BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017090457
v.	ORDER FOR ATTORNEY NICOLE HODGE AMEY TO SHOW CAUSE WHY EXPENSES SHOULD NOT BE SHIFTED FROM HER TO THE OFFICE OF ADMINISTRATIVE HEARINGS
TRACY UNIFIED SCHOOL DISTRICT.	

On September 15, 2017, Attorney Nicole Hodge Amey, representing Student, filed a request for due process hearing in this matter. After a continuance, the prehearing conference (PHC) was set for January 12, 2018, at 10:00 a.m., and the hearing for January 23-25, 2018.

Ms. Amey also represented the student in *Student v. Antioch Unified Sch. Dist.*¸OAH Case No. 2017050795, an earlier-filed matter in which the due process hearing began on December 19, 2017, before ALJ Rita Defillipis. On December 29, 2017, the sixth day of hearing in the *Antioch* matter, Judge Defillipis continued the hearing to January 19, 2018, at 9:00 a.m.

Ms. Amey filed a Prehearing Conference Statement in this matter on January 9, 2018. At the beginning of the PHC in this matter on January 12, 2018, Tracy exercised a peremptory challenge of the then-assigned Administrate Law Judge. The Presiding Judge granted the challenge, continued the PHC to January 19, 2018, at 10:00 a.m., and reassigned the matter to ALJ Charles Marson (hereafter "the ALJ"). OAH staff notified the parties of the continuance the same day. Ms. Amey was therefore aware by January 12, 2018, that her presence would be required for the PHC in this matter on January 19, at 10:00 a.m., which squarely conflicted with her pre-existing obligation to appear in the *Antioch* matter at 9:00 a.m. on the same day. Ms. Amey did nothing to resolve this conflict.

On Thursday morning, January 18, 2018, the ALJ in this matter began to prepare for the PHC scheduled for the next morning. He noticed in Student's PHC Statement a request for an accommodation for Student at the hearing: "Student requires extra time to process information, frequent checks for understanding and visual supports." The ALJ referred this request to Nicole Buckoski, OAH Staff Counsel, who is OAH's Coordinator for matters arising under the Americans with Disabilities Act.

The ADA Coordinator telephoned attorney Amey on the morning of Thursday, January 18, 2018, to inquire into the details of the requested accommodations and to engage

in the interactive process. Ms. Amey stated that she would also bring up one of her requestrs at the PHC the next day. In these conversations she did not mention her conflicting obligation the next morning in the *Antioch* matter or her inability to attend the PHC.

On Thursday afternoon, January 18, 2018, the ADA Coordinator recommended specific accommodations be granted. Believing that the PHC would proceed as scheduled the next morning absent a settlement, the ALJ worked for 3.5 hours, billable to the California Department of Education, to study the file, consider the requested accommodations, prepare for the conference, and prepare to rule on two motions made in Ms. Amey's PHC Statement in anticipation of rulings at the PHC. The ALJ also spent 0.75 hours the next morning preparing on the same matters.

Ms, Amey did not communicate with OAH on Friday morning, January 19, 2018, prior to the 10 a.m. scheduled PHC. At 10:00 a.m. the ALJ telephoned Ms. Amey to set up the conference call for the PHC, only to be told by a paralegal that Ms. Amey was not available because she was in a due process hearing (which proved to be the *Antioch* matter) and was cross-examining a witness. The ALJ requested that the paralegal remain on the line so that he could telephone Tracy's counsel and bring him into the conference call. Ms. Amey requested and received a recess in the Antioch matter, representing that she "forgot" the PHC. When the ALJ brought the parties together on the conference call, Ms. Amey appeared for Student. She explained that this matter had been settled, that she "forgot" to inform OAH of that fact, and that she was in the process of sending in the required dismissal. The ALJ continued the PHC until 1 p.m. the same day, Ms. Amey filed the request for dismissal, the 1 p.m. PHC was vacated, and the matter was dismissed.

