BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. CAPISTRANO UNIFIED SCHOOL DISTRICT,	OAH Case No. 2016070718
CAPISTRANO UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2016081083 ORDER DENYING MOTION TO COMPEL PRODUCTION OF VIDEOTAPE; DENYING MOTION FOR SANCTIONS

On July 6, 2016, Parent on behalf of Student filed a request for due process with the Office of Administrative Hearings, naming Capistrano Unified School District. This matter is set for prehearing conference on October 14, 2016, and due process hearing on October 25, 26, and 27, 2016.

On August 31, 2016, Student filed a motion to compel the production of a videotape, and requested monetary sanctions against District for its delay in producing the videotape. The videotape shows an incident involving Student on a school bus. Other pupils are depicted on the videotape. Student's motion was not accompanied by a Subpoena Duces Tecum.

On September 7, 2016, District opposed Student's motion on the ground that it had made the videotape available to Student on September 1, 2016, after it had redacted images of other pupils shown on the videotape.

On September 9, 2016, Student responded, declaring that he had received a copy of the videotape, but was still requesting monetary sanctions because District had failed to timely provide the videotape.

APPLICABLE LAW

Production of Evidence

A party to a due process hearing under the Individuals with Disabilities in Education Act has the right to present evidence and compel the attendance of witnesses at the hearing. (20 U.S.C §1415(h)(2); Ed. Code, § 56505, subds. (e)(2) and (3).) There is, however, no right to pre-hearing discovery under the IDEA. A parent may obtain his/her child's educational records. (Ed. Code § 56504) Additionally, parents are entitled to receive copies of all the documents the District intends to use at hearing, no less than five business days prior to the hearing. (Ed. Code § 56505, subd. (e)(7).)

Sanctions

In a special education due process matter, an Administrative Law Judge 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.

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

Student's motion requests an order for District to produce a videotape on the basis that the videotape is part of Student's educational records. Student's motion is moot because District has provided the requested videotape. Student's motion to compel is therefore denied.

Student contends that District engaged in frivolous or bad faith litigation techniques by delaying its production of the videotape. District avers that it was delayed in producing the videotape because it had to first redact images of other pupils shown in the videotape. After completing the redaction process, District promptly made the videotape available to Student.

District's conduct was not unreasonable. There is a public interest in protecting the identity of minor students who are not a party to this matter. Generally, OAH permits the redaction of documentary evidence to exclude the identity of minor students who are not a party. The present scenario is similar, except that it is a more difficult and time consuming process to redact a videotape than a document. Following redaction, District provided the videotape to Student, well before the prehearing conference or due process hearing. No part of this case was delayed by District's actions. Overall, Student has failed to present evidence that District has engaged in frivolous or bad faith litigation. Student's request for sanctions is therefore denied.

ORDER

1. Student's motion to compel production of videotape is denied as District has provided the videotape.

2. Student's motion for sanctions is denied.

DATE: September 13, 2016

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Paul H. Kamoroff
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PAUL H. KAMOROFF
Administrative Law Judge
Office of Administrative Hearings