BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

OAKLAND UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020120240

ORDER GRANTING REQUEST FOR CONTINUANCE, DENYING MOTION TO EXCLUDE EVIDENCE AS MOOT, AND ORDERING STUDENT TO SHOW CAUSE REGARDING SHIFTING COSTS

JUNE 21, 2021

On December 7, 2020, Student filed a request for due process, called a complaint, with the office of Administrative Hearings, called OAH, naming Oakland Unified School District, called Oakland. On April 19, 2021, Student filed an amended complaint. On June 1, 2020, OAH granted a continuance to facilitate a mediation and set the prehearing conference for June 14, 2021 and the due process hearing to take place on June 22, 23, and 24, 2021. The prehearing conference proceeded on June 14, as scheduled.

On June 17, 2021, Oakland filed a motion to exclude evidence, or in the alternative, compel the production of evidence. On June 18, 2021, Oakland filed a motion to exclude evidence and a motion for sanctions. On June 21, 2021, Student filed an opposition to the exclusion of evidence and sanctions and a continuance of hearing. On June 21, 2021, Oakland filed a reply to Student's opposition asserting Student's counsel's bad faith delays in prosecuting Student's case, and Student's counsel's withholding of counsel's intention to obtain a continuance in this matter, known to Student's counsel on June 17, 2021, but was communicated to Oakland late in the evening of June 18, 2021. On June 21, 2021, Oakland filed a letter requesting a prehearing conference the same day to discuss Student's request for continuance. On June 21, 2021, Student filed a motion to continue hearing based on Student's counsel's medical condition.

MOTION TO CONTINUE

On June 21, 2021, Student filed a request to continue this matter, based upon the need for time for Student's counsel to recover from a recent flare-up of a medical condition. In support of the request, Student provided a physician note placing Student's counsel off work from June 17, 2021, through July 15, 2021, for a condition with an onset date of 2018.

APPLICABLE LAW

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness

due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (Ed. Code, § 56505, subd. (f)(3); Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance or imposing conditions on the continuance; and any other relevant fact or circumstance. (Cal. Rules of Court, rule 3.1332(d).)

DISCUSSION

OAH has reviewed the request for good cause and considered all relevant facts and circumstances. Student's motion to continue documents Student's counsel's longstanding medical condition and Student's continued filing of due process complaints since the onset of that condition. The administrative record in Student's case, is replete with documentation that Student's counsel's ongoing medical condition has interfered with Student's counsel's ability to provide legal representation for Student and to proceed to hearing on this case without delay. Student's counsel has been informed of the availability of reasonable accommodations counsel can request in the course of representing Student at hearing on this matter. Student's counsel informed OAH at the prehearing conference of counsel's intention to request such accommodations, however none have been requested. Although reasonable

accommodations can be granted upon a showing of disability related need, the Individuals with Disabilities Education Act does not provide for a wholesale delay of hearing on this basis as to attorneys. The sworn declaration of Elizabeth Schwartz, Attorney at Law, in support of Oakland's motion for sanctions, evidences that Student's counsel knowingly filed for due process on Student's behalf in December of 2020, despite a history of Counsel's own communications that her medical condition interfered with her ability to represent Student in the several months leading up to Student's filing for due process.

Upon consideration of all relevant facts and circumstances, Student's request for continuance is granted. However, Counsel's medical condition in this case that has been pending six months, with both prior knowledge of the condition and the failure to seek reasonable accommodations, does not constitute good cause. Rather, good cause is established because Student's counsel's documents establish that Counsel is currently unable to competently represent Student in this matter. Accordingly, a continuance is granted for Student to proceed with competent representation.

Student is hereby on notice that no further continuances will be granted based on Student's Counsel's known and ongoing medical condition. Student is encouraged to consider alternatives going forward, including continued representation by Counsel of record with reasonable accommodations sought to accommodate her medical condition, Counsel's association with an additional attorney, substitution of counsel, or proceeding to hearing without counsel. Oakland's request for a prehearing conference to discuss Student's request for continuance is denied.

Student's request for continuance is granted. All dates are vacated. This matter will be set as follows:

Due Process Hearing will be held on July 20, 21, and 22, 2021. The hearing shall begin at 9:30 AM on all days unless otherwise ordered. The hearing shall continue day to day, as needed at the discretion of the Administrative Law Judge.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure their availability to testify. Good cause for witness unavailability is not established by failing to properly notify or subpoena a witness. Prehearing conference statements and motions are due to OAH no later than three business days before the prehearing conference or with evidence of good cause why it was not possible to file the motion by that date.

MOTION TO EXCLUDE EVIDENCE

On June 17, 2021, Oakland filed a motion to exclude Student's evidence based on Student's failure to comply with OAH's order following prehearing conference and Education Code 56505, subdivision e(7) requirement of parties to serve their exhibits on each other, at least five business days before the due process hearing. As a continuance of this matter has been granted, Oakland's motion is denied, as moot. However, Student is ordered to comply with legal requirements governing the timely exchange of evidence at least five days before hearing and nothing in this order precludes Oakland from filing a motion to exclude evidence for Student's failure, if any, to so comply.

MOTION FOR SANCTIONS

On June 17, 2021, Oakland filed a motion for sanctions asserting that Student's failure to timely exchange evidence violating both the Education code and the order following prehearing conference, evidences Student's bad faith. Further, Counsel's history of refusal to comply with OAH orders is intended to delay a speedy resolution

for Student. Oakland contends that the failure to timely exchange evidence resulted in Oakland having to file motions for which Student should bear the cost.

APPLICABLE LAW

In certain circumstances, an ALJ 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).)

With prior approval from the General Counsel of the California Department of Education, an ALJ 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 11455.30, subd. (a).)

Without first obtaining approval from the California Department of Education, an ALJ 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.)

Oakland contends that Student's failure to timely exchange evidence was another example of Student's demonstrated pattern of delay and refusal to comply with OAH orders. Specifically, Oakland asserts that Student's counsel's excuses for the delay in the exchange of evidence, including the inability to upload the documents using the CaseLines program, medical limitations, and unfamiliarity with OAH procedures for the uploading of evidence, instead evidenced Student's bad faith intent to delay a speedy resolution of this matter. Oakland asserts that Student's opposition to the motion for sanctions contains Student's counsel's admission that she had knowledge that the hearing would likely be continued on June 17, 2021, but failed to so inform Oakland until late in the evening of June 18, 2021, when Oakland was served Student's opposition. Oakland asserts Student's failure to timely exchange evidence resulted in the filing of multiple motions, the cost for which should be shifted to Student.

Student asserts Oakland's motion for sanctions should be denied as Oakland does not have clean hands. Specifically, Student asserts that Oakland filed for due process against Student on two occasions and later withdrew the requests all in an effort to exploit Student's counsel's medical condition. Further, Student justifies the delay of the exchange of evidence based on Student's counsel's fatigue following a day long mediation, counsel's need to attend a medical appointment and to secure a prescription for medication related to Counsel's medical condition.

As discussed above, Student's counsel was aware of her medical condition and the effect of the medical condition on counsel's ability to represent Student in this matter, before making the decision of assume the responsibility of representing Student in the filing of Student's due process complaint. In so doing, Student's counsel assumed the responsibility to facilitate representation of Student leading to the prompt resolution of Student's complaint. Accordingly, Student has failed to establish why an order to show cause as to why the costs of ligation related to Student's failure to timely exchange evidence should not be borne by Student. Student is ordered to file with OAH, by noon on July 16, 2021, a statement as to why Student should not be ordered to bear the costs associated with Oakland's motions related to Student's failure to timely exchange evidence five days before the hearing previously set to begin on June 22, 2021. Any response to Student's filing is due by Oakland no later than noon on July 19, 2021.

IT IS SO ORDERED.

Rita Defilippis

Rita Defilippis
Administrative Law Judge
Office of Administrative Hearings