

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENTS ON BEHALF OF STUDENT,

v.

CHAFFEY JOINT UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2020120161

ORDER SHIFTING COSTS FOR FAILURE TO PRODUCE
SCHEDULED EXPERT WITNESS FOR HEARING
ON JUNE 22, 2021

AUGUST 20, 2021

The Office of Administrative Hearings, called OAH, held a due process hearing in this matter by videoconference using Microsoft Teams on multiple days from June 8, 2021, through July 16, 2021. Attorney Sheila Bayne represented Student. Attorney Sundee Johnson represented Chaffey Union High School District. All hearing days were recorded.

The parties agreed at the end of the hearing day on June 17, 2021, that Parent, a percipient witness, Student's expert witness Dian Tackett, and Chaffey special education director Whelan would testify on June 22, 2021, which the parties intended would be the

last day of hearing. Bayne also informed the administrative law judge, referred to as ALJ, and Johnson, that Bayne might “switch” proposed expert Tackett for another expert.

On June 21, 2021, after close of business at 11:59 p.m., Student e-filed and served a Motion to Continue the due process hearing in this matter, which was deemed filed on June 22, 2021. Student supported the Motion with a declaration from Bayne. Student requested a continuance of the hearing scheduled for June 22, 2021 to August 4 and 5, 2021. Bayne asserted in her sworn declaration that Parent notified Bayne by “text message” at approximately 6 p.m. on June 21, 2021, that Parent’s doctor ordered Parent to “undergo surgery” scheduled to address “ongoing pain” during the morning of June 22, 2021, preventing Parent from testifying on June 22, 2021. Bayne also asserted that she emailed Johnson regarding a stipulation to continue the hearing based upon Parent’s unavailability, but Bayne had “not yet received a response.”

On June 22, 2021, at 9:30 a.m., the undersigned ALJ, opened the record in the virtual due process hearing. Attorneys Bayne and Johnson appeared. Whelan and Dr. Royal Lord, representing the West End Special Education Local Plan area, were also present. The ALJ, both counsel, Whalen and Dr. Lord were available for hearing throughout the day on June 22, 2021. No witnesses were called and no evidence was presented for hearing.

The ALJ considered oral argument from the parties on June 22, 2021, regarding Student’s request for continuance. Bayne represented for the first time that during the evening of June 21, 2021, after learning about Parent’s alleged unavailability due to an undefined medical emergency, Bayne unilaterally cancelled her expert witness scheduled for the next day. Bayne claimed she did so because Student had “a right to take witnesses in the order” of Student’s choice. Because Bayne wanted Parent to testify before the expert, and Parent was unavailable, Bayne unilaterally excused the expert

witness, without first consulting with the ALJ. Notably, Bayne did not mention the expert witness's scheduled testimony in Student's Motion to Continue or in Bayne's declaration in support of the Motion. When questioned by the ALJ, Bayne declined to consider taking her witnesses out of order and inexplicably insisted that Parent must testify before the expert witness, thus justifying cancelling the expert witness.

To avoid delays, and because all present were or should have been ready to proceed with hearing as scheduled, the ALJ ordered Bayne to contact the expert witness during a one hour break and to determine the witness's availability at any time on June 22, 2021, such that the witness's testimony would conclude by 3:30 p.m., as previously scheduled. Bayne reported back at 11:00 a.m. that she could not reach the expert witness.

Johnson then informed the ALJ that, during the evening of June 21, 2021, after learning of Parent's unavailability, Johnson inquired by email to Bayne about scheduling the expert witness for the morning of June 22, 2021. Johnson inquired whether Student's expert was available to testify in the morning. Bayne responded that Student would not be calling the expert on June 22. At 9:45 p.m. Johnson informed Bayne that Chaffey would prefer to complete the expert testimony on June 22, 2021. Bayne responded to Johnson at 10:05 P.M.: "I won't be calling the expert after all, so it is not a concern."

Bayne's reasons for the expert witness's unavailability were inconsistent and not credible. Bayne did not establish any valid reason why she could not have produced the expert witness as scheduled for June 22, 2021, if she intended to call an expert. As of June 21, 2021, OAH had not ordered a continuance of hearing scheduled for June 22, 2021, or of the testimony of any witness.

The ALJ ordered Bayne to submit supporting evidence justifying Parent's unavailability and continued the hearing to June 24, 2021 pending Bayne's offer of proof. Bayne submitted a declaration on June 23, 2021 offering no new or credible evidence in support of Parent's unavailability and renewed her intention to call Student's expert as a witness in the order chosen by Bayne.

On June 23, 2021, OAH issued an Order permitting Student's expert witness to testify on July 15, 2021 to ensure due process for Student, and an Order to Show Cause why OAH should not shift costs to Bayne for failure to produce the scheduled expert witness on June 22, 2021. The Order to Show Cause ordered the parties to submit briefs on July 8, 2021 and set a hearing for July 16, 2021. The parties timely filed their briefs in support of the Order to Show Cause. On June 28, 2021, upon a showing of good cause by Chaffey, OAH advanced the continued due process hearing, including the expert testimony, to July 14, 2021. The ALJ considered oral argument on the Order to Show Cause on July 16, 2021.

