

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

OAH CASE NO. 2009020557

v.

MURRIETA VALLEY UNIFIED
SCHOOL DISTRICT AND SAN
MARCOS UNIFIED SCHOOL DISTRICT.

CORRECTED EXPEDITED DECISION¹

Administrative Law Judge (ALJ) Steven Charles Smith, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Murrieta, California on April 28-30, 2009.

F. Richard Ruderman, Attorney at Law, appeared on behalf of Student. Mother was present at the hearing on all days. Father did not appear. Student appeared April 28, 2009.

Maria E. Gless, Attorney at Law, appeared on behalf of the Murrieta Valley Unified School District (Murrieta Valley USD). Ms. Zhanna Preston, Director of Special Education for Murrieta Valley USD, was present at the hearing on all days.

On February 17, 2009, Parents, on behalf of Student, filed a Request for Due Process Hearing (Student's Complaint) naming Murrieta Valley USD, San Marcos Unified School District (San Marcos USD) and Lake Elsinore Unified School District (Lake Elsinore USD) as respondents. Student's Complaint alleged a denial of a free appropriate public education (FAPE) by each schooling entity, upon a variety of legal theories. One allegation as to Murrieta Valley USD was the failure to conduct an appropriate manifestation determination meeting on September 10, 2008, resulting in Student's unlawful expulsion.

On March 9, 2009, Student withdrew his manifestation allegations, without prejudice. Subsequently, Student, with the consent of Murrieta Valley USD and San Marcos USD,² moved to amend his complaint to reinstate the manifestation allegations and the expedited

¹ This corrected decision is issued to correct an error in the spelling of the name of Student's attorney and to redact the spelling of a name in factual finding 19.

nature of the case. Student's motion was granted and his Amended Complaint deemed filed April 7, 2009.

By OAH order, the reinstated, expedited manifestation allegations were set for hearing on April 28-30, 2009, and the non-expedited allegations were set for hearing June 2, 2009. On the last day of expedited hearing, April 30, 2009, the parties were granted permission to file supplemental legal authorities by 5:00 p.m., May 1, 2009. Upon receipt of the supplemental authorities, the record was closed and the expedited matters were submitted.

ISSUE³

On September 10, 2008, did the Murrieta Valley USD conduct an inappropriate manifestation determination of Student by:

1. Failing to determine that the conduct in question was caused by, or had a direct and substantial relationship to Student's disability; or,
2. Failing to determine that the conduct in question was the direct result of the District's failure to implement Student's IEP?

FINDINGS OF FACT

Jurisdiction and General Background

1. At the time of Student's relevant conduct, August and September, 2008, Student was a boy aged 16 years. At all relevant times, Student resided with Mother within the boundaries of Murrieta Valley USD.
2. Student had received special education services since preschool. He was originally found eligible for special education and related services in kindergarten in 1996 (age 5), in San Diego, California, under the category of speech and language impairment. The following year, additional services were given to Student, because, as noted on his exit report card of June 6, 1997, Student's behavior had deteriorated to the point that he required one-to-one assistance. Student was recommended for retention in kindergarten and further testing.

² Lake Elsinore USD and Student settled their issues and Lake Elsinore USD was dismissed from this matter.

³ Non-expedited FAPE issues were reserved for the June 2, 2009 Due Process Hearing.

3. During summer 1997, Student relocated to the San Marcos USD area and repeated kindergarten there during the 1997-1998 school year. While at San Marcos USD, Student was evaluated by the school psychologist and placed in a Resource Specialist Program (RSP) with speech and language support. By the end of his second year in kindergarten, Student had not yet learned the full alphabet, but did have some beginning math skills. Following the 1997-1998 school year, Student relocated to Murietta USD.

4. On August 28, 1998, at the beginning of the 1998-1999 school year, Student, then a first grader aged six years, nine months, underwent a comprehensive special education evaluation by Murrieta Valley USD (1998 Evaluation). Student scored in the range of mild mental deficiency (retardation). Where average was 100, Student's "full scale IQ" was 62 (1st percentile)⁴, and his mental age range was four years, six months to four years, nine months. The results of Student's evaluation led to his reclassification as eligible for special education services under the category of "multiple disabilities," based on speech and language impairment and mental deficiency. Student's psycho-educational summary described him as having had great difficulty understanding directions and poor verbal comprehension. Student presented as easily frustrated and in need of constant repetition of instructions, broken down to their simplest and briefest forms. Based on this evaluation, Student was placed in the Special Day Class (SDC) program at Avaxat Elementary School (Avaxat), Murrieta Valley USD.

5. On October 2, 2001, Murrieta Valley USD gave Student his required triennial special education evaluation (2001 Triennial Evaluation). At that time, Student was nine years, eleven months old and in a fourth grade SDC at Avaxat. The evaluation revealed that Student had severe expressive and receptive language delays. Student's full scale IQ was 46 (i.e., less than the first percentile); however, Student had not completed some of the questions, so the precise validity of the score was uncertain. A backup testing protocol resulted in scores similar to the 1998 Evaluation. Student's auditory memory skills were below average and his auditory thinking and reasoning skills were in the deficient range. Student's social-emotional functioning had improved over the prior year with fewer temper tantrums and frustrations. Student remained eligible for special education services under the category of "multiple disabilities" and was recommended for continued placement in an SDC.

6. On November 10, 2004, Student was given another triennial evaluation, this time by San Marcos USD (2004 Triennial Evaluation). Student was a seventh-grader with a chronological age of 12 years, 11 months. At the time, Student attended four SDC's (language arts, math, science and social skills) and three general education classes (homeroom, physical education, and choir). The report continued to find Student had "severe delays in expressive and receptive language." It called for teachers, when speaking to Student, to "face him, speak slowly, pause between phrases for processing time, and limit sentence length and complexity. Give [Student] an opportunity to request repetitions or clarifications." In addition, "when giving [Student] directions for a task or assignment,

⁴ The first percentile means that 99% of the tested population would have scored higher than Student.

write them on the board so that [Student] can review the directions as often as needed.” The report specified many additional and similar strategies to assist Student to understand what was asked of him, and to help him retain the directions long enough to complete the assigned task. The bulk of testing results put Student in the delayed, very low, or low-average range, with an occasional average score in non-verbal testing. This evaluation included the Behavior Assessment System for Children (BASC). The BASC was a multidimensional approach to evaluating the behavior and self perceptions of children ages four through eighteen years. It was based primarily on observation reports of teachers and parents. In this case, of eighteen reported behavioral categories, Student was rated at risk or at significant risk in fifteen, most notably, aggression, conduct, attention and learning problems. The San Marcos USD evaluator determined that Student was not eligible under the categories of multiple disabilities, specific learning disability, mental retardation or emotional disturbance, and returned Student’s eligibility to the singular classification of speech and language impairment. Student continued attending SDC classes.

7. On November 8, 2007, Student, then a tenth grader, aged 15 years, 11 months, again underwent a triennial special education evaluation by San Marcos USD (2007 Triennial Evaluation). The report revealed that Student had made “some” progress toward the goal that he would be able to comprehend the meaning of a third grade reading passage with 75% accuracy. It noted that “math is an area of extreme difficulty for [Student],” and that Student scored in the “extremely low” range in math reasoning and “far below basic range in general mathematics” on the California Standards Test. The speech and language pathologist reported that Student continued to exhibit severe delays in expressive and receptive language, concluding that Student’s testing in those areas revealed language abilities hovering around the second grade level with Student’s total composite score individual achievement at the ½ percentile level. Student’s word processing teacher reported that Student “just sits rather than beginning his assignments.” Student was given the BASC, second edition (BASC II). The BASC II revealed clinically significant and “at risk” indications in 24 areas, including these examples: hyperactivity (tendency to be overly active, rush through work activities, and act without thinking); conduct problems (tendency to engage in rule-breaking behaviors); atypicality (tendency to behave in ways that are immature or considered odd); activities of daily living (ability to perform everyday tasks independently and/or without reminders); functional communication (ability to communicate basic thoughts, knowledge, ideas, and feelings in a way others can understand); aggression (tendency to act in a physically or verbally hostile manner that is threatening to others); depression (excessive feelings of unhappiness, sadness, or stress); and, social skills (skills necessary for interacting successfully with peers and adults). Student’s overall non-verbal index score put Student’s learning potential at below the second percentile when compared with same aged peers. The 2007 Triennial Evaluation reaffirmed Student’s eligibility for special education under the category of speech and language impaired.

8. Based in part upon the 2007 Triennial Evaluation, San Marcos USD developed an IEP for Student (November 15, 2007 IEP) which noted speech and language disability as Student’s primary disability and explained that, “deficits in receptive and expressive

language compromise ability to progress in the general curriculum.” It placed Student’s reading and mathematics ability at below third grade and remarked that, “receptive and expressive language disability hinder [Student’s] ability to form full sentences in spoken and written language, and to understand complex oral language.” The November 15, 2007 IEP also acknowledged that the parents were concerned about Student’s ability to develop independent living skills. In the annual goals section of the IEP, Student’s vocabulary was identified as at the second grade level. The IEP acknowledged that Student had a BSP, behavioral support plan for behavior interfering with Student’s learning or the learning of his/her peers, to respond to Student’s aggressive behavior when overwhelmed by emotions (June, 2007 BSP). However, the IEP reported that Student’s behavior had improved. It did not terminate the June, 2007 BSP. One of Student’s measurable annual goals in the November 15, 2007 IEP was that, by the same time the following year (i.e., November, 2008 – eleventh grade), Student, whose baseline for non-literal expressions was noted at below the one-tenth percentile, and ability to understand meaning from context at the first percentile, would be able to use context to identify the meaning of three non-literal expressions with minimal prompting when addressed in speech therapy sessions. Another relevant goal was that by November, 2008, Student would be able to identify what he was feeling and articulate his feelings to his counselor, psychologist or teacher. The responsible party for achievement of this latter goal was identified as “counselor/psychologist.” Services in this IEP included SDC and 45 minutes per week of speech and language, as well as meeting with counseling services as needed for social-emotional issues.

9. On August 1, 2008, Student exited San Marcos USD. On August 13, 2008, Student began attendance at Vista Murrieta High School (Vista HS), in Murrieta Valley USD.

Student’s Conduct

10. On or about August 28, 2008, Student was seen in the girls’ restroom by school security personnel (First Incident). John Files (Files), Student’s Case Carrier (i.e., the SDC teacher responsible for management of all aspects of Student’s IEP), and security personnel, presumed Student had made a mistake. Files inquired of Student whether Student had mistakenly entered the girls’ restroom. Student did not specifically respond. This incident was then dropped, without further conversation, disciplinary consequences, or directions to Student. No one reported this first incident to Parents, nor was the event recorded by security in any report or noted in Student’s file.

11. On September 4, 2008, three weeks after Student began attending Vista HS, Student went into the girls’ restroom to watch the girls use the facilities (Second Incident). Student went into a stall and positioned himself so that his head was on the floor and partway under the stall divider so that he could look up. His positioning was such that anyone using the stall into which he was looking would necessarily see Student. There was no evidence that Student attempted to speak with, or touch, any female student using the restroom. When female students entered the restroom and saw Student, they ran out of the restroom and reported Student to school officials. Student was then questioned and

acknowledged that he had been in the girls' restroom as reported. Thereafter, Student was immediately suspended from school, effective September 5, 2008, pending the manifestation determination meeting which was scheduled for September 10, 2008.

Manifestation Determination

12. On September 10, 2008, Vista HS and Murrieta Valley USD personnel convened the manifestation determination meeting. The decision of the manifestation team, by consensus, was that Student's conduct was not a manifestation of his disability (i.e., not caused by, nor having a direct and substantial relationship to Student's disability), nor was Student's conduct the direct result of any failure to implement Student's IEP. In reaching its decision, the manifestation team did not undertake any assessments of Student. Student was recommended for expulsion and his suspension was extended to accommodate that process.

13. On October 23, 2008, the Board of Education of the Murrieta Valley USD issued its decision expelling Student for the balance of the 2008-2009 school year based on the facts of the Second Incident. On October 27, 2008, Parents were formally notified of the Board's expulsion decision. At the time of this expedited due process hearing, Student attended Mt. San Jacinto Regional Learning Center (San Jacinto), an alternative school of the Riverside County Office of Education.

14. At the time of the manifestation determination, Murrieta Valley USD had knowledge and possession of at least the following documents, as referenced in Findings of Fact 4-8: 1998 Evaluation; 2001 Triennial Evaluation; 2004 Triennial Evaluation; June, 2007 BSP; 2007 Triennial Evaluation; November 15, 2007 IEP; and, Student's Special Education File.

15. Beginning with Student's arrival at Vista HS on August 13, 2008 and continuing through at least the manifestation determination, Amil Alzubaidi (Alzubaidi) was Student's Program Specialist at Vista Murrieta. Alzubaidi's education included an Associate of Arts in Psychology (Southwestern College), a Bachelor of Arts in Psychology (National University), and a Master of Arts in Marriage and Family Therapy (University of San Diego). Alzubaidi held a Pupil Personnel Service Credential in School Psychology and was a Licensed Marriage and Family Therapist. Among Alzubaidi's duties as a Program Specialist were the coordination, consultation and program development of special needs students and attendance at IEP meetings. Alzubaidi had not met Student prior to the manifestation determination, nor through the date of this expedited hearing; he did not attend the manifestation determination for Student due to an unspecified scheduling conflict; he did not review Student's evaluations or education files prior to the manifestation determination, and only reviewed some of Student's evaluations on the day of this expedited hearing. Based on Alzubaidi's education, experience and position with Murrieta Valley USD, he opined that the 1998 Evaluation indicated that Student was qualified for special education services at the time as mentally retarded. He further opined that parents should have been informed of the First Incident and that sexual boundaries should have been a part of Student's IEP. This portion of Alzubaidi's testimony was credible and given weight.

Because Alzubaidi had not met Student by the time of the expedited hearing, nor previously read some of Student's evaluations, Alzubaidi's opinion regarding Student's understanding of, or ability to control his conduct related to the First and Second Incidents, was given no weight.

16. Michael Moore (Moore) was the Associate Principal (AP) at Vista HS at the time of the manifestation determination. Moore's educational background included a Bachelor of Arts in Political Science (Univ. of California, Riverside); a Master of Arts in Special Education (National University); an Administrator's Credential (2000); and, Special Education SDC License (Mild to Moderate). Moore had been the AP since 2004. Prior to that, he had taught special education students for ten years. Moore testified that the Second Incident was reported to him by one of the female students, following which Moore investigated by taking statements from female students and questioning Student. Student answered Moore's questions, but Moore did not try to determine whether Student was competent to answer, and could not recall how long he spoke with Student. Moore testified as to general manifestation determination hearing protocol, but could not specifically recall the details of Student's manifestation determination. Moore could not recall what documents he reviewed or what disabilities of Student he or the manifestation determination team considered; he could not recall any discussion of Student's cognitive abilities. Moore was not aware of the First Incident. Because of Moore's lack of recall as to most specifics of the manifestation determination or his investigation of the Second Incident, his testimony was given little weight and had little relevance, except as to one aspect, his statement to the rest of the manifestation determination team, as recorded in the manifestation determination meeting notes. Moore said, "[Student's] disability is not the issue and we need to protect our students."

17. William Bennett (Bennett) was a school psychologist for Vista HS at the time of the manifestation determination. Bennett's educational background included a Bachelor of Arts in Sociology (California State University, San Diego); Educational Specialist Degree in School Psychology – Master's Equivalent (Chapman University). Bennett was certificated in Behavior Intervention Case Management, Professional Assault Crisis Training, and writing Positive Behavior Support Plans. Bennett had conducted approximately 700 student psychological assessments and reviewed over 1,000 more. Bennett led the Manifestation determination. Bennett testified that not all members of the manifestation determination team had been given copies of all of Student's relevant documents. While Bennett did not recall clearly who had which documents, he did recall that neither the AP Moore (the highest ranking member of the team), nor the rest of the team, had been given or reviewed the San Marcos USD evaluations of Student or the June, 2007 BSP. Bennett testified that Student's cognitive ability was brought up, but not discussed. He further testified that the team found Student's conduct not to be the result of Student's disability, because, as Bennett stated, speech and language was Student's primary disability and speech and language would not directly cause Student's conduct. He felt Student knew right from wrong, and that was what mattered. Bennett testified that he did not instruct the other members of the manifestation determination team to limit their consideration to speech and language at the exclusion of Student's cognitive impairments or

other conditions. However, the manifestation determination meeting notes demonstrated that although Bennett may not have directly instructed the manifestation determination team to limit its consideration to speech and language issues, in fact, as the school psychologist, he did advise the team that, “he didn’t believe that the speech/language disability is the cause of [Student’s] behavior.” Bennett believed the manifestation determination meeting lasted approximately forty-five minutes.

18. Files, Student’s Case Carrier and SDC English teacher at Vista HS, participated on the manifestation determination team. At the time, Files educational background was Bachelor of Arts in English (San Diego State University); a Special Education Credential (National University); and, all but thesis completed toward a Master of Arts in Special Education (National University). He had taught special education for approximately four years. After reviewing Student’s IEP, Files had conducted an informal assessment of Student to determine a starting point for instructing Student. Files determined that Student was at approximately the third grade level of understanding. When questioned about Student perhaps having only a first grade understanding, Files thought that to be quite possible. Files believed Student “knew right from wrong” at the time of the Incidents. At the manifestation determination, Files, who was the official “recorder” of the meeting, had only received and reviewed Student’s IEP and disciplinary records. Files was unsure what records other members had received. He recalled that Student’s cognitive functioning was not discussed at the manifestation determination, nor were any alternatives to expulsion and home schooling. Files believed the manifestation determination lasted approximately one and one-half hours.

19. Student’s Mother (Mother) testified that, contrary to the testimony of Bennett and Files, the manifestation determination lasted only about twenty minutes. She stated that it started shortly after 8:00 am, and that by 8:30 am, she was in another meeting with Moore and others. To support her position, she produced a memorandum from the second conference validating the start time as 8:30 am and signed by Moore. Mother also testified that she was given no documentation at the manifestation determination meeting to read or to understand what, if any, documentation the other members had considered prior to coming to the manifestation determination meeting. Mother asked the team about considering Student’s cognitive deficiency, but was told that Student’s eligibility was speech and language, so cognitive deficiency would not be considered. Mother said that her questions were met with strong responses by Bennett that the law only allowed consideration of whether speech and language disabilities could have led to Student’s misconduct, because the rest of her concerns were not part of Student’s IEP. She said that, although the meeting was amicable, she felt “shut down.” Mother testified, without contradiction, that there was no discussion of the November 15, 2007 IEP goals or implementation of that IEP by Vista HS. She testified, again without contradiction, that Student received no speech and language therapy at Vista HS during his three week attendance, even though the school had Student’s IEP that required the therapy. Mother testified that Student also did not receive any counseling or psychological assistance while at Vista, even though the IEP goals assigned specific responsibilities for Student’s goal achievement to counselors and psychologists. She believed that, had Student received the

required speech therapy, or counselor/psychologist intervention to deal with his social emotional feelings as required by the IEP, he would have had an outlet to discuss the First Incident, and may well have been given proper support to have avoided the Second Incident. According to Mother, Student simply did not understand the full nature of what he had done, or the consequences of it. Mother said she ultimately agreed to the decision of the team, because she believed Bennett that the law would not allow consideration of any condition other than Student's speech and language impairment as listed on the November 15, 2007 IEP. Mother's testimony seemed forthright and credible; she did not appear to embellish her answers or avoid direct answers to questions put to her. Much of her testimony was validated by the testimony of others and the documentation concerning Student. Accordingly, her testimony was given considerable weight.

20. Melissa Gidley (Gidley) was Student's SDC speech and language teacher at the time of the manifestation determination. Gidley's educational background included a Bachelor of Science in Communication Sciences and Disorders, and a Master of Science in Speech and Language Pathology (both Brigham Young University). She had been a speech and language pathologist for approximately twenty years, eighteen of which were in public education. At the time of the manifestation determination hearing, Gidley had met Student, but during his three weeks at Vista HS, she had not provided any services to Student. Gidley recalled that Student's IEP called for forty-five minutes of speech therapy per week. Gidley thought that, because speech therapy services use current events at school as a basis for conversation, if Student had been receiving speech services, he would have had the opportunity to discuss the First Incident. If he had, Gidley would have referred him for a conversation with the school psychologist. Gidley did not recall any discussion at the manifestation determination meeting of the implementation of Student's IEP. Gidley's testimony was credible.

21. Student was called to the stand, but voir dire by his attorney, Murrieta Valley USD's attorney, and the ALJ, established that Student was not competent to understand the concept of, or undertake, and oath to tell the truth. He was none-the-less given the opportunity to present his story by responding to questioning. Student's demeanor and responses to the questions put to him further supported that he had significant difficulty understanding most of what he was asked. His statements were not reliable and were not given any weight or substantively considered. However, Student's mental challenges were apparent.

22. Student's Brother, a thirteen-year-old, eighth grade student of typical abilities and cognition, testified convincingly that: Student is very immature; Student likely will never live independently; Student cannot order food for himself at a restaurant; Student must be reminded daily to shave, shower, use deodorant, and the like; Student has had continuing toileting troubles, including wearing "pull-ups" diapers to age nine, and soiling himself at age fifteen because he could not tell his father that he needed to use the restroom; and, Student simply does not understand most things and cannot think ahead as to the consequences of his acts to himself or others. Student's Brother was articulate, guileless, and tearfully sincere as he discussed Student's challenges. He was very credible.

23. When Student transferred to San Jacinto following his expulsion from Vista HS, Cindy Morley (Morley) became his speech therapist. At that time, her educational and professional background included: Bachelor of Arts in Speech Pathology (Loma Linda University) and continuing education toward a Master's degree in speech disorders (University of Redlands); a lifetime California teaching credential in general education and special education/speech and language; she was a speech and language specialist with the Riverside County Continuing Education. Over her career, Morley had assessed well over 1,000 students for speech and language abilities. She assessed Student in November, 2008 to establish a baseline for assisting Student. Based on her testing, Morley determined that Student's expressive and receptive language abilities were at approximately the five to six year old levels. She found that he did not need speech and language therapy, because he was mentally retarded. So, his speech was actually consistent with his level of cognitive ability. Since that time, through this expedited due process hearing, Morley had seen or worked with Student approximately four times per week, and was sure of her assessment and was credible. Although Morley's observations and interactions with Student occurred after the manifestation determination, her testimony was probative of Student's condition at the time of the manifestation determination and was considered only in that regard.

24. Kenneth Wesson, Ph.D., (Dr. Wesson), was a school psychologist of 25 years experience. His educational background included: Bachelor of Arts in Psychology/minor Sociology (San Diego State University); Master of Arts in Counseling and Doctor of Philosophy, School Psychology (International University). He had special training in mental retardation and had assessed hundreds of mentally retarded students among the 1,000+ psychological evaluations he had conducted. Following the manifestation determination, the Vista IEP team referred Student for a full psycho-educational evaluation to determine, among other things, Student's cognitive ability and academic levels. On November 25, 2008, Dr. Wesson conducted his assessment of Student. Dr. Wesson's report (Wesson 2008 Evaluation) of his assessment revealed that Student's full scale IQ was 57 (less than first percentile), or mildly delayed (retarded). Dr. Wesson put Student's mental age at about eight to nine years old. He testified that mental retardation is developmental delay that manifests prior to seven years of age and which will continue throughout life. Student has a history of mental retardation which manifested prior to age seven years. Dr. Wesson opined that Student will never achieve independent living and will always require some sort of assisted living. Dr. Wesson's testimony, while insightful, was considered only as after-the-fact corroboration of Student's cognitive impairment, which was known to Murrieta Valley USD through the prior assessments. It was given little weight since his evaluation was not available at the time of the manifestation determination.

25. Robert Goode Patterson, Psy.D., (Dr. Patterson), at the time of this expedited due process hearing was a licensed psychologist with fifty years experience in the field of psychology ranging from student, to practitioner, to professor to author. His educational background was Bachelor of Arts in Biology, Psychology and Education (Whittier College), Master of Arts in Educational Psychology (California State University, Long Beach), Master of Arts in Developmental Psychology (Chapman University), and Doctor of Psychology (United States International University). His licenses included Psychologist, Educational

Psychologist, and Marriage, Family and Child Counselor. He held non-public agency status with the California State Dept. of Education – Special Education Division, to provide therapy, counseling and behavioral interventions and assessments. He was regularly retained by school districts and parents alike for evaluations of special education students and had testified as an expert in the field. He had significant specialized training in the sexual behaviors of people with mental retardation.

26. Dr. Patterson was retained to review all of Student’s prior assessments, including Dr. Wesson’s, and to provide his opinion regarding Student’s conduct. His opinion was that all of Student’s prior assessments have consistently revealed that Student was mentally retarded, and that Student was mentally retarded at the time of his conduct. Dr. Patterson’s testimony, while insightful, was considered only as after-the-fact corroboration of Student’s cognitive impairment, which was known to Murrieta Valley USD through the prior assessments. It was given little weight since his evaluation was not available at the time of the manifestation determination.

CONCLUSIONS OF LAW

Burden of Proof

1. As petitioner, Student has the burden of persuasion. (*Schaeffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528].)

General Principles of Special Education Disciplinary Law

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

3. When a special education student is suspended for disciplinary reasons for more than ten days, federal law requires that the local education agency, the parent, and relevant members of the IEP team (as determined by the parent and the local education agency) meet within 10 days to determine whether the student’s conduct was a manifestation of the student’s disability. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e); Ed. Code, § 48915.5.) The manifestation determination 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, the student’s disability?; or (2) Was the student’s conduct a direct result of the local education agency’s failure to implement the student’s IEP? (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).) To answer these questions, the team must review all relevant information in the pupil’s file, including the IEP, any observations of teachers, and any relevant information from the parents. (Ibid.) If the answer to either question is yes, then the student’s conduct is deemed a manifestation of the student’s disability and the district may not remove the student from the current placement. (20 U.S.C. § 1415(k)(1)(E)(ii); 34 C.F.R. § 300.530 (f).) If the team determines that the pupil’s conduct was not a

manifestation of his or her disability, the district may apply to the disabled pupil the same disciplinary procedures, in the same manner and for the same duration, as would

be applied to a non-disabled pupil. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c).)

4. A parent who disagrees with any decision regarding placement or the manifestation determination may request a hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).) If a child's behavior is found to be a manifestation of his or her disability the Administrative Law Judge may order a change in placement of the child and may return the child to the placement from which he or she was removed. (20 U.S.C. §1415(k)(3)(B); 34 C.F.R. § 300.532(b).)

Issue 1: Failure Of Murrieta Valley USD To Conduct An Appropriate Manifestation Determination Meeting – Failure to Consider Student's Disabilities

5. Student contends that on September 10, 2008, Murrieta Valley USD conducted an inappropriate manifestation determination meeting for Student by failing to determine that the conduct in question was caused by, or had a direct and substantial relationship to Student's disability. Student further contends that Murrieta Valley USD committed multiple procedural violations in that it failed to obtain a complete copy of Student's special education records before conducting the manifestation determination meeting; failed to share Student's relevant documents with Parents and some other Murrieta Valley USD manifestation determination team members; failed to consider Student's cognitive impairment, even at Mother's specific request; failed, prior to the manifestation determination meeting, to inform Parents of Student's prior similar conduct; and, failed to consider Student's need for further assessment in light of Student's behavior. Murrieta contends that the manifestation determination was correct in all particulars; further, to the extent any procedural error may have occurred, it was harmless.

6. The manifestation determination team was obliged to consider all relevant information in Student's education files, relevant observations of teachers and relevant information from Student's parents, in determining whether Student's conduct was caused by, or had a direct and substantial relationship to Student's disability. This the team did not do. Legal Conclusions 2 and 3; Findings of Fact 2-26.

7. Bennett, a manifestation determination team member, and the school psychologist who led the manifestation determination team meeting, refused to consider any disability of Student other than Student's speech and language disabilities and instructed the other members of the manifestation determination team, including Mother, that no other conditions mattered under the law. Mother believed this instruction which therefore had the effect of ending Mother's informed participation. It caused Mother to sign the manifestation determination document as being in agreement with team's decision. Bennett's instruction thereby established both Bennett's failure to undertake his statutory obligation to meaningfully consider all of Student's disabilities in the manifestation determination process,

and the loss to Student of the meaningful participation of at least one other manifestation determination team member, Mother. Legal Conclusions 2-3 and 6; Findings of Fact 17 and 19.

8. The weight of the evidence was that the manifestation determination team did not fully consider the information in Student's education file, in that not all members of the team received copies of, or reviewed the relevant IEP, Student's prior assessments, or his BSP, nor did they receive a competent oral or written briefing regarding the information in those documents. There was no evidence that the team sought or considered observations of Student's teachers. There was strong evidence that at least some members of the team rejected considering relevant information from Mother about Student. The evidence was strong that to the extent the team did consider any of Student's disabilities as potential causal factors of Student's conduct, the team only considered Student's speech and language deficiencies, not Student's cognitive impairment or mental age, despite the fact that Murrieta Valley USD's own prior assessments had revealed that Student was mentally retarded. The evidence further supported that Moore, as AP of Vista HS, by reason of his superior position on the team, had a chilling effect on Mother's participation by his statement to the team that Student's disability was not at issue, rather the safety of the student body was the issue of concern. Moore's statement also established that he, as a member of the team, did not consider any of Student's disabilities in the manifestation determination process. Thus, the manifestation determination team failed to undertake its core responsibility to provide Student with a considered manifestation determination. Student was deprived of this basic statutory right. Legal Conclusions 2-3 and 6-7; Findings of Fact 2-26.

9. The manifestation determination team did not properly undertake its statutory obligations to review all relevant information available to it and to consider whether Student's conduct was caused by, or had a direct and substantial relationship to his disabilities. The evidence was clear from the assessments of Student prior to Student's conduct, as corroborated by experts after the fact, that: Student was mentally retarded, with a cognitive age of five to eight years, and with receptive and expressive language skills of approximately the same age; Student marginally understood right from wrong, but his mental retardation prevented him from fully understanding the nature, gravity or consequences of his conduct; to the extent that Student did understand the inappropriateness of his conduct, his undertaking of the conduct was the result of his immature judgment which, in turn, was caused by his mental retardation. Therefore, Student's conduct was directly and substantially related to his disability of mental retardation. Therefore, his expulsion was improper. Legal Conclusions 1-8; Findings of Fact 1-26.

10. In light of the foregoing legal conclusions, it is unnecessary to consider the remainder of Student's contentions regarding procedural errors as to this issue. Legal Conclusions 1-9.

Issue 2: Failure of Murrieta Valley USD To Conduct An Appropriate Manifestation Determination Meeting – Failure to Consider Implementation of Student's IEP

11. Student contends that Murrieta Valley USD failed to consider whether Student's conduct was the direct result of the failure of to implement Student's IEP. Murrieta Valley USD contends that it did consider the implementation of Student's IEP, which, it further contends, it did not have time to implement, because Student was new to Vista HS. Murrieta Valley USD also contends that any failure to implement Student's IEP was negligible and not the cause of Student's conduct.

12. There was no evidence that the team considered Student's IEP at all. There was ample evidence that the manifestation determination team did not discuss implementation of Student's IEP. There was also significant evidence that the speech and language therapy and counseling/psychological services portions of the active IEP (November 15, 2007) were not provided by Vista HS or Murrieta Valley USD. As those portions of the active IEP were important on their face as tools necessary to the achievement of previously determined emotionally related goals, the total failure to consider the possible causal effect of the failure to fully implement the active IEP was in error. Therefore, Student was deprived of his statutory right to a proper manifestation determination. Student's expulsion, in the absence of consideration of the implementation of his IEP was improper. Legal Conclusions 2 and 3; Findings of Fact 1-26.

ORDER

1. Student is to be reinstated at Vista HS as of the date of this Order.
2. Student's educational records are to be expunged by purging all references to his expulsion from Vista HS.

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. Here, Student has prevailed on both issues of this expedited hearing.

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

Dated: May 21, 2009

/s/

STEVEN CHARLES SMITH
Administrative Law Judge
Office of Administrative Hearings