BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

WESTSIDE UNION SCHOOL DISTRICT.

OAH CASE NUMBER 2023020778

ORDER GRANTING MOTION FOR STAY PUT

MARCH 7, 2023

On February 23, 2023, Student filed a motion for stay put. On February 28, 2023, Westside Union School District filed an opposition. On March 1, 2023, Student filed a reply.

Student contends Westside Union did not follow the proper procedures for extending Student's suspension, and Student is entitled to be returned to her pre-disciplinary placement pending the expedited due process hearing in this matter.

Westside Union argues OAH has no jurisdiction over extended suspensions, which are a matter of State law, and which is under the general education section of the Education Code, not the special education section. Alternatively, Westside Union argues

the suspension is Student's interim alternative educational setting and her stay put pending the expedited due process hearing.

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 education program, called IEP, placement prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

When a child violates the student conduct code and school personnel seek a placement change exceeding 10 school days, the local educational agency, the parent, and the relevant IEP team members shall determine if the conduct was a manifestation of the child's disability. A child's parent may appeal the manifestation determination and request an expedited due process hearing. In such cases, the State or local education agency shall arrange for an expedited hearing. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c).)

An expedited hearing shall occur within 20 school days of the hearing request. (20 U.S.C. § 1415(k); 34 C.F.R. § 300.532.) While the appeal is pending, the child shall remain in the interim alternative educational setting pending the hearing officer's decision or until the alternative placement expires after 45 school days, whichever is first, unless the parent and the local education agency agree otherwise. (Ed. Code, § 56505, subd. (d); see 20 U.S.C. § 1415(k)(4)(A) & 34 C.F.R. §§ 300.532, 300.533.)

A student receiving special education services may be suspended or expelled from school as provided by federal law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 48915.5,

subd. (a).) 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)(1)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3).)

Additional removals of not more than 10 consecutive days in the same school year may be made for separate incidents, so long as those removals do not constitute a change of placement by a series of removals (34 C.F.R. § 300.530((b)(1) [referring to 34 C.F.R. § 300.536].). If the behavior that gave rise to the disciplinary incident is determined not to be a manifestation of the student's disability, that student is subject to relevant disciplinary procedures in the same manner and for the same duration as would be applied to children without disabilities. Except, that a student with disabilities removed from their current placement must continue to receive educational services to enable the child to continue to participate in the general education curriculum and to progress towards meeting the goals set out in the student's IEP. (34 C.F.R. § 300.530(b)-(d).)

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 if the student:

- carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;
- knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

- has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(20 U.S.C. § 1415(k)(1)(G); see also 34 C.F.R. § 300.530(j).)

Otherwise, a school district may request a due process hearing to authorize a change of placement to an alternative placement for not more than 45 school days for disciplinary reasons if the district believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).)

Where expulsion from school is being processed by the governing board of the school district, a suspension may be extended until the governing board renders a decision only if the school district designee invites the student and the student's parents to a meeting at which it is determined that the presence of the student at the school would cause a danger to persons or property or a threat of disrupting the instructional process. (Ed. Code, § 48911, subd. (g).)

Here, Westside Union suspended Student on February 3, 2023, for five days for threatening a school shooting on social media. On February 10, 2023, Westside Union extended Student's suspension indefinitely pending expulsion proceedings, and placed Student on independent study. Parent signed an assessment plan prepared by Westside Union in December 2022, and Westside Union completed a comprehensive assessment of Student in February 2023. Westside Union held an IEP team meeting to review the assessment on February 21, 2023, and found Student eligible for special education as a student with a specific learning disability, with diagnoses of depression, severe anxiety, and attention deficit hyperactivity disorder, impulsive type. However, instead of

developing an IEP, Westside Union adjourned the IEP team meeting and held a manifestation determination review that same day. At the manifestation determination review, Westside Union determined Student's conduct was not a manifestation of her disability.

The sworn declarations on both sides demonstrate much dispute between the parties on how and when certain disciplinary actions took place. Westside Union informed Parent, a Spanish speaker, of events in English, and many of the documents Westside Union issued on the disciplinary incident are incomplete and confusing. Meetings were scheduled and rescheduled, at least once, due to the lack of a Spanish language interpreter. Student filed for due process on February 23, 2023, to challenge the manifestation determination review and expulsion proceedings, and seeks a stay put placement in her previous general education setting.

On the information in the motion for stay put and its opposition, Westside Union did not comply with the procedures for extending Student's suspension. Westside Union did not hold an informal meeting with Parent and Student prior to extending the suspension. It did not discuss with Parent whether Student's presence would cause a danger to persons or property or a threat of disrupting the instructional process. Westside Union's letter extending Student's suspension did not include such a finding, and was not translated into Spanish for Parent. A school may not deprive a student of educational benefits by any procedure it arbitrarily chooses. (*Montoya v. Sanger Unified School District* (USDC E.D.Cal. 1980) 502 F.Supp. 209, 212-213.) Westside Union did not comply with the procedures for placing Student on an extended suspension, and Student is entitled to a return to Joe Walker Middle School.

Student is a student with a disability, and OAH has jurisdiction over disciplinary removals of students with disabilities, which must comply with the rights afforded

students with disabilities under federal law. A school district may not remove Student from her educational setting for more than 10 consecutive days in an interim alternative educational setting without a prior order from OAH, except in circumstances that do not apply here. An interim alternative educational setting must also enable Student to continue to participate in the general education curriculum and to progress towards meeting the goals set out in her IEP. (34 C.F.R. §§ 300.530(b)-(d).) Westside cannot avoid the obligation to provide Student with a free appropriate public education by delaying completion of Student's IEP until it has completed a manifestation determination review and expulsion proceedings.

It is unclear why Westside Union held a manifestation determination review to determine if Student's conduct was related to her disability for purposes of expulsion, without having completed the development of an IEP. The IEP team would have identified Student's needs and the services and supports necessary to address those needs. Student was not found eligible for special education until after the disciplinary event, but disciplinary protections for special education students extend to a student with a disability where the school district was on notice that the student had a disability. (20 U.S.C. § 1415(k)(5)(B). Westside Union had notice Student was a student with a disability in December 2022, when it sent a plan to Parent to assess Student for special education eligibility, and its assessment was pending when the disciplinary incident occurred.

Student's indefinite suspension pending expulsion proceedings was a change of placement for more than 10 school days and did not comply with the procedures for extending a suspension. Further, Westside Union did not obtain an OAH Order authorizing Student's change of placement. Accordingly, Student's motion for stay put is granted.

Westside Union must return Student to her pre-disciplinary placement at Joe Walker Middle School no later than one day after it is served with this Order. Student is entitled to remain in that placement pending a decision in this case or case dismissal.

The facts found in this Order are based on the evidence offered in support or opposition to Student's stay put motion and are in no way binding on the Administrative Law Judge who presides over the expedited due process hearing.

IT IS SO ORDERED.

Alexa Hohensee

Alexa Hohensee
Administrative Law Judge
Office of Administrative Hearings