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 TO SHOW CAUSE

APRIL 3, 2024

On April 3, 2024, Administrative Law Judge Tiffany Gilmartin, Office of Administrative Hearings, convened the first day of a due process hearing in the above matter. The Office of Administrative Hearings is called OAH.

Attorneys Robert Burgermeister and Dilini Lankachandra appeared on behalf of Student. Parent attended on Student's behalf. Attorneys Deborah Cesario and Katherine Yuna appeared on behalf of Epic Charter School. Sonja Clause and Kristi Neer attended on behalf of Epic Charter School.

The prehearing conference was held on March 25, 2024. At that prehearing conference, Student had two different attorneys of the same firm appear on her behalf. The Order Following Prehearing Conference was issued on March 26, 2024. The order

states pursuant to discussions with the parties during the Prehearing Conference, the ALJ has clarified the statement of some issues as allowed by the holdings in J.W. v. Fresno Unified Sch. Dist. (9th Cir. 2010) 626 F.3d 431, 442-443, and Ford v. Long Beach Unified Sch. Dist. (9th Cir. 2002) 291 F.3d 1086, 1090. 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. No written challenge to the issues was filed.

On the first day of hearing, all parties made their appearances for the record. The undersigned confirmed the issues as clarified during the prehearing conference of March 24, 2024. Student's counsel confirmed the issues were correct. Parent interjected and asked to be heard. A recess was granted to allow Parent an opportunity to consult with her counsel. When the parties reconvened, counsel for Student moved to withdraw Student's due process complaint without prejudice on the grounds the issues as confirmed in the Order Following Prehearing Conference of March 25, 2024, were not the issues Parent wanted. Epic Charter School objected to Student's request for dismissal without prejudice. Epic Charter School further requested that if such a ruling were to be granted, it had the right to seek sanctions or cost shifting against Student.

Parties were given a brief recess to provide oral argument regarding whether the matter should be dismissed with or without prejudice. After oral argument, the undersigned ruled that since opening statements had not commenced nor witnesses called, Student was entitled to dismiss the matter without prejudice. However, the undersigned explained the consequences of such. Specifically, Student was advised that even if dismissal without prejudice were granted, Epic Charter would be given the opportunity to file its written motion for sanctions or cost shifting. Further, OAH would

consider whether it would seek cost shifting for the ALJ time and expense preparing for and attending hearing and ruling on additional motions resulting from the request. Student was also informed that despite the request to dismiss, Student retained at that point the right to proceed with the hearing on the issues pled without risking sanctions or cost shifting. Student's counsel, having heard the admonitions, confirmed Student's request to dismiss with prejudice. The undersigned ordered Epic to file any requests for cost shifting and sanctions by close of business on Thursday, April 4, 2024. Any response from Student is due by close of business on Monday, April 8, 2024.

OAH issues this Order to Show Cause for why the cost incurred should not be shifted to Student. Student's response is due by close of business on Thursday, April 4, 2024.

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).)

"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.)

DISCUSSION

The issues for hearing were clarified during the prehearing conference of March 25, 2024. At the prehearing conference, lead counsel, Claudia Shockley was unprepared and lacked familiarity with Student's complaint. Parties were ordered to meet and confer no later than March 27, 2024. Both Epic and Student's counsel confirmed Burgermeister participated in the meet and confer.

When the hearing was convened, Shockley failed to appear, and in her place, Burgermeister appeared on behalf of Student.

Parent was unaware of the issues identified for hearing in the Order Following Prehearing Conference given her interruption and statement that the issues were not what she intended. Counsel did not represent that he or any other attorney in his office provided Parent a copy after it was issued. Nor was any objection to the issues filed before the due process hearing. Burgermeister was not present at the Prehearing Conference yet subbed in and appeared unfamiliar with the issues pled in this matter. When given an opportunity to argue why the matter should not be dismissed with prejudice, he blamed the lack of case familiarity on another attorney's eleventh-hour unavailability. Rotating attorneys at the last minute for hearing and having attorneys

unfamiliar with the facts of the specific case at hearing is not an uncommon practice by attorneys from this firm.

Accordingly, Student is Ordered to Show Cause why the expenses incurred by OAH for preparing for, participating in, and ruling on post hearing motions, should not be shifted to Student or Student's counsel. Specifically, for the failure to review the Order Following Prehearing Conference with Student and file a motion with OAH prior to the first day of hearing had the issues as confirmed during the PHC not comport with Parent's understanding of the case. Student's written response to this Order to Show Cause shall be submitted to OAH no later than Thursday, April 4, 2024, by 5:00 p.m. Epic Charter, while not required to respond, may submit a response no later than April 5, 2024, by 3:00 PM.

IT IS SO ORDERED.

Tiffany Gilmartin

Tiffany Gilmartin
Administrative Law Judge
Office of Administrative Hearings