

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. VICTOR VALLEY UNION HIGH SCHOOL DISTRICT,	OAH CASE NO. 2012090744
VICTOR VALLEY UNION HIGH SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH CASE NO. 2012070653 ORDER DENYING STUDENT’S MOTION FOR CONTEMPT SANCTION

On October 25, Student filed a motion for the Office of Administrative Hearings (OAH) to find the Victor Valley Union High School District (District) in contempt for failure to comply with a subpoena for Student’s records.

On October 30, 2012, District filed opposition to Student’s motion. On October 31, 2012, Student filed a response to District’s opposition.

APPLICABLE LAW

Generally, an administrative law judge (ALJ) has the authority to subject a person to contempt sanctions pursuant to Government Code section 11455.20, subdivision (a).¹

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.”

California Code of Regulations, title 5, section 3088, provides that the procedures 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,” with the additional requirement that contempt proceedings require the prior approval of the General Counsel of the California Department of Education (CDE).

A party to a due process proceeding may be subject to a contempt sanction for “failure or refusal, without substantial justification, to comply with a...subpoena, or other order of the presiding officer....” (Gov. Code §1145.10, subd. (e).)

DISCUSSION

Student seeks an order that District be found in contempt for disobedience of the subpoena duces tecum (SDT) issued for Student’s records, seeking production of documents on October 13, 2012 and served on District by certified mail on September 28, 2012. Student contends, and the declaration of Student’s parent (Parent) states, that District (i) was 11 days late in complying with the SDT, which delayed Parent’s preparation for hearing, (ii) failed to provide a declaration of the custodian of records with its response, and (iii) sent Parent the records on a broken CD.

District’s argues that its conduct was in substantial compliance with the subpoena and not in bad faith, and so cannot subject the District to contempt sanctions under Government Code section 11455.10. The declaration of District’s director of special education explains that she informed Parent at a resolution session on October 3, 2012, that the documents would be ready for pick up on October 12, 2012, but when Parent did not pick up the documents, she called Parent and informed her that the District would compile the documents onto a CD and send them to her, but would need additional time to do so. The documents were sent on October 24, 2012, and the District was never informed that the CD was broken. In response, Parent submits her declaration, and that of an individual who accompanied her to the resolution session, stating that they were not informed that the documents would be ready for pick up.

In order for OAH to determine that contempt proceedings should be approved by the CDE and initiated against District, it must find that District’s conduct constituted a “failure or refusal, without substantial justification” to comply with the subpoena. (Gov. Code §1145.10, subd. (e).) Here, District neither failed, nor refused, to comply with the SDT, and its actions were substantially justified.

District provided a copy of Student’s records to Parent as requested in the SDT. Although there is some dispute over whether or not Parent was told that that the documents were available for pick up on October 12, 2012, there is no dispute that Parent received a copy of the requested records on a CD mailed October 24, 2012. Parent made no showing that she informed the District that the CD was broken, or made reasonable attempts to obtain

a replacement CD from the District. Parties are expected to take reasonable steps, such as calling the District or its attorneys on the telephone, before engaging in time-consuming motion practice.

To the extent Parent contends that receipt of a broken CD delayed her preparation for trial, she could have, and should have, promptly contacted the District for a copy of the CD, and any delay is of her own making. In addition, the hearing in this matter is scheduled to begin in January of 2013, and Parent has almost three months in which to prepare, and suffers no prejudice from a delay of a few days in receiving the documents requested.

The lack of a declaration by District's custodian of records under Evidence Code section 1561 was not only substantially justified, but in accordance with law. Although a party to a due process hearing under the Individuals with Disabilities in Education Act (IDEA) has the right to present evidence and compel the attendance of witnesses *at the hearing* (20 U.S.C §1415(h)(2); Ed. Code, § 56505, subds. (e)(2) and (3)(italics added)), there is no right to pre-hearing discovery under the IDEA. Instead, a parent may obtain his or her child's educational records (Ed. Code § 56504), and parents are entitled to receive copies of all the documents the District intends to use at the due process hearing, no less than five days prior to the hearing (Ed. Code § 56505, subd. (e)(7).) The SDT requested Student's educational records, and by providing Parent with a copy of those records prior to the hearing or the documentary evidence exchange, District permissibly treated the SDT as a records request under Education Code section 56504, and was not required to provide a custodian declaration.

Student's request for a contempt sanction against District is denied.

IT IS SO ORDERED.

Dated: November 1, 2012

/s/

ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings