BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF:

PARENT ON BEHALF OF STUDENT,

v.

BAKERSFIELD CITY SCHOOL DISTRICT,

OAH CASE NUMBER 2019120777

and

BAKERSFIELD CITY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT,

OAH CASE NUMBER 2020010042

ORDER FOLLOWING EXPEDITED PREHEARING CONFERENCE, AND GRANTING MOTION TO UNEXPEDITE HEARING

On January 17, 2020, Administrative Law Judge Adrienne L. Krikorian, Office of Administrative Hearings, held a telephonic prehearing conference. The administrative law judge is referred to as ALJ. The prehearing conference is referred to as PHC. The Office of Administrative Hearings is referred to as OAH.

Attorney Andria Seo appeared on behalf of Student. Attorney Kidd Crawford appeared on behalf of Bakersfield City School District. The hearing was recorded. The ALJ makes the following orders.

MOTION TO UNEXPEDITE

On December 18, 2019, Student filed a Due Process Hearing Request, known as a complaint, against Bakersfield City School District. On December 19, 2019, based on allegations in the complaint, the Office of Administrative Hearings, referred to as OAH, issued a Scheduling Order and Notice of Expedited and Non-Expedited Due Process Hearing and Mediation, Scheduling Order. The Scheduling Order set this matter for expedited mediation on January 15, 2020, expedited prehearing conference on January17, 2020, and expedited hearing for January 28, 29, and 30, 2020. The non-expedited issues are set for hearing on February 11, 12, and 13, 2020.

On December 31, 2019, Bakersfield filed a request for due process hearing in OAH case number 2020010042 naming Parent on Student's behalf. Bakersfield's complaint seeks findings that its initial assessments of Student were appropriate such that Student is not entitled to independent educational evaluations.

On January 8, 2020, OAH granted Bakersfield's unopposed motion to consolidate Bakersfield's case with Student's case. On January 13, 2020, Bakersfield filed a motion to unexpedite this matter and vacate the expedited dates. Also on January 13, 2020,

Student filed an opposition to the motion to unexpedite. Bakersfield filed a reply to the opposition on January 14, 2020.

The ALJ considered oral argument on the motion during the PHC, and granted the motion with this Order to follow.

APPLICABLE LAW

A parent of a child with a disability who disagrees with any decision by a school district regarding a change in educational placement of the child based upon a violation of a code of student conduct, or who disagrees with a manifestation determination made by the district, may request and is entitled to receive an expedited due process hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a) (2006); all subsequent references to the Code of Federal Regulations are to the 2006 version.)

School personnel may remove a child with a disability to an appropriate interim alternative educational setting, another setting, or suspension for not more than ten days. (20 U.S.C. § 1415(k)(1)(b). A child who has not been determined to be eligible for special education and related services under title 20 United States Code section 1411 et seq and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for under the Individuals with Disabilities Education Act, referred to as IDEA, if the local educational agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. (20 U.S.C. §§ 1415(k)(5)(A) & (B).

An expedited due process hearing before OAH must occur within 20 school days of the date the complaint requesting the hearing is filed. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2).) The procedural right to an expedited due process hearing is

mandatory and does not authorize OAH to make exceptions or grant continuances of expedited matters. (*Ibid.*)

A matter can only be unexpedited or continued if no issue is alleged that is subject to an expedited hearing, if the student withdraws the issues in the complaint that triggered the expedited hearing, or if the student elects to challenge the change of placement under title 20, section 1415, subdivision (b)(6)(A) and not subdivision (k). (*Molina v. Bd. of Educ. of Los Lunas Schools* (D.N.M. 2016) 157 F.Supp.3d 1064, 1068-1071.)

DISCUSSION

Student's counsel conceded during argument that the complaint did not request an expedited hearing under title 20 United States Code section 1415(k). The complaint asserts the following facts, relevant to this motion.

Student, who was in kindergarten, had a history of behaviors that resulted in partial day suspensions from school. On September 11, 2019, Bakersfield developed a Section 504 plan for Student, pursuant to Section 504 of the Rehabilitation Act of 1973, relative to his diagnosis of attention deficit hyperactivity disorder. Parent renewed earlier requests at the initial Section 504 meeting that Bakersfield assess Student for eligibility for special education, which Bakersfield agreed to. As a result, Student argues that Bakersfield had a basis of knowledge under title 20 United States Code section 1415(k)(5)(B) that Student was a child with a disability, and therefore he was entitled to the protections of the IDEA.

On September 25, 2019, Bakersfield held a Section 504 Compliance Review meeting to discuss Student's conduct during disciplinary incidents at school. The Compliance Review team determined that Student's conduct was not caused by or

substantially related to Student's Section 504 identified impairments of attention deficit disorder, aggressive and physical behavior, and impulsivity.

On November 13, 2019, an individualized education program team determined Student was eligible for special education services. On November 15, 2019, Parent requested an independent psychoeducational evaluation, and an independent functional behavioral assessment.

Student's sole issue identified for the expedited hearing is whether the Section 504 Compliance Review team incorrectly determined that Student's conduct during disciplinary incidents at school was not caused by or did not have a direct and substantial relationship to his disability. Student argues that he is "at risk" for further disciplinary actions that might follow from the September 2019 Section 504 Compliance Review determination, justifying an expedited hearing. Student seeks an order finding the Section 504 Compliance Review team's conclusions "invalid", expungement of suspensions from his school records, and the remedies of an independent functional behavioral assessment and development of a behavior intervention plan, and compensatory education.

Bakersfield asserts in its motion that the complaint does not ask for an expedited hearing, nor does it seek any relief justifying an expedited hearing. Bakersfield argues the complaint does not assert that Bakersfield's actions resulted in a unilateral or imminent disciplinary change of placement for Student requiring expedited resolution. Addressing Student's concern of potential future imminent change of placement, Bakersfield also concedes that Student is entitled to the protections under the IDEA relating to disciplinary actions including a manifestation determination review team meeting.

Bakersfield's arguments are persuasive for the following reasons. First, the complaint states at page 8, paragraph 34, that as a result of "lack of special education and behavioral supports", and Bakersfield's "improper and unjust suspensions, Student missed ten school days." Student's assertion, as pleaded in the complaint, does not meet the "more than ten days" threshold required by title 20 United States Code section 1415(k) to expedite the hearing. Second, Student also concedes he is not currently subject to a change of placement as a result of the Section 504 Compliance Review team's decision, which would also be a basis for expediting the hearing.

Third, OAH does not have jurisdiction over claims raised under section 504 of the Rehabilitation Act of 1973, which is the express basis for Student's Issue Two. As a remedy, he asks OAH to overturn and vacate the Section 504 Compliance Review team's decision. Title 20 United States Code section 1415(k) affords Student the right to challenge a manifestation determination review team decision. However, that is not the case here. The complaint does not allege that Bakersfield held a manifestation determination review under section 1415(k), or that Student challenges the conclusions of manifestation determination review team. Therefore, the remedy Student seeks is outside of OAH's jurisdiction. Student has established no basis for expediting the hearing on that issue.

Bakersfield has demonstrated that the allegations in the complaint do not constitute an appeal pursuant to Section 1415(k)(3), and thus the mandatory provisions of Section 1415(k)(4)(B) for an expedited hearing do not apply. (*Molina, supra,* 157 F.Supp.3d 1064, 1068-1071.) Accordingly, the expedited hearing dates will be vacated and the non-expedited hearing dates confirmed.

Student may only present Issue Two and the facts pertaining to it, as a denial of a free appropriate public education, referred to as FAPE. Student will be precluded from

arguing any violations of the disciplinary provisions of the law that Student would have in an order that requires Bakersfield to overturn a manifestation determination, including those contained in 20 U.S.C. section 1415(k)(3)(A); 34 C.F.R. section 300.532(a); and corresponding California law.

ORDER

1. The motion to unexpedite this matter is granted. Issue Two shall be limited to claims alleging a denial of FAPE.
2. The following expedited dates are vacated: expedited due process hearing on January 28, 29, and 30, 2020.
3. The unexpedited PCH shall proceed, unless otherwise ordered, on February 3, 2020 at 1 p.m. Prehearing motions and PHC statements must be filed no later than three business days before the PHC.
4. The unexpedited due process hearing shall proceed, unless otherwise ordered, on February 11, 12, and 13, 2020.

DATED: January 17, 2020

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Adrienne L. Krikorian
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Adrienne L. Krikorian
Administrative Law Judge
Office of Administrative Hearings