

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. 2015100237

DECISION

On October 6, 2015, Parent filed an expedited due process hearing request on Student's behalf with the Office of Administrative Hearings naming Panama-Buena Vista Union School District as respondent.

Student filed a prior expedited and non-expedited hearing request in OAH Case No. 2014100290. Those matters proceeded to hearing and a Decision (Decision 1) was issued in the expedited matter on January 23, 2015. A Decision in the non-expedited matter (Decision 2) was issued on June 11, 2015.

A telephonic prehearing conference in the instant case was held before Administrative Law Judge Joy Redmon on October 23, 2015, wherein Student's issues were discussed. Panama made a motion to dismiss the case asserting that adjudicating the issues as pled violates the doctrines of res judicata and collateral estoppel as they were fully litigated in OAH Case No. 2014100290. The matter was taken under submission during the PHC. On October 26, 2015, ALJ Redmon issued an Order following the PHC finding that a threshold jurisdictional question needed to be resolved

before determining if Student could proceed on his asserted issues without violating the doctrines of res judicata and collateral estoppel.

ALJ Redmon heard the jurisdictional issue on November 3, 2015, in Bakersfield, California. Both parties submitted written opening briefs and were permitted to make oral arguments. As explained more fully below, this matter involves the same parties and substantially the same issues and time period as adjudicated in OAH 2014100290. Although the decisions in that matter are pending appeal in federal court, no order disturbing the factual findings or legal conclusions contained therein has been issued. Accordingly, the factual findings from Decision 1 and Decision 2 are binding in this matter and neither party submitted additional witnesses or documentary evidence. The matter on the jurisdictional question was submitted for a decision.

Attorney Nicole Hodge Amey represented Student. Also present on Student's behalf for a portion of the day were paralegal Gloria Zepeda and Mother. Certified interpreter Loli Coker provided in-person Spanish language translation for Mother. Attorneys Jennifer Rowe Gonzalez and Kathleen McDonald represented Panama. Rita Pierucci, Panama's Director of Special Education, was also present on Panama's behalf.

ISSUES¹

JURISDICTIONAL ISSUE:

Is Panama deemed to have had a “basis of knowledge” that Student was a student with a disability and entitled to the protections of title 20 United States Code section 1415 et. seq. by operation of law at the time Mother returned the signed assessment plan on January 6, 2015, thereby requiring Panama to have stayed Student’s January 13, 2015, expulsion and followed the manifestation determination review process set forth in section 1415 et. seq?

STUDENT’S ASSERTED ISSUES:

Issue 1: Did Panama deny Student a free appropriate public education by failing to hold a manifestation determination under the IDEA prior to expelling Student?

Issue 2: Is Panama deemed to have had knowledge under 1415(k)(5) that Student was a child with a disability entitling Student to the protections of the IDEA with regard to his January 13, 2015, expulsion?²

¹ The issues have been reworded for clarity. Specifically, the jurisdictional issues identified in the Order following the PHC incorrectly referenced section 1414 et. seq. rather than section 1415 et. seq. This was a typographical error and both parties acknowledged at hearing that they understood section 1415 et. seq. was the intended code section. 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.)

² This issue in the Order following the PHC asked whether Student was entitled to the protections “before” his January 13, 2015, expulsion and Student requested the

Issue 3: Did Panama fail to comply with section 1415(k) before changing his placement on January 13, 2015?

Issue 4: Were Student behaviors causing expulsion during the 2014-2015 school year a manifestation of his disability?

SUMMARY OF DECISION

This Decision holds that Student is barred from litigating his issues as pled based upon the doctrine of collateral estoppel. Student raised two arguments seeking to establish that he was not precluded from litigating his asserted issues. Student's first contention was that Decision I only addressed the time period from his enrollment in Panama in August 2014 through November 24, 2014 (date Student's amended complaint was filed). Student argued that Decision 1's holding that Panama did not have a "basis of knowledge" that he was a child with a disability because Mother had not provided consent to assess Student, ended immediately upon Mother returning a signed assessment plan to Panama on January 6, 2015. Thereafter, Panama is deemed to have had the required knowledge and he was entitled to the protections of title 20 United States Code section 1415 et. seq. before being expelled on January 13, 2015.

This Decision holds that Student's January 13, 2015, expulsion was based entirely on Student's conduct that occurred before November 24, 2014. The statute requires that Panama have a basis of knowledge that Student was a child with a disability before the behavior requiring disciplinary action occurred. Mother's eventual consent to the assessment did not trigger the protections of section 1415 et. seq. because Decision 1 held that Panama did not have the requisite knowledge prior to or at the time the behavior underlying the disciplinary action occurred.

wording be changed to, "with regard" to his January 13, 2015, expulsion. Panama objected; however, the change is consistent with Student's complaint and is permitted.

Student's second contention is that Decision 2 found that Panama violated its child find obligation to Student by failing to provide a Consent Form in Spanish to assess Student, thereby delaying the opportunity for assessment, through October 6, 2014. Student argues that the child find violation equates to Panama having a "basis of knowledge" that Student was a child with a disability before the behavior that precipitated the disciplinary action occurred and was entitled to the protections of section 1415 et. seq. before being expelled.

This Decision holds that Decision 2's conclusion regarding the child find violation through October 6, 2014, is not inconsistent with Decision 1's legal conclusion regarding "basis of knowledge." Even if Decision 2's holding regarding child find imputed a "basis of knowledge" that Student was a child with a disability, Panama provided Mother a Consent Form in Spanish on October 7, 2014. Up to that point, Student had been removed from his then current educational placement for fewer than 10 school days which did not trigger the protections of section 1415(k).

This Decision, relying on the findings in Decision 1 and Decision 2, holds that at the time Panama removed Student from his then current educational placement for more than 10 school days, Panama had complied with its child find obligation by providing Mother an assessment plan in Spanish more than one month before. Mother had not signed that assessment plan. Therefore, pursuant to the legal conclusions reached in Decision 1 and Decision 2, Student was not entitled to the protections of section 1415 et. seq. at that time.

In addressing the threshold jurisdictional issues presented in this matter, this Decision holds that Panama was not required to stay Student's January 13, 2015, expulsion or afford him the protections of section 1415 et. seq. because Mother did not provide consent for Panama to assess Student *before* the conduct underlying the disciplinary action occurred. Therefore, all issues raised in Student's current complaint

are barred by collateral estoppel because they were considered and adjudicated in Decision 1 and Decision 2. Those decisions are pending an appeal in federal court; however, at this time the factual findings and legal conclusions contained therein are binding in this matter. Accordingly, the issues raised in Student's complaint are barred by collateral estoppel.

FACTUAL FINDINGS³

JURISDICTION

1. Student is currently a 13-year-old boy who has lived with Mother and her husband within Panama's boundaries since August 2014. Throughout the relevant time Student attended school in Panama, he 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 type. (Decision 2 F.F.1)

RELEVANT FACTUAL FINDINGS FROM DECISION 1 AND DECISION 2

2. Parent enrolled Student at Panama's Stonecreek Junior High School before the first day of the 2014-2015 school year, which was held on August 18, 2014.⁴ Parent signed a bilingual Home Language Survey dated August 8, 2014, in which she indicated that Spanish was the primary language spoken at home. (Decision 2 F.F. 2 and 3)

³ The factual findings and legal conclusions made in Decision 1 and Decision 2 incorporated herein will be identified by Decision and cited as F.F. and L.C. with the corresponding paragraph number. The findings not attributed to the prior decisions are new findings made in this Decision.

⁴ Decision 1 and Decision 2 use the term Mother and Parent interchangeably. Parent in this Decision also refers to Mother.

3. On August 27, 2014, Student was suspended for two days. That same day, Panama held a Section 504 team meeting with Mother and a Spanish language interpreter present. A revised Section 504 Accommodation Plan was developed. (Decision 2 F.F. 6) Student was suspended for three days on September 11, 2014, for grabbing a female student's buttocks. (Decision 2 F.F. 7) On September 15, 2014, Panama received a handwritten letter from Mother requesting that Student be assessed for special education eligibility. (Decision 2 F.F. 9)

4. On September 18, 2014, a Section 504 team meeting was held. A Spanish language interpreter was present at the meeting. During the meeting, Panama's assistant special education director Janet Clark, a licensed educational psychologist and board certified behavior analyst, explained the special education eligibility categories of "other health impaired," "emotional disturbance," and "specific learning disability." She also explained that Panama wanted to assess Student for eligibility. Parent told staff she thought Student did better with male teachers and counselors. Panama did not allow Student to return to Stonecreek and recommended that he transfer to Thompson Junior High School. (Decision 2 F.F. 10) On September 19, 2014, Parent consented to transferring Student to Thompson where he could receive more support from male staff members. (Decision 1 F.F. 5) Student began attending Thompson on or about September 19, 2014. (Decision 2 F.F. 11)

5. An English version of the assessment Consent Form was mailed to Mother on September 22, 2014. (Decision 2 F.F. 13) The document was not signed or returned to Panama.

6. From Student's first reported behavior incident at Panama on August 21, 2014, through October 6, 2014, Student missed six school days (totaling 36 class periods) as a result of suspensions. Student was suspended for two additional days that were served on October 7th and 8th, 2014. (Decision 2 F.F. 15)

7. Student filed for a due process hearing alleging both expedited and non-expedited issues on October 6, 2014. The expedited issues alleged that Student was entitled to the protections of section 1415(k)(5)(A) because Panama had knowledge that Student was a child with a disability. Student also asserted that his behavior on September 11, 2014, that resulted in a change of placement was a manifestation of, or had a direct and substantial relationship to, Student's disability.

8. A Section 504 team meeting was held on October 7, 2014, with Mother and a Spanish interpreter present. Panama provided a Spanish version of its assessment Consent Form to Parent during the meeting. Ms. Clark reviewed the Consent Form point by point along with the Parent's rights form. Ms. Clark asked Parent to sign the form at the meeting. Mother agreed to take the consent form home to discuss it with her husband and to return it the next day. (Decision 2 F.F. 17)

9. The form was not returned and Panama mailed another copy of the Spanish version of the Consent Form and Notice of Parents' Rights to Parent's home address on October 15, 2014. (Decision 2 F.F. 18)

10. A telephonic prehearing conference regarding Student's expedited hearing request was conducted before OAH on October 22, 2014, during which the legal issues contained in Student's complaint and described above were confirmed. The expedited portion of OAH Case No. 2014100290 was initially scheduled to commence on November 4, 2014. On the eve of hearing, Student's counsel filed a request to dismiss the expedited issues supported by a declaration. Student's counsel asserted that she had just learned that Student had not been suspended by Panama for more than 10 days and, in her opinion, Student was not entitled to an expedited hearing. She therefore requested that the expedited issues be dismissed and the expedited hearing dates be vacated. On November 3, 2014, Student's motion was granted and the expedited due process hearing matter vacated.

11. On November 14, 2014, Student engaged in a pattern of inappropriate behaviors and was suspended from school for two more days. Thompson's school principal, Panama's director of special education Rita Pierucci, and Ms. Clark met with Mother and with the assistance of a Spanish-speaking staff member, discussed Student's behaviors. Dr. Pierucci asked Mother why she would not sign and return the Consent Form. Mother responded that it was in the hands of her attorney. (Decision 2 F.F. 20)

12. Another Section 504 team meeting was held on November 19, 2014, during 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. Ms. Clark, through an interpreter, again explained that Panama wanted to assess Student for special education eligibility and asked Mother to sign. (Decision 1 F.F. 8). Mother declined to sign the Consent Form.

13. Student was suspended from school for a total of 11 days from August 18, 2014, through November 18, 2014. (Decision 1 F.F. 12) On November 22, 2014, Panama mailed Spanish and English copies of the Consent Form, along with other documents, via regular mail to Parent. (Decision 1 F.F. 8)

14. On November 24, 2014, Student filed a motion to amend his complaint and again asserted expedited issues for hearing.⁵ The motion was granted. A telephonic PHC was held on December 12, 2014, wherein Student's amended expedited issues were reviewed. Student's amended expedited issues specifically sought a determination of: 1) whether Student was entitled to the protections of section 1415(k) for all suspensions from school from August 18, 2014, until the amended complaint was filed because Panama had a "basis of knowledge" that Student was a child with a disability entitling

⁵ The complaint was submitted after 5:00 p.m. on Friday, November 21, 2014, and was not deemed filed until November 24, 2014.

him to the IDEA protections; 2) that if Panama had a basis of knowledge did it fail to comply with section 1415(k) before changing Student's placement on November 14, 2014; and 3) was Student's November 14, 2014, behavior caused by, or did it have a direct and substantial relationship to, his disability? Panama asserted as an affirmative defense that as a matter of law it did not have the requisite knowledge because Parent had not allowed an evaluation of Student prior to the behaviors occurring that formed the basis for disciplinary action.

15. Panama's opening brief in the instant matter asserts that it held an administrative expulsion hearing on December 16, 2014, pursuant to Education Code section 48914. The panel recommended that Student be expelled.

16. Mother signed the assessment Consent Form on January 5, 2015, and returned it to Panama the following day. January 6, 2015, was the first day of the expedited due process hearing in OAH 2014100290. (Decision 1 F.F. 11)

17. It was stipulated by the parties in the instant due process matter that Panama's school board ratified the expulsion panel's recommendation and Student was expelled on January 13, 2015. It was further stipulated by the parties that the expulsion was based exclusively upon conduct occurring between the time Student enrolled in Panama in August 2014 and November 14, 2014.

18. Decision 1 on the expedited issues was issued on January 23, 2015. That Decision reached the legal conclusion that, "[w]ithout parent consent for an assessment, Panama could not determine if Student was eligible for special education and related services..." (Decision 1 L.C. 12) The Decision went on to hold that, "[b]ecause 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.” (Decision 1 L.C. 12) The Decision further held that the remaining issues regarding conducting a manifestation determination meeting and determining whether or not Student’s conduct was the result of a disability, “...are meritless, because based upon these facts, Panama was not required to conduct a manifestation determination meeting under the IDEA.” (Decision 1 L.C. 13)

19. The second due process hearing on Student’s non-expedited issues was held in April 2015. The issues in that matter were whether or not Panama violated its obligations under the IDEA from August 18, 2014, through November 24, 2014, (date Student’s amended complaint was filed) by not identifying and assessing Student for special education eligibility; and whether Panama deprived Parent from meaningfully participating in developing Student’s education program by not translating disciplinary documents into Spanish.

20. Decision 2 held that since only an English version of the Consent Form was provided to Parent before October 7, 2014, Panama violated its Child Find obligations under the IDEA through October 6, 2014. Decision 2 held that thereafter Panama was not faulted for failing to assess Student in the absence of parental consent because it provided a Consent Form in Spanish on October 7, 2014. Ultimately, Decision 2 held that Panama met its child find obligations from October 7, 2014, through the date the amended complaint was filed. (Decision 2 L.C. 18) Student did not establish a violation of the IDEA regarding behavior documents not being translated into Spanish. (Decision 2 L.C. 32)

21. As a remedy for Panama’s child find violation, Decision 2 awarded Student seven hours of psychological counseling and 28 hours of intensive academic instruction in the areas of reading or math or a combination of both to be used through December 2015. (Decision 2 Order 1-3)

22. Both Decision 1 and Decision 2 are pending appeal in federal court. On

October 6, 2015, Student filed the instant due process hearing request primarily seeking to have his January 13, 2015, expulsion overturned. Panama asserted that Student should be estopped from litigating all claims raised in his complaint because the legal conclusions reached in Decision 1 and Decision 2 definitively resolved the issues and to proceed violates the doctrines of res judicata and collateral estoppel.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁶

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and their implementing regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁷ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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.

⁶ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

(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 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. A local education agency shall not be deemed to have knowledge that the child is a student with a disability if the parent has not allowed the child to be evaluated 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).)

6. 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 the jurisdictional issue.

JURISDICTIONAL ISSUE: LEGAL EFFECT OF JANUARY 6, 2015, SIGNED CONSENT TO ASSESS

7. Mother returned a signed Consent Form to Panama on January 6, 2015, permitting it to assess Student for special education eligibility. Student argues that even though Student had not been determined eligible for special education at that time, as soon as the form was given to Panama, Student was entitled to the protections of section 1415 et. seq. because Panama had a “basis of knowledge” that he was a student with a suspected disability. Student reasons that since Panama had the requisite knowledge before Student was expelled on January 13, 2015, that Panama was obligated to stay the expulsion and comply with the requirements of section 1415 et. seq. That argument ignores the plain language of the statute.

8. The protections of section 1415(k)(5)(A) apply to a student not previously eligible for special education and related services, and who has engaged in behavior that violates a code of student conduct, 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), emphasis added) In this case the behavior that precipitated the disciplinary action occurred on and before November 14, 2014. Therefore, to invoke the protections of section 1415(k)(5)(A), Student would have to establish that Panama had the requisite knowledge on or before November 14, 2014, not prior to the expulsion on January 13, 2015. That exact legal question was answered

in Decision 1.

9. Regardless of a local education agency's actual knowledge about the likelihood that a child is a student with a disability, section 1415(k)(5)(C) expressly provides that a school district does not have the requisite "basis of knowledge" regarding the student's disability, such that the student is entitled to the IDEA's protections for violations of a code of student conduct, if the parent does not consent to an assessment. Decision 1 determined that Panama met this legal exception because Mother did not consent to a special education assessment *before* the conduct occurred. Decision 1 specifically held that, "[b]ecause 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." (Decision 1 L.C. 12)

10. The fact that Decision 1 addressed suspension rather than expulsion is inconsequential to the analysis. The exception to section 1415(k)'s procedural requirements is applicable to all disciplinary action taken by a local education agency for violations of the code of student conduct. The exception does not distinguish between suspension and expulsion. In this case, the conduct forming the basis for the expulsion occurred on and prior to November 14, 2014, and was fully considered and adjudicated in Decision 1.

LEGAL EFFECT OF DECISION 2

11. Student argues that Decision 2's finding that Panama violated its child find obligation to Student by failing to give Mother an assessment plan in Spanish until October 7, 2014, negated Decision 1's finding that Panama did not have a "basis of knowledge" before the conduct forming the basis for Student's expulsion occurred.

Student reasons that applying Decision 2, Panama is deemed to have had the required knowledge at least until October 7, 2014. Since some of the conduct forming the basis of the expulsion occurred during that time, Panama was obligated to provide the disciplinary protections of section 1415 et. seq. Student's argument fails.

12. Decision 2 analyzed whether or not Panama complied with its child find obligations. This is a separate legal analysis from the discrete disciplinary provisions contained in section 1415 that were fully analyzed in Decision 1. The same ALJ presided over both the expedited and non-expedited portions of OAH 2014100290. She heard all the evidence presented in both cases and issued two separate decisions. In Decision 2, the ALJ could have reached a different legal conclusion regarding the disciplinary provisions of the IDEA regarding Student from the time he enrolled up through the filing of his amended complaint on November 24, 2014. She did not. Further, ALJ's have broad discretion in crafting appropriate remedies for FAPE denials. The broad authority to grant relief extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (*Forest Grove School District v. T.A.* (2009) 129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168].) The ALJ awarded Student specific remedies for the child find violation including academic tutoring and counseling but chose not to order Panama to make any changes regarding Student's suspensions or disciplinary actions taken against Student before October 7, 2014.

13. Even assuming *arguendo* that Decision 2's legal conclusions did equate to Panama being on notice that Student was a child with a suspected disability from the time he enrolled in Panama through October 6, 2014, such a finding does not entitle him to the protections of section 1415(k).

14. 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 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).) Accordingly, the protections contained in section 1415(k) are not required until a student is removed from his current placement for disciplinary reasons for more than 10 consecutive school days (or a pattern of disciplinary action that amounts to a change of placement). Only then does the IDEA require that certain procedural steps be followed.

15. Decision 1 found that Student had only been removed for six days from his educational placement during the time Panama violated its child find obligation up through October 6, 2014. Giving Student the most permissive interpretation of Decision 2's legal conclusions, Mother would have had at least 15 days from receiving the Consent Form to arrive at a decision regarding the proposed assessments. (Educ. Code § 56043(b)). Therefore, Mother had until approximately October 23, 2014, to provide consent for the assessment but she failed to do so. Decision 1 also found that Student was suspended on October 7, 2014, and October 8, 2014, bringing the total to eight days. Therefore, even applying Student's argument that Decision 2 imputed the requisite "basis of knowledge" to Panama up through October 6, 2014, and then extending that finding to include the 15 days provided for a parent to consider a proposed assessment plan, the protections of section 1415(k) still were not triggered as Student had not yet been removed for more than 10 school days.⁸

⁸ Student generally refers to being removed from his educational placement and may be including his transfer from Stonecreek to Thompson as constituting a removal. This argument was rendered moot by Student's motion to dismiss his original expedited complaint filed on the eve of his initial expedited due process hearing. As noted in the factual findings contained herein, Student's counsel submitted a declaration indicating that as of November 3, 2014, Student was not entitled to the protections of section

16. By the time Student was removed from his educational placement for more than 10 school days, Parent had had the Spanish version of the Consent Form for more than one month without providing consent. Decision 1's legal conclusion regarding Panama's excusal from providing Student the procedural protections contained in section 1415(k) applied at the time Panama's obligation would have otherwise been triggered.

RES JUDICATA AND COLLATERAL ESTOPPEL

17. Federal and state courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. (*Allen v. McCurry* (1980) 449 U.S. 90, 94 [101 S.Ct. 411, 66 L.Ed.2d 308]; *Levy v. Cohen* (1977) 19 Cal.3d 165, 171 [collateral estoppel requires that the issues presented for adjudication be the same as those decided in the prior action, that there be a final judgment on the merits in the prior action, and that the party against whom the plea is asserted was a party to the prior action]; see 7 Witkin, California Procedure (4th Ed.), Judgment § 280 et seq.) Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their agents from re-litigating issues that were, or could have been, raised in that action. (*Allen, supra*, 449 U.S. at p. 94.) Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigating the issue in a suit on a different cause of action involving a party to the first case. (*Ibid.*; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; see also *Migra v. Warren City School Dist. Bd. of Ed.* (1984) 465 U.S. 75, 77, n. 1 [104 S.Ct. 892, 79 L.Ed.2d 56] [federal courts use the 1415(k) as he had not been removed from his educational setting for more than 10 days. Student's counsel's motion and declaration make clear that she was aware of the transfer at the time she filed the motion and cannot now argue that the same facts should be interpreted differently.

term “issue preclusion” to describe the doctrine of collateral estoppel].)

18. Collateral estoppel and res judicata are judicial doctrines, but they are also applied to determinations made in administrative settings. (See *Pacific Lumber Co. v. State Resources Control Board* (2006) 37 Cal.4th 921, 944, citing *People v. Sims* (1982) 32 Cal.3d 468, 479; *Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 732.)

19. Student asserts that he is not precluded from litigating the issues asserted in this matter because Decision 1 and Decision 2 addressed the time period through November 24, 2014, and the issues herein did not arise until after the prior case concluded. Student also asserts that the prior Decisions addressed only suspensions and not his eventual expulsion, which is a different issue. Student’s arguments are not persuasive for the reasons identified above. Specifically, although the expulsion was not ratified until January 13, 2015, it was based exclusively on conduct occurring from August 2014 through November 14, 2014. The time period adjudicated in Decision 1 and Decision 2 extended through November 24, 2014. Additionally, as explained above, the statute underlying Panama’s excusal from providing Student the procedural protections of section 1415 et. seq, does not differentiate between suspension and expulsion. The only limitation in section 1415(k)(5)(D) is that the local education agency may only impose disciplinary measures on a child that are applied to children without disabilities who engaged in comparable behaviors. Student did not allege he was treated differently than children without disabilities who engaged in comparable behaviors.

20. The issues alleged in this case are the same as those decided in the prior proceedings given Decision 1’s legal conclusion regarding the operative effect of Mother’s lack of consent to assess prior to Student engaging in the behavior that formed the basis for his suspension and ultimate expulsion. Moreover, the issues raised

in the instant complaint are intrinsically linked to those raised in the prior matter and were decided either directly or resolved based on the holdings in Decision 1 and Decision 2. The issues were fully litigated and two final decisions issued in OAH 2014100290 were reached on the merits. Both OAH 2014100290 and this matter involve the same parties. For the foregoing reasons, the general requirements for collateral estoppel and res judicata have been met and preclude Student from litigating the issues asserted in the instant action.

21. The IDEA modifies the general analysis regarding res judicata and collateral estoppel. Specifically, nothing in the Act precludes a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed. (20 U.S.C. § 1415(o); 34 C.F.R. § 300.513(c) (2006); Ed Code, § 56509.) Therefore, although parties are precluded from re-litigating issues already heard in previous due process proceedings, parents are not precluded from filing a new due process complaint on issues that could have been raised and heard in the first case, but were not.

22. In this case, Student attempts to cast these allegations as new issues not raised or adjudicated in the prior case. Upon careful review, in this matter he seeks only to appeal the findings in Decision 1 and Decision 2. Student disagrees with the legal conclusions contained in Decision 1 and Decision 2 and is not without recourse. Student can address these objections in his federal court appeal but may not re-litigate the matter here. The Ninth Circuit has held that OAH's jurisdiction is limited to the circumstances enumerated in the Education Code. (See *Wyner v. Manhattan Beach Unified School District* (9th Cir. 2000) 223 F.3d 1026.) Since an appeal of prior OAH decisions is not one of the circumstances listed in the Education Code for which a hearing may be requested, OAH lacks jurisdiction to hear Student's remaining issues.

23. Based upon both the general principles of res judicata and collateral

estoppel, Student is precluded from proceeding with the issues pled in this matter. Additionally, the exception to these doctrines contained in the IDEA does not apply here.

ORDER

1. Student's is barred from litigating the issues herein due to collateral estoppel.
2. The remaining due process hearing dates previously scheduled in this matter are vacated.

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, Panama prevailed on the threshold jurisdictional issue in this matter and is therefore deemed the prevailing party.

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).)

DATE: November 13, 2015

/s/

JOY REDMON

Administrative Law Judge

Office of Administrative Hearings