BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

CHAFFEY JOINT UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2019090129

ORDER ON CONTEMPT SANCTIONS

JULY 14, 2020

On January 6, 2020, Student filed an amended request for due process hearing, naming Chaffey Joint Union High School District. On February 21, 2020, a prehearing conference order issued, granting a continuance in this matter, scheduling the hearing to begin on June 16, 2020. On May 14, 2020, Chaffey issued eight subpoenas duces tecum to eight potential witnesses. The subpoenas sought particular categories of documents in the witnesses' possession. They directed the witnesses to submit their documents directly to the Office of Administrative Hearings, known as OAH. Notices to consumer were sent to Student advising Student of the subpoenas. Copies of the subpoenas were sent to Student with the notices to consumer. On June 8, 2020, Student filed motions to quash all eight subpoenas on the grounds that they were overbroad and sought documents that were not reasonably necessary for Chaffey's defense. On June 11, 2020, Chaffey opposed the motions. On June 19, 2020, OAH denied two of the motions to quash, and ordered Student to instruct those two

witnesses to comply with the subpoenas issued to them. Also on June 19, 2020, OAH took six of the motions to quash under submission, and ordered Student to instruct those six witnesses to comply with the subpoenas issued to them, pending the ruling on those motions to quash. June 19, 2020, was a Friday. On the previous day, Thursday June 18, on the record at the due process hearing, the Administrative Law Judge invited the parties to meet and confer to see if they could stipulate to any variances in the subpoenas' instructions. Specifically, the discussion pertained to whether documents could be sent anywhere other than directly to OAH. When it became clear the parties could not agree, the ALJ stated on the record that the subpoenas were to be obeyed as written, that the documents were to be sent directly to OAH, and that written orders would issue the following day. The June 19, 2020 written orders explicitly instructed Student's counsel to instruct the witnesses to submit their documents directly to OAH for delivery on Friday, June 26, 2020.

The next hearing day after the June 19, 2020 orders was Tuesday, June 23, 2020. On the record at that hearing, Student's counsel advised that she had instructed the witnesses to send the documents not to OAH but to herself. Student's counsel expressed confusion about the directions given by the ALJ at the June 18, 2020 hearing day and in the ALJ's June 19, 2020 written order.

No witness submitted documents directly to OAH on June 26, 2020. Instead, on June 26, 2020, OAH received a box of documents from Student's counsel's office. The contents related to witnesses Susan Hollar, Chris Davidson, Bea Braun and Cherie Francis Boegeman. The enclosed declarations from Hollar and Boegeman confirmed that these witnesses sent their documents not to OAH but to Student's counsel. Student's counsel's Opposition to the instant motion confirms that "she sent an email offering to

gather the records. . . and to forward those to OAH," and "she offered to obtain those records from the deponents and to send them in a batch to OAH."

On July 6, 2020, OAH received from SKY Pediatric Therapy the only set of documents to be received yet directly by OAH from any of the subpoenaed witnesses. On July 13, 2020, another subpoenaed witness, Cherie Francis Boegeman, informed OAH that documents from her were forthcoming directly to OAH. OAH has received no other documents directly from any of the other subpoenaed witnesses, only from Student's counsel's office.

On July 6, 2020 and July 8, 2020, Chaffey filed a motion for contempt sanctions. Chaffey sought exclusion of documents that had been improperly produced. Chaffey also requested the ALJ to provide no weight to the testimony of those witnesses to whom the subpoenas had been issued. Chaffey also requested that compliance with the subpoenas be ordered, again, with the right to recall witnesses thereafter. Chaffey also requested that certain of Student's requested remedies be stricken. Finally, Chaffey requested that Student be ordered to pay its reasonable attorneys' fees in bringing the instant motion. On July 13, 2020, Student opposed.

APPLICABLE LAW

In certain circumstances, an administrative law judge, known as the ALJ, presiding over a special education proceeding is authorized to shift expenses from one party to another, or to the Office of Administrative Hearings. (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 entity that is responsible for conducting due process hearings) 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) & €; 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).) Filing a complaint without serving it on the other party is not within the definition of "actions or tactics." (*Ibid.*) "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.)

DISCUSSION

Here, Student's counsel has failed to comply with OAH's orders. The contention that the Orders were unclear is frivolous, totally and completely without merit. While counsel cannot control the actions of the third party witnesses, she is under an obligation to instruct them, with fidelity, in strict accordance with OAH's explicit orders. This she has failed to do. The only question that remains is one of remedy.

Chaffey's requested remedy of exclusion of documents and striking of remedies is rejected as too draconian. Chaffey also requested the ALJ to provide no weight to the testimony of those witnesses to whom the subpoenas had been issued. Although this remedy is also denied, the credibility of the witnesses may be affected by their compliance or non-compliance with the subpoenas, the documents they produce, and their explanations therefor. Chaffey also requested that compliance with the subpoenas be ordered, again, with the right to recall witnesses thereafter. This is granted, with the exception of SKY Pediatric and Cheri Francis Boegeman, both of whom already have or are in the process of complying. Finally, Chaffey requested that Student be ordered to pay its reasonable attorneys' fees in bringing the instant motion. The requested remedy of attorneys' fees is taken under submission and will be addressed in the final Decision.

ORDER

1. Chaffey's motion for contempt sanctions is granted in part, denied in part, and taken under submission in part, as follows.

2. Chaffey's requested remedy of exclusion of documents and striking of remedies is denied.

3. Chaffey's requested remedy that the ALJ to provide no weight to the testimony of certain witnesses to whom subpoenas have been issued is also denied.

4. The credibility of witnesses may be affected by their compliance or non-compliance with the subpoenas, the documents they produce, and their explanations therefor.

5. Student is directed again to comply with the June 19, 2020 Orders as written.

6. The June 26, 2020 compliance date for those Orders having passed, Student shall now instruct witnesses to comply by producing documents to OAH on Friday July 17, 2020 between 8 AM and 12 PM.

7. Chaffey shall have the right to recall witnesses after the Orders have been complied with and documents obtained, if necessary in the ALJ's sole discretion.

8. Paragraphs 5, 6 and 7 above pertain to Student's instructions to all witnesses named in the June 19, 2020 Orders, with the exception of SKY Pediatric and Cheri Francis Boegeman, both of whom already have, or are in the process of, complying with the subpoenas by submitting documents directly to OAH.

9. Chaffey's request that Student be ordered to pay its reasonable attorneys' fees in bringing the instant motion is taken under submission and will be addressed in the final Decision.

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June Lehrman
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June Lehrman

Administrative Law Judge

Office of Administrative Hearings