

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TWIN RIVERS UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015031066

ORDER FOLLOWING PREHEARING
CONFERENCE

On October 23, 2015, a telephonic prehearing conference was held before Administrative Law Judge Dena Coggins, Office of Administrative Hearings. Daniel Shaw, Attorney at Law, appeared on behalf of Student. Anne Sherlock, Attorney at Law, appeared on behalf of the Twin Rivers Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on November 3 through November 5, November 10 and November 12, 2015, and continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at Twin Rivers' offices located at 5115 Dudley Blvd., McClellan, CA 95652. The hearing shall begin at 9:30 a.m. on the first day of the hearing and at 9:00 a.m. on all other days, unless otherwise ordered.¹

Twin Rivers is to 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. Twin Rivers shall inform OAH within two business days of the date of this order it is able to certify that it will provide a facility that complies with the law.

Prior to the beginning of the hearing, Twin Rivers shall assist the ALJ to ensure that the hearing room is configured into a courtroom setting, including (1) a table for Student and his representatives; (2) a table for Twin Rivers' legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical

¹ If this matter is reassigned to a new ALJ, the new ALJ may change the hearing start time to 1:30 p.m. on November 12, 2015.

outlet. Twin Rivers shall also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

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 is 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.²

Issue 1: Does an exception to the two-year statute of limitations exist based upon Twin Rivers’ failure to hold a triennial assessment after Student’s transfer into the District and failure to translate the August 17, 2012, interim individualized education program, and September 27, 2012, IEP into the Spanish language?

Issue 2: Did Twin Rivers deny Student a free appropriate public education during the 2012-2013, 2013-2014, and 2014-2015 school years, including extended school years, by:

- a. failing to document accurate present levels of performance;
- b. failing to develop measurable goals in all areas of need;
- c. failing to adequately identify Student’s eligibility;
- d. failing to provide appropriate speech and language services, including feeding services;
- e. failing to offer appropriate occupational therapy services, including feeding services;
- f. failing to offer appropriate physical therapy services;
- g. failing to offer a one-to-one aid;
- h. failing to offer adequate mainstreaming opportunities;

² The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party’s issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

- i. failing to offer a health plan;
- j. failing to offer an appropriate placement in the least restrictive environment;
- k. failing to offer nursing services;
- l. failing to offer or provide adaptive physical education services;
- m. failing to implement Student's IEP;
- n. failing to provide Student with an adequate transition plan, goals, and services;
- o. failing to provide orientation and mobility services; and
- p. failing to provide adequate alternative augmentative communication/assistive technology services, equipment, software, and applications?

Issue 3: Did Twin Rivers procedurally deny Student a FAPE during the 2012-2013 school year by:

- a. failing to offer a comparable IEP including supports and services upon transfer into Twin Rivers;
- b. failing to conduct a triennial assessment;
- c. failing to document accommodations and modifications;
- d. failing to translate IEP documents into Spanish;
- e. failing to make a clear offer of FAPE;
- f. failing to invite California Children's Services to the IEP team meeting; and
- g. failing to provide Parent with progress reports towards goals?

Issue 4: Did Twin Rivers procedurally deny Student a FAPE during the 2013-2014 and 2014-2015 school years by:

- a. failing to conduct an assessment within sixty days of a signed assessment plan;
- b. failing to conduct a triennial assessment;
- c. failing to document accommodations and modifications;
- d. failing to translate IEP documents into Spanish;
- e. failing to make a clear offer of FAPE;
- f. failing to invite California Children's Services to the IEP meeting;
- g. failing to provide Parent with progress reports towards goals;
- h. failing to convene an IEP team meeting with all required members; and
- i. failing to provide accurate present levels of performance?

Issue 5: Did Twin Rivers fail to adequately assess Student in speech and language, including oral and motor feeding?³

Student's Proposed Resolution:

- a. A finding that Twin Rivers denied Student a FAPE for the 2012-2013, 2013-2014, and 2014-2015 school years, including extended school years.
- b. A finding that Twin Rivers failed to adequately assess Student in all areas of suspected disability.
- c. Compensatory education in the form of individual tutoring in all academic areas, including independent living skills, speech and language therapy, physical therapy, transition services, orientation and mobility, occupational

³ Student withdrew his claim that Twin Rivers failed to adequately assess him in cognitive abilities, academic achievement, physical therapy, occupational therapy, augmentative and alternative communication and assistive technology, health, transition, life skills/adaptive functioning, and orientation and mobility, as alleged in Student's complaint.

therapy, and alternative augmentative communication/assistive technology services, including equipment, software, and applications, in an amount according to proof at hearing.

- d. Compensatory education to be provided to Student by providers selected by parents so long as the selected individuals are appropriately licensed.
- e. Transportation funded by Twin Rivers for these providers to and from the school site Student is placed if the providers desire to work in the school setting.

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 letter “S” or “D” in front of the exhibit to designate if it is a Student or District exhibit (for example, “S-5, S-6, or D-1, D-2”). [Each exhibit shall be internally paginated by exhibit, or all of a party’s exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. The parties shall serve their evidence binders on each other 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’ exhibit binders shall not be the same color. 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.

Student’s attorney objected on relevancy grounds to the admission of correspondence between Student’s attorney and Twin Rivers’ attorney relating to this case, which was listed on Twin Rivers’ proposed exhibit list. The objection was noted, but the objection is premature, as the ALJ did not have a copy of the exhibits at issue. The parties may make objections to admission of evidence at hearing.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible.⁴

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. Both parties have agreed that Twin Rivers will be provided with adequate notice of the witnesses Student intends to call who are under Twin Rivers’ control. The parties

⁴ The parties have acknowledged that Twin Rivers’ recent 750-page document production provided to Student may contain documents either party may wish to add to their respective exhibit binders. The parties have agreed that either party may add documents contained in the 750-page document production to its exhibit binder before the hearing.

shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

Student added three additional witnesses to his witness list with no objection from Twin Rivers:

1. Oksana Koblik, custodian of record for Twin Rivers;
2. Leandro Miesiel, an aide in Student's classroom; and
3. Mr. "C", Student's aide.

The parties are encouraged to review and shorten 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.

The parties shall attempt to reach agreement on a witness list for the first day of hearing. Twin Rivers shall have witnesses available in case agreement on a witness list is not reached. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, the parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony of each such witness is expected to take.

5. Scope of Witness Examination. Each witness shall be called to testify only once, except for rebuttal purposes, 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. 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. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. The proponent of the witness shall provide the proposed witness with a complete 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. No witness will be heard by telephone unless all these requirements have been fulfilled.

7. Electronic Recording of Hearing.

a. Audio Recording. Student's and Twin Rivers' motions to make an audio recording of the hearing is granted, subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the recording will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record; and 3) that 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, Student is the petitioning party. Accordingly, Student shall present its case-in-chief, followed by Twin Rivers.

9. Motions. On October 16, 2015, Student filed a motion to quash subpoenas duces tecum that were issued by Twin Rivers. On October 21, 2015, Twin Rivers submitted an opposition to the motion, and submitted an amended opposition to the motion the following day. Student submitted a reply to Twin Rivers' opposition on October 22, 2015. A separate order on Student's motion to quash will be issued by the ALJ.

No 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 prior to or during the prehearing conference of October 23, 2015.

10. Compensatory Education and 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 written form.

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 set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

13. Special Needs and Accommodations. A Spanish language interpreter will be needed at hearing for the entire duration of the hearing. At present, neither party anticipates the need for any other special accommodation. A party or participant to 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:
<http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>

14. Hearing Open/Closed To the Public. At the request of Student, the hearing will be closed to the public.

15. 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 should 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.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. 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. THE PARTIES SHOULD SIMULTANEOUSLY FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE at 916-376-6319.

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.

16. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: October 26, 2015

/s/

DENA COGGINS
Administrative Law Judge
Office of Administrative Hearings