BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SACRAMENTO CITY UNIFIED SCHOOL DISTRICT.	OAH Case No. 2015100577 ORDER SHIFTING COSTS FROM OFFICE OF ADMINISTRATIVE HEARINGS AND STUDENT TO SACRAMENTO CITY UNIFIED SCHOOL DISTRICT AND DECLINING TO CERTIFY THE FACTS TO SACRAMENTO SUPERIOR COURT REGARDING CONTEMPT

PROCEDURAL MATTERS

On February 2, 2016, Administrative Law Judge Lisa Lunsford convened the first day of hearing in this matter. Student was represented by advocate Darlene Anderson. Mother and Student were present at the hearing. Sacramento City Unified School District was represented by Jessica Gasbarro, Attorney at Law. Becky Bryant, Sacramento City's Special Education Local Plan Area Director was present.

That same day, within less than three hours of the start of the hearing, Becky Bryant sent the Office of Administrative Hearings an ex parte communication. (See Exhibit A). It is unknown whether Ms. Gasbarro was aware of the communication either prior to it being sent or after it was sent. Neither Ms. Gasborro nor Ms. Bryant disclosed the communication on the record at the hearing. ALJ Lunsford was not aware of the communication at the time it was sent. On February 3, 2016, with ALJ Lunsford still unaware of the ex parte communication, the hearing resumed. On the morning of February 4, 2016, prior to the commencement of the hearing, ALJ Lunsford was informed that there was a communication in the case that needed her attention. The matter was continued on the record until February 9, 2016.

After the matter was continued, ALJ Lunsford was given a copy of the improper ex parte communication as required by Government Code section 11430.50 and the notice regarding the disclosure of the communication, which was served on the parties on February 4, 2016. After reviewing the ex parte communication, ALJ Lunsford disqualified herself from hearing this matter. On February 5, 2016, the matter was reassigned to the

undersigned ALJ. On February 5, 2016, an Order to Show Cause was issued regarding the shifting of costs from Parent and OAH to Sacramento City Unified and regarding the certification of contempt to the Sacramento Superior Court.

On February 9, 2016, the parties were provided the opportunity to be heard in regards to the ex parte communication. Subsequently, a hearing was held to allow Sacramento City to show cause as to why expenses should not be shifted from Student and OAH and why the facts should not be certified to Sacramento Superior Court regarding contempt proceedings. At the hearing, Ms. Bryant voluntarily testified about the email in question and circumstances surrounding said email. Jessica Gasbarro and Sara Garcia, Attorneys at Law, represented Sacramento City at the hearing. Parent and her advocate were present and participated in the hearing.

For reasons unrelated to the content of the ex parte communication, the ALJ entertained argument from the parties as to whether the hearing should proceed with the ALJ reviewing the previously recorded testimony and admitted evidence or whether the prior evidence, testimony, and rulings regarding evidence and testimony, which occurred on February 2, 3, and 4, 2016, should be stricken from the record and the hearing started anew. Student requested that the evidence, testimony, and rulings regarding evidence and testimony be stricken and the hearing start again. Sacramento City opposed Student's request. Student's request was granted.

FACTUAL FINDINGS

The email, which contained the improper ex parte communication, was sent through OAH's "Feedback" website. The website contains the disclaimer, "[Q]uestions regarding the calendaring of cases or the assignment of judges should be directed via phone or fax to the calendar clerk of the Regional Offices handling the matter." However, the subject line of Ms. Bryant's email read, "Please Direct This Email to Judge Varma ASAP." Bob Varma is the Special Education Division Presiding Administrative and part of the direct line of supervision for ALJ Lunsford. DPALJ Varma oversees all of the administrative law judges in OAH's Special Education Division.

In the email, Ms. Bryant expressed "grave concerns" regarding the perceived objectivity of ALJ Lunsford and made claims that ALJ Lunsford was giving "little regard" to Sacramento City's objections. Additionally, the email indicated that Ms. Bryant had "no faith" that Sacramento City would receive an "objective hearing" of the case. Ms. Bryant wrote that "it appears that she [ALJ Lunsford] is allowing testimony into evidence that are [sic] not part of the issues filed in the case" and that "Parent and advocate are being given very broad latitude in the presentation of their case." The email ended with the following sentence: "Judge Varma – I have known you for a long time and we have worked through some difficult situations so I hope that you respectfully receive my concerns regarding the path this case is taking." The email was signed by Ms. Bryant, in her professional capacity as the special education local plan area director, and was sent from Ms. Bryant's email account with Sacramento City.

Since 2010, Ms. Bryant has held the position of Sacramento City's Special Education Local Plan Area Director. Prior to holding that position, Ms. Bryant was the Director of Special Education for Sacramento City for eight years. During her tenure with Sacramento City, Ms. Bryant has acted as Sacramento City's representative at approximately eight special education due process hearings.[1] As such, Ms. Bryant should be extremely familiar with the due process hearing process and procedural safeguards.

During the hearing, Ms. Bryant testified that her intent in sending the email was to provide feedback about her observations regarding the hearing process. She testified that DPALJ Varma is "respectful" of the hearing process and that although she wanted him to hear her concerns, she did not expect him to act on her concerns. Contradictorily, Ms. Bryant also testified that her intent in sending the email was to "see the process preserved." By indicating that she wanted to "see the process preserved," Ms. Bryant seemed to be expressing a desire to have DPALJ intervene during the hearing.

Ms. Bryant indicated that she read the information provided on the Feedback website and that it did not contain a warning that she could not provide feedback during an on-going hearing. However, if Ms. Bryant had any concerns regarding the propriety of sending the email about the performance of an ALJ presiding over an on-going hearing, she could have easily made that inquiry of the attorney representing Sacramento City, with whom she spent the entire morning and afternoon on the day she sent the email.

Ms. Bryant testified that she did not believe that DPALJ Varma would take any action regarding the email until the conclusion of the hearing. Ms. Bryant knew DPALJ Varma's role was to supervise, lead, and coach the special education judges. As a leader, Ms. Bryant believed that he would want his staff to be as prepared as they could be and to do the best they could do. Ms. Bryant indicated that she did not know that she needed to wait until the hearing concluded before expressing her concerns. It should be noted that after a hearing concludes, the ALJ, who presided over the hearing, is responsible for issuing a written decision which addresses all of the legal issues raised by the petitioning party, and therefore sending the same communication after the hearing but before the issuance of the written decision would be improper.

Despite Ms. Bryant's testimony regarding her motive for sending the email, the tenor, tone, and wording of her email contradicts her testimony regarding her purpose in sending the email. The subject line of Ms. Bryant's email asks that her email be directed to DPALJ Varma as soon as possible. If Ms. Bryant did not desire to have DPALJ Varma act on her concerns immediately, there would not have been a reason to have the email directed to DPALJ's attention as soon as possible. When questioned at the hearing about this inconsistency, Ms. Bryant's explanation was less than compelling. Ms. Bryant indicated that

[1] Ms. Bryant testified that she could not remember the exact number of hearings in which she had acted as Sacramento City's representative, but that it was more than five hearings, but less than 10 hearings. A search of OAH's database indicated that Ms. Bryant has represented Sacramento City at least eight hearings in front of OAH.

she asked for the email to be directed to DPALJ Varma as soon as possible because she sent her email through generic OAH feedback website and did not want to the email to get "lost."

Additionally, Ms. Bryant's email ended with the sentence: "Judge Varma – I have known you for a long time and we have worked through some difficult situations so I hope that you respectfully receive my concerns regarding the path this case is taking." This last sentence speaks of the hearing in the present tense and implies that she desires DPALJ Varma's assistance in changing the course of the hearing.

As standard procedure, once a decision for a due process hearing has been issued, OAH sends the hearing participants a survey regarding the hearing process. (See Exhibit B.) The due process hearing survey focuses primarily on collecting information regarding the ALJ's work habits, judicial temperament, fairness and impartiality, and professional competence. The form also provides an area for the recipient of the survey to provide written comments regarding suggestions to improve the judge's performance or the performance of OAH. During her testimony, Ms. Bryant acknowledged that she had received numerous surveys from OAH regarding both mediations and hearings. (See Exhibit C.) If Ms. Bryant's only purpose in sending the email was to provide feedback about ALJ Lunsford to DPALJ Varma so that he could provide additional training to ALJ Lunsford upon conclusion of the hearing, Ms. Bryant could have used the comprehensive survey form to accomplish that purpose.

The result of Ms. Bryant's ex parte communication caused ALJ Lunsford to decide to disqualify herself from hearing the matter. As such, a new ALJ was assigned to hear the matter. In order to allow the opportunity for the new ALJ to judge the credibility of witnesses in person and to have the opportunity to ask any clarifying questions, the prior testimony and evidence was stricken from the record and the hearing was started anew. Even if the hearing had not been started anew, the improper ex parte communication would have caused a delay in the hearing as the new ALJ would have had to spend considerable time reviewing the prior testimony and evidence before being able to proceed with the hearing. As a result of the delay in this hearing, both OAH and Parent have suffered financial losses.

ALJ Lunsford spent 35.50 hours preparing for the hearing, traveling to and from the hearing location, conducting the hearing and dealing with the improper ex parte communication issue. The billing rate for ALJ Lunsford is $272.00 per hour. This resulted in a cost to OAH of $9,656.00. This amount does not include hotel and meal costs incurred by OAH on behalf of ALJ Lunsford, or any other costs incurred in the matter by OAH by other ALJ's.

Parent incurred child care costs and transportation costs during the first three days of hearing and on the day of the Order to Show Cause hearing. Parent paid her sister $20 to care for her children for the first day of hearing. Parent and her sister have not yet reached an agreement as to the amount that Parent would pay her sister for the other two days of hearing.

The advocate provided Parent transportation to and from the hearing on February 2, 3, 4, and 9, 2016. During the Order to Show Cause hearing, Parent and Advocate were unable to provide the exact mileage from Advocate's home to Parent's home and from Parent's home to the hearing location. However, both Parent's home address and Advocate's home address were put on the record. Judicial notice is being taken that the combined distance from Advocate's address to Parent's address and from Parent's address to the address of the hearing location is 11.2 miles. That information was obtained from the website Mapquest. The Internal Revenue Service's reimbursement mileage rate is .54 per mile. Parent incurred a daily transportation cost of $12.10 for February 2, 3, 4, and 9, 2016.

LEGAL CONCLUSIONS

Should the Facts Be Certified to Superior Court to Justify Contempt Sanctions?

Government Code section 11430.10 prohibits "any communication either direct or indirect" to the ALJ presiding over a hearing from "an employee or representative of an agency" that this is party to the hearing, "without notice and opportunity" for all parties to "participate in the communication."

Sacramento City argues that Ms. Bryant's email was not an ex parte communication because it was not sent directly to ALJ Lunsford and that it was not sent with the intent that the communication be provided to ALJ Lunsford during the hearing. Sacramento City's argument is without merit. Government Code section 11430.10 specifically states that "any communication either direct or indirect" is considered an ex parte communication. By sending the email to DPALJ Varma, ALJ Lunsford's supervisor and asking for his intervention, she was communicating indirectly with ALJ Lunsford.

Sacramento City's contention that Ms. Bryant did not intend for the communication to be provided to ALJ Lunsford during the hearing is not persuasive. First, any communication prior to the issuance of the final decision in the matter would be impermissible. Second, when looking at the totality of the circumstance, such as Ms. Bryant's experience in special education, knowledge of hearing process, the wording of the email, and the timing of the email, one can only draw the conclusion that Ms. Bryant's purpose in sending the ex parte communication was to have her concerns acted upon before the conclusion of the hearing. Finally, ex parte communications must become part of the official record of a case, which required disclosure to ALJ Lunsford. For these reasons and those detailed above, Ms. Bryant's communication constitutes an ex parte communication under Government Code section 11430.10.

Government Code section 11430.20 creates two exceptions to the prohibition of an ex parte communication. The first exception permits a communication that is "required for disposition of an ex parte matter specifically authorized by statute." (Gov. Code, § 11430.20, subd. (a).) The second exception permits the communication concerning "a matter of procedure or practice, including a request for a continuance that is not in controversy." (Gov. Code, § 11430.20, subd. (b).) Ms. Bryant's ex parte communication clearly was not

regarding a matter of procedure or practice that was not in controversy. The content of her email focused on her disapproval of ALJ Lunsford's rulings during the first several hours of the hearing in question. Nor does Ms. Bryant's ex parte communication fall within any of the other exceptions created by statute. (Gov. Code, §§ 11430.20, 11430.30, 11430.70.) Therefore, Ms. Bryant's email is an impermissible ex parte communication under the Government Code.

Government Code section 11455.10 provides that a person is subject to the contempt sanction for violation of the prohibition of ex parte communications under [Government Code section 11430.10 et seq.] in an adjudicative proceeding before an agency. The provisions for contempt sanctions are applicable to special education due process hearings. (5 Cal Code of Reg. §3088.)

With approval from the General Counsel of the California Department of Education, Government Code section 11455.20, subdivision (a) authorizes the presiding hearing officer in an adjudicative proceeding to certify facts that justify a contempt sanction against a person to the superior court for the county where the proceeding is conducted. On receiving the ALJ's certification, the superior court shall thereupon issue an order directing the person to appear before the court at a specified time and place, and then and there show cause why the person should not be punished for contempt. (Gov. Code, § 11455.20, subd. (a).) The same proceedings shall be had, the same penalties may be imposed, and the person charged may purge the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court. (Gov. Code, section 11455.20, subd. (b).)

Although Ms. Bryant is subject to contempt charges for violating the Government Code's prohibition against impermissible ex parte communication, the undersigned declines at this time to certify the facts to superior court for contempt proceedings.

Should Cost Be Shifted from OAH and Parent to Sacramento City?

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).)

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).)

"Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit [citations]." (*Levy v. Blum* (2001) 92 Cal.App.4th 625, 635.) In addition there must be a showing of improper purpose. (*Ibid.*) A finding of "bad faith" does not require a determination of evil motive. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

Sacramento City argues that Ms. Bryant was not acting in bad faith when she sent the email to DPALJ Varma. Ms. Bryant testified that she sent the email out of frustration and she believed that email would not be shown to ALJ Lunsford prior to the conclusion of the hearing. Sacramento City's argument is not persuasive. The subject line of Ms. Bryant's email asks that her email be directed to DPALJ Varma as soon as possible. If Ms. Bryant did not desire to have DPALJ Varma act on her concerns immediately, there would not have been a reason to have the email directed to DPALJ's attention as soon as possible.

The content of the ex parte communication details Ms. Bryant's "grave concerns" over ALJ Lunsford's evidentiary rulings during the hearing. However, the last line of the email is the most concerning. The last line reads, "Judge Varma – I have known you for a long time and we have worked through some difficult situations so I hope that you respectfully receive my concerns regarding the path this case is taking." This last sentence speaks of the hearing in the present tense and implies that she desires his assistance in changing the course of the hearing. In essence, Ms. Bryant, a representative of Sacramento City, was seeking the assistance of ALJ Lunsford's superior to interfere with the hearing process by circumventing ALJ Lunsford's independent judicial discretion. As such, Ms. Bryant's improper action or tactic of sending the prohibited ex parte communication can only be considered bad faith. (*Levy v. Blum* (2001) 92 Cal.App.4th 625, 635, *West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

The question then becomes whether Ms. Bryant's bad faith action or tactic of sending the prohibited ex parte communication was "frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 128.5, subd. (b)(1).) Any reasonable attorney would agree that Ms. Bryant's action of sending the prohibited ex parte communication with

the intent of interfering with the presiding judge's independent judicial discretion is "totally and completely without merit." (*Levy v. Blum* (2001) 92 Cal.App.4th 625, 635.) Although, Ms. Bryant may not be an attorney, she clearly is very experienced with the special education due process hearing process. More importantly she had access to Sacramento City's attorney for guidance on the propriety of her actions. Furthermore, when Ms. Bryant sent the prohibited ex parte communication to DPALJ Varma, she was acting in her official capacity as a representative of Sacramento City.

In the event that a presiding officer receives an ex parte communication in violation of Government Code Section 11430.10, that presiding officer shall make that communication and any written response to that communication a part of the record, notify all parties of the communication, and allow a requesting party the opportunity to be heard regarding the communication. (Gov. Code, § 11430.50.)

After reviewing the prohibited ex parte communication, ALJ Lunsford made a determination to disqualify herself from hearing the matter. ALJ Lunsford's disqualification required that another ALJ be assigned to preside over the case. As required by Government Code section 11430.50, the ex parte communication was made a part of the record, the parties were notified of the communication, and the parties were allowed to be heard regarding the communication. That entire process caused an unnecessary delay of the completion of the due process hearing by at least 4 days.

Additionally, after hearing from the parties, a ruling was made to strike the prior evidence, testimony, and evidentiary rulings and to start the hearing anew. The striking of the two full days of testimony caused a further delay in the completion of the hearing. As a result of the delays and duplication of hearing days, OAH incurred expenses in the amount of $9,656.00 and Parent incurred expenses in the amount of $68.40. These reasonable expenses were incurred by OAH and Parent as the result of Sacramento City's bad faith actions and tactics that were frivolous. Accordingly, Sacramento City shall be ordered to pay the reasonable expenses of OAH and Parent.

ORDER

1. Within 30 days, Sacramento City Unified School District shall pay Office of Administrative Hearings $9,656.00 for costs.

2. Within 30 days, Sacramento City Unified School District shall pay Parent $68.40 for costs.

DATE: February 22, 2016

DocuSigned by:
B. Andrea Miles
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B. ANDREA MILES
Administrative Law Judge
Office of Administrative Hearings