BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017031156
v.	ORDER GRANTING MOTION TO COMPEL PRODUCTION OF STUDENT RECORDS AND DENYING MOTION FOR SANCTIONS
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT.	

On March 28, 2017, Student filed a motion to compel Sacramento City Unified School District to produce specific educational records and for sanctions. On April 3, 2017, District filed an opposition to Student's motions. On April 4, 2017, Student filed a reply.

APPLICABLE LAW

Educational Records

To guarantee parents the ability to make informed decisions about their child's education, the Individuals with Disabilities Education Act grants parents of a child with a disability the right to examine all relevant records in relation to their child's special education identification, evaluation, educational placement, and receipt of a free appropriate public education. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.501(a) (2006)[1]; Ed. Code, §§ 56501(b)(3) & 56504.) The district must comply with a request to review records without unnecessary delay and before any meeting regarding an individualized education program, any due process hearing, or resolution session, and in no case more than 45 days after the request has been made. (34 C.F.R. § 300.613 (a).) Under California law, the parent shall have the right and opportunity to examine all school records of her child and to receive copies within five business days after the request is made by the parent, either orally or in writing. (Ed. Code, §§ 56043, subd. (n), 56501, subd. (b)(3), 56504.) Parents' due process hearing rights include the right to examine the student's education records. (20 U.S.C. § 1415(b)(1); Ed. Code, § 56501(b)(3).) This access is a hallmark of the procedural protections afforded under the IDEA and a prerequisite to a full and fair administrative hearing.

[1] All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

The IDEA does not have a separate definition of educational records, and adopts the Family Educational Rights and Privacy Act definition of education records by reference. (34 C.F.R. § 300.611 (b).) In general, educational records are defined as those records which are personally identifiable to the student and maintained by an educational agency. (20 U.S.C § 1232g(a)(4)(A); 34 C.F.R. §§ 99.3; Ed. Code, § 49061, subd. (b) [similarly defines pupil record].) The United States Supreme Court in *Owasso Independent School Dist.No.I-011 v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (Owasso), after conducting an analysis of FERPA provisions related to education records, defined the word "maintained" in this context by its ordinary meaning of "preserve" or "retain." Records are maintained when the agency keeps the records in one place with a single record of access. (*Id*. 534 U.S. 426, 433-434.)

Test protocols such as test questions, student answers, evaluator calculation or scoring sheets, and administration instructions, to the extent these are personally identifiable to the student, are educational records that must be provided to parents if requested. (*Newport-Mesa Unified School Dist. v. State of Cal. Dept. of Educ.* (C.D.Cal. 2005) 371 F.Supp.2d 1170 at pp. 1175, 1179 [providing parents copies of their children's test protocols constitutes a permissible "fair use" pursuant to federal copyright law]; *Letter to Price* (OSEP Oct. 13, 2010) 57 IDELR 50 [test protocols with a student's personably identifiable information are education records and if copyright law conflicts with IDEA's requirement to provide educational records, districts should seek ways to facilitate inspection including contacting the copyright holder].)

Neither the IDEA nor California law provides for prehearing discovery in a due process hearing. Rather, a party to a due process hearing has the right to present evidence and compel the attendance of witnesses at the hearing. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56505, subd. (e)(2) and (3).) Further, at least five business days prior to the hearing, the parties have the right to be provided with a copy of all documents and a list of all witnesses and their general area of testimony the parties intend to present at hearing. (Ed. Code, § 56505, subd. (e)(7).)

Sanctions

An award of reasonable attorney's fees to the prevailing parent, guardian, or pupil may only be made either with the agreement of the parties following the conclusion of the administrative hearing process or by a court of competent jurisdiction. (See 20 U.S.C. § 1415(i)(3); Ed. Code, §56507, subd. (b).) OAH is not a court of competent jurisdiction within the meaning of Education Code section 56507, subdivision (b).

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 ordered 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); Gov. Code, §11455.30.)

DISCUSSION

In September 2016, Student's attorney requested that District provide a copy of Student's school records. District did not respond. In October 2016, Student's attorney again requested Student's records. One week later District had not responded, and Student's attorney filed a compliance complaint with the California Department of Education. The Department of Education conducted an investigation and worked with Student and District to obtain for Student a copy of her school records. The Department of Education found that District attempted to email records to Student's attorney on the same date Student filed the compliance complaint, but District sent the message and records to an email address that was no longer in use by Student's attorney. The Department of Education obtained the correct email address and provided it to District and some, but not all, of Student's records were emailed to Student's attorney on November 15, 2016. As of November 17, 2016, District was collecting additional records to send to Student's attorney.

In the Investigation Report dated December 2, 2016, the Department of Education found District had failed to meet the requirements of Education Code section 56504 by not sending Student a complete copy her records within the required five business days. As corrective actions, the Department of Education directed District to provide to the Department of Education by February 15, 2017, evidence that it had provided Student a complete set of her student records. The Department of Education also required District to provide training to District staff regarding the proper process and procedures for production of student records.

Student's motion, through Student's attorney's declaration, complains that despite the Department of Education requiring District to produce a complete copy of Student's records, District still has failed to provide the following specific records: a) test protocols for the speech and language assessment completed November 9,2011; b) test protocols for the psychoeducational report dated October 23, 2012; c) test protocols for the psychoeducational report dated December 11, 2015; d) IEP goal progress updates from the December 5, 2014 and December 11, 2015 IEPs; e) a complete copy of the December 11, 2015 IEP; f) assessment plans; and g) a complete copy of the February 6, 2017 IEP.

District's opposition contends it provided Student what it believes is a complete copy of Student's records, but is willing to search again for any additional records. District submitted a declaration by its attorney based only on information and belief that District had provided Student a complete copy of Student's pupil records. District failed to submit competent evidence demonstrating that the specific records Student seeks had been diligently searched for and a reasonable inquiry had been made and either had in fact been produced or could not be produced.

District is ordered to make a diligent search and reasonable inquiry in an effort to locate the items requested and to produce the specific documents itemized in Student's motion, along with a declaration under penalty of perjury signed by a District employee attesting to the fact that District made a diligent search and reasonable inquiry in an effort to locate the specific items requested in Student's motion and that the items have been provided to Student's attorney or, for each document or category of documents requested, that District is unable to provide the document and the reason District cannot provide the document, e.g., the document never existed; or has been lost or stolen; or has been destroyed; or is not in the possession, custody or control of District, in which case, the declaration must state the name and address of anyone believed to have the document. Further production of Student's records and the declaration of a District employee must be served on Student no later than 5:00 p.m. on April 21, 2017.

Student failed to demonstrate that District engaged in bad faith actions or tactics that were frivolous or solely intended to cause unnecessary delay, justifying an award of sanctions. The training required by the Department Education points more to incompetence than deliberate action intended to harm Student. Student's request for sanctions in the form of reimbursement of attorney's fees is denied. This order does not preclude Student from seeking recovery of all fees and expenses, including those related to this motion, in a court of competent jurisdiction if Student is ultimately determined to be the prevailing party upon the conclusion of this case.[2]

IT IS SO ORDERED.

DATE: April 13, 2017

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Kara Hatfield
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KARA HATFIELD
Administrative Law Judge
Office of Administrative Hearings

[2] Student may also be entitled for attorney's fees in federal District Court as to its compliance complaint success. (*S.A. ex rel. L.A. v. Tulare County Office of Educ.* (E.D.Cal. Jan. 6, 2009, No. CV F 08–1215 LJO GSA) 2009 WL 30298 at *4.)