BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. LONG BEACH UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017050484 ORDER FOLLOWING ORDER TO SHOW CAUSE HEARING AND VACATING ORDER TO SHOW CAUSE

On June 27, 2017, the Office of Administrative Hearings issued an Order to Show Cause why costs should not be shifted to the parties' attorneys for their for failure to file prehearing conference statements, a stipulation and request to delay exchange of PHC statements, a motion or stipulation to continue the prehearing conference and due process hearing, or to in any other way clearly notify OAH that the PHC might not be necessary due to negotiations or communications between the parties. On July 10, 2017, Administrative Law Judge Kara Hatfield conducted the OSC hearing. Tania Whiteleather, Attorney at Law, and advocate Rodney Ford appeared on behalf of Student. Cynthia Yount, Attorney at Law, appeared on behalf of Long Beach Unified School District. The hearing was recorded.

APPLICABLE LAW AND DISCUSSION

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 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 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. Code, § 11455.30, subd. (a).)

"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.)

On May 8, 2017, Student filed a Request for Due Process Hearing (complaint) naming District. At the time Ms. Whiteleather filed Student's case, she was aware she would be unavailable during the time frame a mediation would be scheduled pursuant to OAH's standard scheduling guidelines and practices, and she was aware she would be on a pre-paid vacation during the time frame a due process hearing would be scheduled, based on the date the complaint was filed. On May 11, 2017, OAH issued a scheduling order, which set mediation, PHC, and due process hearing dates; the scheduling order ordered the parties to file PHC statements three business days before the Monday, June 26, 2017 PHC. The May 11, 2017 scheduling order also ordered that if a party wished to continue the due process hearing or prehearing conference, the party must file a written request with OAH and serve the request upon the opposing party.

On or about May 24, 2017, Ms. Whiteleather emailed Ms. Yount to request a stipulation to continued dates for the mediation, PHC, and due process hearing due to Student's attorney's unavailability; she indicated she would be in federal court on the date the due process hearing was scheduled to begin, July 6, 2017, and was leaving on a pre-paid vacation on July 7, 2017. Ms. Whiteleather requested that the due process hearing be held during the last week of July or the first week of August. At some point during the negotiations over the next four weeks, Ms. Whiteleather indicated to Ms. Yount she was contemplating filing an amended complaint, but the parties continued discussing mutually agreeable dates for a continuance of the dates set in the May 11, 2017 scheduling order. On June 21, 2017, Ms. Whiteleather's assistant emailed Ms. Yount's assistant reporting that Parents would be on vacation the month of July. After at least eight emails and at least two phone calls, the parties still had not reached an agreement regarding mutually available dates.

The parties did not file PHC statements, and did not notify OAH that the parties were attempting to select dates for a continuance request to be made before or during the PHC.

After business hours on Friday, June 23, 2017, Ms. Whiteleather emailed Ms. Yount stating, "I jut [sic] made a motion to OAH re the dates we had already selected." The parties had not reached an agreement regarding mutually agreeable dates; Ms. Yount understood the email to mean Ms. Whiteleather had filed a motion to continue the PHC and due process hearing based on Ms. Whiteleather's unavailability and the unavailability of Parents.

Student did not file a request for continuance. Instead, after business hours on Friday, June 23, 2017, Student submitted to OAH and served on District a motion to amend with a proposed amended Request for Due Process Hearing (amended complaint). The filing of an

amended complaint restarts the applicable timelines for the due process hearing. (20 U.S.C. § 1415(c)(2)(E)(ii).) Ms. Yount and OAH received Student's motion to amend on the morning of Monday, June 26, 2017. OAH allows parties who wish to oppose a motion three business days to file a written response. (May 11, 2017 Scheduling Order, Paragraph VIII.) OAH called the parties' attorneys and informed them Student's motion to amend the complaint would be addressed during the PHC at 3:00 p.m. Approximately 10 minutes later, Student's attorney's office informed OAH that Ms. Whiteleather would not be available for the 3:00 p.m. PHC due to being on a flight out of the country at the time of PHC.

Moments after OAH called the parties and informed them the PHC would go forward at 3:00 p.m., District filed a statement of non-opposition to Student's motion to amend. Ms. Yount obtained District's authorization and prepared a written document as soon as she received Student's motion that morning. Ms. Yount believed that if District quickly filed a statement of non-opposition, OAH would immediately grant Student's motion to amend and the PHC would be taken off calendar, and she would not have to spend additional time preparing for and participating in a PHC.

OAH called Ms. Whiteleather's office at 3:00 p.m. on June 26, 2017, and Ms. Whiteleather's assistant directed the ALJ to call Ms. Whiteleather on her mobile phone. The ALJ inquired whether Ms. Whiteleather would answer, because OAH had been informed Ms. Whiteleather actually would be aboard an international flight at that moment. Ms. Whiteleather's assistant stated Ms. Whiteleather was out of the country but would answer her mobile phone. OAH reached both Ms. Whiteleather and Ms. Yount and convened the PHC. During the PHC, OAH granted Student's motion to amend. A new scheduling order was issued the next day.

Three days later, on June 30, 2017, the parties filed a joint request to continue the dates set in the new scheduling order. OAH granted the request and the due process hearing is now scheduled to begin on October 31, 2017, almost six months after Student filed his case.

Student's response to the Order to Show Cause included declarations under penalty of perjury by Ms. Whiteleather and her assistant Patti Schiffner. Ms. Whiteleather declared that she had a pre-planned vacation on July 5, 2017. This is inconsistent with her representations in email to Ms. Yount that she would be in federal court on July 6, 2017, and departing for vacation on July 7, 2017. Ms. Whiteleather also declared that upon receipt of the May 11, 2017 scheduling order, she immediately had her assistant contact Ms. Yount to discuss and identify alternative dates for mediation and hearing. This is inconsistent with the fact that Ms. Whiteleather waited until May 24, 2017 to contact Ms. Yount regarding her unavailability for the dates predictably scheduled in the case she filed. Ms. Whiteleather also declared she believed OAH would act as it had in prior cases and address the continuance at the PHC when the parties raised their request. However, Ms. Whitleather had no intention of participating in the PHC because she was going to be out of the country, and she had been trying for over a month to get District to agree to a different date for the PHC (as well as the

other dates in the case), and she had directed her assistant to inform OAH she would not participate in the PHC due to being aboard an international flight at the scheduled time.

Ms. Schiffner declared that Student's family would be on vacation the last two weeks of July, not the entire month of July as suggested by Ms. Whiteleather's June 21, 2017 email to Ms. Yount.

Student's case concerns events that occurred "over the past year, at least," and does not on the face of the original or amended complaint appear to involve claims that approach the two year statute of limitations, such that it was necessary to file a case immediately to preserve Student's and Parents' rights. Student's amended complaint added a factual allegation to Issue No. 3, specifically that District failed to consider Student's private diagnosis of Attention Deficit Hyperactivity Disorder. Student's amended complaint also added factual allegations to Issue No. 5, specifically that Student's doctor had recommended that an unspecified depressive disorder be ruled out and that District had not done any assessment to rule out depressive disorder. Student's amended complaint also added a new issue, designated as Issue No. 6 with Issue No. 6 of the original complaint being restated as Issue No. 7, alleging District denied Student a free appropriate public education by failing to assess Student in the area of behavior and for autism. Student's motion to amend the complaint was granted based on the addition of a few new factual allegations and a claim regarding failure to assess Student's behavior and the possibility that he has autism.

Consideration of the totality of the circumstances reveals that Ms. Whiteleather amended the complaint as a tactic to delay the due process hearing that had been scheduled according to the date on which she chose to file Student's complaint. The evidence submitted in response to the Order to Show Cause indicates Ms. Whiteleather knew before she filed Student's original complaint that she expected to be on vacation before, during, or after the dates that would be set for the due process hearing. She filed the case despite knowledge of her unavailability, then delayed informing District of her self-imposed conflict for two weeks, and then spent a month negotiating with District for mutually agreeable dates. At the last hour, when she was unable to obtain agreement to continued dates, rather than filing a request to continue the case, Ms. Whiteleather used the tactic of filing an amended complaint to restart the timeline for the case.

During the hearing regarding the Order to Show Cause, Ms. Whiteleather represented that the purpose of filing the amended complaint was to amend the complaint. Her statement is belied by the fact that in her email to Ms. Yount after business hours on Friday, June 23, 2017, she stated that she had just "made a motion to OAH re the dates we had already selected." But Ms. Whiteleather did not file a request for a continuance; she submitted an amended complaint. While Student's amended complaint facially appears to add limited additional new facts and state a new claim, it is inferred from the totality of circumstances that the true purpose of Student's amended complaint was to obtain delayed mediation, PHC, and due process hearing dates. Due to the restarting of the timeline and the additional continuance the parties requested, Student's case has been delayed three and a half

months beyond when it was originally set to be heard, and will have been on file almost six months by the time of the due process hearing.

However, conduct of a party or a party's attorney may only be sanctioned when it is frivolous, meaning that it was totally and completely without merit or for the sole purpose of harassing an opposing party, or solely intended to cause unnecessary delay. While Ms. Whiteleather's use of the device of filing an amended complaint was primarily a tactic to obtain a delay in the case, the amended complaint did also state an additional claim and therefore it cannot be said that Ms. Whiteleather's conduct was *totally and completely* without merit or *solely* to cause unnecessary delay.

Having considered the responses and having heard the parties' arguments during the July 10, 2017 OSC hearing, the OSC is vacated. While the parties could have been more proactive in their communication to OAH about the status of the case and their desire not to participate in or unavailability for the scheduled PHC to avoid the unnecessary use of OAH resources, the attorneys' conduct does not establish grounds to shift OAH's costs to the parties or their legal counsel.

The attorneys are cautioned that in future matters, care should be taken to timely submit PHC statements or a written motion to continue.

ORDER

The Order to Show Cause is vacated.

DATE: July 13, 2017

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Kara Hatfield
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KARA HATFIELD
Administrative Law Judge
Office of Administrative Hearings