BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of: STUDENT, Petitioner, v. SANTA MARIA JOINT UNION HIGH SCHOOL DISTRICT, Respondents.	OAH CASE NO. N2006070104 **ORDER GRANTING PETITIONER'S REQUEST FOR SANCTIONS**

On July 5, 2006, the Office of Administrative Hearings (OAH) received from attorney Kathy Greco a request for a due process hearing (Complaint), on behalf of Student, naming as the Respondent the Santa Maria Joint Union High School District (District). On July 13, 2006, OAH received from attorney Stacy Inman, on behalf of the District, a Motion to Dismiss because Petitioner served the Complaint on Ms. Inman and not the District. Petitioner filed an Opposition Brief on July 18, 2006. Petitioner also requested that OAH impose sanctions on the District because Ms. Inman informed Ms. Greco on June 16, 2006, that all correspondence and communication regarding Student should be sent to Ms. Inman and not the District. On July 18, 2006, the District filed a Reply Brief.

On July 21, 2006, Administrative Law Judge Judith Kopec issued an Order that denied the District's motion and ordered the District to show cause why OAH should not grant Petitioner's request for attorney's fees. On July 28, 2006, OAH received Student's brief in support of attorney's fees. Respondent filed its brief in opposition on August 2, 2006.

APPLICABLE LAW

An ALJ has the authority to subject a person to the issuance of a sanction to shift expenses from one party to another, when a party acts in bad faith. (Government Code § 11455.30 [hereinafter, section 11455.30]).

Section 11455.30 states:

(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. [Hereinafter, section 128.5].

(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.

Code of Civil Procedure section 128.5 states:

(a) Every trial court may order a party, the party's attorney, or both to pay any 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. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.

(b) For purposes of this section:

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint only if the actions or tactics arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section.

(2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.

(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

(d) In addition to any award pursuant to this section for conduct described in subdivision (a), the court may assess punitive damages against the plaintiff upon a determination by the court that the plaintiff's action was an action maintained by a person convicted of a felony against the person's victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony,

and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

(e) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.

The authority of an ALJ to subject to shift expenses is modified for special education hearings. (5 Cal. Code of Regs., title 5, § 3088) [Hereinafter, section 3088]). Section 3088 states:

(a) Provisions for contempt sanctions, order to show cause, and expenses contained in Government Code sections 11455.10-11455.30 of the Administrative Procedure Act apply to special education due process hearing procedures except as modified by (b) through (e) of this section.

(b) Only the presiding hearing officers[1] may initiate contempt sanctions and/or place expenses at issue.

(c) Prior to initiating contempt sanctions with the court, the presiding hearing officer shall obtain approval from the General Counsel of the California Department of Education.

(d) The failure to initiate contempt sanctions and/or impose expenses is not appealable.

(e) The presiding hearing officer may, with approval from the General Counsel of the California Department of Education, order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel, to the California Special Education Hearing Office for the reasons set forth in Government Code section 11455.30(a).

Section 3088 treats contempt sanctions and shifting fees differently. Section 3088, subdivision (c), requires that, "Prior to initiating contempt sanctions with the court, [meaning, prior to certifying the facts to justify contempt, as required by section 11455.20] the presiding hearing officer shall obtain approval from the General Counsel of the California Department of Education [hereinafter, CDE]." Conversely, with regard to expenses, section 3088, subdivision (b), specifically omits any requirement that an ALJ obtain approval from the CDE. Accordingly, section 3088, subdivision (b), does not modify

[1] Government Code section 11405.80 states: "Presiding officer means the agency head, member of the agency head, *administrative law judge*, hearing officer, or other person *who presides in an adjudicative proceeding*." (Emphasis added). This section makes clear that an ALJ who presides in an adjudicative proceeding is the "presiding officer," a point confirmed in *Wyner v. Manhattan Beach Unified School District, et. al.* (2000) 223 F.3d 1026, 1029, where the court stated, "Clearly, § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."

or limit the ALJ's authority when presiding over a special education hearing from shifting expenses from one party to another when a party has acted in bad faith. In short, with respect to the authority provided to an ALJ, section 11455.30 applies in special education hearings in the same fashion as it applies in other administrative hearings.[2]

Section 11455.30 references section 128.5. 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 the sanctioned party's conduct reflected tactics or actions were performed in bad faith and that they were frivolous, designed to harass, or designed to cause unnecessary delay. (*Childs v. Painewebber Incorporated* (1994) 29 Cal.App.4th 982, 996; *County of Imperial v. Farmer* (1998) 205 Cal.App.3d 479, 486.). The trial judge must provide advanced notice and the opportunity to be heard before sanctions can be imposed. (*Pacific Trends Lamp and Lighting Products, Inc. v. J. White, Inc.* (1998) 65 Cal.App.4th 1131, 1136.). The purpose of the statute is not only to compensate, but it is also a means of controlling burdensome and unnecessary legal tactics. (*On v. Cow Hollow Properties* (1990) 222 Cal.App.3d 1568, 1577.) Bad faith is shown when a party engages in actions or tactics that are without merit, frivolous, or solely intended to cause unnecessary delay. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.) However, the bad faith requirement does not impose a determination of evil motive, and subjective bad faith may be inferred. (*Id*., at page 702).

DISCUSSION

The District contends that it did not act in bad faith or engage in frivolous litigation tactics when it filed its Motion to Dismiss. The District asserts that it believed that the June 16, 2006 letter to Ms. Greco did not cover the service of a due process complaint, and Petitioner needed to serve the Complaint on the District. District's opposition brief also states that Ms. Inman did not have the legal authority to authorize Petitioner to serve the Complaint on her office instead of the District.

A fair reading of the June 16, 2006 letter does not support the District's position that Ms. Inman did not intend to cover Petitioner's service of a due process complaint. The letter states that "[a]ny and all future correspondence and/or communications regarding [Student] should be sent to this [Schools Legal Service] office." The June 16, 2006 letter does not exclude the service of a due process complaint, and prohibits Petitioner and Ms. Greco from sending any document directly to the District. Ms. Inman could reasonably expect that Petitioner would file a due process complaint because of the nature of the parties' dispute at the time of the June 16, 2006 letter as set forth in the pending Motion for Stay Put. The

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[2] Section 3088, subdivision (e), requires approval by CDE if the ALJ wants to order reasonable expenses attributable to a party's bad faith to be paid to the California Special Education Hearing Office (SEHO). (Such expenses are now to be paid to OAH, Special Education Division, SEHO's successor). Section 3088, subdivision (e), modifies section 11445.30 by *adding* a remedy allowing an ALJ, with the approval of CDE, to require a party who engages in bad faith to pay reasonable expenses, including, costs of personnel to SEHO (OAH). The authority of the ALJ to shift expenses when a party engages in bad faith is further clarified by Cal. Code Regs., title 1, section 1040.

Motion to Dismiss constitutes bad faith as the June 16, 2006 letter informed Ms. Greco to serve all documents solely on Ms. Inman's office, and then Ms. Inman filed the motion after Ms. Greco complied with the letter.

Regarding the service of a due process complaint, California Code of Regulations, title 5, section 3083(a) permits a petitioner to serve a respondent's attorney if the attorney is the representative of record in the proceeding. Ms. Inman's letter that Petitioner needed to direct all future correspondence and communications regarding Student constituted a representation in this case involving Student. The District should have expected that Petitioner would serve the Complaint on Ms. Inman and that the Motion to Dismiss lacked legal merit. The Motion to Dismiss was also intended to solely delay this matter since Ms. Inman expected Petitioner to re-file the Complaint if OAH granted the Motion to Dismiss. (July 17, 2006 Letter from Ms. Inman to Ms. Greco.)

In Petitioner's brief and Ms. Greco's supporting declaration, Ms. Greco requests attorney's fees in the amount of $2,137.50 at $225 per hour for 9.5 hours billed in opposing Respondent's Motion to Dismiss and responding to the Order to Show Cause. A review of the Ms. Greco's time spent on this matter does not give adequate justification to reimburse Ms. Greco for speaking to Student's Mother's advocate, 85 minutes, since Ms. Greco represents Student in this matter. Also, Ms. Greco did not need to consult with Mother to file Petitioner's briefs, 50 minutes. The time spent by Ms. Greco in conducting research and writing was reasonable concerning the opposition to the Motion to Dismiss and replying to the Order to Show Cause. However, the time Ms. Greco spent in reviewing the District's Special Appearance was not necessary. Also, Ms. Greco is not entitled for reimbursement for her time spent filing and serving Petitioner's papers since these tasks do not require legal expertise. It is estimated that file and service of Petitioner's three briefs took 30 minutes. Therefore, Petitioner is entitled for attorney's fees in the amount of $1,215 for 5.4 hours spent on this matter.

ORDER

1. Petitioner's Motion for Sanctions against the District is granted.

2. The District shall pay Petitioner's counsel, Ms. Greco, $1,215 within 10 business days of this Order.

Dated: August 7, 2006

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PETER PAUL CASTILLO
Administrative Law Judge
Special Education Division
Office of Administrative Hearings