BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. CAPISTRANO UNIFIED SCHOOL DISTRICT AND COMMUNITY ROOTS ACADEMY.	OAH Case No. 2016020288
CAPISTRANO UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2016010119 ORDER DENYING STUDENT'S REQUEST FOR OFFICIAL NOTICE; DENYING DISTRICTS' MOTION TO STRIKE; DENYING STUDENT'S MOTION FOR SANCTIONS

The hearing in this matter concluded on June 24, 2016. A decision is still pending in the case.

On July 18, 2016, District filed its closing brief. On August 1, 2016, Student filed his closing brief. District's reply brief was originally ordered to be filed on August 8, 2016, but by Order dated August 4, 2016, that deadline was continued to August 15, 2016.

Concurrent with his August 1, 2016 closing brief, Student filed a request that the Administrative Law Judge take official notice of a July 26, 2016 press release from the United States Department of Education. The press release concerned the rights of students with attention deficit hyperactivity disorder and the obligations to them by their school districts, under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq. (Section 504).)

On August 3, 2016, Districts filed a motion to strike Student's request for official notice on the grounds that the Office of Administrative Hearings does not have jurisdiction over issues dealing with Section 504. Districts also moved to strike portions of Student's closing brief that requested remedies that Districts contend were neither detailed in Student's due process complaint nor presented at hearing.

On August 8, 2016, Student filed an opposition to Districts' motion to strike. Student's opposition contained a request that Districts be sanctioned.

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Student's Request for Official Notice

Both the Administrative Procedure Act and California Evidence Code provide guidance as to the admissibility of evidence at due process hearings. (See Gov. Code, §§ 11501, 11515.) The APA provides that, "[i]n reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State." (Gov. Code, § 11515.) Certain matters may be subject to judicial notice when they pertain to facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be subject to dispute, or facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code, § 452, subd. (g) & (h), and § 451, subd. (f) (matters that must be judicially noticed); see *Lightfoot v. Mathews* (N.D. Cal. 1977) 430 F. Supp. 620, 621 [In a disability case, the Secretary of Labor was not permitted to rely on "administrative notice" to establish that a claimant can perform certain work and that such work exists. That would inappropriately enable the Secretary to avoid the burden of proof placed on him.])

The document submitted by Student from the United States Department of Education meets the criteria for official notice under the authorities cited above. However, the fact that a document may be officially noticed does not, in and of itself, mean that it should be officially noticed. In this case, the document in question relates to criteria the Department of Education's Office of Civil Rights believes school districts should consider in identifying students with attention deficit hyperactivity disorder and in providing those students with accommodations under Section 504. As pointed out by Districts in their motion to strike, the Office of Administrative Hearings does not have jurisdiction over Section 504 claims.

The guidelines in the document in question are specifically directed at issues involving Section 504 and claims that children are being discriminated against due to their disability in violation of that section. Claims of discrimination are not cognizable under the IDEA, and are not within the jurisdiction of OAH. The July 26, 2016 press release which Student wishes the ALJ to officially notice is therefore irrelevant to the issues in the instant case. Student's request for official notice is denied.

Districts' Motion to Strike Portions of Student's Closing Brief

Districts contend that several portions of Student's closing brief should be stricken because Student requests remedies that were not included in his due process complaints and were not supported by evidence at the hearing.

Contrary to Districts' assertion, Student has not attached new evidence to his closing brief regarding his proposed remedies. Rather, Student has listed several pages of requested

remedies in the body of his brief, and makes legal arguments why he should be granted the proposed remedies. Since Student has not submitted any new evidence, and given that Districts have been afforded an opportunity to file a reply brief to address Student's legal arguments, and that their date to do so has been continued until August 15, 2016, Districts' motion to strike is denied.

Student's Motion for Sanctions

In certain circumstances, an administrative law judge 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) & (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).) 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.)

Student's motion for sanctions is based on three contentions. First, that several actions Districts have taken or failed to take interfered with his education or Mother's ability to participate in the process to develop Student's individualized education program. These issues, to the extent raised at hearing, will be addressed in the pending decision in this case. denied a FAPE.

Student also seeks sanctions based on Districts' opposition to his request for official notice. Student's motion for sanctions in this regard is not well-taken. The press release Student wanted to be officially noticed is not relevant to this case.

To the extent that Student requests that Districts be sanctioned for filing their motion to strike portions of Student's closing brief, Student has failed to demonstrate that Districts' motion is frivolous under the standard described above, or that it was filed for the sole purpose of harassing Student.

ORDER

1. Student's request for official notice is denied.

2. Districts' motion to strike portions of Student's closing brief is denied.

3. Student's motion for sanctions is denied.

DATE: August 9, 2016

DocuSigned by:
Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings