BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

CHULA VISTA ELEMENTARY SCHOOL DISTRICT.

OAH CASE NUMBER 2023100984

ORDER GRANTING CHULA VISTA'S MOTION TO SHIFT EXPENSES

MARCH 6, 2024

PROCEDURAL AND FACTUAL BACKGROUND

On December 11, 2023, the Parties participated in a Pre-Hearing Conference referred to as a PHC, with Administrative Law Judge, referred to as ALJ, Ted Mann.

On December 18, 2023, Chula Vista moved for an order to show cause, supported by declaration testimony and exhibits attached thereto, that Student's counsel should appear on the first day of hearing, December 19, 2023. The crux of the motion was that Student's lead counsel, Ms. Bayne, had stated that she would be unavailable the first day of hearing, but would have another counsel present. Chula Vista argued that Student

had failed to meet and confer on witnesses as ordered in the PHC order. Student had filed a document called "Joint Witness Schedule" with the Office of Administrative Hearings, referred to as OAH. However, the declaration testimony and evidence from counsel for Chula Vista demonstrated that Student's counsel did not meet and confer, despite numerous requests by Chula Vista 's counsel, and unilaterally prepared the joint schedule, filed, and served it.

In her declaration, Chula Vista Elementary School District's counsel, Sarah Sutherland testified that she advised ALJ Mann and Student attorney Sheila Bayne at the PHC that Chula Vista was closed for the 2023 winter break during the scheduled dates for the Due Process Hearing. Ms. Sutherland stated that given the winter break schedule, it was possible Chula Vista's employees have prearranged plans, including travel for the holidays, and as such, could be unavailable during these dates. Chula Vista contends that during the PHC, Ms. Bayne stated she would not be available for the first day of hearing on December 19, 2023, but would have an attorney from her firm present. Chula Vista expressed willingness to make any employees reasonably available on workdays, and to accept service of any subpoenas for current Chula Vista employees.

There was some discussion on the PHC record about continuing the hearing, but neither party made such a motion, and ALJ Mann declined to do so. Consistent with OAH practices and procedures, ALJ Mann ordered the Parties to meet and confer as follows:

> The parties are ordered to meet and confer no later than Thursday, December 14, 2023, by 5:00 PM, to discuss scheduling witnesses and how much time each witness will take. The parties shall discuss any issues related to counsel and witnesses appearing...for the hearing.

According to the sworn declaration of Ms. Bayne, she contracted the flu and became very ill during the same week of the PHC. She asked the "head" of her office staff, James D. Peters, III, to "correspond with opposing counsel," and to "send them a Joint Witness List" she had prepared. Ms. Bayne further testifies that "due to a high fever and very sore throat, I could not respond to telephone calls, nor even access my voicemails…. I would have engaged in the meet and confer process at least in part by telephone or Zoom had I not had the flu that week." Ms. Bayne contends that there is "no mandate" to speak only by telephone to conduct a meeting and confer, and that doing so in writing is permissible.

In its December 18, 2023, Order to Show Cause Motion, as well as the motion to shift fees, Chula Vista argued that on December 13, 2023, one of its attorneys emailed Ms. Bayne to schedule a meet and confer conference, pursuant to ALJ Mann's order. On December 14, 2023, Chula Vista's counsel again telephoned Ms. Bayne twice and left her voicemails for both attempts. Chula Vista's counsel also sent four emails to meet and confer prior to 5:00 p.m. on December 14, 2023, but did not hear back from Ms. Bayne.

At 4:00 p.m. on the same date, Mr. Peters emailed counsel, and stated that Ms. Bayne had a sore throat and was resting her voice for the hearing. Mr. Peters attached a witness list to his 4:00 p.m. email, which he titled a "joint" witness list. Mr. Peters is not an attorney. He had no legal ability to meet and confer and discuss with opposing counsel the nature of the testimony or what witnesses will be called, and when. Ms. Bayne contends, however, that this was Student's effort to "meet and confer," and that because Student has the burden of proof, Student is free to identify each witness in the order he so chooses.

ALJ Brian H. Krikorian convened the due process hearing on December 19, 2023, and addressed the Order to Show Cause Motion on the record. Attorneys Leroy Sumter

and Peter Collisson appeared on behalf of Student. Mr. Sumter did not dispute, and in fact admitted, that neither Ms. Bayne, nor an attorney from her office responded to the numerous phone messages and emails from Chula Vista's counsel the preceding week. Mr. Sumter also acknowledged that, to his knowledge, Student's counsel had not subpoenaed any Chula Vista staff and was not prepared to move forward the first day of hearing unless Chula Vista produced the first witness on the "joint" list filed with OAH. ALJ Krikorian continued the hearing to December 20, 2023, and ordered the parties to meet and confer before the commencement of the hearing the next day, and to file with OAH a joint witness schedule. Mr. Sumter and Chula Vista's counsel were able to prepare a joint witness list for the remainder of the hearing dates.

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 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) & (b); 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.)

FINDINGS

STUDENT'S COUNSEL'S SERIAL FAILURE TO FOLLOW OAH ORDERS AND ENGAGE IN A MEET AND CONFER WAS IN BAD FAITH

OAH's PHC orders are very clear, and the language used in each order is consistent from case to case. Ms. Bayne and her law firm regularly practice before OAH, have filed numerous cases with OAH, have gone to hearing multiple times, and are familiar with the requirements of the PHC orders.

"Meet and Confer" means a good faith conference in person or by telephone to attempt to resolve the matter in dispute without the court's involvement. The court expects a high degree of professionalism and collegiality among counsel during any meet and confer conference. (See https://www.lawinsider.com/dictionary/meet-and-confer). Student's counsel argues that the meet and confer process does not "mandate" a discussion by telephone or in person and can be conducted by writing or email. While Student is correct that the PHC order did not specifically spell out the manner in which a meet and confer conference will be held, it is reasonably inferred that it would require counsel for both sides to engage in a dialogue about—i.e., to "discuss"— the availability of witnesses, the nature of the testimony, and whether the district can produce those witnesses—at a minimum.

Ms. Bayne's argument—that such a discussion could be done "in writing"—might have had some merit if in fact that happened in this case. It did not. To the contrary, no attorney responded orally or in writing to Chula Vista's counsel's requests to meet and confer, let alone engage in a "discussion" required in the PHC order. The only response made to Student's counsel was an email by Mr. Peters, on the date of the meet and confer deadline, that attached a unilaterally prepared Joint Witness List.

Despite attempts by Chula Vista's counsel to arrange a meet and confer telephone conversation prior to the deadline, there was no legitimate effort made by Student's counsel to engage or respond. As noted above, Mr. Peters is not a licensed attorney. Moreover, sending a unilaterally prepared, take-it-or-leave-it witness list, and calling it a "joint" witness list, without engaging in the meet and confer process as defined above, is not good faith and did not comply with the PHC order.

Two attorneys appeared on the first day of hearing for Student, Mr. Sumpter and Mr. Collisson. Since Ms. Bayne was ill the previous week and knew in advance that she

would not be able to attend the first day of hearing, it was incumbent upon her to ask one of the replacement attorneys to engage in the meet and confer process by the deadline stated in the PHC order—not Mr. Peters. There is no evidence that she even made that attempt. Had she done so, she may have met the spirit of the PHC order. Instead, both Mr. Sumter and Mr. Collison appeared on the first day of hearing unprepared, and unable to call a witness. Beyond the blatant disregard of ALJ Mann's PHC order, the failure to meet and confer delayed the hearing by one day. That failure also resulted in Chula Vista having to incur additional fees and costs to prepare for hearing, only to have the hearing continued due to Ms. Bayne's refusal to comply with the order.

Finally, it should be noted that this is not the first time Ms. Bayne and her firm have been sanctioned for failure to follow OAH's orders. (See OAH Case Nos. 2023020611, 2022080550, and 2023020646). It is apparent from the pleadings and the evidence presented at the hearing in this matter, and the prior sanction orders, that Ms. Bayne believes that she does not have to follow OAH's PHC order requirements. For the foregoing reasons, the ALJ finds that Ms. Bayne's failure to comply with the PHC order, and her failure to meet and confer or have an attorney meet and confer on her behalf, were frivolous and solely intended to cause unnecessary delay.

CHULA VISTA SHOULD BE AWARDED ITS REASONABLE FEES CAUSED BY THE DELAY

On January 12, 2024, Chula Vista filed a Motion to Shift Fees/Impose Sanctions, accompanied by the declarations of attorneys Sarah Sutherland, Gillian M. Ramos, and Debra K. Ferdman. Each attorney states her hourly rate and sets forth separately the amount of time she spent on each phase of the pleadings Chula Vista was required to file, in trying to meet and confer, and on appearances at the first day of hearing on

December 19, 2023. Based upon the above analysis and findings, that motion is granted.

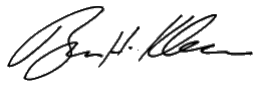
Chula Vista incurred $2,360.0 in fees engaging in efforts to meet and confer during the week of December 11, 2023, and in preparing the original motion for an order to show cause. The undersigned ALJ declines to award this amount as Chula Vista would have been required to meet and confer, in any event.

Chula Vista incurred the sum of $1,380 in legal fees having Ms. Sutherland attend and prepare for the first day of hearing on December 19, 2023. As reflected above, this time was unnecessary because the parties had not agreed on the availability of district witnesses for the first day of hearing, and Student had not subpoenaed any of the witnesses. The matter had to be continued one day due to the fact Student's counsels were unprepared to begin the hearing. Finally, Chula Vista incurred $2,047.50 in fees researching and preparing the motion to shift fees. Both of these incurred fees are awarded to Chula Vista. OAH has examined this statement of costs and finds the expenditures it describes reasonable in all respects.

ORDER

1. Within 30 days of the date of this Order, Sheila C. Bayne shall pay $3,427.50 to Chula Vista, through its attorneys, to defray the costs of litigation caused by her misconduct.
2. The Law Office of Sheila Bayne shall pay the above amount and not pass the cost to a client.
3. Failure to comply with this order may result in a civil judgment or finding of contempt.

IT IS SO ORDERED.



Brian H. Krikorian

Administrative Law Judge

Office of Administrative Hearings