

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2020050048

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PARENT ON BEHALF OF STUDENT,

v.

SANTA PAULA UNIFIED SCHOOL DISTRICT.

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**EXPEDITED DECISION**

JUNE 9, 2020

On April 30, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Santa Paula Unified School District as respondent. The request included expedited and non-expedited issues. Administrative Law Judge Alexa Hohensee conducted a videoconference hearing on the expedited issues on May 27 and 28, 2020.

Janeen Steel, Attorney at Law, and David German, Attorney at Law, represented Student. Parent attended all expedited hearing days on Student's behalf. Kristin Myers, Attorney at Law, represented Santa Paula. Katherine Aguirre, Executive Director of

Special Education for Santa Paula, attended all expedited hearing days on Santa Paula's behalf.

Written closing briefs on the expedited issues were filed on June 2, 2020. The record was closed, and the expedited matter was submitted on June 2, 2020.

## EXPEDITED ISSUES

1. Was Student's conduct reviewed at the January 16, 2019 manifestation determination review team meeting caused by, or have a direct and substantial relationship to, Student's disability; and
2. Was Student's conduct reviewed at the January 16, 2019 manifestation determination review team meeting the direct result of Santa Paula's failure to implement Student's individualized education program, called an IEP?

## JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and

- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student had the burden of proof on the issues. The factual statements in this Expedited Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Parents and school districts may request an expedited due process hearing of claims based upon an appeal of a manifestation determination. (20 U.S.C. § 1415(k)(3).) An expedited hearing must be conducted within 20 school days of the date an expedited due process hearing request is filed, and a decision must be rendered within 10 school days after the hearing ends. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2).)

Student was 15 years old at the time of hearing. Student resided with Parent within Santa Paula's geographic boundaries at all relevant times. At the time of the June 16, 2019 manifestation determination, Student was in middle school at Santa Paula and eligible for special education under the eligibility category of Specific Learning Disability.

ISSUE 1: WAS STUDENT’S CONDUCT REVIEWED AT THE JANUARY 16, 2019 MANIFESTATION DETERMINATION REVIEW TEAM MEETING CAUSED BY, OR HAVE A DIRECT AND SUBSTANTIAL RELATIONSHIP TO, STUDENT’S DISABILITY?

Student contends that Santa Paula erred when it determined at the January 16, 2019 IEP team meeting that Student’s assault of another student was not a manifestation of her disability. Student argues that the behavior for which she was disciplined, a physical fight with a peer, was caused by or had a direct and substantial relationship to her diagnosed social emotional dysfunction.

Santa Paula contends that it properly conducted a meaningful review, and that its determination was correct. It contends that Student’s history of fighting at school supports the January 16, 2019 IEP team’s decision that Student’s assaultive conduct was not a manifestation of her disability.

The analysis of Issue 1 takes place at an intersection of three important principles of the IDEA. One, that a child with a disability is entitled to an appropriate education that meets all of the child’s unique educational needs. Two, that a child’s disability may include characteristics of multiple eligibility categories, and the eligibility category is unimportant so long as all educational needs are met. And three, that a child with a disability should not be unduly disciplined for behavior that is a manifestation of their disability.

First and foremost, the IDEA requires that a child eligible for special education be provided access to specialized instruction and related services that are individually designed to provide educational benefit through an IEP reasonably calculated to enable

a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Andrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000].) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

Secondly, the IDEA does not require that a child be placed in the most accurate eligibility category, or to be limited to one eligibility category. It requires that each child who has a disability listed in the IDEA and who, by reason of that disability, needs special education and related services, be regarded as a child with a disability. (20 U.S.C. § 1412(a)(3)(B); Ed. Code, § 56301, subd. (a).) The IDEA's overarching substantive goal is to ensure that all children with disabilities have available to them a FAPE designed to meet their unique needs. (20 U.S.C. § 1400(d)(1)(A); *Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244-245.) Children with disabilities would be disadvantaged if they had to select one eligibility category to the exclusion of others. (*E.M. v. Pajaro Valley Unified Sch. Dist.* (9th Cir. 2014) 758 F.3d 1162, 1174-1175 (*E.M.*).

Limiting a child with a disability to a particular label creates the possibility that the child may be denied special education benefits not because the child did not qualify for those benefits, but because a school district selected one category and barred consideration of others. (*E.M.*, *supra*, 758 F.3d at p. 1175.) The Ninth Circuit has deferred to the U.S. Department of Education's interpretation of the IDEA that the consideration of a child's condition under only one possible category of disability, when more than one might apply, elevates a myopic concern with the child's specific classification over determining the child's actual educational needs. (*E.M.*, *supra*, 758

F.3d at p. 1173, citing *Heather S. v. Wisconsin* (7th Cir. 1977) 125 F.3d 1045, 1055 (*Heather S.*.) The Department of Education has advised that a child's entitlement is not to a specific disability classification, but to a free appropriate public education. (*Letter to Fazio* (Office of Special Education Programs 1994) 21 IDELR 572, 21 LRP 2759.)

In *Heather S.*, the parties disputed the appropriate eligibility categories for a student whose disability was hard to characterize. In reasoning directly applicable here, the Court of Appeals declined to settle the dispute:

In any event, whether Heather was described as cognitively disabled, other health impaired, or learning disabled is all beside the point. The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education. A disabled child's individual education plan must be tailored to the unique needs of that particular child.

(*Citation.*) In Heather's case, the school is dealing with a child with several disabilities, the combination of which in Heather make her condition unique from that of other disabled students. The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe Heather's multiple disabilities.

(*Heather S., supra*, 125 F.3d at p. 1055.) The very purpose of categorizing disabled students is to try to meet their educational needs, it is not an end to itself. (*Pohorecki v. Anthony Wayne Local School Dist.*, (N.D. Ohio 2009) 637 F.Supp.2d 547, 557.)

Lastly, the IDEA has put in place specific protections for children with disabilities facing discipline. (20 U.S.C. 1415(k) (Section 1415(k)).) The IDEA prohibits expulsion of a student with a disability for conduct that is a manifestation of the student's disability. (20 U.S.C. § 1415(k); 34 C.F.R. 300.530, et seq.; *Doe v. Maher* (9th Cir. 1986) 793 F.2d

1470, 1482, *affd., sub nom., Honig v. Doe* (1988) 484 U.S. 305 (*Mahe*.) Different disciplinary procedures may apply under special circumstances, such as where a child with a disability brings a weapon to school, or inflicts serious bodily injury on another person at school. (20 U.S.C. § 1415(k)(1)(G).) There was no evidence that Student used a weapon or inflicted serious bodily injury on anyone, or that any other special circumstances applied.

When a school district seeks to discipline a child with a disability for violating a code of student conduct, it must convene a meeting to determine whether the child's conduct was a manifestation of the child's disability. (20 U.S.C. § 1415(k); 34 C.F.R. § 300.530.) This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) A manifestation determination must be made by the school district, the parent, and relevant members of the IEP team as determined by the parent and the school district. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1) & (h); *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46540, 46720 (Aug. 14, 2006) (*Comments on 2006 Regulations*).

Conduct is a manifestation of the student's disability if the conduct was caused by, or had a direct and substantial relationship to, the child's disability, or if the conduct was the direct result of the school district's failure to implement the student's IEP. (34 C.F.R. § 300.530(e)(1) & (2).)

The manifestation determination team analyzes the child's behavior as demonstrated across settings and across times. (*Comments to 2006 Regulations, supra*, 71 Fed. Reg. 46720.) All relevant information in the student's file, including the IEP, observations of teachers, and any relevant information from the parents, must be

reviewed as part of the manifestation determination process. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1); *Comments to 2006 Regulations, supra*, 71 Fed. Reg. 46720.)

The Department of Education has taken the position that there is nothing in IDEA or its implementing regulations that limit a manifestation determination review to only the disability that served as the basis for the eligibility determination. (*Letter to Yudian* (OSEP 2004) 39 IDELR 242.) It reasoned that given that the review process included consideration of all relevant information, including evaluation and diagnostic results, information supplied by the parents, observations of the child, and the child's current IEP and placement, the manifestation determination review could include consideration of a previously unidentified disability of the child and of the antecedent to the behavior that is subject to discipline. (*Ibid.*, quoting 64 Fed. Reg. 12625 (March 12, 1999).) Although *Letter to Yudian* referred to an earlier version of the law, the same reasoning would apply to the current statute and regulations, and would be consistent with the Ninth Circuit's directive that school districts consider all of the educational needs of a child with a disability, without limitation by eligibility category, when making decisions that affect the child's education.

If the manifestation determination team determines the conduct is not a manifestation of the student's disability, or is not due to the failure to implement the student's IEP, then the school district may use relevant disciplinary procedures to address the incident in the same way as they would be applied to non-disabled students. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c); see *Maher, supra*, 793 F.2d at p. 1482.)

A parent of a special education student who disagrees with the manifestation determination may appeal the decision by requesting an expedited due process hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. 300.532(a) & (c).)

The following information was available to the manifestation determination review team either through school records, from Student's teachers, or Parents.

Student was identified in 2017 as eligible for special education under the qualifying category of Specific Learning Disability, due to a discrepancy between Student's cognitive ability and achievement in math and language arts, and attention processing deficits. Her IEPs included academic goals, and offered specialized academic instruction and accommodations to support those goals. However, Student also had a history of family disruption, personal trauma, and difficulty expressing anger.

Student attended sixth grade in middle school at Santa Paula for the 2017-2018 school year, where she earned a reputation for fighting. By the end of the school year, Student had been suspended multiple times for assaulting other students, and had missed days of instruction as a result. In March 2018, Santa Paula initiated an educationally-related social emotional services assessment, called an ERSES assessment.

At the annual review of Student's IEP on May 4, 2018, the ERSES assessment had not yet been completed, but the IEP team determined that Student's behavior interfered with learning and identified social emotional functioning as an area of need. The IEP team developed a social emotional goal for Student to state anger rather than using physical violence. The baseline for that goal, Goal 4, stated that Student used physical violence because she could not verbally express anger. Goal 4 designated multiple adults, including Student's special education teacher, general education teacher, case manager, and a therapist, to assist Student in learning to use words instead of fighting. The May 4, 2018 IEP also offered Student 30 minutes weekly of counseling services in support of Goal 4.

Student began the 2018-2019 school year in the Fillmore Unified School District. Fillmore completed the ERSES assessment and reviewed it at a September 9, 2018 IEP team meeting. The ERSES assessor did not find that Student qualified for ERSES counseling, but recommended that Student receive therapy on campus from a community agency. The IEP noted that Student was exhibiting signs of depression, but the team wanted to wait a few weeks to see if further assessment was necessary. The team agreed to meet in late October to develop a behavior intervention plan. Parent consented to the September 26, 2018 IEP, which did not change the May 4, 2018 IEP and continued Student's services, including 30 minutes of weekly individual counseling.

Before the scheduled October meeting, Student was suspended three times, for participating in a physical altercation, vaping, and for injuring another student. Fillmore held an IEP team meeting on October 4, 2019, to determine if Student's behavior was a manifestation of her disability. The October 4, 2018 manifestation determination IEP does not contain notes of the meeting, but documents that the team did not find Student's conduct to be a manifestation of her disability. However, the team did develop a positive behavior intervention plan and added it to Student's IEP.

The behavior plan noted that when Student felt slighted by a peer, she would verbally confront them, which could lead to fights. It proposed that Student replace that behavior by using positive self-talk and decision making skills to avoid confrontation or by asking an adult for help. The plan would be implemented in counseling, where Student would learn positive self-talk and decision making skills. Student was to receive specific praise from her teachers and the school psychologist for effective decision making and conflict avoidance or for asking for help. The behavior plan was expressly noted to be in support of Student's social emotional Goal 4. The October 4, 2018 IEP

document admitted into evidence did not have Parent's signature consenting to implementation of the IEP or the behavior intervention plan.

Student returned to middle school at Santa Paula in mid-November 2018. Santa Paula was aware of the ERSES assessment that had been reviewed by Fillmore, and had copies of the September and October 2018 IEPs. Santa Paula continued to implement the May 4, 2018 IEP, and there was no evidence that Santa Paula sought Parent's consent to the October 4, 2018 IEP and its behavior intervention plan. Within two weeks, Student was suspended for assaulting another student.

A manifestation determination IEP team meeting was held on January 16, 2019, with expulsion proposed because Student violated a code of student conduct by causing, attempting, or threatening physical injury to another student. The team reviewed the May 4, 2018 IEP, and the IEPs from Fillmore. Santa Paula school psychologist Begonia Weslow informed the team that Ventura County Behavioral Health had been providing therapy to Student, and had recently given Student a primary diagnosis of Disruptive Behavior Not Otherwise Specified, and a secondary diagnosis of Adjustment Disorder with Mixed Anxiety and Depressive Mood. However, the Santa Paula IEP team members disregarded Student's social emotional functioning and recent mental health diagnoses, and limited their determination to whether Student's conduct was a manifestation of her specific learning disability. They found that Student's conduct was not related to the discrepancy between her cognitive ability and academic achievement, and so was not a manifestation of her disability. The IEP also documented, by a checked box, that the team found Student's behavior not to be a result of Santa Paula's failure to implement her IEP.

Psychologist Weslow generated a report of the manifestation determination findings at the January 16, 2019 meeting. It contained a recommendation that:

...[G]iven the recent diagnosis of Disruptive Behavior NOS [Not Otherwise Specified] and Adjustment Disorder with Mixed Anxiety and Depressed Mood given by VCBH it is recommended that additional testing be completed to determine if [Student] meets any other special education criteria that may explain her current behavior.

At the IEP team meeting, Ms. Weslow did not recommend that the manifestation determination be delayed pending further assessment, and the IEP team did not delay its determination. Student was placed at home on independent study pending expulsion proceedings.

The evidence overwhelmingly demonstrated that an analysis by the January 16, 2019 IEP team of Student's behavior across settings and across times would have established that Student's disability included diagnosed social emotional dysfunction that manifested in physical altercations with her classmates.

The January 16, 2019 IEP team had abundant relevant information, including teacher observations, regarding Student's history of fighting. Student's seventh grade physical education teacher, Kimberly Cooper, testified that she knew Student had been in fights in sixth grade. Student's case manager, Sydney Gomez, who provided Student with specialized instruction in math, recalled that although she only saw Student a few times in Fall 2018, she had already had conversations with Student about fighting and counseled Student to stay away from people she didn't get along with. The middle school's seventh grade school counselor, Maricruz Valle, admitted being aware that in

sixth grade Student had been intermittently referred by teachers to counseling for behavior concerns.

If there was any doubt about whether Student's behavior was disability based, there was a plethora of documentation in Student's educational file that she initiated fights due to poor social emotional functioning. Santa Paula's May 4, 2018 IEP team added Goal 4 to address Student's social emotional needs, which goal expressly addressed fighting with peers. Student only had four annual goals, so one quarter of her identified areas of educational need was in the social emotional realm, and directly related to her inability to express anger in words rather than physical violence. Santa Paula had initiated the ERSES assessment of Student's need for educationally related social emotional support in March 2018. Although the assessment was completed and reviewed by Fillmore, and Student did not qualify for county mental health services, the September 26, 2018 IEP contained a recommendation that Student receive on campus therapy from a community agency for social emotional support. The October 4, 2018 IEP added a behavior intervention plan to address Student fighting with peers, stating that it was expressly in support of Goal 4, a social emotional goal. Ms. Gomez opined at hearing that goals directly reflect a student's disability, and presumably would have held the same opinion at the January 16, 2019 IEP. The January 16, 2019 IEP team was also informed that Student had been diagnosed in October 2018 with Disruptive Behavior and Adjustment Disorder, and was receiving therapy from a community mental health provider. Ms. Gomez acknowledged at hearing that Student's assaultive behavior was consistent with Student's mental health diagnoses.

Most tellingly, the manifestation determination findings report prepared by Ms. Weslow at the January 16, 2019 IEP team meeting expressly acknowledged that Student's recent mental health diagnoses might explain the conduct for which she was

being disciplined. However, it stated that further assessment was necessary to determine if these diagnoses met the criteria for another eligibility category that would encompass assaultive behavior. Whether or not further assessment would have identified an additional eligibility category applicable to Student's disability, her disability clearly included social emotional dysfunction and diagnosed mental health disorders that resulted in an inability to use words to express anger, and resultant physical aggression.

Ms. Cooper, Ms. Gomez, Ms. Valle and Ms. Weslow testified consistently and adamantly that, at the January 16, 2019 IEP team meeting, they considered only whether the conduct for which Student was being disciplined was related to her stated eligibility category of Specific Learning Disability. This was not a minor procedural error, but a substantive error that led to an incorrect determination.

Section 1415(k) required the manifestation determination review team to determine if the conduct in question was caused by, or had a direct and substantial relationship to Student's disability, not to her eligibility category. The IEP team knew that Student's disability included social emotional difficulty with expressing anger. Student had a social emotional goal to learn to use words instead of physical violence, and a proposed behavior support plan in support of that goal. The IEP team knew that Student had been diagnosed with mental health disorders consistent with her social emotional history and assaultive behavior. The Santa Paula team member's limitation of consideration to an eligibility category, rather than Student's known and identified disabilities, was a dereliction of its duty to consider the full range of Student's disability.

The principles of the IDEA, embodied in the legislative history, case law, and Department of Education interpretation and guidance, mandate that in matters of the

appropriate education of a child with a disability, the full range of a child's disability be considered beyond the confines of the label of an eligibility category. It was not enough for the January 16, 2019 IEP team to go through the motions of reviewing the full range of information required by statute. They were also required to follow the statutory requirement of using that information in the proper context, to determine the relationship between Student's disability and the conduct for which she was subject to discipline. That they did not do.

There is another Section 1415(k) that, although not directly applicable here, demonstrates the magnitude of the January 16, 2019 IEP team's error. The IDEA's protection against disciplining disabled students for manifestations of their disability was deemed so important that Congress extended it to students who had not been identified as eligible for special education services at the time of proposed discipline, if two factors exist. First, that the student engaged in behavior that violated a school rule or code of conduct. And second, that the district has knowledge, or is deemed to have had knowledge, that the student was a child with a disability before the behavior that precipitated the disciplinary action occurred. (20 U.S.C. § 1415 (k)(5)(A); 34 C.F.R. 300.534(a).) If both factors are present, a school district is considered to have a "basis of knowledge" of the child's disability, and the district is required to apply the protections of Section 1415(k). (20 U.S.C. § 1415 (k)(5)(B); 34 C.F.R. 300.534(b).) Because such a student has not been found eligible under any category, the school district needs to consider all suspected disabilities for which it has a basis of knowledge. It is illogical that the IDEA would provide greater protection to a student who is not eligible for special education, but for whom the school district has a basis of knowledge that the student is a child with a disability, than it would to a child already eligible by limiting the manifestation determination review to that student's eligibility category.

The need for caution in matters of school discipline has been repeatedly recognized by Congress, including with the passage of the Every Student Succeeds Act of 2015, which directs school districts to reduce the overuse of discipline practices that remove students from the classroom for all students, which includes students with disabilities. (20 U.S.C. § 6312(b)(11).)

Under Santa Paula's interpretation of the manifestation determination review process, the IEP team did not have to consider if Student's social emotional difficulties or recent mental health diagnoses constituted a disability that caused or had a direct and substantial relationship to the assault, because such a disability was unrelated to her identified eligibility category of Specific Learning Disability. However, if Student had not yet been found eligible for special education, Santa Paula would have had knowledge of those difficulties and diagnoses, and would have been required to determine whether they constituted a disability, which they clearly do. Santa Paula would then have had to analyze whether the conduct in question was a manifestation of Student's social emotional difficulties or recent mental health diagnoses, which it clearly was. Santa Paula improperly used Student's identification as a child with Specific Learning Disability to circumvent a determination of whether her known social emotional dysfunction manifested in the assault for which she was being disciplined. In this manner, Santa Paula effectively accorded Student less protection under Section 1415(k) than a student who had not been found eligible for special education. This Expedited Decision declines to condone such an interpretation of Section 1415(k).

Lastly, it is noteworthy that the January 16, 2019 IEP team, and the manifestation determination findings report, expressly questioned whether Student's recent mental health diagnoses would explain Student's assaultive conduct and recommended further assessment. In light of the mandate of the IDEA that a child with a disability receive a

FAPE, and of the disciplinary protections of Section 1415(k), once the IEP team was aware that it needed more information, it should have delayed the manifestation determination until it had the information it needed to make an informed decision. A manifestation determination expressly made without all relevant information, as required by statute, is a procedural error. Here, where consideration of Student's social emotional dysfunction would have established a clear connection between her disability and the conduct in question, the team's failure to delay a manifestation determination to obtain necessary information resulted in an incorrect conclusion.

The conduct for which Student's expulsion was proposed was caused by, or had a direct and substantial relationship to, Student's disability. Accordingly, Student met her burden of proof on Issue 1.

## ISSUE 2: WAS STUDENT'S CONDUCT REVIEWED AT THE JANUARY 16, 2019 MANIFESTATION DETERMINATION REVIEW TEAM MEETING THE DIRECT RESULT OF SANTA PAULA'S FAILURE TO IMPLEMENT STUDENT'S INDIVIDUALIZED EDUCATION PROGRAM, CALLED AN IEP?

Student contends that Santa Paula failed to consider the second of two questions required by a manifestation determination review, that is, whether the conduct in question was the direct result of Santa Paula's failure to implement the IEP.

Santa Paula contends that Student was only enrolled for two weeks, that her teachers were providing services and accommodations, and there was no evidence that additional counseling services would have prevented Student from engaging in a fight.

If the manifestation review team finds that the student conduct in question is either caused by or had a direct and substantial relationship to the child's disability, or

was the direct failure of the school district's failure to implement the child's IEP, the conduct must be determined to be a manifestation of the child's disability. (20 U.S.C. § 1415(k)(E)(ii).) If the conduct is not a manifestation of the child's disability, regular disciplinary procedures apply. (20 U.S.C. § 1415(k)(C); 34 C.F.R. § 300.530(c).) Section 1415(k) mandates that the manifestation review team answer both questions in the negative before relevant disciplinary proceedings are applied.

Here, the January 16, 2019 IEP team answered the first question in the negative, that is, it found that Student's conduct was not caused by, and did not have a direct and substantial relationship to, her disability. The team was therefore required to answer the second question, whether Student's conduct was the direct result of Santa Paula's failure to implement Student's IEP, to determine if Student's conduct was a manifestation of her disability.

Other than a checked box on the January 16, 2019 IEP manifestation determination page, indicating that the behavior in question was not a direct result of Santa Paula's failure to implement the IEP, there was no evidence that the IEP team considered that question.

The manifestation determination findings report prepared by Ms. Weslow indicated that Student's current IEP was dated May 4, 2018, without reference to the September 26, 2018 IEP. However, as the September 26, 2018 IEP did not make changes to Student's services, accommodations or other supports, the IEP team would have correctly been charged to review whether Student's conduct was the result of Santa Paula's failure to implement the goals and services described in the May 4, 2018 IEP.

There was persuasive evidence that individual counseling services were not being implemented between the time Student enrolled in Santa Paula for the 2018-2019

school year and the incident. Ms. Gomez was Student's case manager and responsible for ensuring that Student's IEP was implemented, but did not know if Student's counseling services were in place prior to the fight that prompted the manifestation determination review. As one of Student's special education teachers, she was aware of Goal 4, but explained at hearing that she could do little more than discuss with Student getting along with others, as she was not a school psychologist qualified to devise strategies for learning the coping skills referenced in that goal. Ms. Valle was a grade-level school psychologist available to all students at the middle school, and not responsible for implementing the individual counseling services in Student's May 4, 2018 IEP. School psychologist Ms. Weslow was not aware that Student was enrolled in Santa Paula for the 2018-2019 school year until informed of the fight for which Student was subject to expulsion. It did not appear that Student was receiving the individual counseling sessions required by her May 4, 2018 IEP, or that Santa Paula was attempting to get this service implemented after Student's return to Santa Paula, to avoid precisely the type of conduct in which Student engaged.

The January 16, 2019 IEP team's pervasive lack of recall of a team discussion concerning implementation of an IEP, the lack of a reference to such discussions in the manifestation determination findings report, and Ms. Gomez's inability to recall if the relevant counseling services she was responsible to oversee had begun, established that it was more likely than not that the January 16, 2019 IEP team did not consider the question of whether Student's conduct was the result of the failure to implement the May 4, 2018 IEP and its individual weekly counseling sessions. The isolated fact that a box is checked on the manifestation determination page of the January 16, 2019 IEP to indicate that Student's behavior was not the result of a failure to implement the IEP is

not persuasive evidence that such a determination was considered, or made, by the January 16, 2019 IEP team, particularly in the absence of corroborating evidence.

The failure of the January 16, 2019 IEP team to consider the second of two questions required of a manifestation determination was more than a minor procedural error. Student had individual counseling services in place to support progress on social emotional Goal 4, to learn to avoid fights by using words to express anger instead of physical violence. Student's IEP was developed to help Student avoid exactly the type of conduct for which she was subject to expulsion proceedings. The manifestation determination was substantively flawed for failure to consider whether Student's conduct was a direct result of Santa Paula's failure to implement her IEP and provide Student with the supports she needed.

The January 16, 2019 IEP team failed to consider, or make a determination as to whether, the conduct for which Student's expulsion was proposed was a direct result of Santa Paula's failure to implement Student's IEP. Student met her burden of proof on Issue 2.

## REMEDIES

The manifestation determination by the January 16, 2019 IEP team was incorrect and substantively flawed. The conduct for which Student was subject to discipline was a manifestation of her disability, and the team failed to consider whether Student's conduct was the direct result of Santa Paula's failure to implement Student's operative September 26, 2018 IEP. As remedies, Student seeks an independent functional behavior analysis and psychoeducational evaluation, modification of her behavior intervention plan, and a finding that any expulsion was a result of Santa Paula's violation of the IDEA.

Following a determination that the conduct was a manifestation of Student's disability the law requires that the IEP team, where a behavioral intervention plan has been developed, review the behavioral intervention plan and modify it as necessary to address the behavior plan. (20 U.S.C. § 1415 (k)(1)(F)(ii) and (iii); 34 C.F.R. § 300.530(f)(1)(ii) and (2).)

In making a determination in an appeal of a manifestation determination, a hearing officer may return the student to the placement from which he or she was removed. Alternatively, the hearing officer may order a change in placement to an appropriate interim alternative educational setting for not more than 45 school days, if it is determined that maintaining the current placement of such child is substantially likely to result in injury to the child or to others. (20 U.S.C. § 1415(k)(3)(B)(ii)(I) and (II); 34 C.F.R. § 532(b)(2)(i) and (ii).)

Here, the events of this appeal are remote in time. The manifestation determination appealed by Student occurred during the 2018-2019 school year. According to Student's complaint, she returned to her placement in middle school in Santa Paula at the beginning of the 2019-2020 school year. The 2019-2020 school year will have ended by the time this Expedited Decision is issued. No evidence was introduced regarding whether Student was actually expelled, Student's current placement, current behaviors, or the need for a functional behavior assessment. No evidence was introduced that Student's current IEP contains a behavior intervention plan. Accordingly, this Expedited Decision declines to order an independent functional behavior analysis or psychoeducational evaluation, or to order modification of any behavior intervention plan. This Expedited Decision does not bar Student from seeking the same or similar remedies for a denial of FAPE upon an appropriate showing in the non-expedited hearing in this due process proceeding.

This Expedited Decision does find that because of Santa Paula's erroneous decisions during the manifestation determination team meeting, Santa Paula's determination that Student's conduct was not a manifestation of her disability is invalid, and shall be removed from Student's educational record.

## CONCLUSIONS AND PREVAILING PARTY

As required by 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.

ISSUE 1: Student's conduct reviewed at the January 16, 2019 manifestation determination review team meeting was caused by, or had a direct and substantial relationship to, Student's disability. Student prevailed on Issue 1.

ISSUE 2: Santa Paula failed to review at the January 16, 2019 manifestation determination review team meeting whether Student's conduct was the direct result of Santa Paula's failure to implement Student's individualized education program. Student prevailed on Issue 2.

## ORDER

1. The January 16, 2019 manifestation determination that Student's conduct in causing, attempting to cause, or threatening to cause physical injury to another person was not a manifestation of her disability is reversed.
2. Santa Paula shall expunge Student's educational records by purging all references to her expulsion from her education records related to the disciplinary incident at issue at the January 16, 2019 manifestation determination meeting.

3. Student's other requested remedies are denied.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Expedited Decision to a court of competent jurisdiction within 90 days of receipt.

*/s/*

Alexa Hohensee

Administrative Law Judge

Office of Administrative Hearings