BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

STOCKTON UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2024050096

ORDER GRANTING REQUEST FOR CONTINUANCE OF DUE PROCESS HEARING BY VIDEOCONFERENCE AND ORDER TO SHOW CAUSE WHY STUDENT'S COUNSEL SHOULD NOT BE SANCTIONED

JUNE 14, 2024

On June 13, 2024, Student filed a request to continue the due process hearing with the Office of Administrative Hearings, called OAH. Stockton Unified School District, called Stockton, did not file a response.

Student contends the hearing should be continued because Parent is currently appearing in another hearing on behalf of Student's sibling, and Parent is a necessary participant in both hearings.

APPLICABLE LAW

OAH must conduct a due process hearing and issue a decision within 45 days of receiving the due process complaint, unless an extension is granted. (34 C.F.R. § 300.515(a); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Resolving the due process hearing quickly is legally required. Hearings may only be continued if "good cause" is established. (Ed. Code, § 56505, subd. (f)(3).) OAH is guided by the Administrative Procedure Act and the California Rules of Court when ruling on continuance motions. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, rule 3.1332.)

Good cause to continue a hearing may include:

- An essential lay or expert witness is unavailable because of death, illness, or other excusable circumstances;
- A party is unavailable because of death, illness, or other excusable circumstances;
- A party's attorney is unavailable because of death, illness, or other excusable circumstances;
- A new attorney substitutes in, but only if the party establishes that the substitution is required in the interests of justice;
- A new party is added, and the new party has not had a reasonable opportunity to prepare for trial, or other parties have not had a reasonable opportunity to prepare for trial regarding the new party's involvement;
- A party is unable to obtain essential testimony, documents, or other material evidence despite diligent efforts; or
- The case has a significant and unexpected change which makes the case not ready for trial.

Generally, continuances are disfavored. (Cal. Rules of Court, rule 3.1332(c).)

DISCUSSION

In her motion, Student asserts good cause exists for a continuance because the due process hearing for her sibling's due process complaint, also against Stockton, is currently underway. Student's counsel, who also represents Student's sibling, asserts that Parent is a necessary party and witness to both matters, and Student's hearing should be continued for two weeks to allow that hearing to conclude before starting Student's hearing.

As a preliminary matter, Student did not timely file her request for continuance. Pursuant to the May 2, 2024 Scheduling Order, Student was required to file any prehearing motions, including requests for continuance, no less than three business days prior to the prehearing conference. OAH held the prehearing conference in this matter on June 7, 2024 and Student filed her motion on June 13, 2024. Therefore, Student did not timely file her motion.

OAH may still consider an untimely motion if the motion is accompanied by a declaration made under the penalty of perjury establishing good cause for the untimely motion. While Student submitted a declaration by her attorney, Sheila Bayne, in support of her motion to continue, the declaration does not provide any explanation as to why the motion was not filed three business days prior to the prehearing conference.

Student's failure to adhere to OAH's orders regarding the filing of prehearing motions is sufficient reason to deny Student's motion. However, Student asserts in her motion that the need for the continuance was unexpected, implying that there is good cause for the late filing.

Notably, Student incorrectly identifies her sibling's matter in her motion. The correct matter number is OAH Case No. 2024050098. Because Student relies on her sibling's matter to argue good cause to continue her due process hearing, the undersigned must review the administrative record in that matter. OAH may take official notice of the entire administrative record for another OAH matter, including the docket, filings, recordings of proceedings, and decisions. (*Hogen v. Valley Hospital* (1983) 147 Cal. App. 3d 119, 125; Evid. Code § 452(c).) The undersigned takes official notice of all portions of the official record in OAH Case No. 2024050098.

In her motion, Student argues that the dates in her sibling's hearing "will very likely conflict" with the dates currently set for Student's hearing. Student also argues that this conflict was an "excusable circumstance." The clear implication of these statements is that the conflict in dates was unexpected and unforeseeable. The record in both Student and her sibling's cases clearly demonstrate that this assertion is not true.

In the instant case, Student's prehearing conference statement included an estimate that she would need eight days to present her case in chief. This is the same estimate Bayne made in the sibling's prehearing conference statement. Bayne did not personally appear at either prehearing conference, or on any days of the sibling's hearing as of the date of this Order. Rather, Attorneys Ryan Song and Addison Morris appeared at Student's prehearing conference. Attorneys Song, Morris, and Michelle Wilkolaski appeared at the prehearing conference for Student's sibling on May 31, 2024. Song identified himself as lead counsel at both prehearing conferences. Different Administrative Law Judges held the prehearing conferences for Student and Sibling, and were not aware of the impending conflict.

During both prehearing conferences, Song confirmed the eight-day estimates for both hearings. The initial dates for the sibling hearing were June 11-13, 2024, and Student's matter was set for June 18-20, 2024. There were no continuances requested for either matter. Thus, Student's counsels all knew or should have known that there would be a conflict in the hearing dates between Student's matter and her sibling's matter no later than the sibling's prehearing conference on May 31, 2024. Even if this failed to occur by May 31, 2024, by Student's prehearing conference on June 7, 2024, the conflict was clear.

Inexplicably, Student's counsel made no mention of the sibling matter at the June 7, 2024 prehearing conference, let alone a request for a continuance. The circumstances that Student now finds herself are not "excusable" as her counsel would suggest. Rather, they are due either to her counsels' repeated failure to diligently manage the calendars for both matters or the result of a questionable litigation tactic. As discussed below, counsels' representations regarding the continuance request raise significant concerns regarding counsels' candor to OAH.

Nevertheless, Parent has a right to appear at both of her children's due process hearings. Her counsels' carelessness in managing the calendars in both hearings should not be held against her, because courts do not generally impose sanctions against clients for the "sins of their attorneys." (See e.g. *Dible v. City of Chandler* (9th. Cir 2007) 242 Fed.Appx. 473.) Therefore, Student's request for continuance is granted.

All previously scheduled dates are vacated. This matter will proceed as follows:

DUE PROCESS HEARING will be held on July 2, and 3, 2024.

As reflected in the June 7, 2024 Order Following Prehearing Conference, the due process hearing will be held by videoconference or telephone, unless otherwise ordered.

The due process hearing will begin at 9:30 AM on all days, and generally end at 3:30 PM, unless otherwise ordered. The hearing will continue day to day, as needed, Mondays and Fridays included, at the discretion of the Administrative Law Judge. Prehearing motions were due no less than three business days before the June 7, 2024 Prehearing Conference. Motions, other than those authorized by this Order, will only be considered if they are accompanied by a declaration made under the penalty of perjury demonstrating good cause for the late filing.

The parties must immediately give potential witnesses the hearing dates, and must subpoena witnesses, if necessary, so they are available to testify. Failing to properly notify or subpoena a witness is not good cause to delay the hearing.

While Student's request for continuance is granted, counsels' concerning actions related to this request have not gone unnoticed and are discussed in detail below.

ORDER TO SHOW CAUSE WHY STUDENT'S COUNSEL SHOULD NOT BE SANCTIONED

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 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).) The undersigned ALJ is currently assigned to the due process hearing in this matter.

With 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 the entity that is responsible for conducting due process hearings) 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. Code, § 11455.30, 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.)

An attorney is an officer of the court and owes the court a duty of candor. (*Levine v. Berschneider* (2020) 56 Cal.App.5th 916, 921 [citing *In re Reno* (2012) 55 Cal.4th 428, 510, 146 Cal.Rptr.3d 297, 283 P.3d 1181[superseded by statute on other grounds]; *Roche v. Hyde* (2020) 51 Cal.App.5th 757, 817, 265 Cal.Rptr.3d 301].) The California State Bar Rules of Professional Conduct state, "[a] lawyer shall not ... knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." (California Bar Rules Prof. Conduct, rule 3.3(a)(1)].) Section 6068 of the Business and Professions Code

explains that every attorney has a duty "never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Bus. & Prof. Code, § 6068, subd. (d)].)

The duty of candor is not simply an obligation to answer honestly when asked a direct question by the trial court but includes an affirmative duty to inform the court when a material statement of fact or law has become false or misleading in light of subsequent events. (*Levine, supra*, 56 Cal.App.5th at 921[citing *In re Reno*, *supra*, 55 Cal.4th at pp. 510-511, 146 Cal.Rptr.3d 297, 283 P.3d 1181 [duty to inform court when a claim in a writ petition is subject to a procedural bar]; *Love v. State Dept. of Education* (2018) 29 Cal.App.5th 980, 990, 240 Cal.Rptr.3d 861 [duty to acknowledge contrary authority]; *Jackson v. State Bar of California* (1979) 23 Cal.3d 509, 513, 153 Cal.Rptr. 24, 591 P.2d 47 ["The representation to a court of facts known to be false is presumed intentional and is a violation of the attorney's duties as an officer of the court"]].)

ORDER TO SHOW CAUSE

Here, Student's counsels appear to have attempted to mislead OAH in Student's request for continuance, in direct contravention of their duties under Bus. & Prof. Code, § 6068, subd. (d). Student asserts that the initial dates for the sibling hearing were June 11-13, 2024, and that the sibling's hearing was expected to continue beyond June 13, 2024. Student then asserts that the sibling's hearing "will very likely conflict" with Student's hearing set for June 18-20, 2024. The way Student pled these facts, and the timing of Student's motion, create the clear implication that the "conflict" in dates was something that only recently came to fruition.

Bayne, in her declaration accompanying Student's motion, represented to OAH that Sibling's hearing "will not be done by the originally chosen dates of

June 11-13, 2024." This statement is does not fully reflect the truth and attempts to create the illusion that the scheduling conflict only came into existence on June 13, 2024. In her declaration, Bayne failed to mention that Sibling had requested eight days of hearing to present Sibling's case in chief at the May 31, 2024 prehearing conference, the May 28, 2024 prehearing conference statement, and even in the due process complaint filed May 2, 2024. Student made similar requests at her June 7, 2024 prehearing conference, in her the June 4, 2024 prehearing conference statement, and in her due process complaint also filed May 2, 2024. Thus, Student's counsels all knew or should have known that there would be a conflict in the hearing dates between Student's matter and her sibling's matter weeks prior.

Bayne was also aware, or should have been aware, that Song was ordered to provide a joint witness schedule to the Administrative Law Judge in Sibling's hearing on June 11, 2024. Song and opposing counsel provided the joint witness schedule on June 12, 2024. That joint witness schedule included witnesses scheduled throughout the days originally scheduled for Student's hearing and even beyond. Bayne makes no reference to any of this in either the motion or her declaration.

Overall, the facts asserted in the motion and Bayne's declaration are incomplete at best, and demonstrably false at worst. Regardless, the law draws no distinction, "among concealment, half-truth, and false statement of fact." (*Grove v. State Bar of California* (1965) 63 Cal.2d 312 [citing *Green v. State Bar of California*, 213 Cal. 403, 405, 2 P.2d 340); see also *Pickering v. State Bar of California*, 24 Cal.2d 141, 145, 148 P.2d 1, 3.) ['It is the endeavor to secure an advantage by means of falsity which is denounced.'].) In total, Student's June 13, 2024 motion to continue the due process hearing raises significant concerns regarding the candor of Student's counsels. These are concerns OAH cannot leave unaddressed.

As a result of Student's counsels' actions, OAH has incurred, and will continue to incur, significant costs related to handling this motion and addressing Student's counsels' apparent misconduct, which it would not otherwise have incurred had Student's counsel not conducted themselves as they have. It is not unreasonable to assume that Stockton may also have incurred costs related to the continued due process hearing dates based on Student's untimely motion and current need to reschedule witnesses. Stockton may respond to this Order to Show Cause if it chooses. Any response must be supported by declarations made under the penalty of perjury and should be served on Student and OAH no later than 5:00 p.m. on June 21, 2024.

For the reasons discussed above, Student is ordered to show cause why Student's attorneys Sheila Bayne, Ryan Song, and Addison Morris, and the Law Offices of Sheila Bayne, should not be required to pay the expenses OAH incurred relating to Student's untimely continuance request, editing the electronic evidence file for the parties to upload hearing exhibits due to the continued hearing dates, preparing this order, preparing orders on this Order, and preparing for and conducting any hearings OAH may set as necessary to resolve this Order.

Student is ordered to file a written response to the Order to Show Cause with OAH by no later than 5:00 p.m. on June 19, 2024. The response shall address why OAH should not order Student's attorneys to pay OAH's expenses and Stockton's expenses. In addition to any legal argument, the response shall include declarations made under penalty of perjury by Bayne, Song, and Morris containing a factual explanation regarding when the Parent was notified that the two hearings were going to overlap and the consequences of such, Student's counsels' apparent attempt to mislead OAH regarding the circumstances of Student's request for continuance described above, and why Student did not request a continuance following the sibling's prehearing

conference on May 31, 2024, timely prior to Student's June 7, 2024 prehearing conference, or any other time prior to June 13, 2024. Student shall timely serve its written response on counsel for Stockton. Student's failure to respond may result in sanctions without further opportunity to be heard.

This Order does not set a hearing related to the Order to Show Cause, but OAH may set such as hearing following the undersigned's review of Student's response to this Order or Stockton's response.

The undersigned finally notes that neither Song nor Morris have filed notices of representation with OAH in Student's matter. This Order requires them to do so no later than June 19, 2024. These notices must include Song's and Morris's California Bar numbers and current business contact information, including phone numbers, email addresses, and mailing addresses. Song and Morris shall timely serve these notices on counsel for Stockton.

IT IS SO ORDERED.

Ashok Pathi

Ashok Pathi
Administrative Law Judge
Office of Administrative Hearings