

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

PANAMA-BUENA VISTA UNION  
SCHOOL DISTRICT.

OAH Case No. 2014100290

EXPEDITED DECISION

On November 22, 2014, Student filed an expedited due process hearing request as part of an amended due process hearing request (complaint) naming Panama-Buena Vista Union School District (Panama).<sup>1</sup>

Administrative Law Judge Adrienne L. Krikorian heard this matter in Bakersfield, California on January 6, 7 and 8, 2015.

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<sup>1</sup> The amended complaint contained expedited and non-expedited claims. OAH set the expedited and non-expedited claims against Panama for separate hearings. Student had initially named Bakersfield City School District, but then subsequently dismissed all claims against it on December 22, 2014. The expedited claims timely proceeded to hearing on the twentieth school day after the complaint was filed. (34 C.F.R. § 300.532(c)(2).) This Expedited Decision resolves only the expedited claims.

Attorney Nicole Hodge Amey represented Student. Advocate Gloria Zepeda and Student's mother (Parent) were present for all three hearing days. The hearing was interpreted into Spanish.

Attorney Stacey Inman represented Panama. Rita Pierucci, Special Education Director, attended the hearing on behalf of Panama on all hearing dates.

The evidentiary portion of the hearing concluded on January 8, 2015. The ALJ granted time for the parties to submit written closing arguments at the parties' request. Upon timely receipt of written closing arguments, the record was closed and the matter was submitted for decision on January 12, 2015.

## ISSUES<sup>2</sup>

1. Did Panama have knowledge under title 20 United States Code section 1415(k)(5) that Student was a child with a disability entitling Student to the protections of the Individuals with Disabilities Education Act with regard to suspensions from school imposed between August 18, 2014, and November 22, 2014?

2. If Student was entitled to the protections of title 20 United States Code section 1415(k), did Panama fail to comply with section 1415(k) before changing his placement on November 14, 2014?

3. If Student was entitled to the protections of title 20 United States Code section 1415(k), was Student's behavior on November 14, 2014, a manifestation of his disability?

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<sup>2</sup> 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.)

## SUMMARY OF DECISION

Student failed to meet his burden of persuasion on Issue 1 because Student failed to establish that Panama had knowledge before November 14, 2014, that Student was a child with a disability entitling him to the protections of title 20 section 1415(k), rendering Issues 2 and 3 meritless. Parent declined to consent to an assessment of Student. Title 20 section 1415(k)(5)(C) precludes a determination that a school district had knowledge that the child is a child with a disability where a parent has not allowed the district to evaluate a child. Therefore, because Panama did not have knowledge that Student was a child with a disability prior to the events on November 14, 2014, Student is not entitled to any relief.

## FACTUAL FINDINGS

1. Student is a 12-year-old male and has lived with Parent and her husband within Panama's boundaries since August 2014. At all relevant times Student had an accommodation plan under Section 504 of the Rehabilitation Act of 1973 (Section 504) based upon a medical diagnosis of Attention Deficit Hyperactivity Disorder combined. Student speaks and writes English, but Spanish is the primary language spoken in his home.

2. Parent enrolled Student at Panama's Stonecreek Junior High School before the first day of school. On August 18, 2014, the first day of school, Parent gave Panama a Spanish language copy of Student's most recent Section 504 Plan and a behavior support plan from Student's former school district, Bakersfield City. She informed Panama that Student had a medical diagnosis of Attention Deficit Hyperactivity Disorder combined.

3. On August 27, 2014, Panama held a Section 504 team meeting and developed a Section 504 Accommodation Plan for Student. Parent, who was

accompanied by an educational advocate, signed and consented to the plan and received her Section 504 rights.

4. From the time she enrolled Student at Panama, Parent asked Panama staff to help her son, claiming he was "sick" and needed more help. On September 15, 2014, Panama received a handwritten letter from Parent, in English, requesting that Panama assess Student for eligibility for special education services and supports.

5. On September 19, 2014, following a Section 504 manifestation determination meeting, Parent consented to allow Panama to transfer Student to Thompson Junior High School where he could receive more support from male staff members.

6. On September 22, 2014, school psychologist Brittany Gentry timely generated a Consent for Assessment for special education eligibility. The proposed assessment plan included a functional behavioral assessment, and an evaluation for emotional disturbance and specific learning disability, which Ms. Gentry found to be appropriate given Parent's expressed concerns and the numerous defiant and inappropriate behaviors Student exhibited during the first month of the school year. Panama's special services secretary Gayle Montana mailed the Consent for Assessment and Notice of Parents Rights to Parent to her address of record on September 22, 2014. Parent did not return the Consent for Assessment and at hearing denied receiving the documents mailed on September 22, 2014. Panama did not receive the documents back as undeliverable.

7. Thompson staff held a Section 504 amendment meeting on October 7, 2014. Parent and her Spanish-speaking educational advocate attended and participated. Panama provided a Spanish language interpreter. School psychologist Matt Harper and special education assistant director Janet Clarke attended the meeting. At the meeting, Ms. Clark provided Parent with, and reviewed, a Spanish language version of the September 22, 2014 Consent for Assessment. Ms. Clarke and Mr. Harper discussed why

Panama wanted to assess Student for special education, explaining that Panama needed to assess Student before it could determine what additional supports and services he required. Ms. Clark asked Parent to sign the Consent for Assessment. Parent declined stating she wanted to discuss the document with her husband and would return it the next day. On October 15, 2014, Ms. Montana mailed a Spanish version of the Consent for Assessment and Notice of Parents Rights to Parent's home address. Parent did not sign and return the Spanish version of the Consent for Assessment, and at hearing contended that she did not receive the document in the mail. Panama did not receive the envelope back as undeliverable.

8. On November 14, 2014, Student engaged in a pattern of inappropriate behaviors, including defiance, failure to follow directives from his teacher and shadow aide, and banging his head against the wall in the principal's office. Panama suspended Student from school for two days. On November 19, 2014, Panama held a Section 504 manifestation determination team meeting, at which Ms. Clark hand-delivered another copy of the Spanish version of the Consent for Assessment to Parent, in the presence of her Spanish speaking educational advocate. Panama provided a Spanish interpreter. Ms. Clark and Mr. Harper discussed the Consent for Assessment, explained that Panama wanted to assess Student for eligibility for special education, and asked Parent to sign it. Parent declined to sign it, and at hearing, denied she ever received it. On November 22, December 2, and December 4, 2014, Panama mailed Spanish and English versions of the Consent for Assessment, along with other documents, by regular mail to Parent. Parent denied at hearing ever receiving any of those documents from Panama in the mail. Panama did not receive the envelopes mailed on those dates back as undeliverable.

9. Panama did not receive a signed Consent for Assessment from Parent between September 22, 2014, when the document was first mailed to Parent, and the November 14, 2014, incident resulting in the November 19, 2014, Section 504 manifestation meeting.

10. Parent is fluent in the Spanish language, reads only a few words in Spanish and English, and speaks and understands some English. Parent's testimony that she never saw, received or had explained to her, any of the documents from Panama, was not credible. She denied ever receiving any mail at her home address from Panama, even though she received other mail at home. Numerous Panama witnesses consistently and credibly testified that: Panama provided a Spanish language interpreter for Section 504 meetings; various Panama staff gave detailed explanations to Parent at the meetings and occasionally spoke to her on the phone after meetings, both in English and Spanish; a Spanish speaking educational advocate accompanied Parent to the Section 504 meetings; Panama gave Parent documents in Spanish at and after October 7, 2014, and explained documents at each meeting; and Panama mailed copies of documents in English and Spanish to Parent's address of record on at least four different occasions without receiving them back as undeliverable. Student offered no credible evidence to establish that the assessment plans were never received.

11. Parent's testimony was particularly inconsistent regarding the Consent for Assessment. She initially denied at hearing that she had ever seen the document in English or Spanish, or had it explained to her, including the English copy mailed on September 22, 2014. During the October 7, 2014, Section 504 amendment meeting, Ms. Clark, who is a licensed school psychologist and board certified behavior analyst, asked Parent about the Consent for Assessment. Both Ms. Clark and Mr. Harper testified that Parent stated at the meeting that she had signed the Consent for Assessment but did not believe she was required to return it. Parent did not explain or refute Ms. Clark's and Mr. Harper's credible testimony. Upon questioning from Panama's counsel, Parent admitted that she reviewed a copy of the Consent for Assessment with her educational advocate a week before the hearing, signed and dated it on January 5, 2015, and returned it to Panama on the first day of the expedited hearing. She did not explain how

or when she received the document she eventually signed, which contradicted her testimony that she never received anything by mail or at meetings.

12. Student was suspended from school for a total of 11 days between August 18, 2014, and November 18, 2014, because of inappropriate behaviors. From August 18, 2014, through November 19, 2014, Panama held multiple meetings with Parent to discuss Student's behaviors: an informal meeting with Parent and Student to develop a behavior contract; two Section 504 team meetings to discuss, develop and revise Student's 504 Accommodation Plan; and two Section 504 manifestation determination meetings involving two separate behavior incidents, at which Panama found on both occasions that Student's behaviors at issue were not manifestations of his Attention Deficit Hyperactivity Disorder combined.

13. Parent attended all of the Section 504 meetings accompanied by a Spanish speaking educational advocate and Panama provided a Spanish language interpreter on and after September 18, 2014. However, Parent did not have a detailed recall of facts from the numerous 504 meetings. She believed that from and after August 18, 2014, Panama kept Student out of classes four to five times a week because of his behaviors. She believed those class absences were depriving Student of a proper education. Parent never visited Student's classes at Stonecreek or Thompson, although Panama often called her to come to school because of Student's inappropriate behaviors.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK FOR STUDENT DISCIPLINE UNDER THE IDEA<sup>3</sup>

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>4</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) Under the IDEA and California law, children with disabilities have the right to a free appropriate public education. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A free appropriate public education is defined as appropriate special education, and related services, that are available to the child at no cost to the parent or guardian, that meet the state educational standards, and that conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); Ed. Code, §§ 56031 & 56040; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

2. Title 20 United States Code section 1415(k) and title 34 Code of Federal Regulations, part 300.530, et seq., govern the discipline of special education students. (Ed. Code, § 48915.5.) A child with a disability may be suspended or expelled from school as provided by federal law. (20 U.S.C. §1415(a)(1)(A); Ed. Code, § 48915.5, subd. (a).) If a child with a disability violates a code of student conduct, school personnel may remove that student from his or her educational placement without providing services

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<sup>3</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>4</sup> All references to the Code of Federal Regulations are to the 2006 version.



for a period not to exceed 10 days per school year, provided typical children are not provided services during disciplinary removal. (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3).)

3. For disciplinary changes in placement greater than 10 consecutive school days (or a pattern of disciplinary action that amounts to a change of placement), the IDEA requires that certain procedural steps be taken. Disciplinary measures imposed on students without disabilities may be applied to a child with a disability if the conduct resulting in discipline is determined not to have been a manifestation of the child's disability. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. §§ 300.530(c) & 300.536(a)(1) & (2).) If the conduct was a manifestation of the child's disability, the child must be returned to the placement from which the child was removed, with limited exceptions. (20 U.S.C. § 1415(k)(1)(F).)

4. A student who has not previously been determined to be a child with a disability eligible for special education and related services, and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for under the 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).)

5. At hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student is the petitioning party and has the burden of persuasion on all issues.

#### ISSUE ONE: DID PANAMA HAVE KNOWLEDGE THAT STUDENT HAD A DISABILITY?

6. Student contends that, prior to November 14, 2014, Panama had knowledge that he was a child with a disability and, therefore, he was entitled to the

protections of title 20 United States Code section 1415(k). Panama contends it did not have knowledge under section 1415(k)(5)(C) because Parent did not return a signed Consent for Assessment during the relevant period, and an exception to a school district being deemed to have knowledge of a student's disability applies based on the lack of consent. Therefore Student was not entitled to the protections of section 1415(k).

7. A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred: (i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services; (ii) the parent of the child has requested an evaluation of the child pursuant to title 20 United States Code section 1414 (a)(1)(B); or (iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency. (20 U.S.C. § 1415(k)(5)(B).)

8. A local education agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to title 20 United States Code section 1414. (20 U.S.C. § 1415(k)(5)(C).) Title 20 United States Code section 1414 provides for the assessment of students to determine if they are eligible for special education and services as a child with a disability under the specific eligibility criteria of the IDEA. A local educational agency must obtain informed consent from the parent before conducting an evaluation. (20 U.S.C. § 1415(a)(1)(D)(i)(I).)

9. Here, Student failed to meet his burden of establishing that Panama had knowledge that Student was a child with a disability eligible for special education

supports and services before the November 14, 2014, incident occurred because Parent did not allow Panama to evaluate Student for special education eligibility.

10. Contrary to Parent's assertion that she never received the Consent for Assessment, the weight of the evidence established that she did. Panama generated an assessment plan on September 22, 2014, and mailed it by regular mail to Parent. The envelope was never returned as undeliverable. Panama hand-delivered the Consent for Assessment translated into Spanish to Parent on October 7, 2014. Ms. Clark and Mr. Harper credibly testified that Parent told them she had previously signed the form but did not think she needed to return it. They explained the form to Parent, asked her to sign the form at the meeting, and she declined stating she wanted to review it with her husband. Parent did not return the signed form after the October 7, 2014 meeting. Panama hand-delivered another copy of the assessment plan translated into Spanish to Parent at the November 19, 2014 Section 504 manifestation determination meeting. Ms. Clark and Mr. Harper explained it to her and asked her to sign it. Parent declined. Panama mailed both English and Spanish copies of the Consent for Assessment, along with other documents, to Parent on November 22, 2014, December 2, 2014, and December 4, 2014. None of those envelopes were returned as undeliverable to Panama.

11. While the evidence established that Parent had limited ability to read Spanish or English, Student offered no credible evidence that Panama failed to communicate the need for parental consent to assess Student for eligibility for special education. Instead, Panama's witnesses credibly testified that they explained the Consent for Assessment to Parent, with the assistance of Spanish translation and interpretation, on multiple occasions. Parent had a Spanish-speaking advocate at all relevant times including at Section 504 meetings, and she was represented by an attorney knowledgeable in special education law at least from and after October 6, 2014. In sum, Parent's testimony that she did not know about, or understand, the necessity for the Consent for Assessment sought by Panama was not persuasive.

12. Without parental consent for an assessment, Panama could not determine if Student was eligible for special education and related services as a student with a disability under the specific criteria of the IDEA, due to Student's Attention Deficit Hyperactivity Disorder combined or other unknown disabilities. Regardless of actual knowledge of parental or teacher concerns, where a parent does not allow an assessment, title 20 United States Code section 1415(k)(5)(C) expressly provides that a school district does not have a "basis of knowledge" of the student's disability, such that the student is not entitled to the IDEA protections applicable to violations of the code of student conduct. Because Parent did not allow Panama to assess Student at any time after he enrolled until the date the amended complaint was filed, Panama cannot be deemed to have had knowledge under section 1415(k)(5)(B) that Student was a child with a disability. Therefore, Panama was not required to comply with section 1415(k) before suspending Student or changing his placement.

#### ISSUES TWO AND THREE: MANIFESTATION DETERMINATION MEETING

13. In Issues Two and Three Student alleges that an IDEA manifestation determination meeting should have been held, and that Student's conduct should have been found to be a manifestation of his disability. However, as discussed in Issue One, Student was not entitled to the protections of title 20 United States Code section 1415(k) because District had no "basis of knowledge" that Student was eligible under IDEA. Therefore, Issues Two and Three, seeking a determination regarding Panama's compliance with section 1415(k), are meritless, because based upon these facts, Panama was not required to conduct a manifestation determination meeting under the IDEA.

#### ORDER

All relief sought by Student is denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on all issues.

## RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: January 23, 2015

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/s/

ADRIENNE L. KRIKORIAN

Administrative Law Judge

Office of Administrative Hearing