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 2024060562

ORDER DENYING ANTIOCH UNIFIED SCHOOL DISTRICT'S MOTION FOR SANCTIONS

AUGUST 12, 2024

On June 14, 2024, the Law Offices of Sheila C. Bayne, attorney for Student, filed a request for due process hearing with the Office of Administrative Hearings, called OAH, naming Antioch Unified School District. Student's attorney Ryan Song, of the Bayne Law Firm, and Antioch's attorney Miachel Tucker, of Edwards Stevens & and Tucker LLP, participated in a prehearing conference, called PHC, with OAH on July 19, 2024. Hearing was confirmed for a start date of July 30, 2024.

During the PHC and in the July 19, 2024, PHC Order, OAH ordered counsel to meet and confer no later than July 25, 2024, by 5:00 PM, to discuss scheduling witnesses, how much time each witness would take, and subpoenas, if any. On

July 29, 2024, Student withdrew her case without prejudice and the matter was dismissed.

On July 29, 2024, Antioch filed a Motion for Sanctions Against Student's Attorneys. On July 30, 2024, Antioch filed a Notice of Errata and an Amended Motion for Sanctions Against Student's Attorneys. The motion is supported by the sworn declaration of Antioch's counsel Heather Edwards and several email attachments. Antioch argues sanctions are warranted as Student's attorney failed to comply with the PHC Order directing the parties to meet and confer. Antioch requests OAH order Student's Attorney to pay Antioch's legal fees incurred to research and draft a Motion for an Order to Show Cause directing Student's counsel to show cause why they should not be subject to contempt for failing to comply with the PHC Order. Because Student withdrew its case, Antioch did not file this motion. It seeks additional costs for preparing and filing its Motion for Sanctions.

On August 1, 2024, Student filed an opposition to Antioch's motion for sanctions. The opposition is supported by the sworn declaration of Bayne. The opposition generally asserts fee shifting is not appropriate as Student's attorney acted in good faith and for good cause, and there was no delay as the case was withdrawn prior to hearing.

The evidence submitted by Antioch established that prior to the meet and confer deadline, Edwards emailed Bayne twice inquiring about witnesses and a proposed witness schedule. Bayne did not respond to the emails, nor did any other attorney from the Bayne Law Firm. Edwards emailed Bayne a third time on July 26, 2024 to confirm whether Bayne intended to proceed to hearing and advising that Antioch could not ensure the attendance of its employees as witnesses at hearing given the lack of notice. Neither Bayne nor any attorney from her law firm responded to this third email.

At 5:00 PM on July 26, 2024, Attorney Michelle Wilkolaski, Bayne Law Firm, emailed Student's proposed "joint" witness list to Edwards. Wilkolaski erroneously asserted that the Bayne Law Firm had not heard from Edwards on July 25, 2024, regarding the meet and confer, and indicated that Wilkolaski's July 26, 2024, 5:00 PM email would "serve as our meet and confer."

Bayne's opposition generally asserts Antioch had plenty of time to review Student's witness list prior to the July 30, 2024, hearing start, and that, regardless, there was no prejudice or delay as Student withdrew its case on July 29, 2024. Bayne further erroneously asserts that Edwards failed to comply with the meet and confer requirement.

APPLICABLE LAW

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).) Absent exceptional circumstances, a law firm is held jointly responsible for violations committed by its partners, associates, or employees. (Code Civ. Proc., § 128.5, subd. (f)(1)(C).)

"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.)

DISCUSSION

At a minimum, attorneys appearing before OAH are expected to comply with OAH orders. Bayne failed to meet this rudimentary expectation. OAH's PHC orders are very clear, and the language used in each order is consistent from case to case. Bayne and her law firm regularly practice before OAH and are familiar with the requirements of

the PHC orders. The evidence submitted by Antioch showed Student's attorney failed to meet and confer as required by the July 19, 2024 PHC Order despite several requests by Edwards. No attorney responded orally or in writing to Edwards' requests to meet and confer. The only outreach was Wilkolaski's email, sent 24 hours after the meet and confer deadline, that attached a unilaterally prepared "joint" witness list, and which erroneously accused Antioch of failing to contact the Bayne Law Firm to patriciate in a meet and confer. Bayne's declaration did not address her failure to participate in, or have any attorney in her firm participate in, the required meet and confer.

OAH does not condone Student's attorney's failure to meet and confer and understands the difficulty it caused Antioch in its attempt to schedule its employees for testimony and arrange for substitute coverage. Even so, in this case, OAH declines to shift legal fees to Student's attorney. Here, Bayne's failure to follow OAH's PHC Order and timely meet and confer with Edwards or ensure that another attorney from her firm did so on her behalf, does not meet the requisite showing of a bad faith, frivolous action or tactic warranting fee shifting.

Student's attorney is expected to comply with all OAH orders in the future. It is also expected that Student's attorney will demonstrate a higher level of professionalism than that shown here. The determination herein not to shift costs is not an invitation to ignore OAH orders. Student's counsel is on notice that failing to comply with similar orders in the future may result in cost shifting.

Antioch's motion for sanctions and request to shift legal fees incurred for drafting its unfiled motion for an order to show cause and its motion for sanctions is denied.

IT IS SO ORDERED.

Theresa Ravandi

Theresa Ravandi
Administrative Law Judge
Office of Administrative Hearings