BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

TWIN RIVERS UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2023020613

ORDER FOLLOWING PREHEARING CONFERENCE CONTINUING DUE PROCESS HEARING; ORDER DENYING TWIN RIVERS' MOTION TO DISMISS; ORDER REQUIRING PARTIES TO PARTICIPATE IN RESOLUTION SESSION

MARCH 27, 2023

On March 27, 2023, Administrative Law Judge Jennifer Kelly, Office of Administrative Hearings, held a prehearing conference by videoconference. The Administrative Law Judge is called an ALJ. The Office of Administrative Hearings is called OAH. The prehearing conference is called a PHC.

Lynda Williams and Robert Burgermeister, Attorneys at Law, appeared on behalf of Student. Tilman A. Heyer, Attorney at Law, appeared on behalf of Twin Rivers Unified

School District, called Twin Rivers. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

TWIN RIVERS' MOTION TO DISMISS FOR FAILURE TO PARTICIPATE IN RESOLUTION SESSION

On March 17, 2023, Twin Rivers filed a motion to dismiss the complaint due to Student's failure to participate in a resolution session. Student filed an opposition to the motion to dismiss on March 22, 2023. Twin Rivers filed a reply to Student's opposition on March 23, 2023.

A local educational agency is required to convene a resolution meeting with the parents and the relevant members of the individualized education program team within 15 days of receiving notice of the Student's complaint. (20 U.S.C. § 1415(f)(1)(B)(i)(I); 34 C.F.R. § 300.510(a)(1).) The resolution session need not be held if it is waived by both parties in writing, or if the parties agree to use mediation. (20 U.S.C. § 1415(f)(1)(B)(i)(IV); 34 C.F.R. § 300.510(a)(3).) There are no provisions of law that allow a parent or a local educational agency to unilaterally waive the resolution meeting. (71 Fed. Reg. 47602, No. 156 (Aug. 14, 2006.)

If the parents do not participate in the resolution session, and it has not been otherwise waived by the parties, a due process hearing shall not take place until a resolution session is held. (34 C.F.R. § 300.510(b)(3).) If the local educational agency is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented, the agency may, at the conclusion of the 30-day period, request that a hearing officer dismiss the complaint. (34 C.F.R. § 300.510(b)(4).)

PARTIES' DECLARATIONS

Twin Rivers' motion to dismiss was supported by sworn declarations from its executive director of special education, Kathleen Walker, its special education coordinator, Lisa Linehan, and senior administrative secretary, Wendy Valeria, all of whom attended the resolution session on March 8, 2023. Walker, Linehan, and Valeria each declared the early resolution session convened on March 8, 2023, at 9:00 a.m., and ended at approximately 9:12 a.m. They reported that advocate James Peters and Parent attended on Student's behalf.

Walker's declaration reports she began introductions of the attendees at approximately 9:00 a.m., and explained the purpose of the resolution session as allowing the parties to discuss the complaint and the facts of the case so the district has the opportunity to resolve the dispute. Walker's declaration further states Twin Rivers had clarifying questions regarding the complaint, specifically the school year in dispute, alleged in the complaint as being one year prior to Student's enrollment in Twin Rivers. According to Walker, in response to her clarifying questions advocate Peters refused to answer the questions and stated parent wanted a settlement offer. Peters and parent disconnected from the call at approximately 9:12 a.m.

Valeria's declaration similarly reports each time Walker asked a question about the facts of the complaint, Peters asked for a settlement offer and refused to respond to clarifying questions about the complaint. Specifically, Peters stated, Parent would like to start off with an offer." In response to Walker's statement that Twin Rivers needed to clarify a few points, Peters responded, "at this point, the district is not prepared." Peters and Parent then ended the call, approximately 12 minutes after the resolution session started.

Student's opposition to Twin Rivers' motion to dismiss was accompanied by declarations from James Peters and Parent. Parent's declaration reports she wanted to know whether Twin Rivers would discuss settlement of the issues alleged in the complaint and she was "uncomfortable" talking about the issues in the complaint.

Peters' declaration similarly states Parent was interested in whether Twin Rivers would discuss a settlement offer. Peters alleges Twin Rivers attempted to involve Parent in a "lengthy discussion" about the issues, but does not specify what issues were raised by Twin Rivers. Peters' declaration does not dispute he and Parent ended the session without responding to Twin Rivers' clarifying questions about the facts of the complaint.

THE PARTIES MUST PARTICIPATE IN A RESOLUTION SESSION WITHIN 15 CALENDAR DAYS

"The purpose of the [resolution session] is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the [local educational agency] has the opportunity to resolve the dispute that is the basis for the due process complaint." (34 C.F.R. § 300.510(a)(2).) However, there is no definition of what "participation" entails at a resolution session.

Twin Rivers cites to a letter from the Office of Special Education Programs, known as OSEP, noting that "it would be inconsistent with the requirements in 34 C.F.R. § 300.510(a)(2) regarding the purpose of the resolution meeting for the [local educational agency] to refuse to discuss the issues raised in the parent's due process complaint during that meeting." (*Letter to Casey* (Mar. 27, 2013).) A parent's refusal to discuss the issues in that parent's complaint raises the same concerns.

Twin Rivers further cites to an OSEP letter in which OSEP opined that a discussion of the due process complaint and the facts that form the basis of the complaint allow

the lead educational agency "an opportunity to better understand, and possibly resolve, the dispute . . ." (*Letter to Irby* (February 12, 2010).) In *Letter to Irby*, OSEP noted nothing in the Individuals with Disabilities Education Act or its implementing regulations require that a parent agree to a specific resolution proposed by the local educational agency. OSEP suggested a school district's remedy in this situation is to reduce or shift attorney's fees to the parent or its attorney. OSEP letters may be persuasive but are not binding authority.

Twin Rivers established Student's advocate Peters obstructed the resolution session without participating in or allowing a discussion of the issues in the complaint. Student's opposition concedes Twin Rivers attempted to discuss the facts forming the basis of the complaint, but that Parent was not willing to discuss the "legal issues" and wanted to discuss a settlement offer. Student's briefing suggests Parent wanted to end the resolution session, but this is contradicted by the declarations of Peter, Walker, and Valeria, who report Peters ended the resolution session. Twin Rivers established it participated in the resolution session in the manner expected under the statutory guidance and asked Student clarifying questions about the facts of the case for the purpose of determining a way to resolve the case. Peters and Parent did not participate in the resolution session in good faith and thereby obstructed any chance of a resolution.

However, Twin Rivers did not offer legal authority holding that participating in a resolution session means more than simply attending the meeting. Therefore, Twin Rivers' motion to dismiss the action is denied. Although dismissal of the complaint is not warranted under these facts, Twin Rivers established that due to Peters' actions at the resolution session, Student did not allow Twin Rivers and Parent the opportunity to discuss the due process complaint and the facts that form the basis of the due process

complaint. This failure deprived Twin Rivers of the opportunity to resolve the dispute through the resolution session.

Every court has the inherent power to control the disposition of the cases on its docket. (*Landis v. North American Co.*, 299 U.S. 248, 254-255, 57 S.Ct. 163, 165-166 (1936).) By analogy, that same power extends to hearing officers in administrative proceedings. Cases may not proceed to hearing if a resolution session has not been held or waived, and one party may not act unilaterally to waive the resolution session. (71 Fed. Reg. 47602, No. 156 (Aug. 14, 2006.)

Twin Rivers established it did not have the opportunity to meet with Student to discuss the due process complaint and the facts that form the basis of the due process complaint. Therefore, this case may not yet proceed to hearing. The parties must meet for a resolution session within 15 calendar days of the date of this Order. The resolution session shall be conducted in accordance with 34 Code of Federal Regulations section 300.510.

PHC IS CONTINUED TO APRIL 24, 2023, AT 10:00 AM

The PHC is continued to April 24, 2023, at 10:00 AM. All other prehearing matters will be discussed at the April 24, 2023 PHC. PHC statements and motions are due to OAH no later than three business days before the PHC or with a showing of good cause why it was not possible to file the motion by that date.

DUE PROCESS HEARING IS CONTINUED TO MAY 2, 3, AND 4, 2023

The due process hearing currently is scheduled for April 11, 12, and 13, 2023. The due process hearing is continued to May 2, 3, and 4, 2023, for the purpose of allowing the parties to participate in a resolution session. The hearing will be conducted via videoconference or telephone and will begin at 9:30 AM on all days, and generally end at 3:30 PM, unless otherwise ordered. The hearing will continue day to day, at the discretion of the ALJ.

The parties must immediately notify all potential witnesses of the hearing dates, and must 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 is not properly notified of the hearing date or properly subpoenaed.

SETTLEMENT

The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately if they reach a settlement or otherwise resolve the dispute before the scheduled hearing. 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. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH by visiting OAH Secure e-file at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 4:00 PM the day prior to hearing, the parties shall leave a voicemail message regarding the settlement at

(916) 274-6035. The parties should also leave contact information such as cellular phone numbers of each party or counsel for each party.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received and processed 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 before the hearing.

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

FAILURE TO COMPLY

The failure to comply with this Order may result in the exclusion of evidence or other sanctions.

ORDER INCLUDES ALL RULINGS

This Order includes all rulings made at the PHC. Any discussion and conversation not referenced in this Order is not binding on the ALJ conducting the hearing and may not be relied upon by the parties. The parties should be aware that, at hearing, the ALJ conducting the hearing has discretion to reconsider any part of this Order.

IT IS SO ORDERED.

Jennifer Kelly

Jennifer Kelly
Administrative Law Judge
Office of Administrative Hearings