

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

In the Matter of:

STUDENT,

Petitioner,

v.

TEHACHAPI UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH No. N 2006010238

DECISION

Administrative Law Judge Deidre L. Johnson, State of California Office of Administrative Hearings, Special Education Division (OAHSED), heard this matter on February 7, 2006, in Tehachapi, California.

Petitioner Student (Student) and his mother (Parent) filed a request for a due process hearing on January 9, 2006, that listed three problems regarding Respondent. Two of the problems involved a claimed denial of a free, appropriate public education (FAPE), and were not heard on February 7, 2006. The third problem involves an appeal of a school disciplinary manifestation determination. On January 30, 2006, Judge Judith Kopec of OAHSED issued an order which, among other things, bifurcated the FAPE problems from the disciplinary problem, and ordered the disciplinary problem to proceed to an expedited hearing as scheduled on February 7, 2006. Judge Kopec found the other two problems to be insufficiently stated and granted Student the right to file an amended complaint regarding them within 14 days of the order, or no later than

February 14, 2005. Student did not file an amended complaint as to those issues. This decision will therefore dispose of the case.

Student was represented by Larry Perkins, Family Advocate and Associate Director of Sequoia Area VIII Board for Developmental Disabilities, State of California. Neither Student nor his mother (Parent) were present at the hearing or testified.

Respondent Tehachapi Unified School District (District) was represented by attorney A. Christopher Duran, of De Goede, Dunne & Martin, P.C. Also present as the District's designated representative was Sharon Owen, licensed school educational psychologist.

Testimony concluded, oral closing arguments were made, the record was closed, and the matter pertaining to the disciplinary problem was submitted on February 7, 2006.

ISSUES

Was the District's determination that Student's violent conduct on school grounds in October 2005 was not a manifestation of his disability appropriate and in compliance with the law?

- (a.) Did District comply with procedural requirements in making the manifestation determination?
- (b.) Was the conduct in question the direct result of the local educational agency's failure to implement Student's individualized education program (IEP)?
- (c.) Was the conduct in question caused by, or did it have a direct and substantial relationship to, Student's disability?

FACTUAL FINDINGS

STUDENT'S STAY PUT PLACEMENT

1. Student is a 17 year old boy in the District, and is currently in the twelfth grade at Tehachapi High School (THS). It is undisputed that, per the high school's IEPs, Student is eligible for special education and related services with a disability of Other Health Impairments (OHI), primarily based on a diagnosis of attention deficit hyperactivity disorder (ADHD).

2. On Monday, October 17, 2005, Student engaged in two acts of violence during school hours at THS. On that date, Student was suspended from school for five school days. District provided written notice to Parent on October 22, 2005 of a pre-expulsion IEP team manifestation determination meeting scheduled for October 31, 2005.

3. On October 31, 2005, during the IEP team manifestation review meeting, District determined that the above behavioral incidents were not a manifestation of his disability. Student faces possible expulsion from THS as a result of District's determination. Following Student's five-day suspension, he was allowed to return to THS. An expulsion hearing was set for December 5, 2005, and postponed at Parent's request. On January 9, 2006, Student filed a motion for "stay put" with his complaint.¹ On January 11, 2006, Parent consented in writing to District's offer to delay further action regarding an expulsion hearing while District conducts a "functional analysis of behavior assessment" (FBA)² of Student. District and Parent agreed that Student shall

¹ See Legal Conclusions, Applicable Law, paragraph 6, *infra*.

² Federal law refers to this as a functional behavioral assessment (FBA). (20 U.S.C. section 1415(k)(1)(F).)

continue to attend THS but shall attend two resource specialist program (RSP) periods per day in the interim, pending the outcome of the assessment.³ While District indicated to Parent that it may not proceed with an expulsion hearing depending on the results of the FBA, it had not withdrawn the manifestation determination as of the hearing date.

4. At the beginning of the hearing on February 7, 2006, Student's placement at THS under the terms of the above-described interim agreement was ordered by the undersigned Administrative Law Judge to be District's stay-put placement for Student pending the outcome of this matter.

STUDENT'S INITIAL HIGH SCHOOL IEP

5. Student's prior IEPs at THS, from his entry into high school in 2001 through the behavioral incidents in the fall of 2005, show the disability which made him eligible for special education, how the disability manifested uniquely for Student, and what academic and behavioral areas of his life were adversely affected by the disability.

6. Student's special education prior to entering high school reveals a relevant prior history of altercations and assessment. Student first became eligible for special education and related services in 1996. Prior to 2001, District records indicate that Student had been diagnosed with a Specific Learning Disability (SLD). At some point,

³ On February 3, 2006, Student made a motion to add the FBA assessor, a program specialist with the Kern County Office of Education, to his witness list. District objected to lack of timely notice of witnesses and completed assessments with recommendations, under Education Code section 56505, subdivision (e)(7). In addition to the motion's prejudicial lack of timeliness, it was also noted that permitting the witness to testify could interfere with a pending assessment that had not been completed. Student withdrew his motion.

Student had a behavioral support plan (BSP) in his IEP. For at least 8th grade (2001-2002 school year), Student's educational placement was "Home/Hospital Instruction." There is no dispute that Student was placed on Home Instruction in junior high school due to the number of altercations that occurred when he attended the school campus. During the time in Home Instruction, Student received individual and group counseling through county mental health services.

7. Student's IEPs at THS, including the designation of Student's disability as OHI, relied at least in part upon a triennial assessment done in 2001. Student's triennial assessment became due in September of 2001 while Student was placed in Home Instruction. District had Student assessed by the California Department of Education, Diagnostic Center of Central California, located in Fresno and a diagnostic assessment report was issued on September 20, 2001 (Fresno report).⁴ Student returned to campus in August of 2002 for summer school and to start his freshman year at THS that fall. The IEP team at THS finalized the triennial IEP for Student on November 21, 2002, over a year after the Fresno assessment, and three months after he returned to campus. The IEP Team decided that Student was eligible for special education services in the fall of 2002 with a disability of OHI.⁵

8. The November 2002 IEP team found that Student still needed supports to access core curriculum. For ninth grade, District placed most of his academic proficiency goals at the 4th to 6th grade levels using the Fresno report as a guide. Parent refused

⁴ The Fresno assessment report of September 2001 was admitted into evidence solely as hearsay to explain and supplement District's IEPs.

⁵ The Fresno report referred to in the IEP found that its 2001 evaluation was consistent with Student's previous diagnoses of ADHD, Impulse Control Disorder Not Otherwise Specified (NOS), Learning Disorder NOS, and Relational Problems.

academic testing. In the area of cognitive/general ability, "mild weaknesses" were noted in visual processing, attention and sensory-motor integration. In the motor/perceptual area, the IEP indicated that Student experienced delays related to his disability calling for more time for tests, assignments, homework, and copying from the board. In the social/emotional domain, it was noted: "There is a diagnosis of ADHD which is supported by Fresno. Anxiety level is also high per rating scales in physical and emotional anxiety. He worries about grades, peers and school staff." Under supplementary aids and services, the November 2002 IEP listed that THS should provide the following behavioral supports: "clearly defined limits; reminder of rules; sitting near the teacher as available, as needed; positive reinforcement as available; take tests in RSP room if requested by student, as needed; and if a wide-eyed look - ask [Student] [illegible] to clarify, to stay after class." Student's initial high school placement was 98 percent general education and 2 percent special education in the RSP program, including one ten-minute consultation with an RSP teacher two times per month.

9. There were no reports of unacceptable behavior during that three-month observation period prior to the IEP meeting, and Student settled into high school motivated to graduate. District determined that Student appeared "on track" and that no written behavioral goals for Student's OHI disability, anxiety, prior history of altercations, or ADHD were necessary.

LAST OPERATIVE IEP PLACEMENT OF SEPTEMBER 2003 AND AMENDMENT OF SEPTEMBER 2005

10. Student's IEP in place prior to the disciplinary incidents of October 17, 2005, was an IEP dated September 22, 2003, when Student was in the tenth grade at the same school. It was the last IEP to which implementation was consented by his Parent, and was amended once with Parent's consent on September 2, 2005. The September 2003 IEP increased Student's time in general education to 99 percent. This was done

despite the fact that Student had experienced 2 behavioral altercation incidents in 2003, discussed *infra*. District did increase Student's time to access the special education teacher to ten minutes per week with the resource specialist. The September 2003 IEP contained the same language as the November 2002 IEP regarding Student's high anxiety level in the social/emotional domain. District noted Student was performing below 60 percent on most academic exams, and set an annual goal of at least 70 percent.

11. The September 2003 IEP noted that Student's areas of weakness included "conflict & testing" but did not reference any particular events or problems. In fact, Student had two disciplinary altercations in 2003:

(a) On March 20, 2003, while Student was still a freshman, THS records show a disciplinary problem in which Student was disciplined for one "fighting" incident.

(b) On August 28, 2003, as a sophomore, he had one other disciplinary incident for "fighting."

12. At hearing, District characterized both of the above incidents as minor, because (a) they did not involve injury or medical treatment, (b) they resulted in a 2-day suspension each time, (c) they were not part of a "pattern" of behavior in the same school year, and (d) the overall number or frequency of behavioral incidents was significantly reduced from Student's prior junior high school altercations. Despite these reasons, District developed an annual goal in the September 2003 IEP in the area of conflict management. Student's level of conflict management performance was evaluated as "able to handle most conflict in a positive way 80 percent of the time," with a goal to increase that accomplishment to 95 percent of the time. At the same time, behavioral supplementary aids and services were reduced. The behavioral supports that remained in Student's IEP were: "positive reinforcement; [illegible], and written progress

reports. "The District credibly asserted that it wanted Student to have at least one full period of RSP study per day, but that Student and Parent did not want any RSP. Student wanted a general education transcript to go to college. Despite District's attempt to increase RSP time, District relented when Parent objected. Parent consented to the September 2003 IEP that included the conflict goal.

13. The next IEP meeting was on September 20, 2004 for 11th grade, and Parent attended but did not sign consent to the proposed IEP. Student had the same high physical and emotional anxiety levels.⁶ Student was still below grade level in academics, he was on track to graduate, needed to pass some exams, and had some tardiness problems. District had no reason to discuss improper or aggressive behavior and it was not a concern to the team. After a year of successful performance without altercations, it was proposed that the conflict goal be eliminated. District also proposed to reduce further the RSP services for Student. Parent signed for receipt of the IEP but, did not consent. There were no meeting notes and no stated reasons for Parent's concerns.

14. On December 9, 2004, three months after the September 2004 IEP meeting, and almost a year and four months since the last behavioral incident, Student physically struck another pupil following a vulgar remark, the specifics of which are unknown. It did not involve serious injury. Student was disciplined with a three-day suspension.

15. On April 25, 2005, the IEP Team held a meeting to resolve the offer outstanding from September, 2004, in light of the disciplinary occurrence of December

⁶ District records noted that Student's physical manifestations of anxiety included physical bowel syndrome, which required special accommodation for restroom breaks.

2004, and Student's declining academic performance. Student was no longer on track to graduate with his class as he was a semester behind schedule in credits. Under the levels of social/emotional performance, Student was described as very social, he got along with peers, but at times displayed "resistance to authority and poor social adaptation skills." District proposed that Student needed a more structured environment, offering to reduce the regular education component to 83 percent, and to increase special education RSP services to 17 percent with specified services. Parent was not present at the meeting. She signed for receipt of the IEP offer on May 6, 2005 as "unhappy," and did not consent to it.

16. District held an annual IEP meeting on September 2, 2005, after Student began 12th grade. During the summer of 2005, Student went to summer school to obtain extra credits in order to graduate. He understood he had fallen behind academically, made a plan of action, and was catching up. District again offered a specific RSP study skills class for Student daily, but Parent did not want this service. Resource specialist Lori Bender was present to begin working with Student after another resource specialist was removed as Student's case manager after Parent complained. Parent refused to agree to place Student in an RSP study class, and District therefore offered to have the RSP teacher briefly meet with Student at lunch to monitor his progress on either Monday, Wednesday, or Friday. Parent consented to the amendment for Student's continued "consult" time with a resource specialist teacher weekly. Although the amendment of September 2005 says it amended the IEP of April 25, 2005, actually it amended the IEP of September 2003, to which Parent last consented.

17. A month later, on October 7, 2005, Student failed to attend a mandatory assembly. When he was assigned to report to an "in school suspension," he swore briefly at school personnel within their hearing distance. This occurred ten days prior to the behavioral incidents at issue.

STUDENT'S DISABILITY

18. As found above, District's IEP emphasized Student's ADHD to support the eligible category of OHI. The eligibility criteria for "Other Health Impairments" include whether a pupil has limited strength, vitality or alertness, due to a chronic or acute health problem. ADHD is not among the statutory examples. ADHD is not a statutory category of disability in either federal or state special education law. It is often included in the disability category of OHI under the rationale of "limited alertness," involving inattention or hyperactivity-impulsivity. The parties presented little evidence to show how a disability of OHI, based primarily on ADHD, may affect a child's school performance, aside from viewing Student's levels of academic and behavioral performance in his IEPs and how it has manifested in his experience. At the same time, District's IEPs noted Student's weaknesses in certain processing and learning disability areas as another aspect of his disability.

19. Official notice is taken of the federal publication, U.S. Department of Education, Office of Special Education and Rehabilitative Services, Office of Special Education Programs, *Identifying and Treating Attention Deficit Hyperactivity Disorder: A Resource for School and Home* (2003) Washington, D.C 20202. Page 1 of the report provides that ADHD "is a neurological condition that involves problems with inattention and hyperactivity-impulsivity that are developmentally inconsistent with the age of the child. We are now learning that ADHD is not a disorder of attention, as had long been assumed. Rather, it is a function of developmental failure in the brain circuitry that monitors inhibition and self-control. This loss of self-regulation impairs other important brain functions crucial for maintaining attention, including the ability to defer immediate rewards for later gain. (Barkley, 1998a). Behavior of children with ADHD can also include excessive motor activity. The high energy level and subsequent behavior are often misperceived as purposeful noncompliance when, in fact, they may be a manifestation

of the disorder and require specific interventions. Children with ADHD exhibit a range of symptoms and levels of severity....[and] ...typically exhibit behavior that is classified into two main categories: poor sustained attention and hyperactivity-impulsiveness." *Ibid*, at pg. 1. Studies have shown that "effective education of children with ADHD requires modifications to academic instruction, behavior management, and the classroom environment." *Ibid*, pg. 10. "Children frequently demonstrate other types of psychosocial difficulties, such as aggression, oppositional defiant behavior, academic underachievement, and depression...." *Ibid*, pg. 10. The report cited studies finding that compared to students without ADHD, students with ADHD had persistent academic difficulties that resulted in "lower average marks, more failed grades, more expulsions, increased dropout rates, and a lower rate of college undergraduate completion [cites]." *Ibid*, pg. 13. "Numerous studies have found that positive results occur when the major stakeholders in a student's education collaborate to address a child's ADHD ...[cites]. Effective collaboration and communication between home and school provide structure across the two major settings in the child's life. Common rewards, reinforcement strategies, and language help to promote consistency across settings." *Ibid*, pg. 14. Medication is often also used to control behavior. In this case, THS school records show that Student was not on medication for the ADHD.

DISTRICT'S MANIFESTATION DETERMINATION

20. The relevant members of the IEP team that reviewed what happened in October of 2005 included Sharon Owens, the THS licensed educational psychologist for the past six years (and past Interim Special Education Director for the District from 2002-2003). Among other things, she interviewed the pupils involved in the incidents, Parent, and school staff, reviewed the Fresno report, the high school IEPs, Student's cumulative high school file, and disciplinary records, and gave Student's core teachers behavior assessment ratings to fill out. Parent participated in the manifestation

determination meeting on October 31, 2005, along with Gary Walker, Student's regular education teacher (physical education), Lori Bender, his special education teacher (resource specialist), Dr. Mike Banricklow, then the District's Director of Special Education,⁷ and Student and Parent's family advocate, Larry Perkins. Ms. Owen prepared a confidential "manifest determination" report [sic], and Ms. Bender prepared a confidential academic assessment report that were presented and discussed at the meeting on October 31, 2005.

21. As determined in the October 2005 manifestation determination review meeting, "[Student] hit another student [pupil no. 1] in the head over an alleged girlfriend issue. The other student did not hit back. A second student [pupil no. 2] was also hit in the face when he inquired about the situation with the first student."

22. The school psychologist's manifestation determination report concluded that Student's girlfriend attended a party in Bakersfield on Friday night, October 14, where alcohol was present. On Sunday, October 16, the girlfriend reported to Student that she believed pupil no. 1 had sexually assaulted her. Student was "shocked at first and couldn't think." When he went to school the next day, he confronted pupil no. 1, who denied it. Student admitted that he became angry, felt threatened, and was being made to feel like a liar. Shortly thereafter, pupil no. 2 confronted Student, and Student punched him in the nose. He told Ms. Owen that he did not go to school that day with the intention of hurting anyone, and that "I know it was wrong." Student exhibited a high degree of anxiety, and admitted to Ms. Owens that he had "screwed up." District

⁷ Effective November of 2005, Patricia Merritt returned to the District as Interim Special Education Director.

determined that pupil no. 1 had a concussion.⁸ The incidents happened in Mr. Walker's class in the PE locker room area.

23. The academic assessment report of October 2005 was based on observation of Student by Ms. Bender in his 6th period English classroom on October 27, teacher comments she had collected, and the Woodcock-Johnson III Tests of Achievement she administered. Student's academic scores on the Woodcock-Johnson III tests were in the "low average range."

24. Significantly, Student's core teachers reported to Ms. Bender that they knew of no other observed behavioral problems involving Student until the October 17 incidents. For example, Student's supervisor for the Workability Program, reported that he placed Student with a demanding employer in the summer of 2004, and Student performed without incidents. He was on time, followed directions, was reliable and responsible. Teachers were reportedly shocked, saddened and surprised at learning of the incidents. The school psychologist had known Student since he was in elementary school, and had seen him work through a difficult period about five years prior, when Student had altercations at school, his father left, his mother was diagnosed with cancer, Student was placed on Home Instruction and he received mental health counseling. Ms. Owens was very proud of Student's hard work and accomplishments during high school since then. Student was a varsity basketball player. His coach Gary Walker teaches his players conflict resolution and was satisfied with Student's progress. Walker recalled only two incidents where Student lost his temper, one in which Student became angry at

⁸ District's findings regarding the incidents that led to disciplinary action are taken as true for purposes of this appeal, and were not litigated in this proceeding. Although school records do not indicate the nature of any injury to pupil no. 2, Ms. Owens testified that pupil no. 2 had a broken nose.

himself, and the other a shoving match, both in which Student had bottled up his anger. He never saw Student acting out in a persistent pattern indicating an anger problem. Student's success as a basketball player supports that opinion. Mr. Walker was a member of the IEP Team conducting the manifestation determination review. The English teacher Julie Avila likewise has not had any behavioral problems with Student in her class this past year, although Student was not doing well academically. Both teachers reported that Student needed work on his study skills. The four prior behavioral incidents at THS from 2003 through the fall of 2005 were reported at the review meeting. The team members, aside from Parent, shared a uniform opinion that Student's misbehavior was based on a unique, sensitive situation, aggravated by perceived physical injury to his girlfriend, where he made a mistake. Aside from Parent, the other team members viewed the incidents of October 17, 2005 as Student's "first offense" for the 2005-2006 school year, and found that no behavioral support plan was provided with his IEPs or necessary.⁹

25. The IEP team's inquiry at the review meeting included answering printed questions in the review report. In addition, the review report form directed that, if the team found any deficiency in the IEP, placement or implementation of the IEP or services, the conduct must be considered a manifestation of disability and a person assigned to coordinate remedying the deficiency problem. The questions included whether Student understood school rules; whether he could distinguish between right and wrong; whether he possessed problem-solving strategies; whether he learned from his mistake; whether he acknowledged wrongdoing; and whether there was anything

⁹ District failed to explain why the behavioral incident of October 7, 2005, just 10 days prior, was not considered a recent prior offense at the meeting, although it was listed in the manifestation determination report.

else going on his life. In three major areas, related to the requirements of prior federal law, District questioned whether Student's IEP and placement (including supplementary aids, services, and any BSP or BIP) was "appropriate" in relation to the behavior subject to disciplinary action [yes]; whether Student's disability impaired his ability to understand the impact and consequences of his behavior [no]; and whether Student's disability impaired his ability to control his behavior [no]. While some of the above information may be relevant, District applied the wrong manifestation determination standards and failed to ask the requisite questions under present law. The school psychologist's report concluded: "Although he has a diagnosis of ADHD, he does not exhibit any of the symptoms of the disorder at school. He is focused, attentive, and exhibits much control and planning ability. [Student] appears to be able to control his actions and makes conscience decisions." After review of all relevant information presented at the meeting, District concluded that Student's above described misconduct on October 17, 2005, was not a manifestation of his disability.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. The reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004) became effective July 1, 2005. IDEA 2004, as its predecessors, prohibits the expulsion of a student with a disability for misbehavior that is a manifestation of the disability. (*Doe v. Maher* (9th Cir. 1986) 793 f.2d 1470.) Subsection (k) of 20 U.S.C. section 1415 governs when and how schools may change the educational placement of a child with a disability because of a violation of a code of student conduct. Children with disabilities are entitled to a FAPE, including those children who are subject to disciplinary measures such as suspension or expulsion by a school for violation of its rules of conduct. (20 U.S.C. section 1412(a)(1)(A).) School personnel may remove a child

with a disability to an interim alternative educational setting, another setting, or to suspension for not more than 10 school days without triggering the "change of placement" protections of the law. 34 Code of Federal Regulations (CFR) section 300.519 defines a change of placement as (a) a removal for more than 10 consecutive school days, or (b) a series of removals that cumulate to more than 10 consecutive school days and constitute a pattern based on listed factors. Depending on its form and duration, a suspension of a child receiving special education and related services due to a disability may constitute a change in their educational placement. Expulsion from school clearly constitutes a change in educational placement. (*Kaelin v. Grubbs* (6th Cir. 1982) 682 F.2d 595.)

20. 20 U.S.C. section 1415(k)(1)(E), regulates the manifestation determination procedure. Within 10 school days of any decision to change the placement of a child with a disability because of a behavior violation, the local educational agency (LEA), the parent, and relevant members of the IEP team 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." This review team must 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.

The law provides that if the review team, consisting of the above members, determines that either of the above is applicable, the child's conduct "shall be determined to be a manifestation of the child's disability."

3. If school personnel seek to order a change in placement that would exceed 10 school days, and if it is determined that the behavior that gave rise to the conduct violation was *not* a manifestation of the child's disability, then:

- (a) The school may apply the same disciplinary procedures that are applicable to children without disabilities “in the same manner and for the same duration in which the procedures would be applied to children without disabilities (20 U.S.C. § 1415(k)(1)(C);”
- (b) The child must still receive a FAPE, although it may be provided in an interim alternative educational setting (20 U.S.C. § 1415(k)(1)(D)(i); and
- (c) In addition, the child shall receive, as appropriate, a functional behavioral assessment (FBA) and behavioral intervention services and modifications “that are designed to address the behavior violation so that it does not recur.” (20 U.S.C. § 1415(k)(1)(D)(ii).)

4. If the IEP team makes a determination that the child’s conduct *was* a manifestation of the child’s disability, the child’s IEP team is required by 20 U.S.C. section 1415(k)(1)(F) to take action, as follows:

- (a) The IEP team must conduct a FBA and implement a behavioral intervention plan for the child, if the LEA had not already conducted one prior to the behavior at issue.
- (b) Where a behavioral intervention plan was already developed, the IEP team must review it, and modify it, as necessary, to address the problematic behavior.
- (c) The IEP team must return the child to the special educational placement from which the child had been removed, unless the parent and the LEA agree to a change of placement “as part of the modification of the behavioral intervention plan.”

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. (20 U.S.C.

§ 1415(k)(3)(a).¹⁰ 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. (20 U.S.C. § 1415(k)(4)(B).)

6. With some exceptions, when an appeal has been requested, the child shall remain in the then-current educational placement under 20 U.S.C. section 1415(j). This is commonly referred to as “stay put.”

7. One exception to the general stay put rule is in a disciplinary matter involving a weapon, drugs, or “serious bodily injury,” where an alternative educational placement is made, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer. (20 U.S.C. § 1415(k)(4)(A). In those narrow circumstances, 20 U.S.C. section 1415(k)(1)(G) permits school personnel to remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child’s disability. “Serious bodily injury” is defined in subsection (k)(7)(D) of Section 1415, and has the same meaning as the term is used in 18 U.S.C. section 1365(h)(3): “the term ‘serious bodily injury’ means bodily injury which involves - (a) a substantial risk of death; (b) extreme physical pain; (c) protracted and obvious disfigurement; or (d) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”

8. IDEA 2004 added language to the disciplinary subsection (k) which emphasizes that, when dealing with students with disabilities who have violated a code of conduct, school personnel are expressly permitted to consider “any unique circumstances on a case-by-case basis” in determining whether a change of placement order would be appropriate. (20 U.S.C. § 1415(k)(1)(A).)

¹⁰ The LEA may also request a hearing in specified circumstances

9. California law is in accord with federal law. California law refers to a “child with a disability” as an “individual with exceptional needs” who is identified as disabled by an IEP team and requires special education and services. 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.

10. Education Code section 48900 provides that a pupil may not be suspended from school or recommended for expulsion unless the superintendent or school principal determines that the pupil has committed an act “related to school activity or school attendance occurring within a school” as defined in subsections (a) through (q).¹¹ Subsection (a)(1) is: “Caused, attempted to cause, or threatened to cause physical injury to another person.” Education Code section 48911 provides that a suspension for conduct proscribed by Section 48900 shall be for not more than five consecutive school days. Under Education Code section 48915, expulsion shall be recommended for specified acts “unless the principal or superintendent finds that expulsion is inappropriate, due to the particular circumstance.” Among the acts listed is: “Causing serious physical injury to another person, except in self- defense.”¹²

11. While the standards in Section 1415(k)(1)(E) for determining whether a child’s behavior was a manifestation of the disability are new, the principle behind them

¹¹ Other Education Code sections define additional acts that may be grounds for discipline.

¹² California’s provision for discretion based on the particular circumstances is consistent with the new federal provision emphasizing the district’s option for discretion in 20 U.S.C. section 1415(k)(1)(A) described in paragraph 9 above.

is not. The court in *Doe v. Maher, supra*, (9th Cir. 1986) 793 F.2d 1470, 1480, discussed the meaning of various phrases describing "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." The court went on to say: "If the child's misbehavior is properly determined *not* to be a manifestation of his handicap, the handicapped child can be expelled. [cites] ... 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." (Emphasis original.) (*Doe v. Maher, supra*, at 1482.)

12. Education Code section 56339 provides that a pupil whose educational performance is adversely affected by a diagnosis of ADHD and who "demonstrates a need for special education and related services by meeting eligibility criteria specified in subdivision (f) or (i) of Section 3030 of Title 5 of the California Code of Regulations (CCR) or Section 56377 and subdivision (j) of Section 3030 ...for the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 and following) categories of 'other health impairments,' 'serious emotional disturbance,' or 'specific learning disabilities,' is entitled to special education and related services."

The eligibility criteria for "Other Health Impairments" under CCR section 3030 are: "A pupil has limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic

fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, and hematological disorders such as sickle cell anemia and hemophilia which adversely affects a pupil's educational performance. In accordance with Section 56026(e) of the Education Code, such physical disabilities shall not be temporary in nature as defined by Section 3001(v)."

13. Pursuant to 34 Code of Federal Regulations (CFR) section 300.346(a)(2)(i), in the case of a child whose behavior impedes his or her learning or that of others, the IEP shall consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.

14. Student, as the petitioner and appellant, has the burden of proof in this proceeding. (*Schaffer v. Weast* (Nov.14,2005, No. 04-698)___U.S.____[2005 U.S. Lexis 8554].)

DETERMINATION OF ISSUES

15. As found in Factual Finding 20, appropriate parties as required by law participated in the manifestation determination review team, in that the LEA was represented, the Parent provided input and was present at the review meeting of October 31, 2006, as were other relevant members of Student's IEP team. Parent did not contend that she was not given proper notice of the meeting or that any District personnel were missing or inappropriate.

16. As found in Factual Findings 20, 22, 23, 24 and 25, the IEP review team reviewed relevant information as required by law prior to making a determination whether Student's behavioral altercations of October 17, 2005, were or were not a manifestation of his disability. The meeting complied with federal and State procedural requirements for the conduct of a manifestation review

17. It is found that Factual Findings 21 and 22 set forth the District's conclusions as to what happened in the behavioral altercations between Student and

two other pupils on October 17, 2005, and they are considered true for purposes of this proceeding.

18. Pursuant to Factual Findings 21 and 22, Student's conduct, that resulted in a mild concussion to one pupil and a broken nose to another pupil did not involve "serious bodily injury" within the meaning of 20 U.S.C. section 1415(k)(1)(G). There was no evidence of extreme physical pain, substantial risk of death, or protracted injuries of the kind described in the federal definition.

19. As found in Factual Finding 25, the IEP review team used the wrong legal standards and failed to expressly ask the requisite questions under present law. The new manifestation determination standards effective July 1, 2005 differ significantly from the prior law. 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. Under the new law, whether the IEP is "appropriate" is no longer a determining factor in the manifestation review process. Rather, the inquiry must now focus on (a) whether the child's conduct was the *direct result* of the LEA's failure to *implement* the IEP; or (b) whether the conduct *was caused by or had a direct and substantial relationship to* the child's disability.¹³

¹³ Although under 34 CFR section 300.523(c)(2), present federal regulations still contain requirements to address impairment of ability to understand the impact and consequences of behavior, and ability to control behavior, in the context of the prior "appropriate" IEP standard for a manifestation review, they conflict with IDEA 2004, are

STUDENT'S CONDUCT WAS NOT THE DIRECT RESULT OF THE LEA'S FAILURE TO IMPLEMENT THE IEP

20. Although the manifestation team applied the incorrect legal standard as to the IEP during its review, its error was harmless. It did not directly answer the question whether Student's IEP "had been implemented." Pursuant to Factual Findings 20, 21, 22, 23, 24, and 25, by finding that Student's IEP was "appropriate," and that no BSP was included in the IEP, District, in this case, found that Student's IEP had been implemented by implication. If, using the wrong standard, the team decided that Student's IEP had been found not to be "appropriate," either by a deficiency in the IEP *or in its implementation*, the team was expressly directed by the school review report form to find the behavior to be a manifestation of the disability, and to take immediate steps to remedy it. The team did not do so. Every reasonable inference leads to the conclusion that the review team knew and understood that Student's IEP had been operative.

21. Pursuant to Factual Findings 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17, and if District implements a change in placement for Student in this matter, District should consider review of Student's IEP, as appropriate, even though the behavior in question was not a manifestation of his disability. The LEA's obligation to consider appropriate review and revision arises under the IDEA in general and 20 U.S.C. section 1415(k)(1)(D)(ii) in particular.¹⁴ Where misbehavior is caused by, or has a direct and substantial relationship to a disability, the child cannot be disciplined, and must either be given an FBA and a behavioral intervention plan, or a BIP in place must be reviewed

being revised, and so far have been eliminated in the proposed new regulations.

(Federal Register, Vol. 70, No. 118.)

¹⁴ As noted in Factual Finding 2, District has already agreed to and has already begun an FBA assessment of Student, without waiting for a formal expulsion.

and modified as necessary to address the behavior. On the other hand, where misbehavior is not caused by the disability, the child may be disciplined, but if the child's placement is changed (e.g. expulsion), the LEA is still required to *consider* giving the child an FBA and behavioral intervention services and modifications of the IEP "as appropriate." Either way, the LEA has a responsibility to the child and to the rest of the students to implement services and modifications "designed to address the behavior violation so that it does not recur." (20 U.S.C. § 1415(k)(1)(D)(ii).) An FBA, behavioral intervention services and modifications of the IEP are statutorily at District's discretion if the determination against manifestation is upheld. District should, however, consider such modifications and implementations of services *as would be appropriate* to prevent the recurrence of similar altercations. (See also 34 CFR § 300.346.)

STUDENT'S CONDUCT WAS NOT CAUSED BY, OR DID NOT HAVE A DIRECT AND SUBSTANTIAL RELATIONSHIP TO HIS DISABILITY

22. Pursuant to Factual Finding 25, District did not expressly answer the question whether Student's conduct "was caused by" or "had a direct and substantial relationship to" his disability. They used the prior legal standard to find that Student's disability did not impair his ability to understand the impact and consequences of his behavior or his ability to control his actions. Student's disability of OHI has at its heart limited vitality, strength and alertness, in this case impacted primarily due to ADHD. In order for the disability to be found to have a direct and substantial relationship to a child's conduct, many factors are involved. Pursuant to Factual Findings 20, 21, 22, 23, 24, and 25, District properly considered factors including whether Student understood school rules, demonstrated over time that he could control his conduct, plan, cooperate, deal with challenge and stress, and whether he possessed problem-solving strategies. Factual Findings 15 and 24, in particular, support the conclusions of the District that Student behaved well in classrooms with no disciplinary incidents with teachers (aside

from the incident of October 7), did not exhibit impulsivity problems, performed well in gainful employment, as well as on the basketball court in varsity competition, and was capable of formulating and implementing plans to catch up in school credits by succeeding in summer school.

23. Although the manifestation team applied the incorrect legal standard as to the causal connection between the conduct and the disability during its review, its error was harmless. By evaluating numerous relevant factors, District, by implication, answered in the negative the narrower, more specific question of whether Student's conduct was *caused by or had a direct and substantial relationship to his disability*. Pursuant to Factual Finding 25, the school psychologist and relevant teachers all found Student performing well in school, focused and able to plan and control his actions. Student's disability manifested itself in high school primarily as anxiety, lower academic performance, processing delays, study skill problems, and difficulty staying on track. In the social/emotional and behavioral realms at issue, while he suffered anxiety, Student was well-liked, and cooperative, with no classroom disciplinary problems on an on-going basis that would suggest an inability to control one's conduct. There is little competent evidence to support a finding that Student's OHI played any significant role in the incidents of October 17, 2005. Although Student had a prior history of aggression and altercations in his younger years, as found *supra*, District's records of his high school performance showed that he had made significant progress academically and behaviorally since attending high school, with the limited exceptions found.

24. Pursuant to Factual Findings 21 and 22, the behavioral incidents of October 17, 2005 were not precipitated by the sudden, unpremeditated impulsivity of a Student troubled with repetitively impulsive or uncontrollable behavior. Student did not suddenly lash out at someone for no apparent reason due to an impulse triggered by the OHI disability. Rather, Student learned about a very unsettling assault on his

girlfriend one day before the incidents. He had a day before attending school on Monday, October 17, to think about the information, and take steps to release his anger and concerns in a positive way. Student admitted that, in the confrontation, he felt threatened and felt that the first pupil was making him a liar. He had choices he could have made, but failed to make them. He acknowledged wrongdoing to Ms. Owen, and knew he had made a mistake. The unique mitigating circumstances in this case may be considered by District.

25. It is conceivable that Student's disability had some distant role in influencing his choice to confront the pupils and physically interact with them. But no evidence was presented to support a finding that Student's OHI disability "caused" his conduct, as in being the core reason for that conduct under the new federal standard, or that the OHI disability had a direct and substantial relationship to the conduct. Student had reason to confront the pupil, and reason to lose his temper in anger, but he also had demonstrated the skills and abilities to overcome those choices for the most part through his high school years. No evidence supported the suggestion that Student's reported anxiety or other minor manifestations of his disability left him unable to control his impulses. Despite some evidence of aggression extrapolated from his history, any relationship between Student's disability and what occurred on October 17, 2005, was at best the kind of attenuated relationship that does not exempt Student from appropriate disciplinary action. (*Doe v. Maher, supra*, at 1482.)

ORDER

1. Petitioner's request for relief from District's manifestation determination is denied.
2. District's expulsion proceedings may go forward.

3. Pursuant to 20 U.S.C. section 1415(k)(1)(A), District may consider any unique circumstances on a case-by-case basis in determining whether a change of placement order would be appropriate.

PREVAILING PARTY

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

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: March 24, 2006

DEIDRE L. JOHNSON

Administrative Law Judge

Office of Administrative Hearings