BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: TRACY UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017010024 ORDER DENYING STUDENT'S MOTION FOR SANCTIONS

On April 10, 2017, Student filed with the Office of Administrative Hearings a motion for sanctions against Tracy Unified School District for filing and maintaining this action and for destroying and failing to produce Student's records. The motion is supported by the sworn declaration of Student's counsel. On April 11, 2017, at the commencement of the due process hearing in this matter, the undersigned administrative law judge informed the parties that ruling on the motion would be deferred; evidence introduced at hearing would be considered in ruling on the motion; and the parties were invited to address the sanctions motion in their closing briefs. Tracy did not filed a response, though at hearing it raised its own oral motion for sanctions against Student's counsel and addressed this motion further in its closing brief filed on May 9, 2017. Tracy's motion for sanctions is addressed in a separate order issued concurrently.

APPLICABLE LAW

The procedural safeguards of the Individuals with Disabilities Act provide that under certain conditions, a parent is entitled to obtain an independent evaluation of a child at public expense. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.502(a) & (b).) An independent evaluation is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i).) A parent has the right to request an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) When a parent requests a publically-funded, independent evaluation, the school district must, without unnecessary delay, either initiate a due process hearing to show that its evaluation is appropriate, or provide the independent evaluation at public expense. (34 C.F.R. §300.502(b)(2); See Ed. Code, § 56329, subd. (c).)

To guarantee parents the ability to make informed decisions about their child's education, the IDEA 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); Ed. Code, §§ 56501, subd.(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), 56504.)

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

Student seeks an order that OAH shift costs of $65,403.16 in legal fees incurred for filing motions and attempting to obtain education records and for filing the motion for sanctions. Student seeks to sanction Tracy and its counsel for: (1) filing a due process hearing to defend its psycho-educational evaluation after it already granted Student an independent evaluation but attempted to limit her choice of assessors; (2) failing to produce Student's report cards and current assessment protocols within five days of Parent's request; and (3) destroying past assessment protocols from 2010 and 2013.

Whether Tracy granted Student's request for an independent evaluation and subsequently inappropriately restricted her to an assessor chosen by Tracy was not an issue for hearing in this District-filed matter. As determined in the Decision issued concurrently in this matter, Tracy timely filed for a due process hearing to defend its psycho-educational assessment of Student. There is no basis for sanctions on this ground as there have been no findings on this issue to date.

As to the contention that Tracy should be sanctioned for withholding records, Student did not prove that Tracy failed to timely produce her report cards in response to her January 20, 2017, written records request. On January 26, 2017, Tracy provided records in response to Student's request. Upon review, Student determined that specific records were missing, including her 2010-2011 report card and past assessment protocols. In her motion for sanctions Student alleged, for the first time, that she had not received any report cards. At the start of the hearing, Student argued that she was missing all her report cards from her 2010-2011 kindergarten year through the time of hearing.[1] Tracy responded that it had timely provided Student with all of her report cards in January 2017 as requested, and explained that it does not issue kindergarten report cards so there was no 2010-2011 grade report.

The evidence showed Student carefully delineated those records that were missing, and, until the afternoon prior to hearing, the only report card Student specifically noted to be missing was the non-existent kindergarten report card. Student's counsel was not clear at the time of hearing as to whether she had or had not received various documents. As such, she did not establish that Tracy withheld her grade reports. Even so, at the start of the hearing, the undersigned ALJ ordered Tracy to produce all of Student's report cards. Tracy did so within 30 minutes, prior to opening statements. As Student did not establish that Tracy improperly withheld her report cards, there is no basis to award sanctions.

At the prehearing conference on April 4, 2017, Student acknowledged receiving copies of Student's 2016 test protocols from Tracy on March 25 and 27, 2016. In her

[1] Student also initially claimed that she had not received other documents such as attendance records. After a quick review, Student acknowledged receipt of attendance and other records.

supporting declaration, Student's counsel avers that on April 7, 2017, pursuant to OAH's April 4, 2017 order, Tracy produced a teacher report from the Behavior Assessment System for Children administered in 2016. Student represented that she had not received any past protocols from 2010 or 2013. Tracy established that it did not maintain past test protocols for students once a new triennial assessment was completed.

Tracy did not timely provide Student with copies of test protocols within its possession. Even so, Student did not establish that this constituted a bad faith action or tactic that was frivolous or solely intended to cause unnecessary delay. In addition, while Student may be dissatisfied with Tracy's records retention and destruction policy, this does not demonstrate that Tracy failed to produce education records within its possession pursuant to Parent's request for records. Student's motion falls short of the standard for imposition of sanctions.

ORDER

Student's motion for sanctions is denied.

IT IS SO ORDERED.

DATE: June 8, 2017

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Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings