BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: TUOLUMNE COUNTY SUPERINTENDENT OF SCHOOLS AND CURTIS CREEK SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT,	OAH Case No. 2019020281
PARENT ON BEHALF OF STUDENT, v. TUOLUMNE COUNTY SUPERINTENDENT OF SCHOOLS AND CURTIS CREEK SCHOOL DISTRICT.	OAH Case No. 2019010105 ORDER CLARIFYING EX PARTE MEMORANDUM; ORDER GRANTING RESPONDENTS' REQUST FOR FEES, IN PART; ORDER DENYING STUDENT'S REQUEST FOR FEES.

On February 25, 2019, a Notice of Ex Parte Communication was issued disclosing the contents of a telephone message left by Student's attorneys on the undersigned's voicemail. The parties were permitted, but not required, to respond to the notice by Wednesday, March 6, 2019. Both parties submitted responses and made additional motions as discussed below.

Clarification Regarding Disclosure

On February 26, 2019, Respondents' counsel sent an initial response requesting clarification regarding whether the February 25, 2019, Notice of Ex Parte constituted a memorandum stating the substance of the communication as required by title 5 California Code of Regulations, section 3084. Additionally, respondents requested an audio recording of the voicemail in question.

When an ex parte communication is received, the administrative law judge presiding over the matter must disclose the communication to all parties, make it part of the record, and allow the parties an opportunity to address the matter within 10 days of receipt of the notification of communication. (Cal. Code. Regs., tit. 5, § 3084, subds. (c)-(e).)

The Notice of Ex Parte Communication dated February 25, 2019, satisfies the disclosure requirements identified above. However, an audio recording of the message itself will be made part of the record in this case. The parties can contact OAH to receive a copy of the message should they so choose.

Respondents' Motion for Sanctions and Student's Request for Attorneys' Fees

On March 1, 2019, Respondents filed a motion for sanctions seeking an order sanctioning Student's attorneys $1,796.00. The request is based, in part, on time expended responding to the Notice of Ex Parte Communication. Respondents further seek sanctions for what they consider an additional frivolous motion.

Administrative Law Judge Tiffany Gilmartin granted Respondents' Motion to Amend their due process complaint during a prehearing conference held on February 22, 2019. That order, which reset the due process hearing timeline as a matter of law, was the subject of the disclosed ex parte communication. The amended complaint added an additional issue. On February 27, 2019, Student filed a Notice of Insufficiency as to the newly added issue. The following day, Student withdrew the NOI. Respondents assert that the NOI was a "frivolous filing intended to harass the [Respondents]," by "increasing litigation costs," for which sanctions are warranted.

On March 4, 2019, Student filed a 46-page opposition to Respondents' sanctions motion that included a declaration from attorney Leigh and several exhibits. Additionally, Student seeks an order requiring Respondents to pay Student's reasonable attorney's fees for the time it took to respond to Respondents' sanctions motion.

EX PARTE COMMUNICATION

Regarding the ex parte communication, Student asserts that the contact, "did not address any of the substance of the pending proceeding but rather a procedural issue." This representation is utterly false. In her declaration, Ms. Leigh states that she contacted the undersigned, "in an attempt to resolve the issue *of the continuance being so abruptly agreed to without cause* in hopes of connecting the presiding hearing officer and opposing counsel on the line." (italics in original) As noted above, ALJ Gilmartin vacated the previously scheduled hearings dates when she granted Respondents' motion to amend their complaint which re-set the applicable timelines as a matter of law. Ms. Leigh incorrectly construes this as granting a motion to continue the due process hearing without requiring a good cause finding. Either way, her message demanded the prehearing conference be placed back on calendar and her declaration confirms her hope of getting the parties "on the line." Doing so would have required the undersigned to reconsider and overrule ALJ Gilmartin's order. Accordingly, the message was substantive and not merely procedural as argued in the response.

Student further asserts that the communication was not ex parte because Student's counsel gave timely written notice of her intent to contact the Presiding Administrative Law Judge thereby complying with Government Code section 11430.10 subdivision (a). Because this process was followed, she asserts, sanctions are not warranted.

Ex parte communication in special education matters is governed by title 5, California Code of Regulations, section 3084, subdivision (a). It states in relevant part, "[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." There is no exception provided and Student's counsel violated the regulation.

However, even if Student is correct that Government Code section 11430.10 does apply, Student's conduct is still found to be impermissible ex parte communication. Government Code section 11430.10 states in relevant part:

> While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.
>
> (Cal. Govt. Code § 11430.10. subd. (a))

Student attached as Exhibit E to the opposition a copy of an email that states:

> "Dear counsel:
>
> We will be filing an opposition to continue. WE are also asking to speak with the presiding judge as I type this email due to what just occurred at the PHC with Judge Gilmartin.
>
> Please remain available.
> Thanks,"

Student asserts that the above email constitutes notice and opportunity for all parties to participate in the communication. It does no such thing. First, the email contains no date or time sent. Student's opposition contained nine emails. All but one other contained the date and time the email was sent. That omission renders the communication unreliable. However, even if the email was sent contemporaneously with counsel's call to the undersigned, a contemporaneous email instructing opposing counsel to remain available does not satisfy section 11430.10's notice requirement.

Moreover, Student's counsel made no attempt to conference Respondents' counsel in before leaving the voicemail. Nor did she request to set up a conference call where both parties could be on the record when Student's counsel raised her concerns regarding the PHC. Counsel's conduct constitutes impermissible ex parte communication.

NOTICE OF INSUFFICIENCY

Student filed an NOI to Respondents' amended complaint and promptly withdrew it the following day. Respondents' seek additional sanctions for the filing and subsequent withdrawal of the NOI. Respondents did not establish that filing and withdrawing the notice constituted a bad faith action or tactic that was frivolous or solely intended to cause unnecessary delay. Accordingly, no sanctions are warranted for such conduct.

REQUEST FOR ATTORNEY'S FEES

Student requested he be awarded reasonable attorney's fees for responding to the sanctions motion. Student asserts that Respondents were permitted, but not required, to respond to the Notice of Ex Parte Communication. Further, Student asserts that attorney's fees are warranted for having to respond to Respondents' allegation charging the NOI was frivolous. Student did not establish that Respondents' motion constituted a bad faith action or tactic that was frivolous or solely intended to cause unnecessary delay. Accordingly, Student's request for attorney's fees is denied.

RELIEF FOR EX PARTE COMMUNICATION

In certain circumstances, an ALJ 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).)

With prior approval from the General Counsel of the California Department of Education, an ALJ 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 11455.30, subd. (a).)

Without first obtaining approval from the California Department of Education, an ALJ 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.)

Here, Student's lead attorney submitted a declaration detailing her expertise in special education due process matters. She included as an exhibit an invitation signed by OAH's Director and Deputy Director inviting her to join the special education advisory committee. Based on her declaration, supporting exhibits, and history before OAH, counsel established she is an experienced attorney knowledgeable about the laws and procedures governing special education due process hearings. Accordingly, it is all the more concerning that counsel acknowledges no error in judgment nor contrition for flagrantly disregarding the law when seeking to indirectly have ALJ Gilmartin's order overturned. Disagreement with an ALJ's order can be expressed through a motion for reconsideration or appeal, not through an ex parte communication to the Presiding ALJ. Under the circumstances of this case, the ex parte communication constitutes a bad faith action or tactic that was frivolous.

Respondents requested Student be ordered to pay $1,796.00 in attorney's fees. Respondents submitted a declaration from each attorney detailing the time spent receiving, reviewing, and responding to the Notice of Ex Parte Communication and the Notice of Insufficiency. Student's argument that respondent was not required to respond to either is not compelling. In reviewing the declarations submitted and carefully considering all facts and argument presented by both sides, the undersigned determines that $700 is considered a reasonable expense incurred by Respondents as a result of bad faith actions or tactics found herein. As no cost is shifted to OAH, the Department of Education need not provide approval.

ORDER

1. Within 15 days from the date of this order Student's counsel shall pay respondents $700.00.

2. Respondents' request for additional fees is denied.

3. Student's request for attorney's fees is denied.

IT IS SO ORDERED.

DATE: March 12, 2019

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Joy Redmon
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JOY REDMON
Presiding Administrative Law Judge
Office of Administrative Hearings