

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

ORDER FOLLOWING PREHEARING
CONFERENCE; SCHEDULING DUE
PROCESS HEARING ON
JURISDICTIONAL ISSUE; ORDERING
OPENING BRIEFS

On October 23, 2015, a telephonic prehearing conference was held before Administrative Law Judge Joy Redmon, Office of Administrative Hearings. Attorney Nicole Hodge Amey appeared on Student's behalf. Attorney Jennifer Rowe Gonzalez appeared on Panama-Buena Vista Union School District's behalf. The PHC was recorded.

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

1. Issues and Proposed Resolutions.

Motion to Dismiss Matter in its Entirety or in the Alternative to Limit Issues:

Panama objected to Student's proposed issues alleging that Issue 1 (Did Panama violate its authority by expelling Student?) is outside of OAH's jurisdiction. Panama further objected to Issues 2-5 on the ground that the issues related to Panama's failure to conduct a manifestation determination meeting, failure to establish that the behaviors causing expulsion were a manifestation of his disability, failure to comply with the IDEA's disciplinary provisions prior to expulsion, and the allegation that Panama was on notice that Student was a child with a suspected disability prior to his expulsion, were fully litigated in OAH 2014100290 (currently pending appeal in federal court). Panama asserts that moving forward with the issues as pled violates the doctrines of res judicata and collateral estoppel.

Regarding Issue 1, Student argued generally that title 20 United States Code section 1414 et seq. confers jurisdiction on OAH to hear expulsion appeals arising under the IDEA. Student contends that this includes jurisdiction of whether or not a student's conduct met the state Education Code criteria for a valid suspension or expulsion. Regarding Issues 2-5, Student argues that once Parent signed consent on January 5, 2015, for Student to be

assessed for special education eligibility, which occurred prior to his expulsion, Panama was deemed to have notice that Student was a child with a suspected disability and all expulsion proceedings should have been stayed pending the outcome of an expedited assessment.

The parties were given an opportunity to orally argue their respective positions regarding dismissal or limiting the issues. The undersigned ALJ dismissed Issue 1 during the PHC as discussed below and took the matter under submission regarding Issues 2-5 in Student's original expedited complaint and rules as follows:

ISSUE 1: Student's complaint asserts that Education Code section 48900 limits a school district's authority to suspend or recommend a student for expulsion only for an identified list of offenses and that Student did not commit one of those offenses but was expelled nonetheless.

A party has the right to present a complaint to OAH arising under the IDEA, "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

OAH does not have jurisdiction over a local education agency's general expulsion process or procedures, including those arising under Education Code section 48900. Student presented no authority to the contrary. Accordingly, this issue is outside of OAH's jurisdiction and was dismissed during the PHC.

ISSUES 2-5: Student asserts that he was expelled from Panama on January 13, 2015, which constituted a change in placement. This expulsion did not occur until after the due process hearing in OAH 2014100290 concluded but prior to the Decision being issued on January 23, 2015. Student argues that he is not estopped from litigating the issues regarding the failure to conduct a manifestation determination and comply with title 20 United States Code section 1414 et seq. because prior to the expulsion, Mother returned to Panama a signed assessment plan providing consent for Panama to assess Student. Student argues that upon receiving the signed assessment plan, Student was entitled to the procedural protections of the IDEA's disciplinary provisions.

Panama argues that in light of the prior Decision's holding that it did not have a basis of knowledge at the time the alleged misconduct occurred, Mother's signature had no legal effect regarding the disciplinary process. The Decision in 2014100290 reached a legal conclusion 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.”

The legal dispute regarding the effect of the signed assessment plan on the issues to be heard in this expedited case is a jurisdictional issue that must be decided before the ALJ can rule on the remaining issues. If Panama is correct in its legal interpretation, all of Student’s issues will be dismissed based upon the prior ruling in OAH 2014100290. If Student’s interpretation is correct, then he would be able to litigate the issues as pled.

Accordingly the jurisdictional issue to be heard is as follows:

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 1414 et seq. by operation of law at the time Mother returned the signed assessment plan on January 5, 2015, thereby requiring Panama to have stayed the expulsion proceedings and followed the manifestation determination review process set forth in section 1414 et seq.?

If the answer to the forgoing legal question is no, then Student’s remaining issues will be dismissed because they were fully adjudicated in OAH 2014100290. If Mother’s consent to the assessment plan triggered the protections of section 1414 et seq. then Student would be able to litigate the remaining issues in the expedited hearing as follows:

- 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 1414(k)(5) that Student was a child with a disability entitling Student to the protections of the IDEA before his January 13, 2015, expulsion?
- ISSUE 3: Did Panama fail to comply with section 1415(k) before changing his placement on January 13, 2015?
- ISSUE 4: Were Student’s causing expulsion during 2014-2015 school year a manifestation of his disability?

Proposed Resolutions: Student seeks to be re-enrolled at Stonecreek Jr. High School, an order that Panama hold a manifestation determination meeting, Panama to produce disciplinary records relating to Student; fund an independent educational evaluation in the areas of psychoeducational, academics, social behavior, auditory processing, educationally

related mental health, neuropsychological, autism spectrum, and other assessments, 140 hours of academic compensatory education, 100 hours of behavioral counseling, a one-to-one aide, wrap around services, and an order that Panama provide a FAPE.

Opening Briefs: The parties are ordered to submit opening briefs on the jurisdictional issue identified above on the first day of hearing. The briefs focus on the legal question presented rather than a lengthy factual recitation as the specific facts underlying the jurisdictional question are generally not disputed. As such, each party's statement of facts shall not exceed three pages and the complete opening briefs will not exceed 15 pages and will contain a table of authorities. The table of authorities will not count toward the overall page limit.

2. Hearing Dates, Times, and Location. The due process hearing will take place at Panama's offices located at **3100 Actis Street, Bakersfield, CA 93309**. During the PHC, this matter was scheduled for Tuesday, November 3, 2015, starting at 9:30 a.m., Wednesday, November 4, 2015, starting at 9:00 a.m., and Tuesday, November 10, 2015, starting at 1:30 p.m. If not complete, the matter was to continue day-to-day Monday through Thursday at the discretion of the ALJ.¹ In light of the ruling contained herein on the jurisdictional question, the undersigned ALJ determines that not more than two days will be necessary to hear the legal arguments. **Therefore, the matter will proceed on Tuesday, November 3, 2015, at 9:30 a.m. and Wednesday, November 4, 2015, at 9:30 a.m., if needed.** The remaining scheduled days are vacated. The continued portion of the expedited hearing will be ordered in the Decision on the jurisdictional question in the expedited matter depending upon the ruling therein. The Decision will also indicate whether or not a second PHC will be scheduled before proceeding with the continued expedited hearing, as needed.

Panama, as the named local educational agency providing the hearing location, shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. Panama is ordered to certify that it will provide a facility that complies with the law by Tuesday, October 27, 2015.

Prior to the beginning of the hearing, Panama shall assist the ALJ to ensure that the hearing room is configured into a courtroom setting, including (1) a table for Student and his representatives; (2) a separate table for Panama's legal counsel and special education

¹ Ms. Rowe Gonzalez provided good cause for going dark on Thursday, November 5, 2015, Monday, November 9, 2015, and the morning of November 10, 2015. Ms. Rowe Gonzalez established that she had purchased nonrefundable airplane tickets in June 2015 for a pre-planned trip to Boise, Idaho, departing on November 5, 2015, and returning to Sacramento (nearly 300 miles from the hearing location) late in the evening of November 9, 2015.

representatives; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. District shall also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses, and the ALJ.

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.

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. Student shall place the letter “S” in front of the exhibit to designate if it is a Student exhibit. District shall place the letter “D” in front of the exhibit to designate it as a District exhibit. 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 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 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 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. The parties shall be permitted to call witnesses not properly disclosed to the other party except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

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 parties were ordered to confer prior to hearing a present a proposed witness list on the first day of hearing. The Districts shall have witnesses available in case agreement on a witness list is not reached. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the

witness schedule. Additionally, 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.

5. Scope of Witness Examination. Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. 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. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear 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 (including tabs) 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.

7. Electronic Recording of Hearing.

a. Audio Recording. Each side requested to record the due process hearing. The motions are granted, subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the recording will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record; and 3) that operation of the party's recording mechanism will not be allowed to delay the hearing.

b. Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

8. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Student is the petitioning party. Accordingly, Student shall present its case-in-chief, followed by Panama.

9. Motions. No motions other than those discussed above were made or contemplated. Any motion made after the PHC must be accompanied by a showing of good cause as to why the motion was not made prior to or during the PHC.

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

12. Conduct of Counsel, Parties, and Witnesses 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.

13. Special Needs and Accommodations. Student's request for a Spanish language translator for Parent was granted. No other request for accommodations was made. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the mediation or hearing may contact the assigned calendar staff, identified in the scheduling order, at (916) 263-0880, as soon as the need is known. Additional information concerning requests for reasonable accommodation is available on OAH's website at: <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>

14. Hearing Closed To the Public. At the request of Student, the hearing will be closed to the public.

15. 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.

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

IT IS SO ORDERED.

DATE: October 26, 2015

/s/

JOY REDMON

Administrative Law Judge

Office of Administrative Hearings