

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BANNING UNIFIED SCHOOL DISTRICT,
RIVERSIDE COUNTY OFFICE OF
EDUCATION.

OAH CASE NO. 2012030122

ORDER DENYING MOTION FOR
STAY PUT

On March 6, 2012, Student filed a Request for Due Process Hearing (complaint), naming Banning Unified School District (District) and Riverside County Office of Education (RCOE) as respondents. The complaint alleged denials of a free appropriate public education (FAPE), failures to assess, and failures to comply with respondents' "Child Find" responsibilities. Most pertinent to the instant motion, the complaint also alleged that Student had been improperly expelled despite respondents' being on notice that Student was a child with a disability whose conduct was a manifestation thereof. Office of Administrative Hearings (OAH) set the matter for dual hearing dates, with the expedited matters, discussed below, scheduled for expedited hearing on April 3-5, 2012.

On March 9, 2012, Student filed this motion for stay put, seeking that she be permitted to return to high school during the pendency of this due process matter. On March 15, 2012, respondents filed their oppositions. As discussed below, the motion is denied.

APPLICABLE LAW

Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); 56505, subd. (d).) This is referred to as "stay-put." For purposes of stay-put, the current educational placement is typically the placement called for in the student's individualized education program (IEP), which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

In general, without violating stay-put, school personnel may remove a child with disabilities from the current placement to an interim alternative educational setting (IAES) for less than 10 days for code of conduct violations. (See 20 U.S.C. § 1415 (k)(1)(B).) When a child violates a code of student conduct and school personnel seek to order a change in placement that would exceed ten school days, the local educational agency (LEA), the

parent, and the relevant members of the IEP team shall determine whether the conduct was a manifestation of the child's disability. (20 U.S.C. § 1415(k)(1)(E).) If the conduct is determined not to be a manifestation of disability, then discipline can be applied in the same manner as with other students. (20 U.S.C. section 1415 (k)(1)(C).) After a manifestation determination, a student has a right to an expedited appeal of the manifestation determination. (20 U.S.C. § 1415(k)(1)(G).)¹ While the appeal is pending, the child shall remain in the IAES pending the decision of the hearing officer or until the expiration of the 45 school-day IAES placement, whichever occurs first, unless the parent and the LEA agree otherwise. (Ed. Code, § 56505, subd. (d); see 20 U.S.C. §1415(k)(4)(A) & 34 C.F.R. §§ 300.532, 300.533.)

When a student who has not yet been determined eligible for special education violates a code of student conduct, these protections apply if the LEA is deemed to have had a basis of knowledge that the student suffered from a disability before the occurrence of the behavior that prompted the disciplinary action. (20 U.S.C. § 1415(k)(5).) The LEA is deemed to have had a basis of knowledge that a student was a student with a disability if any of the following occurred before the behavior that caused the disciplinary action:

- (1) The parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
 - (i) (2) The parent of the child has requested an evaluation of the child pursuant to ... 20 U.S.C. § 1414(a)(1)(B); or
 - (ii) (3) The teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.534(b).)

DISCUSSION

Student's motion argues that she was expelled from Banning High School on September 27, 2011, as a result of an altercation that occurred on August 24, 2011, that resulted in criminal prosecution and probation. She was given an administrative educational placement through RCOE.

¹ In such cases, "the State or local education agency shall arrange for an expedited hearing." (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c).) The expedited hearing shall occur within 20 school days of the date the hearing is requested. (*Id.*)

Student argues that from past IEP's, assessments and behavioral incidents, District had a basis of knowledge that Student suffered from a disability even though she was not receiving special education and related services at the time of the expulsion. Student therefore argues that District was obliged to, and did not, afford her the procedural protection of holding a manifestation determination meeting prior to expelling her. Student further argues that District's failure to hold the manifestation determination and then conclude that Student's conduct had been a manifestation of her disability, was a procedural violation of IDEA that resulted in a denial of FAPE.

Respondents' oppositions argue that Student had been exited from special education with parental consent, prior to the incidents giving rise to the expulsion, and that they therefore cannot be held to the "basis of knowledge" standard.

Even if respondents did have a "basis of knowledge of [Student's] disability," Student's motion fails. The "basis of knowledge" analysis affords IDEA's procedural protections to students who have not yet been determined eligible for special education. However, stay-put would not afford Student the right to return to high school even if she had been eligible for special education at the time of the expulsion. When a student with a disability violates a code of student conduct, and a manifestation determination is held that determines the conduct was not a manifestation of disability, then a student has a right to an expedited appeal of the manifestation determination, and while the appeal is pending, the child shall remain in the IAES pending the decision of the hearing officer. Here, there was no manifestation determination, but the same analysis applies while Student's expedited appeal is pending. Thus, Student's stay-put placement is the IAES. Student's remedy is the expedited appeal process, during which the IAES is the stay-put placement.

ORDER

Student's motion for stay put is denied.

Dated: March 20, 2012

/s/

JUNE R. LEHRMAN
Administrative Law Judge
Office of Administrative Hearings