BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

FREMONT UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2021020338

ORDER DENYING MOTION TO COMPEL PRODUCTION OF RECORDS AND MOTION TO SHIFT COSTS

MARCH 10, 2021

On February 9, 2021, Student filed a Request for Due Process Hearing, with the Office of Administrative Hearings, called OAH, naming Fremont Unified School District. On March 4, 2021, Student filed a Motion to Compel Production of Student Records and a Motion to Shift Costs to Fremont. Student alleges Fremont failed to provide a complete copy of Student's educational records in response to Student's attorney's February 1, 2021 request. Student alleges Fremont's failure to provide a complete copy of Student's educational records infringed on Parents' right to representation and opportunity to meaningfully participate in the design of Student's educational program.

On March 9, 2021, Fremont filed an opposition to Student's motions. Fremont alleges it sent a copy of Student's educational records to Student's attorney on February 4, 2021, in response to the February 1, 2021 request. Further, Fremont alleges it provided additional records to Student's attorney on March 8, 2021, after realizing it had inadvertently excluded the records from the records provided on February 4, 2021. Fremont's Director of Special Education attested to providing the records to Student's attorney in a sworn declaration, under the penalty of perjury.

Parties have no right to formal prehearing discovery in special education due process hearings. However, the procedural safeguards of the Individuals with Disabilities Education Act allow parents the opportunity to examine all records relating to their child with respect to the identification, evaluation, and educational placement of the child; and the provision of a free appropriate public education to the child. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(a).) Additionally, the California Education Code allows parents the right to examine and receive copies of all school records related to their child within five business days after a request for records is made. (Ed. Code, § 56504.)

In certain circumstances, an administrative law judge, called 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 and 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."].) An ALJ 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." (Gov. Code, § 11455.30, subd. (a); Cal. Code. Regs., tit. 5, § 3088, 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).)

Student's Motion to Compel fails for three reasons. First, there is no right to prehearing discovery in special education cases. Second, Fremont's Director of Special Education attested to providing Student's records on February 4, 2021, and March 8, 2021. Finally, Fremont's failure to timely provide records is an issue in Student's complaint for which Student may seek a remedy at a due process hearing. Therefore, Student's Motion to Compel is denied.

Student's Motion to Shift Costs fails because Student did not show that Fremont's actions related to providing Student's educational records were in bad faith, frivolous, or for the sole reason of causing unnecessary delay. Therefore, Student's Motion to Shift Costs is denied.

ORDER

1. Student's Motion to Compel is denied.
2. Student's Motion to Shift Costs is denied.
3. All hearing dates will proceed as scheduled.

Tara Doss

Tara Doss

Administrative Law Judge

Office of Administrative Hearings