

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2013010255

v.

TEMECULA VALLEY UNIFIED SCHOOL  
DISTRICT.

EXPEDITED DECISION

Administrative Law Judge Marian H. Tully, from the Office of Administrative Hearings (OAH), State of California, heard this expedited matter in Temecula, California, on February 5, 6, 19, 20, and 21, and heard closing argument telephonically on February 22, 2013.

Attorney Wendy M. Housman, assisted by Theresa Sester, represented Student. Student was 18 years of age at the time of hearing and had assigned his educational rights to his parents. Student's parents were present throughout the hearing. Student was present for a short time on the afternoon of February 6, 2013.

Attorney Sarah L. W. Sutherland represented Temecula Valley Unified School District (District). Director of Special Education, Kimberly Velez and Assistant Director Melanie Hertig attended the hearing on behalf of District.

Student's Expedited Request for Due Process Hearing was filed on January 8, 2013. The matter was submitted and the record was closed at the conclusion of the hearing on February 22, 2012.

## ISSUES

- 1) Was Student's alleged sale of marijuana on September 12, 2012, and October 5, 2012, for which the District has recommended expulsion, caused by, or have a direct and substantial relationship to, his disability?
- 2) Was Student's alleged sale of marijuana, for which the District has recommended expulsion, the direct result of District's failure to implement Student's IEP?

## FACTUAL FINDINGS

1. Student is a 12th grade boy. At all relevant times he lived with his mother and father (Parents) within District boundaries. Student qualified for special education in first grade with a primary eligibility of autism and a secondary eligibility of speech and language impairment. Student also qualified for special education eligibility under the category of specific learning disability for processing. At all relevant times, District was aware that in addition to autism, Student had been diagnosed with bi-polar disorder, anxiety disorder, impulse control disorder, intermittent explosive disorder, Asperger's disorder and Tourette's syndrome. District was also aware Student took medication daily for bi-polar disorder, anxiety and mood stabilization.

### STUDENT'S BEHAVIOR AT TEMECULA VALLEY HIGH SCHOOL

2. Student attended Temecula Valley High School (TVHS) for his sophomore and junior years. As a junior he attended a special day class program for English, math and U.S. history. District discipline records showed 10 discipline referrals between August 24, 2011, and May 17, 2012, at TVHS. Five involved situations with other students including violation of "no contact contracts" and

"mutual combat" on October 14, 2011. Three incidents involved language and/or disruptive behavior in class. One incident involved a dress code violation. One referenced an occasion where a drug sniffing dog was alerted to a cough drop in Student's backpack. On November 9, 2011, a teacher reported to Mother that the teacher was concerned about a drawing of a bong on Student's notebook and Student calling himself a nickname that implied drug use. Student told his Father that he drew the bong to try to fit in. Student once came home from school with a black eye and told his Parents that kids were in a "play fight." Parents were concerned about Student's behavior and his peer relationships.

### MAY 2012 IEP

3. An annual IEP team meeting was held May 10, 2012. Student continued to be eligible for special education under the categories of autism and speech and language impairment, and he continued to have deficits in processing. Student's present levels of performance in Communication Development reflect difficulties in pragmatics and social language and, according to a reference in the IEP, "It appears [Student] theoretically understands social language concepts; but that he has difficulties in applying them." Notes from the meeting concerning Student's Social Emotional/Behavioral Development include a reference to Student's emulation of "bad, tough boy language." Two goals were written related to these behaviors. Goal number six addressed Student's ability to predict or infer what people might say next based upon his understanding of their emotions, body language, and context. Goal number seven addressed Student's ability to state and justify solutions to oral or written social problem scenarios in a school setting. The persons responsible for these goals were his speech and language pathologist (SLP), special education support staff, Parents and Student. District's offer of free appropriate public education (FAPE) included

specialized academic instruction in core subjects, language and speech services in an individual and group setting for 25 sessions of 55 minutes, and individual counseling and guidance in 20 minute sessions twice a month. District also offered, on an annual basis of 30 minutes each, mentoring, career awareness, vocational assessment, counseling, guidance and career assessment. Parents consented to the IEP.

4. The IEP team determined that a BSP was required to address Student's classroom "behaviors that impede Student's learning or the learning of others" and "aggressive or destructive behaviors that can cause potential injury to self, other[s], or property and result in disciplinary actions." The IEP states that a BSP was attached. Listed as one of the behaviors of concern in the BSP was Student's angry and belligerent behavior. The hypothesized function of this behavior was to permit Student to gain control over a situation. No particular intervention strategy was described for this behavior. Intervention strategies to assist with task completion and asking for assistance with assignments were described. The BSP was to be managed by the case carrier, school psychologist.

#### THE CONDUCT AT ISSUE

5. Student transferred to Chaparral High School (CHS) for his senior year, 2012-2013. School started on August 15, 2012. Student made a friend during the first week in school. The friend's name was Daniel. Daniel was an undercover police officer. Daniel posed as a student in Student's second period art class. The teacher did not know Daniel was an undercover officer. Daniel looked like a regular student. Student invited his new friend to come over to his house a few times but Daniel always told Student he was grounded. It was unusual for Student to make friends, especially so quickly. Parents were very happy Student had made a friend. Mother hoped Student could maintain the

friendship outside of school. Daniel maintained contact with Student on weekends, before school and in the evenings via text messages. Student did not typically text with many people.

6. Almost immediately, Daniel asked Student to sell him Student's prescription medications. At that time Student was taking Lamictal (a mood stabilizer), Depakote (for bi-polar disorder) and Clonazepam (for anxiety). Student did not sell Daniel his medications. On August 17, 2012, Daniel asked Student to get him some pot and gave Student \$20 to buy it. Daniel told Student he desperately needed the pot because he was having family problems and he needed something to help him. On Saturday, August 18, 2012, Daniel sent Student six text messages. Student sent Daniel five text messages.<sup>1</sup>

7. On August 20, 2012, Mother dropped Student off at school. Student was wearing a short sleeved t-shirt. Student did not have any injuries on his arm when she dropped him off. In third period English class, Student's teacher, Mary Venittelli, saw what she thought to be an infected, raw, and sore wound on Student's arm. She instructed her aide to take Student to the nurse's office. Ms. Venittelli thought the injury was self-inflicted.

8. Mother received a call from school around 11:00 a.m. She was told a classroom aide brought Student to the office with what appeared to be a fresh burn on his forearm. She was told the wound would be dressed and Student would be sent back to class. Father took Student to get medical care after school. Student told his Mother he burned himself at school with a cigarette lighter.

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<sup>1</sup> Father obtained a list of the incoming and outgoing text messages from his telephone bill. Father was unable to obtain the content of the text messages before the hearing.

Student saw his therapist within a day or two of the burn incident. He told his therapist that he burned himself because he was having anxiety at school. The therapist, Jason Agnetti, viewed this as a regression to self- injurious behavior caused by anxiety. The burn was an escalation of previous self- injurious behaviors.

9. Mother spoke to Jesus Mondragon, the school psychologist, about the burn incident. She asked CHS to hold an IEP meeting to address issues raised by the burn incident.

10. On Saturday September 1, 2012, Daniel sent Student five text messages. Student sent Daniel three messages. They exchanged messages on Saturday, September 8. On Monday, September 10, 2012, Daniel and Student each sent the other nine text messages between the hours of 2:52 p.m. and 7:36 p.m. On Tuesday, September 11, 2012, Daniel sent Student four messages between the hours of 6:30 a.m. and 7:07 a.m., another message at 12:17 p.m. and seven messages between 4:05 p.m. and 5:25 p.m. Student responded five times.

11. On Wednesday, September 12, 2012, at 6:30 a.m., Daniel sent Student a text message. They exchanged five more texts before 7:02 a.m. Later that day, approximately a month after Daniel gave Student the \$20, Student brought the marijuana to school and gave it to Daniel.

12. Daniel continued to exchange text messages with Student; sending four on Sunday, September 16 and receiving one reply, two on September 20, three on Sunday September 23 and receiving two replies, and 14 more receiving eight replies.

13. On October 5, 2012, Daniel sent his last text message to Student at 7:10 a.m. Later that day at school, Student brought marijuana to school and gave

it to Daniel. As with the first sale, the second sale was initiated by Daniel and accompanied by \$20.

14. Student was arrested at CHS at 8:30 the morning of December 11, 2012. Parent's learned of the arrest when Student did not come home from school that day. Parents did not see Student until two days later. Student was suspended from CHS on December 12, 2012.

#### STUDENT'S BEHAVIORS AND IEP IMPLEMENTATION AT CHS

15. CHS held IEP team meetings on September 7, 2012, and October 2, 2012. The team meetings were attended by Ms. Venittelli, Bridget Denton (Transition Services), James Taylor (art teacher), Laura Day (SLP), Delfina Gomez (counselor), Dennis Amador (algebra teacher), Jesus Mondragon, Dave Carlson (photography teacher), Dianne Cox (administrator), and Parents. As a result of the meetings, Student's counseling was increased to weekly sessions for a month in order to "determine triggers or signs before things became too stressful" for Student and additional accommodations in math were provided. Otherwise, the offer of FAPE was the same as the May 2012 IEP. Parents consented to the IEP.

16. Ms. Venittelli was Student's case carrier, as well as Student's English teacher. Ms. Venittelli had been a teacher for 16 years, nine years at CHS. She held a B.A. and single subject credential in English, and credentials in administration, special education and autism. Ms. Venittelli observed Student's "bad boy" persona in her English class. She knew that this "bad boy" behavior was addressed in Student's IEP. On November 12, 2012, Student prepared an assignment that concerned Ms. Venittelli. The class read a novel about a young man who stole a purse from an old woman who had treated the young man kindly. The class was assigned to write a letter to the old woman from the young man as if it was twenty years later. Student wrote that he was sorry he tried to

steal her purse, but explained by writing that he should have run faster to avoid being caught. Student created a number of hardship reasons to justify the theft. Ms. Venittelli was concerned because, after all the time spent in class discussing the meaning of the story, Student would have the boy steal again. The letter demonstrated that Student did not have the ability to make a correct social inference. The letter showed that Student did not understand how he should have responded. Ms. Venittelli felt that the letter was an effort to show off and preserve his bad boy persona. She addressed this with Student but he shrugged it off.

17. Laura Day had been a speech and language pathologist for two years. She held a B.A., and obtained an M.A. in communication disorders in May 2010. She obtained a certificate of clinical competence in April 2012. Ms. Day was employed by Soliant Health and worked under contract with District on site at CHS three days per week. Ms. Day was assigned to work with Student. She reviewed Student's IEP before she worked with Student and she was aware of goals six and seven. She was the person responsible for those goals. The BSP was not attached to the IEP.<sup>2</sup>

18. Ms. Day saw Student a total of six times. She met with Student and his case carrier on August 31, 2012, for a 30 minute interview. Ms. Day saw Student four times in her 55 minute social skills group and once on a group activity to a fast food restaurant. The social skills group sessions involved discussion of the topic of the day. Ms. Day did not provide any individual services

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<sup>2</sup> The BSP was not in District's file before the manifestation determination review at issue in this matter. The first time any of Student's teachers or service providers saw Student's BSP was after this matter was filed in January 2013.



to Student. On October 12, 2012, the group discussed bullying. Student was angry, aggressive and used bad, tough boy language during the discussion, e.g., in discussing how Student would handle a bully he would "take them down" and "put the hurt on them." This conduct "raised a red flag" with Ms. Day because Student was usually compliant and polite. Ms. Day called Mother and told her about the comments Student made in her group. According to Ms. Day, Mother told her that Student "says stuff like that" and uses this "tough guy persona to deal with being bullied." Mother gave Ms. Day permission to contact Student's therapist and District had Parent's authorization to speak to him. Ms. Day was aware of the burn incident and concerned about self-injurious behavior. Ms. Day did nothing further to address the bad, tough guy persona or to address self-injury. She did not work on either goal number six or seven with Student. She did not track Student's progress because she did not have enough experience with him.

19. Amber Maldonado had been a speech and language pathologist for almost nine years. She held a B.A. and an M.A. in communication disorders. She obtained her California license in 2012. Ms. Maldonado was employed by Top Echelon in 2012 and worked under contract with District on site at CHS five days a week. Ms. Maldonado reviewed Student's IEP when she first came to CHS. She typed his goals so she could have them in front of her during each session. Ms. Maldonado requested Student's assessments but did not receive them. She did not know the nature and extent of Student's impairments and this concerned her. She was aware the IEP provided individual and group services.

20. Ms. Maldonado first saw Student at the group activity outing to the fast food restaurant with Ms. Day. Ms. Day's group was large so the group was divided between Ms. Day and Ms. Maldonado. Student attended Ms.

Maldonado's social skills group three times. Ms. Maldonado did not provide any individual services. Ms. Maldonado and Ms. Day discussed Student's conduct which occurred during the group session on the topic of bullying. Student also used bad, tough boy language in Ms. Maldonado's group and appeared "noticeably overly confident." When Ms. Maldonado asked Student if this was appropriate, he acknowledged that it was inappropriate but justified his conduct because, he said, he was very confident in himself. Ms. Maldonado felt that Student's over confidence was his way to maneuver within the group and maintain his bad boy persona. Student chose behavior to match his language and persona. He was quick to apologize when redirected.

21. Delfina Gomez had been a behavioral health counselor in high school and middle school for 13 years. She held a B.A. in therapeutic counseling, an M.A. in educational psychology and a pupil personnel services credential. Ms. Gomez saw Student six times between September 10, 2012, and December 10, 2012. She did not provide any counseling during the month of November. On October 15, 2012, Ms. Gomez emailed Ms. Venitelli about an incident in which Student, reportedly, got out of a car being driven by a Parent and punched a student who had been bullying Student's younger brother. Ms. Gomez discussed the incident with Student. She asked him whether there was another way to handle the situation. He told her the student deserved it.

#### MANIFESTATION DETERMINATION REVIEW

22. District scheduled a Manifestation Determination Review (MDR) team meeting for December 19, 2012. Ms. Venittelli, as case carrier, was responsible for preparations for the meeting. The day before the meeting, Ms. Venittelli prepared a written report. The report noted the disciplinary actions that occurred at TVHS and that there had been no disciplinary actions at CHS. The

report contained a list of assessments, evaluations and materials reviewed by the team during the MDR. Ms. Venittelli did not ask any of Student's teachers to prepare reports for the MDR. She invited Mr. Carlson, Student's photography teacher, and Mr. Amador, Student's algebra teacher, to attend. Mr. Amador was unable to attend. Ms. Venittelli did not invite any other teachers. Parents were notified of the MDR meeting by telephone the day before the meeting.

23. Neither Ms. Day nor Ms. Maldonado attended the MDR meeting. Ms. Day had not been invited, and at hearing, did not know what a manifestation determination was. Ms. Maldonado was not invited to the MDR meeting until mid to late morning on the day of the one o'clock meeting. Ms. Maldonado informed Ms. Venittelli that she had an appointment and she would not be able to attend. Ms. Venittelli asked Ms. Maldonado to prepare a written report for the meeting. Ms. Maldonado thought the only criteria for determining whether Student's conduct was a manifestation of Student's disability was whether Student knew right from wrong. Ms. Maldonado prepared the report and reviewed the report with Ms. Day. The report was submitted to Ms. Venittelli over both names.

24. David Barret, Student's special education teacher, knew Student had been arrested and that an MDR meeting was scheduled. He knew the purpose of the meeting was to determine whether Student's conduct was the result of his disability. On the day of the meeting, Mr. Barret went early and spoke to several participants, including Ms. Venittelli, even though he had not been invited to the meeting. Parents were not present. Mr. Barret wanted to share some things about Student's personality and to ask for leniency. He explained that Student was in a difficult spot. The social situation would have been difficult for a general education student but, with a disabled student, it would be even more difficult. Ms. Venittelli agreed with Mr. Barret. Ms. Venittelli felt, considering Student's

persona, his desire to appear cool and to belong, that it would make sense that someone who spent time with him and approved his look, speech and persona, had something to do with his decision making. In her opinion, the undercover police officer did that for him. Ms. Venittelli did not share the conversation she had with Mr. Barret during the MDR meeting.

25. Mr. Barret had been a teacher for 33 years and at CHS since the school started in 1997. There were 15 students in his Government Life Skills class. Student was doing well in his class. Mr. Barret's testimony was credible and persuasive because he was a sincere, concerned and experienced teacher, and he observed Student in a small class on a daily basis over the course of the semester.

26. Parents received written notice of the MDR when they arrived at the meeting. The notice stated the purpose of the review was "[t]o review the relationship between the student's disability and the behavior subject to disciplinary action; to adjust the student's IEP; conduct a Functional Behavioral Assessment (FBA) or Functional Analysis Assessment (FAA) and/or develop or review a Positive Behavior Support Plan (PBSP) and/or a Positive Behavior Intervention Plan (PBIP), if appropriate." The notice further provided, if the disciplinary action being considered was expulsion, the team could consider whether to recommend an alternative educational setting.

27. The participants in the MDR meeting were Christine Fonseca, District Program Specialist, Michael Zides, Assistant Principal, Ms. Venittelli, Ms. Gomez, Mr. Carlson, Mr. Mondragon, Student, Parents and their advocate. Parents did not know who would attend the meeting until they arrived at the meeting. Mr. Zides instructed the team to focus on Student's conduct on the dates of the sales in light of two special education eligibility categories, autism and speech and language impairment.

28. Christine Fonseca was a school psychologist for 13 and a half years and a program specialist with District for 11 months. She held a B.A. in psychology and an M.A. Ms. Fonseca estimated that she had participated in more than 60 and less than 80 MDRs over the years. Ms. Fonseca knew of Student from middle school but she did not work with Student in high school. Ms. Fonseca did not recall whether the team discussed the burn or middle school incidents, or a BSP. She did not read any of Student's records. She did not recall any discussion of the characteristics of bi-polar disorder, anxiety disorder, Tourette's disorder, or impulse control disorder, although she did recall that Parents and their advocate brought this up. Ms. Fonseca opined that there was no connection between the diagnosis of autism and the sale of drugs because the level of planning necessary to execute a sale on campus which requires getting the drugs, setting a price, and producing the drugs, is inconsistent with autism. She was not aware Student did not initiate the sales and did not set the price, or whether anyone had put pressure on him. She did not consider the text messages to be relevant. Ms. Fonseca believed the MDR focus was narrow. She considered the violation of the school code of conduct, the autism and speech and language impairment eligibility categories, and whether the IEP was implemented.

29. Ms. Gomez advised the team that Student could explain the difference between right and wrong. She referenced the incident that occurred at Student's younger brother's middle school. She informed the team members that Student knew when he punched the student that he would hurt him. He acknowledged he would not like it if someone did that to him but he thought he was justified. Student knew it was wrong but he did it anyway.

30. Mr. Mondragon was the school psychologist at CHS. He was a school psychologist in elementary, middle and high school for 22 years, seven

years at CHS. He held a B.A. in aviation management, an M.A in counseling and a pupil personnel credential. Mr. Mondragon's responsibilities included participation in assessments, IEP team meetings, three year reviews, MDR meetings, student support groups for emotional issues, interim placement decisions, and preparing draft BSPs. He also provided counseling, collaborated on crisis interventions for behavior issues, and developed and modified IEP's. He worked with hundreds of students. He estimated he participated in about eight high school MDRs per year. His role was to help parents understand the process, lead the meeting, give parents their rights, and go through the process to answer the questions.

31. Mr. Mondragon met Student when his Father enrolled him at CHS. His impression was that Student was sociable, made good eye contact, was agreeable, respectful and an "all around nice kid." He spoke to Student the next week to see how things were going. Student told him he liked his classes and his teachers. He saw Student casually, spoke to him about once a week, and all his contacts with Student were positive. Mr. Mondragon's biggest concern was whether the case carrier was communicating with Parents and whether Student's math accommodations were being implemented. He did not believe Student's autism caused Student to sell marijuana because Student was a high functioning autistic student and it takes a good deal of preparation to plan, buy, allocate, and distribute drugs for profit.

32. The testimony of Ms. Fonseca, Ms. Gomez, Ms. Venittelli and Mr. Mondragon as to whether the report submitted by Ms. Maldonado and Ms. Day was actually read at the meeting was contradictory. There was no evidence anyone discussed the report during the meeting. The report included generalizations about the characteristics of individuals on the autism spectrum

and concluded that it was understandable that Student may have misinterpreted the friendship offered by the undercover officer. The report relayed that Student often displayed an overly self-confident manner as a compensatory strategy, leading to social scenarios where he would choose a behavior to maintain his persona. The report concluded Student had the cognitive/intellectual ability to understand right from wrong.

33. Ms. Fonseca called Michael Hubbard during the meeting. Mr. Hubbard was Director of Child Welfare and Attendance for four years. Only Mr. Hubbard, the Superintendent and the President of the School Board, were aware of the undercover operation. Mr. Hubbard did not know Student personally, although he knew Student was under investigation and he was aware Student was a special needs student. Mr. Hubbard did not know the undercover officer asked Student to buy marijuana for him. He had no personal knowledge of the sale transactions. He was not aware of the burn incident. Mr. Hubbard informed Ms. Fonseca that the committee should consider only the conduct just prior to the sale. He testified at hearing that he did not know whether circumstances leading up to the arrest were relevant to determine whether the conduct was a manifestation of Student's disability.

34. Parents felt District was not taking Student's complete diagnosis into consideration and that District should take the totality of the relationship between the undercover officer and Student leading up to the sale into account. Student was socially naïve and vulnerable. He was starved for friendship. His disabilities manifested in poor choices and inappropriate harmful behavior.

35. At the end of the meeting the District members of the team were asked whether the sale of marijuana was caused by, or had a direct and substantial relationship to Student's disability. Ms. Fonseca, Ms. Gomez, Mr.

Mondragon and Ms. Venittelli concluded that the conduct was not a manifestation of Student's disability. At hearing, Ms. Venittelli testified Student's conduct was substantially related to his disabilities, but she did not know about whether the conduct was directly related to his disabilities. The team members were then asked whether the sale of marijuana was the direct result of District's failure to implement the IEP. Ms. Fonseca, Ms. Gomez, Ms. Venittelli and Mr. Mondragon concluded Student's conduct was not the result of District's failure to implement Student's IEP because District had implemented the IEP. At hearing, Mr. Mondragon acknowledged that the failure to provide counseling services would constitute a failure to implement Student's IEP. Mr. Carlson said he did not feel qualified to offer an opinion.

36. The testimony of Ms. Fonseca, Ms. Gomez, Ms. Venittelli and Mr. Mondragon was not persuasive. Their testimony was inconsistent as to what was discussed and considered during the meeting. They did not consider Student's behavior leading up to the sales and they did not know the facts of the transaction. Their focus was directed narrowly to a consideration of only Student's two eligibility criteria and his conduct on September 12, and October 5, 2012. There was no evidence the District's members of the MDR team discussed or considered whether to adjust Student's IEP or BSP, whether to conduct an FBA or FAA, or whether to recommend any alternative educational setting.

#### STUDENT'S WITNESSES AND EXPERT

37. Several of Student's teachers who were not invited to the MDR meeting testified at the hearing. In addition to Mr. Barret, these teachers included Tom Leach, and James Jaret Taylor III. Mr. Amador, who did not attend the meeting, and campus security officer Rosario Castaneda also testified at the hearing.



38. Tom Leach taught Student in his special education physical science class. Mr. Leach had been a teacher for 13 years, including 7 years at CHS. Mr. Leach held a special education credential with a spectrum certificate, a B.A. and an M.A. in education. Student was doing well in his class, he was a "great kid," polite and trusting. Mr. Leach observed Student to have difficulty in socialization, to struggle with peer interactions, and to have trouble initiating and keeping up with conversations. Student did not make eye contact initially, but that improved over time. Student was slow to process and respond to questions. Student was a literal thinker and had trouble drawing inferences. Student did not have many friends, although he had a girlfriend in Mr. Leach's class. Mr. Leach felt Student wanted to have a friend. Mr. Leach opined that Student's disabilities made him vulnerable to an adult trying to persuade him to do something wrong. Mr. Leach was a credible witness, a well-qualified teacher, and observed Student on a daily basis over the course of the semester.

39. James Jaret Taylor III taught Student in his second period art class. The art class had both general education and special education students. Mr. Taylor held an M.F.A. and a single subject credential in art. Mr. Taylor taught for six years at CHS. He had worked with autistic children for 40 years. Student's disabilities were immediately noticeable. He spoke very slowly, his words were slurred and drawn out. Student's social interaction was at a very low level and lacked intellectual and social content. Student had very poor processing skills. He required modification of the assignments in order to complete the tasks assigned and he was not graded the same way as typical students. Student needed to have things explained, tasks broken into small simple parts and repetition. Mr. Taylor observed Student talking to Daniel in the classroom and Student would occasionally go sit at Daniel's table. In Mr. Taylor's opinion, Student's conduct

resulting in school discipline was “somewhat” related to Student’s disability because Student did not have the understanding other students did. Mr. Taylor was a credible witness with substantial experience with autistic children.

40. Martin Amador taught Student in his Algebra Essentials class. The class had both general education and special education students. Mr. Amador had 31 years of experience as a teacher, 15 years at CHS. Before his teaching career, he obtained a B.A., served in the Marine Corp and obtained a J.D. in 1981. Mr. Amador identified, early on, that Student was a special needs student by his mannerisms and his speech. Student had difficulty with the subject. Mr. Amador tutored Student four or five times at Student’s home. Mr. Amador observed Student alone on campus at a football game. Student did not have friends in class and Mr. Amador never saw him with peers at home or at school. Mr. Amador thought Student was lonely. Mr. Amador opined that Student was more susceptible to influence than students without his disabilities. Mr. Amador’s opinion was supported by his observations that Student responded “really really” well to positive feedback, had poor problem solving skills, seldom interacted with his peers, and had difficulty asking for help. Student would tense up, hold his hands very tightly and squeeze them together when he was anxious. Mr. Amador was an experienced teacher and a credible witness because he had observed Student in his algebra class, at home in his tutoring sessions, and during casual activity on campus.

41. Campus Security Officer Rosario Castaneda was familiar with Student. She was posted near Student’s fifth period classroom. She saw him and spoke to him when he took bathroom breaks after lunch. It was immediately obvious Student was a special needs student. He was slow to process and answer questions. He spoke slowly and he only occasionally made eye contact. She could

tell he was a special needs student by his mannerisms. She thought he was “a nice kid.”

42. Jason Agnetti, L.M.F.T., was Student’s therapist. Mr. Agnetti held a B.A. in psychology, an M.A. in clinical psychology, and he was a licensed Marriage and Family Therapist. From May 1999 through the time of hearing, Mr. Agnetti had extensive experience with case management, psycho-educational plans, IEPs, and behavior management. He had provided therapy for adolescent boys in residential care, and therapy for severely emotionally disturbed, learning disabled and other health impaired children.

43. Mr. Agnetti had worked with at least 10 students with Asperger’s disorder, or high functioning autism. General characteristics of the disorder include: inappropriate interaction, odd rigid thinking, lack of empathy, perseverations, lack of interaction, and problems knowing content from context. Mr. Agnetti illustrated these characteristics by example, e.g., if a child with Asperger’s disorder heard a stranger comment “it’s cold today” the child would hear this as a statement about the weather and not recognize this as an effort to start a conversation.

44. Mr. Agnetti saw Student on a weekly basis without a break in treatment from December 1999 through the date he testified at the hearing. Student initially came to him for anger management, social interaction assistance and to help develop emotional vocabulary. Student was banging his head, scratching himself, snapping his fingers, and acting aggressively with family and a pet.

45. Student had difficulty forming friendships. He had no friends at TVHS. Student struggled to develop an identity. He began to develop an identity as a “bro” in his sophomore year at TVHS. Student employed dress, mannerisms,

music and language to develop this persona to overcome feelings of inferiority. The persona gave Student a feeling of power and strength. Mr. Agnetti believed that Student's effort to find an identity was positive but that this particular identity was false. Student's "bro" persona gave Student the sense that he could act inappropriately. Mr. Agnetti cited particular examples, including the incident where Student jumped out of a car and hit another student at his brother's middle school, an incident where Student threw a trash can at a teacher and Student's aggressive reactions when Parents made a reasonable request at home.

46. Student's transfer to CHS was a difficult transition for Student. During the first semester at CHS, a new house, new school and different people caused Student significant anxiety. Student told Mr. Agnetti about burning himself at school a day or two after it happened. Student said he burned himself because he had anxiety at school. During that time, Student was particularly vulnerable to social stressors. Mr. Mondragon called Mr. Agnetti and spoke to him briefly about two weeks after Parent provided District with authorization. Mr. Mondragon testified he never spoke to Mr. Agnetti. Mr. Agnetti's ability to testify consistently in detail about specifics was more credible than Mr. Mondragon's testimony.

47. According to Mr. Agnetti, the primary features of Asperger's Disorder and Impulse Control Disorder, along with Student's inability to regulate his moods, left Student vulnerable to social stressors and pressures leading Student into poor decision making. Mr. Agnetti opined that Student understood the difference between right and wrong in an abstract environment but when faced with external variables, Student's ability to make proper choices was impaired. Examples of this impairment included the incident at the middle school, the incident with the trash can, and an incident with the family pet. He further

opined Student was unable to formulate an appropriate response in difficult social situations, he was unable to establish appropriate boundaries in a social context, and he was unable to control his aggressive impulses as a result of his disabilities. Student was fearful and anxious due to anxiety and bi-polar disorder. Mr. Agnetti concluded that Student's conduct in selling marijuana to the undercover officer was caused by and had a direct and substantial relationship to his disabilities. Mr. Agnetti was a very credible witness. He was well qualified and had substantial relevant experience in clinical practice. His opinions were based on years of weekly therapy with Student and supported by specific examples of Student's behaviors.

## LEGAL CONCLUSIONS

1. Student appeals from District's determination that the conduct resulting in his expulsion was not a manifestation of his disability. Student contends his conduct was caused by, or had a direct and substantial relationship to, Student's autism and unique needs and was the direct result of District's failure to implement his IEP. Student further contends the actions of the undercover police officer constituted entrapment and the two drug sales were the result of this entrapment.<sup>3</sup> District contends that the manifestation determination was correct. District further contends that Student's IEP was implemented because supports and strategies to manage task avoidance

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<sup>3</sup> District disputes whether the conduct of the undercover police officer constituted entrapment. OAH does not have jurisdiction over this issue and this Decision is limited to whether District's manifestation determination was correct. This decision makes no legal or factual findings as to whether the undercover officer's conduct constituted entrapment.

behavior contained in the BSP were implemented. For the reasons set forth below, the manifestation determination is reversed. Under the circumstances, Student's conduct was a manifestation of his disability.

2. As the petitioning party, Student has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

3. Suspension or expulsion of special education students is governed by title 20 United States Code section 1415(k) and title 34 Code of Federal Regulations, part 300.350 (2006) et seq. (See Ed. Code, § 48915.5.) If a special education student violates a code of student conduct, school personnel may remove the student from his or her educational placement without providing services for a period not to exceed 10 days per school year, provided typical children are not provided services during disciplinary removal. (20 U.S.C. § 1415(k)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3) (2006).)<sup>4</sup> For disciplinary changes in placement greater than 10 consecutive school days (or that are a pattern that amounts to a change of placement), the disciplinary measures applicable to students without disabilities may be applied to a special education student if the conduct resulting in discipline is determined not to have been a manifestation of the special education student's disability. (20 U.S.C. § 1415(k)(C); 34 C.F.R. §§ 300.530(c) & 300.536(a)(1),(2).)

4. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file,

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<sup>4</sup>All references to the Code of Federal Regulations are to the 2006 version.

including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the student's conduct was a manifestation of the student's disability. (20 U.S.C. § 1415(k)(E); 34 C.F.R. § 300.530(e)(1).) Conduct is a manifestation of the student's disability: (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP. (34 C.F.R. § 300.530(e)(1) & (2).)

5. A parent of a special education student may appeal a school district's determination that particular conduct resulting in a disciplinary change of placement was not a manifestation of the child's disability by requesting an expedited due process hearing. (20 U.S.C. § 1415(k)(H)(3)(A); 34 C.F.R. 300.532(a) & (c).) The 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)(H)(4)(B); 34 C.F.R. 300.532(c)(2).) The ALJ may order that a special education student be returned to his or her original placement if the ALJ determines that the conduct was a manifestation of the student's disability. (20 U.S.C. § 1415(k)(H)(3)(B); 34 C.F.R. 300.532(a) & (c).)

6. The California Code of Regulations sets out the eligibility criteria for autistic like behaviors, in relevant part, to include but not limited to, a combination of:

- (1) An inability to use oral language for appropriate communication.
- (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.
- (3) An obsession to maintain sameness.

(4) Extreme preoccupation with objects or inappropriate use of objects or both.

(5) Extreme resistance to controls.

(6) Displays peculiar motoric mannerisms and motility patterns.

(7) Self-stimulating, ritualistic behavior.

(Cal. Code Regs., tit. 5 § 3030, subd. (g).)

7. A language and speech disorder is defined as “difficulty understanding or using spoken language to such an extent that it adversely affects his or her educational performance and cannot be corrected without special education and related services.” (Ed. Code, §56333.) The California Code of Regulations sets out the eligibility criteria for language or speech disorder, in relevant part, as where the pupil displays reduced intelligibility or an inability to use the speech mechanism which significantly interferes with communication and attracts adverse attention. (Cal. Code Regs., tit. 5 § 3030, subd. (c).)

8. The Diagnostic and Statistical Manual of Mental Disorders, Text Revision (4th ed. 2000) (DSM-IV) sets out the relevant diagnostic criteria for Autistic Disorder to include a qualitative impairment in social interaction as manifested by marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, failure to develop peer relationships appropriate to developmental level, lack of social reciprocity, and marked impairment in the ability to initiate or sustain a conversation with others. (DSM-IV, *supra*, at p. 75.)

9. Relevant diagnostic criteria for Asperger’s Disorder include the characteristics set forth in paragraph 6 above and, in addition, clinically significant impairment in social, occupational, or other important areas of functioning. (DSM-IV, *supra*, at p. 84.)



10. Here, Student met his burden of demonstrating that the conduct on September 12, and October 5, 2012, was caused by, or had a direct and substantial relationship to, Student's disabilities. Mr. Agnetti, a highly qualified therapist, met with Student weekly for 12 years. He understood the reasons behind Student's behaviors. His logical conclusions applied standard diagnostic criteria for autism, Asperger's disorder (both of which involve impairments in social and pragmatic language), and were supported by the facts. Mr. Agnetti's opinions carried more weight than the opinions of Mr. Mondragon. Mr. Mondragon had only casual superficial contact with Student and his testimony demonstrated that his analysis of the discipline incident was not focused on, and completely ignored, the social judgment, pragmatic language, and decision-making deficits caused by Student's disabilities. (Factual Findings 3, 5-8, 21, 30-32, 35-36, 42-47; Legal Conclusions 2, 4, 8-9.)

11. The evidence showed that at the time of the marijuana incidents, Student was struggling socially, was anxious, and was demonstrating poor judgment during the transition to a new campus, all of which were related to his autism spectrum disorder. Student's self-inflicted cigarette burn, the assault upon another student at his brother's middle school, and the adoption of a "bad boy" persona to ward off bullying, were all behaviors related to Student's disabilities that occurred at CHS over the same period of time the undercover officer befriended Student and initiated the sales. Student's teachers described incidents of Student's inability to resist poor choices and control his behavior even though he knew the difference between right and wrong. A tangible example of Student's flawed social judgment from his autism was Student's inability to meet Ms. Venettelli's expectation on the writing assignment about writing a letter to express remorse about the fictional purse theft. As another example, Student

acknowledged inappropriate "over-confidence" and threatening behavior in the social skills group. The effect his bad, tough boy persona had on his language and choices demonstrated that Student could not be expected to demonstrate the same level of social judgment as typical peers when faced with the difficult problem of a new, and badly desired "friend," i.e. Daniel, the undercover police officer, stating strongly that he "needed" marijuana. As credibly explained by Mr. Agnetti, Student's lack of insight and inappropriate reactions were autistic-like behaviors. Student's autistic-like behaviors were entirely consistent with Student's eligibility under Education Code section 56333, California Code of Regulations section 3030 subdivision (c), and the diagnostic criteria set out in the DSM-IV. Student may have had the intellectual capacity to understand right from wrong and to verbalize those principles in the controlled, contained, classroom environment. However, he lacked the ability to exercise the correct judgment in social problem scenarios in a school setting. District placed Student in an extremely difficult social problem scenario that would have been difficult even for typical high school students. Even though Mr. Hubbard knew Student was a special needs student, he knew Student was targeted in the undercover operation and that Student was going to be arrested, District did nothing. Moreover, District refused to consider these factors, in light of the needs reflected in Student's IEP, at the MDR meeting. (Factual Findings 3-8, 10, 16-18, 20-21, 30 -36, 42-47; Legal Conclusions 2, 4, 6-9.)

12. Student further demonstrated that his conduct was also caused by, or had a direct and substantial relationship to, his Asperger's, bi-polar and anxiety disorders. Mr. Agnetti explained the significance of Asperger's, bi-polar and anxiety disorders on the development and function of Student's bad, tough boy persona, as well as his vulnerability to social stressors and peer pressure.

Student was unable to establish appropriate boundaries in a social context. As a result, Student was unable to formulate an appropriate response to the choices created by the undercover officer. Student's teachers and speech pathologists at CHS described particular behaviors, consistent with Mr. Agnetti's analysis, that took place over the same period of time the undercover officer befriended Student and initiated the sales. For example, the burn incident occurred within three days of the day Daniel told Student he desperately needed some pot and gave Student \$20 to buy it for him. The burn indicated a regression to and an escalation of Student's self-injurious behavior due to anxiety. Student's difficulty in social language pragmatics and his poor processing skills, combined with his desire to have a friend, fit in and be cool, caused him to accept Daniel's words literally as a plea from a close friend that he could not ignore or deflect. Given the numerous negative impacts of Student's disabilities on his social abilities and judgment, and District's conduct in leaving Student to fend for himself, anxious and alone, against an undercover police officer, Student has overwhelmingly demonstrated that his actions were a manifestation of his disability. (Factual Findings 3, 5-8, 10-13, 16, 18-19, 24, 42-48; Legal Conclusions 2-5.)

13. Student has also demonstrated that his conduct was a result of District's failure to implement his IEP, and as such, the conduct was a manifestation of his disability. The evidence was undisputed that District failed to implement Student's IEP in two critical areas directly related to the conduct at issue. Student did not receive any counseling from August 15, 2012, until September 10, 2012, even though his IEP required two 20 minute sessions per month. During the critical period between August 15, 2012, and September 10, 2012; Student was confronted with serious social and behavioral challenges. He was befriended by the undercover officer, the officer asked him to sell his

prescription medications, and then after Student refused to sell his prescription medications, the undercover officer asked Student to buy him pot and gave Student \$20 to do so. Within three days of the undercover officer's requests, Student burned himself due to his anxiety. Ultimately, Student was persuaded to buy marijuana for someone he thought was a friend who desperately needed this drug, and brought it to school for him. The evidence is also undisputed that Student did not receive any individual speech and language services and his participation in the social skills group did not address goals six and seven, his two speech and language goals. These goals directly related to Student's social, communication and processing deficits and his inability to manage social problems in school scenarios. The threatening behavior in the social skills group raised a "red flag" with Ms. Day, the professional responsible for his speech and language goals. However, although she was concerned about this behavior, she did not provide any individual sessions to address the behavior as would have been appropriate under the IEP. Finally, the fact that Student's instructors and therapists were unaware that District had knowingly exposed Student to difficult social interactions with an adult undercover police officer, intensified the critical need for them to have properly implemented his IEP in the areas of counseling and speech and language. Accordingly, Student's conduct that resulted in discipline is directly attributable to the District's failure to implement his IEP. (Factual Findings 2-4, 9, 16-21; Legal Conclusions 2-5.)

14. District argues, to no avail, that Student's IEP was fully implemented because supports and strategies to manage task avoidance behavior contained in the BSP were used by his teachers even though the BSP was not attached to the IEP. Whether the BSP provided specific interventions for task avoidance is irrelevant for two reasons. First, the evidence showed none of Student's teachers

or service providers saw the BSP, demonstrating that it could not have been implemented. Second, implementation of strategies around task avoidance, even if done, was not related to helping Student navigate the situation District had put him in, i.e., having to make difficult social judgments about a fellow student who was actually an undercover adult police officer. As discussed above, it was not the failure to implement the BSP that was directly related to the conduct, it was District's failure to implement the counseling and language components of the IEP when District had put Student in such a difficult situation that leads to the conclusion that Student's conduct is a result of District not implementing the IEP. (Factual Findings 3-4, 16-21; Legal Conclusion 4.)

15. In light of the above, the determination that Student's conduct was not a manifestation of his disability is reversed. (Factual Findings 1- 47; Legal Conclusions 2-9.)

## ORDER

1. District's manifestation determination that Student's sale of marijuana on September 12, 2012, and October 5, 2012, was not a manifestation of his disability is reversed.

2. District shall reinstate Student's enrollment at CHS within five days of this decision.

## 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. Student 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: March 8, 2013

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MARIAN H. TULLY

Administrative Law Judge

Office of Administrative Hearings