BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

FREMONT UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020020631

ORDER DENYING MOTION FOR CONTEMPT AND FOR AWARD OF SANCTIONS

MAY 04, 2020

On February 8, 2020, Parent and educational rights holder, on behalf of Student, filed a request for due process hearing with the Office of Administrative Hearings naming Fremont Unified School District. Office of Administrative Hearing is referred to as OAH. On March 11, 2020, Student filed a motion to stay put.

On March 20, 2020, OAH issued an Order Partially Granting Motion for Stay Put.

On April 27, 2020, Student filed a motion for contempt against Fremont and requested an award of monetary sanctions against Fremont and its attorney of record, Alejandra Leon. On April 29, 2020, Fremont filed an opposition to Student's motion.

APPLICABLE LAW

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."].) 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).)

Government Code § 11455.30(a) provides, in relevant part, that, "[t]he presiding officer may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney 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 California Code of Civil Procedure § 128.5." "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.)

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. (*Id.* at p. 635.)

DISCUSSION

Student's motion requested stay put for two reasons, first to ensure Student receives 60 minutes a week of individual counseling services as offered in the February 1, 2019 individualized education plan, referred to as IEP, that was amended on March 20, 2019, and second to continue with her current counseling provider.

On March 20, 2020, OAH issued an Order Partially Granting Motion for Stay Put. OAH determined that Student established that the February 1, 2019 IEP increased Student's individual counseling services to two 30-minute sessions weekly totaling 60 minutes per week. The Order further found that Student proved that stay put includes 60 minutes per week of individual counseling. OAH's March 16, 2020 Order required Fremont to provide Student with two 30-minute individual counseling sessions per week.

Generally, it is undisputed that Fremont's psychologist, Jennifer Athanacio, provided counseling services to Student on a weekly basis following OAH's March 20, 2020 Order. It further is undisputed that Ms. Athanacio offered weekly, one-hour

counseling sessions to Student, and not two, thirty-minute sessions as stated in OAH's Order. Student made no showing, however, that Ms. Athanacio was unwilling to offer two, thirty-minute sessions, and Student argued in her stay put motion that hourly sessions were most beneficial to Student.

In her motion, Student argues that Fremont's failure to offer two, thirty-minute counseling sessions constitutes bad faith conduct in violation of OAH's March 20, 2020 Order. More particularly, Student argues that Fremont's counsel's failure to advise Ms. Athanacio of OAH's Order requiring two, thirty-minute weekly counseling services was done in bad faith. Student fails to establish that any delay by Ms. Leon in advising Ms. Athanacio of OAH's Order was for the purpose of harassing Student nor that counsel acted in bad faith. Further, the apparent ten-day period between issuance of the March, 2020 Order and notification of the same to Ms. Athanacio on April 1, 2020 occurred during the COVID-19 pandemic and resulting school closures, and no inference of bad faith can be made under these circumstances.

The gravamen of Student's argument appears to be that the regular date of the counseling services was unilaterally changed and some of the sessions lasted less than one hour. Student may disagree that once a week hourly counseling provides Student with a free appropriate public education. However, Student has not established that Fremont or its counsel engaged in bad faith actions that were either frivolous or solely intended to cause unnecessary delay. For these reasons, Student's motion for contempt is denied.

In addition, Student seeks an order from OAH compelling Fremont and its counsel to each pay Student $250.00 for their conduct. However, Student fails to meet her burden of proof that sanctions are justified, or to delineate what, if any, expenses she incurred as a result of the conduct of Fremont or its attorney. Student further

requests that OAH issue an order directing Fremont and its counsel to turn over confidential attorney-client communications pertaining to OAH's March 20, 2020 Order. OAH does not have legal authority to issue such an order. Accordingly, Student's motion for sanctions is denied.

ORDER

1. Student's motion for contempt is denied.
2. Student's request for sanctions against Fremont and its counsel is denied.
3. Student's request for confidential, attorney-client privileged communications between Fremont and its counsel is denied.

IT IS SO ORDERED.

DocuSigned by:
Jennifer Kelly
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Jennifer Kelly

Administrative Law Judge

Office of Administrative Hearings