BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Consolidated Matters of:<br><br>PARENT ON BEHALF OF STUDENT,<br><br>v.<br><br>FOUNTAIN VALLEY SCHOOL DISTRICT, | OAH Case No. 2017051181 |
| FOUNTAIN VALLEY SCHOOL DISTRICT,<br><br>v.<br><br>PARENT ON BEHALF OF STUDENT. | OAH Case No. 2017030021<br><br>ORDER GRANTING IN PART AND DENYING IN PART DISTRICT'S MOTION TO STRIKE STUDENT'S REPLY TO ITS OPPOSITION TO THE MOTION TO CONSOLIDATE |

On May 24, 2017, Student filed a request for due process hearing with the Office of Administrative Hearings in OAH Case Number 2017051181 naming Fountain Valley. Student also filed a motion to consolidate its case with OAH Case Number 2017030021, which Fountain Valley filed naming Student at the end of February 2017.

On May 25, 2017, Fountain Valley filed an opposition to consolidation of the two cases. On May 26, 2017, Student filed a reply to the opposition, accompanied by a declaration of one of Student's attorneys as well as several exhibits which appear to be several pieces of correspondence between the parties' attorneys.

On May 30, 2017, Fountain Valley filed a motion to strike Student's reply in its entirety, claiming that OAH does not authorize parties to file a reply to an opposition to a motion, and because it does not believe a party can submit a supporting declaration and other documents in relation to its already pending motion. Further, Fountain Valley claims the reply contains a sentence concerning a conversation that occurred during mediation between the parties and since mediation is confidential, this is further reason why the reply should be stricken.[1]

[1] On June 1, 2017, Student filed an errata to its reply, evidentiary objections to the declaration of Fountain Valley's attorney attached to the motion to strike, and a reply to the motion to strike. The reply was considered by the ALJ ruling on the motion. No action will be taken on the evidentiary objections as the motion to strike is now being ruled upon.

## APPLICABLE LAW

There are no statutory provisions governing a motion to strike in a special education proceeding. Therefore, like other administrative agencies in similar situations, OAH looks to the Code of Civil Procedure for guidance. (See, e.g., *Brovelli v. Superior Ct.* (1961) 56 Cal.2d 524, 530 (in the absence of Government Code provisions specifying the manner of service of a summons in an administrative investigation by the attorney general, the court found it "reasonable to conclude that the process provided for in the Government Code is governed by the summons provisions of the Code of Civil Procedure insofar as appropriate.").)

Code of Civil Procedure section 436 provides that a court in its discretion may, upon terms it deems proper, strike "any irrelevant, false, or improper material inserted in any pleading . . . or any pleading not drawn or filed in conformity with the laws of this state, a court rule or an order of the court."

Section 436, subdivision (b), authorizes "the striking of a pleading due to improprieties in its *form* or in the *procedures* pursuant to which it was filed. This provision is commonly invoked to challenge pleadings filed in violation of a deadline, court order, or requirement of prior leave of court." (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 528, as modified on denial of reh'g (Apr. 24, 2008).)

It is well-established that special education mediation is a confidential proceeding. "Anything said, any admission made, and any document prepared in the course of, or pursuant to, mediation . . . is a confidential communication, and a party to the mediation has a privilege to refuse to disclose and to prevent another from disclosing the communication, whether in an adjudicative proceeding, civil action, or other proceeding." (Cal. Code Regs., tit. 5, § 3086, subd. (b)(1).) This includes any activities or actions of parties pursuant to the mediation process. (Cal. Code Regs., tit. 5, § 3086, subds. (b)(2) and (3).)

## DISCUSSION

Fountain Valley cites title 1, sections 1016 and 1022 of the California Code of Regulations as authority for Student's entire reply to be stricken, because Student did not follow the procedures outlined in those sections. However, these sections apply to formal hearings before OAH pursuant to Government Code sections 11500, et seq. Special education hearings are somewhat less formal proceedings governed, for the most part, by Government Code sections 11400 et seq., Education Code sections 56500, et seq., and special education regulations found in title 5 of the California Code of Regulations, sections 3080, et seq. There is nothing in these provisions that prevents a party from filing a reply to an opposition, or specifically limiting what can be attached to a reply including sworn

declarations and documentary evidence, other than what is specifically prohibited, such as the sentence pertaining to mediation conversations discussed in the following paragraph.[2] Fountain Valley's motion to strike Student's reply in its entirety is denied.

Student's reply to Fountain Valley's opposition contains one sentence on page 6, which begins on line 18 and ends on line 19, concerning a statement made in mediation. It is unclear in reading the sentence whether the statement referred to was made "in the course of or pursuant to[ ] mediation[,]" or at the mediation, but not as part of the mediation process. However, because it is possible that the alleged statement was made as part of the mediation process, it will be stricken.

ORDER

1. Fountain Valley's motion to strike Student's reply in its entirety is denied.

2. Fountain Valley's motion to strike Student's reply is granted in part. The sentence on page six of the reply, beginning on line 18, and concluding on line 19, shall be stricken.

IT IS SO ORDERED.

DATE: June 2, 2017

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Rebecca Freie
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REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings

[2] Usually, if a party files a motion with OAH in a special education case, the other side is given three business days to file a response to the motion. Thereafter the motion is considered to be ripe for ruling. However, if the motion has not yet been ruled upon, and an additional pleading is filed by one of the parties, it will be considered, unless specifically prohibited.