BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: WALNUT VALLEY UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH CASE NO. 2013110878 ORDER DENYING "REQUEST TO REMOVE ATTORNEY" AND DENYING REQUEST FOR RECONSIDERATION OF ORDER GRANTING DISTRICT'S MOTION TO AMEND

On April 1, 2014, Student filed a "Request to Remove Attorney and Fagen Friedman and Fulfrost for Cause" and "Request to Have Original Due Process Complaint Restored." OAH interprets these two requests as a request for sanctions and a request for reconsideration of the order granting District's motion to amend the complaint. Each of Student's requests is separately addressed below, and both requests are denied.

Relevant Procedural History

District filed a request for a due process hearing on November 25, 2014, alleging the single issue of whether District's 2013 initial assessments of Student were appropriate, such that it need not fund an independent educational evaluation (IEE). On February 14, 2014, District filed a motion to amend the due process hearing request to add the issue of whether it properly denied Student eligibility for special education following an IEP team meeting in May 2013. The motion to amend was granted on February 20, 2014.

On February 21, 2014, District filed a notice that it had withdrawn the original issue of whether its assessments were appropriate, and intended to proceed to hearing solely on the issue of whether it properly denied Student eligibility for special education in May 2013.

Request to Remove Attorney

In the April 1, 2014 motion, Student contends that District's attorney of record, and her law firm, should be "removed" from representing District. The first reason alleged was that District's attorney "intentionally omitted critical information" when seeking an order permitting District to amend its complaint on February 14, 2014. Student notes that by February 21, 2014, District had offered to reimburse parents for a parentally obtained IEE in the amount of $3,000. As evidence of the alleged omission, Student includes a letter from District dated February 11, 2014 in which District refused to reimburse Parents the $3,000, and a letter from District dated February 21, 2014, in which District states that although District stood behind its assessments, it had made the financial decision to settle the IEE claim and proceed to hearing solely on the denial of eligibility claim.

The second reason alleged was that District's attorney engaged in a "cover-up" of destruction of school records that is currently the subject of a compliance complaint to the California Department of Education. Specifically, Student alleges statements by District's attorney in a letter to the California Department of Education about whether IEP recordings were retained, or even existed, for the IEP's at issue, were inconsistent with a statement by a District employee that District only destroyed recordings of IEP meetings after verifying that Parents had a copy.

The final reason alleged for removal is related to the first: that District's attorney allegedly made false statements in District's motion to amend. Specifically, Student alleges District's attorney was not being truthful by alleging that in a November of 2013 written notice to District from Parents, in which Parents requested an IEE, Parents did not specify the exact nature of their disagreements with District's assessments, other than Parents' request for an neuropsychological evaluation by someone specializing in gifted children. Parents contend this is untruthful because IEP team meeting notes from May 2013 show that the subject of their request for a neuropsychological IEP was discussed then.

As an initial matter, "removal" of an attorney or law firm is not an available sanction. In hearings before OAH, the only available sanctions are contempt of court, or an order to pay expenses, including attorney fees. Specifically, the Administrative Procedure Act applies to special education hearings under California Code of Regulations, title 5, section 3088. Sanctions or expense shifting may only be initiated by the presiding hearing officer, and the failure to do so is not appealable. (Cal. Code Regs., tit. 5, § 3088, subd. (d).) The following are grounds for a contempt sanction under the Administrative Procedure Act:

> (a) Disobedience of or resistance to a lawful order.
> (b) Refusal to take the oath or affirmation as a witness or thereafter refusal to be examined.
> (c) Obstruction or interruption of the due course of the proceeding during a hearing or near the place of the hearing by any of the following:
> (1) Disorderly, contemptuous, or insolent behavior toward the presiding officer while conducting the proceeding.
> (2) Breach of the peace, boisterous conduct, or violent disturbance.
> (3) Other unlawful interference with the process or proceedings of the agency.
> (d) Violation of the prohibition of ex parte communications under Article 7 (commencing with Section 11430.10).
> (e) Failure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer, or moving, without substantial justification, to compel discovery.

(Gov. Code, §11455.10; see also Gov. Code, § 11455.20 [Requiring presiding officer at hearing or agency head to certify facts to superior court, where contempt proceeding is held.].)

A sanction of shifting expenses from one party to the other may be imposed for "bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Gov. Code, § 11455.30, subd. (a).) "Actions or tactics" includes the making or filing of motions. (See Gov. Code, § 11455.30, subd. (a) [incorporating Code of Civ. Proc., § 128.5, subd. (b) by reference].) "Frivolous" means "totally and completely without merit or … for the sole purpose of harassing an opposing party." (*Ibid.*)

Here, as to the first and third grounds argued by Student, there was no evidence of an omission or false statement in the motion to amend. Specifically, the evidence provided by Student showed that as of February 11, 2014, days before the motion to amend was filed, District was still taking the position that it would not fund Student's neuropsychological IEE. By February 21, 2014, the same date District withdrew the IEE issue, District informed Student that it had changed its mind. Specifically, District noted in its letter to Parents that although it still believed its assessment was appropriate, it had made a cost/benefit analysis and decided to focus on the merits of whether Student was appropriately denied special education in May 2013. There is no showing that District's attorney omitted anything at the time the motion to amend was filed. Parties to legal proceedings frequently change course and decide to settle for purely financial reasons. Similarly, there is no showing District misrepresented any material facts. Parents quote a line from District's motion that is related solely to the sufficiency of the written notice of an IEE request by Parents in November 2013. Parents argue this was false because they verbally gave all of their reasons for an IEE at a May 2013 IEP team meeting. Comparison of what District alleged was in a written notice in November to what parents allege they said at an IEP meeting in May does not prove District's attorney was making a false statement. More importantly, neither of the above allegations are material to whether District's motion to amend had merit. The motion was granted for the sole reason that District sought to add an issue closely related to the assessments, i.e., whether District correctly concluded from its assessments that Student was not eligible for special education.

In sum, neither an omission, nor a false statement worthy of sanctions occurred.

As to the second ground alleged by Student's Parents, that District's attorney was intentionally lying about District's document retention policies in a letter to the California Department of Education, and/or the existence of records relevant to this action, sanctions are not appropriate. First, the alleged misstatements by District's attorney allegedly were made to the California Department of Education during the course of Student's compliance complaints to that agency. The statements were not made as part of this proceeding, but allegedly made as part of Parents' first compliance complaint and request for investigation to the California Department of Education regarding document production, and now Parents indicate they have filed another compliance complaint on the same issue. As a result, there is nothing within OAH's jurisdiction on which to grant sanctions. Even if considered, no grounds for sanctions were shown. Comparing the written statements of District's attorney to the California Department of Education about the documents in this case, to a note from a District administrator about recording retention policies, does not demonstrate the type of

bad faith action required for contempt or monetary sanctions. Sanctions are not appropriate on this basis either.

Request for Reconsideration of Order Granting District's Motion to Amend

Student also requests that OAH reconsider the order granting District's motion to amend. Specifically, Student contends that the alleged omissions and misrepresentations alleged above provide grounds for reversing the order granting the motion to amend. Student further contends that amendment to allege an issue regarding the May of 2013 IEP team meeting is not proper because no IEP team meeting has been conducted on Parents' recently-obtained IEE.

OAH will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.)

Here, Student alleges new or different facts in the form of allegations that Student now believes District's motion was based on misleading omissions or misrepresentations. However, these new allegations do not require a change to the order granting amendment. As discussed above, there is no evidence of any statements in the motion to amend that were materially false or misleading. To the contrary, District reasonably sought to add an issue that was closely related to the assessment issue, and reasonably sought to settle and withdraw the IEE issue in order to focus on the substance of whether the May 2013 denial of special education eligibility was correct. Nothing in special education law prohibits District from seeking a hearing on whether its actions in May 2013 were correct. (See Ed. Code, § 56501, subd. (a) [Parent or school district may file a request for a due process hearing for issues including "refusal to initiate" special education eligibility.].) The fact that after May 2013, Parents obtained an independent assessment of Student that has not yet been discussed at an IEP team meeting in 2014 does not bar holding a hearing on whether District's finding of ineligibility in May of 2013 was correct. No grounds for reconsideration of the order granting District's motion to amend have been shown.

IT IS SO ORDERED.

DATE: April 08, 2014

/s/

RICHARD T. BREEN
Presiding Administrative Law Judge
Office of Administrative Hearings