BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

ANTIOCH UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2024020546

ORDER DENYING MOTION TO COMPEL PRODUCTION OF RECORDS AND SHIFT EXPENSES

GRANTING REQUEST FOR CONTINUANCE OF DUE PROCESS HEARING

APRIL 26, 2024

On February 15, 2024, Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Antioch Unified School District, called Antioch. On April 22, 2024, Student filed a motion to compel the production of educational records, reset hearing dates, and a motion for sanctions to shift costs, based upon Antioch's failure to produce Student's complete educational file as requested by

Parent. On April 25, 2024, Antioch opposed the motion based upon having provided the requested records.

MOTION TO COMPEL

OAH held a prehearing conference on April 19, 2024, and ruled on the two motions Antioch timely filed. The prehearing conference order stated that while no other prehearing motions were pending, any motion not filed three business days before the prehearing conference must be supported by a declaration establishing good cause why the motion was not timely filed. The due process hearing is scheduled to begin on April 30, 2024.

Student asserts OAH should order and compel Antioch to produce attendance records by April 30, 2024, claiming they were not produced earlier. Student claims the lack of attendance records was discovered on April 18, 2024, the day before the prehearing conference. Student did not raise this issue at the prehearing conference on April 19, 2024. Student's declaration in support of the motion to compel did not establish good cause why the motion was not timely filed. Consequently, Student's motion to compel is denied.

Additionally, the motion to compel is denied because Antioch exchanged the documents when it uploaded the records into Case Center on April 23, 2024. In accordance with the prehearing conference order, the parties shall serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). The timely uploading electronic hearing exhibits five business days before the first day of hearing constitutes that party's timely exchange of evidence in compliance with Education Code section 56505, subdivision (e)(7). Therefore, Student is deemed to be in possession of those documents at the time they were uploaded.

MOTION TO SHIFT COSTS

In certain circumstances, an administrative law judge, known as the 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).)

Expenses may be ordered to be reimbursed either to OAH or to another party. 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) & €; see Gov. Code, § 11455.30, subd. (a).) 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.)

Student failed to establish Antioch used bad faith tactics justifying sanctions or shifting costs. Therefore, Student's request is denied.

MOTION TO CONTINUE THE DUE PROCESS HEARING

Student asserts the late discovery of these missing records justify a continuance. Antioch contends they provided the requested records but does not oppose a continuance of the due process hearing.

A due process hearing must be conducted, and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for 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.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (Ed. Code, § 56505, subd. (f)(3); Cal. Rules of Court, rule 3.1332(c).)

OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance or imposing conditions on the continuance; and any other relevant fact or circumstance. (Cal. Rules of Court, rule 3.1332(d).)

The request for continuance is granted for good cause. Good cause exists because the Student received the requested documents on April 17, 18, and 23, 2024. A brief continuance will assist Student in preparing for hearing.. All previously scheduled dates are vacated. This matter will be set as follows:

PREHEARING CONFERENCE will be held on May 13, 2024, at 10:00 AM.

The prehearing conference will be held by videoconference or telephone. All prehearing motions must be filed three business days prior to the prehearing conference.

DUE PROCESS HEARING will be held on May 21 through 23, 2024. The hearing will be held by videoconference. The hearing shall begin at 9:30 AM on all days unless otherwise ordered. The hearing shall continue day to day, as needed at the discretion of the Administrative Law Judge. Prehearing conference statements and motions are due to OAH no later than three business days before the prehearing conference or with a showing of good cause why it was not timely filed.

SETTLEMENT

The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately if they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 4:00 PM the day prior to hearing, the parties shall leave a voicemail message regarding the settlement at (916) 274-6035. The parties should also leave contact information such as cellular phone numbers of each party or counsel for each party.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages before the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement, the parties shall provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

IT IS SO ORDERED.

Deborah Myers Cregar

Deborah Myers-Cregar
Administrative Law Judge
Office of Administrative Hearings