

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

In the Matter of:

STUDENT,

Petitioner,

v.

LANCASTER ELEMENTARY SCHOOL  
DISTRICT,

Respondent.

OAH CASE NO. N 2007060309

**DECISION**

Administrative Law Judge (ALJ) Clara L. Slifkin, Office of Administrative Hearings, Special Education Division (OAH) heard this matter in Lancaster, California on July 9 and July 19, 2007.

Student (Student) was represented by David Burkenroad, Esq., of the Law Offices of David Burkenroad. Educational consultant and paralegal Brian Allen and Student's Parents were also present during the hearing.

Lancaster Elementary School District (District) was represented by Stacy L. Inman, Esq., of Schools Legal Service. Ms. Janis Rivera, Director of Student Services, attended on behalf of District.

On June 8, 2007, the Office of Administrative Hearings (OAH) received from Student a request for an expedited due process hearing. This matter was set for a one day hearing, July 9, 2007. Testimony and documents were received into evidence. However, when the parties returned from noon recess on July 9, 2007, Student's counsel David Burkenroad stated that he was in significant pain and requested the case be trailed. Because of Student's counsel's condition, the ALJ trailed the case to July 19, 2007, the first date that the parties were available to resume the hearing. At the conclusion of the presentation of evidence on July 19, 2007, the record was held open until August 1, 2007, to allow the parties to file

closing briefs. Student's attorney filed his Closing Brief on July 27, 2007.<sup>1</sup> District filed its Closing Brief on August 1, 2007. The matter was submitted on August 1, 2007.

In an expedited hearing, the hearing officer must make a determination within ten school days after the hearing. School days are defined as only those days during which students attend school during the regular school year.<sup>2</sup> The first day of the 2007-2008 school year is August 14, 2007, as reflected in the District's student calendar admitted as District's Exhibit 10. The parties confirmed that the ALJ's decision is due on August 28, 2007.

## ISSUES

1. Did District at its June 8, 2007 manifestation determination meeting properly determine that Student's conduct was not a manifestation of his disability?
2. Was Student denied a free appropriate public education (FAPE) because the District's June 8, 2007 Individualized Education Program (IEP) recommended that Student be referred for an expulsion hearing?

## PARTIES' CONTENTIONS AND PROPOSED REMEDIES

Student contends the manifestation determination conducted by the District on June 8, 2007, was procedurally and substantively improper because District determined Student's behaviors were not related to his disability. Student alleges that the June 8, 2007 IEP team's referral of Student to the expulsion hearing process (the threat of expulsion) resulted in a denial of FAPE. As a remedy, Student requests that the expulsion be declared moot and the recommendation for expulsion be withdrawn.

District asserts that it followed proper procedures for Student's manifestation determination, and that the manifestation determination was substantively correct. District contends its offer of placement and services in the June 8, 2007 IEP provided Student FAPE. Since Student was not expelled and was promoted from Piute Intermediate School (Piute), according to District, Student's complaint is moot. District also contends that Student is not entitled to any relief.

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<sup>1</sup> On August 1, 2007, Brian Allen filed a second closing brief entitled, Petitioner's Closing Brief. The ALJ considered only Student's July 27, 2007 closing argument submitted by Student's attorney. However, the ALJ reviewed paralegal Brian Allen's final argument and the text appears to be a verbatim copy of Student's counsel's closing argument.

<sup>2</sup> See, 34 Code of Federal Regulations parts 300.11(c)(1-2) and 300.532 (b)3(c).

## PROCEDURAL MATTERS

At the hearing on July 9, 2007, after Student presented his evidence and rested, District requested that the ALJ grant a judgment of nonsuit, pursuant to California Code of Civil Procedure section 581, subdivision (c). District argued that an ALJ has discretion to determine whether there is sufficient evidence to proceed. District asserted that Student has not presented any evidence to support a denial of FAPE. The IEP team's recommendation to refer Student for the expulsion process is not a denial of FAPE. Student argued that District didn't have the authority to threaten expulsion or expel Student, and Student had presented sufficient evidence.

The ALJ found that pursuant to title 20 United States Code, section 1415, a Student with a disability who disagrees with any decision regarding the manifestation determination may appeal this decision and request an expedited hearing. This section also clearly states the hearing officer shall hear and make a determination regarding the appeal. Because granting a nonsuit would deprive Student of his right to appeal the manifestation determination, the ALJ denied District's nonsuit.

On July 17, 2007, Student filed a notice of motion and motion for judgment pursuant to California Code of Civil Procedure section 631.8, subdivision (a).<sup>3</sup> When the hearing resumed on July 19, 2007, the ALJ heard argument. Student argued that his expulsion would be unlawful because with Student's completing middle school he would not be enrolled within the District during the potential expulsion period. District argued that a motion, pursuant to section 631.8, subdivision (a) could only be made by a party that has not presented any evidence. Therefore, this section does not apply to Student.

The ALJ denied Student's motion because section 631.8 is not applicable to Student, who has rested and presented his evidence. Moreover, a hearing officer must complete the due process hearing and provide a written, reasoned decision. (*See* Ed. Code, § 56505, subd. (f)(3).)

## FACTUAL FINDINGS

### *General findings*

1. Student resides with his parents within the jurisdictional boundaries of the Lancaster Elementary School District. He is qualified to receive special education and related services as a student with a specific learning disability (SLD). His eligibility is based on a severe discrepancy between his age/intellectual ability and his achievement in the areas of basic reading, mathematics calculation, and mathematics reasoning, as well as, a

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<sup>3</sup> Section 631.8 is entitled a Motion for Judgment. The section provides that after a party has completed his presentation of evidence in a trial by the court, the other party without waiving his right to offer evidence in support of his defense may move for judgment.

psychological processing disorder in the area of sensory motor skills. As of July 19, 2007, Student was 14 years old.

2. On June 1, 2007, a school security guard stopped Student on the Piute campus in Lancaster, California. During a search of Student, the security guard found Student to be in possession of marijuana, a controlled substance and tobacco.

### *Manifestation Determination*

3. A pupil who commits any offense related to school activities or attendance involving physical injury to another, profanity, disruption/defiance, theft, possession of a controlled substance, may be removed from the school setting through suspension, expulsion, or involuntary transfer to a continuation school, opportunity program, or county community school. Once a student's removal is deemed a change of placement, the IEP team must conduct a manifestation determination meeting to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or if the conduct in question was the direct result of the local educational agency's (LEA) failure to implement the IEP. The manifestation determination will analyze the child's behavior as demonstrated across settings and across times when determining whether the conduct in question is a direct result of the disability. The decision is made by the LEA, the parent, and relevant members of the child's IEP team (as determined by parent and the LEA). A manifestation determination should be both procedurally and substantively proper.

### *District followed mandated disciplinary procedures*

4. Following Student's possession of controlled substance on June 1, 2007, and the District suspending Student for five days, Piute was obligated to convene an IEP meeting within ten school days. On June 8, 2007, Piute convened an IEP meeting to discuss the results of a written manifestation determination discussion guide, a functional behavioral assessment, and preventative measures. Student's Parents, Lisa Brader-Klenner, school psychologist, Mark Reyna, special day class teacher, and Brian Allen, Student's advocate, attended, as did other appropriate IEP team members. That meeting occurred within the required ten school days. Accordingly, District followed the appropriate disciplinary procedures.

### *IEP implementation*

5. At the June 8, 2007 IEP meeting regarding the manifestation determination, the team reviewed Student's placement and IEP. The manifestation team agreed that Student should remain in the SDC classroom for the remainder of the 2006-2007 school year, in an effort to provide him with intensive, individual support in his weakest academic areas. Although they noted Student had deficits in reading and writing with associated sensory motor and auditory phonological processing deficits, the manifestation IEP team concluded Student's current IEP should be implemented. The manifestation IEP team found: Student's IEP and placement were appropriate at the time of the incident in relation to the behavior

subject to discipline; the DIS counseling services and behavior support services provided were consistent with his IEP; and Student's disability did not impair his ability to understand the impact and consequences of his behavior, or his ability to control the behavior that was the subject of disciplinary action. The manifestation IEP team recommended proceeding with the expulsion process. Student's behavior was not a manifestation of his disability.

6. Student's teacher Mark Reyna provided persuasive testimony that Student responded well to his instruction, interacted appropriately with his peers and teachers, and that his IEP was appropriate and properly implemented by District. Moreover, no evidence was presented that District failed to implement any portion of Student's IEP. Accordingly, there is no basis to conclude that Student's possession of a controlled substance and tobacco was related to District's failure to implement his IEP.

7. The manifestation IEP team also recommended that pending the expulsion process, Student complete the two weeks remaining in the semester in independent study with direct instruction from his SDC teacher at least once a week. At the Parent's request, the IEP team offered to increase DIS counseling services to a minimum of 20-minute weekly sessions commencing on August 14, 2007, the first day of the 2007-2008 school year. District would also provide 40 minutes of counseling during the last two weeks of school while Student was on independent study. Student also requested that a behavior intervention plan (BIP) be developed and an AB 3532 referral be made. In response to these requests, the team agreed that the school psychologist would develop a BIP within five days as well as a behavior related goal as a preventative measure, and would contact Parents within five days in order to complete the necessary referral forms.

8. Parents signed the June 8, 2007 IEP, agreeing to Student's disciplinary placement. Specifically, Parents agreed with Student's independent study pending his expulsion hearing. Parents disagreed with the IEP team's conclusion that Student should be referred to the expulsion hearing process. Parents' objection was based on the assertion that an expulsion hearing was inappropriate and moot because the District has addressed Student's behavior by developing a BIP.

*Caused by, or directly related to, Student's disability*

9. Lisa Ann Braden-Klemer, a licensed school psychologist, who has been an employee of the District for 20 years, attended the June 8, 2007 IEP and testified at hearing. She was very familiar with Student because she administered a battery of tests to Student in June 2006, and found that he had auditory-perceptual deficits, reading and written language deficits, and was eligible for special services under the category of SLD. Ms. Braden-Klemer also examined Student to complete her report for the June 8, 2007 IEP manifestation determination. At the June 8, 2007 IEP meeting, she reported to the team that his behavior was not a result of Student's SLD because this disability did not impact his ability to understand and follow school rules. Ms. Braden-Klemer's testimony was persuasive and established that Student's behavior was not a result of his disability.

10. Student failed to establish how his SLD and his need to more appropriately express his frustration with his school work or social situations was related to his possession of a controlled substance and tobacco. Student also failed to establish that his SLD caused, or was directly related to, his possession of marijuana and tobacco. The evidence established that at the June 8, 2007 meeting, the IEP team discussed, analyzed, and assessed, any potential relationship between Student's disabilities and his possession of marijuana and tobacco. The team concluded that Student's SLD did not impair his ability to follow school rules. Thus, Student's behavior, which violated the student code of conduct, was not a manifestation of his SLD and Student is subject to the standard disciplinary procedures which apply to all students. Therefore, Student failed to establish that the IEP team's conclusion was erroneous.

11. The June 8, 2007 manifestation determination team determined that the conduct in question was not caused by, or had a direct and substantial relationship to, the child's disability, SLD. This team also found that the conduct in question was not a direct result of the local educational agency's failure to implement the IEP. The team's manifestation determination analyzed Student's behavior across settings and across times when it determined the conduct in question was not caused by or a direct result of his disability, and was not a direct result of the LEA's failure to implement his IEP. The evidence established that the manifestation determination reached at the meeting of June 8, 2007, was correct. Thus, the normal school disciplinary procedures should be used to address the incident, the same as applied to non-disabled students.

*June 8, 2007 IEP offer*

12. District's finding that Student is subject to discipline for possession of marijuana and tobacco on school campus, temporarily affected his placement. However, Parents signed and completely agreed with the placement and services in Student's June 8, 2007 IEP. Student's objection to the June 8, 2007 team's manifestation determination was because the team's decision commenced the process to expel Student.

13. The June 8, 2007 team agreed to increase Student's DIS counseling to a minimum of 20 minutes on a weekly basis, modify the BSP to address his behavior and asked the school psychologist to design a BIP. Student was offered two 20-minute or one 40-minute counseling sessions during the two weeks of independent study from June 11, 2007 until June 22, 2007. Student's SDC teacher worked with him during the independent study period and Student was able to finish the school year and promoted from Piute.

14. After a manifestation determination decision, the District may proceed with suspension, expulsion and/or assessment. After the June 8, 2007 manifestation determination meeting, Student's file was referred to the Pupil Safety and Attendance Office for expulsion review as a part of the expulsion recommendation process. The Pupil Safety and Attendance Officer, Scott Smith, reviewed the expulsion referral and evaluated its merits. Mr. Smith determined that the District would not seek expulsion because District is kindergarten through eighth grade and Student would be graduating from District. Student would not be

enrolled in the District during the potential period of expulsion. Therefore, Mr. Smith determined that the best way to address Student's behavior was to refer him back to the manifestation team to consider Student's services and behavioral supports.

15. The June 8, 2007 manifestation team did not actually expel Student; it was only Student's first step in District's disciplinary process. When the Pupil Safety and Attendance officer found that Student should not be expelled, the process ended. In fact, the evidence established that Student was promoted from Piute and matriculated out of the District.

## LEGAL CONCLUSIONS

1. Petitioner has the burden of proving non-compliance with the IDEA by a preponderance of evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed. 2d 387.)

### *FAPE*

2. A child with a disability has the right to a FAPE under the IDEA and California special education law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.6.) A FAPE consists of special education and related services provided at public expense and under public supervision and direction that meet the State's educational standards and conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56040; Cal. Code Regs., tit. 5, § 3001, subd. (o).) A child receives a FAPE if the program: (1) addresses his unique needs; (2) is reasonably calculated to provide some educational benefit; and (3) comports with the IEP. (*Capistrano Unified Sch. Dist. v. Wartenberg*, 59 P.3d 884, 893 (9th Cir. 1995) (citing *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 188-189).)

3. In determining whether the District offered a FAPE, the focus is on the adequacy of the proposed placement. A placement is adequate if it is reasonably calculated to provide educational benefit to the student. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) The requirement that the District's program be "reasonably calculated" to enable a child to receive educational benefits is prospective, i.e. based on an evaluation done by a team of experts prior to the student's placement. (*Furhmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031.)

### *Discipline Procedures*

4. A pupil who commits any offense related to school activities or attendance involving physical injury to another, profanity, disruption/defiance, theft, possession of a controlled substance, may be removed from the school setting through suspension, expulsion, or involuntary transfer to a continuation school, opportunity program, or county community school. (Ed. Code, §§ 48432, 48900, et seq.)

5. A “change of placement” is a fundamental change in, or elimination of, a basic element of a child’s educational program. (34 C.F.R. § 300.536(a).) Expulsion or suspension for more than ten days is a “change of placement.” (*Honig v. Doe* (1988) 484 U.S. 305.) The IEP team must meet within ten days of a decision to change a child’s placement due to a disciplinary code of conduct; and the District must provide parents with procedural safeguards. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(h).) Specified parties shall convene and review relevant information in the student’s file to determine if the conduct in question “was caused by, or had a direct and substantial relationship to, the child’s disability” or the child’s conduct “was the direct result of the local educational agency’s failure to implement the IEP.” (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(h).)

### *Manifestation Determination*

6. Once a student’s removal is deemed a change of placement, the IEP team must conduct a manifestation determination meeting to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).) The decision is made by “the LEA, the parent, and relevant members of the child’s IEP team (as determined by parent and the LEA).” (34 C.F.R. § 300.530(e)(1).) Commentary distinguishes between the team that does the manifestation determination and the IEP team that makes decision about services for the student who is being removed as a result of a change of placement. (Federal Register, Vol. 71, No. 156, at 46720 (8/14/06).)

7. Within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child’s IEP team must review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine: (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or (ii) if the conduct in question was the direct result of the LEA’s failure to implement the IEP. (34 C.F.R. § 300.530(e)(1).) The manifestation determination will analyze the child’s behavior as demonstrated across settings and across times when determining whether the conduct in question is a direct result of the disability. (Comments, Congressional Conference Committee’s Report, page 46720.)

8. If the IEP team determines the conduct is not a manifestation of the disability, then normal school disciplinary procedures may be used to address the incident, the same as applied to non-disabled students. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c).) However, since the IDEA also guarantees that the student must continue to receive appropriate services, albeit in an “interim alternative setting,” some IEP team follow-up is required. (20 U.S.C. § 1415(k)(1)(H)(2) (an interim alternative educational setting must be determined by the IEP team.)) Services are not just educational in nature, but also behavioral, including “behavioral intervention services and modifications that are designed to address

the behavior violation so that it does not recur.” (20 U.S.C. § 1415(k)(1)(D)(2); 34 C.F.R. § 300.530(d)(1)(ii).) A change of placement for disciplinary reasons must enable the student to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in the IEP. (71 Fed.Reg. 46716 (August 14, 2006).)

9. The parent of a child with a disability who disagrees with any decision regarding placement under title 34 of the Code of Federal Regulations part 300.530, or the manifestation determination under part 300.530(e), may appeal the decision by requesting a hearing pursuant to parts 300.507 and 300.508(a) and (b). (20 U.S.C. § 1415(k)(3)(A).) In making the determination, the hearing officer may: (i) return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of part 300.530 or that the child’s behavior was a manifestation of the child’s disability; or (ii) order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. (34 C.F.R. § 300.532(b)(2).)

#### DETERMINATION OF ISSUES

*Did District at its June 8, 2007 manifestation determination meeting properly determine that Student’s conduct was not a manifestation of his disability?*

Because of Factual Findings 1-11, and Legal Conclusions 4-9, Student did not establish that District failed to follow appropriate disciplinary procedures. Student did not establish that Student’s possession of a controlled substance and tobacco on the school campus was due to District’s failure to implement his IEP. Student did not establish that Student’s possession of a controlled substance and tobacco on the school campus was caused by, or had a direct and substantial relationship to his disability. In addition, Student did not establish that District made an erroneous conclusion at the manifestation determination June 8, 2007 meeting.

*Was Student denied a free appropriate public education (FAPE) because District’s June 8, 2007 Individualized Education Program (IEP) recommended that Student be referred for an expulsion hearing?*

Because of Factual Findings 1, 2, 5-8 and 12-15, and Legal Conclusions 1-3, Student did not establish that District failed to offer Student FAPE at the June 8, 2007 meeting. District’s recommendation that Student be referred for an expulsion hearing did not deny Student FAPE.

ORDER

Student's requests for relief are denied.

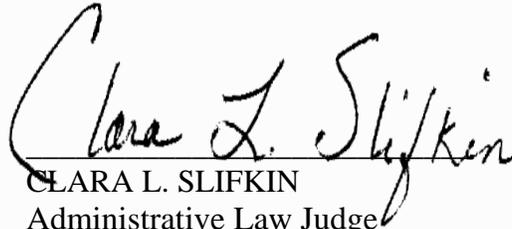
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires this decision to indicate the extent to which each party prevailed on each issue heard and decided. Respondent prevailed on the 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: August 28, 2007



CLARA L. SLIFKIN  
Administrative Law Judge  
Special Education Division  
Office of Administrative Hearings