BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

ENTERPRISE ELEMENTARY SCHOOL DISTRICT.

OAH CASE NUMBER 2022020241

ORDER REGARDING ORDER TO SHOW CAUSE

APRIL 15, 2022

Parent on behalf of Student filed a request for due process with the Office of Administrative Hearings, called OAH, on February 7, 2022, naming Enterprise Elementary School District. Student was represented by counsel Tania Whiteleather. OAH issued a scheduling order on February 8, 2022, setting a prehearing conference, called PHC, for March 21, 2022, and the due process hearing for March 29 and 30, 2022. Enterprise filed a Notice of Representation on February 9, 2022 and a Response to Due Process Complaint on February 17, 2022.

On March 16, 2022, Whiteleather filed Student's Request to Set Mediation and Continuance. Pursuant to the Scheduling Order, Student's motion was timely filed three business days before the prehearing conference. Student did not, however, file a PHC statement, or Participant Information Form, as required by the Scheduling Order.

Enterprise filed a notice of conditional non-opposition to Student's Request on March 17, 2022. Whiteleather filed a supplemental declaration on March 17, 2022. Because the parties did not agree on new hearing dates, OAH telephonically notified both counsel on the same date that Student's Request would be discussed and considered at the March 21, 2022 PHC.

THE PARTIES DID NOT REACH AGREEMENT ON ALTERNATE HEARING DATES

Whiteleather asserted in Student's March 16, 2022 Request that Whiteleather was not available for the originally scheduled PHC on March 21, 2022, or for the hearing dates of March 29 and 30, 2022, because of a prepaid vacation from March 17, 2022 through April 5, 2022. Whiteleather did not, however, offer any credible explanation in either of counsel's two initial declarations as to why counsel waited to file the unilateral request to continue until one day before counsel left for a pre-planned vacation that prevented her from accessing any form of communication to join the PHC. Whiteleather did not submit any documentary evidence supporting her declaration, including documents showing that she had a prepaid vacation, when she arranged for that vacation, and why she could not be available by telephone or videoconference on the date of the PHC.

By waiting until March 16, 2022 to file her Request to Continue, Whiteleather became unavailable, before counsel for Enterprise could file a response to Student's Request, and before OAH could consider and rule on the Request. Whiteleather did not explain why Whiteleather could not have filed the Request earlier when Whiteleather first realized the parties did not agree on hearing dates, knowing her vacation departure date was imminent.

Whiteleather's assertion that the ALJ "does not believe my sworn declarations" was not persuasive. Whiteleather is an experienced attorney who knows or should know that any such declaration attempting to establish unavailability for any scheduled appearance before a tribunal would wisely be supported by documentary evidence establishing counsel's actual unavailability, if such evidence exists. In this case, the evidence existed, and Whiteleather provided it in response to the Order to Show Cause.

Counsel for Enterprise agreed with Whiteleather to participate in mediation on May 9 or May 13, 2022, dates after the scheduled hearing. However, the two counsel did not reach agreement before the prehearing conference on new hearing dates. Enterprise requested in its conditional non-opposition that the hearing be scheduled to be completed by June 10, 2022, when the school year ends. On the other hand, Whiteleather requested undefined dates after June 13, 2022, excluding the first week of July. Neither party offered mutually agreed upon proposed dates for the continued hearing. Whiteleather knew, or should have known based on her experience practicing before OAH, that the unilateral request for a continuance would allow the opposing party three days to respond and then OAH may or may not grant the continuance.

Whiteleather's timing on the Request rendered Whiteleather unavailable for the prehearing conference and for any meaningful discussion with the ALJ and counsel for the parties regarding possible hearing dates. Whiteleather's expectation that OAH would simply grant the Request before the PHC, without having mutually agreed upon dates or a discussion regarding dates, was unreasonable given Whiteleather's extensive experience appearing before OAH and other courts.

OAH HELD THE PHC WITHOUT WHITELEATHER'S APPEARANCE

The undersigned administrative law judge, called ALJ, held a PHC on March 21, 2022 at 1:00 p.m. Counsel for Enterprise file a PHC statement and appeared on behalf of Enterprise. Whiteleather's secretary, who was not an attorney, appeared and the ALJ limited her participation solely for the purpose of discussing Whiteleather's calendar. Whiteleather did not, and reportedly could not, appear.

The undersigned ALJ granted the request for continuance for good cause based on the parties' desire to mediate before hearing, after discussion with Enterprise's counsel, and confirmation by Student's counsel's secretary of Whiteleather's availability for hearing in May 2022. However, Student's request to continue the hearing to June 13, 2022, or thereafter, was not supported by good cause. Student's counsel did not credibly establish in either of the two declarations submitted in support of Student's request for continuance that counsel was not available in May 2022 after the mediation was completed. Whiteleather's secretary confirmed Whitleather's availability in late May, 2022. Accordingly, hearing was set for May 24, 25 and 26, 2022.

ORDER TO SHOW CAUSE ISSUED

On March 21, 2022, OAH issued a PHC Order and Order to Show Cause as to Whiteleather why costs incurred by OAH and by Enterprise, if Enterprise desired, should not be shifted to Student's counsel for counsel's failure to appear at the March 21, 2022 prehearing conference. OAH declined to order a showing of cause regarding dismissal at that stage of the case out of fairness to and consideration of Student. The ALJ offered Enterprise the opportunity to file a declaration and authenticated supporting documentation relating to reasonable costs incurred to prepare for and attend the PHC on March 21, 2022. Enterprise declined to do so.

On March 21, 2022, at 4:35 p.m., Whiteleather requested the audio and written transcript recording of the March 21, 2022 PHC. This is the same day she claimed to be unable to appear telephonically or by video for the PHC. Whiteleather filed a Response to the Order to Show Cause including a declaration and supporting documents on April 8, 2022. Whiteleather included a declaration, a copy of documents related to her vacation, and emails between counsel regarding attempts to find mutually agreeable dates for the continued PHC and hearing.

ORDER SHIFTING COSTS IS WITHIN THE ALJ'S AUTHORITY

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. 1, § 1040; 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).)

Section 3088 refers to "presiding hearing officers." However, the ALJ presiding over the hearing is the presiding officer. Government Code section 11405.80 states: "Presiding officer means the agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in an adjudicative proceeding." This section makes clear that an ALJ who presides in an adjudicative proceeding is the "presiding officer," a point confirmed in *Wyner v. Manhattan Beach Unified Sch. Dist., supra,* 223 F. 3d at p. 1029, where the court stated, "Clearly, § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."

An ALJ presiding over a hearing 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. 1, § 1040; Cal. Code. Regs., tit. 5, § 3088, subd. (e).) 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.)

The ALJ shall determine the reasonable expenses based upon a declaration setting forth specific expenses incurred as a result of the bad faith 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).) If warranted for effective deterrence, an order may direct payment of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the action or tactic. (*Id.*) The courts shall vigorously use their sanction authority to deter improper actions or tactics. (Code Civ. Proc., § 128.5, subd. (g).)

WHITELEATHER FAILED TO EXPLAIN WHY SHE COULD NOT HAVE ANOTHER ATTORNEY COVER HER APPEARANCE ON MARCH 21, 2022

Whiteleather offered in response to the Order to Show Cause authenticated documentation that she paid for a two week cruise vacation outside of the United States on June 21, 2021. The vacation began nine months later on March 18, 2022, and was scheduled to end with a return to Los Angeles on or about April 4, 2022. The evidence

established Whiteleather knew on the day she received the Scheduling Order in the instant case that she had a conflict with the initial hearing dates in this case.

Whiteleather's argument that OAH "unilaterally" sets initial hearing dates, implying the parties have no say in their hearing dates, was frivolous and not persuasive. Whiteleather has practiced before OAH and Federal and State courts for years. Whiteleather is or should be well aware that OAH is required by the Individuals with Disabilities Education Act to handle due process requests involving claims under the IDEA in an expedient manner, and to issue a decision within 45 or 75 days of the receipt of the due process notice, absent a showing of 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.) Whiteleather is also aware that OAH routinely considers requests for continuance, and in doing so requires a credible showing of good cause for any continuance of a due process hearing to meet the federal mandate of speedy resolution of due process cases.

Whiteleather did not explain in her declaration in response to the Order to Show Cause why she did not and could not have asked another attorney to cover the prehearing conference and to attend the prehearing conference prepared to resolve the conflict between Whiteleather and Enterprise's counsel regarding hearing dates. Whiteleather also did not credibly explain why, when first reaching an impasse with Enterprise's attorney, Whiteleather could not have immediately filed the Request to Continue in sufficient time for Enterprise to respond in writing, and for OAH to rule on the motion before Whiteleather left on a vacation that rendered her unable to call into the PHC by phone. Instead, Whiteleather admitted she waited until the day before her vacation out of the country and out of reach of any means of contact to file her Request.

WHITELEATHER DID NOT ESTABLISH GOOD CAUSE FOR FAILING TO FILE A PHC STATEMENT

Whiteleather did not file a PHC statement as required by the Scheduling Order. Whiteleather asserted in her declaration in response to the Order to Show Cause that Whiteleather unilaterally decided not to prepare and file a PHC statement because she and Enterprise's counsel agreed to participate in mediation. Whiteleather argued that not complying with the Scheduling Order saved her time and costs. Whiteleather's failure to do so required the ALJ to spend additional time preparing for the PHC without the benefit of necessary information regarding Student's case. Whiteleather's unfounded assumption that OAH would grant the Request and vacate the prehearing conference without mutually agreed upon dates was not reasonable.

Whiteleather failed to cite to anything in the initial OAH Scheduling Order that provides parties the unilateral option, without leave from OAH, to decline to comply with OAH orders, especially for counsel's convenience, or to save costs. Notably, Enterprise timely filed its PHC statement, notwithstanding that its counsel was aware of Whiteleather's unavailability and intent to seek a continuance.

At the time that Whiteleather left for her vacation, OAH had not granted any continuances in this matter justifying non-compliance with the Scheduling Order. Whiteleather's explanation regarding her failure to comply with the Scheduling Order was not persuasive or supported by any credible reason for failing to comply.

WHITELEATHER FAILED TO SHOW GOOD CAUSE WHY THE REQUEST TO CONTINUE COULD NOT BE FILED EARLIER THAN THE DAY BEFORE WHITELEATHER'S SCHEDULED VACATION OUT OF THE COUNTRY

Whiteleather did not address in any of her three declarations why she could not have filed the Motion for Continuance a week earlier to allow OAH time to rule on the Motion before she left for vacation. Whiteleather knew for several months before she filed the due process complaint that she would not be available for hearing in late March and early April. Had Whiteleather filed her Request earlier than the day before she left the country, OAH would have had the opportunity to rule on the Request with notice to both parties, which would have given Whiteleather time to file a PHC statement and find counsel to cover for her at the PHC. Whiteleather did neither, instead inexplicably assuming she could disobey OAH orders without consequence.

SHIFTING COSTS

Whiteleather failed to establish good cause for 1) failing to timely file a motion to continue the due process hearing given Whiteleather's knowledge she would not be available to represent Student at the scheduled PHC if Student's unilateral March 17, 2022 request for continuance was denied, 2) disobeying OAH's February 8, 2022 Scheduling Order by failing to file a PHC statement, and 3) failing to appear or have another attorney appear on Student's behalf at the March 21, 2022 PHC. Whiteleather established, on the other hand, that Whiteleather knew from the day she filed the due process complaint and received a Scheduling Order that Whiteleather had an unresolvable conflict with the initial hearing dates scheduled in this case. She knew she could not attend the PHC to discuss mutually agreeable dates. Whiteleather's delay in

resolving that conflict by timely filing a request for continuance caused OAH to incur unnecessary costs.

OAH spent time and cost establishing Case Center access for the parties in advance of the PHC, as well as time considering and addressing Whiteleather's initial Request for Continuance, preparing for and conducting the March 21, 2022 PHC, and preparing and reviewing the PHC Order and Order to Show Cause. OAH spent additional hours considering Whiteleather's response to the Order to Show Cause, including supporting documentation, and drafting and reviewing this Order. OAH bills the California Department of Education at the hourly rate of $325. OAH incurred in excess of $3000 in fees. Enterprise declined to submit a request in support of an order shifting costs.

However, because Enterprise declined to seek a shift in costs, OAH in this instance will also decline to shift costs associated with the time the ALJ spent considering the Request to continue, preparing for and appearing at March 21, 2022 PHC, and drafting the Prehearing Conference Order and Order to Show Cause. OAH similarly declines to shift costs related to writing this Order resulting from Whiteleather's disregard for the orderly and timely progress of the due process hearing in Student's case. OAH's decision to decline shifting costs to Whiteleather should not be read by Whiteleather as impacting any future decision if similar circumstances repeat themselves. OAH intends that counsel comply with its orders.

However, Whiteleather is ordered to read, consider carefully, and ensure future compliance with OAH's Scheduling Order, and general procedures relating to requests for continuance in all matters in which she represents parties before OAH. Whiteleather's failure to comply with OAH Orders in the future may result in sanctions.

IT IS SO ORDERED.

Adrienne L. Krikorian

Adrienne L. Krikorian
Administrative Law Judge
Office of Administrative Hearings