BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. OAKLAND UNIFIED SCHOOL DISTRICT,	OAH Case No. 2017050146
OAKLAND UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017030950 ORDER DENYING DISTRICT'S MOTION FOR SANCTIONS

On May 31, 2017, Oakland Unified School District filed a motion for sanctions supported by the sworn declaration of its counsel. Attached to the motion are numerous emails communications between the parties and their counsel and a copy of Oakland's Board Policy and Administrative Regulations regarding school visits.

On June 5, 2017, Student filed an opposition to Oakland's motion supported by a sworn declaration of her counsel and several email attachments.

APPLICABLE LAW

In certain circumstances, an ALJ presiding over a special education proceeding is authorized to 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. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088, subd. (e); 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).)

The ALJ shall determine the reasonable expenses based upon a declaration setting forth specific expenses incurred as a result of the bad faith conduct. (Cal. Code. Regs., tit.1

§ 1040(c).) 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).) "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.)

The California Court of Appeal discussed what is required to impose sanctions under California Code of Civil Procedure section 128.5 in the case of *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635. In discussing what constitutes bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay, the court stated the action taken by the party or its attorney must be solely for the purpose of harassing an opposing party. Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit. There must also be a showing of an improper purpose, such as subjective bad faith on the part of the attorney or party to be sanctioned. (*Levy v. Blum*, *supra*, 92 Cal.App.4th at p. 635.)

DISCUSSION

Oakland requests that OAH sanction Student's counsel for repeatedly failing to abide by Oakland's requests regarding advanced scheduling of observations at Student's school. Oakland contends that these actions constitute bad faith conduct with the sole purpose of frustrating Oakland's right to reasonably control the presence of outside visitors on its campuses. Student maintains that she has a right to have her independent assessors observe her in class; that their schedules do not allow for scheduling appointments in advance; and that notifying Oakland in advance of their observations will result in Oakland changing the school environment causing a skewed observation.

Generally, it is undisputed that Malaca Jones, one of Student's identified assessors, appeared at Student's school unannounced on May 19, 2017. Oakland denied her access based on its policy of scheduling all visits in advance to allow staff to accompany the visitor. On May 19, 2017, Oakland's counsel informed Student's counsel of the visit protocols. After 4:00 p.m. the afternoon of Friday, May 26, 2017, Student's counsel informed Oakland's counsel that her assessor would conduct a full day observation of Student on May 30, 2017. Oakland schools were closed on May 26 and 29, 2017, due to the Memorial Day holiday. Oakland's counsel informed Student's counsel that she had not provided sufficient notice to schedule an observation on May 30, 2017, given the school closure, and that it could not accommodate a full day observation. The parties agreed that a different assessor would observe Student on May 31, 2017, though Oakland changed the start time from 8:30 a.m. to 10:15 a.m. Oakland offered to accommodate Student's request for an early morning

visit on June 5, 2017. The morning of May 31, 2017, Student's counsel emailed Oakland's counsel to inform him that Ms. Jones would be observing Student that morning. Having received no advance notice, Oakland denied Ms. Jones access at that time, but allowed her to join Student's other assessor in an observation later that morning.

In her opposition, Student contends that Oakland thwarted her request for a class observation of Student at the start of her school day. Student argues that Parent informed Oakland that Student was being assessed; the assessor twice signed into the office and left when denied access; that Oakland deliberately scheduled the May 31, 2017 observation during a time when Student would be outside of the academic environment and attending physical education; that the motion for sanctions is an attempt to stop the independent assessment; and that Oakland should not be rewarded for its obstruction.

Oakland correctly points out that the presiding administrative law judge may order an attorney to pay reasonable expenses including attorney fees incurred as a result of bad faith actions that are frivolous or solely intended to cause unnecessary delay. Student's counsel may disagree with Oakland's requirement that she must schedule observations by her independent assessors in advance, but this does not mean that Oakland is required to allow access upon demand. While the actions of Student's counsel evince a lack of understanding that she is required to schedule an observation in advance with Oakland, and may not simply announce in advance when her assessor will appear, Oakland has not established that Student's counsel should be sanctioned. Oakland did not prove that Student's counsel engaged in bad faith actions that were either frivolous or solely intended to cause unnecessary delay. In addition, Oakland asks that OAH order Student's counsel to pay monetary sanctions to Oakland and its counsel for her conduct. However, Oakland fails to delineate what, if any, expenses it incurred as a result of the conduct of Student's attorney. Oakland requests that OAH issue an order directing Student's counsel to strictly abide by the lawful instructions of Oakland with respect to its school sites. Oakland does not provide any legal authority that OAH has jurisdiction to issue such an order. Accordingly, Oakland's motion is denied.

In her opposition, Student appears to identify additional claims alleging a denial of a free appropriate public education. However, any claims outside of those identified in Student's request for due process hearing filed April 28, 2017, and those identified in Oakland's request for hearing filed March 16, 2017, will not be adjudicated as part of this consolidated matter. Nothing in this order prevents Student from filing a separate complaint, raising additional issues for hearing.[1]

[1] The Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) specifically exempts parents from any requirement that they file all possible issues at one time in the same due process complaint. Instead, the IDEA permits a parent to file separate due process complaints on separate issues, even if a due process complaint is already on file. (20 U.S.C. § 1415(o); Ed. Code, § 56509.)

ORDER

Oakland's motion for sanctions is denied.

IT IS SO ORDERED.

DATE: June 12, 2017



THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings