BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2022100623

ORDER DENYING REQUEST TO ADD WITNESSES TO WITNESS LIST AND DENYING SANCTIONS

DECEMBER 7, 2022

On November 30, 2022, Student filed a "Notice of Additional Witnesses and Evidence." That listed an additional 14 witnesses Student sought to add to the witness list for the hearing beginning December 6, 2022. On December 5, 2022, Los Angeles Unified School District filed a Request for Sanctions due to Student's late request for additional witnesses.

REQUEST FOR ADDITIONAL WITNESSES

Parties must disclose witnesses and evidence five business days prior to the start of a special education hearing. (34 C.F.R. 300. 512 (b); Ed. Code § 56505, subd. (e)(7).)

Witnesses and evidence not timely disclosed may be barred by the Administrative Law Judge. ((34 C.F.R. 300. 512 (b)(2); Ed. Code § 56505.1, subd. (f).)

The deadline for disclosure of witnesses and evidence was Tuesday, November 29, 2022. Student's November 30, 2022 "Notice of Additional Witnesses and Evidence" asks to introduce 14 additional witnesses that were not disclosed by the statutory deadline. Student's notice included neither a statement of good cause explaining the delayed notice or an attached declaration establishing good cause for the delay. Los Angeles opposed allowing the additional witnesses. Los Angeles asserts Student's counsel indicated only five additional witnesses would be included in the notice.

During the first day of hearing, the issue of the additional witnesses was raised during the discussion of the witness schedule. The undersigned noted that no good cause was stated in the notice for the delay. Student's counsel argued that the need for the additional witnesses resulted from a previously undisclosed document. Counsel, however, could not cite the document. The undersigned permitted Student until December 7, 2022, prior to the hearing day starting, to file a written response to Los Angeles' request to exclude witnesses.

Student's response was not timely filed prior to hearing. Acknowledging the delay, Student argued that he was entitled to three days to reply to Los Angeles' opposition. Although OAH customarily provides three days to respond to written motions, there is no legal requirement to do so. Moreover, Student was granted additional time to file a written response rather than being limited to oral argument on the first day of hearing. Given Student's failure to comply with the order, the undersigned ruled no additional witnesses would be permitted. On further reflection, that ruling is reconsidered.

Initially, it is noted that OAH procedures do not provide for reply briefs and no specific amount of time is allocated to receive them. Furthermore, the reply states only that the witness list was not provided timely because it was "going through an internal review process." It fails to append any declaration offering good cause for the delayed notice of witnesses. The pleading makes several vague allegations of inaccuracies regarding District's representations, but offers no declaration from a percipient witness to the conversation to support the allegations.

This additional list of witnesses did not comply with the legally required pre-hearing disclosures. As a result, Student's request to add 14 additional witnesses to his witness list is denied. However, the undersigned will consider individual witnesses from whom testimony is requested with a description of their role in relation to Student's education, accompanied by an offer of proof as to which pending issue or issues the witness will testify about, and what their testimony will contribute to the evidence that has not already been the subject of prior testimony. This information must be filed no later than 8:00 AM on Monday, December 12, 2022. The names will be discussed at the beginning of the hearing on Monday December 12, 2022. Los Angeles' response will be heard during that oral argument.

MOTION FOR SANCTIONS

Los Angeles asserts that Student's request to add 14 additional witnesses to the witness list after the deadline for disclosure is in bad faith and prejudiced the district. No opposition to the Sanctions motion was received.

In certain circumstances, an administrative law judge 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 administrative law judge presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).) The administrative law judge 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.)

Los Angeles makes the generalized claim that filing the notice of the intent to call an additional 14 witnesses was in bad faith and caused it prejudice, but offers no proof of those claims. While a vague allegation is made of additional time required to prepare for hearing, no declaration accounting for the additional time spent or calculating the additional fees expended by Los Angeles was attached to the motion.

Los Angeles failed to carry its burden to prove the action was in bad faith, or that Los Angeles suffered calculable prejudice as a result of the late filing.

ORDER

1. Student's request to add 14 additional witnesses to the witness schedule is denied.
2. If additional witnesses are still sought, Student must file, by 8:00 AM on Monday, December 12, 2022, a list including the proposed witness name, role in Student's education, and a specific offer of proof regarding the

issues on which the witness will testify and the subject of the testimony being offered. Witnesses offering cumulative testimony will not be allowed.

3. Los Angeles' motion for sanctions is denied.

IT IS SO ORDERED.

Penelope S. Pahl

Penelope S. Pahl
Administrative Law Judge
Office of Administrative Hearings