BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2018020378
v.	ORDER REJECTING COMPLAINTS; SEALING THE RECORD; AND ENFORCING MEDIATION CONFIDENTIALITY
BUTTE VALLEY UNIFIED SCHOOL DISTRICT AND SISKIYOU COUNTY OFFICE OF EDUCATION.	

On February 7, 2018, Martha A. Millar, Law Offices of Martha Millar, filed a due process hearing complaint on Student's behalf naming Butte Valley Unified School District and Siskiyou County Office of Education as respondents ("second complaint," OAH Case No. 2018020378).

In the second complaint, Ms. Millar referenced a previous case filed on Student's behalf on November 20, 2017, against the same respondents ("original complaint," OAH Case No. 2017110885 "original matter"). The second complaint included specific statements allegedly made by the mediator during mediation while in caucus with one party. The statements are directly related to the issues raised in the second complaint.

On February 9, 2018, Student withdrew the second complaint without prejudice. On February 9, 2018, Student filed a third complaint ("third complaint," OAH Case No. 2018020477). The third complaint contains identical language to the second compliant regarding the statements allegedly made during the mediation in OAH Case No. 2017110885.

On February 12, 2018, Respondents filed a motion to dismiss the request for expedited special education due process hearing, motion to strike portions of the complaint, and a request for sanctions against Student's attorney.

Rejection of Complaints

Parents have the right to present a complaint, "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) OAH has jurisdiction to hear due process claims arising under the Individuals

with Disabilities Education Act. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029 [hereafter *Wyner*].)

OAH has jurisdiction over the three complaints filed in this matter. The relief sought in the second and third complaints, however, is predicated in significant part, on alleged statements during a mediation in the original matter. Statements made during a mediation are confidential. California Education Code section 56500, subdivision (f), provides that a written mediation agreement must include the statement that, "discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding." Title 5, California Code of Regulations section 3086, subdivision (b)(1) provides that, notwithstanding any other provision of law, "[a]nything said, any admission made, and any document prepared in the course of, or pursuant to, mediation under this article 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."

Confidentiality is the cornerstone of mediation and the privileged nature of the communications made therein is sacrosanct. Statements contained in Student's second and third complaints violate the confidentiality provisions related to mediation. No evidence was provided that the mediation participants waived that privilege. This violates Education Code section 56500, subdivision (f), and title 5, California Code of Regulations section 3086, subdivision (b)(1).

The Education Code and regulations are silent regarding the consequence of a mediation participant violating the mediation privilege. Evidence Code section 1121, while not directly applicable, provides guidance in this context. It states that, "[n]either a mediator nor anyone else may submit to a court or other adjudicative body, and *a court or other adjudicative body may not consider*, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118." (italics added).

Careful consideration was given to the appropriate action to be taken in this situation, including striking the confidential statements from the complaints. Student's withdrawal without prejudice of the second complaint does not ameliorate the issues created by the inappropriate disclosure of confidential mediation communications. As noted above, the statements are inextricably linked to the issues raised and requested remedies. Evidence Code section 1121's prohibition against *any* adjudicative body considering a mediator's recommendation or finding, is consistent with Evidence Code section 560500 and title 5, California Code of Regulations, section 3086, subdivision (b)(1), which are both directly applicable to special education matters. Therefore, the entire second complaint is rejected by OAH, and Student's attempted withdrawal is moot. Student's third complaint is rejected, without prejudice, for the same reasons. As both Student's second and third complaint are rejected, respondents' motion to dismiss the request for an expedited special education due

process hearing, motion to strike portions of the compliant, and request for sanctions is denied as moot at this time.

Order Sealing Documents

The second complaint, third complaint, this order, respondents' motion and any documents submitted in both matters are hereby sealed. This sealing order does not apply to any documents filed in the original matter OAH 2017110885.

Order Regarding Further Communication

All parties are ordered to maintain confidentiality and not discuss or further disclose in any forum, statements made during the mediation in the original action without written waivers from all parties to the mediation, including the mediator.

IT IS SO ORDERED.

DATE: February 13, 2018

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Joy Redmon
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JOY REDMON
Presiding Administrative Law Judge
Office of Administrative Hearings