BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS INVOLVING:

PARENT ON BEHALF OF STUDENT,

and

TWIN RIVERS UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2024040199

OAH CASE NUMBER 2024030829

ORDER DENYING MOTION TO COMPEL AS MOOT, AND DENYING MOTION TO SHIFT EXPENSES

AUGUST 9, 2024

On March 22, 2024, Twin Rivers Unified School District filed with the Office of Administrative Hearings a Request for Due Process Hearing in OAH case number 2024030829, naming Student. On April 3, 2024, Student filed a Request for Due Process Hearing in OAH case number 2024040199, naming Twin Rivers. On April 5, 2024, OAH consolidated the two cases, designating Student's case as the primary case.

On May 20, 2024, Student filed a motion to compel Twin Rivers to allow Student's expert to observe Twin Rivers' proposed placement for Student at Foothill High School, without limitation, on or before May 23, 2024. Student's motion included a motion for sanctions requesting an order directing Twin Rivers' and/or its attorney to pay Student's attorney the costs incurred to prepare and file the motion to compel. Twin Rivers' attorney filed an opposition to the motion to compel and motion for sanctions on May 23, 2024. The opposition stated that Twin Rivers had agreed after Student filed her motions to allow observation by Student's expert, and was working to accommodate the request, as schedules permitted.

On the first day of hearing on May 29, 2024, the parties confirmed that the observation by Student's expert was proceeding. Student withdrew the motion to compel, but not the motion for sanctions for having had to bring the motion to compel. The ALJ stated on the record the motion to compel would be considered after the hearing concluded.

APPLICABLE LAW

In certain circumstances, an administrative law judge, known as the ALJ, presiding over a special education proceeding is authorized to shift expenses from one party to another, or to the Office of Administrative Hearings. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; 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).)

Expenses may be ordered to be reimbursed either to OAH or to another party. With approval from the General Counsel of the California Department of Education, the ALJ presiding over the hearing may "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel" to OAH (as the entity that is responsible for conducting due process hearings) as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Cal. Code. Regs., tit. 5, § 3088, subds. (a) & €; see Gov. Code, § 11455.30, subd. (a).) An ALJ presiding over a hearing may, without first obtaining approval from the California Department of Education, "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." (Gov. Code, § 11455.30, subd. (a); Cal. Code. Regs., tit. 5, § 3088, subd. (a).) 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).) Filing a complaint without serving it on the other party is not within the definition of "actions or tactics." (*Ibid.*) "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.)

DISCUSSION

Student showed good cause to shift the expenses of Student's motion to compel to Twin Rivers and/or its attorneys. As stated in the supporting declaration of Twin Rivers' attorney Colleen Snyder, Snyder emailed Twin Rivers' attorney Marcy Gutierrez on May 13, 2024, requesting that Twin Rivers permit Student's expert, Lisa Pippin, to observe Twin Rivers' proposed placement for Student prior to the hearing, which was set to start on May 29, 2024. On May 17, 2024, Snyder emailed Gutierrez legal authority in support of Student's right to have her expert observe the proposed placement. Snyder stated that Student would file a motion to compel the observation if Twin River did not respond by 3:00 PM the same day with at least three possible dates for Pippin to observe the placement the week of May 20-24, 2024. Gutierrez responded that a motion was not necessary, because Twin Rivers agreed to the observation, and would provide a specific date and time by the morning of May 20, 2024.

On May 20, 2024, Gutierrez emailed Snyder at 10:35 AM, stating, "After speaking further with District staff, we are not able to accommodate the request for Lisa Pippin to observe. If parent would like to observe any classes, we can arrange that for her." Gutierrez did not explain further why Twin Rivers would not allow observation by Student's expert.

Student filed her motion to compel and for sanctions at 12:53 PM on May 20, 2024.

On May 21, 2024 at 10:42 AM, Gutierrez emailed Snyder that Twin Rivers would permit Student's expert to observe Twin Rivers' proposed placement. Gutierrez explained that, since receiving Student's motion to compel, Twin Rivers had talked to staff in the classrooms to be observed, and determined that they had been misinformed

about the nature of the observation. Having been told, due to "some communication gaps," that a group of attorneys would be conducting the observation, they had expressed discomfort, which led to Gutierrez's email rescinding Twin Rivers' agreement to permit the observation.

The chronology of events indicates Student was justified in filing the motion to compel, and the motion for sanctions. Twin Rivers' May 20, 2024 communication rescinding permission of Student's expert to observe Student's proposed placement was in bad faith, frivolous, or solely intended to cause unnecessary delay. Twin Rivers' argument that sanctions should be denied because its decision to rescind permission to observe was the result of a misunderstanding is not persuasive. Twin Rivers does not dispute Student had a right to have her expert observe the proposed placement. If Gutierrez was told by Twin Rivers that it would not allow the observation, it was Gutierrez's obligation to advise Twin Rivers that Student was entitled to the observation, and address any concerns Twin Rivers had about allowing it. Nothing in Snyder's communications with Gutierrez suggested that attorneys would be conducting the observation, and any miscommunication with the classroom teachers was solely the responsibility of Twin Rivers and/or Gutierrez. The fact that the miscommunication was sorted out only after Student filed her motion to compel and motion for sanctions further supports Student's argument that he motion was justified.

Although Student showed good cause to shift the expense of the motion to compel and motion for sanctions to Twin Rivers and/or its attorneys, Student provided no evidence on which the amount of an award could be based. Student did not explain who drafted the motion, the amount of time spent, the billing rate, or the total amount sought by Student. Because Student presented no evidence on which the amount of an

award could be based, Student's motion to shift the expenses of the motion to compel must be denied.

ORDER

1. Student's motion to motion to compel Twin Rivers to allow Student's expert to observe Twin Rivers' proposed placement for Student at Foothill High School is denied on grounds that it was withdrawn by Student, and moot.
2. Student's motion to shift the expense of Student's motion to compel to Twin Rivers and/or its attorneys is denied on grounds Student presented no evidence on which the amount of an award could be based.

IT IS SO ORDERED.



Robert G. Martin
Administrative Law Judge
Office of Administrative Hearings