BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017031156
v.	ORDER ON MOTION TO COMPEL AND GRANTING MOTION TO SHIFT COSTS
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT.	

On May 5, 2017, Student moved to compel production of Student records and for sanctions against Sacramento City Unified School District. The motion for sanctions is being considered as a motion to shift costs. Student's motions followed a directive to produce the records by the California Department of Education dated December 2, 2016, and a subsequent OAH order, issued on April 13, 2017, again compelling production, when full compliance did not follow from the CDE directive.

In its May 5, 2017 motions, Student asserts that Sacramento City's purposeful delay in producing documents is evidenced by the fact that Sacramento City failed to produce all of Student's records by the OAH production deadline of April 21, 2017. Student further asserts that when documents were produced, Sacramento City produced them in such disarray that extraordinary effort was required to discern exactly what had been provided, noting particularly that .pdf files sent by Sacramento City were not sequential and some .pdf files abruptly ended in the middle of documents resulting in confusion regarding whether the production was complete. Furthermore, IEP documents contained in the.pdf files produced were not paginated making it very time consuming to discern which pages went with which IEP document or whether the complete document had been provided.

On May 10, 2017, Sacramento City responded to Student's motions asserting that there had been no purposeful delay, that additional documents came to light in April 2017 because they found more records existed "and more records were obtained from individuals who had them in their possession." Sacramento City states that their electronic system does not put page numbers on IEP documents. Sacramento City asserted that it was not clear that the December 11, 2015 IEP was being requested as some of opposing counsel's communications did not request it. Sacramento City asserts that the documents were produced in the manner in which they were maintained and the method of production was not intended to harass or to delay the proceedings. However, their statements in support of those assertions were vague and, coupled with the totality of the circumstances, lacked credibility

APPLICABLE LAW

Motion to Compel Educational Records

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.)

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 United States Supreme Court in *Owasso Independent School Dist.No.I-011 v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (Owasso), after conducting an analysis of FERPA provisions related to education records, defined the word "maintained" in this context by its ordinary meaning of "preserve" or "retain." Records are maintained when the agency keeps the records in one place with a single record of access. (*Id*. 534 U.S. 426, 433-434.)

Test protocols such as test questions, student answers, evaluator calculation or scoring sheets, and administration instructions, to the extent these are personally identifiable to the student, are educational records that must be provided to parents if requested. (*Newport-Mesa Unified School Dist. v. State of Cal. Dept. of Educ.* (C.D.Cal. 2005) 371 F.Supp.2d 1170 at pp. 1175, 1179 [providing parents copies of their children's test protocols constitutes a permissible "fair use" pursuant to federal copyright law]; *Letter to Price* (OSEP Oct. 13, 2010) 57 IDELR 50 [test protocols with a student's personably identifiable information are education records and if copyright law conflicts with IDEA's requirement to provide educational records, districts should seek ways to facilitate inspection including contacting the copyright holder].)

Neither the IDEA nor California law provides for prehearing discovery in a due process hearing. Rather, a party to a due process hearing has the right to present evidence and compel the attendance of witnesses at the hearing. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56505, subd. (e)(2) and (3).) Further, at least five business days prior to the hearing, the parties have the right to be provided with a copy of all documents and a list of all witnesses

and their general area of testimony the parties intend to present at hearing. (Ed. Code, § 56505, subd. (e)(7).)

The status of this motion was discussed with counsel for both parties during the June 5, 2017 Prehearing Conference. Counsel for Student argued that Sacramento City had delayed in their disclosures even after the admonitions from the California Department of Education and the OAH order compelling disclosure of Student records. The OAH order compelled Sacramento City to do what it should have done originally, that is, that it "make a diligent search and reasonable inquiry in an effort to locate the items requested and to produce the specific documents itemized in Student's motion and to produce them not later than April 21, 2017". Sacramento City was also ordered to attest with specificity as to the reason why any documents or category of documents requested was unable to be produced by that same date. Despite that order, the last productions of documents were dated May 10, 2017 and May 17, 2017. At the time of the Prehearing Conference, counsel for Sacramento City represented all student records had been provided. Counsel for Student stated he was no longer seeking an order compelling further production of documents as he believed he would get nothing more. Instead, he reserved his right to raise the issue at hearing should documents not previously disclosed come to light. On this basis, no further orders of production are included here and the motion to compel documents is considered withdrawn.

Sacramento City failed to comply with its obligation to produce all of Student's records repeatedly, and without reasonable explanation. Its assertion that, "More documents were produced in April 2017 because more records exists *[sic]* and more records had been obtained from individuals who had them in their possession" begs the question of how thorough a search was conducted, even after both a CDE order to produce and one from OAH. Assertions that, somehow, Student was being uncooperative when he declined to attempt to identify missing or incomplete records are disingenuous. Such an exercise would require that Student be able to prove a negative as he could not know what he did not receive.

Request for Sanctions

In a special education due process matter, an Administrative Law Judge (ALJ) has the authority to award attorneys' fees under the Government Code and the California Code of Regulations. Government Code section 11455.30 provides:

> (a) The presiding officer may 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.
>
> (b) The order, or denial of an order, is subject to judicial review in the same manner as a decision in the proceeding. The order is enforceable in the same manner as a money judgment or by the contempt sanction.

That section is implemented by California Code of Regulations, title 1, section 1040, which provides:

> (a) The ALJ may order a party, a party's 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.
>
> > (1) 'Actions or tactics' include, but are not limited to, the making or opposing of Motions or the failure to comply with a lawful order of the ALJ.
> >
> > (2) 'Frivolous' means
> >
> > > (A) totally and completely without merit or
> > >
> > > (B) for the sole purpose of harassing an opposing party.
>
> (b) The ALJ shall not impose sanctions without providing notice and an opportunity to be heard.
>
> (c) The ALJ shall determine the reasonable expenses based upon testimony under oath or a Declaration setting forth specific expenses incurred as a result of the bad faith conduct. An order for sanctions may be made on the record or in writing, setting forth the factual findings on which the sanctions are based.

A comprehensive discussion of the grounds for sanctions under Code of Civil Procedure section 128.5 is set forth in *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635-637. A trial court may impose sanctions under Code of Civil Procedure section 128.5 against a party, a party's attorney, or both, for "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." A bad faith action or tactic is frivolous if it is "totally and completely without merit" or if it is instituted "for the sole purpose of harassing an opposing party." (*Id*., subd. (b)(2).) Whether an action is frivolous is governed by an objective standard: whether any reasonable attorney would agree it is totally and completely without merit. There must also be a showing of an improper purpose; i.e., subjective bad faith on the part of the attorney or party to be sanctioned. An improper purpose may be inferred from the circumstances. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

In this case, Sacramento City's multiple failures to produce a complete, clearly verifiable copy of Student's records constitute bad faith tactics. While the late discovery of one or two straggling documents might be understandable, Student's receipt of the bulk of the production only followed several orders. A few electronic document glitches may be understandable, but not the incomplete and non-sequential .pdf presentation coupled with a

demand that the Student identify what is missing. Student should not have had to make any effort beyond a request to secure his records. It certainly should not have required the filing of three separate motions/complaints. Failing to provide a complete, easily followed group of documents and then serving multiple incomplete copies, demanding Student identify what was missing from Sacramento City's documents and dragging out the process over most of a school year was totally and completely without merit and could easily be perceived as for the sole purpose of harassing Student, and therefore frivolous.

However, Student has failed to provide adequate information on which cost shifting could be calculated. Student includes a declaration with his motion stating only that $2,450 was incurred in attorney fees in preparing the motion to compel of May 5, 2017. Student fails to specify how this figure was calculated. This does not meet the requirements of the regulation. Student has shown he is entitled to have his costs which were incurred as a result of Sacramento City's actions and inactions reimbursed by Sacramento City. However, more information is needed to determine the amount of costs Student is entitled to shift to Sacramento City. Student is hereby ordered to file and serve a supplemental declaration that provides the required specificity as to hours devoted, tasks involved and hourly rate charged to support his request for cost shifting in this matter no later than 3:00 p.m. June 13, 2017. Sacramento City may file any opposition, to the amount of sanctions requested only, by 3:00 p.m. Friday June 16, 2017. If a supplemental declaration is not filed by the deadline ordered, no further action shall be taken on this request.

IT IS SO ORDERED.

June 9, 2017

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Penelope S. Pahl
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PENELOPE S. PAHL
Administrative Law Judge
Office of Administrative Hearings