

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

SALINAS UNION HIGH SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N2006120494

DECISION

John A. Thawley, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division, State of California, heard this expedited matter on January 29, 2007, in Salinas, California.

Student's Mother represented Student. Student also attended a portion of the hearing.

Karen Rezendes, Attorney at Law, represented Salinas Union High School District (District). Ms. Rezendes was assisted by Kelli Lydon, Attorney at Law. Nancy Jones-Powers, District's Director of Special Education, GATE, and Health Services, attended the hearing.

Student filed the Complaint on December 11, 2006. Oral and documentary evidence were received. The record was closed and the matter submitted following oral closing arguments at the conclusion of the expedited hearing on January 29, 2007.

ISSUES

Did District fail to conduct an appropriate manifestation determination by:

1. Failing to provide Mother with an updated copy of the parental procedural safeguards before the manifestation determination meeting?
2. Failing to fully review Student's record or to consider all of his disabilities before concluding that the conduct for which Student was disciplined was not a manifestation of his disability?

CONTENTIONS OF THE PARTIES

Student contends that the District failed to timely provide a copy of the updated procedural safeguards that reflected changes to the federal special education regulations that went into effect on October 13, 2006, eleven days before the manifestation determination meeting was held.¹ Student also contends that the District erroneously found that the conduct for which he has now been expelled was not a manifestation of his disability, at least in part because the District did not fully review his record or consider all of his disabilities, as required by law.

District asserts it properly conducted the manifestation determination meeting, during which the District's manifestation determination team considered Student's entire record, his disability, and his potential disabilities, such as Attention Deficit Hyperactivity Disorder (ADHD) and depression, which have posed difficulties for Student but for which he has not been found eligible for special education and related services. The District asserts that it appropriately determined that Student's conduct was not a manifestation of his disability.

FACTUAL FINDINGS

Background Information

1. Student is a 16-year-old tenth-grade student who is eligible for special education and related services under the category of speech and language disorder based on a mild hearing loss. Student attended Salinas High School until October 2006, and he is now in a home instruction placement.

¹ Student also asserts several other procedural deficiencies, including the District's failure to hold an individualized education plan (IEP) team meeting before the manifestation determination meeting, and the District's failure to ask Student the questions required by federal law. However, in light of the procedures that the District was required to follow, set forth in the Legal Conclusions, Student's assertions of other procedural deficiencies are without legal merit. In addition, Student specifically testified that he followed the advice of his attorney and did not talk to the manifestation determination team or to the District employee who investigated Student's conduct. Accordingly, Student's assertion regarding the questions asked of him is without merit.

2. On October 19, 2006, Student was suspended for five days for disrupting school activities by allegedly persuading a female pupil to leave their closed campus high school during the lunch break to go with him to his house, and for allegedly sexually assaulting her at his house.² That same day, Ms. Pfeiffer sent to Mother a “Notice of IEP Meeting” that indicated District would conduct a manifestation determination meeting on October 24, 2006.

3. The District held the manifestation determination meeting as scheduled. On December 14, 2006, the District expelled Student.

The District’s Provision of Updated Procedural Safeguards to Mother

4. As discussed in Legal Conclusion 7, a school district must notify parents of a decision to take disciplinary action, and of the applicable procedural safeguards, no later than the date on which the district makes the decision to take disciplinary action.

5. Mother brought an outdated copy of the procedural safeguards to the manifestation determination meeting. Karen Pfeiffer, Student’s case carrier, gave Mother an updated copy at the meeting. Mother conceded that she received an updated copy of her parental procedural safeguards at the meeting.

6. The District appropriately provided Mother a copy of the updated applicable procedural safeguards on the same day that the District decided to take disciplinary action against Student.

District’s Preparation for the Manifestation Determination Meeting

7. As discussed in Legal Conclusions 2 through 5, a school district is required to conduct a manifestation determination meeting before expelling a special education pupil. The determination as to whether the pupil’s conduct is a manifestation of the pupil’s disability, or the result of a failure to implement the IEP, is to be made by the district, the parents, and relevant members of the IEP team, after reviewing all relevant information in the pupil’s file, including the IEP, any teacher observations, and any relevant information provided by the parents.

8. School psychologist Roger “Mick” Friedberg conducted a pre-expulsion psychological assessment of Student, which consisted of reviewing Student’s grades and Mr. Friedberg’s February 2006 triennial psychological assessment of Student, and meeting with Student for about 15 minutes so that Student could complete a general pupil survey. Student’s intelligence assessment scores were in the low-average range, while his achievement scores were just below the average range.

² For the purposes of the appeal of the manifestation determination, the ALJ must presume that the conduct for which Student was disciplined occurred.

9. Mr. Friedberg concluded that Student did not display a processing disorder, and that there was not a significant discrepancy between his ability and his achievement. Student was not emotionally disturbed, because he was able to make conscious decisions about school and social behaviors, appeared to have a social network of peers, and was able to respond appropriately to adults. Mr. Friedberg knew of nothing that would indicate Student acted out in a sexual manner, nor could he find any connection between Student's conduct and his disability.

Manifestation Determination Meeting

10. On October 24, 2006, Ms. Jones-Powers; Mr. Friedberg; Janice Saul, Student's speech and language therapist; Ms. Pfeiffer; Nick Garcia, a school counselor; a special education teacher; a general education teacher; Mother; and Student's private therapist attended the manifestation determination meeting.

11. Ms. Jones-Powers began the meeting by giving Mother a copy of the District's manifestation determination form, and by explaining the effect of the new federal special education regulations, which were less than two weeks old. Specifically, Ms. Jones-Powers stated that the purpose of the meeting was to consider two factors: whether Student's conduct was caused by, or had a direct and substantial relationship to, his disability, and whether the conduct was the direct result of the District's failure to implement Student's IEP.³

12. Ms. Jones-Powers read aloud the background section of the District's form, taken from Student's IEPs and assessments in his file, which included a description of his disability, and other potential disabilities such as ADHD.⁴ There was an opportunity for team members' input to the background section. Ms. Jones-Powers read the description of the special education and related services that Student was receiving, and noted that Student had eight cumulative days of suspension. Darin Hershberger, the vice principal of the high school that Student attended, provided a description of Student's conduct, without going into the details of the alleged conduct.

13. Mr. Friedberg shared the conclusions of his pre-expulsion psychological assessment of Student. The team discussed and considered Student's speech and language disability, and the effect of a mild hearing loss. The team also discussed and considered Student's potential disabilities, including social/emotional issues (and the aspects of those areas that impacted Student's non-performance in school), a central auditory processing

³ This is the standard established by the reauthorized Individuals with Disabilities Education Improvement Act (IDEIA), which became effective July 1, 2005. (See 20 U.S.C. § 1415(k); compare 34 C.F.R. § 300.530(e) (2006) with 34 C.F.R. § 300.523(c)(2)(i)-(iii) (1997).)

⁴ At some point in the past, Ms. Pfeiffer had seen some paperwork indicating that Student had been diagnosed with ADHD. However, when she asked Mother about the diagnosis, she learned that Student was no longer taking ADHD medication, and the diagnosis seemed inapplicable.

disorder, attention/ADHD/attention deficit disorder challenges, and depression, to the extent that the District knew about those potential disabilities.⁵ Student had behavioral goals to deal with the behaviors District personnel had noticed, such as non-attending and failure to complete tasks. District personnel had not seen a pattern of Student acting out in a sexual manner, or engaging in inappropriate sexual conduct. Ms. Jones-Powers, Ms. Saul, and Ms. Pfeiffer were surprised to hear about Student's conduct, because neither of them had seen anything that would indicate that Student had a problem with acting out sexually, or that he had any type of sexual problem. Ms. Pfeiffer and Ms. Saul believed that Student could make conscious decisions about his behavior.

14. Ms. Jones-Powers asked Student, Mother, and Student's therapist for their input. Student responded that his attorney had told him not to talk to the manifestation determination team. Student's therapist discussed Student's depression.

15. The manifestation determination team appropriately determined that Student's conduct was not caused by, or did not have a direct and substantial relationship to, Student's disability. The team considered all of the relevant information, including Student's IEP and Addenda, as well as assessments of Student. The team also considered Student's disability, as well as all of his potential disabilities, before making their manifestation determination.

16. The team also noted that Student was covered by an IEP and 504 plan. The team reviewed the March 2006 triennial IEP and the September 2006 IEP Addendum, as well as Mr. Friedberg's triennial psychological assessment of Student. The team determined that Student's IEP and 504 plan were being implemented. Mother agreed, and was very complimentary of the District's services. Accordingly, the team appropriately determined that Student's conduct was not a direct result of the District's failure to implement Student's IEP or 504 plan.

17. The District correctly determined that Student's conduct was not a manifestation of his disability.

LEGAL CONCLUSIONS

Applicable Law

1. As the petitioner, Student has the burden of proving that District did not comply with the law. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387]).

2. A pupil receiving special education services may be suspended or expelled from school as provided by federal law. (Ed. Code, § 48915.5, subd. (a).)

⁵ Mother had refused to complete the forms necessary to identify whether Student had social/emotional and ADHD needs, and had refused to consent to a mental health referral.

3. Whenever a district removes a pupil from his or her current educational placement for over 10 days, subjects a pupil to a pattern of removals that total over 10 days, or removes a pupil to an interim alternative educational setting for specific conduct involving weapons, drugs, or violent acts, a pupil receiving special education and related services is entitled to specific procedural protections. The district is required to conduct a review to determine if the conduct that is subject to discipline is a manifestation of the pupil's disability. This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).)⁶

4. A school district must conduct a manifestation determination within 10 school days of a decision to change the placement of a pupil with a disability due to a violation of the code of student conduct. (§ 1415(k)(1)(E)(i).) The manifestation determination team consists of the district, the parents, and relevant members of the IEP team as determined by the parent and the district. (*Ibid.*) The team must review all relevant information in the pupil's file, including the IEP, any observations of teachers, and any relevant information from the parents, to determine if the pupil's conduct "was caused by, or had a direct and substantial relationship to, the child's disability," or if the pupil's conduct "was the direct result of the [district]'s failure to implement the IEP." (*Ibid.*)

5. While the standards in section 1415(k)(1)(E) for determining whether a pupil's behavior was a manifestation of the disability are relatively new, the principle behind them is not. In *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470, 1480, the court discussed the meaning of various phrases describing "conduct that is a manifestation of the child's handicap." The court explained:

As we use them, these phrases are terms intended to mean the same thing. They refer to conduct that is caused by, or has a direct and substantial relationship to, the child's handicap. Put another way, a handicapped child's conduct is covered by this definition only if the handicap significantly impairs the child's behavioral controls . . . it does not embrace conduct that bears only an attenuated relationship to the child's handicap. . . . If the child's misbehavior is properly determined not to be a manifestation of his handicap, the handicapped child can be expelled. [Citations.] . . . When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not so.

(*Doe v. Maher, supra*, at p. 1482, emphasis in original.)

⁶ All statutory references are to the Individuals with Disabilities Education Act (IDEA), title 20 of the United State Code, unless specifically noted otherwise.

6. If the team decides that either of the two factors apply, then the conduct must be determined to be a manifestation of the pupil's disability. (§ 1415(k)(1)(E)(ii).)⁷ If the team determines that the pupil's conduct was not a manifestation of his or her disability, the district may apply to the disabled pupil the same disciplinary procedures, in the same manner and for the same duration, as would be applied to a non-disabled pupil. (§ 1415(k)(1)(C).)

7. The district shall notify parents of the decision to take disciplinary action, and of the applicable procedural safeguards, no later than the date on which the district makes the decision to take disciplinary action. (§ 1415(k)(a)(H).)

8. A parent who disagrees with any decision regarding placement or the manifestation determination may request a hearing. (§ 1415(k)(3)(A).) An ALJ shall decide these appeals. (§ 1415(k)(3)(B)(i).) The ALJ may order a change in placement of the pupil and may return the pupil to the placement from which he or she was removed. (§1415(k)(3)(B)(ii)(I).)

9. It is presumed that an official duty has been regularly performed. (Evid. Code, § 664.)

Determination of Issues

Did District fail to conduct an appropriate manifestation determination by failing to provide Mother with an updated copy of the parental procedural safeguards before the manifestation determination meeting?

10. As discussed in Legal Conclusions 7 and 9, the District was required to notify Mother of the decision to take disciplinary action, and of the applicable procedural safeguards, no later than the date on which the District made the decision to take disciplinary action. As determined by Factual Findings 5 and 6, the District appropriately provided Mother a copy of the updated applicable procedural safeguards on October 24, 2006, the same day that the District decided to take disciplinary action against Student.

Did District fail to conduct an appropriate manifestation determination by failing to fully review Student's record or to consider all of his disabilities before concluding that the conduct for which Student was disciplined was not a manifestation of his disability?

11. As discussed in Legal Conclusions 2 through 6 and 9, the District was required to conduct a manifestation determination with members of its staff, Mother, and relevant members of the IEP team. The manifestation determination team was to consider all relevant

⁷ If the conduct was a manifestation of the child's disability, then the district must do a functional behavioral assessment and develop a behavior intervention plan, if such an assessment had not been previously done. (§ 1415(k)(1)(F)(i).) Otherwise, the district must review the existing behavior intervention plan, and modify it, if necessary, to address the conduct. (§ 1415(k)(1)(F)(ii).) In both situations, absent special circumstances, the child must be returned to his/her previous placement, unless the parents and the district agree to a different placement as part of the modification of the behavior intervention plan. (§ 1415(k)(1)(F)(iii).)

information in Student's file, including the IEP, teacher observations and any relevant information from Mother, to determine whether Student's conduct was a manifestation of his disability.

12. As determined by Factual Findings 8 through 17, the District properly held a manifestation determination meeting, with the complete team, and appropriately considered all of the relevant information. The manifestation determination team considered Student's disabilities, as well as all of his potential disabilities, before properly determining that Student's conduct was not caused by, or did not have a direct and substantial relationship to, his disability. Then the team discussed Student's IEP and 504 plan before appropriately determining that the District was implementing Student's IEP and 504 plan. Mother agreed that Student's IEP was being implemented, and she was very complimentary of the services District was providing to Student. Accordingly, the District conducted an appropriate manifestation determination, and correctly determined that Student's conduct was not a manifestation of his disability, before Student's expulsion.

ORDER

Student's appeal of District's manifestation determination is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: February 9, 2007

JOHN A. THAWLEY
Administrative Law Judge
Special Education Division
Office of Administrative Hearings