BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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

On April 11, 2017, at the start of the due process hearing in this matter, Tracy Unified School District orally moved for sanctions against Student's counsel for bringing multiple motions regarding Tracy's alleged failure to provided Student's education records as requested by Parent. 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 addressed its motion for sanctions in its closing brief filed on May 9, 2017. Student did not file a response.

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

Tracy argues that Student filed a March 24, 2017 Motion to Dismiss, an April 3, 2017 motion in limine, and other unspecified motions in the matter of *Student v. Tracy Unified School District*, OAH Case No. 2017030577, all based on Tracy's alleged failure to produce all of Student's education records. Tracy contends that at the start of the due process hearing on April 11, 2017, Student continued to argue that records had not been provided, including records that Student had not previously identified as missing (first through fifth grade report cards). Tracy alleges that such motions and argument were in bad faith, frivolous and intended to cause delay, especially since the records were, in Tracy's opinion, "completely irrelevant" to the hearing. Tracy asks OAH to sanction Student's counsel and allow Tracy "a separate opportunity to prove an appropriate amount for the sanction award."[1]

Based on Student's various motions alleging Tracy's failure to provide her with requested education records, the undersigned administrative law judge specially calendared a prehearing conference on April 4, 2017, to address whether Tracy had provided Student all of her education records. The resulting PHC order required Tracy to provide Student with all requested education records, including test protocols by April 7, 2017. Tracy failed to timely provide Student with her test protocols based on its erroneous determination that test protocols were not education records subject to a records request. Tracy has not established that Student's motions regarding its failure to provide education records were frivolous or in

[1] OAH has issued a final Decision concurrently with this Order and no longer retains jurisdiction to entertain Tracy's request for additional time to prove an appropriate sanction award.

bad faith or otherwise intended solely to cause unnecessary delay. OAH ordered the records to be produced and continued the hearing to afford Student an opportunity to review the records.

Tracy did not establish that Student's continued arguments at the start of hearing regarding the alleged failure to provide all requested education records was a bad faith action or tactic. Tracy did not timely provide Student with test protocols within its possession based on its unsupported legal theory that these are not education records. Tracy continued to send education records in piecemeal fashion which made it difficult for Student to know what had and had not been provided. While there was some delay in the start of the hearing to ensure that Student had received all records that Tracy was ordered to provide pursuant to the April 4, 2017 PHC Order, Tracy did not establish that Student's counsel engaged in bad faith actions or tactics that were frivolous or solely intended to cause unnecessary delay. Tracy's motion falls short of the standard for imposition of sanctions.

ORDER

Tracy's motion for sanctions is denied.

IT IS SO ORDERED.

DATE: June 8, 2017

DocuSigned by:
Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings