

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

In the Matter of:

STUDENT,

Petitioner,

OAH No. N 2006030182

v.

MANTECA UNIFIED SCHOOL
DISTRICT,

Respondent.

DECISION

Administrative Law Judge Debra R. Huston, Office of Administrative Hearings, Special Education Division (OAHSED), heard this matter on April 24, 2006, in Manteca, California.

On March 6, 2006, Petitioner/Student (Student), by and through her mother (Mother) and father (Father), filed with OAHSED a Request for Due Process Hearing (Complaint) naming Respondent Manteca Unified School District (District).

Based on the information supplied by both Petitioner and District in their pleadings, OAHSED determined that the Complaint was a two-part complaint: (1) The Complaint challenged the propriety of District's manifestation determination as part of a discipline procedure involving Student that resulted in District's change of Student's placement on January 30, 2006, and expulsion of Student on February 28, 2006; and (2) The Complaint challenged the procedures at the January 30, 2006, individualized education program (IEP) meeting.

OAHSED set for an expedited due process hearing the complaint challenging the propriety of Respondent's manifestation determination, to commence April 24, 2006. OAHSED set a due process hearing for the remaining issues, to commence on May 24, 2006.

Student was represented by Mother and Father at the expedited due process hearing. Student was not present at the hearing.

District was represented at the expedited due process hearing by attorney Jennifer R. Rowe of Lozano Smith. Also present at the hearing, as the District's designated representative, was Janice Callanan, Director of Special Education.

Testimony concluded on April 24, 2006, and OAHSED ordered submission of closing arguments and briefs by April 27, 2006. District and Petitioner each filed a brief with OAHSED on April 27, 2006, the record was closed, and the matter pertaining to the manifestation determination as part of a discipline procedure was submitted on April 27, 2006.

ISSUES

Was the District's determination that Student's conduct on school grounds on January 23 and 24, 2006, was not a manifestation of her disability appropriate and in compliance with applicable law?

FACTUAL FINDINGS

1. On January 23 and 24, 2006, Student was 16 years of age and in the 11th grade at Manteca High School. It is undisputed that Student is eligible for special education and related services, and has been since 2001, because of a specific learning disability with an auditory processing disorder.

2. The December 20, 2005, IEP was the IEP in place for Student at the time of the behavior incidents underlying this proceeding. That December 20, 2005, IEP placed Student in general education, with two resource classes, including English and study skills. The December 20, 2005, IEP includes a specific finding that "Student's behavior impedes learning of self or others and behavior interventions needed," and states that a behavior support plan (BSP) is attached. The BSP contains a requirement of counseling two times per month by "school counselor" to discuss "anger issues/learn anger management techniques," and another requirement of counseling two times per month by "counselor" for Student to learn to manage her anger in appropriate ways. Considering all of the testimony at hearing, the IEP team agreed to these counseling requirements of the BSP, but not to the entire BSP.

3. Student's May 2005 psycho-educational evaluation, which was introduced into evidence, states that Student had displayed, periodically, throughout her school career significant issues in the areas of hostility, irritability, antisocial behavior and aggressiveness, inattention, hyperactivity, impulsiveness, conduct problems, and anxiety. The report states that between February 2004, which was the time Student began attending Sierra High School, and the May 2004 psycho-educational evaluation, there had been 23 entries in Student's discipline file, which led to nine days of suspension. According to the report, many of those issues existed as of the date of the report.¹

¹ According to Father's testimony, Student's IEP that was based on this psycho-educational evaluation and that followed Student from Sierra High School to Manteca High School, both within District, in August 2005 contained a

4. Despite her disability, Student was driven to be successful at Manteca High School. She worked hard in school to understand the work, she completed and turned in her homework, and she did extra credit work. She had all A and B grades at Manteca High School. She turned in her work on time and made up work when she was absent.

5. It is undisputed that it is a violation of the District code of student conduct to do any of the following on school grounds: (1) Have a cell phone turned on, except for before school, during lunch, or after school; (2) Engage in habitual profanity; (3) Disrupt school activities; or (4) Willfully defy the valid authority of a teacher.

6. On January 23, 2006, Student was in her resource class, taught by Mr. Roger Knauss. It was the last class of the school day. Student answered her cell phone in that class about five minutes before the class was to end. Mr. Knauss asked Student for the phone so he could turn it in to the office. Student said her boyfriend was on the phone. Mr. Knauss told her to give the phone to him or he would call the office. Student walked out of the classroom with her phone and left school for the day. Mr. Knauss called for a monitor and made a referral to the dean.

7. On January 24, 2006, Student met with Ms. Linda Cumvy, the dean of students of Manteca High School responsible for attendance and discipline, to discuss the cell phone incident of the previous day. Student walked out of the dean's office yelling obscenities, including "I hate this fucking white school."

8. Also on January 24, 2006, Ms. Cumvy prepared a report of suspension based on the grounds that Student engaged in habitual profanity, disrupted school activities, and willfully defied the valid authority of a teacher. Student, who had been suspended for a total of five days earlier in the school year, was suspended, effective January 26, 2006. Student was recommended for expulsion. Parents were notified of this action.

9. On January 26, 2006, District notified parents in writing of a manifestation determination/pre-expulsion IEP meeting, to be held on January 30, 2006.

10. At the January 30, 2006, manifestation determination/pre-expulsion IEP team meeting (manifestation determination IEP team), District determined that Student's behavior on January 23 and 24, 2006, was not a manifestation of her disability. Specifically, it was determined that Student's IEP and placement were appropriate in relationship to the behavior subject to disciplinary action; that special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with Student's IEP and placement; and that the IEP services and behavior intervention strategies were implemented. Further, it was determined that the disability did not impair Student's ability

requirement for counseling that was not implemented at Manteca High School. This IEP was not offered into evidence by either party.

to understand the impact and consequences of the behavior, or Student's ability to control the behavior subject to disciplinary action.²

11. Various District employees testified at the administrative hearing that the manifestation determination IEP team, including Mother, determined and agreed that Student's conduct was not caused by, and did not have a direct and substantial relationship to, the Student's disability, and that the conduct in question was not the direct result of the local educational agency's failure to implement Student's IEP. Mother testified that she was not in agreement with the IEP team's determinations. Mother's testimony is credible given the comments regarding her disagreement that were written on the IEP. For example, on the January 30, 2006, manifestation determination IEP, under the determination on the signature page that the behavior was not a manifestation of the disability, Mother wrote "I disagree with this decision"; on the signature page regarding placement and services, Mother checked the box indicating that she does not approve, and she wrote that "it will not be best for [Student] education goal saw the work at county about 6 grade level"; on the first page, Ms. Miscione wrote that "Parent refused to sign all documents. Parent decided to sign dissenting both manifestation and IEP"; and under the section for comments regarding parent input, Ms. Miscione wrote "[p]arent felt that placement was already determined prior to the meeting. Mother refused to sign manifestation."

12. As a result of the January 30, 2006, manifestation determination IEP team meeting, Student was removed from her then-current placement at Manteca High School and placed at an alternative site at a county program.

13. Father testified at the administrative hearing and expressed his belief that Student's conduct on January 23 and 24, 2006, was the direct result of District's failure to implement Student's IEP.

The Behavior-Related Services Required in Student's December 20, 2005, IEP.

14. Student's December 20, 2005, IEP, which was the IEP in place at the time of the conduct in question and attached to the January 30, 2006, IEP, includes a BSP.

15. The January 30, 2006, manifestation determination IEP states that "[b]ehavior support plan implementation was discussed." That IEP further states that "[s]pecial education services, supplementary aids and services, and behavior intervention strategies

² The manifestation determination/pre-expulsion IEP team's written findings from the January 30, 2006, meeting are consistent with the Individuals with Disabilities Education Act (20 U.S.C. § 1400, et seq.; IDEA) standards applicable to a manifestation determination IEP that were in effect prior to the 2004 amendments to the IDEA and were obsolete at the time of the January 30, 2006, hearing. Under former Section 1415(k)(4)(c)(ii), the inquiry was focused on whether, in relationship to the behavior subject to disciplinary action, the child's IEP and placement were "appropriate," including whether services and strategies provided were consistent with the IEP and placement, whether the child's disability impaired the child's ability to understand the impact and consequences of the behavior at issue, and whether the child's disability impaired the child's ability to control the behavior.

were provided and consistent with the child's IEP and placement," and that "[t]he IEP services and behavior intervention services were implemented."

16. According to the BSP attached to both the December 20, 2005, and the January 30, 2006, IEPs, Student's behavior impeding learning is Student's not following school rules, and being "[c]onsistently disruptive, verbally abusive to peers and adults, defiant", at a frequency of every two to four weeks. The BSP specifies that these behaviors impede learning because they interrupt learning and instructional time is lost due to suspensions. The BSP contains a requirement of counseling two times per month by "school counselor" to discuss "anger issues/learn anger management techniques," and another requirement of counseling two times per month by "counselor" for Student to learn to manage her anger in appropriate ways. The anger management counseling for Student's behavior was to be provided by Valley Community Counseling (Valley), which is the entity that provides anger management counseling on the Manteca High School campus.

17. Father and Student were present at the December 20, 2005, IEP meeting, and Mother was not. Ms. Lisa Miscione, the school psychologist who was present at both the December 20, 2005, and the January 30, 2006, IEP meetings, testified that Father consented to all of the December 20, 2005, IEP except for the BSP.

18. Father testified that he and the rest of the December 20, 2005, IEP Team agreed to counseling at the December 20, 2005, IEP meeting, but not to a BSP. Father requested that counseling be included in the IEP and provided Student because Student needed it for her behavior issues, and it had not, unbeknownst to Father, been provided to her up to that point in the academic year.

19. According to the notes from the December 20, 2005, IEP team meeting, which were prepared by Mr. Knauss, the members of the IEP team, except for Father, wanted to implement a BSP for Student, and the psychologist recommended a behavior support plan "that includes [Student] seeing a counselor for anger management." According to the notes, Father "questioned the necessity of a behavior support plan at this time" and "[t]he process for developing a behavior support plan was explained. The team agreed to the support plan with [Father] dissenting except for the referral for [Student] to see the counselor."

20. According to Ms. Callanan, who was present at the expedited due process hearing as the District representative, counseling for Student was never agreed upon as part of the December 20, 2005, IEP. Rather, there was only a "referral" for counseling.

21. Considering all of the testimony and Mr. Knauss's notes recited above, counseling was recommended and agreed upon, and although the BSP was not agreed upon, the counseling required in the BSP was agreed upon.

The Behavior-Related Services Provided to Student Pursuant to the December 20, 2005, IEP

22. Between the date of the December 20, 2005, IEP meeting and January 23, 2005, the day of the cell phone incident, Student received one counseling session through Valley.

23. No further counseling sessions were provided Student because Valley had its own consent form, separate from the school's consent form. Father was not asked to sign a Valley consent form at the December 20, 2005, IEP meeting, even though the IEP team discussed the fact that Student would benefit from counseling for her behavior from Valley. Rather, on one or more occasions after the December 20, 2005, IEP meeting, the form was given to Student to take to one of her parents to get his or her signature and return the form, but Student left the form in her backpack. Student never got a parent to sign the form, the form was never returned to Valley signed by the parents, so no further counseling sessions were provided Student by Valley. The form was eventually mailed by Valley to Student's parents, although District employees did not know when. Mother did not receive the consent form that was mailed to the parents' home until January 29, 2006.

24. Student received no counseling from the school counselor, as required by the counseling portion of the BSP. Student was "counseled" by Ms. Cumvy, the dean of attendance and discipline. Ms. Cumvy has no professional background in special education and no professional training with respect to learning disabilities or counseling, and she is not a counselor. However, she tried to counsel Student not to resort to anger.

LEGAL CONCLUSIONS

Applicable Law

1. Section 1415(k) of Title 20 of the United States Code³ establishes the statutory standard for conducting manifestation reviews in a proceeding to expel from school a child with a disability because of a violation of a code of student conduct. The reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004) became effective July 1, 2005, and significantly amended Section 1415(k).

2. Pursuant to the IDEA 2004, school personal may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days, to the extent that the same alternatives are applied to children without disabilities. (§1415(k)(1)(B).)⁴

³ All further section references are to Title 20 of the United States Code.

⁴ Under California Education Code section 48915.5, an individual with exceptional needs may be suspended or expelled from school "in accordance with subsection (k) of Section 1415 of Title 20 of the United States Code," including the discipline provisions in federal regulations and other provisions of California law that do not conflict with federal law and regulations.

3. School personnel may seek to order a change in placement of a child with a disability that would exceed 10 school days if the behavior that gave rise to the violation of the code of student conduct is determined not to be a manifestation of the child's disability. (§1415(k)(1)(C).) In such a case, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration as would be applied to children without disabilities, although discipline may be provided in an interim alternative educational setting. (*Ibid.*)

4. The manifestation determination process, which is codified in Section 1415, requires that, 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 district, the parent, and "relevant members of the IEP Team (as determined by the parent and the district) 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 the following:

- (a) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- (b) If the conduct in question was the direct result of the local educational agency's failure to implement the IEP. (§1415(k)(1)(E)(i).)

If the IEP team determines that either of the above is applicable, the child's conduct "shall be determined to be a manifestation of the child's disability." (§1415(k)(1)(E)(ii).)

5. The parent of a child with a disability who disagrees with either a school's decision to change the child's educational placement as a disciplinary measure or the manifestation determination may appeal by requesting a due process hearing. (§1415(k)(3)(A).)⁵ An expedited hearing shall be held within 20 school days of the date the hearing is requested. A decision or "determination" shall be made by the hearing officer within 10 school days after the hearing. (§1415(k)(4)(B).)

Determination of Issues

1. As discussed in Legal Conclusion No. 4, the manifestation determination IEP team is required to "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" if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or whether the conduct was the direct result of District's failure to implement the IEP. If the conduct is determined to be either caused by or having a

⁵ The District may also request a hearing in specified circumstances.

directly and substantially related to the child's disability, or the direct result of the local agency's failure to implement the IEP, the child's conduct is required to be determined to be a manifestation of the child's disability. (§1415(k)(1)(E).)

2. Based on Factual Finding No. 4, Student was driven to be successful, she worked hard in school to understand the work, she completed and turned in her homework on time and made up work when she was absent, she did extra credit work. Student had all A and B grades at Manteca High School. Based on Factual Findings No. 2 and 3, however, Student's December 20, 2005, IEP and her May 2005 psycho-educational evaluation indicate that Student has a long-standing history of behavior problems, that Student's behavior was impeding her ability to learn, and Student's IEP required counseling for Student. Based on Factual Finding No. 16, the behavior problems that impede Student's learning include Student's not following school rules, and being "[c]onsistently disruptive, verbally abusive to peers and adults, defiant", at a frequency of every two to four weeks. Based on Factual Findings Nos. 15, 16, 17, 18, 19, and 21, Student's IEP team agreed during the December 20, 2005, IEP team meeting to the counseling portions of the BSP; specifically, that Student was to receive counseling from a school counselor at a frequency of two times per month and from a counselor from Valley Community Counseling at a frequency of two times per month for these behavior issues that impeded her ability to learn. Based on Factual Finding No. 16, Valley Community Counseling provides the anger management counseling services to students at Manteca High School, and those counseling sessions are provided on campus. Based on Factual Finding Nos. 17, 18, and 23, Valley has a separate consent form for counseling, and this form was not given to Father to sign at the December 20, 2005, IEP team meeting, even though he requested counseling and agreed to counseling for Student's behavior issues. Rather, the form was given to Student sometime later to take home to her parents, get a parent signature on the form, and return the form to Valley. Student did not follow through on getting the form signed and returned, and no further counseling was provided Student. As of January 23 and 24, 2006, the days of Student's violation of District's code of student conduct, Student had received one counseling session pursuant to the December 20, 2005, IEP, although she was required to receive, between the school counselor and Valley Community Counseling, at least three more during that time period.⁶

3. Based on the facts recited above, it can fairly be inferred that Student's conduct of taking a cell phone call in class, defying the teacher's direction to give him the phone, walking out of class, and yelling obscenities the next day as she left the office of the dean of discipline was the type of conduct for which Student was to receive counseling pursuant to her IEP.

⁶ Although there was no testimony as to the exact dates of District's winter break, Ms. Callanan testified the IEP team meeting was before the break, and there were two weeks after the break and before the incidents. Therefore, from December 20, 2005, to January 23, 2006, there would have been approximately three weeks of school, and Student should have received at least three counseling sessions during that time.

4. Moreover, District failed to implement Student's IEP in that District failed to have Father sign the appropriate consent form so that Student could receive the anger management counseling required by her IEP (Factual Finding No. 23); District provided Student only one counseling session with Valley from December 20, 2005, and January 23, 2006 (Factual Finding No. 22); and District failed to provide Student with any sessions with the school counselor (Factual Finding No. 24). It is District's obligation to ensure that the requirements of the IEP are fulfilled and that students with disabilities are provided services required by their IEPs. In this case, District failed to do so.

5. Given Student's record of good grades and school habits and her drive to be successful in school, and given that Student's conduct on January 23 and 24, 2006, was the type of conduct for which she was to receive the counseling, Student's conduct on January 23 and 24, 2006, was the direct result of District's failure to implement Student's IEP.

ORDER

Petitioner's request for relief from District's manifestation determination is granted.

PREVAILING PARTY

Petitioner prevailed on all issues for hearing in this case. (Ed. Code § 56507, subd. (d).)

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. Or, a party may bring a civil action in United States District Court. (Ed. Code § 56505, subd. (k).)

DATED: May 11, 2006

DEBRA R. HUSTON
Administrative Law Judge
Office of Administrative Hearings