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

OCTOBER 9, 2020

On May 14, 2020, Chaffey issued eight subpoenas duces tecum to eight of Student's experts and other potential witnesses, all of whom had either conducted independent assessments of, or provided services to, Student, and all of whom appeared on Student's witness list. Two of the subpoenas were directed to witnesses whose independent assessments had been specifically identified by name in Student's amended due process complaint.

The subpoenas sought particular categories of documents in the witnesses' possession. The subpoenas directed the witnesses to submit their documents directly to the Office of Administrative Hearings, known as OAH, for receipt by the Administrative Law Judge five business days prior to the first hearing date of June 17, 2020.

On June 1, 2020, Student's counsel emailed counsel for Chaffey regarding the subpoenas. The email argued that the subpoenas sought prehearing discovery not permitted in OAH proceedings. The email was copied to all eight witnesses, and stated "I am informing the witnesses of [the fact that prehearing discovery is not permitted in OAH special education proceedings]." Student's counsel's email, to opposing counsel and to all eight potential witnesses, further informed them of Student's counsel's plans to file motions to quash the subpoenas.

On June 8, 2020, Student filed motions to quash all eight subpoenas on the grounds that they were overbroad, sought documents that were not reasonably necessary for Chaffey's defense, and sought prehearing discovery. On June 11, 2020, Chaffey opposed the motions.

On 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.

On Friday, 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, such that OAH alone would be in receipt of the documents, pending the final ruling on those motions to quash. The June 19, 2020 written orders then, explicitly, instructed Student's counsel to instruct her witnesses to submit their documents directly to OAH, and

specifically ruled that the subpoenas did not seek prehearing discovery. As the June 19 Order explained, the subpoenas did not seek prehearing discovery because the timing of the production to OAH five business days prior to the first hearing day was solely to allow for the production of documents to OAH, not Chaffey, such that electronic access to the documents could then be provided to the parties.

The next hearing day after the June 19, 2020 orders were issued 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 during the hearing on June 18, 2020, and in the ALJ's June 19, 2020 written order.

On June 26, 2020, OAH received a box of documents from Student's counsel's office. The contents related to four of the witnesses, specifically Susan Hollar, Chris Davidson, Bea Braun and Cherie Francis Boegeman. The enclosed declarations from Hollar and Boegeman confirmed that these witnesses had sent their documents not to OAH but to Student's counsel. Student's counsel's Opposition to the motion for contempt sanctions confirmed 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."

Because Student's counsel had violated OAH's orders by failing to instruct witnesses to send documents directly to OAH, as ordered, and instead by collecting documents herself and forwarding them, Chaffey on July 6, 2020, filed a motion for contempt sanctions. Chaffey sought a number of different remedies including that Student be ordered to pay its reasonable attorneys' fees in bringing the motion.

Chaffey presented a declaration attesting to having expended $2,510.00 in attorneys' fees. Three attorneys worked on the motion, two of whom also appeared before the ALJ on all hearing days. Tiffany Santos' billable rate was $275 per hour. Joshua Walden's and Katherine Rice's billable rate was $245 per hour. The $2,510.00 in attorneys' fees represents fewer than ten hours' time, for work involving eight subpoenas and voluminous backup documentation concerning the Orders and correspondence pertaining to each one. The fees are reasonable for the work performed.

On July 13, 2020, Student opposed. Student's counsel presented various arguments, that all pertained not to whether she had complied with the June 18 and 19 Orders, but instead arguing that those Orders were incorrect or unfair. On July 14, 2020, the ALJ issued an Order finding that Student's counsel had failed to comply with OAH's prior orders, oral at the hearing on June 18 and written thereafter on June 19. Specifically, Student's counsel had instructed witnesses to send documents to herself, rather than to OAH as she had been ordered. The July 14 Order directed Student, again, to comply with the June 19, 2020 Orders as written, and found that Student's contention that the June 18 and 19 Orders were unclear was frivolous, totally and completely without merit. The July 14 Order stated that, while counsel could not control the actions of third party witnesses, she was nevertheless "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." The Order took under submission the requested remedy of attorney's fees for bringing the contempt motion, to be addressed in the final Decision.

The requested remedy of attorney's fees for bringing the contempt motion is now granted. The motion for contempt sanctions was reasonable and necessary, given Student's counsel's repeated efforts to control the witnesses' response to the subpoenas in such a way as to allow her to view the documents, before the ALJ or opposing party had

the opportunity to do so, in direct violation of the instructions to witnesses contained in the subpoenas, and OAH's explicit June 18 oral and June 19 written orders. The time spent and the billing rates were all appropriate. Therefore, Student's counsel shall reimburse to Chaffey the sum of $2,510.00 for reasonable attorney's fees incurred in bringing their July 6 motion.

In certain circumstances, an 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."].)

Expenses may be ordered to be reimbursed to OAH, with approval from the General Counsel of the California Department of Education. (Cal. Code. Regs., tit. 5, § 3088, subds. (a) &(e); see Gov. Code, § 11455.30, subd. (a).)

Or, 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).)

Student's counsel's actions in violating the June 18 and June 19 orders are found to be completely without merit and frivolous. As stated above, on July 14, 2020, the ALJ issued an Order finding that Student's counsel had failed to comply with OAH's prior orders, on the record at the hearing on June 18 and in writing thereafter on June 19. Specifically, Student's counsel had instructed witnesses to send documents to herself, rather than to OAH as she had been ordered. The July 14 Order found that Student's contention that the June 18 and 19 Orders were unclear was frivolous, totally and completely without merit. As a result, Chaffey is entitled to its reasonable expenses incurred in bringing its motion to compel compliance with those orders.

ORDER

Student's counsel shall pay to Chaffey $2,510.00, within 20 business days of the date of this Order, for Chaffey's attorney's fees incurred as a result of bad faith actions or tactics that were frivolous or solely intended to cause unnecessary delay. This order is enforceable in the same manner as a money judgment or by seeking a contempt of court order.

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June Lehrman
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June Lehrman

Administrative Law Judge

Office of Administrative Hearings