

PARKER & COVERT LLP
17862 EAST SEVENTEENTH STREET
SUITE 204 • EAST BUILDING
TUSTIN, CALIFORNIA 92780
TELEPHONE (714) 573-0900
FACSIMILE (714) 573-0998
jmott@parkercovert.com

FILED - EASTERN DIVISION
CLERK, U.S. DISTRICT COURT
MAY 17 2007
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

Jonathan J. Mott, State Bar No. 118912
Attorneys for Defendant ALVORD UNIFIED
SCHOOL DISTRICT

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION

LOGGED

DIANE ALLEN, DAVID
BURKENROAD, and BRIAN ALLEN,
Plaintiffs,

CASE NO. ED CV 06-0311 SGL
JUDGE: Stephen G. Larson
CTRM: 1

ALVORD UNIFIED SCHOOL
DISTRICT, AND THE OFFICE OF
ADMINISTRATIVE HEARINGS,
SPECIAL EDUCATION DIVISION,
Defendants.

~~PROPOSED~~ JUDGMENT
UPHOLDING JANUARY 6, 2006
ORDER IMPOSING SANCTIONS

Date Action Filed: March 16, 2006

After considering the trial briefs of the parties, the stipulated administrative record and evidence produced, and good cause appearing therefor, this Court finds as follows:

IT IS HEREBY ORDERED that judgment be entered in favor of Defendant Alvord Unified School District, as follows:

1. Following exercise of its independent judgment after fully reviewing the administrative record in this matter, the Court finds that the Administrative Law Judge's ("ALJ") Order Imposing Sanctions, dated January 6, 2006, in Office of Administrative Hearings ("OAH") Case No. N2005070955, is both entitled to substantial deference and supported by a preponderance of the evidence. Consequently, this Court elects to accept

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MAY 21 2007
CENTRAL DISTRICT OF CALIFORNIA
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1 the ALJ's findings in their entirety. (Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467,
2 1473-74 (9th Cir. 1993));

3 2. Inasmuch as the Court consequently rejects the entire premise of the instant
4 lawsuit, which alleges error on the part of the ALJ, judgment shall be and hereby is
5 entered against Plaintiffs and in favor of Defendant Alvord Unified School District.

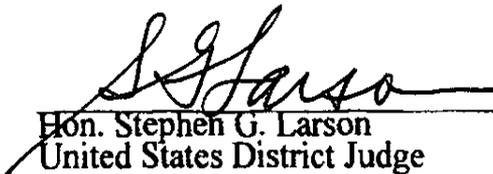
6 3. The Order Imposing Sanctions against Brian Allen and David Burkenroad
7 is affirmed and judgment shall be and hereby is entered against Brian Allen and David
8 Burkenroad, and in favor of Alvord Unified School District, in the amount of
9 \$18,000.00, jointly and severally.

10 4. Plaintiffs shall take nothing by reason of their Complaint; and

11 5. Defendant Alvord Unified School District shall recover its costs.

12 **IT IS SO ORDERED.**

13
14 Dated: 5-17-07



Hon. Stephen G. Larson
United States District Judge

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PROOF OF SERVICE

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STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 years and am not a party to this action. My business address is PARKER & COVERT LLP, 17862 East Seventeenth Street, Suite 204, East Building, Tustin, California 92780-2164. On May 17, 2007, I served the following document(s) described as [PROPOSED] JUDGMENT UPHOLDING JANUARY 6, 2006 ORDER IMPOSING SANCTIONS parties in this action as follows:

by placing the original a true copy thereof enclosed in sealed envelopes addressed as follows:

David Burkenroad, Esq.
11514 Vienna Way
Los Angeles, CA 90066-2113

Attorneys for Plaintiffs
Tel.: (310) 572-1585
Fax: (310) 397-0732

Peter M. Williams
Deputy Attorney General
California Department of Justice
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

Tel.: (916) 323-8405
Fax: (916) 324-5567

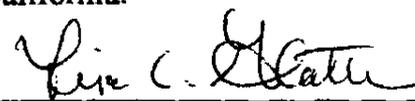
BY U.S. MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Tustin, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

BY FACSIMILE TRANSMISSION: The facsimile machine I used complied with Rule 2003(3), and no error was reported by the machine. Pursuant to Rule 2008(e)(3), I caused the machine to print a record of the transmission.

[State] I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[Federal] I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 17, 2007, at Tustin, California.



