

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

MANTECA UNIFIED SCHOOL DISTRICT,
SAN JOAQUIN COUNTY OFFICE OF
EDUCATION, AND SAN JOAQUIN
SELPA,

OAH CASE NOS. 2011060184 (Primary
Case) and 2011050574

MANTECA UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2011050289

ORDER: GRANTING MOTION TO
BIFURCATE THE ISSUE OF
STUDENT’S RESIDENCY AS TO
RESPONDENTS SAN JOAQUIN
COUNTY OFFICE OF EDUCATION
AND SAN JOAQUIN COUNTY
SPECIAL EDUCATION LOCAL PLAN
AREA; AND DENYING STUDENT’S
RENEWED REQUEST FOR
SANCTIONS.

On July 6, 2011, Respondents San Joaquin County Office of Education (SJCOE) and San Joaquin County Special Education Local Plan Area (SELPA), (collectively, “Respondents”), filed a Motion to Bifurcate the Issue of SJCOE and SELPAs Responsibility for Student’s Special Education Program/Student Residency (Motion to Bifurcate). On July 11, 2011, Student filed an Opposition and Renewed Request for Sanctions.

Respondents’ contend that they have no responsibility for Student’s special education program, because: Student was not a resident of the Respondents during the operative period of the complaint; Student has not attended or been involved in programs sponsored by Respondents; and Respondents have not been involved in any educational decisions involving Student, including proposing or refusing to change Student’s educational program.

Respondents' contend that judicial economy would be promoted by bifurcating the issue of their responsibility from the remaining consolidated matters, not only because the issue of their responsibility is limited, but also because they are not parties to all the cases consolidated.

Student maintains that Respondents' are responsible for Student's special education program because: Student is a resident of San Joaquin County; at all times Respondents provided special education services to Student; and at all times, Respondents were involved in the decisions, policies and procedures regarding Student's program. Student also renews his request for sanctions because Respondents' current motion is duplicative of previous motions which were denied by OAH.

For the reasons set forth below, Respondents' Motion to Bifurcate is granted and Student's Renewed Motion for Sanctions is denied.

APPLICABLE LAW

Jurisdiction

California Education Code 56501, subdivision (a), provides that the appropriate agency party in a special education due process hearing is the local educational agency involved in the educational decisions regarding the child. That agency is determined by the residency of the pupil. (Ed. Code, §§ 48200, 56028.) If the local educational agency is not the district of Student's residency, the action has been brought against the wrong party.

The federal and state law pertaining to special education due process administrative proceedings does not contain a specific reference to the procedure for bifurcating issues at trial. Such authority resides in the discretion of the administrative law judge, provided the separate hearings are conducive to judicial economy or efficient and expeditious use of judicial resources. (See Gov. Code, § 11507.3, subd. (b).)

Request for Monetary Sanctions

Under certain circumstances, an administrative law judge 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 a contempt of court order. (Gov. Code, § 11455.30, subd. (b).)

“Actions or tactics” is defined as including, but not limited to, making or opposing motions or filing and serving a complaint. (Gov. Code, §11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(1).) “Frivolous” means totally and completely without merit or for the sole purpose of harassing an opposing party. (Gov. Code, § 11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(2).) A finding of “bad faith” does not require a determination of evil motive, and subjective bad faith may be inferred. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

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.) This subjective bad faith requirement does not impose a determination of evil motive, and subjective bad faith may be inferred. (*West Coast Development v. Reed, supra*, 2 Cal.App.4th at p. 702.)

ANALYSIS

Respondents’ Motion to Bifurcate

Respondents argue that the issue of Student’s residency should be determined in a separate hearing before the matter of whether Respondents failed to provide Student with a FAPE. Respondents contend that Student was not a resident of their local educational agencies, and not responsible for Student’s educational program. In Student’s (primary) due process hearing request, he contends that all named respondents failed to obtain proper consent from his parent when Student was assessed in December 2010 pursuant to an assessment plan, failed to delineate the testing that was going to be done, failed to inform Parent of what alternative assessments would be conducted, improperly conducted

assessments to obtain Student's intelligence quotient, failed to fully inform Parent of the scope of the assessments, and infringed upon Parent's right to participate in the development of Student's individualized education program. All allegations in Student's complaint stem from the assessments performed in or around December 2010, and from an IEP meeting which allegedly occurred on January 15, 2011.

The issue of residency is a threshold jurisdictional issue which can be efficiently resolved in an evidentiary proceeding that should not take more than one day, and would be limited to evidence of Student's residence, and Respondents' participation in the IEP process, or responsibility to participate in the IEP process, during the assessment period, in or around December 2010, and an IEP team meeting on January 14, 2011. The determination of the issue of residency at this one-day hearing would potentially further judicial economy by reducing the number of witnesses, and time for witness examination and cross-examination on issues related to Student's assessment and offer of FAPE. Bifurcation is further warranted here where Respondents' have not been named in all matters consolidated for hearing. Respondents' possible dismissal from a consolidated proceeding that extends to a complaint that does not involve them, will further promote judicial economy, by clarifying the presentation of claims against each party, and reducing the time needed to present the remaining claims. Therefore, Respondents' Motion to Bifurcate is granted.

Student's Renewed Motion for Sanctions

Student's Renewed Motion for Sanctions does not support an award of sanctions against Respondents.¹ The OAH denied Respondents' request to be dismissed in their opposition to Student's request to add them as parties. The OAH has also rejected Respondent's claim that Student's complaint is insufficient on the ground that it omits references to the time period where Respondent's were allegedly responsible for providing Student a FAPE. However, the OAH orders did not reject Respondents' right to contest jurisdiction at hearing. On the contrary, the OAH made clear that the issue of jurisdiction required an evidentiary ruling, which Respondents now seek.

ORDER

1. Respondents' Motion to Bifurcate is granted.
2. The bifurcated proceeding shall be scheduled for no more than one-day, and shall be limited to evidence of Student's residence, Respondents' actual participation, or contractual responsibility to participate, in the IEP process, during the assessment period, in or around December 2010, and the IEP team meeting in or around January 14, 2011.

¹ OAH issued an order dated July 21, 2011, denying Student's Motion for Sanctions.

3. The schedule for the bifurcated proceeding shall be determined by the ALJ at the prehearing conference.

4. Student's renewed Motion for Sanctions is denied.

IT IS SO ORDERED

Dated: July 21, 2011

/s/

EILEEN M. COHN
Administrative Law Judge
Office of Administrative Hearings