BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

DEL NORTE COUNTY UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NUMBER 2024110598

NOTICE OF RECEIPT OF EX PARTE COMMUNICATIONS AND ORDER TO SHOW CAUSE SANCTIONS

JANUARY 16, 2025

On January 16, 2025, Vivian B. Randolph, attorney for Del Norte County Unified School District, filed ex parte communications with the Office of Administrative Hearings, called OAH, in this matter. These filings do not contain a proof of service upon counsel for Student, Joshua Cruz. The specific ex parte communications are listed below in the order in which they were received.

Request to IMMEDIATELY Remove ALJ Lucier - OAH Case #2024110598

ATTORNEY RANDOLPH EX PARTE COMMUNICATION

Ex parte communications, communications from one side to the tribunal without service on the opposing party, 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 of California* (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.)

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).)

Here, Attorney Randolph sought to communicate to an OAH administrative law judge in a special education matter without serving the other side. The documents enumerate herein are ex parte communications intended to affect the conduct of the hearing and the outcome in this matter and are unlawful communications unless timely served on the opposing party. This Notice discloses the communications to Student and

their counsel. The ex parte communications shall be attached to this Notice and shall be made part of the record in this matter.

All parties are advised that further communications to OAH shall be accompanied by a proof of service. The proof of service must establish that a copy of the submitted document was provided to the other side, and the means by which it was provided and when.

ORDER TO SHOW CAUSE

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).) As Attorney Randolph directed the recusal motion to ALJ Lucier's superiors, the Division Chief ALJ would be the presiding hearing officer over the January 16, 2025 request.

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) & (e); 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.)

In this case, Attorney Randolph sought an order from the Presiding ALJ to remove ALJ Cararea Lucier on day six of the administrative hearing, which would necessitate starting the hearing from scratch. Attorney Randoph's motion contains derogatory assertions against both ALJ Lucier and Attorney Cruz regarding their conduct in the present administrative hearing. Attorney Randolph's motion did not include a declaration under penalty of perjury to support any of her contentions.

Attorney Randolph's conduct was substantially similar to the ex parte communication of the Sacramento City Unified School District's administrator in OAH Case No. 2015100577 in trying to influence the final outcome of a pending administrative hearing. (*Order Shifting Costs From Office of Administrative Hearings and Student to Sacramento City Unified School District*, https://www.dgs.ca.gov/-/media/Divisions/OAH/Special-Education/SE-Orders-Page/Sanctions-and-Shifting-Costs/2015100577/2015100577-Order-Shifting-Costs-AccMod.pdf)

Therefore, Attorney Randolph is ordered to show cause why Attorney Randolph should not be required to pay OAH's costs as to the January 16, 2025 Request to Remove ALJ Lucier, Notice of Receipt of Ex Parte Communications, and this Order to Show Cause.

Attorney Randolph is ordered to file a written response with OAH by no later than 5:00 PM, on January 23, 2025. A copy of the response shall be served upon Attorney Cruz. Attorney Cruz may file a written response, or Student's own request for sanctions for the January 16, 2025 motion, by 5:00 PM, on January 27, 2025.

Attorney Randolph's response shall address why Attorney Randolph did not serve a copy of their January 16, 2025 motion on Attorney Cruz, and shall include a declaration of penalty of perjury as to any underlying facts.

The order to show cause hearing shall take place by videoconference on January 31, 2025, at 11:00 AM. Failure of Attorney Randolph to appear by videoconference at the order to show cause hearing on January 31, 2025, may result in additional sanctions.

ORDER

1. An Order to Show Cause as to Why Attorney Randolph Should be Ordered to Pay Expenses is hereby issued. Attorney Randolph must file a response no later than 5:00 PM, on Thursday, January 23, 2025.
2. A telephonic order to show cause hearing shall be convened at 11:00 AM, on Friday, January 31, 2025.

IT IS SO ORDERED.

Peter Paul Castillo

Peter Paul Castillo
Division Chief Administrative Law Judge
Office of Administrative Hearings