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).)

BAYNE DID NOT ESTABLISH JUSTIFICATION BY CREDIBLE EVIDENCE FOR
HER UNILATERAL DECISION TO CANCEL EXPERT TESTIMONY FOR
JUNE 22, 2021

Bayne represented to OAH, under penalty of perjury in her declaration, and on the record at hearing, that Parent informed Bayne during the evening of June 21, 2021 that Parent's doctor ordered that Parent must have emergency surgery on the morning of June 22, 2021, necessitating cancelling Parent's scheduled testimony. On June 23, 2021, Bayne filed a declaration under penalty of perjury with OAH offering no additional credible facts or authenticated documentary evidence supporting that Parent had a medical emergency arising on June 21, 2021 or supporting Bayne's assertion that Parent was hospitalized and unavailable for four to six weeks, as represented by Bayne. Bayne's failure to do so was directly relevant to Bayne's failure to credibly justify why she also cancelled the expert witness for June 22, 2021, causing prejudice and unnecessary expense to OAH and Chaffey.

On July 14, 2021, Parent appeared and testified by videoconference under penalty of perjury at the due process hearing. The ALJ established through general questions to Parent that Parent was competent to testify under oath. Parent recalled that "someone" at Parent's attorney's office informed Parent that she would be testifying at hearing. Parent did not recall the specific date, or whether she was scheduled to testify as a witness on June 22, 2021. Parent recalled that she notified "someone" at Bayne's office during "the days before" June 22, 2021 that she "did not feel well." Parent did not recall whether she told Bayne, or anyone at Bayne's office, Parent had a medical emergency resulting in emergency surgery and or hospitalization on June 22, 2021. Parent did not recall whether a doctor ordered Parent to have any type of emergency surgical procedure requiring hospitalization rendering her

unavailable to testify on June 22, 2021. Parent incredibly did not recall whether Parent was in the hospital at any time during the two preceding months. Parent testified, in response to two leading follow-up questions from Bayne, that Parent declined to discuss details of her personal medical condition based upon her right of privacy. Parent's testimony and complete lack of general recall regarding her unavailability, whether due to a medical emergency or something else on June 22, 2021, was not credible and raised significant questions as to the reasons why Bayne unilaterally cancelled the expert witness scheduled to testify on June 22, 2021.

On July 16, 2021, expert witness Tackett testified at hearing. Tackett testified under oath that she first spoke to Parent and Student to gather facts regarding Tackett's anticipated testimony during the week of July 5, 2021, two weeks after Tackett's originally scheduled testimony. Tackett first talked to Bayne regarding this case during the same week of July 5, 2021. Tackett's testimony raised further doubt as to whether Bayne ever intended to call Tackett to testify on June 22, 2021.

On July 16, 2021, counsel for the parties argued in support of their position on the Order to Show Cause. Bayne offered no new evidence or persuasive argument supporting a finding that Bayne should not be found responsible for shifting costs for Bayne's June 22, 2021 unilateral decision to delay the hearing by cancelling Tackett's testimony. Instead, Bayne asserted Bayne and Student had an absolute right to control the order of witnesses at hearing, notwithstanding the role of the presiding officer, and Bayne made unprofessional and inappropriate personal accusations against the ALJ.

SHIFTING COSTS IS APPROPRIATE AND WARRANTED

Bayne specifically raised Parent's "medical emergency surgery" as the reason for cancelling witnesses on June 22, 2021 in her June 21, 2021 declaration under oath, and

at hearing on June 22, 2021. Bayne therefore put the existence, rather than the specific nature, of Parent's alleged medical emergency at issue for the purpose of verifying Parent's actual unavailability and establishing the veracity of Bayne's representations. Based upon Parent's failure to recall any general non-confidential facts relating to Parent's inability to testify due to a medical emergency on June 22, 2021, Bayne failed to credibly establish that Parent's alleged emergency medical condition and surgery existed. Bayne failed to establish a basis for good cause for cancelling an entire day of hearing without OAH consent, including cancelling the appearance of Student's expert witness. Bayne's conduct caused an unreasonable delay of the hearing and prejudice to Chaffey and OAH.

CHAFFEY'S REPRESENTATIVES INCURRED UNNECESSARY COSTS ON JUNE 22, 2021

Chaffey submitted a brief and declaration under oath from Johnson in support of an order shifting costs. Johnson's declaration included a transcript of the June 21, 2021 email exchange between Johnson and Bayne. Chaffey incurred the following costs as a result of Bayne's unilateral decision without good cause to cancel her expert's testimony for June 22, 2021:

- 3 hours for preparation and attendance at hearing by Special Education Director Whelan, at the rate of \$720 per day, totaling \$270.00;
- 3 hours for preparation and attendance at hearing by West End SELPA litigation coordinator Dr. Lord, at the rate of \$600 per day, totaling \$225.00
- 2.75 hours for preparation of expert witness by Johnson and correspondence with Bayne regarding a continuance, and 3 hours for appearing and representing Chaffey on June 22, 2021, at the rate of \$290 per hour, totaling \$1667.50.

BAYNE'S INCONSISTENT MISREPRESENTATIONS CONSTITUTE BAD FAITH WARRANTING SHIFTING OF COSTS

Bayne represented to Johnson on June 21, 2021, that Student was withdrawing her expert. Bayne inexplicably changed courses during hearing on June 22, 2021, insisting that she intended to reserve the right to call an expert witness "after Parent testified." Without citing to any authority, Bayne insisted that Student, as the party with the burden of proof, had the absolute and unconditional right to control the order of witnesses at hearing, essentially and improperly usurping control of the hearing from the ALJ as the presiding officer.

Bayne did not provide a credible explanation as to why Tackett was not still available for the afternoon of June 22, 2022, given the alleged late hour cancellation the night before and the fact that Tackett had allegedly been scheduled to testify at that time for at least several days. Bayne's inconsistent statements to Johnson in her June 21, 2021 emails about deciding not to call the witness at all, and in argument to the ALJ on June 22, 2021, that she had a right to call the expert when she wanted to, and intended to do so, were misleading, unprofessional, and evidence of bad faith.

Bayne's representation on June 22, 2021 that Tackett was not available to testify at any time that day, as previously scheduled, raised significant doubt as to whether Bayne's reasons for cancelling Tackett were because of Parent's unsubstantiated medical emergency, or because Tackett was not available as allegedly scheduled. If the latter had actually been the case, Bayne could and should have appropriately notified OAH and Ms. Johnson in writing, before close of business on June 21, 2021, to avoid the unnecessary time and money spent by all involved in preparing for the witness's testimony and reserving the entire day for hearing on June 22, 2021. Tackett's hearing testimony regarding the first time she spoke to Parent, Student and Bayne regarding her

anticipated testimony during the week of July 5, 2021, raised further doubt as to whether Bayne ever intended to call Tackett to testify on June 22, 2021.

The IDEA mandates speedy resolution of due process hearings in order to ensure that children with special needs receive a free appropriate public education in a timely manner. Here, the hearing started more than six months after Student filed her complaint. Because of unnecessary delays without proof of good cause by Student's counsel, the last day of hearing was more than eight months after the complaint was filed. The Decision was issued almost ten months after the complaint was filed, well beyond when OAH typically issues decisions in due process cases.

Parent's unsubstantiated unavailability on June 22, 2021, was not a valid excuse for Bayne's unilateral decision to cancel the expert witness, wasting a hearing day and delaying the remainder of the hearing. Bayne's actions caused prejudice and unnecessary expense to OAH, Chaffey and West End SELPA, including attorney's fees. Bayne's actions were in bad faith, regardless of whether the behavior was careless or unintentional.

OAH waives any right to costs associated with the time the ALJ spent preparing for and appearing at hearing on June 22, 2021. OAH similarly waives any right to costs for preparing for the Order to Show Cause hearing and writing this Order shifting costs resulting from Bayne's disregard for the orderly and timely progress of the due process hearing in Student's case.

Johnson spent 2.75 hours on June 21, 2021, preparing for cross examination of the expert witness and scheduled rebuttal testimony of Whelan, and communicating with Bayne. Whelan and Dr. Tackett appeared for hearing, on July 14, 2021 and July 16, 2021, respectively. Therefore, the attorney preparation time was not wasted. The 2.75

hours will be reduced by 2 hours, leaving .75 hour for time spent after hours corresponding with Bayne on June 21, 2021, at the hourly rate of \$290, or \$217.50.

Johnson also spent 3 hours preparing for and attending hearing on June 22, 2021. The hearing, including waiting time, lasted approximately 2 hours, from 9:30 a.m. until approximately 11:30 a.m. Therefore, a reasonable amount of time for reimbursement for attorney time spent on June 22, 2021 is 2 hours, at the hourly rate of \$290, or \$580.

Whelan and Dr. Lord spent approximately 3 hours preparing for and attending hearing on June 22, 2021, including wait time. Whelan's daily rate based on an eight hour day is \$720, or \$270 for 3 hours. Dr. Lord's daily rate based on an eight hour day is \$600, or \$225 for 3 hours.

ORDER

Based upon the facts and authorities stated above, costs in the amount of \$1282.75 are shifted to Bayne and the Law Firm of Sheila Bayne. For fees incurred in preparation for and attending hearing on June 22, 2021, Bayne and the Law Firm of Sheila Bayne shall:

1. Reimburse Chaffey Union High School District the sum of \$270.00;
2. Reimburse West End SELPA the sum of \$225.00, and
3. Reimburse the law firm of Andelson, Loya, Rudd and Romo the sum of \$787.75.

4. Bayne shall pay reimbursement to each recipient by certified check, within 30 days of this Order. Failure to comply with this Order may result in a civil judgment or finding of contempt.

Adrienne L. Krikorian

Adrienne L. Krikorian
Administrative Law Judge
Office of Administrative Hearings