BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

EPIC CHARTER SCHOOL.

OAH CASE NUMBER 2024020551

ORDER GRANTING MOTION TO SHIFT EXPENSES AND SPECIFYING COSTS SHIFTED

APRIL 17, 2024

On April 3, 2024, the undersigned issued an Order to Show Cause. Specifically, why costs incurred by Epic Charter School after the Order Following Prehearing Conference was issued through the time of hearing should not be shifted to the Student.

Student replied on April 4, 2024. Student filed an additional opposition to Epic's request for sanctions on April 8, 2024. Student argued costs should not be shifted to Student because counsel did discuss the outcome of the prehearing conference with Parent. Further, Student argued counsel failed to file a responsive motion to the Order Following Prehearing Conference because the parties were engaged in settlement

negotiations. Additionally, the motion to withdraw was not made on the basis of the outcome of the Prehearing Conference, but rather the sudden unavailability of one of the attorneys representing Student, and Student's motion to withdraw was neither frivolous nor undertaken in bad faith.

Epic Charter School filed its response on April 4, 2024, a reply on April 5, 2024, and a response on April 9, 2024. Epic detailed its numerous attempts to negotiate settlement while simultaneously prepare for Due Process hearing. Epic transmitted its statutory settlement offer to Student's counsel on March 21, 2024. The Prehearing Conference was conducted on March 25, 2024, before the undersigned. Attorneys Claudia Shockley and Addison Morris, from the Law Offices of Sheila Bayne, appeared on Student's behalf. On March 26, 2024, James D. Peters, a paralegal in Bayne's office informed Epic that attorney Robert Burgermeister would attend the Meet and Confer as ordered in the Order Following Prehearing Conference. After some back and forth, Burgermeister and Epic's counsel, Deborah Cesario, attended a Meet and Confer on March 27, 2024.

On March 28, 2024, Epic presented Student with its final settlement terms. This offer was accepted by Peters via email on March 29, 2024. At this point, Epic ceased hearing preparations based on the settlement. Cesario emailed Bayne and Peters a written settlement agreement on April 1, 2024. On April 2, 2024, Epic resumed hearing preparations because it did not receive a response or signed agreement from Student. On the evening of April 2, 2024, Peters withdrew agreement to the settlement terms and instead proposed other terms and conditions.

The following morning, April 3, 2024, the due process hearing convened. Parties made their appearances for the record. Present for Student were attorneys Burgermeister and Dilini Lankachandra, not attorneys Claudia Shockley and Addison

Morris who appeared at the Prehearing Conference. Burgermeister stated on the record Shockley had not slept well, did not feel well as a result, and thus would not attend the hearing. Burgermeister did not move to continue the hearing.

The issues as clarified in the Order Following Prehearing Conference of March 25, 2024, were read into the record. Burgermeister confirmed the issues were correct. Parent then spoke up and objected that the issues were not those she wanted heard. The undersigned ordered a brief continuance so Parent could caucus with her attorneys. When the parties returned, Burgermeister requested Student's case be withdrawn without prejudice because Parent was not satisfied with the issues in the Order Following Prehearing Conference. Epic objected arguing the matter should be dismissed with prejudice given the hearing had started. After oral argument, Student's case was withdrawn without prejudice. Epic requested costs be shifted and the record was left open for the limited purpose of addressing cost shifting.

APPLICABLE LAW

In certain circumstances, an administrative law judge, known as the ALJ, presiding over a special education proceeding is authorized to shift expenses from one party to another, or to the Office of Administrative Hearings. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; 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 place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

Expenses may be ordered to be reimbursed either to OAH or to another party. With 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 the entity that is responsible for conducting due process hearings) 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) & €; see Gov. Code, § 11455.30, subd. (a).) An ALJ presiding over a hearing may, without first obtaining approval from the California Department of Education, "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).) Filing a complaint without serving it on the other party is not within the definition of "actions or tactics." (*Ibid.*) "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.)

DISCUSSION

Student argued costs should not be shifted to Student because counsel did discuss the outcome of the prehearing conference with Parent. Student's motion claimed this assertation was supported by a Declaration from Sheila C. Bayne; however,

Student's response to the Order to Show Cause was only seven pages and did not contain any exhibits or declarations. Student's proof of service only indicates a response to the Order to Show Cause was served on Epic and OAH. Bayne's failure to include a sworn declaration in support of her contention she communicated with her client is evasive and inadequate. Bayne attached a declaration to her April 8, 2024, opposition to Epic's request for sanctions. Bayne's declaration was non-responsive to the question of whether she, or anyone from her office, appropriately communicated to her client the Order Following Prehearing Conference. In Student's April 8, 2024, response, exhibit A contained confidential communication between Parent and non-attorneys with the Bayne firm. The communications included a request for Parent to review the original filing dated February 13, 2024, a revised copy of Student's original Request for Due Process with directions for Parent to respond to Epic's resolution session meeting dated February 14, 2024, and then an email titled Prep Parent Notes for Ress Sess 2/27 dated February 27, 2024, where Parent was told to discuss her concerns with non-attorney Peters, who also attended the resolution session with Parent. None of these documents establishes that any attorney communicated with Parent at any time prior to the hearing commencing on April 3, 2024.

Bayne's declaration in Student's response to Epic's request for sanctions referred to previous sanctions levied against the Law Offices of Shiela C. Bayne for failing to appear at a prehearing conference. The declaration further claimed it was unforeseeable Claudia Shockley, the lead attorney, would be ill the morning of the Due Process Hearing. Moreover, the declaration referred to the common practice of the Law Office of Shiela C. Bayne to have two attorneys from her firm appear at Prehearing Conferences and Hearings. Shockley confirmed, in her typo-ridden declaration where she misnamed Student, that Burgermeister was co-counsel in this matter. Thus,

Shockley's unavailability had no bearing on the ability of this firm to timely prosecute this case.

Student argued it was the sudden unavailability of Shockley that resulted in Student seeking to withdraw her Request for Due Process without prejudice. This argument is also unpersuasive. There are mechanisms to address the sudden illness of an attorney or crucial witness; however, at no time did Student request a continuance due to Shockley's absence. Moreover, Burgermeister appeared at hearing and confirmed the issues were accurate, never raising Shockley's unavailability until after Parent interjected challenging the issues.

It is a practice of this firm to have multiple attorneys appear on various days throughout the proceedings. This practice was confirmed by Bayne's declaration. In this matter, five licensed members of the California State Bar appeared on Student's behalf. Burgermeister and Lankachandra were present on Student's behalf on the morning of the hearing. Burgermeister participated in the Meet and Confer, held himself out as co-counsel, and according to Student's response to the Order to Show Cause, familiarized himself with the facts of the case. It was Burgermeister who represented on the record that Parent disagreed with the issues. It is important to note that not all special education claims must be pursued in a single action. (20 U.S.C. § 1415(o)). Accordingly, even had Parent wished to pursue additional claims, nothing prevented Student from filing an additional complaint but proceeding with those claims contained in Student's complaint and clarified in the Order Following Prehearing Conference.

Student's argument that counsel failed to file a written objection to the issues as stated in the Order Following Prehearing Conference as parties were engaged in settlement discussions is unpersuasive. Nothing precludes parties from simultaneously preparing for due process while engaging in settlement discussions. Moreover, parties

are explicitly informed in the Order Following Prehearing Conference, that they are to carefully review the issues and file a motion with OAH should the issues not comport with the discussions that occurred during the prehearing conference. In this case, the Order Following Prehearing Conference, issued on March 26, 2024, specifically noted, "No change in substance has been made. A party believing that an issue has been misstated or improperly omitted shall promptly file a notice in writing, prior to the first day of hearing, stating its concern and referring to supporting portions of the complaint."

Finally, Student argued costs should not shift as her motion to withdraw was neither frivolous nor undertaken in bad faith. Again, Student's argument is unpersuasive. Student argues the issue clarification during the Order Following Prehearing conference was the reason Parent elected to request to withdraw her complaint. As discussed above, the Prehearing Conference occurred on March 25, 2024. The Order Following Prehearing Conference was issued on March 26, 2024. Student's response to Epic's request for Sanctions demonstrates no communication occurred with Parent beyond February 27, 2024's resolution session.

The Rules of Professional Conduct dictate an attorney will abide by a client's wishes concerning the objectives of representation. (Rules of Prof. Conduct, rule 1.2.) However, the rules further dictate a lawyer shall keep the client reasonably informed about significant developments. (Rules of Prof. Conduct, rule 1.4). Here, Bayne's firm and her supporting cast of attorneys clearly failed to communicate with client.

All attorneys carry a duty of competence to perform legal services. (Rules of Prof. Conduct State, rule 1.1). If an attorney lacks skills to perform their duties competently, the attorney may associate with another lawyer who is competent. Here, the Bayne firm routinely sends two attorneys to appear on Student's behalf at prehearing conferences

and due process hearings. In her declaration, Cesario, Epic's counsel, repeatedly stated Burgermeister told her Shockley had never tried a special education matter before. Shockley was unprepared and appeared unknowledgeable about Student's complaint during the March 25, 2024, prehearing conference. However, it was Burgermeister, not Shockley, who sought to withdraw the Request for Due Process rather than request a continuance to address Shockley's absence.

Finally, Student's Request for Due Process, Prehearing Conference Statement, Response to the Order to Show Cause, and Student's Opposition to the Order to Show Cause and Epic's request for sanctions are all filed under Bayne's name and license number. Neither Burgermeister, Shockley, Morris, or Lankachandra have filed a notice of appearance on behalf of Student. Their multiple attorneys who appeared on Student's behalf did so under the supervisory authority of Bayne and The Law Offices of Sheila Bayne as she was the only officially noticed counsel. Thus, Bayne is required to ensure all lawyers, and nonlawyers acting on her behalf, comply with the rules of Professional Conduct and the State Bar Act. (Rules of Prof. Conduct, rule 5.1.)

This is not the first time OAH has sanctioned this law firm. Bayne's own declaration addressed sanctions levied against her firm for an attorney failing to appear on another student's behalf at a prehearing conference. Official notice is taken of the pleadings and orders in OAH Case No, 2023100314. OAH has other examples of sanctioned conduct by the Bayne firm.

In the instant case, Bayne's firm engaged in frivolous tactics. The combined actions of the five attorneys representing Student in this matter were frivolous and completely without merit. (Gov. Code, § 11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(2).) The tactics are deemed to have harassed Epic Charter school. Bayne's firm sent unprepared and inexperienced attorneys to the Prehearing Conference, utilized an

attorney who failed to appear for a hearing, and condoned the tactics employed by Burgermeister and Lankachandra to request to dismiss the matter without prejudice after the appearances were taken and preliminary matters conducted on the first day of hearing when Shockley failed to appear. Moreover, when provided an opportunity to address their failures, the firm demonstrated a lack of candor with the tribunal and a complete lack of concern for the Student and her interests.

The ALJ shall determine the reasonable expenses based upon a declaration setting forth specific expenses incurred as a result of the bad faith or frivolous conduct. (Cal. Code. Regs., tit.1 § 1040(c).) Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates or employees. (Code Civ. Proc., § 128.5, subd. (f)(1)(C).) An order of sanctions shall be limited to what is sufficient to deter repetition of the action or tactic or comparable action or tactic by others similarly situated. (Code Civ. Proc., § 128.5, subd. (f)(2).)

Epic's response established it incurred $13,003.00 preparing for hearing on April 2 and 3, 2024, after Student revoked her settlement agreement and preparing its sanctions motion on April 3 and 4, 2024. Cost for hearing preparation is expected. In this case, Epic does not seek recovery of all hearing preparation costs. Rather, Epic limited its request not just to the expenses incurred after the Order Following Prehearing Conference was issued, when the issues were identified, but only to costs incurred just two days before hearing and to prepare this motion. Each attorney states their hourly rate separately and sets forth the amount of time spent preparing for hearing and the subsequent sanctions motion and response to the Order to Show Cause. OAH has examined this statement of costs and finds the expenditures it describes reasonable in all respects.

These fees are reasonable given the conduct of Bayne's firm and the deterrence impact of sanctions. (Code Civ. Proc., § 128.5, subd. (f)(2).) For purposes of payment the Law Office of Shiela C. Bayne will direct payment to Epic Charter school through its counsel, Deborah Cesario. To further deter this behavior from continuing, all attorneys who appeared on behalf of Student shall be jointly sanctioned. It is left to the firm to apportion the payment. Each attorney must individually comply with reporting obligations as determined by the State Bar of California.

Epic's motion for sanctions is granted. Epic's request for an additional Order to Show Cause is denied.

ORDER

1. Within 30 days of the date of this Order, The Law Offices of Sheila C. Bayne shall pay $13,003 to Epic Charter, through its attorneys, to defray the costs of litigation occasioned by the misconduct of the attorneys involved in this matter.
2. No costs associated with this order shall be shifted to Parent.
3. All attorneys who appeared on behalf of Student shall be jointly responsible for the sanctions payment, to be apportioned by the firm, and subsequent compliance with the reporting obligations to the State Bar of California

4. Within 35 days of the date of this order, Epic Charter shall file with OAH a statement showing whether the full amount assessed was properly paid.
5. A copy of this order will be mailed directly to Parent.

IT IS SO ORDERED.

Tiffany Gilmartin

Tiffany Gilmartin

Administrative Law Judge

Office of Administrative Hearings