BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2018040263
v.	ORDER PARTIALLY SHIFTING TO PARENT OAH'S COSTS IN RESPONDING TO EX PARTE COMMUNICATIONS
SAN BRUNO PARK SCHOOL DISTRICT.	

The San Bruno Park School District filed this matter on April 5, 2018, seeking an order allowing it to assess Student. A prehearing conference (PHC) was held on May 25, 2018, and a due process hearing was scheduled for June 5, 2018. Student was represented by Parent.

Sometime on or shortly before May 29, 2018, Parent engaged in an indirect ex parte communication to Judge Melissa Crowell of OAH's General Jurisdiction Division concerning a possible order against San Bruno Park. On June 1, 2018, the undersigned ALJ issued a Notice of Ex Parte Communication that, among other things, revealed Parent's ex parte communication to San Bruno Park.

On June 4, 2018, Parent engaged in three more ex parte communications directed to this ALJ, who on June 6, 2018, issued a Second Notice of Ex Parte Communications and an Order to Show Cause why OAH's costs in responding to Parent's ex parte communications should not be shifted to Parent. On June 26, 2018, Parent filed a response to the Order to Show Cause. San Bruno Park filed its response on June 12, 2018, and a telephonic oral argument on the Order to Show Cause was held on July 16, 2018.

APPLICABLE LAW

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 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).) 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.)

First Ex Parte Communication

Parent's ex parte communication on or shortly before May 29, 2018, is described in detail in the first Notice of Ex Parte Communication, issued on June 1, 2018. That description is incorporated by reference and is summarized here.

In essence Parent, through a Regional Center advocate, sent a letter to Judge Crowell on May 29, 2018, under the caption of a closed Regional Center matter. The letter, which was not served on San Bruno Park, requested that Judge Crowell order San Bruno Park to hold an individualized education program team meeting before the end of the school year so that the Regional Center could advocate in favor of a particular placement for Student. The letter incorrectly claimed that the undersigned had ordered Parent to make that contact with Judge Crowell. It addressed many of the same arguments Parent had set forth in her prehearing conference statement as issues relevant to this proceeding. In that statement Parent also sought an order compelling San Bruno Park to hold such an IEP team meeting.

In her response to the Order to Show Cause, Parent explained her actions concerning the ex parte letter to Judge Crowell primarily by reference to the perceived merits of her claims against San Bruno Park. She also stated that she was uncertain of the proper procedures to be followed, and that she relied on the expertise of the Regional Center advocate. However, that explanation is unpersuasive since Parent, acting entirely on her

own, entered into several other ex parte communications in a different General Jurisdiction case on the same day, for the same purpose. Parent herself mentions this incident in her response.

In *Claimant v. Golden Gate Regional Center* (OAH Case No. 2018040034), a Lanterman Act case involving Parent and Student, OAH General Jurisdiction Judge Regina Brown had issued a decision on May 17, 2018, that was adverse to Parent's claim. On May 29, 2018, the same day the Regional Center sent an ex parte letter to Judge Crowell, Parent sent an ex parte letter to Judge Brown requesting various relief, including ordering San Bruno to hold an IEP team meeting and granting other requests that Parent was simultaneously pursuing in this special education matter. Parent also sent to Judge Brown, without serving San Bruno, copies of numerous emails between her, the school district, and the Regional Center on the same subjects.[1] Parent cannot place responsibility on the Regional Center advocate for deciding to communicate ex parte; she did so herself, repeatedly, in a separate case for the same purpose.

Finally, Parent stated in her response that she and the Regional Center advocate should not be held responsible for the ex parte communication because they were "just following direction and were trying to get [Student's] access to education, services, and into an appropriate school placement." That statement was disingenuous because it claimed, without factual basis, that Parent had been directed to contact Judge Crowell. In addition, it knowingly conflated the underlying purpose of Parent's communication with the separate issue addressed by the Order to Show Cause, which sought to establish why the communication was not served on the school district. Nothing in Parent's response with respect to the letter to Judge Crowell addressed that issue. Asked about it at oral argument, Parent responded merely by restating her grievances against the school district.

By the time Parent made that disingenuous statement in her response on June 26, 2018, she was well aware that the inquiry made by the Order to Show Cause did not concern the merits of her claim against the school district or her underlying purpose in seeking an order against San Bruno; she knew it concerned instead her seeking such an order without the district's knowledge. Parent had previously been found to have engaged in ex parte communication in an earlier special education matter before OAH. In *San Bruno Park School District v. Parent* (OAH, Dec. 17, 2015, No. 2015110053, Notice of Receipt of Ex Parte Communication and Notice of No Action), Parent had sent a four-page letter on the merits of her position to ALJ Teresa Ravandi, who was presiding over the case, without serving it on San Bruno. In her Order disclosing the communication, Judge Ravandi clearly explained the nature of an ex parte communication and the reasons it is prohibited.[2] From that Order alone Parent should have known that such communications were unlawful.

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[1] Official notice is taken of the pleadings and papers on file in OAH Case No. 2018040034.

[2] Official notice is taken of the pleadings and papers on file in OAH Case No. 2015110053.

In addition, by June 26, 2018, Parent had been clearly advised in the first and second notices of ex parte communication issued in this matter on June 1 and June 6, 2018, of the unlawful nature of an ex parte communication and why such a communication is forbidden due to its unfairness to an opponent in litigation. Moreover, Parent is quite experienced in litigating before OAH and knows its procedures well; she has been a party to seven previous OAH matters.

The evidence therefore supports the conclusion that, in procuring the Regional Center advocate's ex parte communication to Judge Crowell, Parent acted knowingly and in bad faith.

Second and Third Ex Parte Communications

Parent's second and third ex parte communications, made on June 4, 2018, are described in detail in the Second Notice of Ex Parte Communication, issued on June 6, 2018. Those descriptions are incorporated by reference and are summarized here.

Parent had been served on June 1, 2018, with the first Notice of Ex Parte Communication (concerning the letter to Judge Crowell), which again explained the nature of prohibited ex parte communications and the reasons they are unlawful. In her response, Parent admits she reviewed that document on June 2, 2018.

On Monday morning, June 4, 2018, the day before the due process hearing in this matter was scheduled to begin, 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 confidential communications relating to settlement which should not have been communicated to OAH, and many factual claims relating to disputed issues that were to be heard by the ALJ the next day. It was intended to influence the ALJ's conduct and the disposition of the proceedings, and was not served on San Bruno Park.

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. This second set of email correspondence also contained confidential settlement discussions and factual claims relating to disputed issues that were to be heard by the ALJ at the due process hearing. It, too, 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.

Parent's response to the Order to Show Cause offered two explanations for this conduct. First, it implied that no harm was done by sending email correspondence with the school district or its attorney to OAH, because the opposing party already had copies of that correspondence. However, the prohibition of ex parte communication fully applies to the filing of documents in the possession of the opposing party. It is common in litigation that a

party will introduce documents that support its case and will omit documents that do not, and unless the opponent knows what documents have been sent to the judge, it cannot exercise its right to introduce other documents to make the record complete or put the earlier filing in context. (See Evid. Code, § 356.) By failing to serve these two collections of emails on San Bruno Park, Parent deprived the school district of that right.

Second, Parent claimed she thought she was required to send to OAH all correspondence between her and the school district. She stated:

> I had repeatedly been told by OAH staffs [sic] that "Everything that is communicated or exhange[] between you and the other side, you have to let OAH knows [sic]. And everything that you communicated or give to OAH, you have to give to the other side. The same is true for the other side."

This claim is inconsistent with Parent's conduct. Had she been following such an instruction she would have served her communications on San Bruno Park. More importantly, it is not credible. Like all of Parent's factual claims, this one was not made under oath and was made in violation of the terms of the Order to Show Cause, which ordered that "Parent's response shall include a declaration under oath setting forth the particular facts of these events in detail," including her reasons for sending the communications ex parte.

The evidence supports the conclusion that, in filing the two sets of email correspondence ex parte on June 4, 2018, Parent acted knowingly and in bad faith, and was at the time well aware that those ex parte communications were unlawful.

Fourth Ex Parte Communication

Parent's fourth ex parte communication, made on June 4, 2018, is described in detail in the Second Notice of Ex Parte Communication, issued on June 1, 2018. That description is incorporated by reference and is summarized here.

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. Shortly before 3:41 p.m. on June 4, 2018, Parent telephoned Trinity Dorantes, OAH's case clerk assigned to this matter. According to Ms. Dorantes, 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 dismiss its complaint. Ms. Dorantes promptly made a written record of the call. 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 of this matter.

In her response and at oral argument, Parent denied that she told Ms. Dorantes she opposed the dismissal and that it should not be allowed. In light of the credibility findings

made above, and in the absence of the required declaration under oath, Parent's denial is not credible. The evidence supports the conclusion that Parent's communication to Ms. Dorantes was made ex parte, was intended to influence the ALJ's consideration of San Bruno Park's pending request for dismissal, and was made knowingly and in bad faith.

Providing notice of the four ex parte communications described in the Order to Show Cause, drafting that Order, analyzing the responses of Parent and San Bruno Park, conducting the telephonic status conference on the Order to Show Cause and drafting this Order Shifting Costs have unnecessarily consumed 15.75 hours of judicial time, which in monetary terms equal far more than the costs shifted here.[3] The costs shifted are limited to $500.00 so that payment will not be unduly burdensome and in the expectation that Parent will, by paying them, be persuaded to cease her pattern of ex parte communications to OAH judges. Should she fail to do so, another Order to Show Cause may issue and more serious sanctions may be considered.

This Order has been approved by the General Counsel of the California Department of Education.

ORDER

1. Costs are hereby partially shifted to Parent for making the four ex parte communications described above and in the Order to Show Cause knowingly and in bad faith.

2. Five hundred dollars of the costs of the ALJ's issuing notices of ex parte communications and the Order to Show Cause, analyzing the responses, conducting the telephonic status conference and drafting this Order are shifted to Parent. Parent shall remit to OAH the sum of $ 500.00 within 10 business days of this Order.

DATE: September 13, 2018

DocuSigned by:
Charles Marson
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CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings

[3] No sanctions are imposed with respect to the ex parte communications in *Claimant v. Golden Gate Regional Center* (OAH Case No. 2018040034), as that matter was not addressed in the Order to Show Cause.