtaining the expert report and resulting dilatory tactics to delay the hearing, that justify the sanction of a dismissal with prejudice in this matter. Unless this matter is dismissed with prejudice, there is nothing to prevent Petitioner from again refiling this matter and continuing to abuse the hearing process. A dismissal with prejudice is the appropriate sanction in this matter in that it is designed to protect the public's interest in expeditious resolution of this matter; it assists the Agency and this hearing officer in managing the docket of hearings; it eliminates the continued risk of prejudice to Ingram ISD of having to defend and incur costs associated with the multiple filings and dismissals of this proceeding; and there are no available less drastic sanctions capable of addressing the multiple filings and dismissals of this proceeding. *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997). Accordingly, I find that a dismissal with prejudice is the appropriate sanction to impose on Petitioner and his counsel in this matter.

V.

Conclusions of Law

1. Through the incorporation of Rule 215 and Rule 13 of the Texas Rules of Civil Procedure by the Texas Education Agency as part of the special education due process hearing procedures in Texas, special education hearing officers have been conferred the authority

- to impose those sanctions described in Rule 215, as necessary to maintain an orderly hearing process, to the extent that such sanctions do not conflict with the IDEA or its implementing federal and state regulations. 19 Tex. Admin. Code §89.1180(f).
2. The Texas Education Agency through its rule-making authority has empowered special education hearing officers with broad inherent sanction powers including "making any other orders as justice requires" to maintain an orderly hearing process, to the extent such powers do not conflict with the IDEA or its implementing federal and state regulations. Such orders may include, where appropriate, other types of sanctions not specified in Rule 215 of the Texas Rules of Civil Procedure that are more specifically designed to address abuses of the administrative hearing process. 19 Tex. Admin. Code §89.1180(f).
 3. Not all of the sanctions listed in Rule 215 of the Texas Rules of Civil Procedure are available to special education hearing officers. Special education hearing officers do not have the authority to make "contempt of court" determinations in these administrative proceedings. Rule 215 was promulgated by the Texas Supreme Court for implementation in the District and County Courts of the State of Texas in recognition that such Court's already had "contempt of court" powers. Without express statutory or regulatory authority granting special education hearing officers such powers, the exercise of a power of contempt for which the Agency may lack specific delegation and enforcement authority would be inappropriate.
 4. Special education due process hearing officers do not have the authority to award attorney's fees or charge costs against an offending party for sanctionable conduct in these administrative proceedings. Although the IDEA does not specifically address or place limitations on the sanction authority of hearing officers, it also does not grant to special education due process hearing officers the authority to order attorneys fees or costs to prevailing parties in special education due process hearings. Instead, the IDEA has reserved such authority to the state and federal district courts as part of their quasi-appellate jurisdiction. The IDEA envisions that issues concerning attorney's fees and costs arising out of the administrative proceedings would be adjudicated in the Courts, not in the special education administrative hearings. Accordingly, absence any express statutory or regulatory authority authorizing special education hearing officers to award attorneys fees or costs in special education due process hearings coupled with the IDEA's recognition that only Courts may determine attorney's fees and cost issues in these proceedings, I conclude that special education hearing officers in the State of Texas do not have the authority to award attorney's fees or costs as sanctions for abuses of the administrative hearing process. *See* 20 U.S.C. §1415(i)(3).
 5. Special education due process hearing officers, acting in a quasi-judicial capacity, as do the courts, have inherent sanction powers to protect the integrity of their positions and to prevent abuse of the hearing process. *See Webb v. Dist. of Columbia*, 146 F.3d. 964 (D.C. Cir. 1998), 331 U.S. App. D.C. 23, on remand 189 F.R.D. 180; *Simon v. Najon*, 71 F.3d. 9 (1st Cir. 1995), on remand 951 F. Supp. 279.
 6. Under Texas law, to determine whether a sanction of a dismissal with prejudice is appropriate, a court or hearing officer must determine whether imposing such a sanction would be "just" under the circumstances. *See TransAmerica National Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). A permissible sanction should be no more severe than required to satisfy a legitimate purpose. When determining whether the sanction to imposed is "just", a court or hearing officer must consider two factors. First,

is whether there is a direct relationship between the offensive conduct and the sanctions. *TransAmerica*, 811 S.W.2d at 917. Under this principle, a court or hearing officer must attempt to determine if the offensive conduct is attributable to the attorney, the party, or both. *Id.* This second principle generally requires a court or hearing officer to first test the effectiveness of lesser sanctions before entering "death penalty" sanctions. *Id. at 918* A "death penalty" sanction amounts to an adjudication of a cause without examining the merits of the case. Therefore, this sanction should be employed when a party's hindrance of discovery or the hearing process justifies a presumption that his claims or defenses lack merit. *Jones v. Andrew*, 873 S.W.2d 102 (Tex. App. - Dallas 1994, no writ). In addition, constitutional due process precludes the imposition of sanctions that determine the merits of a case unless the abuse justifies a legal presumption that the disobedient party's claim or defenses lack merit. *Id.*; *See also, Kugle v. DaimlerChrysler*, 88 S.W.3d 355 (Tex. App. - San Antonio 2000, writ denied).

7. Under federal law, in determining whether a sanction of dismissal or default is appropriate, the federal courts weigh five factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the opposing party; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997).
8. Additionally, courts are instructed to determine if there is willful misconduct or bad faith in the course of the litigation. When there is bad faith conduct in the course of litigation that could be adequately sanctioned under applicable rules, then courts ordinarily rely on the rules rather than their inherent powers, but in the informed discretion of the court, neither statute or rules are up to the task, a court may safely rely on its inherent powers. *Chambers v. NASCO, Inc.*, 111 S.Ct. 2123, 501 U.S. 32, 115 L.Ed.2d. 27, rehearing denied 112 S.Ct. 12, 501 U.S. 1269, 115 L.Ed.2d. 1097.
9. A dismissal with prejudice is the appropriate sanction in this matter in that it is designed to protect the public's interest in expeditious resolution of this matter; it assists the Agency and this hearing officer in managing the docket of hearings; it eliminates the continued risk of prejudice to Ingram ISD of having to defend and incur costs associated with the multiple filings and dismissals of this proceeding; and there are no available less drastic sanctions capable of addressing the multiple filings and dismissals of this proceeding. *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997).
10. There exists the legal presumption that Petitioner's case lacked merit based on the multiple filings and dismissals of the case coupled with Petitioner's failure to obtain an expert report and designate an expert witness after using this excuse to obtain prior dismissals. *Kugle v. DaimlerChrysler*, 88 S.W.3d 355 (Tex. App. - San Antonio 2000, writ denied).
11. The IDEA has no presentment provision requiring a parent to present his or her complaint to an ARD Committee prior to requesting a due process hearing. Accordingly, to order relief requiring Petitioner to first notify Respondent of any concerns prior to filing any subsequent due process hearing as a sanction resulting from this proceeding would be inappropriate and contrary to a parent's recognized hearing right under the IDEA. 20 U.S.C. §1415(b) (6) and (f).

ORDER

After due consideration of the record and the foregoing findings of fact and conclusions of law, I ORDER:

1. Petitioner's Motion to Dismiss without prejudice is DENIED.
2. Ingram ISD's Motion to Dismiss on the Merits is DENIED.
3. Ingram ISD's Motion for Sanctions seeking an award of attorney's fees and costs is DENIED.
4. Ingram ISD's Motion for Sanctions seeking an order requiring Petitioner to hereafter notify Ingram ISD of any complaints prior to filing a due process hearing is DENIED.
4. Ingram ISD's Motion for Sanctions seeking a dismissal with prejudice to refiling same is GRANTED and this matter is hereby DISMISSED with prejudice to refiling same.

SIGNED this 19th day of June 2004.

/s/ James W. Holtz

James W. Holtz
Special Education Hearing Officer

DOCKET NO. 219-SE-0204

Student, BNF Parent	§	BEFORE A SPECIAL EDUCATION
	§	
V.	§	HEARING OFFICER
	§	
INGRAM INDEPENDENT	§	
SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

SYNOPSIS

Issue: Whether four filing and dismissals of the same due process hearing for purposes of manipulating the hearing date constitutes sanctionable conduct?

Held: For School District. Petitioner and his counsel's numerous filings and dismissals of the same due process hearing was to manipulate hearing process and the hearing date because of their lack of due diligence in seeking and obtaining an expert evaluation and report of the student. Their dilatory tactics and lack of preparation caused the school district to incur the expenses and inconvenience associated with having to prepare for hearing on four separate occasions. This offensive conduct interfered with the parties' rights to an expeditious hearing on the merits as envisioned by the IDEA and denied the parties an orderly hearing process.

Cite: 19 Tex. Admin. Code §89.1170(b).

Issue: What is the nature and scope of the sanction authority granted to special education due process hearing officers in the State of Texas?

Held: Through the incorporation of Rule 215 and Rule 13 of the Texas Rules of Civil Procedure by the Texas Education Agency as part of the special education due process hearing procedures in Texas, special education hearing officers have authority to impose those sanctions described in Rule 215, as necessary to maintain an orderly hearing process, to the extent that such sanctions do not violate the IDEA or its implementing federal and state regulations. 19 Tex. Admin. Code §89.1180(f).

Moreover, hearing officers are empowered with even broader sanction authority under their mandate to "make any other orders as justice requires," as long as such orders are necessary for maintaining an orderly hearing process. Hearing officers acting in their quasi-judicial capacity, like courts, have those inherent powers necessary to protect the integrity of the hearing process. *See Webb v. Dist. of Columbia*, 146 F.3d. 964 (D.C. Cir. 1998), 331 U.S.App.D.C. 23, on remand 189 F.R.D. 180; *Simon v. Najon*, 71 F.3d. 9 (1st Cir. 1995), on remand 951 F.Supp. 279. Such orders may include, where appropriate, other types of sanctions more specifically designed to address abuses of the administrative hearing process.

Cite: Rule 215 and Rule 13 of the Texas Rules of Civil Procedure; 19 Tex. Admin. Code §§ 89.1170 (b) and 89.1180(f); *See Webb v. Dist. of Columbia*, 146 F.3d. 964 (D.C. Cir. 1998), 331 U.S.App.D.C. 23, on remand 189 F.R.D. 180; *Simon v. Najon*, 71 F.3d. 9 (1st Cir. 1995), on remand 951 F.Supp. 279.

Issue: What limitations have been placed on the sanction authority of special education due process hearing officers in the State of Texas?

Held: Not all of the Rule 215 sanctions are available to special education hearing officers. Special education hearing officers do not have the authority to make "contempt of court" determinations in these administrative proceeding. Additionally, special education due process hearing officers do not have the authority to award attorney's fees or charge costs against an offending party for sanctionable conduct. Although the IDEA does not specifically address the sanction authority of special education due process hearing officers, it also does not grant to special education due process hearing officers the authority to order attorneys fees or costs to prevailing parties in special education due process hearings. Instead, the IDEA has reserved such authority to the state and federal district courts as part of their quasi-appellate jurisdiction. *See* 20 U.S.C. §1415(i)(3). Additionally, the IDEA gives the state and federal district courts the right to not only review the record of the administrative proceeding but to also hear additional evidence at the request of a party and to grant such relief as the court determines appropriate. 20 U.S.C. §1415(i)(2)(B). Accordingly, IDEA envisions that issues concerning attorney's fees and costs of the proceeding would be adjudicated in the courts, not in the special education administrative hearings.

Cite: 20 U.S.C. §1415(i)(3)

Issue: What constitutes an appropriate sanction for Petitioner's misconduct?

Held: A dismissal with prejudice is the appropriate sanction in this matter in that it is designed to protect the public's interest in expeditious resolution of this matter; it assists the Agency and this hearing officer in managing the docket of hearings; it eliminates the continued risk of prejudice to the school district of having to defend and incur costs associated with the multiple filings and dismissals of this proceeding; and there are no available less drastic sanctions capable of addressing the multiple filings and dismissals of this proceeding.

Cite: *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997).