BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
SAN BRUNO PARK SCHOOL DISTRICT,	OAH Case No. 2018040263
v.	ORDER TO SHOW CAUSE WHY COSTS SHOULD NOT BE SHIFTED TO PARENT, OR OTHER SANCTIONS IMPOSED, DUE TO REPEATED UNLAWFUL EX PARTE COMMUNICATIONS
PARENT ON BEHALF OF STUDENT.	

This matter was calendared for due process hearing on June 5, 2018.

On Friday, June 1, 2018, the undersigned ALJ issued a Notice of Ex Parte Communications concerning a letter from the Golden Gate Regional Center to an administrative law judge in OAH's general jurisdiction division. The letter essentially requested an order against San Bruno Park and had not been served on San Bruno Park. The Notice of Ex Parte Communications reviewed the prohibition of ex parte communications and explained the fundamental unfairness of those communications. The Notice was served on Parent the same day.

At 9:44 a.m. on Monday, June 4, 2018, Parent filed with OAH a letter addressed to the undersigned ALJ which attached 10 pages of email correspondence between Parent and the school district or its attorney. The email correspondence contained many disputed factual claims relating to issues that were to be heard by the ALJ at the due process hearing the next morning. It was intended to influence the ALJ's conduct and disposition of the proceedings and was not served on San Bruno Park. It was a second unlawful ex parte communication prohibited by subsection (a) of section 3084 of title 5 of the California Code of Regulations. Having just been served the previous business day with a full explanation of the illegality of such communications, Parent was aware of its illegality and filed it anyway.

At 1:14 p.m. on June 4, 2018, San Bruno Park filed with OAH a notice that it wished to withdraw its request for due process hearing in this matter and requested that OAH dismiss its case without prejudice.

AT 3:05 p.m. on June 4, 2018, Parent filed with OAH another letter addressed to the undersigned ALJ. The letter attached 8 additional pages of email correspondence between Parent and the school district or its attorney. Like the email correspondence Parent filed earlier in the day, this newly filed email correspondence also contained many disputed factual claims relating to issues that were to be heard by the ALJ at the due process hearing

the next morning and was intended to influence the ALJ's conduct and disposition of that hearing. Like the earlier communication, it was not served on San Bruno Park. It was a third unlawful ex parte communication prohibited by subsection (a) of section 3084 of title 5 of the California Code of Regulations. Parent was aware of its illegality and filed it anyway.

Shortly before 3:41 p.m. on June 4, 2018, Parent telephoned Trinity Dorantes, OAH's case clerk assigned to this matter. Parent objected to San Bruno Park's request to dismiss the matter without prejudice and expressed the view that it ought not to be allowed to do so. San Bruno Park was not a party to this communication or aware of it. The oral communication was an indirect communication intended to influence the ALJ's conduct and disposition of the proceedings, and in particular the outcome of San Bruno Park's request for dismissal without prejudice. It was a fourth unlawful ex parte communication prohibited by subsection (a) of section 3084 of title 5 of the California Code of Regulations. Parent was aware of its illegality and engaged in it anyway.

APPLICABLE LAW

Ex parte communications are not permitted while a due process proceeding is pending. "[W]hile special education due process hearing proceedings are pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to a hearing officer from an employee or representative of a party or from an interested person unless the communication is made on the record at the hearing." (Cal. Code. Regs., tit. 5, § 3084, subd. (a).) The rule against ex parte communications "is, in essence, a rule of fairness meant to insure that all interested sides will be heard on an issue." (*Heavey v. State Bar* (1976) 17 Cal.3d 553, 559.) "[T]he right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its termination upon information received without the knowledge of the parties." (*English v. City of Long Beach* (1950) 35 Cal.2d 155, 159.)

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 v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly [Cal. Code Regs., tit. 5] § 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 ALJ presiding at the hearing may order reimbursement 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. Cod 1455.30, subd. (a).)

An ALJ presiding over a hearing, without first obtaining approval from the California Department of Education, may "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).) "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.)

In this matter it appears from the record that Parent unlawfully engaged in an indirect ex party communication with the Golden Gate Regional Center on or before May 29, 2018, which was intended to result, and did result, in an ex parte communication by the Regional Center to Administrative Law Judge Melissa Crowell seeking judicial action adverse to San Bruno Park in this special education matter. The facts of this communication are set forth in more detail in the Notice of Ex Parte Communications issued and served on Parent on June 1, 2018.

It further appears from the record that Parent, fully informed on June 1, 2018 of the illegality of her ex parte communication, nonetheless deliberately and in bad faith engaged in three more such ex parte communications on June 4, 2018, in this matter, as set forth in more detail above.

ORDER TO SHOW CAUSE

1. Parent is ORDERED TO SHOW CAUSE, in documents filed with OAH by the close of business on June 12, 2018, why the costs incurred by OAH in connection with the receipt of the four ex parte communications described above, and the production of the required notifications of those communications to San Bruno Park, should not be shifted to her under the provisions cited above, or other appropriate financial sanctions imposed. (Cal. Code. Regs., tit. 5, § 3088, subds. (a), (e); Gov. Code, § 1455.30, subd. (a).)

2. Parent's response shall include a declaration under oath setting forth the particular facts of these events in detail. It shall address, among other things, why she persisted on June 4, 2018, in engaging in three additional unlawful ex parte communications when she was previously aware, or at minimum had learned on the previous business day, that such communications were unlawful.

3. San Bruno Park may address the ex parte communications and file any motions related thereto by close of business on June 12, 2018. (Cal. Code. Regs., tit. 5, § 3084, subds. (c)-(e).)

4. Parent's response to any motions filed by San Bruno Park is due by close of business on June 15, 2018.

5. A continuance of this matter is granted and a telephonic status conference regarding the Order to Show Cause and motions filed pursuant to this order, if any, will be held Monday, June 18, 2018, at 1:00 p.m.

DATE: June 6, 2018

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Charles Marson
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CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings