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 2023020611

# ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE; ORDER GRANTING MOTION TO DISMISS, AND ORDER GRANTING IN PART, AND DENYING IN PART, MOTION FOR SANCTIONS OR SHIFTING COSTS

JUNE 8, 2023

On May 8, 2023, Administrative Law Judge Cole Dalton, 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.

Leroy Sumter, Attorney at Law, appeared on behalf of Student. John Louis Chiappe and Tilman Heyer, Attorneys at Law, appeared on behalf of Twin Rivers Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

## TWIN RIVERS' SECOND MOTION TO DISMISS

On May 1, 2023, Twin Rivers filed a second motion to dismiss Student's complaint for his failure to participate in a resolution session. Twin Rivers supported its motion with 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 May 4, 2023, Student filed an Opposition to the second motion to dismiss. Student supported his opposition with declarations from Parent Svetlana Normukhamedov and non-attorney James Peters, III. Although Mr. Peters is not an attorney, he is described on the website of the Law Firm of Shelia Bayne as the Executive Director of the Special Education Law Offices of Sheila Bayne. There is at least one video on the website which strongly implies that Mr. Peters is an attorney. Moreover, Peters appears to have represented to at least one district court that he operated a law practice called the Peters Firm. (See, *N.R. by and through D.R. v. Del Mar Unified School District* (S.D. Cal., Sept. 2, 2022, No. 21-CV-01759-AJB-WVG) 2022 WL 4071910, *1)(district court describes a November 2020 class action on behalf of California special education students, stating that, "[t]he Peters Firm brought the class action, and Parent agreed to be represented by the Peters Firm.") Peters attached, to his declaration here, photocopies of photographs of himself with various politicians and a copy of a settlement agreement between various plaintiffs and California state agencies, having no relation to Student's action here or to the law firm representing Student.

On May 5, 2023, Twin Rivers filed a reply brief.

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

On February 6, 2023, Student filed his complaint with OAH. The parties did not enter into a written agreement to waive the resolution session or agree to mediate in lieu of the early resolution session.

Twin Rivers made reasonable efforts to hold the resolution session, which occurred on March 1, 2023. Executive Director of Special Education Kathleen Walker, Special Education Coordinator Lisa Linehan, administrative assistant Wendy Valeriano, and interpreter Ver Daly, attended on behalf of Twin Rivers. Valeriano took notes of the meeting. Non-attorney advocate Peters attended the meeting with Parent, on behalf of Student. Walker, Linehan, Parent, and Peters had specific knowledge of facts identified in the due process complaint. Walker had decision-making authority on behalf of Twin Rivers. Neither party was represented by an attorney. Accordingly, all necessary participants attended the meeting. (34 C.F.R. § 300.510(a)(1).) Neither party argued otherwise.

Peters repeatedly asked for a settlement offer and refused to answer any questions seeking clarification of the facts forming the basis of the complaint. Twin Rivers sought clarifying information so that it could develop an appropriate offer and

had Executive Director of Special Education Walker, who held authority to do so, present at the meeting. On March 17, 2023, Twin Rivers filed a motion to dismiss the case based upon Student's mere attendance but failure to participate in the resolution session.

On March 27, 2023, during the PHC, ALJ Dalton found that Student thwarted the very purpose of the resolution session by refusing to respond to clarifying questions about, or discuss in any way, the facts forming the basis of the complaint. (34 C.F.R. § 300.510(a)(2).) The statute requires the parties to work cooperatively in the discussion of the complaint and the facts that form the basis of the complaint so that the local educational agency has the opportunity to resolve the dispute that is the basis for the due process complaint. (*Ibid.*) Twin Rivers informed Student it needed more information to develop an offer. Instead of providing the information, which was within Student's control, Student refused. Twin Rivers made it clear that it required additional information to craft a settlement offer responsive to the issues raised in the complaint. If Student merely wanted to demand a settlement offer, he could have done this at any time since the complaint was filed. He could have then circulated a written agreement to forego the resolution session, in compliance with 34 Code of Federal Regulations 300.510, subdivision (a)(3)(i).)

Twin Rivers sought a resolution session to clarify the issues. Accordingly, ALJ Dalton denied Twin Rivers' motion to dismiss and ordered the parties to participate in, and not merely attend, a resolution session in compliance with 34 Code of Federal Regulations section 300.510. ALJ Dalton ordered the procedural timelines be reset and the parties hold a resolution session no later than the close of business on April 14, 2023.

## STUDENT'S SECOND REFUSAL TO PARTICIPATE IN A RESOLUTION SESSION

On April 11, 2023, the parties attended a resolution session for the second time. Walker, Linehan, Valeriano, interpreter Alina Brenich, Peters, and Parent attended the resolution session. Again, all necessary participants attended the meeting and neither party argued otherwise. (34 C.F.R. § 300.510(a)(1).)

Valeriano took notes of the meeting. Linehan asked where Student had been enrolled for the 2021-2022 school year. Student's attendance in another school district would have an impact on Twin Rivers' settlement offer as Student alleged regression once he enrolled at Twin Rivers for the 2022-2023 school year. Parent said she did not know where Student went to school for the 2021-2022 school year. When Linehan asked a follow up question, Peters insisted that Parent had answered the question already.

Linehan asked other clarifying questions. For example, the complaint seeks behavior intervention services. Twin River alleged addressing behavior concerns in the November 9, 2022 IEP and asked Parent to clarify any remaining concerns. Parent replied that she wanted what was "on the paper." This became the refrain from Parent and Peters regarding any additional questions. After answering a handful of questions in this manner, Peters insisted on obtaining a settlement demand.

Twin Rivers had many reasons to seek clarification on the 2021-2022 school year, based upon allegations in the complaint. For example, Student alleges several claims against Winship-Robbins Elementary School District and Twin Rivers. During certain school years, Student attended the Feather Rivers Charter School, which appears to have operated independently from either school district but is not a named party. Regarding

the 2021-2022 school year, Student's complaint alleges, in different places, that both Winship-Robbins and Twin Rivers failed to evaluate him in all areas of need thereby denying him a FAPE. Twin Rivers knew Student had not been enrolled in its district during the 2021-2022 school year but still did not know where Student had been enrolled. On February 21, 2023, Student dismissed Winship-Robbins.

Student's complaint also alleges Twin Rivers denied him a FAPE during the 2022-2023 school year, in part, by failing to address Student's regression. Tilman Heyer, counsel for Twin Rivers, attached a declaration and other documents to the second motion to dismiss, which demonstrated Twin Rivers' attempts to obtain Student's school records for the 2021-2022 school year. Twin Rivers sought the records to assess the regression issue. Twin Rivers reasonably argued that not having information on Student's program during the 2021-2022 school year impacted its ability to make an offer on the remedies Student sought.

The purpose of the meeting 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 LEA has the opportunity to resolve the dispute that is the basis for the due process complaint. (34 C.F.R. § 300.510(a)(2).)

Student's opposition to the motion to dismiss does not dispute the facts set forth in the motion. Rather, Student argues that Parent and Peters attended two resolution sessions, which, in their view, means the matter cannot be dismissed. Student's opposition then cites to a case standing for the proposition that dismissals are only warranted where an underlying complaint cannot be amended to state a claim for relief. The sufficiency of the complaint, here, is not at issue. Notice pleading requirements are governed by 20 United States Code section 1415, subsection (b). A party's participation in a resolution session goes beyond the four corners of the complaint as it involves a

live discussion of the complaint and the facts that form the basis of the complaint, so that the local educational agency has the opportunity to resolve the dispute that is the basis for the complaint. (34 C.F.R. § 300.510(a)(2).)

Student provided no argument against the motion to dismiss or motion for sanctions during the May 8, 2023 PHC. Sumter represented Student on behalf of Bayne's law firm but was not familiar with the pending motion to dismiss nor with Peters' conduct at the two resolution sessions. Sumter had not been made aware of the contents of the motion to dismiss before appearing for the PHC. ALJ Dalton admonished counsel on the record for failing to abide by prior OAH orders and for failing to engage in a resolution session not once, but twice. The conduct of Bayne's law firm employees and agents disrupted the timeline for bringing Student's claims to hearing, for obtaining a possible settlement offer from Twin Rivers, or otherwise timely resolving the issues in dispute. Bayne's firm has done so without any reasonable grounds.

The IDEA provides a mechanism for avoiding resolution meetings. A parent and school district may agree in writing to waive the resolution meeting. (34 C.F.R. § 300.510(a)(3)(i).) A parent and school district may agree to use the mediation process in lieu of holding a resolution meeting. (34 C.F.R. § 300.510(a)(3)(ii).) What the Bayne law firm, or other parties and their representatives, may not do, is simply ignore the law or OAH orders mandating resolution meetings.

Student's disregard for the law, OAH orders, and the time and efforts of all involved in attending and translating the meetings, cannot be rewarded. Therefore, this case is dismissed, all dates have been vacated.

## TWIN RIVERS' MOTION FOR SANCTIONS OR SHIFTING COSTS TO ATTORNEY SHEILA BAYNE AND HER FIRM

Twin Rivers seeks sanctions or cost shifting related to expenses incurred due to Student's refusals to discuss the underlying facts forming the basis of his complaint on March 1, 2023, and April 11, 2023. Here, cost shifting refers to shifting attorney's fees and expenses. Student's refusal to participate resulted in Twin Rivers seeking OAH's intervention by filing motions to dismiss on March 17, 2023, May 1, 2023, and a motion for sanctions on May 1, 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 John Louis Chiappe.

On May 4, 2023, Student filed an opposition to the motion for sanctions or cost shifting, supported by a declaration by Baynes. Student, in his opposition, argues that Student participated in both resolution sessions and that Twin Rivers filed three inappropriate, harassing, and frivolous motions based upon contrived dissatisfaction with a member of Student's counsel's staff.

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 the reasonable attorney's fees and other expenses incurred as a direct result of the action or tactic. (*Ibid.*) 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 exercised due diligence in attempting to obtain Student's participation in a resolution session, thereby avoiding dismissal and sanctions. (Code Civ. Proc., § 128.5, subd. (f)(1).) Twin Rivers brought a separate motion for sanctions when Student failed to correct course. (Code Civ. Proc., § 128.5, subd. (f)(1)(A).) 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. (Code Civ. Proc., § 128.5, subds. (a), (f)(1)(A), and (f)(1)(C).) Bayne's firm has been repeatedly admonished by OAH in several cases regarding the failure to participate in resolution sessions and disobey prior OAH orders, as explained below. Such repeated refusals, in the face of knowledge, support a finding that Bayne and employees or agents of her law firm have acted in bad faith in this matter.

Student argued that Twin Rivers made a frivolous and inappropriate motion for sanctions based on its repeated motions to dismiss Student's complaint. Student provided inadequate proof and no law in support of his arguments. Student contends Twin Rivers misapplied the law and misconstrued facts, in a summary fashion. Student did not support his contentions with a legal or factual basis.

Failure to support Student's opposition with credible facts or applicable law, after defying a specific OAH order to participate in a resolution session in the manner specified by statute constitutes a frivolous and bad faith tactic. Such actions are reminiscent of the Bayne firm's failure to abide by applicable statutes and local rules at the district court level. (*Wingler v. Chaffey Joint Union High School District* (C.D. Cal., Dec. 19, 2022, No. 5:21-CV-)01316-JWH-SP) 2022 WL 18564670, at *2.) In *Wingler,* the

District Court admonished Bayne after analyzing Bayne's reasons for failing to file opposing papers in a timely manner. The District Court reminded Bayne of the duty of candor, citing State Bar of California, Rule 3.3, Candor Toward the Tribunal, and Business and Professions Code, section 6068, subdivision (d). Section 6068 provides, at subdivision (d), that it is the duty of an attorney to employ those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law. The Bayne law firm and its agents and employees are reminded that the same rules apply in OAH proceedings.

Student has not disputed Twin River's attorney billing entries or the overall amount of fees and costs requested as sanctions. Bayne's law firm has been on notice that such bad faith and dilatory tactics could result in an award of sanctions or cost shifting based upon prior instances of refusing to discuss the due process complaint and the facts that form the basis of the complaint. (See, *Student v. Twin Rivers*, OAH Case No. 2023020613, ALJ Kong's April 21, 2023 Order Following Prehearing Conference by Videoconference; Order Granting Motion to Dismiss; Order Granting In Part, And Denying In Part, The Motion For Sanctions.) Official notice was taken of the pleadings and orders in OAH Case No. 2023020613 and in the OAH cases cited below.

As noted in ALJ Kong's order, this case constitutes but one in a line of prior instances where Attorney Bayne, or her agents, defied a court order. In April 2023, 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 her or her employees' 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.

## TWIN RIVERS' REASONABLE ATTORNEYS' FEES SHOULD BE SHIFTED TO ATTORNEY BAYNE AND HER FIRM

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 May 4, 2023 motions to dismiss, and the May 4, 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 Chiappe appeared at the PHC in support of Twin River's motion for sanctions, explaining the attorney fee billing entries. He had already authenticated the billing entries in his declaration attached to the motion, showing that Twin Rivers reasonably incurred a total of $6,115.50 for preparation of the motions for dismissal and motion for sanctions. Chiappe demonstrated that the firm's billing entries related to this matter were entered contemporaneously with the work conducted and reflected the actual costs billed to Twin Rivers. Chiappe persuasively demonstrated a lack of overlap in work between the instant motions and those made in related to ALJ Kong's order, referenced above. Billing entries detail the hourly rate and time spent on filing and preparing the motions to dismiss and motion for sanctions, summarized as follows:

1. $2,385.00 for filing and preparing the March 17, 2023 motion to dismiss;
2. $2,964.00 for filing and preparing the May 1, 2023 motion to dismiss; and
3. $519.00 for filing and preparing the May 1, 2023 motion for sanctions and accompanying declarations and exhibits.
4. $247.50 for related entries regarding resolution session expenses for the second meeting.

Chiappe also asked for recovery of 247.50 in miscellaneous fees and costs associated with Student's refusal to attend the first resolution session but did not show how that was reasonable. Therefore the 247.50 in miscellaneous fees and costs should not be shifted to Bayne or her firm. OAH examined the billing entries and found the $5,868.00 amount supported through documentation and sworn statements and reasonable to shift to Bayne and her firm.

ALJ Dalton exercised discretion in not shifting OAH's fees and costs incurred in connection with the March 27, 2023 or May 8, 2023 PHCs to Bayne or her firm. Given the number of prior refusals to comply with OAH orders, Bayne and her firm should be prepared to have OAH fees and costs shifted to them in the future.

Continued failure to comply with OAH orders will demonstrate that sanctions awarded to date have not been sufficient to deter improper actions or tactics and may result in shifting of OAH costs to Bayne and her firm in addition to attorney's fees and costs. 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).) The courts shall vigorously use their sanction authority to deter improper actions or tactics. (Code Civ. Proc., § 128.5, subd. (g).) Several prior OAH orders of cost shifting, or sanctions, against Bayne and her firm have failed to deter them from violating special education statutes, regulations, and OAH orders. On nearly

identical facts, Bayne and her firm failed to participate in a resolution session in OAH Case number 2023020613, as related above. In that case, ALJ Kong ordered cost shifting in the amount of $4,895.50. That amount failed to deter Bayne and her firm from repeating substantially the same behavior in this case. Bayne and her firm must act with due diligence to comply with future OAH orders.

## ORDER

1. Twin Rivers' motion to dismiss is granted, without prejudice.
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 $5868.00, and partially denied as to the $247.50 amount. Sheila Bayne and the Law Offices of Sheila C. Bayne, Esq. shall reimburse Twin Rivers in the amount of $5868.00 within 30 days of this Order.
3. Sheila Bayne and the Law Offices of Sheila C. Bayne, Esq. shall not shift payment of the $5868.00 amount to her client.
4. All other requests for relief are denied.

Cole Dalton

Cole Dalton
Administrative Law Judge
Office of Administrative Hearings