

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

MERCED UNION HIGH SCHOOL
DISTRICT.

OAH CASE NO. 2009031283

EXPEDITED DECISION

Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH), State of California, heard this expedited matter in Atwater, California, on April 21 and 22, 2009.

Student's mother (Parent) represented him. Student was present at the hearing on April 21 and part of April 22, 2009.

Karen E. Gilyard, Attorney at Law, represented the Merced Union High School District (District). Marie Nelson, the District's Director of Student Support Services, was present throughout the hearing.

Student filed a due process hearing request (complaint) on March 24, 2009. OAH scheduled the expedited portion of the hearing for April 21 and 22, 2009. At the conclusion of the hearing, Parent presented oral closing argument. On April 27, 2009, the District filed a closing brief, and the matter was submitted.

ISSUE

Was Student's conduct on March 3, 2009, that led to his expulsion caused by, or did it have a direct and substantial relationship to, his specific learning disorder or speech and language impairment, and therefore was a manifestation of his disabilities?

FACTUAL FINDINGS

Background

1. Student is 14 years of age and resides with Parent within the boundaries of the District. He has been receiving special education and related services since 2001. Student's primary qualifying disability is a specific learning disorder (SLD) that takes the form of auditory memory and language processing deficits. His secondary category of disability is speech and language impairment, which is manifested in receptive and expressive vocabulary deficits.

2. Student completed his elementary education in the Merced City School District and Weaver Union School District. He entered the District's Merced High School in the fall of 2008 as a ninth grader, and, at Parent's request, was transferred to the District's Golden Valley High School (GVHS) in late January 2009. A new Individualized Education Program (IEP) was written for him at that time. The IEP provided that Student would attend most classes in a resource specialist program setting, have a one-to-one instructional assistant (IA) at all times on campus, receive 51 minutes a day of speech and language services, receive five hours a week of instruction at home, and have transportation to and from school. The IEP also contained a detailed behavior support plan (BSP). Parent agreed to these provisions. In addition, Student was offered counseling services. Parent declined the counseling services in January, but agreed to them in March 2009.

The March 3, 2009 incident

3. The incident for which Student was disciplined occurred on March 3, 2009. Student arrived at school at about 8:00 a.m. on the school bus, and was met by his instructional assistant, Zachary Wells. Mr. Wells accompanied Student to his first period math class. According to Mr. Wells, Student paid attention and did well in the class. Then Student and Mr. Wells went to Student's second period speech class. Again Student had a good day in class, although the teacher later reported that Student was sending or receiving text messages (texting) on his cellular telephone (cell phone), under his sweatshirt, during the class. When the teacher mentioned this, Student smiled in acknowledgement and appeared to be aware of the school policy, which prohibits the use of cell phones on campus during school hours.

4. Student and Mr. Wells then went to Student's third period geometry class, which was his only regular education class and was larger than his other classes. Student had previously had difficulty in completing the class, and frequently took breaks during it. Mr. Wells testified that when Student had difficulty staying in the geometry class, the two of them would return to the special education room to work on the material, or to a table outside the classroom in good weather. On March 3, 2009, Student had difficulty in geometry and left the class, walking with Mr. Wells to the special education room. There, he and Mr. Wells proceeded to work one on one in a study area, but Student soon took out his cell phone. At first Mr. Wells did not intervene, thinking that Student might be checking the

time. However, Student repeatedly used the phone, and Mr. Wells repeatedly told him to put it away. Student used the phone between 10 and 15 times in the special education room, prompting Mr. Wells to accuse him of texting and to tell him that he would have to confiscate the phone until the end of the school day.

5. Student testified that he was annoyed that Mr. Wells would not tell him how to spell a word, and was annoyed that Mr. Wells thought he was texting when he was only checking the time. So he said to Mr. Wells: “You’re just a punk,” swept the contents of his desktop onto the floor, and walked out, heading for the bathroom. Mr. Wells, as he had been instructed to do in such an event, followed Student and used his radio to summon campus liaisons (security personnel) to assist him. Two liaisons joined him outside the bathroom, where they could hear Student’s voice from within. The two liaisons entered the bathroom. Then Student angrily emerged.

6. The only significant factual dispute at hearing concerned the events just after Student emerged from the bathroom. Student testified that Mr. Wells approached him from behind, put a hand on his left shoulder, and tried to direct or drag him somewhere. At this point, Student claimed, he simply removed Mr. Wells’s hand from his shoulder and walked to the cafeteria.

7. Mr. Wells testified that Student came out of the bathroom ahead of the two campus liaisons. Mr. Wells held his hand out and asked for the cell phone. Student then said: “Get out of my way, you fucking snitch.” He placed his left forearm against Mr. Wells’s chest, and pushed or shoved him up against the wall before walking on to the cafeteria. Mr. Wells had been instructed never to touch Student, and had not done so.

8. Student’s version of this event was not credible. He was an unpersuasive witness. He answered Parent’s questions with some confidence, but was evasive during cross-examination. Although the cross-examination was polite and respectful, Student moved uncomfortably in his chair, darted his eyes around the room, and mumbled monosyllabic answers that were hard to hear. He professed not to understand the straightforward questions asked of him, and repeatedly stated that he was confused.

9. Mr. Wells, on the other hand, was an excellent and persuasive witness. He started as an IA for the District in 2007. Before that, he worked as the director of activities at a hotel in Hawaii, and had been in the United States Navy. He was calm in his demeanor, careful to be sure he understood questions, and precise in the wording of his answers. There is nothing in the record that furnishes any reason to doubt his account.

10. Moreover, Mr. Wells’s version was confirmed by an eyewitness, Constantino Aguilar. Mr. Aguilar has worked for the District since 1996 as a teacher, a baseball coach, and now as Associate Principal of GVHS. Mr. Aguilar testified credibly that, on March 3, 2009, he was across the school’s quadrangle, about 250 feet away from the bathroom, when he heard Mr. Wells’s radio call for assistance. Mr. Aguilar scanned the campus and made eye contact with Mr. Wells. He saw Mr. Wells hold out his palm toward Student in the

manner of someone asking for something. Student then “bench pressed” Mr. Wells against the wall and walk off toward the cafeteria. Mr. Aguilar was at some distance, and remembered Student using two hands instead of one hand and a forearm, but he confirmed that Student pushed or shoved Mr. Wells up against the wall.

11. The aftermath of the incident, which is undisputed, also undermines Student’s version. Mr. Aguilar reported the incident to the Principal, Craig Chavez. Mr. Chavez approached Student in the cafeteria and invited him to his office. Once there, Mr. Chavez asked Student to describe the incident. Student explained that Mr. Wells wrongly suspected him of texting, and wanted to take his cell phone. Mr. Chavez then asked to see the cell phone, because he knew most cell phones would display a record of any text messages. Student refused to turn it over, asking instead whether Mr. Chavez trusted him. Mr. Chavez said he had to work with facts. Student then cursed, and left the office.

12. Mr. Chavez arranged by radio to have Student observed from a distance for the rest of the school day, and instructed Mr. Aguilar to attempt to arrange a conversation between Student and Kelli Parreira, the school psychologist, who knew Student well and was Mr. Wells’s supervisor. Student would not talk to Ms. Parreira. Mr. Aguilar then approached Student at a lunch table and asked him what happened, but Student said “I don’t know you” and refused to discuss the matter. At the end of the day, Student was suspended for five days, and at a later hearing, was expelled.¹

13. Student’s refusal to allow either Mr. Wells or Mr. Chavez to see his cellphone so that his denials could be verified, and his subsequent refusal to discuss the incident with Ms. Parreira and Mr. Aguilar, strongly suggest a consciousness of guilt, and that his version of events is not credible. The preponderance of evidence showed that the incident happened as Mr. Wells described it: Student had been repeatedly texting during class hours in defiance of requests to stop. He was annoyed by Mr. Wells’s attempts to stop him from texting. He became angered when Mr. Wells called for assistance in resolving the matter, and when he attempted to confiscate the cell phone. He forcibly shoved Mr. Wells into the wall and walked past him to the cafeteria, retaining the cell phone.

Notice and scheduling of the manifestation determination meeting

14. When a special education student is suspended for disciplinary reasons for more than 10 days, the suspension constitutes a change of placement. Relevant members of the IEP team must then meet to determine whether the student’s conduct was a manifestation of his disability. That determination must take place within 10 school days of the decision to change the placement. In making the manifestation determination, the IEP team is required to answer two questions: (1) was the student’s conduct caused by, or did it have a direct and substantial relationship to, his disability; and (2) was the student’s conduct a direct result of the district’s failure to implement the student’s IEP? If the answer to either question is yes, then the student’s conduct is deemed a manifestation of his disability and the district may not

¹ The expulsion is not at issue here.

remove him from his current placement without an order of an ALJ. If the answer to both questions is no, then the district may change the student's placement in the same manner, and for the same duration, that it could change the placement of a student not in special education.

15. A parent must be given reasonable notice of an IEP team meeting, which must be held at a mutually agreed time and place. In the case of a manifestation determination IEP meeting, the notice must inform the parent of the decision to change the student's placement and must be accompanied by a copy of the parent's procedural safeguards. A District may proceed with an IEP meeting without the parent only when it has made and documented efforts to convince the parent to participate. Parent contends that the District failed to send her in advance the documents that would be considered at the meeting, failed to give her reasonable notice of the manifestation determination meeting it held on March 9, 2009, and failed to include her in making the determination.

16. In making a manifestation determination, the IEP team, including the student's parents, is required to review all relevant information in the student's file. However, there is no requirement that the district, in advance of the meeting, send parents the documents to be reviewed. In the notice of the manifestation determination IEP meeting, the district is required only to notify a parent of the decision to change the placement, and to send a copy of a parent's procedural safeguards in special education disputes.

17. The facts surrounding the manifestation determination IEP meeting are not in dispute. After the incident of March 3, 2009, Principal Chavez realized that Student had already been suspended by the District for 10 days that year, and that a further suspension would constitute a change in placement and require a manifestation determination. That afternoon he telephoned Parent, told her of the incident, informed her that he had decided to suspend Student for five days, explained to her generally what a manifestation determination is, and explained that it would have to be conducted within 10 school days.

18. On March 5, 2009, the District mailed to Parent a notice that the manifestation determination IEP meeting would take place on March 9, 2009, at 9:00 a.m. Marie Nelson, the District's Director of Student Support Services, is responsible for its special education programs. She established that she instructed her staff to send the notice by certified mail, return receipt requested, on March 5, 2009.

19. Shortly after sending the March 5, 2009 notice, Ms. Nelson learned that the funeral for a close friend would occur on the late morning of March 9. Consequently, on March 6, she caused to be sent another notice of the manifestation determination IEP meeting by the same method. The only difference between the March 5 and March 6 notices was that the latter set the meeting for 8:00 a.m. instead of 9:00 a.m. so that Ms. Nelson could attend the funeral. Parent does not dispute that these notices were accompanied by copies of special education procedural safeguards.

20. Ms. Nelson and Mr. Chavez both testified that the District had received return receipts for the notices of March 5 and 6, 2009. However, the receipts themselves were not introduced. During Parent's questioning of Mr. Nelson and Mr. Chavez, Parent implied that those receipts did not exist and that the notices were not sent by certified mail or sent on the dates they bore. However, although she testified twice, Parent never made those claims in her testimony.² In any event, Ms. Nelson testified without contradiction that the regular mail in Merced took one day to arrive at another address in Merced. Parent did not testify that she received them late, or did not receive them at all.

21. On March 5 and March 7, 2009, school psychologist Parreira telephoned Parent to persuade her to come to the manifestation determination IEP meeting. Since Parent did not answer, Ms. Parreira left messages. In the days leading up to the March 9, 2009 manifestation determination IEP meeting, Principal Chavez also called Parent at least twice, for the same purpose, and left messages. Parent did not respond to any of these messages, and gave no explanation for failing to do so. Parent thus received two written notices and four telephone messages informing her of the meeting on March 9, 2009. These notices were adequate to inform her of the meeting in advance. Therefore, the persuasive weight of the evidence established that Parent had sufficient notice of the manifestation meeting.

22. On March 9, 2009, the manifestation determination IEP team assembled, but Parent did not appear. Mr. Chavez telephoned her, and they had a brief conversation. Mr. Chavez informed Parent that the team was present, answered a few questions about the nature and purpose of the meeting, put the call on a speakerphone, had the team members introduce themselves, and encouraged Parent to participate. Parent stated she was not prepared to proceed with the meeting. Mr. Chavez offered to reschedule the meeting for the following morning, before an unrelated special education mediation Parent was scheduled to attend. Parent declined. Parent offered no alternative dates either within or outside the 10 school day time limitation. Instead, she reminded Mr. Chavez that she had previously informed the District she was unavailable throughout the month of March.³ Finally, Parent stated that the District should do what it was going to do, and she was going to do what she was going to do. At that point, she hung up. The IEP team then decided to proceed with the manifestation determination in Parent's absence.

23. The District's decision to proceed with the manifestation determination in Parent's absence was reasonable and justified. Parent had ignored two written notices and four telephone messages attempting to arrange the meeting. She waited until the IEP team was assembled, then refused to participate. She refused to cooperate in rescheduling the

² In the course of her advocacy for Student, Parent made numerous factual assertions that conflicted with the testimony of the witnesses she questioned. She was repeatedly cautioned that unsworn statements during questioning were not evidence and could not be considered in this decision, and that the only way that they could become evidence was if she made those statements under oath as a witness. Since Parent did not repeat any of those claims when she testified, they are not considered here.

³ On March 1, 2009, in returning to the District a form invitation to an annual IEP meeting for Student, Parent had written that she had other meetings throughout the month of March and could meet in April.

meeting, and reminded Mr. Chavez she was unavailable throughout the month of March. By these actions she made it clear to the District that she would not participate in a manifestation determination meeting within the time required by law.

24. The evidence showed that the District gave Parent reasonable advance notice of the meeting, gave Parent in advance the documents required by law, attempted to schedule the meeting at her convenience within the required time frame, and attempted to convince her to attend and participate. It properly recorded its attempts to obtain her attendance. Parent's failure to attend and participate was her choice, and no fault of the District.

The manifestation determination

25. At the manifestation determination IEP team meeting, the District IEP team members reviewed and discussed the documents in Student's file, including but not limited to Student's attendance, his health, his academic and functional strengths and weaknesses, individual reports from each of his teachers, the results of his most recent assessments, the nature of his processing deficits, and his IEP. The team also analyzed Student's disciplinary and behavioral history across settings and across times. The team then concluded that Student's conduct in assaulting Mr. Wells on March 3, 2009, was not caused by, nor did it have a direct and substantial relationship to, his disabilities; and that his conduct was not a direct result of any failure to implement his IEP.

26. The evidence supports the District's manifestation determination. There was no evidence that Student's assault upon Mr. Wells was caused by, or had a direct and substantial relationship to, Student's deficits in auditory memory, language processing, receptive or expressive vocabulary. Nothing about the incident suggests that Student was unable to comprehend or understand repeated verbal direction to stop using or surrender his cell phone. To the contrary, the evidence established that Student fully understood the directions given him; he was simply unwilling to comply with them. Student was determined to use his cell phone during school time, in violation of school rules, and to maintain possession of it even though school personnel attempted to confiscate it from him. His willingness to use force to keep his cell phone had nothing to do with his disabilities.

27. Student has long had behavioral difficulties, and had a BSP in his IEP, but nothing in the record suggests that there is any connection between his disabilities and his assaultive behavior. Student's current IEP notes that he can control his behavior when he wants to control it. There was no evidence that Student's BSP was not properly implemented.

28. Only Student and Parent testified in his behalf. No witness having any relevant professional credential claimed at hearing that there was any causal relationship between Student's conduct and his disabilities. Mother testified, and Student confirmed, that Student becomes angry when things do not go his way, and when other people do not do what they are supposed to do. Student testified that on March 3, 2009, he was already angry at Mr. Wells because Mr. Wells was constantly late in meeting his bus in the morning, and

because Mr. Wells refused to help him spell a word. Mr. Wells's tardiness, Student claimed, sometimes deprived him of breakfast in the cafeteria. But Mr. Wells, a more credible witness, testified that he was only late in meeting the bus one day because of traffic, and on that day he called the special education office and arranged for someone else to meet Student at the bus on time. He also testified that this event, which was not on March 3, 2009, did not annoy Student; instead, Student joked with him about it. Mr. Wells also testified that he never refused any request by Student to help him spell a word. The preponderance of evidence supports Mr. Wells' version. Moreover, annoyance at others who fail in their duties is not a characteristic limited to people who have disabilities, nor does it explain or justify violence against a school employee.

29. The evidence at hearing did not support a finding that Student's conduct on March 3, 2009, in shoving Mr. Wells against a wall, was caused by, or had a direct and substantial relationship to, his disabilities. To the contrary, the conduct that led to Student's suspension and expulsion was directly caused by the enforcement of school rules. It was the direct result of Student's being caught in repeated violation of the school's policy prohibiting use of cell phones, his annoyance that his cell phone would be taken from him, and his fear that examination of his cell phone would expose his denials as false.

30. Moreover, Student does not contend, and the record does not reveal, that there was any relevant document or consideration left out of the manifestation determination. The evidence showed that the District complied with the procedural requirements for making the manifestation determination.⁴

CONCLUSIONS OF LAW

Burden of proof

1. Student, as the party seeking relief, has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed.2d 387].)

Manifestation determination

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

3. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to him. (Cal. Code Regs., tit. 5, § 3042(a).) The removal of a special education student from his placement for more than 10 consecutive school days constitutes a change of placement. (34 C.F.R. § 300.536(a)(i)(2006).)

⁴ Student's complaint does not allege that his conduct was a direct result of the District's failure to implement his IEP, and no evidence at hearing suggested that it was.

4. When a school district changes the placement of a student receiving special education services for specific conduct in violation of a student code of conduct, the student is entitled to certain 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 student's disability. This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) It must be accomplished within ten school days of the decision to change the student's placement. (*Ibid.*)

5. A school district must notify parents of an IEP meeting, including a manifestation determination IEP team meeting, early enough to ensure that they will have an opportunity to attend, and must schedule the meeting at a mutually agreed upon time and place. (34 C.F.R. § 300.322(a)(1), (2)(2006); Ed. Code, § 56341.5, subds. (a)-(c).) In the case of a manifestation determination IEP meeting, the notice must inform the parent of the decision to change the student's placement and must be accompanied by a copy of the parent's procedural safeguards. (20 U.S.C. § 1415(k)(1)(H).) The meeting may be conducted without a parent in attendance if the district is unable to convince the parents to attend, in which case it must keep a record of its efforts and its attempts to arrange a mutually agreed upon time and place. (34 C.F.R. § 300.322(d)(2006); Ed Code, § 56341.5, subd. (h).)

6. A manifestation determination must be made by the district, the parent, and relevant members of the IEP team as determined by the parent and the district. (20 U.S.C. § 1415(k)(1)(E)(i).) The manifestation determination analyzes the child's behavior as demonstrated across settings and across times. All relevant information in the student's file, including the IEP, any observations of teachers, and any relevant information from the parents must be reviewed to determine if the conduct was caused by, or had a direct and substantial relationship to the student's disability, or was the direct result of the district's failure to implement the student's IEP. (34 C.F.R. § 300.530(e)(2006); 71 Fed.Reg. 46720 (Aug. 14, 2006).)

7. If the IEP team decides that the student's conduct was caused by, or had a direct and substantial relationship to the child's disability, then the conduct must be determined to be a manifestation of the child's disability. If the IEP team determines the conduct is not a manifestation of the student's disability, then normal school disciplinary procedures may be used to address the incident in the same way as they would be applied to non-disabled students. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c)(2006).)

8. A parent who disagrees with any decision regarding the manifestation determination may request a hearing. (20 U.S.C. § 1415(k)(3)(A).) In appropriate circumstances the ALJ hearing the dispute may order a change in placement of the student, and may return the student to the placement from which he was removed. (20 U.S.C. §1415(k)(3)(B)(ii).)

Causation

9. In order for a special education student's misconduct to be a manifestation of his disability, that conduct must either be caused by, or have a direct and substantial relationship to, the student's disability. (20 U.S.C. § 1415(k)(E)(i).) While these statutory standards are relatively new, the principle behind them is not. In *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470, 1480, fn. 8, *affd. sub nom. Honig v. Doe* (1988) 484 U.S. 305 [98 L.Ed.2d 686], the Ninth Circuit discussed the meaning of various phrases such as "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.

Was Student's conduct on March 3, 2009, that led to his expulsion caused by, or did it have a direct and substantial relationship to, his specific learning disorder or speech and language impairment, and therefore was a manifestation of his disabilities?

10. Based on Factual Findings 1-13 and 25-30, and Legal Conclusions 1, 6, and 7, Student's conduct on March 3, 2009, that led to his expulsion was not caused by, nor did it have a direct and substantial relationship to, his specific learning disorder or speech and language impairment. Instead, the conduct that led to Student's expulsion was directly caused by the enforcement of school rules. It was the direct result of Student's being caught in repeated violation of the school's policy prohibiting use of cell phones, the prospect that his cell phone would be taken from him, and his fear that examination of his cell phone would expose his denials that he was texting as false.

11. Based on Factual Findings 14-24, and Legal Conclusions 2-5 and 8, the District gave Parent reasonable advance notice of the manifestation determination IEP meeting, gave her in advance the documents required by law, attempted to schedule the meeting at her convenience within the required time, and attempted to convince her to attend and participate. Parent did not attend the manifestation determination because she was unwilling to participate in it within the time limits imposed by law. The District complied with the procedural requirements for making the manifestation determination.

