

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT, on behalf of STUDENT,

v.

MANTECA UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2008050468

EXPEDITED DECISION

Administrative Law Judge (ALJ) Trevor Skarda, Office of Administrative Hearings (OAH), State of California, heard this expedited matter on June 10-13, 2008, in Manteca, California.

Attorney Daniel A. Osher represented Manteca Unified School District (District). Janice Callanan, Special Education Director, attended the hearing on the District's behalf.

Attorney F. Richard Ruderman represented Student. Student was present the morning of the first hearing day. Student's grandmother attended the hearing on the Student's behalf throughout the hearing.

On May 16, 2008, OAH received a request for expedited due process hearing (complaint) from the District in this matter, and scheduled the expedited portion of the hearing to convene on June 9-13, 2008.¹ During a Prehearing Conference on June 6, 2008, OAH rescheduled the hearing for June 10-13, 2008. Following oral closing arguments on June 13, 2008, the record was closed and the matter was submitted.

ISSUES

1. Was Student's behavior on April 23, 2008, of kicking another student in the groin a manifestation of her disability?

¹ The hearing request originally included both expedited and non-expedited issues. Student subsequently withdrew all non-expedited issues.

2. Did District commit a procedural violation at the manifestation determination individualized education program (IEP) team meeting on May 8, 2008, by bringing an attorney to the meeting?

3. Was the District's determination that Student's behavior was not a manifestation of her disability frivolous?

CONTENTIONS

Student contends that her behavior of kicking another student in the groin on April 23, 2008, had a direct and substantial relationship to her disability. Specifically, Student contends that Student's behavior had a direct and substantial relationship to her problems with impulsivity, executive functioning, post traumatic stress disorder (PTSD) and/or depression. District contends that because Student had not acted violently towards another student before April 23, 2008, her conduct on that date did not have a direct and substantial relationship to her disability.

Student also contends that the District failed to implement a behavior support plan (BSP) developed in January 2008, and that Student's behavior was a direct result of the District's failure to implement the BSP. District contends that the January 2008 BSP was never agreed to by Student's grandparent.

Student contends that the District committed a procedural violation when it brought its attorney, Mr. Osher, to the manifestation determination IEP team meeting. District admits that Mr. Osher attended that IEP team meeting, but contends that this was not a procedural violation.

Finally, Student contends that the District's conclusion that Student's behavior was not a manifestation of her disability was frivolous. District contends that its decision was correct.

Student seeks an order requiring the District to place Student back in her pre-discipline placement, along with an order that the District's manifestation determination was "frivolous."

FACTUAL FINDINGS

1. Student is a 17-year-old girl who resides within the boundaries of the District with her grandmother. She is eligible for special education under the category of traumatic brain injury (TBI) due to an acquired brain injury (ABI) suffered in December 2000.

Student's Behavior

2. On April 23, 2008, during the lunch period, Student kicked a boy in the groin. The boy had been sexually harassing Student, teasing her about a cold sore on her face, and teasing her about her facial paralysis (one half of Student's face is paralyzed) immediately prior to the incident. However, prior to kicking the boy, Student warned him that she was having a bad day and that he should leave her alone. The boy was not seriously injured. However, Student was arrested and subsequently suspended. Thereafter, the District initiated expulsion proceedings.

Student's Disability

3. In December 2000, Student was hospitalized due to a brain hemorrhage caused by an arteriovenous malformation (AVM). Part of her brain was permanently damaged by the hemorrhage. After the hospitalization, Student began living with her grandmother, as her parents were unable to adequately care for her because they were addicted to drugs.

4. The portion of Student's brain that was damaged by the hemorrhage is partly responsible for executive functioning and impulse control. Student has exhibited some difficulties with both executive functioning and impulse control since the hemorrhage.

5. Student suffers from a seizure disorder. Her seizures have recently increased in frequency.

6. Student has difficulties with inhibition, although it is not clear whether these difficulties are related to her AVM and the resultant hemorrhage, a March 2007 sexual assault, or other trauma during her childhood.² She has been disciplined for two incidents at school where she behaved in a sexually inappropriate manner. In December 2007, Student allowed a male student to touch her breast. The incident occurred in a secluded area of the high school campus near the football field. In January 2008, Student was observed by school staff engaging in inappropriate horseplay with male students. When confronted by school staff, Student cursed at staff and was suspended.

7. Student suffers from PTSD due to a sexual assault that occurred on March 5, 2007. On that date, Student was sexually assaulted by a boy while walking to school. According to Student, the boy grabbed her breasts and pinned her arms over her head and held her against a fence. She kned him in the groin and escaped. Since the incident, Student has been treated by a psychiatrist for PTSD and depression.

² Student may have witnessed her mother take drugs and engage in sexual acts at a young age prior to her AVM.

Student's Current IEP

8. Student's last agreed upon IEP is dated May 22, 2006. That IEP contains no behavioral support plan (BSP).

9. Student's IEP team meeting convened in January 2008 and again in April 2008. Prior to the January 2008 IEP team meeting, the District developed a BSP to address Student's sexually inappropriate behaviors. The BSP requires, in pertinent part, a staff member to watch Student during unstructured times.

10. Student's guardian (her grandmother) never consented to the BSP. Indeed, the only portion of the January and April 2008 IEP to which Student's guardian has consented are accommodations for the California High School Exit Examination.

Manifestation Determination

11. When a special education student is suspended for disciplinary reasons for more than ten days, federal law requires that the appropriate members of the IEP team meet to determine whether her conduct was a manifestation of her disability. The 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 her 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 her disability and the district may not remove the child from her current placement.

12. The District convened a timely manifestation meeting on May 8, 2008. The team determined that the Student's conduct (kicking Student in the groin) was not caused by, nor did it have a direct and substantial relationship to, Student's disability. The team also determined that Student's conduct was not a result of the District's failure to implement the IEP. Student's guardian disagreed. The primary issue in this hearing is whether the District made the correct determination.

Caused by, or Direct and Substantial Relationship to, Student's Disability

13. Student's expert witness, Corey H. Brink, M.D., has been treating Student for PTSD and depression since March 2007. Dr. Brink is board certified in child and adolescent psychiatry. He presented as an excellent witness.

14. Dr. Brink testified that Student's conduct of kicking a child in the groin very likely had a direct and substantial relationship to her PTSD and depression. He testified that Student suffers from PTSD due to the March 2007 sexual assault. Dr. Brink testified that one of the core symptoms of PTSD is anger outbursts, especially when confronted with something that is symbolic of the traumatic event that caused the PTSD. He explained that Student's behavior was very likely related to her PTSD because the boy who Student kicked was sexually harassing her before she kicked him and her PTSD was caused by a sexual

assault. Dr. Brink also testified that hyper-vigilance is symptomatic of PTSD, and that Student was likely hyper-vigilant at the time she kicked the boy because of the sexual nature of his comments. He also testified that emotional regulation problems are symptomatic of PTSD, and that Student has exhibited the inability to regulate her emotions at times. Dr. Brink opined that Student's emotional regulation problems may have also contributed to her conduct. Finally, Dr. Brink opined that Student's conduct had a direct and substantial relationship to her long-diagnosed depression. He explained that one symptom of depression is irritability, and that Student reported that she was irritable at the time she kicked the student.

15. District's expert witness, Jaqueline Cheong, Ph.D., is a school neuropsychologist who was most recently employed as a program manager by a different school district. She has never assessed, treated or met Student.

16. Dr. Cheong opined that Student's conduct did not have a direct and substantial relationship to any of her disabilities, primarily because she had never attacked another student before the incident in question.³ With regard to PTSD and depression, Dr. Cheong opined without explanation that Student's conduct did not have a direct and substantial relationship to her PTSD and depression.

17. Dr. Brink's expert opinion was more persuasive than Dr. Cheong's. Dr. Brink has treated Student for over a year. Dr. Cheong has never met Student. Dr. Brink is a child and adolescent psychiatrist, and as such, he can diagnosis and treat PTSD and depression. It was not established that Dr. Cheong's credentials and/or training permit her to diagnosis and/or treat PTSD and/or depression. Finally, and most importantly, Dr. Brink provided a detailed, plausible explanation linking Student's conduct to her PTSD and depression. Dr. Cheong's opinion was not similarly supported.

18. Dr. Brink's testimony established that Student's conduct of kicking a boy in the groin had a direct and substantial relationship to her disability, specifically, her PTSD and depression.⁴

The School District Attorney's Presence at the Manifestation Determination Meeting

19. On May 2, 2008, during a telephone conversation, Student's attorney informed the District's attorney, that no attorney would attend the May 8, 2008 manifestation determination IEP meeting on Student's behalf. The District's attorney *did not* state that he would not attend.

³ The bulk of her testimony related to Student's other disabling conditions (executive functioning and impulse control) and their relationship to her conduct of kicking the student.

⁴ Because it has been determined that her conduct had a direct and substantial relationship to her disability, it is not necessary to determine whether the same conduct was a result of the District's failure to implement Student's IEP. Nonetheless, the ALJ notes that the Student's parents never consented to the BSP that potentially could have prevented Student's conduct.

20. Student and her grandmother attended the meeting with an educational advocate, but without an attorney. The District's attorney was present.

21. The District held a second meeting in late-May 2008. Both parties were represented by attorneys. The District did not commit a procedural violation.

Frivolous Manifestation Determination

22. There was no evidence that the District's substantive decision that Student's conduct was a manifestation of her disability was frivolous. Indeed, the District held two lengthy manifestation determination IEP team meetings at which multiple individuals provided input on behalf of the District and the Student. Although the District decision regarding whether Student's disability had a direct and substantial relationship to her conduct was ultimately incorrect, this fact does not make its determination frivolous.

LEGAL CONCLUSIONS

1. In an administrative proceeding, the burden of proof is on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) Student requested the hearing; Student has the burden of proof.

Was Student's behavior on April 23, 2008, of kicking another student in the groin a manifestation of her disability?

2. When a special education student is suspended for disciplinary reasons for more than ten days, federal law requires that the appropriate members of the IEP team meet to determine whether the student's conduct was a "manifestation" of her disability. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e).) The 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 her disability; and (2) Was the student's conduct a direct result of the district's failure to implement her IEP? (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).) If the answer to either question is yes, then the student's conduct is deemed a manifestation of her disability and the district may not remove the student from her current placement. (20 U.S.C. § 1415(k)(1)(E)(ii); 34 C.F.R. § 300.530 (f).)

3. As determined in Factual Finding 18, Dr. Brink's testimony established that Student's conduct of kicking a boy in the groin had a direct and substantial relationship to her disability, specifically, her PTSD and depression. As such, her conduct was a manifestation of her disability.

Did District commit a procedural violation at the manifestation determination IEP team meeting on May 8, 2008 by bringing an attorney to the meeting?

4. As determined in Factual Findings 19 to 21, Student cited no authority for the proposition that a district may not bring legal counsel to a manifestation determination IEP meeting, nor is the ALJ aware of any such authority. In contrast, when Congress and/or the California Legislature intended for a party to be prohibited from bringing an attorney to a meeting, the law specifically states that restriction. (See 20 U.S.C. §1415(f)(1)(B)(i)(III); Ed. Code, § 56500.3, subd. (a).) The District committed no procedural violation.

Was the District's determination that Student's behavior was not a manifestation of her disability frivolous?

5. An administrative law judge may shift costs from one party to another for bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. (Gov. Code, § 11455.30.) The actions or tactics which may result in such an award include *hearing conduct*, not substantive determinations made by a school district prior to a hearing. Student cited no authority (state or federal) requiring or even allowing an ALJ to make such a determination related to a district's pre-hearing request conduct. Accordingly, this issue is dismissed.

6. Assuming *arguendo* that there is legal authority requiring or allowing an ALJ to determine whether a district's manifestation determination was frivolous, the District's decision in this case, although incorrect, was not frivolous.⁵ (Factual Finding 22.)

ORDER

The District shall immediately return Student to her pre-discipline placement.

PREVAILING PARTY

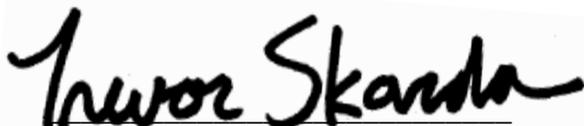
Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: Student prevailed on Issue 1; the District prevailed on Issues 2 and 3.

⁵ According to Black's Law Dictionary, frivolous is defined as "of little weight or importance."

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 ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: June 27, 2008



TREVOR SKARDA
Administrative Law Judge
Office of Administrative Hearings