BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: CARLSBAD UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT,	OAH Case No. 2017070048
PARENTS ON BEHALF OF STUDENT, v. CARLSBAD UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017050889 ORDER GRANTING IN PART AND DENYING IN PART STUDENT'S MOTION TO SHIFT COSTS

PROCEDURAL BACKGROUND

On May 18, 2017, Parents on behalf of Student filed with the Office of Administrative Hearings a request for due process hearing (complaint) in OAH case number 2017050889 (Student's case) naming the Carlsbad Unified School District. On June 28, 2017, Student filed a motion to compel District to file a response to his complaint and a motion to shift costs.

On June 30, 2017, District filed the following documents: 1) Response to Student's complaint; 2) A response to Student's motion to compel a response; 3) A due process complaint in OAH case number 2017070048 (District's case), naming Student; and 4) A motion to consolidate District's case with Student's case and a motion to continue. On July 3, 2017, Student filed a reply to District's response to the motion to compel and shift costs.

OAH convened the prehearing conference in Student's case on July 3, 2017. At that time, Student stated that he did not oppose either the motion to consolidate or the motion to continue. OAH granted District's motions to consolidate and to continue in an order dated July 3, 2017. That same day, OAH issued an order for supplemental briefing on Student's motion to compel a response and to shift costs. The parties timely filed supplemental briefs as directed.

APPLICABLE LAW AND DISCUSSION

Duty to File a Response to a Complaint

The Individuals with Disabilities Act contains several procedural safeguards that school districts are required to follow if they receive federal assistance under the Act. These safeguards are codified in Title 20 United States Code section 1415.[1] The preamble to that section states that the purpose of the section is to ensure that "children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies," referring to state and local educational agencies, such as District in this case.[2]

One of the procedural protections is that of prior written notice, codified in section 1415(b)(3), which requires a school district to provide written notice to the parents of a disabled child whenever the district proposes to initiate or change, or refuses to initiate or change the identification, evaluation, educational placement, or the provision of a free appropriate public education of the child in question. Under this section, for example, if a school district declined a parent's request to conduct a certain assessment of a child, the district would be required to give the parent written notice of why it was declining the to conduct the assessment. Section 1415(c)(1) describes what the written notice must contain.

After a student or his or her parents file a due process complaint, further procedural safeguards are required of school districts. Section 1415(c)(2)(B)(i)(1) states that within 10 days of receiving the complaint, the district must send to the parent a response to the complaint. This section of the IDEA defines what the response must contain. The section also states that no response to the complaint is required if the school district has already sent prior written notice to the parent regarding the subject matter contained in the due process complaint. There is no requirement that the district's response be filed with the state hearing office that handles due process complaints.

Although a district's requirement to file a response to a due process complaint was codified when the IDEA was reauthorized in 2004, the requirement was not enforced as a violation of FAPE until the Ninth Circuit Court of Appeals issued its decision in *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. May 30, 2017) 858 F.3d 1189, 1199-1200 (*M.C.*).

In *M.C.*, the school district never filed a response to the student's due process complaint. Student did not raise the issue of a failure to send parents a response during the administrative hearing, where the ALJ found in favor of the school district. However,

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[1] All sections cited here refer to those found in title 20, United States Code, section 1400, et seq.

[2] The IDEA generally refers to school districts as "local educational agencies." The terms "district" or "school district" will be used in this Order.

Student did raise the issue in his appeal of the administrative decision to the Central District of California. The Central District applied the three-prong analysis of an alleged procedural violation of the IDEA (see, e.g., *R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 937-938) and found that the student had failed to prove that the lack of a response to his complaint resulted in his loss of educational opportunity, caused him a deprivation of educational benefits, or seriously infringed the opportunity of the student's parents to participate in the process of formulating the student's individualized education program. Since the student failed to demonstrate any prejudice he or his parent suffered due to the district's failure to file a response, the court denied any relief for the failure. (*M.C. v. Antelope Valley Union High Sch. Dist.* (C.D.Cal. July 23, 2014) Case number CV 13-1452 DMG (MRWX), 2014 WL 12689940 at *5)

The Ninth Circuit reversed the district court. It found that although the school district's failure to file a response may not have denied the student a free appropriate public education, the failure to respond still violated the IDEA and due process. (*M.C., supra,* 858 F.3d at p. 1199). The Ninth Circuit found that an administrative due process hearing cannot proceed if a district fails to file a response to the complaint. Rather, the ALJ hearing the matter must "order a response and shift the cost of the delay to the school district, regardless of who is ultimately the prevailing party." The Ninth Circuit remanded the case to the district court for a determination of the prejudice the student's parent suffered as a result of the failure to file a response and for the award of appropriate compensation. (*Id., at pp.* 1199-1200.)

Student's Contentions

Student's complaint, filed May 18, 2017, raises two issues. First, whether District denied him a FAPE by failing to offer him an appropriate placement and services to address his unique needs. Second, whether District denied Student a FAPE by failing to either provide him with the independent educational evaluations Parents requested District to fund, or to file for due process to defend its assessments. District did not respond to Student's complaint within 10 days as required by the IDEA. Student contends that his attorney left a voice mail message for District's attorney on June 16, 2016, reminding District that it needed to file a response to Student's complaint, filed on May 18, 2017. District did not respond to the voice mail. The parties met for mediation on July 22, 2017. The mediation lasted only an hour and the case did not settle. Student contends that District's lack of a response impeded the parties' ability to settle the case because Parents did not have an understanding of District's position on the allegations in Student's complaint. Student further contends that Parents were forced to obtain their own independent evaluation because District did not timely file a response, that he had to receive educational therapy by a dyslexia specialist due to the delay, and that Student has incurred legal fees in preparing his motion to compel a response. Student contends that OAH should order District to pay for the costs of the independent evaluation, his therapy, and his legal fees, because all costs were incurred as a result of District's failure to file a response.

District's Contentions

In its response to Student's motion to compel and shift costs, District states that it sent parents a prior written notice on March 27, 2017, declining to fund the requested independent evaluations, which contained an explanation of why District believed its own assessments were valid. Therefore, Student and Parents have been on notice since that date that District would not fund the requested IEEs since it did not believe its own assessments were insufficient. District also contended that Student failed to demonstrate a correlation between its lack of timely answer to the complaint and Student's incurring costs for private therapy. District pointed out that Student was aware since District made its IEP offer on February 24, 2017, that District believed it had offered Student a FAPE. District contended that Student failed to demonstrate any prejudice suffered by the lack of a timely answer, as required by the decision in *M.C.* District did not address Student's contention that Student's counsel had left a voice mail message reminding District that it had failed to file a response to Student's complaint.

Student's reply to District's response added no further support for his motion to compel a response and shift expenses.

Contentions in Supplemental Briefs

In its supplemental briefing, District contends that Student failed to show any prejudice by District's late filing of its response, and that Student has failed to demonstrate that District's conduct in filing a late response constitutes bad faith. District contends that a showing of bad faith is a prerequisite to a finding that costs should be shifted to an opposing party. District provided a declaration of its counsel indicating that the failure to file the response was an office oversight, and was not done deliberately, for the purpose of delay, or for any other improper reason. District again did not address the contention of Student's counsel that she had left a voice mail for District's counsel on June 16, 2017, reminding him that District had not yet filed a response.

In his supplemental brief, Student reiterates that he was prejudiced by District's failure to file a response because it was only upon filing his motion to compel that District realized it had failed to do so. Student acknowledges that District did provide prior written notice regarding its reasons for declining to fund the requested independent evaluations, but Student argues that the prior written notice fails to address why District delayed in either funding the independent evaluations or filing for due process. Student did not, however, provide a clear nexus between District's untimely response to his complaint and Parents' decision to obtain their own independent evaluation or fund private therapy for Student.

Analysis

District has adequately demonstrated that its failure to file a timely response to Student's complaint was an oversight and was not in bad faith, was not a frivolous tactic, and was not intended to deliberately delay the proceedings. However, the decision in *M.C.* does

not analyze the issue of a failure to file a response pursuant to the concept of bad faith. Therefore, the provisions of Government Code Section 11455.30 , which address the ability of a hearing officer in California to order a party or the party's attorney or representative to pay reasonable expenses, including attorney's fees, upon a showing of bad faith, are not applicable here. The Ninth Circuit analyzed the wording of the IDEA not state law in determining that districts are required to file responses to due process complaints, that a due process hearing cannot proceed absent the filing of a response, and that a student is entitled to recover costs associated with a showing of prejudice occasioned by a delay in the filing of the response.

Here, Student has failed to demonstrate a persuasive correlation between District's delay in filing its answer and the decision of Parents to obtain their own independent evaluation and to fund educational therapy for Student. These are remedies that may be available to Student should he prevail on some or all of his issues at hearing. He is not entitled to them at this stage of the proceedings.

However, Student is correct that it was his motion to compel a response that was the impetus for District finally filing an answer to his complaint. District acknowledged this in its two responses to Student's motion. Student is also correct that District's prior written notice concerning its reasons for declining to fund independent evaluations does not address the contention in Student's complaint that District did not timely file for due process to defend its assessments.

Student has shown by a preponderance of the evidence that he incurred legal costs in the amount of $1,320.00 for filing a motion to compel a response to his complaint, and that it was his motion to compel that precipitated District filing its untimely response. Student's motion is therefore granted as to his request for reimbursement for the attorney's fees incurred in preparing and filing his motion to compel. Student's motion is denied as to his request for reimbursement for the cost of his privately obtained independent evaluation and is denied as to his request for reimbursement for the cost of privately funded educational therapy.

ORDER

1. Within 45 calendar days of this Order, District shall reimburse Student for the cost of his attorney's fees incurred in filing his motion to compel a response and shift costs, in the amount of $1,320.00.

2. All other requests for reimbursement are denied.

3. Student's motion to compel District to file a response to his complaint is denied as moot.

DATE: September 20, 2017

DocuSigned by:
Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings