BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: EAST SIDE UNION HIGH SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2019010414 ORDER DENYING STUDENT'S MOTION FOR PRODUCTION OF RECORDS AND FOR SANCTIONS

The due process hearing in this matter was held on March 19, 20, 21, 26 and 27, 2019, and was concluded on March 28, 2019.

On March 22, 2019, Student filed a motion to compel the production of certain of his records from East Side and for sanctions for withholding those records.

On March 27, 2019, East Side filed an opposition to the motion, together with a declaration by East Side's attorney, and on March 28, 2019, East Side filed an amended declaration by its attorney.

APPLICABLE LAW

Access to Educational Records

Under state and federal special education law, a parent has the right to receive copies of all educational records of his or her child within five business days after they are requested. (20 U.S.C. § 1415(b)(1); Ed. Code, § 56504.)

An "education record" under IDEA is defined by the regulations implementing the Family Educational Rights and Privacy Act ("FERPA"). (34 C.F.R. § 300.611(b).) Under FERPA, an education record includes records, files, and documents that "(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A).) The Supreme Court has interpreted the word "maintained" in FERPA as "to keep in existence or continuance; preserve; retain" and reasoned that "[t]he word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database." *Owasso Indep. Sch. Dist. No I-011 v. Falvo* (2002) 534 U.S. 426, 432-33, 122 S.Ct. 934, 151 L.Ed.2d 896.

Sanctions

Government Code section 11455.30, subdivision (a) 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.

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.

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

In his motion for disclosure of records and for sanctions, Student asserts that Parents made a request for Student's educational records on January 23, 2019, and received some but not all of his records in a bulk disclosure on February 5, 2019. Student further asserts that East

Side's disclosure was incomplete, and that it has in general withheld numerous documents and "trickled" others out well after the deadline for disclosure, to Student's prejudice in preparing for and conducting the due process hearing.

Student's motion, however, does not contain any declaration under oath that would establish the facts of the alleged withholding or the claimed prejudice, and does not contain references to any more than a few specific documents.

Timing of the Motion

Student's motion was filed so late that any difficulties he had in preparing for hearing in the absence of the records sought were self-inflicted. Student received East Side's allegedly incomplete disclosure on February 5, 2019. Five weeks later, on March 11, 2019, Student's attorney asserted orally at the prehearing conference that East Side had unlawfully failed to produce various records, but by that time Student had not made any written motion pertaining to those records. In paragraph 9(b) of the Order Following Prehearing Conference, filed on March 11, 2019, the ALJ invited Student to file a written motion pertaining to those records before the hearing, so that it could be considered and acted upon. Student did not file such a prehearing motion.

Instead, the instant motion was filed late on Friday, March 22, 2019, after three days of hearing. East Side responded in writing on March 26, 2019, within the time allotted for response, but on March 27, 2019, sought and obtained leave to amend the declaration of its counsel to correct minor errors. The corrected declaration was filed on March 28, 2019, the last day of hearing. Due to the timing of the motion, the ALJ could not have ordered any relief that would have been effective in allowing Student to obtain withheld records in time for use at hearing.

The amended declaration of East Side's attorney addresses each document allegedly wrongfully withheld. Since its assertions are specific, in a sworn declaration and have not been contradicted by Student, they constitute the best available evidence of the status of the disputed documents. Some evidence produced at hearing also bore on the status of the disputed documents.

Mootness

From Ms. McArthur's amended declaration and the pertinent evidence at hearing, the motion to compel production is moot with respect to the following disputed documents because they have been produced:

1. The assessment plan of October 3, 2017 was produced to Student on March 12, 2019, as Exhibit 10 in the District's Exhibit Binders.

2. The prior written notice of November 8, 2017, was produced as part of East Side's general production on February 5, 2019, and again on March 12, 2019 as Exhibit 13 in the District's Exhibit Binders.

3. Assessor William Coleman's WISC-V test protocols were produced to Student on March 21, 2019.

4. Assessor Dr. Yvana Uranga-Hernandez's test protocols were produced only as an attachment to Ms. McArthur's Amended Declaration filed March 28, 2019. However, Student did not show that he was entitled to disclosure of these protocols through a records request, as he did not show in his motion or at hearing that Dr. Hernandez was an employee of the District. If she was an independent contractor – an issue reserved for decision – East Side would not have maintained her protocols in its system of records, and Dr. Hernandez's' testimony showed she gave the protocols to East Side only in response to a separate and recent request.

5. The audio recording of the May 12, 2017 IEP team meeting was produced on March 12, 2019, as Exhibits 66-67 in the District's Exhibit Binders.

6. The triennial assessment was produced on March 12, 2019, as Exhibit D-18 in the District's Exhibit Binders. Mr. Coleman, the principal assessor, testified that it had been repeatedly given to Father in the winter and spring of 2018, and in amended form at the IEP team meeting on December 4, 2019. Moreover, in paragraph 17 of the complaint in a separate due process filed by Student (OAH Case No. 2019030332) it is alleged that the triennial assessment was produced on February 26, 2018.

Documents Not Subject to Disclosure

The other two specifically disputed documents were not subject to production under the records request for the following reasons:

1. The May 2017 assessment plan referenced in the May 12, 2017 meeting notes as having been given to Father was not ever returned, according to the evidence at hearing. Cynthia Perez, Student's case manager, testified without contradiction that a blank assessment plan never signed and returned by a parent would not be placed in East Side's system of records. Student therefore did not show that East Side maintained the blank assessment plan within the meaning of Education Code section 56504 and related laws.

2. The version of the October 18, 2017 IEP document that was given to Father for signature was produced in the District's February 5, 2019 general production and again as Exihibt D-12 in the District's Exhibit Binders. The evidence at hearing showed that Father later signed his consent to the offer but, in handwriting, altered the document by adding an eligibility category the IEP team had not chosen or approved. Student now complains that the version of the document altered by Father was not disclosed in response to his records request. However, there was no evidence Father ever returned the altered document to East Side. Assuming he did, Ms. Perez testified without contradiction that an IEP offer unilaterally altered by a parent would not be placed in the District's system of records. Student therefore did not show that East Side maintained the altered October 18, 2017 IEP document within the meaning of Education Code section 56504 and related laws. And even if it had, it is not possible to see how Student could have been prejudiced by not receiving a second copy of the altered document from the District as

part of a records disclosure, since Student was in possession of the altered document at all relevant times.

Sanctions

Student makes the generalized claim that the District's withholding or tardy disclosure of disputed records was intentional but offers no proof of that claim. As shown above, most of Student's claims of withholding made in the motion to compel were inaccurate. As to the others, the documentary record in this matter is voluminous and sometimes confused. It is true that East Side was slow, and occasionally haphazard, in producing a few documents, but that is not the same as bad faith. There is no evidence that would support a finding of bad faith or an award of sanctions.

For the reasons above, Student's motion to compel disclosure of educational records and for sanctions is DENIED.

DATE: April 3, 2019

DocuSigned by:
Charles Marson
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CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings