BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of: STUDENT, Petitioner, vs. POWAY UNIFIED SCHOOL DISTRICT Respondent.	OAH No. N 2005080077

DECISION

Gary A. Geren, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division (OAH), heard this matter on February 28-March 1, 2006, in San Diego, California.

The Student's mother (Parent) represented the Student (Student).

Attorney Justin R. Shinnefield, from the law firm of Atkinson, Andelson, Loya, Ruud and Romo, represented the Poway Unified School District (District). Emily Shieh, Assistant Special Education Director, attended as District's representative, and was present during most of the hearing.

Student called the following witnesses to testify: Parent, Hillary Ward (School Psychologist); Betsy Ann Slavik (Occupational Therapist); Robin Lee Robinson (Area Administrator); McKayla La Borde (Resource Specialist); Barbara Everett (District's Special Education Department Chair and Special Education Teacher); and Emily Shieh.

District called the same witnesses to testify.

Oral and documentary evidence were received. At the hearing's conclusion on March 1, 2006, the record was closed, with two exceptions: (1) The parties were permitted to fileb closing briefs; and, (2) District was permitted to file and serve a motion for costs seeking reimbursement. District sought reimbursement of expenses it incurred because Parent faxed 651 pages of proposed exhibits to District's counsel's office prior to the commencement of the hearing. Parent was provided an opportunity to file a written response to District's motion. District's motion for sanctions was filed with OAH on March 7, 2006; Parent's opposition thereto was filed on March 20, 2006. District's closing brief was filed on March 15, 2006; Student's closing brief was filed on March 17, 2006. All briefs were made part of the record, and with the receipt of Student's brief on March 20, 2006, the record was closed.[1] The ALJ will rule on District's Motion for Sanctions as part of this decision.

On November 14, 2005, Student filed a Request for a Due Process Hearing. On January 5, 2006, OAH ordered the hearing to commence on January 23, 2006. At a prehearing conference held on January 17, 2006, the hearing was postponed until March 28, 2006. OAH's issuance of a final decision in this matter is due no later than April 20, 2006.

ISSUES

1. Did the District appropriately assess Student for the 2004-2005 school year?

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[1] Despite the limited purposes for which the record was held open, Student filed numerous posthearing motions that either attempted to augment the record of the hearing, or that requested OAH to issue other various posthearing orders. On March 7, 2006, OAH issued an order denying each of Student's posthearing requests.

2. Did the District offer Student a free, appropriate public education (FAPE) for the 2004-2005 school year?

3. Did the District fail to prepare Student's transition plan?

4. Should District's Motion for Sanctions be granted?

FACTUAL FINDINGS

PRELIMINARY FINDINGS

1. Student has qualified for special education services since 1990. (District's Exhibit 2)

2. Student is now eighteen-years-old. The 2004-2005 school year was Student's junior year of high school.

3. On January 17, 2003, District convened an Individualized Education Plan (IEP) team meeting. The IEP team recommended completing a comprehensive assessment of Student. The team determined the assessment was necessary in order to identify Student's educational needs and to accurately develop his IEP. (District's Exhibit 7). Parent refused to allow District to conduct any assessments. In response, District initiated a due process proceeding seeking to establish its right to assess Student. After a hearing on the issue, District's right to assess Student was confirmed, and Parent was ordered to make Student reasonably available for District to conduct the assessment. Those orders were issued on March 28, 2003. (*Ibid.*).

4. Despite these orders, Parent refused to allow District to conduct the assessment. The proposed assessment plan was an issue again in a subsequent hearing. District again prevailed on its right to assess Student. That decision was issued on December 19, 2003. (District's Exhibit 9).

5. Parent allowed District to begin to assess Student in January, 2004. As set forth more fully below, District completed the assessments on October 28, 2004. Parent

now challenges whether Student was appropriately assessed, whether District offered Student a FAPE for the 2004-2005 school year, and whether District should have developed a transition plan for Student.

ISSUE 1: DID THE DISTRICT APPROPRIATELY ASSESS STUDENT FOR THE 2004-2005 SCHOOL YEAR?

6. From January through March 2004, school psychologist (Ms. Marsaglia), education specialist (Ms. LaBorde), and occupational therapist (Ms. Slavik), began conducting various assessments of Student. District's attempt to fully assess Student, however, was frustrated by Student's absenteeism from school. (District's Exhibit 11). His attendance record for the period between March, 2004, and June, 2004, establish he either missed classes, or entire school days, more often than he attended an entire day's schedule. As a result, District's assessment team was unable to complete their assessment of Student prior to the commencement of his summer recess, in June, 2004.

7. Assessment of Student continued when school reconvened for the 2004-2005 school year. On October 28, 2004, District completed the assessment. The educational psychologist, resource specialist, and the occupational therapist, completed the following evaluations: Review of Student's records; observation of Student in the classroom setting; a Sentence Completion test; a Student Interview; the Wechsler Abbreviated Scale of Intelligence (WASI); the Behavior Assessment System for Children (BASC); including self and parent reports; the Wide Range Assessment of Memory and Learning (WRAML); the Developmental Test of Visual-Motor Integration (VMI); the Test of Auditory-Perceptual Skills (TAPS); the Behavior Rating Inventory of Executive Function (BRIEF), including three teacher ratings and a parent rating; the Asperger's Syndrome Diagnostic Scale (ADS); including two teacher ratings and a parent rating; the Delis Kaplan Executive Function System Test; the Wechsler Individual Achievement Test

(WIAT); the Kaufman Test of Educational Achievement--Comprehensive (KTEA); the Short Sensory Profile Test; the Caregiver Sensory Profile; the Adolescence Self Questionnaire; the Bruininks-Oseretsky Test of Motor Proficiency, as well as, various clinical observations, a writing sample, and a typing sample. (District's Exhibits 14-17).

8. The ALJ finds Student was properly and thoroughly assessed. The evaluations followed the appropriate protocols. The assessment accurately identified Student's needs, and Student presented no evidence from which one could reasonably infer that the conclusions reached in the assessment were in anyway invalid, inaccurate, or unreliable. District's witnesses presented as well educated, well trained, and competent professionals, who conveyed a sense of dedication to Student's receipt of an appropriate education.

9. Student's contention that the assessment results were flawed, because the findings concluded that he did not suffer from Asperger's Syndrome, is without merit. Student did not meet the educational definition of autism (Asperger's Syndrome is a condition identified within the spectrum of autism disorders). This conclusion is well supported by the evidence. The Psychological Report prepared by Ms. Ward, dated October 28, 2004, provided dispositive evidence on this point. The report established that Ms. Ward specifically assessed whether Student suffered from any autistic-like behaviors. She concluded that he did not. Student offered no competent evidence to support a contrary conclusion.

10. Student's assertion that the results of the assessments were not provided to Parent in a timely manner, and thereby impaired Parent's ability to evaluate the appropriateness of the resulting IEP, also lacked merit. Any delay (to the extent any delay occurred) in completing the assessment of Student, was either due to Parent's failure to make Student available, or to Student's absenteeism. The assessment results were scheduled to be discussed at an IEP meeting held on November 18, 2004. Parent

was given notice of this meeting and chose not to attend it. On November 29, 2004, a letter was sent by District to Parent that included a copy of the notes made at the meeting. On December 2, 2004, Parent requested a copy of the notes, despite the fact they were already sent to her. On December 3, 2004, District again sent Parent a copy of the notes from the November 18, 2004 IEP team meeting that discussed Student's assessment results. District provided Parent with the results in a timely manner. (District's Exhibit 19).

ISSUE 2: DID THE DISTRICT OFFER STUDENT A FAPE FOR THE 2004-2005 SCHOOL YEAR?