Lisa C. Glatter

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CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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THIS CONSTITUTES NOTICE OF
ENTRY AS REQUIRED BY FRCP 77(d)

5-16-07

EASTERN DIVISION
BY *[Signature]* DEPUTY

FILED - EASTERN DIVISION
CLERK, U.S. DISTRICT COURT
MAY 16 2007
CENTRAL DISTRICT OF CALIFORNIA
BY *[Signature]* DEPUTY
JIM HOLMES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DIANE ALLEN, DAVID BURKENROAD,
AND BRIAN ALLEN,

Plaintiffs,

v.

ALVORD UNIFIED SCHOOL DISTRICT
AND THE OFFICE OF
ADMINISTRATIVE HEARINGS,
SPECIAL EDUCATION DIVISION,

Defendants.

CASE NO. EDCV 06-00311 SGL

ORDER UPHOLDING HEARING
OFFICER'S JANUARY 6, 2006,
ORDER IMPOSING SANCTIONS

This action, brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), arises out of an errant form. That form was mailed to the parent of a special needs student enrolled in the defendant school district and was meant to authorize the defendant school district's referral of the student to the Riverside County Department of Mental Health ("RCDMH"). Whether this form went astray through the parent's failure to fill it out and return it (as the hearing officer found), through the postal services' failure to deliver it, or the school district's mishandling of the form due to its arrival time near the end of the school year, the parent's representative and lawyer -- rather than merely securing a new form and seeing to its completion and return -- demanded a due process hearing designed to determine if the district was denying Ashley a free and appropriate public

#45

1 education.

2 After sorting out this underlying dispute, the hearing officer ordered the
3 parent's representative and lawyer to pay \$18,000 in costs to the district as
4 sanctions. That order prompted the present action, which is, in substance, an
5 appeal of the hearing officer's order imposing sanctions. Plaintiffs challenge both
6 the authority of the hearing officer to impose sanctions and the appropriateness of
7 the imposition of sanctions in this case.

8 Upon review of the hearing officer's decision, the Court upholds the decision
9 and orders Allen and Burkenroad to pay the costs as set forth in the hearing
10 officer's decision.

11 I. Background

12 Ashley H. ("Ashley") attended Loma Vista Middle School in the Alvord
13 Unified School District ("the district") during the 2004-2005 school year. She was
14 diagnosed with a learning disability and therefore qualified for special education
15 services.

16 On June 8, 2005, the district convened an individual education plan ("IEP")
17 meeting for Ashley that included a number of teachers and administrators involved
18 in Ashley's education, as well as Ashley and Brian Allen ("Allen").¹ Ashley's mother,
19 Diane Allen (referred to herein as "Ashley's mother" or "Ms. Allen"), attended by
20 telephone.

21 The IEP team agreed that Ashley should be evaluated by the RCDMH. This
22 process required that Ashley's mother sign a consent form. On June 14, 2005, the
23 school psychologist mailed the form to her, with instructions that she sign the form
24 and return it to the school.

25 About a week later, on June 22, 2005, the assistant principal sent a letter to

26
27 ¹ Brian Allen is Diane Allen's brother and Ashley's uncle. Mr. Allen acts as
28 a consultant and paralegal to attorney David Burkenroad. Both Mr. Allen and Mr.
Burkenroad appeal the hearing officer's imposition of sanctions.

1 Ashley's mother stating that the school had not received the completed form and
2 that the school would be closed for the summer on June 30, 2005. There is no
3 evidence of record that plaintiffs did anything in response to the June 22 letter
4 before the actions taken on July 21, 2005.

5 On July 21, 2005, Mr. Allen called Ellen Hinkle ("Hinkle"), the district's special
6 education director, asking about the referral to RCDMH and stating that Ms. Allen
7 had mailed the referral form back to the school. Hinkle informed Allen that the
8 district had not received the consent for referral form and, after the conversation
9 with Allen, initiated a search for the consent form in the district's mailroom, the
10 school, and the post office.

11 That same day, although he understood that it was the district's position that
12 it was merely waiting for the signed consent form before taking action, Allen sent a
13 letter to Hinkle stating that Ms. Allen had already mailed the signed form and
14 scolding her for failing to follow through on the referral to RCDMH by stating: "It is
15 my understanding according to our phone conversation that . . . the referral has not
16 been submitted in a timely manner." Allen made a due process hearing demand
17 that same day, asserting that "the District is refusing to assess Ashley in all of her
18 areas of suspected disabilities with regard to AB 3632 /or AB 2726 eligibility and
19 services."

20 One week later, Allen and Burkenroad communicated with the district an
21 offer to settle the dispute for \$420 in attorney fees incurred.

