

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

POWAY UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2010060622

**DECISION**

Administrative Law Judge Adeniyi A. Ayoade, Office of Administrative Hearings, State of California, heard this expedited matter in San Diego, California, on July 13, 2010.

Student's mother (Parent) represented him. Student was not present at the hearing.

Emily Shieh, Assistant Director of Special Education, Poway Unified School District (District) represented District. Theresa Kurtz, District's representative and Director of Special Education, attended the hearing.

Student's Expedited Request for Due Process Hearing was filed on June 15, 2010, and OAH scheduled an expedited hearing in this matter because the issue was related to a disciplinary matter. At the conclusion of the hearing, the parties were given until July 21, 2010, to file closing briefs. Only District submitted a closing brief, and the record was closed on July 21, 2010.

**ISSUE<sup>1</sup>**

Was Student's conduct on February 1, 2010, which led to his expulsion, caused by, or determined to have a direct and substantial relationship to his ADHD, and therefore a manifestation of his disabilities?

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<sup>1</sup> The ALJ has reframed the issue for the purpose of clarity.

## CONTENTIONS OF PARTIES

Parent contends that Student's conduct that led to his expulsion was impulsive and therefore a manifestation of his disabilities. District asserts that Student's conduct was neither impulsive nor a manifestation of his disabilities.

## FACTUAL FINDINGS

### *Background*

1. Student is an eighth-grade boy who attended the Meadowbrook Middle School (School) until his suspension from school on February 1, 2010. At all relevant times, he qualified for special education services under the category of other health impairment (OHI) due to his ADHD. Based on its assessments, District was aware that Student had unique needs in the areas of attention (being distracted and getting off-task), impulsivity (inappropriate frequent talking-out and acting out during classes), and working independently. The severity of Student's problems in these areas was described as extreme based on his current individualized education program (IEP), dated December 4, 2009.<sup>2</sup>

### *Student's February 1, 2010 Conduct*

2. On February 1, 2010, Student got dry ice, placed the dry ice in a bottle, added water and hid the "dry ice bomb" in a stall of a bathroom at the school. A teacher, who suspected that something was going on, went into the bathroom to investigate and was hit by the bottle cap when the dry ice bomb exploded. The teacher, Michael Billings, was injured as a result. Even though it was not established at the hearing how Student obtained the dry ice, there is no dispute regarding the fact that Student constructed the dry ice device, or that Student placed the dry ice device in the bathroom where it exploded. It is also not disputed that the explosion injured Mr. Billings. Student was arrested and interviewed by the San Diego County Sheriff's Department as a result of the February 1, 2010 incident.

3. On February 1, 2010, District issued a suspension order and notified Parent that Student was suspended from school for five school days, from February 2, 2010, until February 8, 2010, pending the administrative review of Student's action. On February 5, 2010, Miguel Carrillo, the School Principal, forwarded a memorandum to Paul Gentle, District's Director of Attendance and Discipline, recommending that Student be expelled from school. On February 10, 2010, District extended the suspension order to allow its governing board time to review the suspension order and the school's recommendation for expulsion, and render its decision regarding Student's discipline.

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<sup>2</sup> The evidence showed that Student had numerous disciplinary issues relating to these problems.

### *Manifestation Determination IEP Meeting*

4. When a special education student is suspended for disciplinary reasons for more than 10 days, the suspension constitutes a change of placement. Relevant members of the IEP team must meet to determine whether the student's conduct was a manifestation of his disability. That determination must take place within 10 school days of the decision to change the placement. In making the manifestation determination, the IEP 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 him from his current placement without an order of an ALJ. If the answer to both questions is no, then the district may change the student's placement in the same manner, and for the same duration, that it could change the placement of a student not in special education.

5. As part of Student's manifestation determination meeting process, Diedra Dunn, School Psychologist, was asked to prepare a Confidential Manifestation Determination Report. In her report dated February 5, 2010, Ms. Dunn described the alleged conduct on February 1, 2010, and provided background information about Student and his disabilities. She provided information regarding Student's prior assessments and their results, and discussed his educational programs, educational records and performance. Based on the information reviewed by her, Ms. Dunn opined that Student's conduct was not related to his disability. Ms. Dunn presented her report at the manifestation determination IEP meeting, which was held on February 8, 2010.

6. The District provided Parent with a notice of procedural safeguards. All required participants attended the February 8, 2010 manifestation determination IEP meeting, including Parent, Ms. Dunn, Dr. Carrillo, Ms. Mary Jo Lance, District's special education (Resource Specialist Program) teacher, and Ms. Elaine Bailey, the general education teacher. Student did not attend. The team reviewed Ms. Dunn's Confidential Manifestation Determination Report, Student's previous assessment reports, including the triennial assessments, Student's educational and disciplinary records, the current IEP and other relevant history. District's members of the IEP team noted that Student's IEP was current and fully implemented. Therefore, and based on the review of the all records (including Student's current IEP and the Confidential Manifestation Determination Report), and discussion between team members regarding Student's disability and the facts relating to the February 1, 2010 incident, the IEP team members determined that Student's action was not a direct result of his disability. At either the manifestation determination IEP meeting, or at the hearing, Parent did not allege that Student's IEP was not being implemented on February 1, 2010.

### *The Manifestation Determination*

7. Parent believes that even though Student's conduct reflected bad judgment on his part, the conduct was nonetheless impulsive and unplanned. Parent believes that Student's conduct was directly and substantially related to his ADHD, and thus was a manifestation of his disabilities. She explained that Student did not take his medication on February 1, 2010 and that Student's behavior was affected by this. According to Parent, Student "behaves" differently while on medication." Ms. Lance also believes that Student was more focused and stayed in his seat more when on his medication.<sup>3</sup> Parent credibly testified that Student is impulsive.

8. Parent submitted two letters from Dr. Richard Heidenfelder and Dr. Robert Kelin in support of her claim that Student's February 1, 2010 conduct was impulsive or a result of "poor impulse control." The letters were not provided to the members of the IEP team during their manifestation meeting on February 8, 2010, and neither of the doctors testified.<sup>4</sup>

9. However, the letters from both Dr. Richard Heidenfelder and Dr. Robert Kelin are not persuasive. Dr. Kelin's opinion seems to be based on certain "understandings" and a hypothesis, none of which was established at hearing. Among others, Dr. Kelin said he understands that Student did not take the dry ice from the science classroom and that his companion did, and he did not plan to make the explosive device while he was in class. Also, while Dr. Heidenfelder talked about Student's "recent behavior difficulties," he failed to address the February 1, 2010 incident specifically. The letters, both of which were written after the manifestation determination IEP meeting, offer no discussion of any evaluation or assessment, or how each doctor arrived at their conclusions.

10. Ms. Dunn also testified at the hearing. She is a qualified and credentialed school psychologist. She has a master's degree in school psychology, a bachelor's degree in psychology and holds both the California Pupil Personnel Services and teaching credentials. As part of her job, she provides counseling to students and conducts assessments. She supports parents and provides assistance to teachers. She had previously assessed Student and had participated as a member of the IEP team in determining Student's eligibility for special education services.

11. Ms. Dunn is familiar with the symptoms of ADHD, which she described as including inattention, hyperactivity (i.e. fidgeting, doodling and restlessness) and impulsivity, among others. She believes that Student's February 1, 2010 incident was due to

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<sup>3</sup> About three weeks prior to the February 1, 2010 incident, Student began taking stimulant medication to aid his executive functioning.

<sup>4</sup> The letters are hearsay evidence and have been considered to the extent permitted by Government Code section 11513, subdivision (d).

“poor judgment,” and not a result of his ADHD. Ms. Dunn credibly testified that Student’s conduct was not impulsive or a manifestation of his disabilities. She explained that Student’s conduct involved a chain of behaviors that do not support a finding of impulsivity, as: 1) Student researched how to obtain dry ice, 2) procured the dry ice, 3) chose a vacant place to construct the bomb – the bathroom, 4) constructed the bomb, and 5) chose a location to hid the bomb- a bathroom stall, while he waited for detonation. In contrast, according to Ms. Dunn, impulsive actions usually involve spontaneity and accessible materials within reach or sight.

12. When Ms. Dunn first spoke with Student about the February 1, 2010 incident, Student informed her that it was not the first time he had used dry ice (outside the school science laboratory) at school. Student informed her that on one prior occasion he had obtained dry ice at school. Ms. Dunn believes that on that prior occasion Student had used the dry ice in a bathroom as well.

13. Ms. Lance participated in the manifestation determination IEP meeting. She also believes that Student is impulsive, but that his impulsivity relates to his inappropriate “speaking out,” and frequent talking-out and acting-out during classes. She does not believe that Student’s action on February 1, 2010, was impulsive, because “it took many steps to do this.” She explained that, a couple of weeks before the February 1, 2010 incident, she had overheard Student asking other students how he could get dry ice. Ms. Lance explained that she had intervened and advised Student and others that they should not attempt to obtain dry ice because dry ice is dangerous.

14. To address Student’s behavior issues, his current December 4, 2009 IEP included a Behavior Support Plan (BSP) to, among other things: teach Student new alternative behavior and reinforcement, support Student’s learning environment, and provide necessary accommodations. Student would receive direct behavior instruction through the Resource Specialist Program (RSP),<sup>5</sup> with two RSP classes in language arts and math. Student would also receive positive reinforcements for on-task behaviors. The RSP teacher, through daily communication with Student, would monitor his progress and issue progress reports every six weeks. The IEP was in effect at the time of the incident and Student offered no evidence at hearing that the District had not implemented the December 4, 2009 IEP during the relevant time period.

15. Regarding the manifestation determination IEP meeting, Student does not contend, and the record does not reveal, that there was any relevant document or information not considered at the manifestation determination meeting. The evidence showed that the District complied with the procedural requirements for conducting the manifestation determination meeting.

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<sup>5</sup> The RSP provides students with special education instruction for a portion of their school day.

16. While it is undisputed that Student is impulsive due to his ADHD, Parent failed to establish that Student's February 1, 2010 conduct was either impulsive or related to his disability. On the contrary, the evidence established that Student's action was researched, planned, executed and not impulsive, and therefore not a manifestation of his disabilities. Therefore, the evidence did not establish that Student's conduct was caused by, or had a direct and substantial relationship to his disability, or was the direct result of District's failure to implement Student's IEP.

## LEGAL CONCLUSIONS

### *Burden of proof*

1. Student, as the party seeking relief, has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed.2d 387].)

### *Manifestation Determination*

2. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to him. (Cal. Code Regs., tit. 5, § 3042, subd. (a).) If a special education student violates a code of student conduct, school personnel may remove the student from his or her educational placement without providing services for a period not to exceed 10 days per school year, provided typical children are not provided services during disciplinary removal. (20 U.S.C. § 1415(k)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3) (2006).<sup>6</sup>) The removal of a special education student from his placement for more than 10 consecutive school days constitutes a change of placement. (34 C.F.R. § 300.536(a)(i).)

3. A student receiving special education services may be suspended or expelled from school as provided by federal law. Suspension or expulsion of special education students is governed by title 20 United States Code section 1415(k); title 34 Code of Federal Regulations, part 300.350, et seq. (Ed. Code, § 48915.5.)

4. When a school district changes the placement of a student receiving special education services for specific conduct in violation of a student code of conduct, the student is entitled to certain procedural protections. The district is required to conduct a review to determine if the conduct that is subject to discipline is a manifestation of the student's disability. This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) It must be accomplished within 10 school days of the decision to change the student's placement. (*Ibid.*) For disciplinary changes in placement greater than 10 consecutive school days (or that are a pattern that amounts to a change of placement), the disciplinary measures applicable to students without disabilities may be applied to a special education student if the

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<sup>6</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

conduct resulting in discipline is determined not to have been a manifestation of the special education student's disability. (20 U.S.C. § 1415(k)(C); 34 C.F.R. §§ 300.530(c); 300.536(a)(1),(2).)

5. A school district must notify parents of an IEP meeting, including a manifestation determination IEP team meeting, early enough to ensure that they will have an opportunity to attend, and must schedule the meeting at a mutually agreed upon time and place. (34 C.F.R. § 300.322(a)(1), (2); Ed. Code, § 56341.5, subds. (a)-(c).) In the case of a manifestation determination IEP meeting, the notice must inform the parent of the decision to change the student's placement and must be accompanied by a copy of the parent's procedural safeguards. (20 U.S.C. § 1415(k)(1)(H).)

6. As determined by the parent and the district, a manifestation determination must be made by the district, the parent, and relevant members of the IEP team. (20 U.S.C. § 1415(k)(1)(E)(i).) The manifestation determination analyzes the child's behavior as demonstrated across settings and across times. All relevant information in the student's file, including the IEP, any observations of teachers, and any relevant information from the parents must be reviewed to determine if the conduct was caused by, or had a direct and substantial relationship to the student's disability, or was the direct result of the district's failure to implement the student's IEP. (34 C.F.R. § 300.530(e); 71 Fed.Reg. 46720 (Aug. 14, 2006).)

7. If the IEP team decides that the student's conduct was caused by, or had a direct and substantial relationship to the child's disability, then the conduct must be determined to be a manifestation of the child's disability. If the IEP team determines that the conduct is not a manifestation of the student's disability, then normal school disciplinary procedures may be used to address the incident in the same way as they would be applied to nondisabled students. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c).)

8. A parent who disagrees with any decision regarding the manifestation determination may request a hearing. (20 U.S.C. § 1415(k)(3)(A).) In appropriate circumstances, the ALJ hearing the dispute may order a change in placement of the student, and may return the student to the placement from which he was removed. (20 U.S.C. §1415(k)(3)(B)(ii).)

9. For a special education student's misconduct to be a manifestation of his disability, that conduct must either be caused by, or have a direct and substantial relationship to, the student's disability. (20 U.S.C. § 1415(k)(E)(i).) While these statutory standards are relatively new, the principle behind them is not. In *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470, 1480, fn. 8, *affd. sub nom. Honig v. Doe* (1988) 484 U.S. 305 [98 L.Ed.2d 686], the Ninth Circuit discussed the meaning of various phrases such as "conduct that is a manifestation of the child's handicap." The court explained:

As we use them, these phrases are terms intended to mean the same thing. They refer to conduct that is caused by, or has a direct and substantial

relationship to, the child's handicap. Put another way, a handicapped child's conduct is covered by this definition only if the handicap significantly impairs the child's behavioral controls . . . it does not embrace conduct that bears only an attenuated relationship to the child's handicap. . . . If the child's misbehavior is properly determined not to be a manifestation of his handicap, the handicapped child can be expelled. [Citations.] . . . When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children . . . . To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not so.

10. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV),<sup>7</sup> lists the diagnostic symptoms of ADHD to include inattention, hyperactivity and impulsivity. However, the evidence did not establish that Student's February 1, 2010 conduct was a result of inattention, hyperactivity or impulsivity.

11. Even if a disability causes impulsive behavior, it is not an impulsive behavior if it takes place over the course of hours or days and involves a series of decisions. (See *Farrin v. Maine School Administrative District No. 59* (D. Me. 2001) 165 F.Supp.2d 37, 52.)

*Was Student's conduct on February 1, 2010, which led to his expulsion, caused by, or determined to have a direct and substantial relationship to his ADHD, and therefore a manifestation of his disabilities?*

12. Student failed to meet his burden of demonstrating that exploding a dry ice bomb in the school bathroom was caused by, or had a direct and substantial relationship to his ADHD. The evidence established that Student researched how to obtain dry ice, procured the dry ice, chose a place to construct the bomb, constructed the bomb, and selected a location to hide and explode the bomb. Each step involves many actions and together, the chain of events and behaviors took a significant period of time to accomplish. These actions and the incident of February 1, 2010, were not consistent with impulsivity given the long time period over which Student mulled over the steps required to construct and explode his dry ice bomb. Accordingly, Student's conduct was not caused by his ADHD and did not have a direct and substantial relationship to it.

13. Student failed to demonstrate that his conduct was caused by the District not implementing his IEP as Student received the agreed-to services and support in the December 4, 2009 IEP. Student did not offer any evidence at the hearing showing that the IEP dated December 4, 2009, was not or had not been fully implemented.

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<sup>7</sup> Diagnostic and Statistical Manual of Mental Disorders, Text Revision (4th ed. 2000), pp. 92-93.

