

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

SANTA BARBARA HIGH SCHOOL  
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2012080406

ORDER ON MOTIONS FOR  
SANCTIONS AND COSTS

This Order addresses various motions to exclude, quash, and/or for sanctions that were made during the hearing in this matter. The rulings on these motions have been set out separately from the decision following hearing, which is being issued concurrently. This Order first describes the three motions at issue, followed by the applicable law and analysis.

*Motion I*

*District's Motion to Exclude Student's Witnesses and Exhibits and Motion for Sanctions*

District filed a due process hearing request on August 16, 2012 naming Student as respondent. The prehearing conference (PHC) was held in this matter on September 5, 2012. The undersigned ALJ issued a PHC order on September 5, 2012 setting the hearing to commence on September 13, 2012. The PHC order also denied Student's motion to quash District's timely notice to Student to appear and testify at the due process hearing and ordered Student to disclose all witnesses and serve all exhibits Student intended to rely on at the due process hearing by close of business on September 6, 2012, five business days prior to the hearing, as required by Education Code section 56505, subdivision (b)(7).

On September 7, 2012, District moved to exclude Student's witnesses specifically David Gilbertson, who was not identified at the PHC, and all exhibits because Student failed to timely serve his list of exhibits and witnesses to District as instructed in the September 5, 2012 PHC order. District also moved for cost sanctions. Student filed opposition to the motion on September 10, 2012.

District contends that Student untimely electronically transmitted his final witness list, exhibit list and exhibits to District via an invitation to join "Drop Box" after 6:00 p.m. on September 6, 2012. District further contends that Student was not authorized by the PHC order nor requested District's permission to serve his evidence in this manner. District asserts it received five e mails of attached documents totaling 287 pages which were neither paginated nor organized into exhibit binders as required by the PHC order. District asserts that Student engaged in bad faith litigation tactics by untimely emailing District 287 pages of documents instead of the serving hard copies of Student's evidence as ordered to do. District

seeks monetary sanctions in the amount of \$1, 552.50 for the cost of printing out 287 pages, and using its own support staff to properly assemble them in order to prepare for the hearing.

At the hearing on September 13, 2012 District also asserted that Student sent a sixth email transmission to District with documents attached, which was not received until the next business day of Monday September 10, 2012. District moved to exclude the documents and also moved for costs sanctions against Student for frivolous tactics and undue delay in serving his evidence. The ALJ granted in part District's motion and excluded witness David Gilbertson and all exhibits contained in the sixth e mail received by District on September 10, 2012.

### *Motion II*

#### *Student's Motion to Quash and for Sanctions for District's Subpoena*

On September 12, 2012 Student filed a Motion to Quash District's Subpoena of respondent Student to appear and testify at hearing. Student contended that he was not competent to testify and his testimony was not relevant to the issue for hearing. Student also requested cost sanctions for District's subpoena on grounds it was frivolous. District opposed the motion on the same date and requested cost sanctions against Student for having to file the opposition to the motion. District contended that Student's motion was frivolous because the ALJ's PHC order of September 5, 2012 denied his motion to quash. Student's motion to quash was treated as a motion for reconsideration and was denied at the hearing on September 13, 2012.

### *Motion III*

#### *District's Motion for Contempt and Monetary Sanctions*

On September 13, 2012 District moved on the record for contempt and monetary sanctions against Student's counsel for unauthorized communication with a represented party. On September 17, 2012 District filed a written motion for sanctions. Student filed opposition to the motion and requested sanctions for the cost of opposing District's motion on September 19, 2012.

District contends Andrea Marcus, Student's counsel, willfully disregarded the undersigned ALJ's PHC order of September 5, 2012, which ordered her to produce Student for testimony at hearing. District contends that on September 13, 2012, approximately one-half hour before the start of the hearing Student's counsel wrote an e-mail to the Superintendent of Schools for District objecting to District calling Student as a witness. The e-mail also discussed the evidence and asserted that Student's testimony was irrelevant to the hearing. Student's counsel offered in the e-mail message to meet with the Superintendent during the hearing to discuss the evidence and to share evidence with him. District asserts counsel's conduct is in violation of Rule 2-100 of the California Rules of Professional Conduct which prohibits unauthorized attorney communication with a represented party. Student's counsel contends that sanctions are not warranted because there is no evidence she acted in bad faith or engaged in contemptuous conduct. Student's counsel asserts that she

had previously been authorized by District counsel to communicate with the Superintendent about various matters.

The ALJ reserved the ruling on cost ad contempt sanctions in all the above referenced motions until the case was submitted for decision. For the reasons set forth below the parties' motions for cost sanctions in Motions I and II and District's motion for cost and contempt sanctions in Motion III are denied.

#### APPLICABLE LAW

An ALJ is authorized to issue sanctions to shift expenses to a party acting in bad faith, or using tactics that are frivolous or solely intended to cause unnecessary delay to the other party and/or their attorneys. (Gov. Code, § 11455.30.) Sanctions may include reasonable attorneys' fees and expenses. (*Ibid.*) The authority of an ALJ to shift expenses in special education matters is further defined by the California Code of Regulations, title 5, 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).

A bad faith action or tactic is frivolous if, viewed objectively, it is "totally and completely without merit" or if it is instituted "for the sole purpose of harassing an opposing party." (See *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635-637.) To be sanctionable, there must also be a showing of an improper purpose; i.e., subjective bad faith on the part of the attorney or party to be sanctioned. An improper purpose may be inferred from the circumstances. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

## DISCUSSION

In Motions I and II, neither District nor Student have established that either parties' conduct was in bad faith, or amounted to tactics that were frivolous or solely intended to cause unnecessary delay to the other party and/or their attorneys. In addition, District's request for costs is denied because there is no evidence that the act of emailing the documentary evidence to District and the failure to provide a hard copy of Student's exhibits to District was done in bad faith or was a tactic calculated to cause unnecessary delay of the hearing. The hearing proceeded as scheduled on each day of hearing and was timely completed. Student was produced and testified at hearing on October 4, 2012. Accordingly there is no evidence that would warrant sanctions and the motions are denied

In Motion III, while Student's counsel's contact with the Superintendent of schools by e-mail on the first day of hearing is suspect and could be regarded as violating the September 5, 2012 PHC order, District did not produce evidence that Ms. Marcus' e-mail communication to the District Superintendent was willful, for an improper purpose, interfered with District's presentation of its case, or was intended to disregard the undersigned ALJ's PHC order. Moreover, as previously stated, the hearing of this matter was not delayed, Student appeared and testified, all relevant evidence was received, and the matter was timely submitted for decision. Accordingly, District's Motion for contempt and monetary sanctions is denied.

IT IS SO ORDERED

Dated: October 16, 2012

/s/

---

STELLA OWENS-MURRELL  
Administrative Law Judge  
Office of Administrative Hearings