

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

ORDER FOLLOWING PREHEARING
CONFERENCE; DENYING
PEREMPTORY CHALLENGE AND
CHALLENGE FOR CAUSE; AND
CONTINUING FIRST DAY OF
HEARING

On April 3, 2015, Administrative Law Judge Adrienne L. Krikorian, Office of Administrative Hearings held a telephonic prehearing conference. Attorney Nicole Hodge Amey appeared on Student's behalf. Attorney Stacy Inman appeared on behalf of Panama-Buena Vista Union School District.¹ The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The first day of the hearing is continued for good cause to April 15, 2015 at 9:30 a.m., and shall continue on April 16, 2015 at 9:00 a.m. If the parties need additional time, the ALJ will consider holding the hearing on Friday, April 17, 2015 at 9:00 a.m., and thereafter continuing day to day Monday through Thursday at the discretion of the ALJ. The hearing shall take place at the District's offices located at 3100 Actis Street, Bakersfield, California 93309.

The school district shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

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

¹ Student's amended complaint named Bakersfield City School District. Student dismissed with prejudice all claims against Bakersfield City School District on December 23, 2014. Any issues identified by Student in his complaint and prehearing conference statement against Bakersfield City School District are dismissed and not issues to be decided at the hearing.

continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

2. Issues. The issues at the due process hearing are:

a) Did District violate its obligations under the Individuals with Disabilities Education Act from August 2014 to November 22, 2014, by failing to identify and assess Student in all areas of suspected need for eligibility for special education placement, supports and services?

b) Did District deprive Student's Parent of the opportunity to meaningfully participate in the development of Student's educational program under the IDEA and as a result deny Student a free appropriate public education by:

1) Failing to translate documents into Spanish, and

2) Failing to provide Bakersfield City School District with copies of Student's educational records, including individualized education programs and assessments, from 2007 and 2008 when Student transferred from District to Bakersfield City School District?

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 letter "S" or "P" in front of the exhibit to designate if it is a Student or District exhibit. Student shall begin numbering new exhibits from S35; District shall begin numbering new exhibits from P25. The ALJ shall have exhibits marked and admitted into evidence during the expedited hearing on January 6, 7 and 8, 2015, available during the hearing for reference by the witnesses.

Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be Bates-stamped. Documents with separate dates shall be identified separately. Each exhibit binder shall contain a detailed table of contents, which shall include the exhibit number, date of the document, title of the document, and page numbers. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7). At the hearing, each party shall supply an exhibit binder containing its exhibits, as described above, for use by the ALJ, and a second exhibit binder for use by witnesses.

Counsel for the parties shall have hard copies of the documents available for their use during the hearing and shall not unreasonably delay the hearing by searching for documents electronically stored.

The parties shall meet and confer telephonically or in person no later than April 9, 2015, at 9:00 a.m. to discuss exhibits, delete duplicate exhibits, and consolidate exhibits where possible. The parties shall not serve exhibits on OAH prior to the hearing.

The parties shall exchange resumes or curriculum vitae for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

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 telephonically or in person no later than April 9, 2015, at 5:00 p.m. as to the schedule of witnesses. On the first day of hearing, the parties shall provide the ALJ with a detailed schedule which shall include an estimate of time for each side's direct and cross examination. Each witness will only be called once to testify, except for rebuttal purposes, and both parties shall examine the witness on all issues when the witness is first called. District shall have witnesses available in case agreement on a witness list is not reached. The parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony of each such witness is expected to take.

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.

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 ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

5. Scope of Witness Examination. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination.

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 requested to allow Dr. Delaina Martinez to testify telephonically. The parties estimated that they would need 90 minutes to two hours for her testimony. At Ms. Amey's request, the parties shall meet and confer as to whether it is feasible to have Dr. Martinez testify remotely by Skype, and, if so, the parties shall be jointly responsible for ensuring that the appropriate technology is available so that Dr. Martinez can be heard by both counsel and the ALJ at all times. Student shall ensure that Dr. Martinez has all exhibits from both parties, including those admitted during the expedited hearing, in her possession prior to her testimony. If Skype testimony is not feasible, then the parties shall meet and confer and schedule Dr. Martinez' testimony in person in such a manner as to ensure that her entire testimony is completed in no more than one hearing day. The ALJ will discuss that schedule at the beginning of the first day of hearing.

7. Motions. During the PHC, Student made the following oral motions:

a) Challenges to ALJ. At the commencement of the PHC, Ms. Amey orally made a peremptory challenge and a challenge for cause to ALJ Adrienne L. Krikorian. Ms. Amey stated that her challenge for cause was based on an allegation of bias by ALJ Krikorian against Ms. Amey.

Government Code section 11425.40, subdivision (d), establishes the criteria for disqualification of the presiding officer. A party is entitled to one peremptory challenge (disqualification without cause) to an ALJ assigned to an OAH hearing. (Cal. Code Regs., tit. 1, § 1034, subs. (a) & (b); Gov. Code, § 11425.40, subd. (d).) In no event will a peremptory challenge be allowed if it is made after the hearing has commenced. In addition, if at the time of a scheduled prehearing conference, an ALJ has been assigned to the hearing, any challenge to the assigned ALJ shall be made no later than commencement of that prehearing conference. (Cal. Code Regs., tit. 1, § 1034, subd. (c).) A peremptory challenge is not allowed on reconsideration or remand, and cannot be made after a hearing has begun. (Cal. Code Regs., tit. 1, § 1034, subd. (a).)

Student's peremptory challenge is untimely because it was made after the hearing in this matter commenced on January 6, 2015. The fact that only the expedited issues were heard in January 2015 does not relieve Student's counsel from making her peremptory challenge before the hearing in OAH Case No. 2014100290 commenced. The peremptory challenge is denied.

An ALJ may be disqualified for bias, prejudice, or interest in the proceeding. (Gov. Code, § 11425.40, subd. (a).) The following, without further evidence of bias, prejudice, or

interest, are not by themselves grounds for disqualification: 1) the ALJ is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group; 2) the ALJ has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding; or 3) the ALJ has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding. (Gov. Code, § 11425.40, subd. (b).)

In other words, to disqualify an ALJ for cause, a factual showing of actual bias or prejudice is required. (See *American Isuzu Motors, Inc. v. New Motor Vehicle Board* (1986) 186 Cal.App.3d 464, 472.) For example, in order to be a basis for disqualification, the financial interest of the ALJ in the outcome of the case must be direct, personal, and substantial, rather than slight. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1031.) Similarly, personal involvement in the case by the ALJ or familial connections may warrant disqualification based solely on the probability of bias. (See *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170-1173.) However, in most other cases, including claims of bias arising from the hearing officer's personal or political views, disqualification will not occur absent a showing of actual bias. (*Haas, supra*, at p. 1032.)

Student's challenge for cause based on bias is denied because Student has not made a factual showing of actual bias or prejudice by the ALJ.

b) Motion to consolidate. Student's counsel orally requested that District's complaint in OAH case number 2015031164 be consolidated with this case and heard on the same dates scheduled for this case. District's counsel responded that it objected to consolidation. The ALJ deferred ruling on the oral motion. After the PHC, at 11:39 a.m., Student filed a written motion to consolidate the two cases. District shall have until 5:00 p.m. on April 8, 2015, to respond in writing to Student's motion to consolidate District's case, OAH case number 201531164 and Student's case, OAH case number 2014100290.

c) Motion to Amend. Student's counsel informed the ALJ during the PHC that she had filed an amended complaint at approximately 5:00 a.m. on the date of the PHC. District's counsel objected that the document served on District was a new complaint not an amendment to this case. The ALJ has confirmed that the document filed with OAH was identified as a Request for Expedited Due Process Hearing and Hearing, and that the case number was identified as "to be determined" and therefore not an amendment to this matter. Student's request to hear the new matter at the same time as this matter is denied.

No other pretrial motions are pending or contemplated. Any motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during the prehearing conference of April 3, 2015.

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

9. 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.

10. 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.

11. Special Needs and Accommodations. A Spanish language interpreter is required. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made known.

Additional information concerning requests for reasonable accommodation is available on OAH's website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>.

12. Hearing Closed To the Public.

13. 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.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall submit a request for a status conference and provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

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

IT IS SO ORDERED.

DATE: April 3, 2015

/s/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings