BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017090457
v.	ORDER SHIFTING COSTS FROM ATTORNEY NICOLE HODGE AMEY TO THE OFFICE OF ADMINISTRATIVE HEARINGS
TRACY UNIFIED SCHOOL DISTRICT.	

PROCEDURAL HISTORY

On September 15, 2017, Attorney Nicole Hodge Amey, representing Student, filed a request for due process hearing in this matter. After a continuance, the prehearing conference (PHC) was set for January 12, 2018, at 10:00 a.m., and the hearing for January 23-25, 2018.

Ms. Amey also represented the student in *Student v. Antioch Unified Sch. Dist.*¸OAH Case No. 2017050795, an earlier-filed matter in which the due process hearing began on December 19, 2017, before ALJ Rita Defillipis. On December 29, 2017, the sixth day of hearing in the *Antioch* matter, Judge Defillipis continued the hearing to January 19, 2018, at 9:00 a.m.

Ms. Amey filed a Prehearing Conference Statement in this matter on January 9, 2018. At the beginning of the PHC in this matter on January 12, 2018, Tracy exercised a peremptory challenge of the then-assigned Administrate Law Judge. The Presiding Judge granted the challenge, continued the PHC to January 19, 2018, at 10:00 a.m., and reassigned the matter to ALJ Charles Marson (hereafter "the ALJ"). OAH staff notified the parties of the continuance the same day. Ms. Amey was therefore aware by January 12, 2018, that her presence would be required for the PHC in this matter on January 19, at 10:00 a.m., which squarely conflicted with her pre-existing obligation to appear in the *Antioch* matter at 9:00 a.m. on the same day. Ms. Amey did nothing to resolve this conflict.

On Thursday morning, January 18, 2018, the ALJ began to prepare for the PHC scheduled for the next morning. He noticed in Student's PHC Statement a request for an accommodation for Student at the hearing: "Student requires extra time to process information, frequent checks for understanding and visual supports." The ALJ referred this request to Nicole Buckoski, OAH Staff Counsel, who is OAH's Coordinator for matters arising under the Americans with Disabilities Act.

The ADA Coordinator telephoned attorney Amey on the morning of Thursday, January 18, 2018, to inquire into the details of the requested accommodations and to engage in the interactive process. Ms. Amey did not mention her conflicting obligation the next morning in the *Antioch* matter or her inability to attend the PHC.

On Thursday afternoon, January 18, 2018, the ADA Coordinator recommended that specific accommodations be granted. Believing that the PHC would proceed as scheduled the next morning absent a settlement, the ALJ worked for 3.5 hours to study the file, consider the requested accommodations, prepare for the conference, and prepare to rule on two motions made in Ms. Amey's PHC Statement in anticipation of rulings at the PHC. The ALJ also spent 0.75 hours the next morning preparing on the same matters.

Ms, Amey did not communicate with OAH on Friday morning, January 19, 2018, prior to the 10 a.m. scheduled PHC. At 10:00 a.m. the ALJ telephoned Ms. Amey to set up the conference call for the PHC, only to be told by a paralegal that Ms. Amey was not available because she was in a due process hearing (which proved to be the *Antioch* matter) and was cross-examining a witness. The ALJ requested that the paralegal bring Ms. Amey out of her hearing to the conference call. Ms. Amey requested and received a recess in the Antioch matter, representing to Judge Defillipis that she "forgot" the PHC. When the ALJ brought the parties together on the conference call, Ms. Amey appeared for Student. She explained that this matter had been settled, that she "forgot" to inform OAH of that fact, and that she was in the process of sending in the required dismissal. The ALJ continued the PHC until 1 p.m. the same day, Ms. Amey filed the request for dismissal, the 1 p.m. PHC was vacated, and the matter was dismissed.

On January 19, 2017, the ALJ issued an Order to Show Cause, ordering Ms. Amey to explain why she did not attempt to resolve her calendar conflict, did not advise OAH of the settlement of this matter, and did not appear at the PHC or notify OAH she would not appear.

On January 31, 2018, Ms. Amey filed a Response to the Order to Show Cause in the form of a declaration under oath. Her responses are set forth and discussed below individually.

APPLICABLE LAW

In certain circumstances, an ALJ presiding over a special education proceeding is authorized to shift expenses from one party to another, or to OAH. (Gov. Code, § 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; see *Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly [Cal. Code Regs., tit. 5] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

The ALJ presiding at the hearing may order reimbursement either to OAH or to another party. With prior approval from the General Counsel of the California Department of Education, the ALJ presiding over the hearing may "order a party, the party's attorney or

other authorized representative, or both, to pay reasonable expenses, including costs of personnel" to OAH as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. (Cal. Code. Regs., tit. 5, § 3088, subds. (a) & (e); see Gov. Cod 1455.30, subd. (a).)

An ALJ presiding over a hearing, without first obtaining approval from the California Department of Education, 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." (Gov. Code, § 11455.30, subd. (a); Cal. Code. Regs., tit. 5, § 3088, subd. (a).) 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.)

FACTUAL FINDINGS

1. Ms. Amey's declaration does not disagree with the statement of procedural facts set forth above and in the Order to Show Cause.

2. Ms. Amey learned late on Friday afternoon, January 12, 2018, that she had been ordered to appear in two different OAH proceedings at approximately the same time. On December 29, 2017, in *Student v. Antioch Unified Sch. Dist.*¸OAH Case No. 2017050795 (the *Antioch* matter), Judge Rita Defillipis had continued the hearing to January 19, 2018, at 9:00 a.m., to hear additional testimony. On January 12, 2018, Ms. Amey learned that the Presiding Judge had continued the PHC in this matter to January 19, 2018, at 10:00 a.m., a setting that conflicted with Ms. Amey's duty to appear at 9:00 a.m. the same day for further hearing in the *Antioch* matter.

3. Ms. Amey did nothing to resolve the conflict in her calendar. In her declaration she explains this failing only by stating that Monday, January 15, 2018, was Martin Luther King Day, a holiday, and that "there was not sufficient days [sic] to make a written motion to continue either the prehearing in [this matter] or the hearing in [the *Antioch* matter]." Since Ms. Amey could at any time from Tuesday morning, January 16, 2018, through Thursday afternoon, January 18, 2018, have filed such a written motion, and could have prepared it earlier, this response is not credible and made in bad faith.

4. Ms. Amey further declares that the *Antioch* matter:

> had been on recess from December 29, 2017 to January 19, 2018, 2018, and there was no opportunity for me to communicate with Judge Fillipis [sic] prior to the January 19, 2018, hearing date, therefore I intended to appear at hearing on January 9, 2018, and notify Judge De Fillipis [sic]of the 10 a.m. pre-hearing and request a break to take the call.

The declaration does not explain why "there was no opportunity" to communicate with Judge Defillipis during the seven days starting on Friday, January 12, 2018. Nor does it explain why, during that period, it was not possible to communicate with the undersigned ALJ, an OAH Presiding Judge, or any other responsible official at OAH.

5. In her declaration, Ms. Amey agrees that she spoke to OAH ADA Coordinator and Staff Counsel Nicole Buckowski on Thursday, January 18, 2018, and that in those conversations she mentioned that the parties were "negotiating settlement," but also states that settlement had not been reached at that time and she was "not aware that the ADA coordinator could assist in resolving the conflict." While that is correct, it does not explain why Ms. Amey did not contact OAH judges or staff who could assist in resolving the conflict.

6. In her declaration, Ms. Amey states that on Thursday, January 18, 2018, she told the ADA coordinator that she intended to discuss the accommodations required for hearing in this matter at the prehearing conference, which was scheduled for the following morning. She therefore had to know that OAH would assume the PHC would proceed as scheduled the next day.

7. In her declaration, Ms. Amey sets forth various grievances against OAH for her perceived treatment in other cases. For example, she states that "In recent months OAH has continuously denied my request for continuances," identifying a matter unrelated either to this case or the *Antioch* matter. Since she attributes her failure to seek a continuance in this matter to a lack of time, it is not clear why Ms. Amey makes this complaint. She does not overtly contend that it would have been hopeless to apply for a continuance in this matter. It would not have been; OAH continues proceedings to resolve calendar conflicts on a case-by-case basis.

8. In her declaration, Ms. Amey states that she is familiar with OAH's practice of scheduling prehearing conferences on Mondays and Fridays. Since the hearing in this matter was scheduled for the next Tuesday, January 23, 2018, Ms. Amey concludes that the only possible time for rescheduling the PHC would have been Monday, January 22, 2018. She adds that such a scheduling "would deny parties opportunity for a meaningful pre-hearing conference and deny time to resolve the issues regarding the disability accommodations requested." The unstated implication of this claim is that it was pointless to continue the

prehearing conference, so it was justified to leave it calendared as it was, in conflict with another case.

9. The implication above is unwarranted. As Ms. Amey knows, OAH continues hearings as well as PHC's and could easily have resolved the problem she anticipates. She does not explain why such a conference would be a failure one business day before a hearing but not two business days before a hearing. And she does not explain why that would be her decision, rather than OAH's decision, to make. Finally, any difficulty in rescheduling the PHC does not justify ignoring the conflicting scheduling that existed at the time and allowing OAH and the opposing party to waste resources in preparing for an event she knew would not occur.

10. In her declaration, Ms. Amey also complains that OAH has been unfair to her by rejecting continuances that she has requested based on her health:

> On December 29, 2017, I made a written complaint against the Office of Administrative Hearings for its failure to give me reasonable accommodations after I requested those accommodation and gave notice that I am a disabled person and the nature of my disability requires me to honor my health and rest when ill.

However, Ms. Amey makes no attempt in her declaration to connect this claim to the events in this matter. She does not assert that she was in ill health between January 12 and January 19, 2018, or that ill health had anything to do with her failure to attempt to resolve her scheduling conflict, to notify OAH of the settlement of the instant matter, or to appear for the PHC.

11. In her declaration, Ms. Amey complains, without any further explanation, that "My joint request to continue Student v. Vallejo Unified School District OAH Case No. 2017120281 was denied." The case file in that matter shows that a joint request for continuance was made on January 10, 2018, to continue a hearing then set for January 30, 2018, to September 19, 2018, a proposed delay of almost eight months. No reason for the request was given, and the request was denied on the ground that the proposed dates were too distant. This event has no relationship to the matters addressed here, and the reason for its inclusion in Ms. Amey's declaration is not apparent.

12. In her declaration, Ms. Amey suggests that she is the victim of persecution by OAH. After listing the grievances described above (which are not related to this matter), she mentions the "implicit bias I suffered during the OAH hearing," which likely refers to the denial of her request for continuance in the *Antioch* matter on December 29, 2017. Then she states, as a reason for her actions, "not knowing if OAH intentionally set the conflicting dates to disadvantage me . . ." These claims are not supported by the facts and are frivolous.

13. Turning to the events of late Thursday, January 18, 2018, and early Friday, January 19, 2018, Ms. Amey declares that she and opposing counsel "finalized discussions

on the settlement language" in this matter at 5:28 p.m. on January 18, 2018, and received the final version of the settlement agreement from opposing counsel at 5:42 p.m. She then prepared an OAH dismissal form "which I intended to file once I received the signatures." She received the final agreement with signatures at approximately 9:15 a.m. on January 19, 2018, by email from opposing counsel but did not immediately see the email because she was driving to the hearing in Antioch.

14. Ms. Amey further declares that she was late for the *Antioch* hearing "due to low air pressure in my tires" and the hearing began "a few moments after I sat down and unpacked." Ms. Amey's declaration does not explain why she had not arranged for her paralegal or staff to file the dismissal once the signatures were received. She also does not address why, once she had arrived in Antioch and presumably saw the email, she did nothing, personally or through her paralegal or other office staff, to inform OAH that the matter had been settled, to file the dismissal form she had previously prepared, or to take any other action with respect to the PHC she knew was upcoming.

15. Once Ms. Amey's grievances against OAH are set aside, the essence of her response is that she did not have time to do anything to resolve her scheduling conflict, report her settlement or attempt to reschedule the PHC in this matter during the seven days starting January 12, 2017. She declares that "There was not sufficient days [sic] to make a written motion to continue either the prehearing in OAH Case No. 2017090457 or hearing in OAH Case No. 2017050795." She declares further that "OAH Case No. 2017050795 had been on recess from December 29, 2017 to January 19, 2018, and there was no opportunity for me to communicate with Judge Fillipis [sic] prior to the January 19, 2018, hearing date, therefore I intended to appear at hearing on January 19, 2018, and notify Judge De Fillipis [sic] of the 10 a.m. pre-hearing and request a break to take the call." She later refers to her perception that she "lack[ed] sufficient time prior to hearing dates to make a written motion . . ." Ms. Amey's explanation does not mention why she could not seek the help of her paralegal, her staff, or another attorney in discharging her responsibilities.

16.. Ms. Amey's claim of insufficient time to act throughout the relevant seven-day period is not further explained, but Ms. Amey has many matters pending before OAH at any given time, and her explanation may reveal, at minimum, that she maintains a law practice with an excessive caseload.

LEGAL CONCLUSIONS

Duty to Manage Practice

1. The State Bar Act and the Rules of Professional Conduct apply to proceedings before the Office of Administrative Hearings. OAH is a "court" within the meaning of Business and Professions Code section 6103, which authorizes sanctions for an attorney's dereliction of duties. (*In the Matter of Moriarity* (Review Dept. 2017)(No. 15–O–10406) __ Cal. State Bar Ct. Rptr. ___, 2017 WL 1424407 at pp. 7-8.)

2. Under rule 3-110(a) of the Rules of Professional Conduct, "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." An attorney has a fiduciary duty to her clients to "maintain adequate management and accounting procedures for the proper operation of a law office . . ." (*In re Valinoti* (Review Dept. 2002) (No. 96–O–08095) __ Cal. State Bar Ct. Rptr. __, 2002 WL 31907316 at p. 15.) "At a minimum, respondent was required to develop and maintain procedures for . . . calendaring court hearings and filing deadlines [and] tracking court hearing dates and filing deadlines to insure they are not missed . . ." (*Ibid.*) This duty includes avoiding an excessive caseload and having adequate support staff. (*Id.* at pp. 15-16.)

3. If Ms. Amey's seven-day lack of time to resolve her scheduling conflict was due to the competing demands of her law practice, then she was not performing legal services for her clients with competence. If it was due to some other cause, Ms. Amey's response does not identify that cause.

Duty to Appear in Court

4. An attorney's failure to notify a tribunal of her inability to appear at a calendared legal proceeding is a ground for discipline and can be contempt of court. In *In re Aguilar* (2004) 34 Cal.4th 386, an attorney failed to appear for oral argument before the Supreme Court and failed to notify the court that he would not appear. The Supreme Court held him in contempt:

> Past California cases that have considered whether an attorney may be held in contempt of court for failure to appear in court establish that when an attorney is aware of an order requiring his or her appearance in court, and the attorney has the ability to appear but knowingly and intentionally does not appear, the attorney has "willfully" neglected or failed to appear. [Citation.] Once such willful failure to appear is shown, the propriety of a contempt judgment depends upon the validity or persuasiveness of the attorney's excuse or justification for his or her nonappearance. [Citations]

(*Id.* at pp. 388-389.) The Court rejected the attorney's excuse or justification as inadequate, fined him, and referred him to the State Bar for investigation and possibly additional sanctions. (*Id.* at p. 389.)

5. Ms. Amey's justifications for her failure to resolve the conflict on her calendar, notify OAH of the settlement of the instant case, and failure to appear for the prehearing conference are inadequate to explain or justify her conduct. She had seven days to do something to resolve her scheduling conflict and did nothing. As soon as settlement negotiations approached success, she could and should have sought a brief continuance of the January 19, 2018 PHC (and if necessary the associated hearing) to facilitate that settlement. OAH routinely grants such continuances on a proper showing. Instead, as late as the afternoon of January 18, 2018, she told an OAH staff counsel she intended to raise certain

issues at the PHC the next morning, and then did nothing to correct the impression that the PHC would proceed. Ms. Amey had the ability to seek to resolve her conflict and to appear at the PHC but knowingly and intentionally did not do so.

6. As a result of Ms. Amey's failures to conform to professional standards, the ALJ was required to expend 4.25 hours in useless preparation for the PHC, which effort would not have been wasted if Ms. Amey had discharged her responsibilities to the tribunal. The ALJ finds that Ms. Amey's failures, described above, amounted to "bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Cal. Code. Regs., tit. 5, § 3088, subds. (a) & (e); see Gov. Cod 1455.30, subd. (a); *In re Marriage of Gumabao* (1984) 150 Cal.App.3d 572, 577.)

7. The most troubling aspect of Ms. Amey's response, and the most compelling reason for shifting costs, is that her response lacks any expression of contrition or any recognition that her behavior in the matter was less than exemplary. It displays no consciousness that she caused the unnecessary expenditure of resources or inconvenienced anyone. It reflects no understanding of the duties of an attorney in resolving the conflict that faced her. To the contrary, Ms. Amey concludes that the way in which she conducted herself was "my only way" to resolve the conflict. It is apparent from the tone and content of Ms. Amey's response that, given a similar situation in the future, she will engage in the same sort of conduct, and resort to the same sort of explanations, as described here.

8. The time spent by OAH's ADA Coordinator is not directly attributable to Ms. Amey's conduct, and its costs will not be shifted. But Ms. Amey's conduct directly and inevitably caused the ALJ to expend 4.25 hours in the unnecessary preparation for and conduct of the PHC (including a request for accommodations and two motions made by Student). It then caused the ALJ to expend 18.5 hours in the preparation of the Order to Show Cause, analysis of the Return, and drafting of this Order. These hours, totaling 22.75 hours, were billed to the California Department of Education at the rate of $276 an hour. Cost shifting from OAH to Ms. Amey of $6,279 is justified. However, in balancing the equities, as this is the first OAH order shifting costs to Ms. Amey and she timely replied to the OSC, the total amount will be reduced to $4,000. Ms. Amey is reminded of her ongoing obligation to manage her law practice in a manner that does not strain the fiscal resources and waste the valuable time of this tribunal. Costs amounting to $ 4,000 will be shifted.

This Order has been approved by the General Counsel of the California Department of Education.

ORDER

1. Ms. Amey is hereby sanctioned for her failure in this matter to attempt to resolve her calendar conflict, failure timely to notify OAH of the settlement, failure to appear at the January 19, 2018 PHC until summoned out of another hearing, and failure to notify OAH that she would not appear.

2. The costs of the ALJ's unnecessary preparation for and conduct of the PHC on January 19, 2018, are hereby shifted to Ms. Amey. Most of the costs related to the Order to Show Cause and this Order are also shifted to Ms. Amey. Ms. Amey shall remit to OAH the sum of $ 4000.00 within 10 business days of this order. Ms. Amey shall not pass these costs on to Student or Parents.

3. A copy of this Order shall be provided to the State Bar of California as required by subdivision (a)(3) of Business and Professions Code section 6086.7.

DATE: March 13, 2018

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