BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

UPLAND UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 20220807488§

ORDER GRANTING MOTION FOR STAY PUT

SEPTEMBER 56, 2022

On August 25, 2022, Parents, on behalf of Student, filed a complaint for due process with the Office of Administrative Hearings, naming Upland Unified School District as respondent. Student's complaint included an appeal from a manifestation determination. (20 U.S.C. § 1415(k).) OAH therefore set an expedited hearing on appeal from the manifestation determination process (20 U.S.C. § 1415(k)(3)) for September 13 through 15, 2022, and a due process hearing on Student's allegations that Upland denied Student a FAPE for October 11 through 13, 2022.

Student also filed a Motion for Stay Put on August 25, 2022. On August 26, 2022, Upland filed a "Notice of Non-Opposition with Qualifications" combined with a motion to "unexpedite" the case. On August 29, 2022, Student filed a reply seeking an immediate stay put.

On September 2, 2022, Administrative Law Judge Clifford H. Woosley held an expedited prehearing conference by videoconference. Attorney David W. German appeared on behalf of Student and attorneys Christopher Fernandes and Jennifer Aardema appeared on behalf of Upland. The parties' counsel argued the motions at the expedited prehearing conference. ALJ Woosley denied Upland's motion to "unexpedite" and declare that Student's complaint did not include issues requiring an expedited hearing. The expedited hearing remains as scheduled. Student's motion for stay put was submitted for ruling.

DISCUSSION AND ANALYSIS

Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); Ed.Code, § 56505 subd. (d).) This is referred to as "stay put." For purposes of stay put, the current educational placement is typically the last agreed upon and implemented individualized educational program, called IEP, placement prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

In California, "specific educational placement" is defined as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs," as specified in the IEP. (Cal. Code Regs. tit. 5, § 3042, subd. (a).)

Student is a "child with a disability" and has an individualized education program with Upland. Student's last agreed upon and implemented IEP was May 7, 2021. The IEP places Student on a comprehensive high school campus within the general education setting, with 275 minutes a week when Student receives academic support in

a separate room on campus. The IEP includes a behavior intervention plan which addresses Student's inappropriate statements and not maintaining comfortable personal space involving Student's peers.

On or about January 13, 2022, another student (the complainant) filed a complaint with Upland alleging Student had inappropriately touched her in a sexual manner, in October 2021. Upland initiated a "Title IX" investigation, pursuant to 34 Code of Federal Regulations parts 106.44 and 106.45, regarding the complainant's allegations involving Student. On or about January 18, 2022, Upland informed Student and Parents that Student could not attend school pending the outcome of the Title IX investigation. Upland exercised the regulation's emergency removal option, finding that Student's return to his education program on the comprehensive high school campus posed an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment. (34 C.F.R. § 106.44(c).)

Under the IDEA, when a child with a disability violates the code of student conduct, and school personnel seek a placement change exceeding ten school days, the local educational agency, the parents, and relevant members of the IEP team shall review all relevant information and determine if the student's conduct was a manifestation of the child's disability. (20 U.S.C. 1415(k)(1); 34 C.F.R. § 300.530(e).) Here, Upland convened a manifestation determination meeting on February 2, 2022. The team determined Student's conduct was a manifestation of Student's disability. (20 U.S.C. 1415(k)(1)(E); 34 C.F.R. § 300.530(e).)

The IDEA provides that when a child's behavior, which violated a code of student conduct, is deemed a manifestation of the child's disability, the child's IEP team must conduct a functional behavior assessment (if not recently done) and create or amend the child's behavior intervention plan. Additionally, the child shall be returned to the

placement from which the child was removed. (20 U.S.C. 1415(k)(1)(F); 34 C.F.R. § 300.530(f).) Upland did not convene Student's IEP team to adjust Student's IEP or amend Student behavior intervention plan. Upland has not returned Student to his IEP placement.

The IDEA dictates that school personnel may remove a student to an interim alternative educational setting for not more than 45 school days, even if the behavior is a manifestation of the student's disability, in extraordinary circumstances involving: carrying or possessing of weapon: possessing, using or selling illegal drugs; or the infliction of serious bodily injury upon another person. (20 U.S.C. § 1415(k)(1)(G); See also 34 C.F.R. §§ 300.530(j).)

The IDEA provides that the local educational agency may file an appeal from the manifestation determination when it believes that maintaining the current placement of the child was substantially likely to result to injury to the child or others. The ALJ is authorized to place the child in an interim alternative educational setting for not more than 45 days. Further, the local educational agency may repeat and file again for additional time in an interim setting. (20 U.S.C. 1415(k)(3); 34 C.F.R. § 300.532(a) and (b).) The appeal would be set for hearing within 20 school days of its filing, and final determination within 10 school days after hearing. (20 U.S.C. 1415(k)(4)(B); 34 C.F.R. § 300.532(c).)

Here, Upland did not declare a statutory special circumstance or file an appeal with OAH to seek an order of an interim alternative educational setting. Instead, Upland contended that it was barred from participating in or conducting the IDEA's manifestation process because to do so would violate the Title IX mandate that Upland's grievance process must "[i]nclude a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the

conclusion of the grievance process." (34 C.F.R. § 106.45(b)(1)(iv); see 34 C.F.R. § 106.44(b)(1) [requiring a grievance process that complies with § 106.45].) Upland contends a manifestation review means a finding the Student committed the conduct, which Upland asserts would violate Title IX.

However, the emergency removal section upon which Upland relied in removing Student from his education program includes the proviso that "[t]his provision may not be construed to modify any rights under the Individuals with Disabilities Education Act. . ." (34 C.F.R. § 106.44(c).) Therefore, Title IX's grievance process emergency removal provision and IDEA's manifestation determination process must be interpreted and implemented in a manner that preserves the statutory intent of both.

The Title IX "grievance process" includes an investigation in response to a formal complaint of sexual harassment. Title IX determines if Student's conduct was sexual harassment and IDEA determines if Student's behavior was a manifestation of Student's disabilities. The Title IX grievance process and IDEA's manifestation determination have different purposes and do not conflict. This view is consistent with Title IX's requirement that the emergency removal of Student from his IEP placement did not modify his rights under IDEA.

Upland has admitted not seeking an interim alternative educational setting and filing an appeal, pursuant to the IDEA manifestation statutes and regulations, from Student's February 2, 2022 manifestation determination. Student was therefore entitled to be returned to his IEP placement.

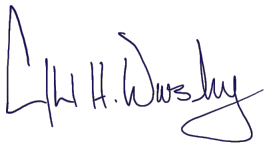
Additionally, Student is entitled to remain in his or her current educational placement, until these due process hearing procedures are complete. (20 U.S.C. §

1415(j); 34 C.F.R. § 300.518(a) (2006); Ed.Code, § 56505 subd. (d).) Student's current educational placement is Student's last agreed to and implemented IEP of May 7, 2021.

ORDER

1. Student's motion for stay put is granted.
2. Upland Unified School District will immediately return Student to his educational placement and implement all accommodations and services, as set forth in Student's May 7, 2021, IEP.

IT IS SO ORDERED.



Clifford H. Woosley
Administrative Law Judge
Office of Administrative Hearings