

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2014051179

ORDER TO SHOW CAUSE WHY
PARTY OR ITS ATTORNEY SHOULD
NOT BE SANCTIONED OR ORDERED
TO PAY COSTS

On June 18, 2014, the Newport-Mesa Unified School District (Newport-Mesa) filed a request to continue the dates in this matter. On June 20, 2014, the undersigned denied the request. On June 26, 2014, Newport-Mesa filed a request for reconsideration of the June 20, 2014 Order. As new facts warranting reconsideration, Newport-Mesa alleged that was set for a conflicting due process hearing in Office of Administrative Hearings Case No. 2014051060. The request for reconsideration was supported by a sworn declaration from Maureen Cottrell, director of special education for Newport-Mesa.

Ms. Cottrell's declaration specifically stated that Newport-Mesa was set to begin a due process hearing on July 15, 2014, in OAH Case No. 2014051060. The declaration is dated June 25, 2014. However, what is represented in Newport-Mesa's request for reconsideration and in Ms. Cottrell's declaration is incorrect.

In considering Newport-Mesa's request for reconsideration, the undersigned reviewed the filings in OAH Case No. 2014051060. In OAH Case No. 2014051060 Newport-Mesa is represented by the Harbottle Law Group. On June 19, 2014, the attorneys for both parties in OAH Case No. 2014051060 filed a request to continue the dates in that matter. Mr. Harbottle's office also forwarded a copy of the continuance request to Ms. Cottrell on the same day it was filed with OAH. Therefore, as late as June 19, 2014, Ms. Cottrell was aware that her attorney was seeking a continuance of OAH Case No. 2014051060.

On June 20, 2014, OAH granted the parties' continuance request in OAH Case No. 2014051060. The order was served, via facsimile, on Mr. Harbottle's office on June 20, 2014. As of June 20, 2014, there was no longer a conflict in hearing dates in OAH Case No. 2014051060 and the instant matter. Even if Ms. Cottrell was not made aware of the status of the other case by Mr. Harbottle, there is no evidence to show that she, or Newport-Mesa's counsel in this matter, investigated the status of Mr. Harbottle's continuance request in OAH

Case No. 2014051060.¹ Taken all of the facts into consideration, it appears that Newport-Mesa, with or without knowledge of its counsel in this matter, Adam J. Newman, attempted to mislead OAH into believing there was a conflicting hearing in OAH Case No. 2014051060 and that Newport-Mesa was entitled to a continuance.

ORDER TO SHOW CAUSE

Under certain circumstances, an 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 a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.” (Cal. Code. Regs., tit. 5, § 3088, subs. (a) & (e); see Gov. Code, § 11455.30, subd. (a).)

“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

¹ It is noted that OAH’s online calendar had updated the status of OAH Case No. 2014051060 on June 20, 2014. Accordingly, either Ms. Cottrell or Newport-Mesa’s counsel in this matter could have ascertained the status of OAH Case No. 2014051060 themselves, without need to contact Mr. Harbottle.

requirement does not impose a determination of evil motive, and subjective bad faith may be inferred. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

Here, Ms. Cottrell omitted key facts from her declaration, specifically that Newport-Mesa had sought a continuance of OAH Case No. 2014051060 on June 19, 2014. Ms. Cottrell either purposefully, or without having exercised due diligence to ascertain the status of OAH Case No. 2014051060, misrepresented, in her declaration, the status of the hearing in that matter. Mr. Newman was either complicit in Ms. Cottrell's representation or failed to exercise due diligence prior to having his client execute a declaration that contained false representations.

Newport-Mesa and its counsel, Adam J. Newman, are ordered to show cause why Newport-Mesa or Mr. Newman should not be sanctioned or ordered to pay the expenses of OAH in addressing the June 26, 2014 request for reconsideration, and this order to show cause. **Newport-Mesa and Mr. Newman are ordered to file a written response with OAH no later than 5:00 p.m. on July 7, 2014,** by facsimile transmission to (916) 376-6319. A copy shall be served upon Student's counsel. The response shall address what Ms. Cottrell knew of the status of the request for continuance in OAH Case No. 2014051060 on June 25, 2014; what steps if any she took to make herself aware of the status of the continuance request in OAH Case No. 2014051060 prior to executing the June 25, 2014 declaration in this matter; why she did not inform Mr. Newman or OAH that a continuance had been requested in OAH Case No. 2014051060; and whether she has ever utilized OAH's website to check the calendar for the status of any mediation or due process hearing. Mr. Newman's response shall set forth the steps he or an associate in his firm took to ascertain the status of the hearing dates in OAH Case No. 2014051060 prior to filing the request for reconsideration on June 26, 2014.²

Student's counsel is not ordered to file a response, but may do so if Student feels necessary, by 5:00 p.m. on July 7, 2014. **A telephonic hearing on the Order to Show Cause is set for July 8, 2014, at 3:00 p.m.** In addition to the appearance of any designated counsel for Newport-Mesa, Kristin M. Myers and Ms. Cottrell shall also appear. Newport-Mesa and Student shall provide OAH with telephone numbers for the telephonic hearing by 12:00 p.m. on July 8, 2014. OAH will initiate the teleconference on July 8, 2014.

ORDER

1. An Order to Show Cause as to Why Newport-Mesa or its Attorney of Record Should Not be Sanctioned or Ordered to Pay Expenses is issued. Newport-Mesa must file a written response no later than 5:00 p.m. on July 7, 2014.

² If Mr. Newman did not prepare, or review and approve, the June 26, 2014 request for reconsideration, the associate in his firm who did prepare and file the document shall provide all of the information this Order to Show Cause requests of Mr. Newman.

2. A telephonic hearing on the Order to Show Cause is set for 3:00 p.m. on July 8, 2014.

3. Kristin M. Myers and Maureen Cottrell must appear, in addition to anyone else Newport-Mesa wishes to have participate.

4. By 12:00 p.m. on July 8, 2014, the parties shall inform OAH of the telephone numbers where all participants can be reached. OAH shall initiate the teleconference.

DATE: June 30, 2014

/s/

BOB N. VARMA
Presiding Administrative Law Judge
Office of Administrative Hearings