BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017080513
v.	ORDER GRANTING DISTRICT'S MOTION TO SHIFT COSTS
ANTIOCH UNIFIED SCHOOL DISTRICT.	

On August 10, 2017, Attorney Tania Whiteleather, representing Student, filed a request for due process hearing in this matter. Student filed a first and second amended complaint with OAH on November 27, 2017 and January 19, 2018, respectively.

On February 28, 2018, Ms. Whiteleather filed Student's prehearing conference statement, and witness and exhibit lists. Exhibits on the list were designated with letters beginning with "A." and ending with "ZZZZZ."

On March 5, 2018, OAH held a prehearing conference. Ms. Whiteleather represented Student. Attorneys Matthew Tamel and Kasmira Brough represented District.

On March 7, 2018, OAH issued an Order Following Prehearing Conference. The ALJ ordered the parties to use numbers to identify exhibits. Specifically, the Order states that, "[t]he parties shall use numbers to identify exhibits, but shall place the letter "S" or "D" in front of the exhibit to designate if it is a Student or District exhibit (for example, "S-5, S-6, or D-1, D-2"). The PHC Order confirmed that no pretrial motions were pending or contemplated and specifically stated any motions made after the PHC must be supported by good cause demonstrating why the motion was not made prior to the PHC. The PHC Order states that the failure to comply with the Order may result in the exclusion of evidence or other sanctions.

On March 13, 2018 and March 15, 2018, Student filed amended exhibit lists, each identifying exhibits with letters, beginning with "A" and ranging to "PPPPPP." At no time did Student seek relief from the requirement in the March 7, 2018 PHC Order to designate exhibits by number, rather than by letters. The use of multiple letters to identify exhibits creates confusion and unnecessarily lengthens the hearing while waiting for counsel, a witness, or the ALJ to state the correct number of letters, hear the correct number of letters, and then locate the correct exhibit tab with that number of letters in an exhibit binder. Moreover, identifying exhibits by letters would likely be incomprehensible on the official recording and next to impossible to transcribe to produce a written transcript of hearing. Various letters, such as "B," "C" and "D" especially in multiples may be indistinguishable.

On March 16, 2018, at 2:16 p.m., OAH issued an Order to Comply with Order Following Prehearing Conference. The undersigned ALJ ordered that Student's counsel (1) provide binders for witnesses and the ALJ, which were tabbed and numbered as set forth in the PHC Order; (2) meet and confer with District to exchange improperly identified exhibits with numbered exhibits so as not to delay the start of hearing; and (3) provide an index to District and the ALJ, cross-referencing improperly lettered exhibits with the new properly numbered exhibits. The Order to Comply stated that failure to comply may result in exclusion of evidence or other sanctions.

On March 16, 2018, at 4:55 p.m., Ms. Whiteleather filed a Response to the Order to Comply, arguing that (1) the parties did not discuss the issue of numbering exhibits during the PHC; (2) Student already [lettered] and copied his multiple exhibit binders; and (3) the parties agreed, and it was reasonable, to simply use binders from the prior expedited hearing between the same parties (which did not go forward) in this matter and those exhibits used letters, not numbers. Ms. Whiteleather further argued that exhibit tabs with an "S" do not exist and cannot be purchased through any legal vendor and that she always used lettered tabs in the past. Finally, Ms. Whiteleather asserted that the Order to Comply created an extreme burden and she could not re-label the exhibits prior to the first day of hearing on March 20, 2018.

On March 19, 2018, District filed a Reply to Student's Response. Mr. Tamel explained that evidence binders were exchanged between the parties before Student's second amended complaint was filed. Ms. Whiteleather agreed, according to Mr. Tamel, to bring updated binders to the February 1, 2018 expedited hearing, but did not. Instead, Ms. Whiteleather asked that District accept supplements to the old binders for the March 20, 2018 hearing. Supplements were sent on March 13 and 15, 2018, by attaching hundreds of pages of documents to emails directed to Mr. Tamel's office. Through no choice of his own, Mr. Tamel argued, he or his staff, then printed, three-hole punched, and placed documents in the old binders. On March 16, 2018, after the Order to Comply issued, Ms. Whiteleather sent another document identified as "WWWWW" to Mr. Tamel. Mr. Tamel believed he would need to meet and confer with Ms. Whiteleather prior to hearing to correct missing evidence but thought this would not be necessary had Ms. Whiteleather produced corrected binders pursuant to OAH's Order to Comply. The parties met and conferred, with District agreeing to meet on Monday, March 19, 2018, to accept corrected binders or to receive binders by mail at District offices.

On March 19, 2018, Ms. Whiteleather did not serve a corrected evidence binder, and provided neither numbered evidence tabs, nor an index cross-referencing lettered exhibits with correctly numbered exhibits.

On March 19, 2018, at 4:06 p.m., Ms. Whiteleather filed a Motion for Reconsideration of the Order to Comply. Ms. Whiteleather essentially reiterated arguments from her prior Response, adding that (1) OAH allowed her to use letters for exhibits since 2005; and (2) because she had one assistant who did not work over the weekend, she could

not renumber multiple evidence binders, re-bate stamp them, copy them, and prepare them in time for hearing.

The due process hearing began as scheduled on March 20, 2018. The undersigned ALJ heard Student's Motion for Reconsideration. Ms. Whiteleather provided no new argument in support of her refusal to number the exhibits. She did not bring numbered exhibit tabs to hearing. She did not bring white out or markers to number the exhibit tabs already in binders. She did not provide an index cross-referencing letters with numbers. In short, she refused to comply with every portion of the Order to Comply.

For the reasons stated on the record, consistent with the Order to Comply, Student's motion for reconsideration was denied. Student was ordered to comply by renumbering exhibit tabs before evidence was taken. Student brought four evidence binders each for the ALJ and the official record. The ALJ provided Student and District with white out and markers to change exhibit tabs with letters to numbers. To expedite the process, District numbered one set of Student's binders, the ALJ numbered another set of Student's binders, and Student renumbered one set of binders. District had already printed out and applied numbers to the evidence binder provided to it by Student.

While properly numbering Student's exhibits, Mr. Tamel and Ms. Brough observed that several of Student's exhibits were missing, incomplete, or otherwise different in Student's binder submitted as the official record compared to Student's binder given to District. To rectify the disparity in exhibits, the ALJ ordered the parties to take the eight Student evidence binders, which constituted the official record and ALJ binders, along with Student and District versions, into another room, proceed exhibit by exhibit comparing them to Student's evidence binder and ensure that Student's exhibits were the same in all four sets of binders.

The hearing was delayed approximately three hours to properly number the tabs on Student's exhibits and to reconcile the differences in various evidence binders submitted by Student at hearing. When the matter went back on the record at hearing, District moved to shift costs to recompense for both the delay and time spent by District to prepare evidence binders from several hundred pages of emailed documents.

The ALJ ordered District to file its motion to shift costs within three business days after the last day of hearing and granted Student three business days after that to file a reply brief. The hearing ended on April 5, 2018. District timely filed its brief and declarations on April 9, 2018. Student timely filed his reply and declarations on April 12, 2018.

FINDINGS OF FACT

On March 5, 2018, Ms. Whiteleather appeared at two prehearing conferences wherein she was ordered to number, not letter Student's exhibits. Ms. Whiteleather contends the PHC in this matter did not entail a lengthy discussion about exhibit numbering and argues that she has persistently used letters in the past.

Ms. Whiteleather attended another PHC on March 5, 2018 (Case 2), engaged in a lengthy discussion with the ALJ about exhibit numbering, and was ordered to identify exhibits by numbers, not letters, in that matter. (See, PHC Order in OAH Case No. 2017120319, consolidated with OAH Case No. 2017081066.) The PHC Order in Case 2 required Ms. Whiteleather to number Student's approximately 150 exhibits and admonished that, "the concerns stated in this Order apply to all due process proceedings, and that counsel should use numbers to identify exhibits in subsequent due process proceedings in compliance with OAH's standard PHC orders." The reasons for numbering, not lettering, exhibits in Case 2, were substantially similar to the instant matter, as reflected by the PHC Order issued March 6, 2018.

Ignoring both orders from PHCs held on March 5, 2018, Ms. Whiteleather failed to take any action to correct the numbering of Student's exhibits. Instead, on March 13, and 15, 2018, she continued to serve amended exhibit lists using letters. Even after being sent the undersigned ALJ's March 16, 2018 Order to Comply, Ms. Whiteleather continued to serve District with exhibits identified by letters.

Ms. Whiteleather underscored her unwillingness to comply with the PHC Order and Order to Comply by filing various oppositions to the orders. Her March 16, 2018 Response brief and March 19, 2018 Motion to Reconsider used valuable time, which could easily have been spent obtaining numbered exhibit tabs from a local store and replacing the lettered tabs currently in her evidence binders.

On March 16, 2018, at 5:22 p.m., Ms. Whiteleather emailed Mr. Tamel indicating that she would not have time to remark all of her exhibits over the weekend, before boarding a plane Monday morning. She added, "[i]n all my years of appearing in hearings at OAH, I have never once had any order like the one just issued, but there is always a first time." In fact, since 2012 Ms. Whiteleather has been served with 65 PHC orders using the same instructions to number exhibits (for example, "S-1, S-2…") contained in the PHC Order in this case.

By the morning of hearing on March 20, 2018, Ms. Whiteleather had done absolutely nothing to comply with OAH's orders. On the record, the ALJ discussed the importance of maintaining a clear record and orderly hearing. The ALJ noted that Student's exhibit tabs were difficult to read. Each tab had a letter "A" through "Z" pre-printed on it. But each tab beginning with "AA" had additional letters written in ballpoint pen, many in light print. The more letters required to identify the exhibit meant letters were more condensed on the tabs, making them exceedingly difficult to read.

The ALJ weighed the likelihood of confusion created by using tabs lettered in the manner contained in Student's binders, and the relative ease available to Ms. Whiteleather to number exhibits consistent with OAH's standard PHC Orders and, specifically, the Order to Comply herein. Stating multiple exhibit letters instead of numbers would likely create an unclear record and lengthen the hearing for many reasons. First, a party has to identify the exhibit with the right number of letters and enunciate clearly enough for everyone to understand. Since the hearing was digitally recorded, the transcriber would be unable to ask for clarification between "AAAA" and "AAAAA" or "AAAAAA." Confusion could easily arise between hearing "CCC" or "ZZZ;" "EEEEE," "DDDD," or "GGGG;" or "BBBB" and "PPPP;" or any number of other combinations. The ALJ then required Ms. Whiteleather and enlisted District, to number the exhibits.

District's April 9, 2018 motion for cost shifting includes the declaration of Amanda Johnson, an attorney working with Mr. Tamel. Ms. Johnson spent 5.2 hours researching and drafting the motion and attached declarations. Her billing rate is $220.00.

Mr. Tamel's declaration explains his efforts to meet and confer with Ms. Whiteleather regarding the disordered state of Student's exhibits and exhibit numbering. He offered to meet Ms. Whiteleather on Monday, March 19, 2018, to obtain Student's updated binders. Mr. Tamel spent 30 minutes preparing District's response to Student's Response to the Order to Comply. Mr. Tamel and Ms. Brough each spent approximately 2.5 hours, with Ms. Whiteleather, correcting Student's evidence binders, as ordered by the ALJ at hearing on March 20, 2018.

Mr. Tamel's secretarial staff replaced the lettered tabs in Student binders with numbered tabs, in compliance with the March 16, 2018 Order to Comply. Though this task took several hours, Mr. Tamel does not seek reimbursement for these efforts. Further, Mr. Tamel is not seeking reimbursement of 1.2 hours of Ms. Johnson's time, citing her lack of personal familiarity with the file.

Mr. Tamel's billing rate is $265.00 and Ms. Brough's billing rate is $195.00. Mr. Tamel seeks fee shifting for three hours of his time and two and one half hours of Ms. Brough's time expended due to the state of Student's exhibits and failure to comply with OAH's prior orders.

In total, District expended over $2,426.50 responding to OAH's Order to Comply, correcting Student exhibit binders before and at hearing, and preparing their motion for cost shifting. Of this, District seeks cost shifting in the amount of $1,902.50.

Ms. Whiteleather's Opposition, filed April 12, 2018, argues that District's motion is frivolous and seeks recompense for the time it took to prepare the Opposition and supporting declarations. Ms. Whiteleather, for the first time, argues that she did not have evidence binders with her over the weekend as they had been shipped on Friday, March 16, 2018, to an office in Northern California, and picked up on Monday, March 19, 2018. This explanation contradicts what Ms. Whiteleather said at hearing. She specifically discussed

using an airline that does not charge for two checked bags. As such, she brought evidence binders in suitcases, which she wheeled into the hearing room.

Ms. Whiteleather made no effort and showed no intention to comply with OAH's orders.

APPLICABLE LAW

In certain circumstances, an administrative law judge presiding over a special education proceeding is authorized to shift expenses from one party to another, or to the Office of Administrative Hearings. (Gov. Code, §§ 11405.80, 11455.30; 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).)

An ALJ presiding over a hearing may, without first obtaining approval from the California Department of Education, "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).) Filing a complaint without serving it on the other party is not within the definition of "actions or tactics." (*Ibid.*) "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.)

LEGAL CONCLUSIONS

Ms. Whiteleather refused to comply with direct OAH orders. Ms. Whiteleather is an experienced counsel, appearing before OAH on a regular basis. She is well aware OAH PHC orders routinely require Student exhibits to be marked with an "S" followed by a number.

From the issuance of OAH's Order to Comply through the instant briefing schedule, Ms. Whiteleather failed to show any understanding of the reason for the Order. She offered no solution to counter the ALJ's concern over maintaining a clear record or orderly hearing.

Moreover, she has not shown any contrition regarding the use of District, let alone judicial, resources spent before, during, and after the hearing because of her unwillingness to comply with a PHC Order issued approximately two weeks before the hearing.

At hearing, Ms. Whiteleather insisted that no other ALJ ever ordered her to identify student exhibits with numbers rather than letters. When confronted with another ALJ's order in Case 2, at a March 5, 2018 PHC, requiring her to use exhibit numbers and not letters for substantially similar reasons, she had no response.

In her briefs and at hearing, Ms. Whiteleather tried to justify her actions by explaining that it would take several days to re-mark her exhibits. In fact, the ALJ brought whiteout and markers to the hearing and it took approximately 30 minutes to remark each set of binders.

Ms. Whiteleather made every argument she could in an effort to avoid numbering her exhibits in compliance with OAH's orders. Instead, she chose to allocate her time and resources to filing a Response with no legal basis and a Motion for Reconsideration both of which resulted in additional expense to District. Given that Ms. Whiteleather's arguments completely lack merit, and that she failed to take any step towards compliance, an inference of subjective bad faith is warranted. Ms. Whiteleather could have easily substantially complied with the order but made no effort to do so.

On the other hand, District seeks to shift costs for an amount of time including correcting exhibits in Student's binders, in addition to the time spent re-marking exhibits. District's request is well taken but not considered as part of the violation of OAH's orders.

Therefore, District's motion to shift costs, directly related to Ms. Whiteleather's refusal to comply with OAH orders, in the total amount of $925.00, for Ms. Johnson's motion preparation in the amount of $660.00 (three hours x $220.00) and for Mr. Tamel's time spent numbering Student's exhibits (one hour x $265.00) is granted. Though Mr. Tamel spent less than an hour marking Student's exhibits, he spent a significantly longer amount of time helping re-order them. Further, Mr. Tamel took it upon himself to have District's set of Student's binders renumbered before hearing. Equity favors reimbursing Mr. Tamel for one full hour. In comparison, Ms. Whiteleather's declaration states that her fee for responding to the Order to Show Cause and District's Motion to Shift Costs, totals $1,500.00, an amount likely in excess of what it would have cost to comply with the Orders.

The ordered costs, which were a direct result of Ms. Whiteleather's frivolous and bad faith tactics in violation of OAH's orders, are deemed sufficient to deter Ms. Whiteleather and other attorneys similarly situated from repetition of such conduct.

ORDER

1. Within 30 days, Tania L. Whiteleather and the Law Offices of Tania L. Whiteleather shall pay Dannis, Woliver, and Kelley by certified check the sum of $925.00 as cost shifting. These costs are imposed on Tania L. Whiteleather and the Law Offices of Tania L. Whiteleather jointly and severally. Neither Tania L. Whiteleather nor the Law Offices of Tania L. Whiteleather shall pass these costs on to Student or parents.

2. Failure to comply with this order may result in a civil judgment or finding of contempt.

IT IS SO ORDERED.

DATE: May 17, 2018

DocuSigned by:

COLE DALTON
Administrative Law Judge
Office of Administrative Hearings