Sanctioning Authority of Hearing Officials

National Association of Hearing Officials
Fall 2021 conference Philadelphia, Pennsylvania
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Course Description

- This course addresses whether hearing officials have sanctioning authority related to parties, attorneys, or other hearing representatives. Topics include grounds for sanctions, such as frivolous claims, obstructive behavior, and refusal to comply with hearing rules or orders. Other topics include types of sanctions, including money penalties, dismissal of claims, and injunctions against obstructive behavior. Final topics include authority for sanctions in statutes and rules.

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Types of ALJ sanctions

- A) **monetary sanctions** for frivolous motions, pleadings or arguments [Like Rule 11 FRCP].
- 1) grounds include lack of legal merit, lack of factual merit, improper purpose including to harass, cause unnecessary delay, or needlessly increase litigations costs.
- B) **Discovery sanctions** like FRCP. Rule 26(g)(3)[award of expenses and attorneys fees and FRCP 37(a)(5) [various merits based sanctions].

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USDA discovery sanctions 1

- 7 CFR § 1.646 - What sanctions may the ALJ impose for failure to comply with discovery?
- **(a)** Upon motion of a party, the ALJ may impose sanctions under paragraph (b) of this section if any party:
- **(1)** Fails to comply with an order approving discovery; or
- **(2)** Fails to supplement or amend a response to discovery under § 1.642(a).
- .

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USDA discovery sanctions 2

- **(b)** The ALJ may impose one or more of the following sanctions:
- **(1)** Infer that the information, testimony, document, or other evidence withheld would have been adverse to the party;
- **(2)** Order that, for the purposes of the hearing, designated facts are established;
- **(3)** Order that the party not introduce into evidence, or otherwise rely on to support its case, any information, testimony, document, or other evidence:
- **(i)** That the party improperly withheld; or
- **(ii)** That the party obtained from another party in discovery;
- **(4)** Allow another party to use secondary evidence to show what the information, testimony, document, or other evidence withheld would have shown; or
- **(5)** Take other appropriate action to remedy the party's failure to comply

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HHS Departmental appeals board

- 23. Sanctions
- The ALJ may sanction a person, including any party or attorney, for failing to comply with an order or procedure, for failing to defend an action, or for other misconduct that interferes with the speedy, orderly or fair conduct of the hearing.

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HHS dismissal decision

- Department of Health and Human Services DEPARTMENTAL APPEALS BOARD Civil Remedies Division Littlefield Hospitality (CCN: 67-6149), Petitioner, v. Centers for Medicare & Medicaid Services. Docket No. C-16-536 ALJ Ruling No. 2017-12 Date: February 24, 2017 DISMISSAL Littlefield Hospitality (Littlefield or Petitioner) has not filed its prehearing exchange or responded to my order to show cause why I should not dismiss its request for hearing due to abandonment. Therefore, I dismiss Littlefield's hearing request.

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Social Security ALJ Sanctions 1

- **Title 20 CFR § 498.214. Sanctions.**
- (a) The ALJ may sanction a person, including any party or attorney, for:
- (1) Failing to comply with an order or procedure;
- (2) Failing to defend an action; or
- (3) Misconduct that interferes with the speedy, orderly or fair conduct of the hearing.

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Social Security ALJ Sanctions 2

- (b) Such sanctions will reasonably relate to the severity and nature of the failure or misconduct. Such sanction may include—
- (1) In the case of refusal to provide or permit discovery under the terms of this part, drawing negative factual inferences or treating such refusal as an admission by deeming the matter, or certain facts, to be established;
- (2) Prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense;
- (3) Striking pleadings, in whole or in part;
- (4) Staying the proceedings;
- (5) Dismissal of the action; or
- (6) Entering a decision by default.

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Social Security ALJ Sanctions 3

- (c) In addition to the sanctions listed in paragraph (b) of this section, the ALJ may:
- (1) Order the party or attorney to pay attorney's fees and other costs caused by the failure or misconduct; or
- (2) Refuse to consider any motion or other action that is not filed in a timely manner.
- [61 FR 65471, Dec. 13, 1996]

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MN ALJ Sanctions (state) 1

- Minnesota administrative procedure Ch. 8 Discovery, Section 8.7. See: https://mitchellhamline.edu/minnesota-administrative-procedure/8-7-sanctions-for-failure-to-make-discovery/
- "In contested cases under the Minnesota Human Rights Act,[11] the ALJ also has statutory authority to impose sanctions for intentional and frivolous delay.[12] The statute has been interpreted by the chief ALJ to authorize the adoption of appropriate rules regarding sanctions during both the investigatory and hearing stages.[13] Intentional and frivolous delay might include failure to make ordered discovery in a timely fashion. In addition to the sanctions available in other contested cases, in human rights proceedings indirect monetary penalties may be imposed.[14]"See:

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MN ALJ Sanctions (state) 2

- There are also discovery sanctions discussed under Section 8.7 of the same chapter (Chapter 8 Discovery)
- "The rules of the OAH authorize the ALJ to impose a variety of sanctions for failure to comply with a discovery order. With the exceptions of a direct contempt penalty and the award of expenses, an ALJ may employ sanctions parallel to those available to a district court.[1] In *Caucus Distributors, Inc. v. Commissioner of Commerce*,[2] the court of appeals affirmed an order by an ALJ in a contested case precluding a party from defending portions of the complaint as a sanction for failure to provide ordered discovery. Available sanctions include the exclusion of the testimony of undisclosed witnesses,[3] constructive admissions,[4] the exclusion of specific claims, defenses, and designated matters in evidence,[5] and a recommendation for default." See https://mitchellhamline.edu/minnesota-administrative-procedure/8-7-sanctions-for-failure-to-make-discovery/

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ITC ALJ Sanctions 1

- ABA litigation See: https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2018/spoliation-on-a-staggering-scale-leads-to-sanction-of-default-judgment/An administrative law judge (ALJ) did not abuse his discretion when he entered default judgment as a sanction for spoliation of evidence. *Organik Kimya, San. Ve Tic. A.S. v. ITC*, 122 U.S.P.Q. 1281, 848 F.3d 994 (Fed. Cir. 2017).

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ITC ALJ Sanctions 2

- https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2018/spoliation-on-a-staggering-scale-leads-to-sanction-of-default-judgment/ Under 19 C.F.R. § 210.33(b), the ALJ in an International Trade Commission (ITC) investigation has the authority to issue non-monetary sanctions for failure to comply with an order compelling discovery. The list of possible sanctions includes "any other non-monetary sanction available under Rule 37(b) of the Federal Rules of Civil Procedure." 19 C.F.R. § 210.33(b)(6). Rule 37(b) states that a court may "render[] a default judgment against the disobedient party" if the party fails to obey a discovery order. Fed. R. Civ. P. 37(b)(2)(A)(vi).

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DC ALJ Sanctions 1

- TERENCE K. WOLFE, Claimant – Petitioner, v. WASHINGTON SPORTS AND ENTERTAINMENT/ MCI CENTER, Self-Insured Employer – Respondent. Appeal from a Compensation Order of Administrative Law Judge Henry W. McCoy AHD No. 04-405A, OWC No. 5909.
- DECISION AND ORDER JURISDICTION Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005)

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DC ALJ Sanctions 2

- "This appeal follows the issuance of an Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on October 28, 2005, the Administrative Law Judge (ALJ) dismissed the March 10, 2005 Application for Formal Hearing without prejudice and directed the Claimant-Petitioner (Petitioner) to remit court costs in the amount of $175.00 by November 10, 2005. The Petitioner now seeks review of that Order. As grounds for this appeal, the Petitioner alleges that the ALJ erred in imposing sanctions and in denying his request to appear at the formal hearing via telephone, and that consequently, the Order should be vacated." **Dismissal of claim upheld with $ 175.00 in costs imposed.**

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OSHA ALJ Discovery sanctions

- Title 29 Section 1955.33 authorizes discovery sanctions to be imposed by an ALJ working for OSHA in the Department of Labor. These sanctions are for failure to comply with a discovery order. These are very similar sanctions to those authorized by the SSA and the USDA for sanctions to be imposed by ALJ's for the same type of discovery violations. These are also very similar to merits based sanction in Rule 37 of the FRCP.

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HHS DAB sanctions for ex parte contacts

- 4. Contact with the ALJ
- **Ex parte communications.**
  Direct communication with the ALJ is prohibited unless all parties or party representatives are present. All party contact with an ALJ is through the staff attorney assigned to assist the ALJ with a particular case. The name, telephone number, facsimile number, and e-mail address of the staff attorney will be provided to the parties with the CRD acknowledgment of a party's hearing request. When sending an e-mail to the assigned staff attorney, you must copy ("CC") the opposing party on the e-mail. Parties may also contact CRD staff by calling the CRD at (202) 795-7490.
- **Sanctions.**
  An ALJ may impose sanctions against a party for engaging in *ex parte* communication, that is, any written or oral communication directly with an ALJ or with the assigned staff attorney assisting the ALJ about any issue other than a general procedural question in which the opposing party is not present or copied.
- Content created by Departmental Appeals Board (DAB)
  Content last reviewed on March 28, 2016
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Sanctions (Alaska) ALJ

- In Re Kohler (Alaska Office of administrative hearings) OAH No. 10-0635-MED) Board Case No. 2800-08-002
- Medical Board of Alaska case
- "ORDER ON MOTION FOR SANCTIONS At the hearing in this matter, the respondent moved for dismissal or other sanctions for conduct by the Division of Corporations, Business and Professional Licensing (division) and its counsel in connection with a subpoena the division provided to itself during the course of the hearing. Because the issuance of the subpoena was improper and the associated conduct falls within the definition of bad faith, the motion is granted. The sanction of dismissal is rejected as excessive, however. The division and its counsel will be required to pay the expenses occasioned by their course of action."

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ALJ control of the Hearing

- "ALJ Control of the Hearing: What Does an ALJ do About an Unruly Witness or Obstreperous Attorney?" By Prof. Allen Shoenberger 23 N.A.A.L.J. 91 (2003-2004).
- This is a short but interesting article on ALJ control of hearings, which is a topic related to sanctions.
- See: https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1163&context=naalj
- This article is publicly available for download at no charge for educational purposes.

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ALJ contempt sanctions (FDA)

- U. S. v. Century Clinic (D. Nev. 1998) 75 F. Supp. 2d 1127. The court affirmed civil contempt findings by an ALJ, and also affirmed a $ 400,000 civil contempt fine.
- The ALJ worked for the Food and Drug Administration. The FDA issued a final administrative decision which included the civil contempt findings and the $ 400,000 fine. The district court affirmed that decision.
- **That said, it is rare for an ALJ or an agency to have authority to issue contempt sanctions.**

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IDEA Sanctions 1

- Sanctioning authority is governed by statutes and administrative regulations
- Whether hearing officers have the authority to issue disciplinary sanctions against a party or the party's attorney for what the hearing officer regards as hearing misconduct is a matter of state law, according to OSEP. [Letter to Armstrong, 28 IDELR 303 (OSEP 1997).]

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IDEA Sanctions 2

- Salma A. Khaleq "The Sanctioning Authority of Hearing Officers in Special Education Law Cases", 32 Journal of the National Association of Administrative Law Judiciary 1 (2012) is a good law journal resource on this topic. This article is a source for much of the primary authority discussed in this program.
- See: https://digitalcommons.pepperdine.edu/naalj/
- This link will provide online access to NAALJ Journal issues

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IDEA Sanctions 3

- ***EXPRESS* GRANT OF POWER:**
- "Few states expressly grant IDEA hearing officers sanctioning authority." This minority of states includes California, Texas, Massachusetts, and Minnesota.
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- **CALIFORNIA**
- California expressly grants IDEA hearing officers sanctioning authority under two statutes:
- CAL. GOV. CODE § 11455.30(a),(b)(1997) ("The presiding officer may 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 as defined in Section 128.5 of the Code of Civil Procedure.(b) The order, or denial of an order, is subject to judicial review in the same manner as a decision in the proceeding. The order is enforceable in the same manner as a money judgment or by the contempt sanction.")

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IDEA Sanctions 4

- Cal. Code Civ. Proc. Section 128.5 (a), (b)
- ("(a) a trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay ….. (b) For purposes of this section: (1)"actions or tactics" include, but are not limited to, the making or opposing of motions of the filing or service of a complaint, cross-complaint, answer, or other responsive pleading…..

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IDEA Sanctions 5

- Cal. CCP Section 128.5 (b)(2) "Frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party.")
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- 5 CCR § 3088 (1997) (California) ("The presiding hearing officer may, with approval from the General Counsel of the California Department of Education, order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel, to the California Special Education Hearing Office….")

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IDEA Sanctions 6

- **Court decisions in California**
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- A few California court cases uphold hearing officers' decisions to grant sanctions:
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- *G.M. v. Drycreek Joint Elementary Sch. Dist*., 59 IDELR ¶ 224 (C.D. Cal. 2012) (upholding hearing officer's decision to partially award attorneys' fees of $3880 to district for frivolous claim of parent's attorney).
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IDEA Sanctions 7

- *K.S. v. Fremont Unified Sch. Dist.* 545 F. Supp. 2d 995 (N.D. Cal. 2008) (upholding hearing officer's decision to grant sanctions against parent's attorney. ALJ concluded that parent's attorney's motion for clarification related to hearing date was completely without merit and in bad faith.)
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- *K.S. v. Fremont Unified School Dist.,* 426 Fed.Appx. 536 (2011) (unpublished) district court summary judgment affirmed on appeal. Claim of ALJ bias (based on taking hearing notes) rejected.)
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IDEA Sanction 8

- *Moser v. Brett Harte Unified School District* 366 F. Supp. 2d 944 (ED Cal) the District court judge held sua sponte sanctions hearing (order to show cause hearing) and ordered monetary sanctions against attorneys for school district that "engaged in egregious conduct in this appeal from an administrative hearing". This conduct included " misrepresenting facts and law, violating their duty of candor, and willfully and vexatiously multiplying the proceedings under FRCP Rule 11, 28 U.S.C. Section 1927, and the court's inherent power."

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IDEA Sanctions 9

- *Poway Unified Sch. Dist. v. Stewart*, 2007 WL 1620766 (Cal. Ct. App. June 6, 2007) (unpublished) (affirming an award of sanctions issued by a hearing officer in the amount of $3,091.25 for an untimely notice of withdrawal by the parent on the morning of the hearing).
- *Poway Unified Sch. Dist. v. Stewart*, 2008 WL 607530 (Cal. Ct. App. March 6, 2008) (unpublished)(appeal from an order issuing a bench warrant directed to a parent that refused to participate in a debtor's examination related to enforcement of the sanctions order ($ 3,091.25) in the prior matter. The appeal was dismissed because the appealing party refused to comply with lawful court orders.)

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IDEA Sanctions 10

- **California Office of administrative Hearings Special Education Law Division decisions of Administrative Law Judges that grant sanctions**
- **See:** https://www.dgs.ca.gov/OAH/Case-Types/Special-Education/Services/Page-Content/Special-Education-Services-List-Folder/Decisions-and-Orders
- The web link is for all decisions.

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IDEA Sanctions 11

- Student v. Poway Unified School District OAH No. N 2005080077 (April 9, 2006)) (ALJ Geren). An ALJ granted monetary sanctions of $ 1,302.00 against a parent who faxed 651 pages of largely irrelevant materials to the school district office. The award was based on the amount of expenses incurred by the school district related to the faxed materials. The ALJ found that the parent had acted in bad faith in faxing the voluminous material to the school district.).

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IDEA Sanctions 12

- Student v. Alvord Unified School District OAH No. N 2005070955 (October 26, 2005) (ALJ Alvord). Decision upheld by US District Court (CD Cal). The ALJ made fact findings that supported the issue of placing the district's expenses in issue and to order the parents representatives but not the parent to show cause why monetary sanctions should not be issued against them in this matter.
- Allen v. Alvord Unified School District (EDCV 06-00311 SGoL) (CD Cal) The district court upheld the award of sanctions against the parents representatives in the previous matter.

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IDEA Sanctions 13

- Student v. Corona Norco Unified School District OAH No. N 2005070232 (May 23, 2006) (ALJ Brown). ALJ Brown did not award bad faith sanctions against a parent's lawyer (Mr. Peters) because in other cases brought by this lawyer (and another lawyer, Mr. Appel, two other ALJ's (Hejlt and Ahler) had awarded substantial bad faith monetary sanctions ($30,000 in one matter and $15,000 in another matter) against the two lawyers and in favor of the same school district for bad faith actions and frivolous tactics by these lawyers for filing multiple due process hearing requests for a number of students and against the same school district as a threat to force the school district to pay advocate fees of $ 63,000 dollars. These sanctions findings were part of the hearing record in this matter.

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IDEA Sanctions 14

- Parents on Behalf of Student v. Lancaster Elementary School District OAH no. N 2008010456 (June 4, 2008) (ALJ Ruff). The ALJ made fact findings that supported the issue of placing the district's expenses in issue and to order the parents representatives to show cause why monetary sanctions should not be issued against them in this matter.

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IDEA Sanctions 15

- Orange Unified School District v. Student OAH no. N 2006100003 (November 22, 2006) (ALJ Ruff) ALJ denied district's request for sanctions against student for refusal to consent to assessment. Parents objected to assessment of student in grounds that it would be harmful to students. That was within parents' due process rights to make that decision and was not conduct that was subject to sanctions award.

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IDEA Sanctions 16

- Dry Creek Joint Elementary School District v. Parent on behalf of Student OAH N 2009071109 (February 18, 2010) (ALJ Marson). The ALJ awarded $ 3,880.00 in sanctions against Student's father who was an attorney to compensate School District for attorneys' fees and related expenses incurred in defending against four frivolous pleadings and motions filed by father in matter.

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IDEA Sanctions 17

- Student v. Corona Norco Unified School District OAH No. N 2005070169 (October 18, 2005) (ALJ Ahler) The ALJ found that parents representatives requested a due process hearing in bad faith. Sanctions would have been awarded but for unclean hands of the school district.
- Long Beach Unified Sch. Dist., 32 IDELR 128, 410-411 (Cal. 2000) (Parents sought contempt sanctions against a school district for failure to implement a final decision against the school district. The decision required the district to reimburse parents for unilateral placement and services. The ALJ refused to award contempt sanctions not because of lack of authority but because the parents did not show that the school district's failure was in bad faith under Cal. CCP section 128.5.)

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IDEA Sanctions 18

- **TEXAS**
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- 19 TEX. ADMIN. CODE § 89.1170(b) (2001) ("The hearing officer has the authority to … make any other orders as justice requires, including the application of sanctions as necessary to maintain an orderly hearing process.");
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- 1) Nicholas W. v. Northwest Indep. Sch. Dist., 2009 WL 2744150, 53 IDELR 43 (E.D. Tex. Aug. 25, 2009) (upholding the sanction of a dismissal without prejudice because an alternative to dismissal, i.e., fines, costs or damages, against the plaintiffs was not available because plaintiffs proceeded in forma pauperis);
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IDEA Sanctions 19

- 2) Ingram Indep. Sch. Dist., 43 IDELR 124 (SEA Tex. 2004) (finding that the conduct of Petitioner's counsel was willful, intentional, in bad faith and sufficiently egregious as to justify the sanction of a dismissal with prejudice).
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- For a comprehensive list of Texas due process hearing officer decisions, See https://tea.texas.gov/About_TEA/Government_Relations_and_Legal/Special_Education/Due_Process_Hearings/Special_Education_Due_Process_Hearing_Decisions/
- A review of those decisions with the indexing features provided showed that no sanctions orders were issued in the listed decisions.

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IDEA Sanctions 20

- **MASSACHUSETTS**
- 801 CMR 1.01(8)(i) (2012) (Massachusetts) ("A Party may file with the Presiding Officer, subject to 801 CMR 1.01(7)(a), a motion to compel discovery if a discovery request is not honored, or only partially honored, or interrogatories or questions at deposition are not fully answered. If the motion is granted and the other Party fails without good cause to obey an order to provide or permit discovery, the Presiding Officer before whom the action is pending may make orders in regard to the failure as are just, including one or more of the following … [a]n order that designated facts shall be established adversely to the Party failing to comply with the order[] or [a]n order refusing to allow the disobedient Party to support or oppose designated claims or defenses, or prohibiting him or her from introducing evidence on designated matters.");

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IDEA Sanctions 21

- MASSACHUSETTS (cont.)
- Special education law due process hearing decisions can be found on the website for the Bureau of Special Education Appeals.
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- For due process hearing decisions,
- See: https://www.mass.gov/lists/bsea-decisions-2016-to-date
- These decisions are not easily searchable as there are no issues decided index of decisions.
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IDEA Sanctions 22

- **MINNESOTA**
- MINN. RULES 3525.4110, Subp. 3 (2007) ("The hearing officer has the authority to take any actions necessary to ensure the compliance with all requirements of law and may dismiss the matter, with or without prejudice, if the party requesting the hearing fails to provide information required or ordered by the hearing officer.").
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- 1) Dist. City 1 & Dist. City 2 Pub. Sch., 24 IDELR 1081 (SEA Minn. 1996) (relying on the notion that hearing officers have the "implied authority to control the conduct of the hearing and persons appearing there" when ordering the student's attorney to pay the school districts $2000 for pursuing a summary judgment motion "made without factual basis, upon unsupported and distorted facts, and upon illogical arguments").

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IDEA Sanctions 23

- **MINNESOTA** (cont.)
- 2) Moubry v. Indep. Sch. Dist. No. 696, 32 IDELR 90 (D. Minn. 2000) (interpreting a Minnesota Rule of Civil Procedure, since repealed, which granted the hearing officer authority to "do additional things necessary to comply" with the special education rules, to include "the authority to assess sanctions against a party who files a frivolous request for a hearing." The court upheld the IHO's order for the parent's attorney to pay $2,432 as a sanction for filing a frivolous fourth hearing request–based on a Minnesota statute repealed in 2004);

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IDEA Sanctions 24

- **New Jersey**
  New Jersey administrative regulations authorize sanctions awards.
- N.J.A.C. 1:1–14.14
- **1:1–14.14 Sanctions; failure to comply with orders or requirements of this chapter**
- (a) For unreasonable failure to comply with any order of a judge or with any requirements of this chapter, the judge may:
- 1. Dismiss or grant the motion or application;
- 2. Suppress a defense or claim;
- 3. Exclude evidence;
- 4. Order costs or reasonable expenses, including attorney's fees, to be paid to the State of New Jersey or an aggrieved representative or party; or
- 5. Take other appropriate case-related action.

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IDEA Sanctions 25

- **NEW JERSEY** (cont.)
- S.B. AND K.B. ON BEHALF OF P.B., Petitioners,
- v. PARK RIDGE BOARD OF EDUCATION, Respondent.
- 2009 WL 1574247 (N.J. Adm.) (April 21, 2009) New Jersey Office of Administrative Law.
- The ALJ in this case excluded all evidence related to a placement of a student in a particular program from admission into evidence because one of the parties to the lawsuit refused in bad faith and unreasonably to allow discovery of facts and other information that would have been necessary for the parent's expert witness to offer an opinion on the issues in this IDEA matter as to whether the school district offered a F.A.P.E. Without that information, the parent would not have been able to offer expert testimony on this issue. The ALJ relied on NJAC 1:1-14.14 (a)(3).

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IDEA Sanctions 26

- Second New Jersey case OAL
- 2006 WL 3075736 (N.J. Adm.)(10 23 2016)
- Z.J. and V.J., o/b/o L.J., Petitioners,
- v.
- AUDUBON BOARD OF EDUCATION, Respondent.
- Special Education
- OAL DKT. EDS 6203-06
- **ORDER EXCLUDING EVIDENCE PURSUANT TO** N.J.A.C.1:6A-10.1
-
- " During the hearing on August 29, 2006, attorney for petitioner raised an evidentiary objection to certain documents offered for identification by respondent on the basis that respondent had not provided any discovery pursuant to the requirements of N.J.A.C. 1:6A-10.1(a) and (b).1 Attorney for respondent did not dispute this. He represented that he had made an unsuccessful attempt to provide discovery to the petitioner but he acknowledged that such discovery had not been provided. In view of this the petitioner applied prospectively for the exclusion of all testimony and evidence which respondent may attempt to proffer at the hearing, citing the provisions of N.J.A.C. 1:6A-10.1(c).....

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IDEA Sanctions 27

- After considering all of the foregoing, I **FIND** that there is no basis for disregarding the provisions of N.J.A.C. 1:6A:10.1(a), (b) and (c). Therefore, I **ORDER** that there shall be excluded at hearing any evidence that has not been disclosed by respondent to the petitioners at least five business days before the hearing, unless I determine that the evidence could not reasonably have been disclosed within that time. However, I also **ORDER** and **DETERMINE** that any evidence that has been disclosed by respondent to petitioners at least five business days before the hearing, is not subject to exclusion.
- In his letter of August 29, 2006, attorney for petitioners seeks attorney fees as a **sanction** for time spent on this issue pursuant to N.J.A.C. 1:1-14.14(a)(4) for respondent's "unreasonable failure to comply with the requirements of this chapter."

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IDEA Sanctions 28

- The imposition of such a **sanction** would be similar to imposing a **sanction** where one party attempts to introduce irrelevant or privileged evidence and the adverse party objects. The time spent by an attorney making a valid objection to such evidence does not entitle the objecting attorney to fees as a **sanction**. Therefore, I **FIND** that there is no basis for the imposition of a monetary **sanction** in this matter and hereby **DENY** the request.
- As an aside, I suggest that if attorney for respondent intends to seek the exclusion of any of petitioner's evidence or the testimony of petitioners' witnesses, the matter be addressed as expeditiously as possible in order to avoid unnecessary expenditures of time and expense."

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IDEA Sanctions 29

- For a comprehensive list of New Jersey due process hearing officer decisions,
  See http://njlaw.rutgers.edu/cgi-bin/swish-e/oal.cgi?query=special+education+law+due+process+hearing+decisions
- I could not find any other sanctions decisions in this list

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IDEA Sanctions 30

- ***IMPLIED* GRANT OF POWER:**
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- "Many states, however, do not have laws that expressly provide for sanctioning authority. In these states, hearing officers who have exercised sanctioning authority have done so under the assumption that their authority is coextensive with that of the court and it is a power not derived from any express authority but arising from necessity. Said authority is, therefore, implied." Support for the inherent, sanctioning authority of IDEA hearing officers is sometimes explicitly provided by courts in such states. This majority of states includes Michigan, Ohio, Indiana, and New Mexico.

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IDEA Sanctions 31

- **MICHIGAN**
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- MICH. ADMIN. CODE r. 340.1725e(1)(e) (1994) ("Control the conduct of parties or participants in the hearing for the purpose of assuring an orderly procedure.) - it implies authority to grant sanctions.
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- 1) Bd. of Educ. of the Hillsdale Cmty. Sch., 32 IDELR 162 (SEA Mich. 1999) (relying on the state's administrative code providing hearing officers the authority "to control the conduct of the parties or participants in the hearing for the purpose of ensuring an orderly procedure" when awarding costs of $308.86 to the school district's lawyer based on the parents' attorney's "unexcusable failure to communicate with the District's counsel in a timely fashion").
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- 2) Okemos Pub. Sch., 29 IDELR 677 (SEA Mich. 1998) (relying on the state's administrative code also relied on in Hillsdale, supra, when dismissing the due process complaint with prejudice because of the parent's failure to cooperate and to comply with pre-hearing orders).
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IDEA Sanctions 32

- **OHIO**
- Stancourt v. Worthington City Sch. Dist., 841 N.E. 2d 812, 44 IDELR 166 (Ohio Ct. App. 2005) (concluding that IDEA hearing officers are "vested with implied powers similar to those of a court" and have the discretionary power to dismiss due process complaints as a sanction for disregarding orders or failing to prosecute. However, the court held that in this case the sanction of dismissal with prejudice was too harsh).

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IDEA Sanctions 33

- **INDIANA**
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- Indianapolis Pub. Sch., 21 IDELR 423 (SEA Ind. 1994) (upholding a hearing officer's decision, premised on expressed statutory authority which has since been repealed, to sanction petitioner's attorney $500 for "sham objections" and the failure to comply with repeated discovery orders).
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- **NEW MEXICO**
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- Las Cruces Pub. Sch., 44 IDELR 205 (SEA N.M. 2005) (overturning a hearing officer's recommendation to a court that the parents' be held responsible for the district's attorneys' fees).

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IDEA Sanctions 34

- **DISTRICT OF COLUMBIA**
- Silva v. District of Columbia (D. DC, 2014) 57 F. Supp. 3d 62, 316 Ed. Law Rep. 325. The IHO had implied authority in a quasi-judicial proceeding to issue a conditional order dismissing a parent's IDEA complaint with prejudice in advance of the hearing if the parent did not refile the complaint within 30 days when the parent's attorney withdrew the complaint without prejudice one week before the hearing date based on concerns about the fairness of the hearing officer. The IHO did not abuse its discretion in issuing that conditional order and then making it a final order when the parent's attorney did not refile the complaint within the 30 day time period.

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IDEA Sanctions 35

- **NEW HAMPSHIRE**
- 1) Epsom Sch. Dist. 31 IDELR 120, 445 (N.H. SEA 1999) (parents refused to sign a release of records form allowing the school district to review records of their child. The IHO granted a motion by the district to compel pre-hearing discovery of those documents. The IHO warned the parents that further refusal to sign the release form would result in a dismissal of their due process hearing).
- 2) In Re Caroline T, 16 IDELR 1340 (N.H. SEA 1990) (parents refused to sign a release of records form for their child's records so the district could prepare for the due process hearing. The IHO issued an order compelling the parents to comply with the district's discovery request. The IHO warned the parents that a further refusal to comply with the order would result in sanctions being awarded against the parents.)

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IDEA Sanctions 36

- **PENNSYLVANIA**
- Wissahickon Sch. Dist., 26 IDELR 1370 (Penn. SEA 1997) (IHO's have broad discretion in the conduct of their proceedings, including evidentiary rulings, whether or not to admit evidence into the record, or to exclude evidence as a sanction for failure to offer evidence in a timely manner.)
- **TENNESSEE**
- Smith Cnty. Sch. Sys. 27 IDELR 764 (Tenn. SEA 1998) (IHO issued order compelling school district to disclose documents within five business days before the hearing. District failed to meet that deadline and refused to receive parent's documents. Parents sought contempt sanctions against district. ALJ stated that he had no authority to fine or jail anyone under state law. The only remedy available would be for ALJ to exclude district's documents from being admitted into the evidentiary record if they were submitted at a later date.).

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Ex parte contacts sanctions

- Reversal of a decision for improper ex parte contacts between a decision maker and a lawyer for a party.
- Arbitration decision Grabowski v. Kaiser Foundation Health Care plan, Inc. 64 Cal. App. 5th 67 (2021)
- The court "held that arbitrator's failure to disclose ex parte communication with health care provider's counsel about claimant's self-represented status required vacation of arbitration award."

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APA sanctions for ex parte contacts

- 1. Federal APA, 5 U.S. C. Section 557(d)(1)(D) merits sanctions for knowingly made ex parte contacts violations when consistent "with the interests of justice and the policy of the underlying statutes".
- 2. 2010 MSAPA Section 408(i), merits sanctions "other appropriate relief may be granted, including an adverse ruling on the merits of the case, or dismissal of the application."

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