22 On July 29, 2005, the district sent a second form to Ms. Allen, which she
23 signed. However, Ms. Allen back-dated her signature to June 8, 2005, the date of
24 the initial IEP meeting, before the original form had ever been mailed to her. Allen
25 returned this form to the district on August 2, 2005. Within two days, on August 4,
26 2005, the district had prepared the referral, sent it to RCDMH, and the district
27 offered to hold a resolution meeting, which Ms. Allen declined to attend.

28 Instead, a due process hearing was held on September 26, 2005, which

1 resulted in an October 26, 2005, decision finding in favor of the district that Ashley
2 had not been denied a free and appropriate public education. In that decision, the
3 hearing officer noted that the evidence presented by Ashley's mother and her
4 representative was internally inconsistent, and that the evidence did not support a
5 finding that Ashley's mother returned the original form:

6 The school psychologist testified (and the documents support) that
7 she mailed the consent form to Ms. A on June 14, 2005. Ms. A's
8 declaration states she "submitted the referral on June 12, 2005 to the
9 school in the envelope provided." It is not clear how the mother could
10 mail something back to the school two days before the school mailed
11 it to her. Ms. A's telephone testimony at the hearing occurred while
12 she was at work and was not persuasive. She was interrupted
13 several times by work duties and did not have any of the documents
14 to refresh her recollection or otherwise add credibility to her testimony.
15 Mr. Allen testified at the hearing that he faxed the consent form to the
16 district, but he did not send a cover letter with the form and did not
17 maintain a record of the date in any of his files or records on this
18 case. At best, he provided a range of dates sometime between June
19 12 and June 22, 2005. Mr. Allen wrote a letter, dated August 2, 2005,
20 to the district's attorney which states "According to the mother she
21 submitted the referral on June 12, 2005 to the school in the envelop
22 provided." Petitioner's claim that she sent the consent for referral
23 form to the district earlier than August 2, 2005 is not supported by the
24 evidence.

25 A.R. at 70; see also A.R. at 1 (incorporating this factual finding in the decision on
26 review). In addition to finding in favor of the district on the merits, the hearing
27 officer ordered Allen and Burkenroad to show cause why monetary sanctions
28 should not be imposed upon them for filing a frivolous due process hearing

1 demand.

2 On January 6, 2006, the hearing officer imposed sanctions on Allen and
3 Burkenroad, jointly and severally, in the amount of \$18,000. In relevant part, the
4 hearing officer made the following factual findings:

5 Allen and Burkenroad did several things to elevate the level of
6 dispute in this case[. O]n July 21, 2005, the same day Allen had the
7 phone conversation with Hinkle[, the district's special education
8 director,] Allen sent a self-serving letter to the district purporting to
9 confirm the conversation with Hinkle stating that the referral to mental
10 health "ha[d] not been submitted in a timely manner." Allen and
11 Burkenroad also filed the due process request on July 21, 2005,
12 alleging the district was "refusing" to assess Ashley for mental health
13 services. This statement to the Office of Administrative Hearings was
14 absolutely untrue. At the time they filed the due process request[,] the
15 only thing Allen and Burkenroad knew was that the district claimed it
16 did not receive a referral form that the mother claimed had been
17 mailed. There was no evidence on July 21, 2005, that the district was
18 refusing to make the mental health referral. While Allen and
19 Burkenroad undertook intentional misrepresentations on July 21, it is
20 perhaps more telling to consider what Allen and Burkenroad did NOT
21 do. They did nothing to attempt to replace the consent for referral
22 form that the district did not receive. If their concern was for their
23 client, they would have taken steps to replace the missing consent
24 form to get the mental health referral process started. The district
25 could not make the referral until it had the parent's signed consent.

26

27 On July 28, 2005, one week after they filed the due process request,
28 Allen and Burkenroad presented an invoice for \$420 to the district with

1 a cover letter offering to resolve the case for the payment of attorneys'
2 fees. . . . [T]he invoice for services does not show that Allen or
3 Burkenroad did anything to secure the mother's consent for the
4 mental health referral.

5

6 Allen and Burkenroad discovered on July 21, 2005, that the form Ms.
7 A. purportedly signed and mailed had not reached the district.
8 Viewing the facts in the light most favorable to them, they used the
9 missing document as an opportunity to file a due process request
10 when they knew or should have known that Ashley's education had
11 not suffered, then presented a bill for attorneys' fees and tried to get a
12 quick settlement. . . . When the district refused to pay the fees, Allen
13 and Burkenroad continued to pursue the case rather than dismiss it,
14 even after the second referral consent form had been submitted to the
15 district and the referral for mental health services completed.

16 Decision at 2-4.

17 The hearing officer concluded that imposition of sanctions was warranted:

18 The evidence shows that Burkenroad and Allen did not file the
19 due process request because there was a legitimate, good faith
20 dispute between the district and the parent over the services offered
21 to Ashley. [They] filed the due process request using deliberate
22 misrepresentations for the purpose of supporting a clam for attorneys'
23 fees. The due process request was totally and completely without
24 merit and was filed to harass and annoy the district.

25 Decision at 4.

26 **II. Standard of Review**

27 Under the IDEA, an aggrieved party may file an action in federal court for
28 review of the decision of an impartial due process hearing. 20 U.S.C.

1 § 1415(h)(i)(2)(A). Upon review, a district court must generally give deference to
 2 the hearing officer's administrative findings, especially when they are "thorough and
 3 careful." Union School Dist. v. Smith, 15 F.3d 1519, 1524 (9th Cir. 1994).²

4 III. Hearing Officer's Authority to Impose Sanctions

5 Plaintiffs challenge the authority of the hearing officer to impose sanctions.

6 The hearing officer's authority to impose sanctions is found in California
 7 Government Code § 11455.30, which provides, generally, that officers who preside
 8 over state administrative proceedings may require a party, attorney, or
 9 representative of a party to pay reasonable expenses, including attorney fees,
 10 incurred as a result of bad faith actions, frivolous tactics, or tactics intended to
 11 cause unnecessary delay. Cal. Gov't Code § 11455.30(a).³ The California Code of
 12 Regulations specifically confers these powers upon hearing officers who preside
 13 over special education due process hearings, such as the one at issue in this case.

14
 15 ² The deferential standard of review given to administrative decisions in
 16 IDEA cases arose from the notion that a court should not substitute its judgment
 17 for the judgment of educators in determining the appropriateness of a child's
 18 education. See Union School Dist. v. Smith, 15 F.3d 1519, 1524 (9th Cir. 1994)
 19 ("We . . . must give 'due weight' to judgments of education policy when [we] review
 20 state hearings [C]ourts should not substitute their own notions of sound
 21 educational policy for those of the school authorities which they review.") (internal
 22 quotation and citations omitted). Here, the decision at issue does not implicate
 23 any issues of education policy because it involves imposition of sanctions. The
 24 decision on the merits has not been appealed. This fact supports an argument
 25 that a lesser amount of deference be paid to the hearing officer's conclusions of
 26 law because the decision on review does not implicate this concern; however,
 27 such a concern need not detain the Court for long, because, upon a review of the
 28 record in this action, the Court would uphold the hearing officer's legal conclusions
 under either a deferential or *de novo* standard of review.

Even applying a *de novo* standard of review, however, the Court would give
 deference to the hearing officer's factual findings because of the hearing officer's
 unique ability to assess the credibility of parties and representatives appearing
 before him.

³ When such an order is made, it is subject to the same judicial review
 procedures as is a substantive order by the hearing officer. Cal. Gov't Code
 § 11455.30(b).

1 5 Cal. Code Reg. § 3088(a) ("Provisions for contempt sanctions, order to show
2 cause, and expenses contained in Government Code sections 11455.10-11455.30
3 of the Administrative Procedure Act apply to special education due process hearing
4 procedures except as modified by (b) through (e) of this section.") Subsections (b)
5 through (d) set forth exceptions that are not at issue here. Subsection (e) is
6 arguably applicable:

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

13 Cal. Code Reg. § 3088(e). Plaintiffs contend that this subsection requires that the
14 hearing officer obtain the approval of the General Counsel before imposing
15 sanctions pursuant to Cal. Gov't Code § 11455.30 and 5 Cal. Code Reg. § 3088(a).
16 However, as the district correctly points out, the hearing officer did not order that
17 the plaintiffs pay "reasonable expenses . . . to the California Special Hearing
18 Office"; rather, the hearing officer ordered plaintiffs to pay \$18,000 in costs to **the**
19 **district** as sanctions. Subsection (e) does not by its text require that the hearing
20 officer obtain authorization from the General Counsel when awarding costs to a
21 party harmed by another's misconduct; subsection (e) is limited to situations in
22 which the hearing officer orders that sanctions be paid to the California Special
23 Education Hearing Office. Accordingly, the Court concludes that the hearing officer
24 had the power to impose the sanctions as set forth in his decision.
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IV. The Appropriateness of the Order Imposing Sanctions

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2 Plaintiffs also challenge whether imposing sanctions in this action was
3 appropriate. Hearing officers may impose costs on parties for actions taken in bad
4 faith or in pursuing frivolous cases. Cal. Gov't Code § 11455.30(a). California law
5 defines frivolous as "totally and completely without merit or . . . for the sole purpose
6 of harassing an opposing party." Cal. Code Civ. Pro. § 128.5(b)(2). Subjective bad
7 faith may be inferred from the prosecution of a frivolous action. Childs v.
8 PaineWebber, Inc., 29 Cal.App.4th 982, 996 (1994) (citing West Coast
9 Development v. Reed, 2 Cal.App. 4th 693, 702 (1992)).

10 Here, the hearing officer found that, while school was not in session over the
11 summer, Allen and Burkenroad filed the demand for a due process hearing that
12 included a statement the district was refusing to properly assess Ashley -- a
13 statement that the hearing officer found Allen and Burkenroad understood was
14 false -- when they knew that the mental health referral had been delayed only
15 because a parental consent form went astray. The hearing officer found that the
16 two took the opportunity presented by the errant form to demand a due process
17 hearing and to present a bill for attorney fees in an attempt to get a quick
18 settlement. The hearing officer also found that Allen and Burkenroad continued to
19 pursue the case after the issue had been resolved by the submission of the
20 parental consent form. In short, the hearing officer's findings make it clear that he
21 believed that Allen and Burkenroad's actions amounted to nothing more than an
22 attempt to receive a cash settlement from the school district that was unrelated to
23 any legitimate concern regarding Ashley's education.⁴

24 Here, because the Court finds the hearing officer's administrative findings to
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26
27 ⁴ The hearing officer also found that Allen understood throughout this
28 See A.R. 70.
process that Ashley would not be assessed for services until after summer break.

1 be "thorough and careful," it gives deference to them. Union School Dist. v. Smith,
2 15 F.3d 1519, 1524 (9th Cir. 1994). The hearing officer's conclusion regarding
3 Allen and Burkenroad's improper motivation in making the due process hearing
4 demand is supported by the factual finding that the original form was not returned
5 by Ashley's mother, a finding which is itself supported by the internally inconsistent
6 evidence offered by the plaintiffs. The *factual record on review* strongly supports
7 an inference that Allen and Burkenroad made a due process hearing demand as to
8 an issue they knew to be completely unmeritorious, that they used that demand in
9 order to attempt to get a quick settlement for themselves, and that they continued to
10 pursue the case long after it became even more clear that the case was
11 unmeritorious.

12 The IDEA, of course, provides for awards of attorney fees to prevailing
13 parties, 20 U.S.C. § 1415(i)(3)(B), and parties are not to be penalized for attempting
14 to avail themselves of that provision. This provision, along with numerous other
15 attorney-fee shifting provisions in federal statutes, serves the important purpose of
16 securing legal representation for parties who might not otherwise be able to secure
17 such representation. However, such provisions are also subject to abuse. Based
18 on the record, it appears to Court, as it appeared to the hearing officer below, that
19 Allen and Burkenroad's judgment in filing the due process complaint was clouded
20 by the potential for recovery of attorney fees in settlement at the outset of the case.
21 The delay in assessing Ashley for mental health services -- services which her
22 mother *ultimately declined* -- did not result in the denial of a free and appropriate
23 education for Ashley because she was on her summer break during the relevant
24 time period. In any event, the delay was caused by plaintiffs' own failure to return
25 the referral form and was remedied with no more effort on the plaintiffs' part than a
26 phone call and completion of a second form. Not every difficulty encountered in
27 fashioning a school child's education plan should be subjected to litigation. The
28 underlying due process complaint was unmeritorious, imprudent, inadequate,

1 premature, and frivolous. Accordingly, the hearing officer properly imposed
2 sanctions for Allen and Burkenroad's conduct.⁵

3 **V. Conclusion**

4 As stated herein, the Court **UPHOLDS** the hearing officer's decision to
5 impose sanctions as set forth in the January 6, 2006, decision.

6 Defendants shall lodge with the Court, within five days of the entry of this
7 Order, a proposed judgment. Upon the Court's entry of judgment in favor of
8 defendants, the Clerk shall close the case.

9 DATE: May 15, 2007

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12 STEPHEN G. LARSON
13 UNITED STATES DISTRICT JUDGE
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⁵ The Court would come to the same conclusion even if it were to review *de novo* the legal conclusions made by the hearing officer.