

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2009060881

EXPEDITED DECISION

Administrative Law Judge (ALJ) Rebecca Freie, Office of Administrative Hearings (OAH), State of California, heard this matter on July 15 through 17, and July 20, 2009, in San Diego, California.

Attorney Thomas S. Nelson represented Student. Legal intern Cynthia Arce was present on behalf of Student for part of the hearing. Student's mother (Mother) was present for the entire hearing. Student's father (Father) was present for part of the hearing.¹ Student was present only to testify. Attorney Amy Bozone represented San Diego Unified School District (District). Legal interns Jeff Hutchins and Kurt Whitman were also present on behalf of the District for part of the hearing. Amy Perez, diagnostic resource teacher, was present throughout the hearing as the District's representative.

On June 12, 2009, Student filed a request for due process hearing (complaint). OAH scheduled an expedited hearing in this matter because the issue was related to a disciplinary matter. At the conclusion of the hearing on July 20, 2009, the matter was orally argued, the record was closed and the matter was submitted for decision.²

¹ Student's mother and father are collectively referred to as "Parents" in this Decision.

² The parties were permitted to submit tables of authorities cited in their closing arguments which have been marked as exhibits. Student's table of authorities has been designated as S-66, and the District's table of authorities has been designated as D-9.

ISSUES

1. Was Student's conduct on May 22, 2009, consisting of his involvement in selling marijuana seeds to another student, caused by, or did it have a direct and substantial relationship to, his disabilities?

2. Did the individualized education program (IEP) team predetermine that Student's behavior was not a manifestation of his disability at the manifestation determination IEP team meeting on June 5, 2009?

3. On June 5, 2009, did the manifestation determination IEP team commit procedural violations by failing to consider all relevant information in Student's file and parent input, and by limiting their consideration to only the primary disability category on Student's last IEP (i.e., specific learning disability (SLD)), instead of his other disability of attention deficit/hyperactivity disorder (ADHD)?

CONTENTIONS

Student contends that his conduct on May 22, 2009, which consisted of acting as a "middle man" in a single transaction concerning the purchase of marijuana seeds in school, had a direct and substantial relationship to his disability of ADHD. Specifically, Student claims that he has ADHD, which causes him difficulty with executive functioning and impulsivity. Student also asserts that this is part of his SLD. Student alleges that on May 22, 2009, he had not taken his ADHD medication for a week or two and, therefore, he impulsively engaged in the conduct that is the focus of this case.

Student also contends that the District predetermined the results of the manifestation determination IEP team meeting on June 5, 2009, thereby violating his procedural rights. Finally, Student claims that the District committed other procedural violations by not reviewing or considering all of his educational records and parental input at the manifestation determination IEP team meeting, and focusing only on his primary SLD, which is related to math. Student believes that if all of this information had been considered, the manifestation determination IEP team would have determined that his conduct had a direct and substantial relationship to his disability. Student seeks an order finding the determination of the manifestation determination IEP team to be in error, and requiring the District to reverse the determination of the IEP meeting on June 5, 2009, and to expunge Student's school record.³

The District contends that Student's SLD is a "severe discrepancy between intellectual functioning and math calculation/fluency, in association with attention[] problems and weaknesses in areas [related to] various executive functions." The District

³ An expulsion hearing was held several days after the manifestation determination was made, and Student was not expelled. He currently attends another school in the District. There was no evidence that Student seeks to return to his previous middle school.

concedes that Student has ADHD, but contends this is not his “primary handicapping condition.” Further, the District claims that Student probably engaged in more than one transaction concerning marijuana seeds on the day in question or, in the alternative, there was a single transaction that occurred for a time period encompassing several hours, and therefore Student’s behavior was not a single impulsive act related to his ADHD. The District contends that it did not predetermine the results of the manifestation determination IEP team meeting. Finally, the District contends that it did consider all relevant records and information concerning Student, including the input of Mother, at the June 5, 2009 manifestation determination IEP team meeting, and therefore did not commit a procedural violation in that regard.

FACTUAL FINDINGS

1. Student is a 13-year-old boy who resides within the boundaries of the District with his parents. He is eligible for special education under the category of SLD in that he has a “severe discrepancy between intellectual functioning and math calculation/fluency, in association with attentional problems and weaknesses in areas subserved by various executive functions.” Student also has been diagnosed with ADHD, and takes medication to control his behavior when school is session.

Student’s Conduct

2. From November 2008 to May 22, 2009, Student attended Innovation Middle School (Innovation), a public school in the District. The evidence established that on May 22, 2009, between third and fourth periods (10:25 to 10:30 a.m.), Student acted as a “middle man” in a transaction where one student (Student A) purchased marijuana seeds from another student (Student B). According to Student, Student A approached him and asked him where he could find Student B. Rather than just pointing Student A towards Student B, Student led Student A to Student B. Student B then told Student A that he could obtain the seeds from Student C. Student then took Student A to Student C. Student was given the seeds by Student C, and he handed them to Student A. Student then collected money for the seeds from Student A, to give to Student B. However, Student did not have time to give the money to Student B during the passing period, and Student was on detention during lunch, so Student had the money in his possession at the end of the school day.

3. The evidence established that on the day in question, several students were engaged in the purchase and sale of marijuana seeds on the campus of Innovation. Seeds were recovered from Student B, and other students. The seeds were identified as marijuana seeds by school police officers, but were never chemically tested to determine if they were actually marijuana seeds. Although the District’s witnesses testified that they believed Student was involved in another transaction shortly before school began on May 22, 2009, this claim was not supported by the evidence. Student testified credibly and admitted at the hearing that he acted as a middle man between third and fourth periods on May 22, 2009, in a sale and purchase of marijuana seeds. This testimony was consistent with what Student told

Mother after the incident, and also consistent with what he told Robert Kelin, Psy.D. (Dr. Kelin), a doctor of psychology and forensic psychologist who interviewed Student several weeks after the incident. The evidence established that Student engaged in only a single sales transaction between third and fourth periods.⁴

4. During the afternoon of May 22, 2009, several students who were reported to have been involved in the selling and purchasing of marijuana seeds were interviewed by school administration. When Student was interviewed by the principal Harlan Klein (Principal Klein), Student admitted that he “sold” marijuana seeds to another student. However, the evidence established that Student had not brought the seeds to school, nor was he found in possession of seeds. Instead, he was found to have two or three dollars that he intended to give to Student B from the sale of the seeds to Student A by Student C. No criminal charges were brought against Student, but the District initiated expulsion proceedings.⁵

5. Student testified that he had not taken his ADHD medication for one to two weeks prior to May 22, 2009, because he believed it was giving him headaches at night that disturbed his sleep. Student’s testimony was corroborated by a hospital laboratory report produced at the manifestation determination IEP meeting as well as at the hearing. When Mother picked up Student at School on May 22, 2009, she transported him to a hospital where his blood was drawn and tested for multiple drugs including marijuana and methamphetamines. Student tested negative on all drug screens. The evidence established that Student would have tested positive for methamphetamines if he had taken his ADHD medication that date. The District stipulated at hearing that Student had not taken his ADHD medication on May 22, 2009.

Student’s Disability

6. The evidence established that Student’s birth mother was addicted to drugs, and he was exposed to drugs *in utero*, and subsequently made a dependent of juvenile court. When he was five years of age, he and a sibling were placed in the care of Parents and subsequently adopted by parents. In elementary school, Student had anger management problems and was described by both this third and fourth grade teachers as “not playing well with other children.” Parents were often called by school personnel because Student had exhibited behavior problems in class or on the playground. When Student was in fifth grade, Mother asked that a student study team (SST) meeting be convened to see if he was eligible for accommodations pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §

⁴ The evidence established that Student has no history of drug use, other than his medically prescribed ADHD medication.

⁵ On May 22, 2009, Student consented to a search of his backpack which revealed the blade from an Exacto knife, and items school personnel initially suspected could be made into a device to smoke marijuana. However, at the manifestation determination IEP team meeting, all charges concerning these items were dismissed. Student used the razor blade to cut grip tape for his skate board, and the other items could not be used in the manner originally suspected by the District.

701, et seq.). However, because it was so late in the school year, the SST meeting was not convened.

7. In 2006, the fall of Student's sixth grade year, he moved to Colorado with Father, while Mother remained in California to ready their house for sale. During the first week of school in Colorado, Student was involved in an incident involving several students pushing each other and sliding down icy stairs. When Father responded to a telephone call from the school regarding this incident, the school counselor informed him that Student appeared to be "all over the place," and the counselor suggested that Student be tested for ADHD and prescribed medication. Father did not follow through on this recommendation.

8. Student returned to California in May 2007 because Parents could not sell their house in California, and at the beginning of the next school year, he enrolled in seventh grade at High Tech Middle School (High Tech), a charter school in the District. In November 2007, Student was assessed by High Tech to determine if he was eligible for special education. The assessment team completed a Multidisciplinary Report and found that Student had "a severe discrepancy between intellectual functioning and math calculation and fluency, in association with significant attentional problems and weaknesses in areas subserved by various executive functions." At about the same time, a private therapist providing Student and his family with therapy related to family issues suggested that Student be evaluated for ADHD. Student then saw a psychiatrist who prescribed Vyvanse, a medication for ADHD, and also referred him to a psychologist, Paul Whitehead, Ph.D. (Whitehead), for an evaluation to determine if Student actually did have ADHD. Student stopped taking his medication three days prior to the assessment by Whitehead, which occurred on December 17, 2007.⁶ Whitehead conducted formal psychological testing of Student, and reviewed the District's Multidisciplinary Report that contained the results of its formal assessment of Student. Whitehead issued his own report in which he concurred with the District's findings that Student had an SLD relating to math, with difficulties in executive functioning. He also found that Student appeared to have ADHD.

9. At the IEP team meeting at High Tech on January 11, 2008, Student was described as "struggl[ing] on tasks measuring processing speed, auditory processing under quiet conditions, visual motor integration, and various areas associated with executive functioning (controlling impulses, initiating activities, working memory, planning and organization and the ability to self monitor)." The IEP team and several of Student's teachers at High Tech all reported positive changes that correlated in time to when Student began taking the medication prescribed for his ADHD. Parents also testified persuasively about the positive effect medication had on Student's behavior. Student was found eligible for special education under the category of SLD.

⁶ It appeared that the District's assessment occurred prior to Student being prescribed medication.

Student's Current IEP

10. After Student transferred to Innovation in the fall of 2008, an IEP team meeting was held on December 8, 2008. The IEP developed at that time reflects that “[Student] exhibits a severe discrepancy between intellectual functioning and math calculation and fluency, in association with significant attention problems and weaknesses associated with the diagnosis of ADHD.”

11. The IEP of December 8, 2008, contains goals and objectives in the areas of math, written language, and social/emotional functioning. The latter goals concern organization and self-advocacy. There are no goals that address behavior. However, the evidence established that Student’s behavior was relatively well controlled when he took his medication.⁷

Manifestation Determination

12. 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 his conduct was a manifestation of his 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 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 remove the child from his current placement.

13. The District convened a timely manifestation determination IEP team meeting on May 22, 2009.⁸ The team determined that the Student’s conduct, consisting of his being involved in the sale and purchase of marijuana seeds, was not caused by, nor did it have as 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. Parents disagreed. The primary issue in this hearing was whether the District made the correct determination.

⁷ Student was suspended from High Tech because he shoplifted from a supermarket in October 2008. Student testified that he was on medication at the time of the shoplifting incident. However, the evidence also established that Student does not take his medication during weekends or school breaks, based on medical advice. It was not established exactly when the shoplifting incident occurred. Parents did not contest the suspension. No other disciplinary incidents were noted between the time Student began taking medication in late 2007, and May 22, 2009 incident.

⁸ An earlier date was suggested by the District, but Mother asked that the date be changed.

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

14. Dr. Kelin, Student's expert witness, is a forensic psychologist. Dr. Kelin obtained his doctorate degree from Rutgers University in 1979, and his Family Therapy Certificate from the New Jersey Center for Family Studies in 1982. In 1982, he obtained his California Psychology License. Dr. Kelin has been in private practice since that time. Approximately 60 percent of the time he is a school psychologist for the Sweetwater Union High School District, and in that capacity he has chaired manifestation determination IEP team meetings. He also serves as a forensic psychologist for the San Diego County Juvenile Court. He is appointed by the court to conduct psychological evaluations of youth who are involved in delinquency proceedings, and is also retained by criminal defense counsel to evaluate the same juvenile population. At least half of his juvenile court work is the result of court appointment. Dr. Kelin described ADHD as a condition where children with ADHD react impulsively, rather than thinking things through.

15. Dr. Kelin reviewed Student's educational records, and also conducted a clinical interview of Student and Mother on July 7, 2009. He testified persuasively and candidly that before he interviewed Student, he believed the incident of May 22, 2009, was not a manifestation of Student's disability of SLD, or related to his ADHD. However, he changed his opinion after he interviewed Student. Dr. Kelin's recitation of what Student told him was identical to what Student testified to at the hearing. Student was present in the hearing room only when he himself testified. Parents were cautioned to not discuss the hearing with Student prior to his testimony, and Student's demeanor and responses indicated that no one discussed the case with Student prior to him testifying.

16. Dr. Kelin was a very well-qualified psychologist and a credible witness. In addition to his experience as a school psychologist who had conducted manifestation determination IEP meetings for another school district, he also had extensive experience as a court-appointed psychologist evaluating youth who had committed acts that were violations of the Penal Code. Based on his experience, it was unlikely that he would be deceived by Student. Likewise, this ALJ found Student to be credible when he testified about a single incident during which he acted as a middle man.

17. Dr. Kelin testified that Student's behavior on May 22, 2009, had a direct and substantial relationship to his ADHD. Dr. Kelin also testified to the fact that Student had not taken his medication for ADHD for several days prior to the incident. Dr. Kelin testified that because Student was not on his medication, he did not think through the consequences of his actions before becoming involved in the marijuana sales transaction. Student testified that if he had taken his medication on May 22, 2009, when Student A approached him and asked him where Student B was so he could buy some marijuana seeds, Student would have simply pointed to Student B, and would not have been involved at all.

18. The evidence established that the District members of the IEP team relied on the information provided to them by Principal Klein concerning the events of May 22, 2009. Principal Klein told the team that he saw Student receive money during the passing period

between third and fourth periods, and when Principal Klein asked Student about the money, Student told him that it was the return of a loan of lunch money. Principal Klein formed the opinion that because Student had lied to him about the source of the money that morning, and still had the money at the end of the school day, his participation in the transaction was not a manifestation of his ADHD. In addition, one of the other students interviewed by the administration on May 22, 2009, claimed that Student had been involved in another transaction before school, and this student's written statement was given to the IEP team.

19. The District members of the IEP team at the manifestation determination meeting also were not convinced that the laboratory report produced by Mother actually proved that he was not on his medication at the time of the incident. At the hearing Dr. Kelin provided the testimony that corroborated Mother's assertion that the laboratory report proved Student was not on his medication on May 22, 2009. However, Dr. Kelin was not a participant at the IEP team meeting, and no other participant had the expertise to explain to the team the significance of the results of the drug testing.

20. The evidence established that the District's IEP team members would have been more inclined to find that Student's conduct was a manifestation of his ADHD had they been convinced that Student had just been involved in a single transaction when they met on June 5, 2009. Student's case manager, Chantal Bonfond (Bonfond), a special education teacher, testified that she believed Student was involved in more than one seeds transaction on May 22, 2009, as did the school psychologist for the District, Michelle Cirsci (Cirsci). Bonfond testified that if she had known there was just a single incident of short duration she would have been more inclined to find Student's behavior a manifestation of his ADHD. The evidence also established that at the manifestation determination IEP meeting, the District personnel did not understand the significance that the laboratory report of Student's drug testing corroborated that he was not on his ADHD medication, and also not on any other drugs.

21. The District contended that ADHD was not Student's "primary handicapping condition" and, therefore, not a real consideration in this case, Cirsci led the manifestation determination IEP meeting and reviewed school records prior to that meeting. She testified that she had did not see any hyperactivity reflected in the school records she reviewed. However, it was unclear whether she reviewed the Whitehead report, which contained a diagnosis of ADHD. In addition, the Innovation IEP of December 8, 2008 also reflected that Student had ADHD. District witnesses testified that this description was an error, and the description of Student's disability should have focused on his difficulties in math and executive functioning, not ADHD. However, the evidence established that the IEP team of December 18, 2008, did consider ADHD to be related to his SLD. Moreover, the District stipulated that Student had ADHD towards the end of the hearing. Based on the foregoing, the fact that the District determined at some point that SLD was Student's "primary handicapping condition" does not establish that it was his only handicapping condition.

22. Cirsci also testified that she reviewed the computerized discipline records system kept by the District, called ZANGLE,⁹ and based on the low number of incident reports concerning Student from kindergarten on, she determined that Student's behavior history was not that of a student with ADHD. However, the evidence established that ZANGLE was not an accurate reflection of a student's discipline history. Parents' persuasive testimony highlighted numerous incidents where Student exhibited serious behaviors that were never documented by ZANGLE. In fact, the evidence established that one week prior to May 22, 2009, Student was placed on lunch detention by his history teacher for misbehavior in class, and this was not reflected in ZANGLE although both the teacher and Principal Klein talked to Parents about the incident before May 22, 2009. Bonfond testified that she saw Student daily as his case manager and did not observe any behavior out of the ordinary, but she was unaware of the misconduct in the history class the week before May 22, 2009. The evidence established that ZANGLE was not an accurate source of information on which Cirsci should have relied, and the lack of incident reports regarding Student in ZANGLE does not establish that he did not have ADHD. Moreover, it was District's contention at hearing, that the manifestation determination IEP team was required to consider only Student's primary handicapping condition.

23. The evidence established that Student has ADHD, as well as an SLD. Student's ADHD causes him to be impulsive, and to act without thinking. Student's ADHD is controlled by medication. One or two weeks prior to May 22, 2009, Student stopped taking his ADHD medication and told no one. On May 17, 2009, Student acted out in his history class. This conduct resulted in the teacher calling Parents, and Principal Klein talking to Mother about it when she was picking up Student at school the following week. On May 22, 2009, Student acted impulsively when he acted as a middle man and helped Student A buy marijuana seeds. When Student was approached by Student A and asked where Student B was so he could purchase marijuana seeds, Student impulsively took him to Student B rather than just pointing out Student B. The evidence established that Student's involvement in the seeds transaction between third and fourth periods was a single incident of less than five minutes. The evidence established that Student did not think about the consequences in getting involved in a transaction that could be construed as drug related. Therefore, the evidence established that Student's conduct on May 22, 2009, was an impulsive act caused by his ADHD and the fact that he had not taken his medication.

24. Based on the foregoing, the evidence established that Student's conduct on May 22, 2009, was caused by, or had a direct and substantial relationship to his disability, and, therefore, was a manifestation of his disability.

Predetermination and Other Procedural Violations

25. There was no evidence that District personnel predetermined the result of the manifestation determination IEP team meeting. District personnel who testified, Klein, Cirsci and Bonfond, testified persuasively that they did not enter the meeting with the

⁹ Witnesses testified that ZANGLE is the actual name of the system and is not an acronym.

intention of finding Student's behavior was not a manifestation of his disability of ADHD. The audio tape recording of the meeting was admitted into evidence, and it confirms this. In addition, the recording establishes that Mother provided the team with a great deal of input, as did a student advocate and Student's attorney who attended the meeting with her, and this input was considered by the District, although not necessarily believed. The evidence established that Student had attended several different schools in the District, and it is unclear if Student's file was complete. Although it appears that every document in Student's records was not reviewed by District personnel, a good faith effort was made to ensure that relevant records were reviewed. There were no procedural violations at the manifestation determination meeting and the outcome of that meeting was not predetermined.

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 and has the burden of proof.

Was Student's conduct on May 22, 2009, consisting of his involvement in selling marijuana seeds to another student, caused by, or did it have a direct and substantial relationship to, his disabilities?

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 his 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 his disability; and (2) Was the student's conduct a direct result of the district's failure to implement his IEP? (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1) (2006).) 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 remove the student from his current placement. (20 U.S.C. § 1415(k)(1)(E)(ii); 34 C.F.R. § 300.530 (f).)

3. As determined in Factual Findings 2-24, Dr. Kelin's testimony, as well as the testimony of Student, established that Student's conduct of acting as a middle man in a single transaction of selling and buying marijuana seeds had a direct and substantial relationship to his disability of ADHD. As such, his conduct was a manifestation of his disability.

Did the IEP team predetermine that Student's behavior was not a manifestation of his disability at the manifestation determination IEP team meeting on June 5, 2009?

4. As determined in Factual Finding 25, there was no evidence that the District predetermined the result of the manifestation hearing. District personnel entered the meeting with no predetermined result according to testimony and the audio recording of the meeting.

