BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. NEW HAVEN UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013010236 ORDER DENYING MOTION FOR MONETARY SANCTIONS

On April 12, 2013, Attorney Melanie Seymour, representing the New Haven Unified School District, (District), filed with the Office of Administrative Hearings (OAH) a motion to impose monetary sanctions against Attorney Nicole Hodge Amey, representing Parent on behalf of Student (Student). The District seeks an order shifting expenses for Student to reimburse attorneys' fees for time spent opposing his motion to amend and in preparing the motion for sanctions. The District alleges that Student's April 11, 2013 motion to amend his complaint was frivolous, filed in bad faith, and failed to comply with the April 9, 2013 Order Following Prehearing Conference (PHC) requiring that it be supported by a declaration establishing good cause as to why the motion was not made during the PHC.[1] Further, the District seeks sanctions on the grounds that Student's declaration in support of his motion references confidential mediation discussions. On May 29, 2013, the first day of hearing, the District was ordered to file a supporting declaration as to the specific monetary amount it sought to recover from Student by June 5, 2013. Student was given until June 10, 2013, to file any written opposition. OAH timely received the parties' further pleadings.

APPLICABLE LAW

In certain circumstances, an administrative law judge (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

[1] Student's motion to amend was received after business hours on April 10, 2013, and therefore is deemed filed as of the next business day.

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. An ALJ presiding over a hearing 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, and subjective bad faith may be inferred. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

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).)

An amended complaint may be filed when either (a) the other party consents in writing and is given the opportunity to resolve the complaint through a resolution session, or (b) the hearing officer grants permission, provided the hearing officer may grant such permission at any time more than five (5) days prior to the due process hearing. (20 U.S.C. §1415(c)(2)(E)(i).) The filing of an amended complaint restarts the applicable timelines for the due process hearing. (20 U.S.C. §1415(c)(2)(E)(ii).)

DISCUSSION

Disclosure of Confidential Settlement Negotiations

The hearing officer has the ability, and responsibility, to control due process proceedings under the Individuals with Disabilities Education Act (DEA) similar to those in

a civil or criminal action before other tribunals. Student's counsel committed a serious breach of her professional and ethical obligations to maintain the confidentiality of mediation discussions by referencing mediation discussions in her declaration.

At hearing, the undersigned administrative law judge (ALJ) denied the District's motion to strike Student's declaration, but admonished Student's counsel regarding her breach of confidentiality and ordered her to submit a redacted declaration in support of the prior motion to amend, omitting details of the mediation discussions.[2] The District contends Student's amended declaration is not sufficiently redacted as it continues to reference confidential settlement discussions. Student's counsel timely filed her amended declaration which is found to be sufficiently in compliance with the order for redaction.

Compliance with Statutory Timelines and OAH Orders

The hearing in this matter was originally set for April 16, 2013. Student's motion to amend was not received until after 5:00 p.m. on April 10, 2013, and therefore was not filed until April 11, 2013, within five days of the hearing date. The District is correct that the timing of Student's motion to amend would make granting the motion within five days of the date of hearing impossible. As the experienced attorney representing Student is aware, parties appearing before OAH have three business days to file an opposition to a pre-hearing motion. Therefore, Student's motion was not timely as it was not filed sufficiently in advance of hearing to allow time for the District to reply and for OAH to issue an order granting the motion. Further, Student originally filed his motion to amend without a supporting declaration establishing why the motion was not brought earlier as required by the Order Following PHC. Student submitted a declaration under separate cover the next business day. Student is expected to comply fully with all orders issued by OAH. The fact of Student's untimely filing, without District's agreement to amend, supports a finding that Student's filing was frivolous.[3]

The District's motion for sanctions has merit and Student's counsel is strongly admonished to adhere to the highest level of professional conduct and abide by all statutory rules and regulations governing special education proceedings and settlement negotiations, as well as orders of this tribunal. However, the District has not made a showing of improper purpose. On this record, Student will not be required to reimburse the District for fees incurred in responding to Student's motion to amend or in filing for sanctions.

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[2] OAH uses a paperless document maintenance system. Student's original declaration will be password protected and secured to maintain confidentiality.

[3] The District, however, was not required to file a reply in light of the fact that OAH had no authority to grant Student's motion.

ORDER

The District's motion for sanctions is denied.

Dated: June 27, 2013

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings