BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. UPLAND UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018080058 ORDER TO SHOW CAUSE RE: SANCTIONS AND/OR CONTEMPT, WEST END SPECIAL EDUCATION LOCAL PLAN AREA AND ROYAL LORD, ED.D.

On August 2, 2017, Parent, on behalf of Student, filed with the Office of Administrative Hearings Request for Mediation Only, naming Upland Unified School District. On August 2, 2018, OAH sent the parties a scheduling order for the mediation to occur on August 16, 2018.

On August 3, 2018, Royal Lord, Ed.D., sent a letter Parent, copied to OAH, which stated that upon consultation with Upland that Upland was not willing to participate in mediation. Dr. Lord is a non-attorney advocate, employed as a Program Manager for the West End Special Education Local Plan Area, of which Upland is a member. On August 6, 2018, the OAH Case Manager, based on prior orders by OAH that Dr. Lord could not act as a non-attorney representative for member school districts of West End SELPA, contacted the Special Education Director of Upland, who stated that Upland did not wish to participate in mediation. That same day, OAH closed out Student's mediation only request and informed both parties.

APPLICABLE LAW

Under certain circumstances, an administrative law judge 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."].) A party may be order to pay expenses of a party, or 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, subd. (a).) A party may also be ordered to pay costs for failure or refusal, without substantial justification, to comply with an order of the presiding officer. (Govt. Code § 11455.10.) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

For a mediation only case, the law provides that attorneys and other independent contractors who provide legal advocacy services shall not attend or otherwise participate in a "prehearing request mediation conference." (Ed. Code, § 56500.3, subd. (a).) However, the parent or school district may be "accompanied and advised by nonattorney representatives in the mediation conferences and consulting with an attorney prior to or following a mediation conference." (Ed. Code, § 56500.3, subd. (b).)

The parties to a due process proceeding have a right to be "accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." (20 U.S.C. § 1415(h)(1); see also Ed. Code, § 56505, subd. (e)(1).) The right to be represented by an attorney and the right to be accompanied and advised by an individual with special knowledge or training does not mean that attorneys and individuals with special knowledge perform the same function. Attorneys are legally authorized to act on behalf of their clients and to practice law.

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); and (2) a shift of expenses from one party to another, when a party acts in bad faith. (Government Code section 11455.30). Section 11455.20 reads:

> (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.[1] 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.
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> (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 contempt in the trial of a civil action before a superior court.

[1] 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."

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 successor to the California Special Education Hearing Office) 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.)

On September 28, 2017, the attorney general issued an opinion letter which considered whether the IDEA, the implementing regulations, and/or the California Education Code authorized a party to special education due process proceedings to be represented by a person that was not an active member of the California State Bar. The attorney general's opinion concluded that these laws did not authorize parties to a special education due process hearing to be represented by a person that is not an active member of the California State Bar in due process hearings.

ORDER TO SHOW CAUSE

OAH has issued several orders regarding Dr. Lord's representation of school districts as a non-attorney advocate, each time informing Dr. Lord that he was not authorized by law to represent member school districts of the West End SELPA regarding matters pending before OAH. (OAH Case No. 2017101074 (November 21, 2017); OAH Case No. 2017110085 (November 29, 2017); OAH Case No. 2017111040 (December 1, 2017); OAH Case No. 2017110085 (December 7, 2017); OAH Case No. 2018041203 May 4, 2018).) The May 4, 2018 Order indicated that OAH reserved the right to impose sanctions if Dr. Lord, or any other non-attorney advocate, was designated as the non-attorney advocate for the member school district by West End SELPA.

As Dr. Lord and West End SELPA have repeatedly ignored orders from OAH for Dr. Lord not to submit documents to OAH on behalf of school districts as their non-attorney advocate, West End SELPA and Dr. Lord are ordered to show cause why OAH should not sanction West End SELPA and Dr. Lord for their repeated violation of OAH orders, which may include paying OAH's costs and/or referring West End SELPA and Dr. Lord for a finding of contempt for failure to follow OAH's lawful orders. **West End SELPA and Dr. Lord are ordered to file a written response with OAH by no later than 5:00 p.m. on August 23, 2018**.

West End SELPA's and Dr. Lord's response shall address why Dr. Lord has continued attempt to represent school district as a non-attorney advocate before OAH despite the prior OAH orders to the contrary. **West End SELPA's and Dr. Lord's written response shall address why OAH should not order West End SELPA and Dr. Lord to pay OAH's expenses related to this order to show cause and/or not to refer both for a finding of contempt .**

The order to show cause hearing shall take place telephonically on August 27, 2018, at 4:00 p.m. Failure of West End SELPA and Dr. Lord to appear telephonically at the order to show cause hearing on August 27, 2018, may result in additional sanctions.

ORDER

1. An Order to Show Cause as to Why West End SELPA and Dr. Lord Should be Ordered to Pay Expenses and/or Referred for Contempt is hereby issued. West End SELPA and Dr. Lord must file a response no later than 5:00 p.m. on Thursday, August 23, 2018.

2. A telephonic order to show cause hearing shall be convened at 4:00 p.m. on Monday, August 27, 2018.

IT IS SO ORDERED.

DATE: August 16, 2018

DocuSigned by:
Peter Paul Castillo
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PETER PAUL CASTILLO
Presiding Administrative Law Judge
Office of Administrative Hearings