BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: ELK GROVE UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2016020899 ORDER TO SHOW CAUSE WHY EXPENSES SHOULD NOT BE SHIFTED FROM ELK GROVE UNIFIED SCHOOL DISTRICT AND THE OFFICE OF ADMINISTRATIVE HEARINGS AND WHY FACTS SHOULD NOT BE CERTIFIED TO SACRAMENTO SUPERIOR COURT REGARDING CONTEMPT

On June 6, 2016, Student's advocate, James Peters III, made a motion to continue this case, scheduled to begin on June 7, 2016. The motion was denied by the undersigned Presiding Administrative Law Judge, and the parties were notified by phone on June 6, 2016, and written order on June 7, 2016. The hearing was held on June 7, 2016, and the matter submitted for decision. Neither Mr. Peters nor Parent appeared at hearing.

On June 9, 2016, Mr. Peters filed a motion for reconsideration of the denial of the motion to continue, which was opposed by Elk Grove Unified School District. Before the motion to reconsider could be ruled upon by the undersigned, Mr. Peters sent two improper ex parte communications to Division Presiding Administrative Law Judge Bob Varma.

The two communications are virtually identical in content, although one was sent via email and the other via fax. The fax was sent in several parts and several pages are duplicative. The communications consisted of another copy of the motion to reconsider along with a letter from Mr. Peters to DPALJ Varma. The letter and email were specifically addressed to DPALJ Varma, asking him to review the motion to reconsider because he believes that "Judge Broussard lost focus of the issue." Mr. Peters contends that the undersigned attempted to discredit him and that other orders in the case and ALJ assignments made were "suspect." Mr. Peters requests that DPALJ Varma review the motion and then states "your review of the attached would be beneficial to ensure parents and their representatives do not have this type of inappropriate focus and inappropriate written comments from a Judge, let alone a presiding [sic] Judge." There was no indication that either the fax or the email were sent to the attorney for Elk Grove and no proof of service was attached.

Here, the ex parte communication was not made to ALJ Marson or PALJ Broussard, but rather to the Division Presiding ALJ, who is in their line of supervision. It is, nonetheless, an ex parte communication intended to affect the outcome of a motion and the conduct of the hearing, and is an inappropriate communication during the pendency of a proceeding. The law requires that both the communication and the notice be made a part of the record. No action was taken by OAH regarding the allegations contained in the improper ex parte communication.

It is unknown what costs, if any, Elk Grove incurred or will incur regarding ex parte communication and this order to show cause. DPALJ Varma and PALJ Broussard have spent more than 4 hours to date dealing with the ex parte communication issue. The billing rate for DPALJ Varma PALJ Broussard is $272.00 per hour. This resulted in a cost to OAH, so far, of $1088.00.

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).) 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).)

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).) 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.)

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. (Govt. Code, section 11455.20, subd. (b).)

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.)

DISCUSSION

Mr. Peters has appeared in front of OAH as an advocate for many, many years. He is aware of the appeal rights of Student, and even mentions them in his ex parte communication, in the event he receives a decision or order which he does not believe was fair or correct. Mr. Peters is aware that OAH sends out surveys regarding the performance of OAH following mediations and after hearing decisions are delivered to the parties and that would be one avenue through which Mr. Peters could have expressed his dissatisfaction. Another avenue to express his dissatisfaction would be through a properly noticed motion to recuse the undersigned. Mr. Peters' email and letter are an improper request to interfere with the judicial independence of PALJ Broussard. In order for parties to be ensured that they

have a fair hearing, both parties have to be assured that there is no communication with OAH while a case is pending, to which they are not aware.

A hearing to show cause as to why Mr. Peters should not be ordered to pay the costs associated with the improper ex parte communication and why the facts of this matter should not be certified to Sacramento County Superior Court for contempt proceedings will be held telephonically on **June 17, 2016 at 9:00 AM**. OAH will initiate the telephone calls. Mr. Peters should be prepared to argue why he should not be ordered to pay costs to Elk Grove and to OAH in an amount to be determined at the hearing. Mr. Peters should also be prepared to argue why the matter should not be certified to Superior Court. Elk Grove's attorney should be prepared to testify under oath regarding costs they have incurred regarding the ex parte communication. After hearing arguments from Mr. Peters and allowing Elk Grove to be heard on the matter, the undersigned will issue a written order. In the event that sanctions are ordered or a fact certification is made, approval from CDE will be obtained first, if so required.

ORDER

1. No written briefs will be allowed on this issue.

2. Elk Grove should be prepared to detail any costs incurred regarding the ex parte communication.

DATE: June 14, 2016

DocuSigned by:
Margaret Broussard
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MARGARET BROUSSARD
Presiding Administrative Law Judge
Office of Administrative Hearings