BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. OAKLAND UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013050644 ORDER DENYING MOTION FOR SANCTIONS

On May 15, 2013, Student filed a due process hearing request (complaint) against the Oakland Unified School District (OUSD).

On July 2, 2013, Student filed a motion to impose sanctions on OUSD. On July 8, 2013, the District filed an opposition.

APPLICABLE LAW

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.)

DISCUSSION

From the pleadings it appears that on April 1, 2013, Student's attorney, Natashe Washington, requested from the District all of Student's educational records, and picked up those records on April 8, 2013. The records contained an assessment completed in November 2009 and an individualized education program (IEP) from December 2009, but no more recent assessment or IEP. On July 1, 2013, Ms. Washington received from the District its exhibit binder for the upcoming due process hearing, and found in it a speech and language assessment dated February 2012 and an IEP dated April 3, 2012. Neither of these documents was part of the District's earlier disclosure.

The late-arriving documents made it necessary for Student to move for a continuance and move to amend his complaint to include issues relating to those documents, thereby

restarting the timeline in this matter and delaying its resolution for a significant time. Student also incurred significant attorneys' fees for those steps. Student now seeks sanctions for being forced to file those motions, delay resolution of his complaint, and incur those fees..

The District does not dispute the basic facts above, but explains that its failure to produce the records on April 8, 2013, was the result of a complicated set of events beginning with the closing of the charter school Student attended in the school year 2011-2012. The District's Compliance Coordinator, John Rusk, asserts in a declaration that "there has been confusion in the District" concerning the duties of charter schools to maintain and forward student records, and as a result the District did not receive the disputed documents until late June 2013, whereupon it promptly sent them to Student. The District also asserts that Student's guardian was present at the April 3, 2012 IEP meeting and that Student therefore was aware of both the assessment and the IEP documents.

Student has shown persuasively that he has been prejudiced by the District's failure to timely disclose the disputed records. But nowhere in Student's moving papers is there any attempt to assert or prove that the District failed to timely disclose the records for the purpose of delay or harassment or some other improper purpose. Student's moving papers are fully consistent with the District's assertion that disclosure of the documents was delayed due to confusion. Confusion does not equate to bad faith.

Student has failed to bear the burden of persuasion on his motion for sanctions, and his request is DENIED.

Dated: August 22, 2013

/s/
CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings