BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. SPRINGS CHARTER SCHOOLS AKA RIVER SPRINGS CHARTER SCHOOL,	OAH Case No. 2018031003
RIVER SPRINGS CHARTER SCHOOL, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2018060667 ORDER FOLLOWING PREHEARING CONFERENCE; GRANTING IN PART STUDENT'S MOTION FOR OFFICIAL NOTICE; DENYING STUDENT'S MOTION FOR STAY; AND DENYING RIVER SPRINGS'S MOTION RE: STATUTE OF LIMITATIONS/ BIFURCATION AS MOOT

On September 14, 2018, a telephonic prehearing conference was held before Administrative Law Judge Elsa H. Jones, Office of Administrative Hearings. Punam P. Grewal and Michelle B. Powers, Attorneys at Law, appeared on behalf of Student and Parents (collectively, Student). Deborah R.G. Cesario and Kenneth Bounds, Attorneys at Law, appeared on behalf of Springs Charter Schools AKA River Springs Charter School. The PHC was recorded.

River Springs filed its response to Student's second amended complaint on June 4, 2018, which permits the hearing to go forward on Student's case. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

Based upon discussion with the parties, the ALJ issues the following Order:

1. Hearing Dates, Times, and Location. The hearing on the consolidated cases shall take place on September 25-27, 2018, and shall continue day to day, Monday through Thursday as needed, at the discretion of the ALJ. The hearing shall take place at River Springs's offices located at 27740 Jefferson Avenue, Suite 100, Temecula, California 92590.

The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.

As ordered in the scheduling order, the named local educational agency shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. The named local educational agency certified that the facilities used for this case comply with the law. The local educational agency shall inform OAH within two days of the date of this order if it is unable to comply with this Order.

Prior to the beginning of the hearing, River Springs shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum: (1) a table for Student and his representatives; (2) a table for River Springs representatives; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. River Springs shall provide drinking water and tissue to all parties, witnesses and the ALJ. River Springs shall use its best efforts to ensure that the same hearing room is used for each day of hearing and shall be available at least one hour prior to the commencement of the hearing each day. The hearing room shall be locked following the hearing each night. River Springs shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing "good cause" to continue the hearing if the witness was not properly notified of the hearing date or properly subpoenaed, as applicable.

2. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are listed below.

Student's Issues

1. Did River Springs deprive Student of a free appropriate public education during the period from March 21, 2016 to August 2017, by failing provide her appropriate instruction and services, goals, and present levels of performance to address her unique needs in the following areas: (a) occupational therapy; (b) speech; (c) specialized academic instruction; (d) assistive technology; (e) educationally related mental health; (f) behavior; (g) vocational support; (h) social skills; and (i) adaptive living?

2. Did River Springs deny Student a FAPE in the least restrictive environment by offering placement at Flabob Airport Preparatory Academy in the March 2, 2018, IEP?

3. Did River Springs deprive Student of a FAPE by failing to assess Student in the following areas of suspected disability from March 21, 2016 to August 2017: (a) health/development; (b) academics; (c) cognition: (d) occupational therapy; (e) fine/gross

motor skills; (f) vision; (g) speech and language; (h) self-help/adaptive skills; (i) central auditory processing disorder; (j) socialization; (k) mental health; (l) attention; (m) behavior; (n) transition/vocational skills; and (o) assistive technology?

4 Did River Springs deprive Student of a FAPE from March 2016 through August 2017 by reason of a material failure to implement the following services:

(a) The specialized academic instruction offered in the individualized education programs of March 30, 2016, April 26, 2016, January 12, 2017, March 23, 2017, April 28, 2017, and May 12, 2017; and

(b) The specialized academic instruction, occupational therapy, speech and language, and counseling services offered in the August 4, 2017 IEP, during the period from April 19, 2018 through May 21, 2018?

5. Did River Springs deprive Student of a FAPE by failing to provide all educational records of Student in response to Student's requests therefor, including the requests made in March and September 2016, and May 2018?

6. Did River Springs deprive Student of a FAPE by predetermining Student's placement in the March 2, 2018, IEP?

7. Did River Springs fail to provide Student a FAPE by failing to provide clear and coherent offers of a FAPE in each of the following IEP's: March 30, 2016, April 26, 2016, January 12, 2017, March 23, 2017, April 28, 2017, May 12, 2017, August 4, 2017, October 6, 2017, November 7, 2017, February 9, 2018, and March 2, 2018?

8. Did River Springs deprive Student of a FAPE by failing to provide appropriate prior written notice at all times from March 30, 2016 through March 21, 2018?

9. Did River Springs deprive Student of a FAPE by failing to include all necessary IEP team members at every IEP team meeting from March 30, 2016 through March 2, 2018?[1]

Student's proposed resolutions include an order that River Springs (1) provide Student with a clear and coherent offer of a FAPE; (2) placement at Prentice School for the 2018-2019 school year with the same services, transportation reimbursement, and extended school year offer as were contained in the August 4, 2017 IEP; (3); independent evaluations in all areas of need; (4) compensatory education; (5) reimbursement for all education-related expenses incurred by Parents; (6) train staff in special education law and procedure; (7) give Student a complete copy of her educational records.

[1] Student's Second Amended Complaint also included language with respect to this issue that the subject IEP team meetings were not held "timely." At the PHC, Student withdrew any claims pertaining to timeliness of IEP team meetings with respect to Issue 9.

To clarify Student's Issues 5 and 7, the ALJ orders:

(1) On September 21, 2018, at 10:00 a.m., the parties shall telephonically meet and confer to discuss the specific educational documents that Student contends River Springs has not produced, and that are the subject of Student's Issue 5. Prior to the meet and confer, and by no later than September 20, 2018, at 10:00 a.m., Student shall provide River Springs with a written list of the educational records that Student contends have not been produced, including a description of the time periods of any such documents. (For example, "All speech and language service logs from the first semester of the 2017-2018 school year."); and

(2) By no later than noon on September 21, 2018, Student shall file with OAH and serve on River Springs a list of each IEP that is the subject of Student's Issue 7, as set forth above, and a brief description of the manner in which each such IEP does not state a clear and coherent offer of a FAPE.

District's Issues

1. Did the February 9, 2018, IEP offer Student a FAPE in the least restrictive environment, such that River Springs may implement the IEP without Parents' consent.

2. Were River Springs's assessments in the areas of health/development, academics, cognition, occupational therapy, fine/gross motor skills, vision, speech and language, self-help/adaptive skills, central auditory processing disorder, socialization, mental health, attention, behavior, transition/vocational skills, and assistive technology appropriate such that Student is not entitled to independent evaluations at River Springs's expense?

As resolutions, River Springs seeks an order that it may implement Student's February 9, 2018, IEP, despite Parents' lack of consent; and an order that its assessments were appropriate such that Student is not entitled to independent evaluations at River Springs's expense.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letters "S" in front of the exhibit to designate that it is a Student exhibit, and "D" in front of the exhibit to designate that it is a Charter School exhibit (for example, "S-1" or "D-2"). Each exhibit shall be internally paginated, by exhibit, or all of a party's exhibits shall be consecutively numbered, by Bates-stamp or similar method, commencing with the first page of the first exhibit and ending with the last page of the last exhibit. Each exhibit binder shall contain a detailed table of contents. Each party shall serve an exhibit binder containing its respective exhibits on the other party by September 18, 2018, in compliance with Education Code section 56505, subdivision (e)(7). At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Documents offered as evidence to support a request for reimbursement must be separated by vendor and should be internally chronological where possible. To the extent practicable, exhibits in the binders shall be in chronological order.

The parties shall include, as exhibits, resumes for each witness expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

River Springs shall include as part of its exhibits the school calendar(s) for the years at issue.

If any IEPs are among the exhibits, the parties shall attach all pages of the IEP, including copies of all actual signatures on the IEP and any typewritten or handwritten notes or comments, if any, written on the IEP.

Excerpts of an audio record of an individualized education program team meeting, if any, must be transcribed and offered as documentary evidence. That portion of the audio record transcribed shall be provided to the opposing party with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcription need not be done by a certified court reporter.

Unless used solely for rebuttal or impeachment, any exhibit not included in a party's final exhibit list and not previously timely exchanged shall not be admitted into evidence at the hearing at the request of that party, except for good cause shown, and at the discretion of the ALJ, and unless the ALJ rules that the exhibit is admissible.

If any document is offered at hearing for review by the ALJ or a witness but was not included in any of the exhibit books, each such document shall be tabbed, hole-punched, and page numbered as described above before being presented to the ALJ or witness.

4. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available, upon timely notice. Neither party shall be permitted to call any witnesses not disclosed in the party's final witness list, exchanged by no later than close of business on September 18, 2018, except for good cause shown, and at the discretion of the ALJ.

The parties shall be prepared at the commencement of the first day of hearing to present a schedule of witnesses for the first day of hearing. During the hearing, the parties shall keep the ALJ and each other apprised of the witness schedule. The parties shall be prepared at the beginning of the hearing, as well as at all times during the hearing, to discuss the witnesses to be presented, the order in which they will be called, and the amount of time the testimony of each witness is expected to take. The parties shall coordinate the

availability and order of testimony of witnesses to ensure that there is a witness available to testify at all times during the hearing, and to ensure that the hearing is completed as scheduled.

The ALJ has discretion to limit the number of witnesses who testify and to set the length of time allowed for the testimony of each witness. The parties are encouraged to review and curtail their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

5. Scope of Witness Examination. The parties should anticipate that each witness shall be called to testify only once, except for purposes of rebuttal or impeachment, and all parties shall examine the witness on all issues when the witness is first called. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination, at the discretion of the ALJ. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

6. Telephonic Testimony. No party has moved for leave to present telephonic testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) The proponent of the witness shall provide the proposed witness with a complete physical set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. The witness shall testify on a landline, while alone in a private room. No witness will be heard by telephone unless all these requirements have been fulfilled.

7. Electronic Recording of Hearing.

a. Audio Recording. In its PHC Statement, River Springs requested permission to make an audio recording of the hearing. The request is denied without prejudice, and may be renewed at the beginning of the hearing. If recording is allowed, it shall be subject to the following conditions, as well as any other conditions imposed by the hearing ALJ: (1) The recording device shall be shut off at the same time that the ALJ is off the record, to avoid recording conversations while off the record; (2) No prospective witness shall listen to the recording; (3) The recording shall not be transcribed; (4) Counsel who is making the audio recording shall maintain sole custody and possession of the recording, and no part of the recording shall be published or disseminated for any purpose other than to assist in the presentation of the party's case; (4) the recording will be erased or destroyed after the hearing and all opportunities for appeal from any decision herein has been exhausted; and (5) the parties shall not use the recording in any subsequent due process hearing. The recording by OAH is the only official recording; recording of the hearing by a party is not the official record and is permitted only as a courtesy. The operation of the party's recording mechanism will not be allowed to delay the hearing.

b. Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

8. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, both Student and River Springs are petitioning parties. However, the issues in Student's case are broader than those in River Springs's case, and accordingly, Student shall present her case-in-chief first.

9. Motions.

River Springs's Motion to Limit Issues/Bifurcate. On September 11, 2018, River Springs filed a motion to limit the issues or, in the alternative, to bifurcate the hearing in this matter, based upon the statute of limitations. Student filed no written opposition to the motion. During the PHC, Student agreed to limit the issues to the period within the two-year statute of limitations, and to withdraw all claims which date prior to March 21, 2016. Consequently, the motion is denied as it is moot.

Student's Request for Official Notice/Request for Stay. On September 11, 2018, Student filed its request for official notice of a an Order by the United States District Court for the Central District of California dated March 18, 2018, in the case of *C.Q. v. River Springs Charter Schools,* ED CV 18-01017 SJO (SHKx), of the proceedings in that case, and of the appeal of the March 18, 2018, order by River Springs that is pending in the Ninth Circuit Court of Appeals. River Springs filed no opposition to the request for official notice. The request for official notice is granted only as to the March 18, 2018, Order. The request is denied without prejudice as to any other documents or matters pertaining to the pending proceedings in the District Court or the Ninth Circuit.

An ALJ may take official notice of any fact which may be judicially noticed by the courts of California. (Gov. Code, § 11515.) California courts may take judicial notice of official acts of the judicial branch of the United States. (Evid. Code, § 452, subd. (c).) Accordingly, official notice may be taken of rulings of the District Court. Here, the March 18, 2018 Order involved only a ruling by the District on Student's last agreed upon and implemented educational placement for purposes of stay put. Although a ruling on the correct temporary placement of Student pending an evidentiary due process hearing and decision is not determinative of whether Student was provided a FAPE during that time, it provides the ALJ with information regarding Student's current placement, and what the parties understood regarding their respective obligations. Accordingly, OAH will take official notice of the 5-page minute order issued by the District Court in the above-reference case, dated March 18, 2018. Student shall provide a copy of the 5-page minute order as a separate, tabbed exhibit in Student's exhibit binder, and inform the ALJ of the exhibit number on the first day of hearing so that official notice can be taken on the record. Official notice will not be taken of any other document or matter pertaining to the proceedings in the

pending District Court and Ninth Circuit cases, unless a specific showing is made at hearing as to its relevance and that it is appropriate for the ALJ to take official notice of it.

Student's request for official notice also included a motion for a stay of the hearing in these consolidated matters until the Ninth Circuit decides an appeal by River Springs from the District Court ruling determining Student's stay put placement. Student relies upon Federal Rules of Appellate Practice, Rule 8, permitting a party to stay enforcement of a lower court judgement pending appeal. Student also contends that the issues to be decided in this matter overlap with those to be decided in the Ninth Circuit appeal.

On September 14, 2018, River Springs filed its opposition to the motion for stay.

Hearings before OAH, a state agency, are conducted pursuant to the Administrative Procedures Act (Gov. Code, § 11370, et seq.), and the Federal Rules of Appellate Practice do not apply to due process proceedings. The Individuals with Disabilities Education Act provides that orders of state agencies are deemed final unless and until vacated or modified by the appropriate federal court. (20 U.S.C. § 1415(i).) Accordingly, OAH has no authority to automatically stay due process proceedings, and any stay should be issued by the appropriate federal court. Here, Student may seek a stay of proceedings from the Ninth Circuit.

More importantly, stay put placement is only a *temporary* measure pending completion of the due process hearing. (20 U.S.C. § 1415(j).) Student's request to stay this hearing until the stay put issue is determined by the Ninth Circuit would not only delay the resolution of the issue of whether Student received a FAPE, but would also delay the implementation of any remedies to which Student might be entitled should she prevail at hearing. Such a use of stay put is entirely inimical to the IDEA's and Education Code's mandate of a timely decision regarding whether a child with a disability received a FAPE. (See 34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).)

In addition, the doctrine of issue preclusion, urged by Student, does not apply. The issue of Student's temporary placement (placement according to the last agreed upon and implemented IEP) is not determinative of the issues in this case, which involve whether River Springs offered Student a FAPE, or whether the alleged failure to implement an IEP resulted in a denial of a FAPE. Indeed, the federal courts may not decide Student's FAPE claims until those issues are resolved at a due process hearing at the administrative level by OAH. (20 U.S.C. § 1415(l); *Fry v. Napoleon Community Schools* (2017) __ U.S. __ [137 S. Ct. 743, 754].) Accordingly, Student's motion for a stay of due process proceedings pending the appeal of OAH's stay put order is denied.

No additional pretrial motions are pending or contemplated. Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made three business days prior to the PHC of September 14, 2018.

10. Compensatory Education/Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

11. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in writing.

12. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off or placed on the vibrate setting during the hearing unless permission to the contrary is obtained from the ALJ. There shall be no weapons in the hearing room, except for those that are carried by authorized law enforcement personnel while they are present in the hearing room.

13. Special Needs and Accommodations. No party has requested language interpretation or translation services or any other accommodation.

A party or participant in this case, such as a witness, requiring reasonable accommodation to participate in the mediation or hearing may contact the assigned calendar staff, identified in the scheduling order, at (916) 263-0880, as soon as the need is known. Additional information concerning requests for reasonable accommodation is available on OAH's website at https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing Open to the Public. At the request of Student, the hearing will be open to the public. If any party anticipates that media will be present, they shall notify OAH of same in writing by no later than one business day before the media is due to appear.

15. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. Each of the parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing, or if the petitioning party withdraws the request for due process. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED, OR THE PETITIONING PARTY WITHDRAWS THE DUE PROCESS HEARING REQUEST, AFTER 3:00 P.M. THE DAY PRIOR TO HEARING, EACH OF THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE FOR OAH REGARDING THE SETTLEMENT OR WITHDRAWAL AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. IN THE CASE OF SETTLEMENT, THE PARTIES SHOULD SIMULTANEOUSLY EMAIL THE

SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO OAH AT https://www.applications.dgs.ca.gov/oah/oahsftweb.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall submit a request for a status conference and provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

16. Failure to comply with this Order and with Education Code section 56505, subdivision (e)(7), as applicable, may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: September 18, 2018

DocuSigned by:
Elsa H. Jones
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ELSA H. JONES
Administrative Law Judge
Office of Administrative Hearings