

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

In the Matter of:

STUDENT,

Petitioner,

v.

POWAY UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2007080406

**ORDER DENYING STUDENT'S  
MOTION TO SHIFT BURDEN OF  
PERSUASION**

On August 14, 2007, the Office of Administrative Hearings (OAH) received a Request for an Expedited Due Process Hearing (Complaint) from attorney Thomas S. Nelson on behalf of Student, naming Poway Unified School District (District) as the Respondent.

The same day, Student filed a motion to shift the burden of persuasion to the District in the Expedited Due Process Hearing. Student contends that the District should have the burden of persuasion because the District changed the status quo by involuntarily transferring Student to another high school. OAH received the District's opposition brief on August 24, 2007.

**APPLICABLE LAW**

Under the Individuals with Disabilities Educational Improvement Act (IDEIA), the party filing a due process action to determine whether the local education agency provided a student with a Free and Appropriate Public Education has the burden of persuasion in the due process hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, \_\_\_ [126 S.Ct. 528, 163 L.Ed.2d 387].)

Title 20 United States Code section 1415(k)(a)(C)<sup>1</sup> provides:

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 612(a)(1) [§ 1412(a)(1)] although it may be provided in an interim alternative educational setting.

Section 1415(k)(1)(E)(i) provides:

Except as provided in subparagraph (B), within 10 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 local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall 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 local educational agency's failure to implement the IEP.

Section 1415(k)(3)(A) provides: "The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing."

Pursuant to section 1415(k)(3)(b)(i), the Administrative Law Judge "shall hear, and make a determination regarding, an appeal requested under [section 1415(k)(3)(A)]."

## **DISCUSSION**

The District suspended Student for allegedly harassing a fellow student after the District had previously warned Student not to have any contact with this student. The District held a manifestation determination IEP meeting and determined that Student's disciplinary conduct was not a manifestation of her disability or caused by the District's

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<sup>1</sup> All statutory citations are to Title 20 United States Code, unless otherwise noted.

failure to implement her IEP. The District also determined to involuntarily transfer Student to another high school due to her disciplinary conduct. Student appealed the District's manifestation determination and change in placement.

Student contends that the District has the burden of persuasion at the upcoming Expedited Due Process Hearing to prove that Student's disciplinary conduct was not a manifestation of her disability or caused by the District's failure to implement her IEP. Student attempts to distinguish *Schaffer*, which places the burden of persuasion on the party seeking relief, because the District unilaterally changed Student's placement at the manifestation determination meeting. Student's position is not persuasive due to changes made in 2004 in the IDEIA to the manifestation determination process. Former section 1415(k)(6)(B) explicitly placed the burden of persuasion on the local education agency to prove that the student's disciplinary conduct was not a manifestation of the student's disability. Congress removed that provision in the 2004 revisions to the IDEIA. The removal of this section indicates that Congress intended to place the burden of persuasion to the party contesting the manifestation determination, pursuant to the common law rule that the party seeking relief has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, \_\_\_ [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, Student has the burden of persuasion as Student is the party seeking relief.

### **ORDER**

Student's motion to shift the burden of persuasion is denied.

Dated: August 31, 2007

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PETER PAUL CASTILLO  
Administrative Law Judge  
Special Education Division  
Office of Administrative Hearings