

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

VICTOR VALLEY UNION HIGH
SCHOOL DISTRICT.

OAH CASE NO. 2009120327

ORDER DENYING REQUEST FOR
CONTEMPT SANCTIONS

On December 8, 2009, Student filed a Due Process Hearing Request (complaint) naming the Victor Valley Union School District (District).

On February 8, 2010 Student filed an amended complaint. On February 9, 2010, OAH issued a scheduling order setting Mediation on March 16, 2010 at 9:30 a.m., Prehearing Conference on March 29, 2010 at 10:00 a.m., and Due Process hearing on April 6-8, 2010 at 9:30 a.m.

On January 21, 2010, Student served a Subpoena Duces Tecum (SDT) requesting production of Student records and other records. The SDT requested compliance by February 12, 2010. District timely produced records in response to the SDT along with a completed Declaration of Custodian of Records, and served written notification to Student of the need for clarification of the nature and scope of Student's request in three specific areas. Student failed to provide clarification.

On February 16, 2010, Student filed a motion for contempt sanctions against the District on the grounds that District failed to fully comply with Student's SDT.

On February 18, 2010 District filed a request for extension of time to respond to Student's motion because Student had not served District with his motion. On February 23, 2010 District filed opposition to Student's motion and the opposition was accompanied by the declaration of Jeannette Anderson in support of District's opposition.

APPLICABLE LAW

Contempt Sanctions

Generally, an ALJ has the authority to subject a person to the issuance of two types of sanctions: (1) contempt (Government Code sections 11455.10 and 11455.20) [hereinafter, sections 11455.10 and 11455.20]; and, (2) the authority to shift expenses from one party to

another, when a party acts in bad faith. (Government Code section 11455.30 [hereinafter, section 11455.30]). These sections state:

11455.10. Grounds for contempt sanction

A person is subject to the contempt sanction for any of the following in an adjudicative proceeding before an agency:

- (a) Disobedience of or resistance to a lawful order.
- (b) Refusal to take the oath or affirmation as a witness or thereafter refusal to be examined.
- (c) Obstruction or interruption of the due course of the proceeding during a hearing or near the place of the hearing by any of the following:
 - (1) Disorderly, contemptuous, or insolent behavior toward the presiding officer while conducting the proceeding.
 - (2) Breach of the peace, boisterous conduct, or violent disturbance.
 - (3) Other unlawful interference with the process or proceedings of the agency.
- (d) Violation of the prohibition of ex parte communications under Article 7 (commencing with Section 11430.10).
- (e) Failure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer or moving without substantial justification to compel discovery.

11455.20. Certification of facts to justify contempt sanction;
Other procedure

(a) The presiding officer or agency head may certify the facts that justify the contempt sanction against a person to the superior court in and for the county where the proceeding is conducted.¹ The court shall thereupon issue an order directing the person to appear before the court at a specified time and place, and then and there to show cause why the person should not be punished for contempt. The order and a copy of the certified statement shall be served on the person. Upon service of the order and a copy of the certified statement, the court has jurisdiction of the matter.

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 *Jonathon Andrew 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.”

(b) The same proceedings shall be had, the same penalties may be imposed, and the person charged may purge the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.

Under Section 11455.30 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, CCP section 128.5]. 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. 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 that 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.). 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).

The authority of an ALJ to subject one to contempt sanctions or 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 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)*. (Emphasis added).

Subpoenas Duces Tecum

Special education law does not specifically address what requirements apply to the issuance of a SDT. Since special education law is silent on the issue, OAH analogizes to the relevant portions of the California Code of Civil Procedure (CCP)² CCP section 1985 requires the party issuing the SDT serve a copy of an affidavit with the SDT showing good cause for the production of those matters and things that are described in the SDT and specifying the exact matters or things that are requested for production. Section 1985 further requires the affidavit set forth the materiality of the matters requested to the issues in the case and that the matters requested are under the possession or control of the entity to which the SDT is directed.

DISCUSSION

Student contends that District should be subject to a contempt order by the court because District failed to provide him with all of the matters and things requested in the SDT. Student further contends that the SDT was clear on its face and no further clarification was warranted. Student contends that District's conduct was not in good faith and warrants a contempt sanction.

District contends that there are no grounds for contempt sanctions as District timely responded to the SDT and requested further clarification from Student regarding certain requests that were unclear, overbroad, and ambiguous. District further contends that the SDT was defective on its face for failure to comply with the requirements in CCP section 1985 requiring specificity of the matters and things being sought by Student. District further contends that while it could have moved to quash the SDT, District sought Student's response to District's written requests for further clarification, but Student refused to respond.

Here, the evidence shows that the SDT was vague, overbroad and ambiguous on its face. District attempted to comply with the SDT and further sought clarification of Student's SDT to determine what documents and things it could further produce in response to the SDT. Further based upon the evidence, after Student filed his motion for contempt sanctions, the District provided Student with additional documents in its possession pursuant to some clarification subsequently provided by Student. There is no evidence that District failed or refused, without substantial justification, to comply with the SDT. Nor is there evidence that District acted in bad faith and for the purpose of causing unnecessary delay in

² CCR Section 3089 specifies that the subpoena provisions of the Administrative Procedures Act (APA), found in Government Code Sections 11450.05 to 11450.30, do not apply in special education due process hearing matters.

the production of the matters and things requested in the SDT. Student has failed to demonstrate that District acted in any manner that would warrant contempt sanctions against District.

ORDER

Student's motion for contempt sanctions is denied.

Dated: March 11, 2010

/s/

STELLA OWENS-MURRELL
Administrative Law Judge
Office of Administrative Hearings