11. After completing the assessment, District held two IEP meetings. Parent, a member of the IEP team, received written notification prior to each of the meetings, yet chose not to attend them. At the November 18, 2004, meeting the balance of the IEP team reviewed the assessment and findings and discussed Student's then current levels of performance. On January 6, 2005, the IEP team met again to complete Student's IEP. The team further discussed Student's then present levels of performance, the results of the assessment, and his need for aides, supports, and accommodations. After a thorough review and discussion over the course of the two IEP meetings (that lasted approximately two hours each) the team, without participation and cooperation of Parent, developed goals and objectives designed to meet Student's unique needs. District offered Student a curriculum that included a non-severely handicapped special day class, counseling (one time per week, for thirty minutes), occupational therapy (once-a-month, for thirty minutes), transportation
services, and an extended school year for the summer of 2005, which included special education services. (*Ibid*, page 19).

12. The goals and objectives contained in the IEP for Student's 2004-2005 school year were reasonably calculated to provide Student with an educational benefit. (District's Exhibit 18). Student's IEP was developed by qualified professionals who crafted a plan reasonably suited to meet Student's unique educational needs; in short, the IEP developed by the team on January 6, 2005, offered Student a FAPE.

ISSUE 3: DID THE DISTRICT FAIL TO PREPARE STUDENT'S TRANSITION PLAN?

13. District asserted that it was unable to complete Student's transition plan because of his absenteeism. The IEP states Student's transition plan, "…to be completed upon [Student's] return to school." Evidence established that input from parents and student is necessary to develop a transition plan. In light of Parent's failure to attend IEP meetings, as well as Parent's failure to cooperate with District in addressing Student's absenteeism, District's position in this regard was plausible, yet missed the point. District was obligated to prepare a transition plan for student. Simply noting that one will be prepared at some future date, provided no excuse for not preparing a transition plan based on the information it had, particularly since Student's comprehensive assessment was completed on October 18, 2004. District failed to explain with any particularity how Student's absenteeism prevented it from preparing a transition plan. For example, after October 18, 2004, District had the Student Interview as well as the results from the BASC, the BRIEF, the ASD, and the ASQ, all of which included reports from Parent, Student, or both. District failed to explain why this information could not have been used to fulfill its obligation to develop Student's transition plan.

14. District's failure to develop a transition plan, however, was a procedural violation of its obligation to provide a FAPE, not a substantive one. The January 6, 2005, IEP offered Student appropriate services to prepare him to transition for his life outside of the school environment—the end that a transition plan aims to reach. For example,

the IEP addressed Student's following needs: (1) to be more organized by using a daily planner that required him to allocate the time necessary to complete tasks, (2) to help him stay on-task and to focus better, (3) to write better and, (4) to better deal with stressful/frustrating situations that may confront him in a more mature manner.

15. While District was obligated to develop *a* transition plan, it could not have prepared a *meaningful* one without participation from Parent in the IEP process and Student's attendance at school. District's exhibit 18, at page 9, notes that Student was marked truant after October 28, 2004. Accordingly, District's failure to follow procedural requirements for developing a transition plan did not result in Student losing any educational opportunity, in part, since he was absent from school. Based on the above, District's procedural violation in not developing a transition plan did not result in Student being denied a FAPE.

ISSUE 4: SHOULD THE DISTRICT'S MOTION FOR SANCTIONS BE GRANTED?

16. Parent faxed to District's counsel's office 651-pages of exhibits Parent intended to use at hearing. Only a small percentage of these exhibits faxed were actually discussed at hearing. District requested sanctions be imposed on Parent in the amount of the costs it incurred as a result of Parent faxing this many documents. District's motion was taken under submission, and the parties were given an opportunity to file written briefs and documentation that supported their respective positions. As stated above, the District's moving papers and Parent's opposing papers were received by OAH and made part of the record.

17. District's declarations established Parent faxed the documents to District's counsel between February 19, 2006, and February 21, 2006. District's declarations also established that it is billed $2.00 per page for facsimiles received on its behalf by its counsel. Sandra Holquin, the fax operator employed at counsel's office, declared that in

the six years she worked as a fax operator, she never received such a series of faxes. She further declared that it would have cost Parent approximately $25.00 to have sent the documents via overnight mail. District's counsel represented that Parent did not contact him or his office prior to faxing the documents.

18. Parent does not dispute faxing the documents. Parent contended that a charge of $2.00 per page was an excessive fee. Parent failed to establish credible evidence on this point. Accordingly, the ALJ finds that the $2.00 per page charge was reasonable. Accordingly, the total cost incurred by District as a consequence of Parent sending the facsimiles was $1302.00.

19. Parent is an experienced practitioner in special education matters. Since 1999, no less than ten cases have been filed regarding Student.[2] Parent represented Student in each matter. These matters resulted in the issuance of seven decisions (District prevailed on all issues, in each case), two orders that dismissed matters filed on behalf of Student, and an order that imposed monetary sanctions against Parent, because she acted in bad faith. Based on Parent's experience, it may be fairly inferred that Parent knew faxing 651 pages of documents fell outside the bounds of reasonable conduct imposed on one representing a party in a proceeding such as this. Sending the faxes constituted frivolous and harassing conduct. Parent displayed an antagonistic demeanor toward District and its counsel at hearing. Additionally, much of the materials faxed to District related to allegations parent raised in previous hearings where District prevailed. Student's exhibits are replete with accusatory letters, e-mails, and transcribed phone calls that Parent made to District with an unnecessary and burdensome

[2] These prior decisions, commencing in 1999, are included in the record as District's Exhibits 1-10. District's Exhibit 1 established Parent initiated at least 11 Compliance Complaints with the California Department of Education, prior to 1999.

frequency. Parent's communications alleged a multitude of misdeeds that she believed District committed. As was established by the findings made in this and prior decisions, these allegations lacked any basis in fact. The ALJ's conclusion in this regard is consistent with the findings made by the hearing officer who issued a decision in favor of District arising from Parent's claim that District violated her civil rights. The decision issued by the Office of Civil Rights is cited at 37 IDELR 164.[3] The ALJ finds Parent sent the faxes at issue in an attempt to continue her pattern of harassing District. As a result, District incurred the unnecessary cost discussed above. Accordingly, Parent's conduct in this regard was in bad faith.

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[3] Therein the Administrative Officer found: "However, OCR [Office of Civil Rights] also determined that the District provided a legitimate non-discriminatory reason for its adverse action [seeking a restraining against Parent] and that the reason provided was not a pretext for retaliation. The District stated that its consideration of a restraining order was made because of the complainant's conduct. According to the District, the complainant's conduct resulted in a fundamental disruption of the District's ability to achieve its programmatic responsibilities. The District also provided OCR with written records documenting the complainant's contacts with the District to establish that its rationale for considering a restraining order was not a pretext for retaliation. The record showed that from September 6, 2001 through December 20, 2001, the complainant made approximately 258 inquires and requests for data from the District through letters, memoranda, facsimile transmissions, e-mails and telephone calls to various District and school personnel. These records established that the District's adverse action was not based on the content of the complainant's message, but rather the frequency and manner in which she delivered it. The Government complainant's message is protected by the laws enforced by OCR, her particular manner of conduct is not."

LEGAL CONCLUSIONS

1. Petitioner had the burden of proof to establish issues 1-3. (*Schaffer v. Weast* (2005) _____ U.S.____ [163 L.Ed.2d 387].) District had the burden of proof on its motion for sanctions, issue 4. (5 Cal. Code of Regs., title 5, §3088).

2. Under both State law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1400; Cal. Ed. Code § 56000.) The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parents, that meet the State educational standards, and that conform to the student's individualized education program (IEP). (20 U.S.C. § 1401(a)(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(a)(29).)

3. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, 102 S.Ct. 3034, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at 198- 200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Id.* at 201.)

4. To determine whether a district offered a student a FAPE, the focus is on the adequacy of the placement the district offered, rather than on the placement

preferred by the parent. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d, 1307, 1314.)

5. To constitute a FAPE as required by the IDEA and *Rowley*, a district's offer must be designed to meet a student's unique needs and be reasonably calculated to provide the student with some educational benefit. A district's offer must conform to the IEP, must be in the least restrictive environment (LRE), and provide the student with access to the general education curriculum. (See 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. §§ 300.347(a), 300.550(b); Cal. Ed. Code § 56031.) Pursuant to these governing principles, District offered Student a FAPE for his 2004-2005, school year. Petitioner failed to meet its burden of proof to establish District's offer, as contained in the IEP, did not provide an opportunity for Student to obtain some educational benefit, in the least restrict environment. (Findings 3- 15).

6. Student did not suffer from an autistic disorder and, therefore, was ineligible to receive special education services under the governing eligibility criteria for autistic students. (5 Cal. Code of Regs., title 5, § 3030(g)). (Finding 9).

7. At the time of the IEP meetings for the 2004-2005 school year, the applicable law, Title 34, Code of Federal Regulations section 300.347(b)(1), required a statement of the transition services needed, focusing on Student's course of study. When a student turns sixteen, a school district must have in the IEP, a statement of needed transition services for the student for life outside of school. (34 C.F.R. § 347(b)(2).)

8. California Education Code section 56345.1, subdivision (b), requires that beginning at age sixteen or younger, a Student's IEP must contain a statement of needed transition services. Subdivision (c) defines transitional services as a coordinated set of services designed to promote movement from school to post-school activities, including post- secondary education, independent living and vocational training. The

transitional services are to be based on the student's needs, taking into account the student's preferences and interests, and include instruction, related services, development of employment, and when appropriate, acquisition of daily living skills and functional vocational evaluation. District offered no evidence that a transition plan, as such, was prepared for Student. District established only that a transition plan would be completed later. Accordingly, District did not meet its procedural obligation in this regard, and therefore, committed a procedural violation of the above mentioned laws. (Findings 13-15).

9. Procedural deviations in developing an IEP do not automatically lead to the conclusion that the IEP is invalid. (*Urban v. Jefferson County School District R-1* (10th Cir. 1996) 89 F.3d 720, 726). Only procedural violations which result in a "loss of educational opportunity" or which "seriously infringe upon the parents' opportunity to participate in the IEP formulation process clearly result in the denial of FAPE." (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) Under these governing principles, Student was not denied a FAPE as a result of District's failure to complete a transition plan as part of Student's IEP. Petitioner did not meet the burden of proving Student suffered a loss of educational opportunity due to District's procedural failure. Student's truancy would have hindered any opportunity to reap any educational benefit provided by any transition plan that District might have prepared. (Finding 15). Additionally, because Parent chose not to participate in the IEP process, her ability to participate in that process was not infringed upon. (Finding 11).

10. 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. 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.

(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.

11455.30. Bad faith actions; Order to pay expenses including attorney's fees

(a) 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, section 128.5].

(b) 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. (Emphasis added).

Code of Civil Procedure section 128.5 states:

128.5. Expenses for frivolous action, bad faith or delay; Punitive damages

(a) Every trial court may order a party, the party's attorney, or both to pay any 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. This section also applies to judicial arbitration

proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.

(b) For purposes of this section:

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint only if the actions or tactics arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section.

(2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party.

(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

(d) In addition to any award pursuant to this section for conduct described in subdivision (a), the court may assess punitive damages against the plaintiff upon a determination by the court that the plaintiff's action was an action maintained by a person convicted of a felony against the person's victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony, and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

(e) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.

12. 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:

3088. Sanctions

(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 through (e) of this section.

(b) Only the presiding hearing officers[4] 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

[4] 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."

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).

13. Section 3088 treats the two types of sanctions differently. Section 3088(c) requires that, "Prior to initiating contempt sanctions with the court, [meaning, prior to certifying the facts to justify contempt, as required by section 11455.20] the presiding hearing officer shall obtain approval from the General Counsel of the California Department of Education [hereinafter, CDE]." Conversely, with regard to expenses, section 3088(b) specifically omits any requirement that an ALJ obtain approval from the CDE. Accordingly, section 3088(b) does not modify or limit the ALJ's authority when presiding over a special education hearing from shifting expenses from one party to another when a party has acted in bad faith. In short, with respect to the authority provided to an ALJ, section 11455.30 applies in special education hearings in the same fashion as it applies in other administrative hearings.[5]

[5] Section 3088(e) requires approval by CDE, however, if the ALJ wants to order reasonable expenses attributable to a party's bad faith be paid not to the aggrieved party, but to the California Special Education Hearing Office (SEHO). (Now, such expenses are to presumably be paid to OAH, Special Education Division, SEHO's successor). In this regard, Section 3088(e) modifies section 11445.30 by *adding* a remedy allowing an ALJ, with the approval of CDE, to require a party who engages in bad faith to pay reasonable expenses, including, costs of personnel to SEHO (OAH). The authority of the ALJ to shift expenses when a party engages in bad faith is further clarified by Cal. Code Regs., title 1, section 1040.

14. Section 11455.30 references section 128.5. 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 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.). The trial judge must provide advanced notice and the opportunity to be heard before sanctions can be imposed. (*Pacific Trends Lamp and Lighting Products, Inc. v. J. White, Inc.* (1998) 65 Cal.App.4th 1131, 1136.). The purpose of the statute is not only to compensate, but it is also a means of controlling burdensome and unnecessary legal tactics. (*On v. Cow Hollow Properties* (1990) 222 Cal.App.3d 1568, 1577.) 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). Under these governing principles, Parent was given the opportunity to be heard on whether sanctions should be imposed against her, and in considering the arguments made by the parties, the ALJ finds Parent acted in bad faith. (Findings 16-19).

15. A party in a due process proceeding is permitted to serve, "notice[s], motions, and other writings pertaining to special education due process hearing procedures to the California Special Education Hearing Office and any other person or entity…" by facsimile. (5 Cal. Code of Regs., title 5, § 3083). This section, however, does not confer a right to fax voluminous, unnecessary documents to a party opponent for an improper purpose. Even in the absence of an express statement limiting the number of pages that a party may fax to another under this provision, faxing 651 pages of largely

irrelevant material clearly constitutes a frivolous action, and based on the pattern of Parent's harassing conduct, constitutes bad faith. The fact that "writings" may be served by facsimile, does not include "writings" of any length, or for any purpose. (Findings 16-19)

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the decision must indicate the extent to each party has prevailed on each issue heard and decided. District prevailed on all issues that were the subject matter of this hearing, with the exception of issue 3, the transition plan. On issue 3, neither party prevailed since District's procedural violation did not result in a denial of a FAPE, and Parent was equally culpable for not participating in the IEP process to develop a transition plan, or remedy Student's truancy.

ORDER

WHEREFORE, the following order is made:

1. District properly assessed Student and provided an appropriate offer of a FAPE to Student for his 2004-2005 school year.

2. District shall convene an IEP team meeting no later than 30 days after the issuance of this decision. District shall provide to parent ten days notice of the date on which the meeting will be held. Parent shall attend the IEP meeting and the team shall develop a transition plan for Student.

3. Parent shall pay District $1302.00 within 30 days of the issuance of this decision as a consequence of her bad faith. This order is enforceable in the same manner as a money judgment. (Gov. Code §11455.30, subd. (b).)

4. Petitioner's remaining requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

The parties to this case may appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Cal. Ed. Code § 56505(k).)

Date: April 13, 2006

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GARY A. GEREN

Administrative Law Judge

Special Education Division

Office of Administrative Hearings