

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. 2012120644

ORDER FOLLOWING PRE-HEARING
CONFERENCE, ORDER
CONTINUING HEARING TO
FEBRUARY 13, 2013, AND ORDER
DISMISSING ISSUE 2

On February 4, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Deborah Myers-Cregar, Office of Administrative Hearings (OAH). James D. Peters III, Advocate, appeared on behalf of Student. Stacy L. Inman, Attorney at Law, appeared on behalf of Panama-Buena Vista School District (District). The PHC was recorded.

Based on discussion with the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing is continued from February 7, 2012, on District's motion, and shall take place on February 13, 14, 19, 20 and 21, 2013, and continuing day to day, Monday through Thursday, as needed at the discretion of the ALJ. On February 13 and 19, 2013, the hearing shall begin at 10:30 p.m. All other days shall begin at 10:00 am, unless otherwise ordered. The hearing shall end by 5:00 p.m. each day, unless otherwise ordered.

The hearing shall take place at the District's offices, located at 3100 Actis Street, Bakersfield, California 93309.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing "good cause" to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

2. Issues and Proposed Resolutions. The issues at the due process hearing are listed below.

Issue 1: At the March 14, 2011 and February 23, 2012 IEPs, for the 2012-2013 school year, did the District deny Student a free appropriate public education (FAPE) by failing to:

- a) Offer Student placement in the least restrict environment, which is a general education kindergarten class;
- b) Offer Student a one-to-one aide during school hours from a certified non-public agency (NPA) who is trained in Applied Behavior Analysis (ABA);
- c) Provide appropriate training to Student's teacher;
- d) Provide Student with a resource specialist for 30 minutes a week;
- e) Provide Student with individual speech and language services for 120 minutes a week, group speech and language for 90 minutes a week and speech and language collaboration for 20 minutes a week;
- f) Provide Student with individual occupational therapy (OT), two times a week, 30 minutes a session;
- g) Provide transportation to Student to attend associated therapies; and
- h) Provide Student with a 40 four a week ABA program that consists of working one-to-one with a ABA trained aide, eight hours a month of supervision and four hours a month of parent training?

Issue 2: Did the District deny Student a FAPE by failing to offer 2013 extended school year (ESY) services with an ABA trained aide from a certified NPA.¹

Proposed Resolutions: Student requests placement in a general education classroom at his home elementary school, and that the District provide him with an ABA trained one-to-one aide from a certified NPA, such as the Center for Autism and Related Disorders (CARD), during the school day, and an appropriate transition plan to this classroom. Additionally, the District shall provide additional training to Student's teacher and service providers as to his unique needs. The District shall provide resource specialist services for 30 minutes a week. Further, Student shall receive speech and language services, 90 minutes a week, individual instruction, 30 minutes a week group instruction, and 20 minutes a week collaboration. The District shall also provide transportation to all therapies, OT for 30 minutes a session, and ESY services. The District shall provide Student with a 40 hour a week ABA program, with eight hours a month of supervision and four hours a month of parent training.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the

¹ The second issue was subject to a written motion to dismiss. District filed its motion on February 5, 2013.

letter “S” or “D” in front of the exhibit to designate if it is a Student or District exhibit (for example, “S-5, S-6,” or “D-1, D-2”). Each exhibit shall be internally paginated by exhibit, or all of a party’s exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. The parties have represented that they have exchanged their exhibit binders with each other. At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible and complete version will be used.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible.

4. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party shall be permitted to call any witnesses not disclosed in the party’s prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

The parties are ordered to meet and confer by February 7, 2013, as to the schedule of witnesses, and have agreed to coordinate the availability and order of testimony of witnesses to ensure that there is a witness available to testify at all times during the hearing, and to ensure that the hearing is completed as scheduled. By 3:00 p.m. on February 8, 2013, each party shall serve on the other party and on the ALJ, the final witness list, including the anticipated order of the witnesses to be called at the hearing, an estimate of the length of time for the direct examination of each witness the party actually intends to call, along with time estimates for the testimony of any additional witnesses the party may call, depending on the flow of the hearing and the evidence. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses’ testimony.

The following witnesses will be called to testify by Student: Parents, Vince Redmond, Marci Shockley, Dr. Evelin Garcia, Danielle Townsend, Caitlin Chapin, Joanne Thomas, Rita Pierucci, Alicia Ramos, Sheri Jiron, Tanya Strangland, Brian Cortez, and Sheri Messiha.

The following witnesses will be called to testify by the District: Parents, Angelina Bertran-Harris, Caitlin Chapin, Brian Cortez, Sherry Jiron, Dr. Bill Matthew, Sheri Messiha, Rita Pierucci, Tanya Strangland, and Joanne Thomas.

5. Scope of Witness Examination. The parties will be given latitude in their questions during direct and cross examination such that witnesses shall be called to testify only once.

6. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. Cal. Code Regs., tit. 5, § 3082, subd. (g). Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. The proponent of the witness shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

Student's motion to allow Dr. Evelin Garcia to testify telephonically is denied.
District's motion to allow Sherie Messiha to testify telephonically is denied.

7. Order of Presentation of Evidence. Student shall present its case in chief first.

8. Motions. Rulings on motions made at PHC:

1. Student's motion to allow television, the press and the media to attend the hearing is denied. The press and media may not be within 50 yards of the hearing location.
2. Student's motion to audio record the hearing is denied.
3. District's written motion to dismiss Issue 2 is granted. Issue 2 is not ripe because the operative IEP for 2013 ESY has not occurred and is scheduled for February 23, 2013.
4. Any prehearing motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made prior to or during the prehearing conference of February 4, 2013.

9. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

10. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off

or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

11. Compensatory Education/Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

12. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for translation services.

13. Hearing Open/Closed To the Public. The hearing will be closed to the public.

14. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE at 916-376-6319.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

15. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

Dated: February 06, 2013

/s/

DEBORAH MYERS-CREGAR

Administrative Law Judge
Office of Administrative Hearings