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 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).)

The ALJ presiding at the hearing may order reimbursement either to OAH or to another party. With prior 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 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 1455.30, subd. (a).)

An ALJ presiding over a hearing, without first obtaining approval from the California Department of Education, 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.)

DISCUSSION

The facts set forth above appear to show that Ms. Amey was aware no later than January 12, 2018, that she had conflicting professional commitments in two different matters on the morning of January 19, 2018. They appear to show that she did nothing to resolve this conflict, thereby leading both the ALJ in this matter and Judge Defillipis, the ALJ in the *Antioch* matter, to believe and assume that she would be participating before them at the designated times. Failure by counsel to notify a court and opposing counsel of inability to attend a hearing has been held to be in bad faith, frivolous and intended to delay, and to be sanctionable misconduct under the authorities cited above. (*In re Marriage of Gumabao* (1984) 150 Cal.App.3d 572, 577.)

The facts also appear to show that Ms. Amey actively and affirmatively misled OAH's ADA Coordinator to believe that she (Ms. Amey) intended to appear at the PHC in this matter at 10:00 a.m. the next morning, absent a settlement, to discuss further her request for accommodations for her client at the upcoming hearing.

In addition, the facts appear to show that sometime between January 12 and January 18, 2018, Ms. Amey and Tracy arrived at a settlement in this matter, but Ms. Amey did nothing to inform OAH of that fact or to dismiss this matter.

Finally, the facts appear to show that, as a result of Ms. Amey's inaction in attempting to resolve her conflicting commitments, her failure to inform OAH of the settlement of this matter, and her affirmative misleading of OAH's ADA Coordinator to believe that she intended to appear at the PHC in this matter the next morning, the Coordinator wastefully and pointlessly expended 0.5 hours of effort in speaking with Ms. Amey, and considering and recommending accommodations in this matter, and the ALJ wastefully and pointlessly expended 4.25 hours of judicial time preparing for a PHC. All during the expenditure of these efforts, it appears that Ms. Amey was well aware that the PHC would not occur, as she knew this matter had been settled; that she intended to be in hearing in the *Antioch* matter at the same time at which the PHC in this matter was scheduled; and that she would be unable to appear at the PHC in this matter at the same time.

ORDER

1. **Attorney Amey is ORDERED TO SHOW CAUSE, if she has any, by the close of business on January 31, 2018, why the costs incurred by OAH in the form of the efforts of its ADA Coordinator and ALJ described above should not be shifted to her under the provisions cited above.** (Cal. Code. Regs., tit. 5, § 3088, subds. (a) & (e); Gov. Code, § 1455.30, subd. (a).)

2. Ms. Amey's response shall include a declaration under oath setting forth the particular facts of these events in detail. It shall address in detail, among other things, when she first learned that a settlement had been reached in this matter, when she obtained sufficient signatures on the settlement agreement to support a request for dismissal, and why she did not communicate the fact of the settlement to OAH.

3. Ms. Amey's declaration shall also address in detail why, on the afternoon of Thursday, January 18, 2018, she discussed the merits of her request for accommodations in this matter with OAH's ADA Coordinator, why she did not inform the Coordinator of the settlement other than by saying that settlement was possible, and why she told the Coordinator that she would further address the requested accommodations at the PHC the next morning, all the while apparently knowing that the PHC would not occur because settlement had been reached and she would be engaged in the *Antioch* hearing at the same time.

4. Tracy is invited to file a declaration setting forth its understanding of the timing of the finalizing of the settlement in this matter, and, if it desires, an itemization of any costs it incurred as a result of Ms. Amey's actions and inactions described above.

5. Whether OAH shall order Ms. Amey to bear the costs of its and/or Tracy's wasted efforts will be decided on the pleadings filed in response to this Order. Oral argument will not be entertained.

Dated: January 24, 2018

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Charles Marson
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CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings