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 SHIFTING COSTS FROM ELK GROVE UNIFIED SCHOOL DISTRICT TO JAMES D. PETERS, III, DECLINING TO SHIFT COSTS FROM OFFICE OF ADMINISTRATIVE HEARINGS AND DECLINING TO CERTIFY THE FACTS TO SACRAMENTO SUPERIOR COURT REGARDING CONTEMPT

PROCEDURAL MATTERS

On June 6, 2016, at approximately 3:30 p.m., Mr. James Peters, III, who identifies himself as both a paralegal and advocate, and represents Parent in this matter, filed a request to continue the due process hearing scheduled to begin at 9:30 a.m. on June 7, 2016, in Elk Grove, California. The motion to continue was denied, the parties were notified telephonically on June 6, 2016, regarding the denial and on June 7, 2016, a written order was issued by the undersigned denying the request to continue on. Despite the order denying the continuance and several phone calls made to Mr. Peters the morning of June 7, 2016, neither Mr. Peters nor Parent were present for the hearing. The hearing convened, witnesses were called by Elk Grove Unified School District, evidence was admitted, closing argument was made and the matter was submitted for decision.

On June 8, 2016, beginning at 5:26 p.m. and continuing until 7:04 p.m., several faxes were sent from Mr. Peter's office which contained a motion to reconsider the denial of the continuance. Because the motion to reconsider was received after business hours, it is considered received on June 10, 2016. On June 13, 2016, before any ruling was issued on the motion to reconsider, Division Presiding Administrative Law Judge Bob Varma was sent both an email and facsimile from Mr. Peters. Attached to the email was another copy of the motion for reconsideration and the supporting documentation. The fax letter was slightly different in content from the email but was also accompanied by the motion for reconsideration and the supporting documentation. There was no indication that a copy of the facsimile or email were sent to the attorney for Elk Grove.

On June 14, 2016, a notice of ex parte communication was served on the parties as a result of the facsimile and email to DPALJ Varma. An order to show cause was issued to Mr. Peters as a result of the ex parte communication, with the OSC hearing scheduled for June 17, 2016. The order denying reconsideration was issued by the undersigned later in the day on June 14, 2016. On June17, 2016, the OSC hearing was convened. Mr. Peters claimed to be unprepared for the hearing and asked for a continuance so that he could investigate the circumstances which led to the ex parte communications, and so that he could obtain the services of an attorney to represent him in the OSC matter. The OSC hearing was continued until Monday, June 20, 2016.

When the OSC hearing convened on June 20, 2016, Mr. Peters asked for a further continuance of more than two weeks because he had not had time to engage the services of an attorney and because his step-mother had passed away that morning. The matter was continued to Friday, June 24, 2016. Mr. Peters filed a motion to continue the OSC hearing on June 21, 2016, because, he stated, he still wanted to find an attorney and because of the death of his step-mother. Despite an order that stated that no written arguments for the OSC would be considered, Mr. Peters advanced several arguments regarding the ex parte communication and the OSC in the motion. The motion to continue was denied and the OSC hearing took place on June 24, 2016. Mr. Peters and Ms. Arrowsmith, attorney for Elk Grove, both testified under oath. At this time, the decision in the underlying matter has not been issued.

FACTUAL FINDINGS

The two improper ex parte communications sent by email and facsimile on June 13, 2016, were addressed personally to DPALJ Varma. DPALJ Varma is the direct supervisor of the undersigned, to whom the motion for reconsideration was addressed. Neither document was served on the attorney for Elk Grove.

The email was sent to DALJ Varma's work email address, an email address which is not used by parties to file documents with OAH. The subject line of the email reads: "Presiding Administrative Law Judge Bob Varma Please Review Order and Attached Motion to Reconsider." The email address identifies the sender as jim@autismlaws.com. The body of the email is as follows:

> To Presiding Administrative Law Judge Bob Varma,
>
> Please review attachments regarding Order and Motion to Reconsider. I ("Mr. Peters" "James D. Peters, III") believe Judge Broussard lost focus of the issue.
>
> Without response from opposing counsel, she referred to two cases pertaining to continuances, which were, in fact, granted by the Trier of fact. She then for some unknown reason, referenced three cases pertaining to alleged "bad faith" which were, in fact, looked into. No sanctions were in fact, deemed

appropriate. To the contrary, SEHO reversed the hearing officer's order and CDE Joyce Eckerm and General Counsel documented they would represent me in District court appeal.

The fact is, Judge Broussard left a 6 year old without representation, and submitted references to a few continuances all granted over a period from 2005-2016, and ultimately, attempted to discredit me.

There is no one who can dispute the professional opinion of my personal doctor and another physician, who reviewed the chart and concurred with a follow up letter of his own.

Additionally, the facts of the case itself cause suspect when a few days earlier my motion to recuse the assigned Judge to the case was denied, (Judge Coggins), but days later Judge Coggins was replaced.

I'm requesting you review the motion as I recover. Once back on my feet, and released from my doctor, I anticipate an expedited motion in district court pertaining to this case, which involves the Elk Grove School District dispatching the Sacramento Sheriff's deputy to Student's house to investigate, the then, 4 year old, and his parent, for a SARB violation, knowing full well the statute does not apply to children under 6 years old, only children between the ages of 6-18.

I understand I can appeal the hearing, which went forward in District court, but still believe 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 Judge.

Judge Broussard's order not only was unrelated to the issue of good cause for continuance, it also suggested good cause was related to past cases, and comments by judges, who have stated opinions which afterwards, I have been vindicated of, so much so, CDC recognized the errors. It must be noted I personally assisted OAH's presiding judge at the time with a transition from SEHO as during that time, there were very limited in ALJ's because of the strenuous transition.

I believe I am one of the most respected civil rights leaders and paralegals in the country. Judge Broussard's order, and her personal attack of what she called, my patterns and practices, is her fabrication. I have an exceptional record of success since 1994.

Thank you,

JAMES D. PETERS, III
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The body of the letter that came in via facsimile was essentially the same letter, although some sentences were in different paragraphs.

At the OSC hearings and in the motion to continue the OSC hearing on June 21, 2016, Mr. Peters took several, sometimes contradictory, positions regarding the ex parte communications. He claimed that the communications were sent to DPALJ Varma to ask him to review the motion to continue that was originally filed and the order denying the request for continuance issued by the undersigned. He claimed that the purpose of the communications was not to ask DPALJ Varma to intervene in the pending motion for reconsideration, but to make sure that Judge Varma was aware of the poor judgement of the undersigned and that his initial request for continuance should have been granted. He claimed that the request to review the pending motion for reconsideration was simply a clerical error and, that instead of reconsideration he meant to say continue. He was unable to explain, under oath, how the clerical error happened, who made the error and most importantly, why he attached the pending motion for reconsideration and all of the supporting documents for the motion for reconsideration to the communications. Mr. Peters' contention in this regard is not consistent with the communication sent.

Mr. Peters further claimed that until June 16, 2016, he was on medication and bedridden, and not fully aware of what was going on in his office. During that time period, Mr. Peters claims that he dictated the letter and email and that his staff, which consists of volunteers, was not to send the communications until some later time. Mr. Peters then claimed that he was given the ex parte letter which arrived by facsimile to sign while he was bedridden and that he signed it, but did not realize what it was. It is not clear why, as Mr. Peters claims, his staff came to his house to have him sign a letter which he had dictated while on medication and bedridden and not fully aware of what was going on but which he did not intend to send until after he returned to work. Mr. Peters claims that it was a volunteer in his office, Donna Kohatsu, who faxed and emailed the ex parte communications, without his knowledge or approval. He claimed that all of the volunteers in his office have access to send things from his personal email and that he has no relationship with Ms. Kohatsu except that she is a volunteer in his office. Mr. Peters also testified that he believed that the entire matter was closed on June 8, 2016, so the sending of the communications were not ex parte as the matter was closed.

Mr. Peters was not credible. When asked direct and narrow questions, he often answered in bits and pieces and made general sweeping statements. For instance, when asked why he thought the matter was closed, he said that he was told the matter was closed. When pressed as to who told him, he first said that OAH had told him but then he eventually stated that he was told this by the attorney for Elk Grove. When pressed for more detail, he stated that he read it in something filed by Elk Grove's attorney, yet he could not point to any document which said that the matter was closed. Mr. Peters admitted that he had not received any document from OAH indicating that the matter was withdrawn and that no decision had been rendered in the case at that time.

As to Mr. Peters' claim that he was on mediation and not aware what was going on from June 7, 2016, through June 16, 2016, he filed several other motions with declarations and arguments attesting to the fact he was the author of the documents, and Mr. Peters did not explain why he was lucid enough to write all of the other motions, and be aware of the service of those motions, but not the ex parte communications.

Mr. Peters' also stated that at the time he sent the communications to DPALJ Varma, the motion to reconsider he had filed was moot and therefore there was nothing in which DPALJ Varma could intervene. When questioned about this, Mr. Peters could not explain how he knew the motion to reconsider was moot, as the order finding it moot did not come out until one day later. This also was inconsistent with his testimony that the communications were not asking Judge Varma to intervene in the motion to reconsider but to express his dissatisfaction with the order denying the continuance. Mr. Peters' testimony about being given the letter to sign was not consistent with the evidence, as the letter faxed to DPALJ Varma was not signed. The words of the letter itself and the timing make clear Mr. Peters intent to have DPALJ Varma intervene and rule on the motion to reconsider. Overall, the communications show that Mr. Peters attempted to influence the outcome of the motion for reconsideration.

Mr. Peters, by his own declaration and testimony, is well versed in special education law and special education due process hearings in front of the Office of Administrative Hearings. He has "represented" students and their families in special education matters for approximately twenty years.

Mr. Peters' ex parte communications caused OAH and Elk Grove to spend time on this case, which otherwise would not have been spent reviewing documents, issuing and reading a notice of ex parte communication, issuing and reading an order to show cause and then participating in three OSC hearings. As a result, both OAH and Elk Grove suffered financial losses.

DPALJ Varma and the undersigned spent more than 18.50 hours in conjunction with the ex parte communications including reviewing the communication, writing the notice of

ex parte communication, the order to show cause, conducting legal research, holding the OSC hearings, denying the motion to continue the OSC hearing and writing this order. The billing rate for DPALJ Varma and PALJ Broussard was $272.00 per hour. This resulted in a cost to OAH of $5032.00.

Elk Grove alleges that the special education director and program specialist each spent five hours as a result of the ex parte communication, one at $55.00 per hour and one at 56.81 per hour, for a total of $559.05. Elk Grove also alleges that its attorneys spent 4.8 hours, total, between two attorneys, at a rate of $242.00 per hour as a result of the ex parte communication, for a total of $1161.60.

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."

Mr. Peters contends that the email and facsimile were not an ex parte communication because he believed the matter was closed. He also argued that the attachments to the email and facsimile were provided earlier to Elk Grove in the motion for reconsideration which he had earlier filed and served on Elk Grove, and also that he did not send the documents to either ALJ Marson, who presided over the hearing or the undersigned. Mr. Peters' arguments are 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 and facsimile to DPALJ Varma, the undersigned's supervisor and asking for his intervention, he was communicating indirectly with the undersigned, as well as ALJ Marson.

Mr. Peters' contention that he did not intend for the communication to be sent when it was or that he thought the matter was closed 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 Mr. Peters' experience in special education, knowledge of hearing process, the wording of the email and facsimile, and the timing of the communications, one can only draw the conclusion that Mr. Peters' purpose in sending the ex parte communication was to have his concerns acted upon when determining the motion to reconsider. Finally, he is responsible for all correspondence that comes from his office. Even if Mr. Peters has volunteers sending emails and facsimiles from him without his approval or knowledge, he remains responsible for the contents of the communications. For these reasons and those detailed above, Mr. Peters' communications constitute ex parte communications 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).) Mr. Peters' ex parte communication clearly was not regarding a matter of procedure or practice that was not in controversy. He wanted his request for reconsideration granted and Elk Grove had filed an opposition to the motion for reconsideration. The content of the communications focused on his disapproval of the undersigned's order denying his continuance request. Mr. Peters' ex parte communication does not fall within any of the other exceptions created by statute. (Gov. Code, §§ 11430.20, 11430.30, 11430.70.) Therefore, Mr. Peters' email and facsimile are impermissible ex parte communications 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 Mr. Peters' 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 Elk Grove to Mr. James Peters?

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.)

Mr. Peters' argues that he was not acting in bad faith when he sent the email and facsimile to DPALJ Varma. He testified that he sent the communications because he thought the matter was closed; because he wanted to express displeasure with the undersigned's ruling on his motion to continue; that he did not intend to send the communications when they were sent and they were sent prematurely; that he had no idea they were sent when they were; that the communications were not asking DPALJ Varma to take any action; and they were not regarding the pending motion for reconsideration. Mr. Peter's arguments are at odds with each other and a plain reading of the communications. None of the arguments are persuasive. The subject line of the communications was clearly regarding the pending motion for reconsideration and the body of the communications ask for DPALJ Varma's intervention.

The content of the ex parte communication details Mr. Peter's concerns regarding the undersigned's "loss of focus." He further states" I'm requesting you review the motion as I recover." This last sentence speaks of the motion in the present tense and asks for DPALJ's direct intervention because it "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 Judge."

Mr. Peters, was seeking the assistance of the undersigned's supervisor to interfere with the adjudicative process by attempting to circumvent the undersigned's independent judicial discretion. Mr. Peters sent the letters without service to the opposing party and did not properly file these documents with the Office of Administrative Hearings. As such, Mr. Peters' 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 Mr. Peters' bad faith action or tactic of sending the prohibited ex parte communications was "frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 128.5, subd. (b)(1).) Any reasonable attorney would agree that Mr. Peters' action of sending the prohibited ex parte communications 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, Mr. Peters' is not an attorney, he clearly is very experienced with the special education due process hearing process. Furthermore, when Mr. Peters sent the prohibited ex parte communications to DPALJ Varma, he was acting in his official capacity as the representative for Student.

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.)

As required by Government Code section 11430.50, after reviewing the prohibited ex parte communication, the undersigned made the ex parte communication 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 a variety of orders to be issued, OSC hearings convened and motions and oppositions to be made.

However, given the circumstances, shifting of all of the expenses is not warranted in this circumstance. Mr. Peters will not be required to pay the expenses incurred by OAH as a result of the improper ex parte communications, given the fact that there is no ongoing record of ex parte communications sent by him to OAH and because the hearing was completed at the time he sent the communication, although both the order regarding the motion to reconsider and the decision were still pending. Further, the amount of time claimed by Elk Grove employees as a result of the ex parte communications is excessive, given they had representation by an attorney at all times. Mr. Peters' will be ordered to pay two hours of expenses for Elk Grove's special education director at $ 56.81 per hour, because his attorney

was required to consult with the special education director, and keep him apprised of the issues regarding the ex parte communication and the OSC hearings. Mr. Peters will be ordered to pay all 4.8 hours of the attorney time incurred by the two attorneys representing Elk Grove in this matter at $242.00 an hour. The expenses were incurred as the result of Mr. Peters' bad faith actions and tactics that were frivolous. Accordingly, Mr. Peters shall be ordered to pay the reasonable expenses of Elk Grove and its attorneys in the amount of $1275.22. The costs shall be paid by Mr. Peters and not Student or Parent.

ORDER

1. Within 30 days, James Peters, III, shall pay Elk Grove Unified School District for costs in the amount of $1275.22.

IT IS SO ORDERED

DATE: July 5, 2016

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