

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

COUNTY OF SAN DIEGO OFFICE OF  
EDUCATION.

OAH CASE NO. 2012110566

ORDER DENYING MOTION FOR  
SANCTIONS

On February 8, 2013, the Respondent, the San Diego County Office of Education (COE), filed a motion for sanctions requesting monetary sanctions on Petitioner's counsel. COE contends that Petitioner's counsel acted in bad faith in withholding documents sought by COE in subpoenas duces tecum (SDT's) which had been addressed to the San Diego County Health and Human Services Agency (HHSA), the San Diego County Probation Department (Probation) and three mental health workers employed by HHSA.

On February 20, 2013, Petitioner's counsel (counsel) filed an opposition to the motion. Counsel contends that he acted properly, that COE's counsel failed to properly obtain required court orders for release of the requested records, that the Office of Administrative Hearings (OAH) had previously issued a ruling finding that COE's counsel had failed to obtain the required court order, and that he had no control or possession of the records at issue.

The records sought by COE were in the custody or control of HSSA and Probation. In fact, the HHSA and Probation were represented by the San Diego County Counsel's office. Counsel also sought the same records for use in his case. Counsel obtained the cooperation of the Public Defender's Office to assist in obtaining a court order to have the requested records released and produced copies of the records at the first day of hearing.

On February 4, 2013, COE filed a second motion for continuance on grounds that it had been unable to obtain the subpoenaed records. After due consideration of the motion and opposition, OAH, by the undersigned ALJ, denied the motion thusly: "OAH has reviewed the request for good cause and considered all relevant facts and circumstances. The request is DENIED as the failure to obtain the records sought by its SDT's was the failure of the COE to obtain the required court order."

## APPLICABLE LAW

In certain circumstances, an administrative law judge (ALJ) presiding over a special education proceeding is authorized to shift expenses from one party to another, or to OAH. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; see *Wyner ex rel. Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 [“Clearly, [California Code of Regulations] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge.”].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

Expenses may be ordered to be reimbursed either to OAH or to another party. With approval from the General Counsel of the California Department of Education, the ALJ presiding over the hearing may “order a party, the party’s attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel” to OAH (as the successor to the California Special Education Hearing Office) as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.” (Cal. Code. Regs., tit. 5, § 3088, subds. (a) & (e); see Gov. Code, § 11455.30, subd. (a).) An ALJ presiding over a hearing may, without first obtaining approval from the California Department of Education, “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.” (Gov. Code, § 11455.30, subd. (a); Cal. Code. Regs., tit. 5, § 3088, subd. (a).) An order to pay expenses is enforceable in the same manner as a money judgment or by seeking contempt of court order. (Gov. Code, § 11455.30, subd. (b).)

California Code of Regulations, title 1, section 1040, provides:

(a) The ALJ may order a party, a party's 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.

(1) ‘Actions or tactics’ include, but are not limited to, the making or opposing of motions or the failure to comply with a lawful order of the ALJ.

(2) ‘Frivolous’ means

- (A) Totally and completely without merit or
- (B) For the sole purpose of harassing an opposing party.

(b) The ALJ shall not impose sanctions without providing notice and an opportunity to be heard.

(c) The ALJ shall determine the reasonable expenses based upon testimony under oath or a Declaration setting forth specific expenses incurred as a result of the bad faith conduct. An order for sanctions may be made on the record or in writing, setting forth the factual findings on which the sanctions are based.

The California Court of Appeal discussed what is required to impose sanctions under California Code of Civil Procedure section 128.5, in the case of *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635. In discussing what constitutes bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay, the court stated the action taken by the party or its attorney must be solely for the purpose of harassing an opposing party. Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit. There must also be a showing of an improper purpose, such as subjective bad faith on the part of the attorney or party to be sanctioned. (*Levy v. Blum, supra*, 92 Cal.App.4th at p. 635; *West Coast Development v. Reed* (1992) 2 Cal.App.4th 463,702.)

#### DISCUSSION

Here, COE has failed to demonstrate that counsel acted in bad faith or engaged in tactics designed to cause unnecessary delay. As counsel correctly points out in his opposition, OAH has previously ruled that the delay in obtaining the requested records was partially because COE failed to obtain the proper court order. The records sought were in the possession and control of two other county agencies that were represented by their own counsel. Additionally, counsel was attempting to obtain the same records for use in his case. For these reasons, COE's motion is without merit.

#### ORDER

COE's motion for sanctions is DENIED.

IT IS SO ORDERED.

Dated: February 21, 2013

/s/

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ROBERT HELFAND  
Administrative Law Judge  
Office of Administrative Hearings