BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017030577
v.	ORDER DENYING STUDENT'S MOTION TO SANCTION DISTRICT, SHIFT COSTS OR ORDER A RESPONSE FILED
TRACY UNIFIED SCHOOL DISTRICT.	

On March 13, 2017, Student filed a due process hearing request (complaint) against Tracy Unified School District.

On March 20, 2017, Student filed a motion to consolidate this due process hearing with one in *Tracy Unified Sch. Dist. v. Student*, OAH case number 2017010024 (District's case), which was denied by OAH order dated March 23, 2017.

On March 21, 2017, District filed a motion to dismiss some of Student's claims as time-barred, which motion was denied by OAH order dated March 29, 2017.

On April 11, 2017, Student filed a motion to sanction District, to shift Student's costs to District, and to order District to file a response to Student's complaint. Also on April 11, 2017, District filed a response to Student's complaint.

On April 13, 2017, District filed an opposition to Student's motion. On April 17, 2017, Student filed a reply.

APPLICABLE LAW

In certain circumstances, an ALJ 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 initiate contempt sanctions or place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

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).)

"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.) This subjective bad faith requirement does not impose 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 IDEA requires a school district to respond to a parent's due process complaint within 10 days. (20 U.S.C. § 1415(c)(2)(B)(i)(I).) The answer to a complaint serves an important dual purpose: It gives notice of the issues in dispute and binds the answering party to a position. (*M.C. v. Antelope Valley Union High School District* 852 F.3d 840, 851 (*Antelope Valley*).) When a school district fails to file a timely answer, the ALJ must not go forward with the hearing, but instead order a response and shift the cost of delay to the school district, regardless of who is ultimately the prevailing party. (*Ibid*.)

A school district is also required to convene a meeting with the parents and relevant members of the a student's individualized education program team within 15 days of receiving notice of a due process hearing request. (20 U.S.C. § 1415(f)(1)(B)(i)(1); 34 C.F.R. § 300.510(a)(1). The resolution session need not be held if it is waived by both parties in writing or the parties agree to use mediation. (§ 1415(f)(1)(B)(i)(IV); 34 C.F.R. § 300.510(a)(3).)

DISCUSSION

Student seeks an order that OAH shift costs of $18,226.25 in legal fees and costs to District as a sanction for (i) failure to timely hold an early resolution session, (ii) failure to timely file a response to Student's complaint, (iii) failure to produce Student's educational

records after a written request, and (iv) destruction of Student's educational records. The motion is supported by the sworn declaration of Student's counsel, stating that: Student requested educational records from District on January 20, 2017 and obtained an order from OAH in District's case on April 4, 2017, but District did not produce assessment protocols for "months"; in a prehearing conference call on the other matter District's counsel represented that it no long maintained Student's protocols from 2010 and 2013; and District has not produced various documents from 2010 through 2015.

District contends that it has fully complied with OAH's order in District's case, that it did not schedule an early resolution session because the parties had agreed to mediate, and that it timely responded to Student's complaint with a motion to dismiss and filed a response to Student's complaint after that motion was denied. In reply, Student contends that she was required to file this motion for sanctions to prompt District to file its response.

The declaration of District's counsel in support of District's opposition states that the parties engaged in voluntary efforts to mediate this matter at the time of the mediation in District's case, which would eliminate the requirement for an early resolution session. The hearing in this matter is scheduled for May 9, 2017, which is the originally scheduled hearing date. Student did not address the fact that the parties had already mediated in her reply. Student has made no showing that the lack of an early resolution session resulted in delay or prejudice to Student and failed to adequately connect her claimed fees to the absence of the resolution session.

Student fails to provide any factual support for Student's contention that District has engaged in bad faith actions or tactics that were frivolous or solely intended to cause unnecessary delay. Within days of filing her complaint, it was Student, not District, who filed a motion to consolidate this case with District's case and to continue both matters. District responded to Student's complaint within eight days by filing a motion to dismiss allegedly time-barred claims. The Ninth Circuit's March 27, 2017 decision in *Antelope Valley* for the first time interpreted the IDEA's requirement that a school district respond to the parent's complaint within 10 days to require the filing of an answer with OAH as well, and District filed its response 15 days after *Antelope Valley* was published. Student provided no evidence that the delay in filing an answer caused any specific costs to be incurred and also failed to explain how Student was prejudiced by the delay.

Student submits no evidence of District failing to produce educational records in this case. Instead, Student submits an OAH order from District's case, indicating that this procedural issue has already been argued and addressed by OAH. No finding of bad faith actions or tactics that were frivolous or solely intended to cause unnecessary delay were made by ALJ Ravandi when she ordered additional documents produced in the April 4, 2017 order. To the extent Student contends that District has failed to comply with that order, enforcement of that order should be sought in District's case, not here. Additionally, Student has failed to make any argument or evidentiary showing of how educational records from 2010 through 2015 are relevant to the issues in Student's complaint filed March 13, 2017, or

how their absence causes Student prejudice or delay in preparing for this hearing, or how their absence caused the fees she seeks.

Student submits no evidence that District has intentionally suppressed evidence or withheld Student's educational records, as a bad faith action or tactic or otherwise. The declaration of Student's counsel is primarily speculation that certain documents should exist, and that District must therefore be intentionally keeping such documents from Student. Student's dissatisfaction with District's destruction policy does not evince a failure to produce documents in District's possession and control. Student fails to establish intent by District to evade its obligation to respond to Parent's educational records request.

Student's showing falls short of the standard for imposition of sanctions. Student fails to demonstrate that District has taken any position in this case that is totally and completely without merit, or that District has acted with an improper purpose.

Lastly, the declaration of Student's counsel is devoid of facts setting forth specific expenses incurred as a result of the bad faith conduct. A statement of legal fees and costs "related" to this matter is insufficient to support an order imposing sanctions and shifting costs.

ORDER

1. Student's motion to sanction District and shift costs is denied.

2. Student's motion to order District to file a response to Student's complaint is denied as moot.

IT IS SO ORDERED.

DATE: April 24, 2017

DocuSigned by:
Alexa Hohensee
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ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings