

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT, on behalf of STUDENT,

v.

ELK GROVE UNIFIED SCHOOL DISTRICT

OAH CASE NO. 2008120009

EXPEDITED DECISION

Administrative Law Judge (ALJ) Trevor Skarda, Office of Administrative Hearings (OAH), State of California, heard this expedited matter on December 17 and 19, 2008, in Sacramento, California.

Attorneys Cathy S. Holmes and Jack Clark represented Elk Grove Unified School District (District). Terry deBoer, Program Specialist, attended the hearing on the District's behalf.

Attorney Mark E. Zeller represented Student, who is an adult and was present throughout the hearing. Student's Mother, Father and siblings attended the hearing.

On December 2, 2008, OAH received a request for expedited due process hearing (complaint) from Student in this matter, and scheduled the expedited portion of the hearing to convene on December 17, 2008 and conclude on December 22, 2008. During a telephonic Prehearing Conference on December 12, 2008, OAH rescheduled the hearing to convene on December 17 and 19, 2008. District's written closing argument was received on December 26, 2008, and was marked as District's Exhibit 20. Student's written closing argument was received on December 26, 2008, and was marked as Student's Exhibit 7. The record was closed and the matter was submitted on December 26, 2008.

ISSUES

1. Was Student's conduct that led to the District's disciplinary action caused by, or did it have a direct and substantial relationship to, his Attention Deficit Hyperactivity (ADHD) disorder and/or Student's auditory processing disorder?
2. Was Student's conduct that led to District's disciplinary action a direct result of the District's failure to implement Student's behavioral support plan (BSP)?

CONTENTIONS

Student contends that his impulsivity and problems focusing related to his diagnosis of ADHD, and/or his oral language problems related to his auditory processing disorder, caused him to engage in the conduct which is the subject of the discipline.

Student also contends that the District failed to implement Student's BSP, and that this failure directly resulted in Student's behavior.

Student's primary contention was that he was wrongfully accused. As the ALJ stated at the prehearing conference and hearing, the IDEA and concomitant state law do not provide a special education hearing officer with jurisdiction to determine whether or not a student actually did what a local educational agency accuses him of doing.¹

District contends that Student's conduct which led to disciplinary action was unrelated to his disability. District further contends that Student's BSP was properly implemented.

FACTUAL FINDINGS

1. Student is 18 years old and resides within the boundaries of the District with

¹ That jurisdiction lies with the governing board of each school district or its designee. (Ed. Code, § 48918.)

his Mother and Father. He is eligible for special education under the category of specific learning disability (SLD) and secondarily, under the category other health impairment (OHI). Student suffers from an auditory processing disorder and ADHD. Until he was suspended, he attended Valley High School.

STUDENT'S BEHAVIOR

2. On November 13, 2008, Student threatened two football coaches after the final football practice of the season. Student was asked to return his football pads. He was seen exiting the hallway adjacent to the locker room carrying an oversized bag with another athlete. After one of the assistant coaches, Coach Michael Rosales, stopped him, Student engaged in a profanity-laced tirade towards Coach Rosales (and later) towards the head coach, Preston Jackson. The District's "report of home suspension" describes the incident as follows:

After practice on 11/13/08 the football coaches were collecting equipment from the players who would not be participating in Friday's game. According to Coach Jackson and Coach Rosales, [Student] was one of the students who needed to turn in his equipment. [Student] was attempting to leave with the equipment and was told by both coaches that he ([Student]) needed to turn in all of his equipment. [Student] refused to turn in his equipment and stated, "I'm not going to give you shit today." [Student] then removed his shirt baring his chest and with clinched [sic] fists approached Coach Jackson and stated, "I have been waiting for this moment I'm going to fuck you up you been

disrespecting my mama ... I swear on my mama I'll fuck you up." At this point another student intervened and restrained [Student]. [Student] continued to move towards the coaches. He then faced Coach Rosales and while being restrained by another student stated, "I will fuck you up too and get my older brother to fuck you up."

3. Student was initially suspended for five days. The suspension was subsequently extended and Student has not been allowed to return to Valley High School.

STUDENT'S DISABILITY

4. As a result of ADHD, Student acts impulsively at times, and has difficulty focusing in class. Student also has an auditory processing disorder. Because of his auditory processing disorder, Student has some difficulty understanding oral language at times. It is sometimes necessary for teachers in the classroom to repeat instructions to Student and/or to check for understanding, i.e., verify that Student understood verbal instructions.

5. Prior to the behavioral incident, Student was educated with his typically-developing, non-disabled peers for the entire school day. He received minimal special education services – thirty-five minutes of resource specialist program (RSP) consultation/monitoring each week, along with vocational counseling one to two times each year, and an unspecified amount of mental health counseling provided by Sacramento County Mental Health Services (SCMHS).

STUDENT'S BSP

6. Student's individualized education program (IEP) dated November 3, 2008, contains an ongoing BSP which targets certain behaviors Student exhibits which interfere with learning. Under the sub-heading "teaching strategies and necessary curriculum or

materials for new behavior instruction” the BSP states, in relevant part, that “Staff should address [Student] with calm demeanor; past school experiences could cause [Student] to respond unfavorably if spoken to with disrespect, anger, or harassment, or intimidation.”

MANIFESTATION DETERMINATION

7. When a special education student is suspended for disciplinary reasons for more than 10 days, federal law requires that the appropriate members of the IEP team meet to determine whether his conduct was a manifestation of his disability. The 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 or her disability and the district may not remove the child from his current placement.

8. The District convened a timely manifestation meeting on November 21, 2008. The team determined that Student’s conduct (verbal threats to staff, profanity, disruption of school activities, and willful defiance) was neither caused by, nor did it have a direct and substantial relationship to, Student’s disability. The team also determined that Student’s conduct was not a result of the District’s failure to implement the IEP, specifically, his BSP. Student’s parents disagreed. The only issue in this hearing was whether the District made the correct determination.

CAUSED BY, OR DIRECT AND SUBSTANTIAL RELATIONSHIP TO, STUDENT’S DISABILITY

9. District’s primary expert witness, Armando Fernandez, M.S., Licensed Educational Psychologist, has worked as a school psychologist since 1999. Since 2007, Mr. Fernandez has been the Lead Psychologist in the District. As the Lead Psychologist, Mr. Fernandez coordinates psychological services for the entire district. He was an excellent,

credible witness. He was well versed in the psychological relationship between ADHD and/or auditory processing disorders and the types of conduct which are a manifestation of those conditions. He also possessed specific knowledge about Student because he has been involved in Student's previous assessments and attended some of Student's IEP team meetings.

10. Mr. Fernandez's testimony established that Student's behavior was not caused by, nor did it have a direct and substantial relationship to, Student's ADHD and/or auditory processing disorder. According to Mr. Fernandez, Student demonstrated that he understood the coaches' instructions to return his football uniform, and therefore his difficulty processing auditory information did not cause him to verbally attack the coaches. Likewise, Student's comments to the coaches that he had been waiting for the opportunity to verbally attack them established that his conduct was unrelated to his problems with impulsivity stemming from his ADHD. Mr. Fernandez explained that Student's conduct was planned out and therefore not impulsive.

11. Student presented no contrary evidence by persons competent to provide an expert opinion about the causal relationship between Student's ADHD and/or auditory processing disorder, and Student's conduct. The only non-District employee who testified who was competent to provide such an expert opinion was Elizabeth Harte. Ms. Harte is Student's mental health services coordinator.² She, however, *did not* testify that Student's behaviors were caused by, or that they have a direct and substantial relationship to, his disabilities.

12. Mr. Fernandez's testimony established that Student's conduct did not have a direct and substantial relationship to, nor was it caused by, his disability.

DIRECT RESULT OF DISTRICT'S FAILURE TO IMPLEMENT STUDENT'S BEHAVIOR

² Her credentials, education and training were not established by the evidence.

SUPPORT PLAN

13. Student's contends that Student verbally attacked the coaches because they failed to implement his BSP. Essentially, Student argues that the coaches talked to him with anger and disrespect and not with a "calm demeanor" and that he in turn threatened them.

14. Preliminarily, the evidence did not establish that the coaches were required to implement the BSP at the time of the incident. The pertinent portion of the BSP states that it was to be implemented for "teaching strategies ... for new behavior instruction." Student was not receiving "new behavior instruction" from the coaches at the time of the altercation and they were not required to implement the BSP. Student's behavior could not have resulted from the District's failure to implement something it was not obligated to implement.

15. Assuming *arguendo* that the District was required to implement the BSP at the time of the incident, Student nevertheless failed to establish that the football coaches failed to implement the BSP and/or that their failure directly caused Student's behavior.

16. Coaches Rosales and Jackson were sufficiently aware of Student's BSP. In particular, they were aware of the requirement that Student be addressed with a calm demeanor. Moreover, the evidence did not establish that any coach spoke to him with "disrespect or anger" and/or that either displayed anything other than a calm demeanor. Instead, Student acted out because he was upset at the coaching staff for not allowing him to play in the final game of the season, and because he had a personal dispute with the head coach, as evidenced by his statement that he had been waiting for the opportunity.

17. It was not established that Student's behavior was caused by the District's failure to implement the BSP.

LEGAL CONCLUSIONS

1. In an administrative proceeding, the burden of proof is on the party

requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) Student requested the hearing; Student has the burden of proof.

2. The governing board of each school district (or its designee) has jurisdiction to hear disciplinary appeals. (Ed. Code, § 48918.) Accordingly, the question of whether or not Student actually engaged in the behavior that precipitated the disciplinary action was neither heard nor decided in this matter.

WAS STUDENT'S BEHAVIOR A MANIFESTATION OF HIS DISABILITY?

3. When a special education student is suspended for disciplinary reasons for more than 10 days, federal law requires that the appropriate members of the IEP team meet to determine whether the student's conduct was a "manifestation" of his or her disability. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e).) The 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 or her disability; and (2) Was the student's conduct a direct result of the district's failure to implement his or her IEP? (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).) If the answer to either question is yes, then the student's conduct is deemed a manifestation of his or her disability and the district may not remove the student from his or her current placement. (20 U.S.C. § 1415(k)(1)(E)(ii); 34 C.F.R. § 300.530(f).)

4. As determined in Factual Finding 12, Student failed to establish that his conduct of threatening the football coaches and cursing had a direct and substantial relationship to his disability, including his auditory processing disorder and his ADHD. As such, his conduct was not a manifestation of his disability under that criterion.

5. As determined in Factual Finding 17, Student failed to establish that his conduct of threatening the football coaches and cursing was a direct result of the district's failure to implement his IEP. As such, his conduct was not a manifestation of his disability under that criterion.

ORDER

Student's request for relief is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: January 14, 2009

_____/s/_____

TREVOR SKARDA

Administrative Law Judge

Office of Administrative Hearings