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 STUDENT'S REQUESTS TO: (1) COMPEL OBSERVATION; (2) COMPEL PRODUCTION OF IEP RECORDINGS; AND (3) GRANT EVIDENTIARY OR MONETARY SANCTIONS; AND GRANTING STUDENT'S REQUEST TO CONTINUE ALL DATES

On June 5, 2017, Student filed a combined request to compel a classroom observation; to produce all individualized education program team meeting audio recordings; and to continue the hearing or issue evidentiary or monetary sanctions against Oakland Unified School District. Student's motion is supported by the sworn declaration of her counsel and email correspondence between the parties.

On June 7, 2017, Oakland filed an opposition to Student's combined motion supported by a sworn declaration of its counsel and numerous attachments. On June 9, 2017, Student filed a reply.

APPLICABLE LAW AND DISCUSION

Class Observations

Neither the Individuals with Disabilities Act nor its implementing regulations provide parents with an entitlement for either them or their professional representative to observe their child in the classroom. (*Letter to Mamas* (OSEP 2004) 42 IDELR 10.) Although there

may be circumstances in which access may need to be provided such as when parents invoke their right to an independent educational evaluation which may require observing the child in the educational placement, this is a matter left to state law. (*Ibid.*) Federal special education law neither requires nor precludes observation of child in the regular classroom setting by an independent evaluator. (*Letter to Wessels* (OSEP 1990) 16 IDELR 735.) If a public agency observed a child in conducting its evaluation, or if its assessment procedures make it permissible to have in-class observation of a child, the independent evaluator has the right to do so. (*Ibid.*)

In California, a student has the right to have an independent assessor conduct an in-class observation of the student under certain circumstances. (Ed. Code, § 56329, subds. (b) and (c).) Education Code section 56329, subdivisions (b) and (c), are essentially identical in their relevant parts and provide as to independent assessments at public or private expense that, "if [the public education agency's] assessment procedures make it permissible to have in-class observation of a pupil, an equivalent opportunity shall apply to an independent educational assessment of the pupil in the pupil's current educational placement and setting, and observation of an educational placement and setting, if any, proposed by the public education agency, regardless of whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding."

The court in *Benjamin G. v. Special Education Hearing Office* (2005) 131 Cal. App. 4th 875 (*Benjamin G.*), examined the legislative history of Education Code section 56329, subdivision (b) and construed this provision broadly to allow independent experts to observe placements not only as part of independent educational evaluations, but also as part of expert preparation for a due process hearing. The purpose of Education Code sections 56329, subdivisions (b) and (c) is to level the playing field between the parents and a more knowledgeable school district. (*Id.* at p. 881, citing (*Burlington School Committee. v. Mass. Dept. of Educ.* (1985) 471 U.S. 359, 368–369, 373; see also *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 909-910 (*L.M.*).) The *Benjamin G.* court held that the statute mandated an opportunity for student's hired expert to observe the school district's proposed placement prior to testifying at a due process hearing and regardless of whether the observation was technically a part of an independent educational evaluation. (*Id.* at pp. 883-884.) *Benjamin G.*, furthermore, provides for a pre-hearing order compelling a school district to permit the observation in question. (*Benjamin G.*, supra, 131 Cal. App.4th 875, 883.)

A school district's limitation of a parent's expert to twenty-minute observations has been held to constitute a procedural violation of Education Code section 56329, subdivision (c), when the limitation was not also imposed on district's own employees. (*L.M., supra,* 556 F.3d at pp. 909-910.) In *L.M.*, a school district limited parent's expert to twenty-minute observations of a placement despite its own assessors' observations lasting up to three hours. The Ninth Circuit found that the twenty-minute limitation violated California Education Code section 56329, subdivision (c), however, on the basis of the facts presented, the procedural error did not deprive parents of their right to meaningfully participate in the IEP process so there was no denial of a free appropriate public education.

Student alleges that Oakland has obstructed three attempts by Student's assessors to observe her in class at the start of her school day. Student does not believe she should be required to schedule observations as any advance notice will result in Oakland changing her educational environment which will impact the observation. Oakland asserts that it has attempted to schedule observations; that Student's counsel has failed to comply with its visitation policy; and that Student's alleged experts are not qualified to conduct independent assessments, so there is no basis to compel an observation.

Student's allegation that Oakland thwarted three observations is not supported by her motion. Rather, the pleadings filed in this matter establish that Student's assessor first arrived unannounced for an in-class observation on May 19, 2017. Oakland denied access as Student did not comply with its school visitation policy which requires that observations be scheduled in advance. Student's counsel was informed of this requirement on May 19, 2017. Late in the afternoon on Friday, May 26, 2017, Student's counsel announced to Oakland's counsel that her assessor would arrive at school for a full day of observation on May 30, 2017, following a four-day weekend for Oakland. Oakland could not accommodate this request given the late notice and the fact that its school site was closed on May 26 and 29, 2017. The parties were able to agree to an in-class observation for May 31, 2017, but Oakland could not accommodate the request for an observation at the start of Student's school day, and instead arranged for Students' assessors to observe Student beginning at 10:30 a.m., during a scheduled physical education period as opposed to an academic class period. Given a scheduled field trip and other scheduling difficulties, Oakland's only offer for a scheduled observation of Student at the start of her school day was for the last week of school on June 5, 2017. On that date, Student's regularly scheduled aide called in sick, and Student herself was absent.

Student's counsel disagrees with Oakland's requirement that all observations must be scheduled in advance and with Oakland limiting her observations to a period of one hour. However, Student provides no legal authority to support her requests that her assessors be allowed to observe for an eight hour period of time and that Oakland be required to accommodate the assessors' schedule upon notice given at 3:00 p.m., the afternoon prior. While the parties did not schedule an early morning in-class observation prior to the end of the school year, Student's counsel did not timely attempt to schedule such an observation in accordance with Oakland's school visitation policy. It was, in part, Student's counsel's delay in attempting to schedule in-class observations in accordance with Oakland's policy which prevented Student's assessors from observing Student.

Because Oakland has not denied Parent the right to have her identified assessors observe Student in her classroom, this issue is not ripe for resolution. Student's motion to compel an in-class observation is accordingly denied. There is no need to determine whether Student's identified assessors are qualified to conduct independent assessments. The *Benjamin G*. holding supports allowing Student's identified experts to conduct in-class observations of Student separate and apart from any assessment. Nothing in this order prevents Student from filing a further motion to compel observation should Oakland refuse

to allow an in-class observation of Student by her identified experts at the start of her school day. Student appears to identify in her motion additional issues regarding a denial of FAPE. Both parties are reminded that this consolidate matter will proceed to hearing solely on the issues identified by the parties in their respective requests for due process. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Nothing in this order prohibits either party from filing a separate hearing request as to additional issues or a motion to amend. (20 U.S.C. § 1415(o); Ed. Code, § 56509.)

Right to Access Education Records

To guarantee parents the ability to make informed decisions about their child's education, the Individuals with Disabilities 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); 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.)

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 pleadings filed in this matter establish that on February 20, 2017, Parent requested a complete copy of Student's education records. On March 7, 2017, Parent informed Oakland that she was additionally requesting all copies of audio recordings of Student's IEP team meetings. That same day, Oakland responded that the IEP team meeting recordings were not maintained by the custodian of records at its central office, so Oakland does not considered them to be part of Student's educational record. On March 21, 2017, Student's counsel also requested a complete copy of Student's education records. Oakland asserts that on or about March 22, 2017, it sent to Student's counsel the same set of records that it provided to Parent the month prior. Sometime after March 27, 2017, Student filed a Compliance Complaint with the California Department of Education complaining of Oakland's failure to provide numerous records.

On May 11, 2017, Student filed a motion to compel production of her education records. After business hours on Friday, May 12, 2017, Oakland's counsel sent, via electronic correspondence, seven portable document format (pdf) files of Student's education

records to Student's counsel. Oakland contends that the records within these electronic files had already been provided to Parent in February 2017 and to her counsel in March 2017. Oakland asserted in its May 15, 2017 opposition to Student's motion to compel production that it provided Parent with copies of Student's records with the exception of those "which do not meet the definition of pupil records under Federal or California law."

In a May 24, 2017 order granting Student's motion to compel production of records, the undersigned ALJ determined that audio recordings of Student's IEP team meetings, and numerous other categories of documents personably identifiable to Student are education records and ordered Oakland to produce all such recordings and specified records, including Student's preschool records, that were in its possession, by June 1, 2017.

On May 26, and 30, 2017 and June 1, 2017, Oakland provided Student additional education records that it had in its possession pursuant to the May 24, 2017 order, including three audio recordings of Student's IEP team meetings and Student's preschool file. Oakland contends that it did not maintain any preschool assessments of Student that may have been completed, and that it does not have access to any IEP team meeting recording that was made by a former employee in September of 2016.

Student has not established that Oakland has withheld any of Student's education records that it was required to provide to her. Accordingly, Student's motion to compel the production of IEP team meeting audio recordings as well her preschool assessment is denied.

Sanctions

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.)

Student seeks sanctions against Oakland for its actions of withholding education records, thwarting her assessors' attempts to conduct in-class observations of Student, and delaying the hearing in this matter. Student specifically seeks an award of $17, 200 for her legal fees in filing her May 11, 2017 motion to compel records and her current motion. Student seeks an unspecified amount of costs incurred by her assessors in attempting to observe Student.

As determined herein, Student did not establish that Oakland obstructed her attempts to have her assessors conduct class observations. Oakland did, however, fail to timely provide Student with a full copy of her education record. Oakland erroneously believed that many categories of student documents, such as audio recordings of IEP team meetings and test protocols, did not constitute education records. Oakland subsequently provided Student with her education records pursuant to OAH's May 24, 2017 order. Student has not established that Oakland continues to withhold requested education records in its possession. Student has not established that Oakland's failure to timely provide Student with her education records constitutes a bad faith action that was frivolous or solely intended to cause unnecessary delay. Oakland did not provide Student with requested records due to its erroneous belief that numerous categories of documents did not constitute education records. At this juncture, its inaction does not merit an award for sanctions. 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.[1]

Continuance

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted. (34 C.F.R. § 300.515(a); Ed.

[1] 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.)

Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) In ruling upon a motion for continuance, OAH is guided by the provisions found within the Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, rule 3.1332.) Generally, continuances of matters are disfavored. (Cal. Rules of Court, rule 3.1332(c).)

Student requests that this matter be continued from its current hearing date of June 22, 2017, to September 10, 2017, in order to allow time for Student's assessors to conduct in-class observations at the start of the 2017-2018 school year. While Oakland argues that a continuance is not warranted, it fails to establish that Oakland would be prejudiced by a continuance. Student's assessors were not able to complete in-class observations prior to the end of the current school year due, in part, to the failure of Student's counsel to timely schedule the observations. However, Oakland offered very limited scheduling options. Student further indicates her intent to retain an expert to review education records, including an autism assessment, which were originally requested in February 2017, yet only recently provided to Student on or about May 26, 2017. Student intends to have an expert further assess Student based on the results from this autism tool which were previously unknown to Student.

Given Oakland's failure to timely provide Student with all requested education records, given that Oakland was ordered to provide Student a copy of her education records by June 1, 2017, and that Student received some records as recently as June 1, 2017, and given that Student's assessors will not have another opportunity to observe Student in class during her regular school year until the start of the 2017-2018 school year, Student has established good cause for a continuance. All current dates are vacated. The due process hearing will be held on September 12, 2017, at 9:30 a.m., September 13-14, 2017, at 9:00 a.m., and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The prehearing conference is set for September 1, 2017, at 10:00 a.m.

ORDER

1. Student's motion to compel observations is denied.

2. Student's motion to compel production of IEP team meeting audio recordings and her preschool assessment is denied.

3. Student's motion for evidentiary or monetary sanctions is denied.

4. Student's motion to continue the hearing is granted. All dates are vacated. The due process hearing is scheduled for September 12, 2017, at 9:30 a.m., September 13-14, 2017, at 9:00 a.m., and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The prehearing conference is set for September 1, 2017, at 10:00 a.m.

IT IS SO ORDERED.

DATE: June 12, 2017

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