BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: OAKLAND UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT,	
PARENT ON BEHALF OF STUDENT, v. OAKLAND UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017050146 ORDER DENYING MOTION TO SHIFT COSTS AND FOR SANCTIONS; PARTIALLY GRANTING MOTION TO STRIKE; STRIKING STUDENT'S EXHIBIT "D"; PROHIBITING FILING OF EXHIBIT "E"; AND DENYING REQUEST TO SET ORDER TO SHOW CAUSE

On March 16, 2017, Oakland Unified School District filed with the Office of Administrative Hearings a Request for Due Process Hearing in OAH case number 2017030950, naming Parent on Behalf of Student. On April 28, 2017, Student filed a Request for Due Process Hearing in OAH case number 2017050146, naming Oakland and Aspire College Academy.[1] On May 26, 2017, OAH granted Oakland's request to consolidate the matters.

On June 23, 2017, Oakland filed an amended complaint which included an expedited issue of whether maintaining Student's placement would result in substantial risk of injury. OAH maintained consolidation, and calendared this as a dual matter with Oakland's case as lead. The expedited matter was heard over an eight day period ended August 9, 2017, and is pending decision. The non-expedited matter is scheduled for hearing starting September 12, 2017.

[1] On June 7, 2017, OAH granted Student's request to dismiss Aspire.

On August 10, 2017, Student filed a motion to shift costs of the expedited hearing and to sanction Oakland Unified School District and its counsel for withholding Student's educational records.[2] Student seeks attorney fees for 243.75 hours at $500 per hour; paralegal costs for 207 hours at $375 per hour; and expert witness expenses of $14, 279, for a total of $213, 779. Student's motion is supported by a sworn declaration of her counsel and multiple exhibits, including Exhibit "D," which consists of 20 pages of charts. Student avers this exhibit, "combines and compares the behavioral [d]ata, resource logs, emails, and attendance records provided by the [D]istrict and included in the [D]istrict and [S]tudent's exhibit binders." Student attests that the purpose for this exhibit is to identify discrepancies in the data and show the prejudice Student suffered by the late production of this data.

On August 11, 2017, Oakland filed an opposition to Student's motion on the grounds that OAH has already addressed Student's education records issue and has previously denied her request for sanctions. In its opposition, Oakland moves to strike Student's substantive arguments and exhibits on the basis that Student is using her motion to improperly argue the substance of the expedited case which has been submitted for decision. Oakland asks OAH to issue an order to show cause as to why Student and her attorney should not be sanctioned for litigation abuse.

On August 16, 2017, Student filed a reply wherein she references an Exhibit "E" identified as a chart originally prepared for her closing argument that details Oakland's failures to implement Student's individualized education program and behavior intervention plan. Student did not attach Exhibit "E" to her reply.

APPLICABLE LAW

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

[2] Based on new evidence elicited at the expedited hearing of additional data logs that were not provided to Student pursuant to the May 24, 2017 order compelling Oakland to produce education records, Student now seeks to shift the full cost of the expedited hearing and recover all fees based on Oakland's failure to provide education records. This motion is treated as a new and independent request, rather than a request for reconsideration.

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].)

Sanctions

In certain circumstances, an administrative law judge 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).)

"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.)

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).)

Authority to Strike Information from Pleadings

There are no statutory provisions governing a motion to strike in a special education proceeding. Although the California Code of Civil Procedure does not directly apply to due process hearings, OAH looks to the provisions of the Code of Civil Procedure for guidance in areas for which the Administrative Procedures Act or the Education Code do not have a specific provision.

Code of Civil Procedure section 436 provides that a court in its discretion may, upon terms it deems proper, strike "any irrelevant, false, or improper material inserted in any pleading . . . or any pleading not drawn or filed in conformity with the laws of this state, a court rule or an order of the court." As explained in *Ferraro v. Camarlinghini* (2008) 161 CalApp.4th 509, 528, the purpose of section 436 is to authorize "the excision of superfluous or abusive allegations," and "the striking of a pleading due to improprieties in its form or in the procedures pursuant to which it was filed," such as a pleading "filed in violation of a deadline, court order, or requirement of prior leave of court." Consistent with this authority, OAH will grant motions to strike on various grounds; for example, striking references to matters discussed in mediation that violate the mediation privilege (Cal. Code Regs., tit. 5, § 3086, subd. (b)(1)), and untimely-filed briefs and evidence the late admission of which would be prejudicial.

DISCUSSION

A short summary of prior motions and orders provides important context for the current motions. On May 24, 2017, OAH granted Student's motion to compel production of records with the exception of work samples and email correspondence. As relevant to the current motion, Oakland was ordered to produce Student's discipline and behavior records including behavior data and emergency behavior reports from the 2014-2015 through 2016-2017 school years by June 1, 2017.

On June 5, 2017, Student filed a motion for evidentiary and monetary sanctions against Oakland, in part, for withholding educational records. On June 12, 2017, OAH denied Student's request for sanctions as Student did not establish that Oakland's failure to timely provide Student with her education records pursuant to her requests in February and March 2017, constituted a bad faith action that was frivolous or solely intended to cause unnecessary delay. OAH determined that Oakland's failure to timely provide the requested records was due to its erroneous belief that numerous categories of documents did not constitute education records, and that its inaction did not merit an award for sanctions. OAH further found that Oakland subsequently provided Student with requested education records pursuant to OAH's May 24, 2017 order, and Student had not established that Oakland continued to withhold requested education records in its possession.

Oakland is correct that OAH's June 12, 2017 order already addressed many of Student's renewed allegations. For instance, OAH denied Student's request to sanction

Oakland for costs related to filing a motion to compel and for responding to Oakland's opposition, or to sanction Oakland for filing what Student deemed a "frivolous" opposition. OAH found Oakland's position to be contrary to the law and ordered the production of most of the records requested by Student. Student's new basis for sanctions focuses on the prejudice to Student of being required to have participated in an expedited hearing over the summer and highlights new evidence learned in the course of that hearing.

Student currently contends that Oakland and its counsel should be sanctioned for what she characterizes as "abusive conduct of unreasonably withholding Student's education records." Student alleges that Oakland's act of withholding her records resulted in her inability to fully participate in the resolution session, mediation,[3] or the expedited hearing. Student argues that because Oakland did not produce required records until June 1, 2017, Student needed to seek a continuance of hearing until September 2017. Oakland then filed an expedited complaint which required Student to participate in an expedited hearing beginning July 18, 2017. Student contends this did not allow her sufficient time to review all the records prior to hearing, and was a tactic Oakland used to force Student to proceed to hearing prior to the continuance date, and during the summer, when access to District witnesses would be limited.

Student's argument that Oakland should be sanctioned for bringing an expedited claim over the summer and prior to the consolidated non-expedited matter is not persuasive. The law specifically allows Oakland to request an expedited hearing for an ALJ to determine if maintaining Student's educational placement is substantially likely to result in injury. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).) Based on its belief that Student required an interim alternative educational placement, Oakland had a responsibility to file for an expedited hearing.

In support of her motion, Student points to the expedited hearing testimony of board certified behavior analyst Monica Piedrahita and Geri Baskind, Oakland's Director of Legal Support Services for Special Education.[4] Ms. Piedrahita testified that: (1) she collected and relied on her own data from her observations of Student in preparing her December 2016 functional behavioral assessment; (2) she recorded her observations in handwritten notes that she incorporated into her assessment report; (3) she did not provide these notes to Oakland; and (4) her notes were likely still available at Juvo's office. Ms. Baskind signed a declaration dated May 31, 2017, in which she attests that she collected behavior data maintained by Student's board certified behavior analyst pursuant to OAH's May 24, 2017 order, and that all documents had been or would be delivered to Student by June 1, 2017. Ms. Baskind testified consistent with her declaration that she requested all of Student's

[3] The parties participated in mediation on April 25, 2017. Student cancelled the expedited mediation scheduled for July 6, 2017. There is no resolution session required for a District filed case.

[4] Ms. Piedrahita works for the non-public agency Juvo Autism and Behavioral Health Services. Oakland contracted with Juvo to provide behavior services to Student.

behavior data from Juvo and provided all data she received to Student. Ms. Baskind also testified that over her 13 years of representing students, and during her employment with Oakland, she had experience with reviewing behavior data. Based on Ms. Baskind's experience, Student now contends Ms. Baskind knew that Student was entitled to receive, upon request, all of her behavior data maintained by Oakland or Juvo and she wrongly withheld the data until compelled to produce it. Student further alleges that Ms. Baskind improperly failed to provide Ms. Piedrahita's notes to Student.

That Ms. Baskind has many years of experience reviewing behavior data does not establish that she knew that Student's behavior data constituted an education record and that she intentionally withheld this data. Further, the evidence at hearing established that Ms. Piedrahita did not provide her handwritten notes to Oakland. Student did not establish that Oakland was aware of these handwritten notes. While Oakland did not provide these notes to Student, there was no evidence that Oakland knew of this data or withheld this information.

Pursuant to OAH's May 24, 2017 Order, Ms. Baskind contacted Juvo to request all behavioral data on Student. Ms. Piedrahita failed to inform Oakland of her handwritten notes or provide them to Oakland pursuant to its request for all behavior data. By June 1, 2017, Oakland provided all behavior records it received to Student. Student did not establish that Ms. Baskind knew that Juvo had additional data on Student or that she withheld this additional data. Student has not established that Oakland's failure to provide Student with Ms. Piedrahita's notes constitutes a bad faith action that was frivolous or solely intended to cause unnecessary delay.

In essence, Student claims that Oakland should now bear her costs of preparing for and participating in the eight-day expedited hearing because Oakland abusively filed an expedited complaint when OAH had already granted Student a continuance in the non-expedited portion of this matter to review records that Oakland had wrongfully withheld. As determined in the May 2017 Order, Oakland did not provide Student with requested records due to its erroneous belief that numerous categories of documents did not constitute education records. Its inaction did not and does not merit an award for sanctions. Student provides no legal support for her contention that Oakland should be sanctioned for filing an expedited complaint during the summer. The law clearly provides Oakland the right to seek an expedited hearing on the grounds that maintaining Student's current placement is substantially likely to result in injury. That Student had to participate in what she believed to be an unnecessary expedited hearing is not grounds for shifting her hearing costs to Oakland.

At the close of hearing, Student requested permission to file an 80 page brief to accommodate multiple charts of data she had already compiled. The undersigned denied her request and ordered the parties to file closing briefs of not more than 30 pages. Student internally identified her motion for sanctions as "Student's Expedited Closing Brief" by way of a footer located at the bottom of each page. Student describes her attached Exhibit "D" as a summary of alleged discrepancies in the behavior data from various exhibits contained in the parties' evidence binders. It consists of 20 pages of charts comparing the hearing

evidence. Student claims the chart is simply to show the amount of data Student had to review such that withholding records caused her prejudice. Student's claim is not persuasive. The chart does not prove the prejudice. Rather, its submission is an attempt to argue the merits of Student's legal position at hearing.

Oakland correctly argues that Student's Exhibit "D" is an unauthorized expansion of Student's right to file a closing argument and is inconsistent with the limits imposed on closing arguments. Oakland's motion to strike Student's Exhibit "D" from the record is granted and this document will not be considered. Oakland's request to strike Student's arguments within her motion is denied. However, such arguments were considered only as part of this order and will not be considered when deciding the expedited matter.

In her reply, Student references Exhibit "E" which she identifies as one of the charts she wanted to include in her closing argument but did not, due to page limitations. It appears Student was planning to attach Exhibit "E" to her reply. It is not attached, but allegedly contains a chart detailing Oakland's failures to implement her IEP and behavior plan. Clearly, there is no relevance of such a chart to Student's motion and filing such a document would constitute improper argument and a further attempt to disregard the limitations on her closing argument. Student shall not be permitted to file Exhibit "E."

At this juncture, the ALJ declines to set an Order to Show Cause hearing as to whether Student's conduct in continuing to file for sanctions regarding Oakland's withholding of educational records and her attempt to circumvent the restrictions imposed on closing briefs should be sanctioned.

ORDER

1. Student's motion to shift costs and for sanctions is denied.

2. Oakland's motion to strike is granted in part.

3. Student's Exhibit "D" is stricken from the record.

3. Student is prohibited from filing Exhibit "E."

4. Oakland's request that an Order to Show Cause hearing be set as to whether the conduct of Student's counsel merits sanction is denied.

IT IS SO ORDERED.

DATE: August 23, 2017

DocuSigned by:
Theresa Ravandi
180B9BDB98E5424...

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings