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 FOR HEARING BY VIDEOCONFERENCE; ORDER GRANTING MOTION TO DISMISS; ORDER GRANTING IN PART, AND DENYING IN PART, THE MOTION FOR SANCTIONS, AND SHIFTING FEES

APRIL 24, 2023

On April 24, 2023, Administrative Law Judge Sabrina Kong of the 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.

Attorney Lynda Williams appeared on Student's behalf. Attorneys Tilman Heyer and John Chiappe appeared on Twin Rivers Unified School District's, called Twin Rivers, behalf. Law clerk Cristy Williams also attended the PHC on Twin Rivers' behalf. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order.

TWIN RIVERS' MOTION TO DISMISS

On March 19, 2023, Twin Rivers filed a motion to dismiss the complaint for Student's failure to participate in a resolution session. Twin Rivers' motion is supported by declarations under the penalty of perjury from executive director of special education Kathleen Walker, special education coordinator Lisa Linehan, senior administrative secretary Wendy Valeria, and Attorney Heyer.

On April 24, 2023, Student filed an opposition to the motion to dismiss. Student's opposition is supported by a declaration under the penalty of perjury from non-attorney advocate Jim Peters.

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) (2006).) 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)(2006).) There are no laws 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 will not take place until a

resolution session is held. (34 C.F.R. § 300.510(b)(3) (2006).) 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) (2006).)

Comments to the regulations explain that the law requires more than mere attendance at an early resolution session. (Federal Register Volume 71, No. 156, p. 46545, 46702 (Aug. 14, 2006).) The Comments provide that where a local educational agency convenes a resolution meeting with the parent and the parent fails to participate, the agency would need to continue making diligent efforts to obtain participation and, if unsuccessful, seek hearing officer intervention. (*Ibid.*)

The Office of Special Education Programs, referred to as OSEP, found 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.

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).)

STUDENT'S FIRST REFUSAL TO PARTICIPATE IN A RESOLUTION SESSION

The parties did not waive the resolution session. Twin Rivers first exercised reasonable efforts to hold a resolution session on March 8, 2023, and filed a motion to dismiss the case when Student attended but did not participate in the resolution

session. On March 27 ,2023, ALJ Jennifer Kelly found that Student did not participate in the March 8, 2023 resolution session when Parent and non-attorney advocate Jim Peters attended the meeting, asked for a settlement offer, and refused to respond to clarifying questions about, or discuss, the facts forming the basis of the complaint. ALJ Kelly specifically found that Peters and Parent did not participate in the resolution session, acted in bad faith, and obstructed any chance of a resolution. (See March 27, 2023 Order Following Prehearing Conference Continuing Due Process Hearing; Order Denying Twin Rivers' Motion to Dismiss; and Order Requiring Parties to Participate in Resolution Session, p. 5.) ALJ Kelly did not dismiss the complaint per Twin Rivers' request, but gave Student another opportunity to comply with title 34 Code of Federal Regulations section 300.510, and ordered to the parties to participate in a resolution session.

STUDENT'S SECOND REFUSAL TO PARTICIPATE IN A RESOLUTION SESSION

Twin Rivers held a March 30, 2023 resolution session in compliance with ALJ Kelly's March 27, 2023 order. Walker, Linehan, Valeriano, a Russian interpreter, Peters, and Parent attended the March 30, 2023 resolution session. Walker, Linehan, and Valeriano, who took meeting notes, all represented that Peters repeatedly demanded a settlement offer by stating, "Mom wants what's on paper," referring to Student's demand in the complaint, and again refused to discuss the substantive facts forming the basis of the complaint when Twin Rivers' representatives asked questions about the facts alleged in the complaint.

Student's opposition did not dispute Twin Rivers' representations that Peters and Parent asked for a settlement offer without discussing the substantive facts forming the basis of the complaint at the March 30, 2023 meeting. Instead, the opposition was

riddled with excuses as to why Student did not comply with the March 27, 2023 Order to discuss substantive facts forming the basis of the complaint. At the PHC, Attorney Williams offered distinctions without a difference between the March 8, 2023 and March 30, 2023 resolution sessions in arguing the case should not be dismissed. For example, Attorney Williams distinguished the March 30, 2023 from the March 8, 2023 resolution session stating the second meeting lasted 30 minutes, and was longer than the first meeting. Attorney Williams also argued that Twin Rivers' representatives were unhappy with Peters' and Parent's statements at the March 30, 2023 resolution session. Attorney Williams then referred the ALJ to statements in Peters' declaration as support that Student participated in the March 30, 2023 meeting, emphasizing that Twin Rivers' use of a Russian interpreter was inappropriate intimidation.

Student relied solely on Peters' declaration to support the opposition. Peters concluded that Parent felt intimidated by Twin Rivers' questions about the complaint, and because of the Russia and Ukraine war, Parent was distrustful of the Russian interpreter as Parent is Ukrainian. Peter's conclusion that Parent felt uncomfortable and intimidated at the March 30, 2023 resolution session was unsupported, unreasonable, and unpersuasive to excuse Student's unilateral non-participation in a resolution session.

The purpose of the March 30, 2023 resolution session was so Parent and Twin Rivers could discuss the due process complaint and the facts forming the basis of the complaint. (See 34 C.F.R. § 300.510(a)(2) (2006).) The March 30, 2023 resolution session provided the parties an opportunity to resolve the dispute forming the basis of the complaint because Student refused any substantive discussions at the March 8, 2023 meeting. However, Peters repeated the same non-participatory conduct during the March 30, 2023 meeting in direct contravention of ALJ Kelly's March 27, 2023 Order. ALJ

Kelly explained that Peters' and Parent's refusal to discuss the facts forming the basis of the complaint at the March 8, 2023 meeting was the equivalent of not participating in the resolution session. Yet, when given the opportunity to remedy the March 8, 2023 non-participation, Student again refused to participate on March 30, 2023.

Title 34 Code of Federal Regulations section 300.510 stated that a due process hearing will not proceed until a resolution session is held, and could not be unilaterally waived, specifically granting the ALJ authority to dismiss the complaint. (See 34 C.F.R. § 300.510(b)(3) and (4) (2006); (71 Fed. Reg. 47602, No. 156 (Aug. 14, 2006).) Comments to the regulations explain that the regulation requires more than mere attendance at a resolution session. (*Id.*) Student did not cite to any law supporting his representatives' refusal to discuss the facts forming the basis of the complaint, or that such refusal qualified as participation.

Student's attempts to conflate mere attendance at the March 8, 2023, and March 30, 2023 meetings as satisfying the requirement for participating in a resolution session is disingenuous. Student's repeated disregard for the law shall not be rewarded with a third bite at the proverbial apple. Therefore, this case is dismissed.

TWIN RIVERS' MOTION FOR SANCTIONS AND SHIFTING COST TO ATTORNEY SHEILA BAYNE AND HER FIRM

Based on Student's refusals to discuss the underlying facts forming the basis of the complaint on March 8, 2023, and March 30, 2023, as discussed above, Twin Rivers sought OAH's intervention by filing motions to dismiss on March 17, 2023, and April 19, 2023, and a motion for sanctions on April 19, 2023. The motion for sanctions requested OAH to shift Twin Rivers' fees and costs incurred in filing the three motions, and OAH's fees in hearing them, to Student's attorney Sheila Bayne and the Law Offices of Sheila C.

Bayne, Esq. The motion for sanctions is supported by a declaration under the penalty of perjury from Attorney Heyer.

At the PHC, Attorney Williams informed the ALJ that Student mistakenly filed the opposition to the sanctions motion minutes before the 10:00 AM PHC, when it had not been completed, and withdrew the opposition on the record. Attorney Williams also informed the ALJ that she was unprepared to argue the opposition regarding sanctions at the PHC, but that Student would file an opposition to the sanctions motion later that day. Therefore, only Student's opposition to sanctions filed at approximately 4:52 PM on April 24, 2023, was considered in this order regarding sanctions.

Student's attorney of record Sheila Bayne of the Law Office of Sheila C. Bayne, Esq. opposed the motion for sanctions. She disputed Peters' conduct during the March 8, 2023, and March 30, 2023 resolutions sessions constituted failure to participate in a resolution session. The opposition to sanctions was supported by a declarations under the penalty of perjury from Attorney Bayne, Peters, and Parent.

In certain circumstances, an ALJ presiding over a special education proceeding is authorized to shift expenses from one party to another, or to OAH. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code Regs., tit. 1, § 1040; Cal. Code. Regs., tit. 5, § 3088; see *Wyner ex rel. Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly, [California Code of Regulations] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

Section 3088 refers to "presiding hearing officers." Government Code section 11405.80 states: "Presiding officer means the agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in an

adjudicative proceeding." This section makes clear that an ALJ who presides in an adjudicative proceeding is the "presiding officer," a point confirmed in *Wyner v. Manhattan Beach Unified Sch. Dist., supra,* 223 F. 3d at p. 1029. (*Ibid.*)

An ALJ presiding over a hearing may "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Gov. Code, § 11455.30, subd. (a); Cal. Code Regs., tit. 1, § 1040; Cal. Code. Regs., tit. 5, § 3088, subd. (e).) A finding of "bad faith" does not require a determination of evil motive, and subjective bad faith may be inferred. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702 (*West Coast*).)

The ALJ shall determine the reasonable expenses based upon a declaration setting forth specific expenses incurred as a result of the bad faith conduct. (Cal. Code. Regs., tit.1 § 1040(c).) Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates or employees. (Code Civ. Proc., § 128.5, subd. (f)(1)(C).) An order of sanctions shall be limited to what is sufficient to deter repetition of the action or tactic or comparable action or tactic by others similarly situated. (Code Civ. Proc., § 128.5, subd. (f)(2).) If warranted for effective deterrence, an order may direct payment of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the action or tactic. (*Id.*) The courts shall vigorously use their sanction authority to deter improper actions or tactics. (Code Civ. Proc., § 128.5, subd. (g); see also *Letter to Irby* (February 12, 2010) [OSEP suggested a school district's remedy could include a reduction or shifting attorney's fees to the parent or its attorney.].)

Twin Rivers proved that Student's representatives' repeated refusals to participate in a resolution session amounted to bad faith tactics warranting a shifting of fees and costs to Attorney Bayne and her law firm.

Attorney Bayne did not specifically dispute Attorney Heyer's billing entries, but characterized all three motions as unnecessary, and another form of intimidation and harassment by Twin Rivers, and its displeasure with her employee, Peters. Attorney Bayne did not dispute that the ALJ may order her to pay reasonable expenses, including attorney's fees, incurred by Twin Rivers as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. However, she disputed that she should be sanctioned because Twin Rivers did not prove that she engaged in bad faith tactics. Attorney Bayne attempted to relitigate the issue that Student participated in two resolutions sessions in arguing that she and her firm should not be sanctioned. Discussion of Peters' and Parent's conduct during the March 8, 2023, and March 20, 2023 meetings, was addressed by the respective motions to dismiss orders, and was not reconsidered for purposes of this order regarding sanctions.

Attorney Bayne's arguments were unpersuasive. Bad faith could be inferred from Attorney Bayne's employee's tactics of twice refusing to discuss the facts forming the basis of the complaint at the scheduled resolution sessions, the second time in defiance of ALJ Kelly's March 27, 2023 Order. (See *West Coast, supra,* 2 Cal.App.4th at 702.)

Further, non-attorney Peters works for Attorney Bayne. Therefore, Attorney Bayne is responsible for Peters' obstructive conduct during both the March 8, 2023, and March 30, 2023 scheduled resolution sessions. On March 27, 2023, ALJ Kelly concluded that Peters obstructed the resolution session without participating in, or allowing, a discussion of the issues in the complaint. As discussed in the section addressing the motion to dismiss above, Peters' again refused to discuss the facts forming the basis of

the complaint on March 30, 2023. Attorney Bayne's argument that Peters never had to "pay one cent of any monetary sanctions, for any reason" was irrelevant to whether she should be sanctioned. Peters is not an attorney, is not allowed to appear as an attorney before OAH, and is not held to an attorney's standard of care. However, Peters acted as Attorney Bayne's employee and agent when he attended the March 8, 2023, and March 30, 2023 meetings, and repeatedly refused to discuss the allegations in the complaint. Attorney Bayne is held to the standard of an attorney practicing law under the State of California and is responsible for Peters' refusal to abide by law, here statutes under the Individual with Disabilities Act, and ALJ Kelly's March 27, 2023 Order.

ATTORNEY BAYNE AND HER EMPLOYEE PETERS REPEATEDLY ENGAGED IN BAD FAITH TACTICS WITHOUT REGARD FOR THE LAW

Peters also acted in bad faith when he engaged in the same tactics and refused to participate in a resolution session in another OAH case. Less than a month ago, ALJ Cole Dalton found that Peters' demands for a settlement offer from the school district and refusal to discuss the allegations in the complaint at a scheduled resolution session amounted to non-participation. (*Student v. Twin Rivers Unified School District,* OAH Case No. 2023020611, ALJ Dalton's March 28, 2023 Order Following Prehearing Conference for Hearing by Videoconference and Extending Procedural Timelines.) Official notice was taken of the pleadings and orders in OAH Case No. 2023020611.

In the case presided over by ALJ Dalton, Peters also attended the scheduled resolution session with the parent, demanded a settlement offer, and refused to discuss the allegations in the complaint, stating that parent was uncomfortable doing so. ALJ Dalton concluded contentions regarding parent's discomfort discussing facts and issues in the complaint were unpersuasive and an excuse not to participate in the resolution session. However, ALJ Dalton did not dismiss the case, but reset the timelines and

ordered the parties to participate in another resolution session. ALJ Dalton gave Attorney Bayne's firm another opportunity to comply and participate in a resolution session. A few weeks later, Peters used the same tactics again, and refused to discuss the facts forming the basis of the complaint in this case.

This case was also not the first time Attorney Bayne, or her agents, defied a court order. Just last month, Attorney Bayne was sanctioned, with the opposing party's fees shifted to her, for non-compliance with at least two other OAH orders. Attorney Bayne was sanctioned for non-compliance with OAH requirements regarding PHC statements, non-appearance at PHCs, and being unprepared to answer questions at the PHCs. (*Student v. San Marcos Unified School District,* OAH Case No. 2021120803, ALJ Christine Arden's April 4, 2022 Order Ruling on Order to Show Cause, District's Motion to Dismiss Student's Complaint with Prejudice, and District's First and Second Motions to Shift Fees; *Student v. Yuba City Unified School District*, OAH Case No. 2023020646, ALJ Charles Marson's April 5, 2023 Order Shifting Costs for Attorney Misconduct.) In their orders sanctioning Attorney Bayne, ALJs Arden and Marson cited to other instances when Attorney Bayne also ignored OAH's orders.

Further, the District Court found in two recent cases that Peters' obstructive conduct at IEP team meetings prevented Student's representatives from participating in IEP team meetings. In those two cases, Peters deliberately disconnected the call during IEP team meetings, then claimed the school district did not allow for parental participation at those same IEP team meetings. (See *Amaya v. Chaffey Joint Union High School District*, (C.D.Cal. April 28, 2022), ED-CV 20-1903-JFW(SHKx)) 2022 WL 301181; *Guevara v. Chaffey Joint Union High School District*, (C.D.Cal. September 29, 2022), Case No. CV 20-1929-FMO(SPx)) 2022 WL 16947936.)

TWIN RIVERS' REASONABLE ATTORNEYS' FEES SOULD BE SHIFTED TO ATTORNEY BAYNE AND HER FIRM IN THIS CASE

Attorney Bayne and her agents continued to ignore the law and defy OAH's orders employing bad faith tactics causing unnecessary delay and undue consumption of the public's, including OAH's, resources in this case. Therefore, the reasonable fees and costs Twin Rivers incurred in filing and preparing for the March 17, 2023, and April 19, 2023 motions to dismiss, and the April 19, 2023 motion for sanctions, shall be shifted jointly to Attorney Bayne and her firm. Attorney Bayne shall not pass the fees and costs from this sanctions order to her client, and shall pay Twin Rivers within 30 days of the date of this Order as detailed below.

Attorney Heyer showed that he reasonably incurred a total of $4,895.50 through accompanying declarations and billing exhibits with individual entries detailing the hourly rate and time spent on filing and preparing for the motions to dismiss and motion for sanctions summarized as follows:

1. $1,752.00 in filing and preparing for the March 17, 2023 motion to dismiss;
2. $1,597.50 in filing and preparing for the April 19, 2023 motion to dismiss; and
3. $1,546.00 in filing and preparing for the April 19, 2023 motion for sanctions.

Although Attorney Heyer also sought to recover $334.50 in miscellaneous fees and costs, he did not show the $334.50 was reasonable. Therefore, the $334.50 amount should not be shifted to Attorney Bayne and her firm. OAH examined the billing entries and found the $4,895.50 amount reasonable to shift to Attorney Bayne.

The ALJ exercised her discretion not to shift OAH's fees and costs incurred in connection with the March 27, 2023, and April 19, 2023 PHCs, to Attorney Bayne and her firm.

ATTORNEY BAYNE REQUESTED THAT HER ATTORNEYS' FEES BE SHIFTED TO TWIN RIVERS

Additionally, Attorney Bayne requested that OAH order her fees in opposing the two motions to dismiss and the motion for sanctions shifted to Twin Rivers. At the April 24, 2023 PHC, the ALJ dismissed the case for Student's repeated refusals to participate in a resolution session and only retained jurisdiction to rule on Twin Rivers' motion for sanctions. Therefore, OAH no longer has jurisdiction to rule on Attorney Bayne's request to shift fees. However, to the extent OAH still has jurisdiction, Attorney Bayne's request to shift her fees to Twin Rivers lacks merit for the same reasons discussed in this order granting Twin Rivers' motion for sanctions, and is therefore denied.

ORDER

1. Twin Rivers' motion to dismiss is granted.
2. Twin Rivers' motion for sanctions shifting its attorneys' fees to Sheila Bayne and the Law Offices of Sheila C. Bayne, Esq. is partially granted in the amount of $4,895.50, and partially denied as to the $334.50 amount. Sheila Bayne and the Law Offices of Sheila C. Bayne, Esq. shall reimburse Twin Rivers in the amount of $4,895.50 within 30 days of this Order.

3. Sheila Bayne and the Law Offices of Sheila C. Bayne, Esq. shall not shift payment of the $4,895.50 amount to her client.
4. All other requests are denied.

Sabrina Kong

Sabrina Kong

Administrative Law Judge

Office of Administrative Hearings