

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009070224

DECISION

Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), State of California, heard this expedited matter in Irvine, California, on July 28-30, 2009.

Attorney Ava Weitzen represented Student. Student's mother (Mother), who is also an attorney, attended the hearing on all days.

Assistant General Counsel Patrick Frost represented San Diego Unified School District. District representative Phyllis Trombi attended the hearing on all days.

Student's Expedited Request for Due Process Hearing was filed on July 2, 2009. The matter was submitted and the record was closed at the conclusion of the hearing on July 30, 2009.

ISSUE

Was Student's May 12, 2009 conduct of supplying a prescription drug to another student a manifestation of his disability, either directly, or because the conduct was the result of a failure to implement his Individualized Education Program (IEP).

FACTUAL FINDINGS

1. Student is a ninth grade boy. At all relevant times he qualified for special education under the category of specific learning disability (SLD) based on deficits in visual motor integration and attention. At all relevant times, the District was aware that Student had unique needs in the areas of: visual motor integration (handwriting); attention / being off-task; organization of study materials and assignments; assignment completion; and mathematical calculation.

2. Student testified at hearing. Student's grandfather had died in early April of 2009, and he was upset by this, as well as having helped care for his grandmother prior to her death from a stroke nine months earlier. Student had difficulty sleeping because of anxious thoughts and had been prescribed the sleep aid Ambien beginning in 2007.

3. Student described that he would sporadically "space out" in class, particularly with subjects that were not interesting to him. According to Student, he had trouble making good decisions because of his disability. Student's testimony on this point was not credited given Student's motive to get out of trouble and the fact that during his testimony Student frequently alluded to having obtained his understanding about his condition from his psychiatrist.

4. Student considered Student K to be his best friend. He told Student K that he had a prescription for Ambien. In late April of 2009, Student K asked him to bring Ambien to school to take during the school day. Student K stated that nothing would happen and that she had taken it, and other drugs before. Student K begged him for two weeks and would threaten their friendship by making statements to the effect of, "why aren't you willing to help out a friend?" Student and Student K discussed bringing Ambien to school at various times, for example, while walking between classes or in numerous text messages. Student sometimes expressed to Student K that he did not

want to do it because he had a limited supply and needed it for himself. Sometimes Student K would not talk to Student for a few hours after he refused to bring some of his Ambien to school. Student K also told Student that she was worried that her father would be deployed to Iraq.

5. On May 11, 2009, Student and Student K sent each other text messages confirming that Student would be bringing two Ambien pills to Student K the next day, as well as some for Student himself to take in class.

6. On May 12, 2009, Student gave Student K two Ambien pills in science class at 7:35 a.m. by placing the pills on her textbook. Student K gave Student water, which he used to take two Ambien himself. Student K then took the two pills Student had provided. Resource teacher Gregory Chronopolos (Chronopolos) noticed that something was going on because Student uncharacteristically did not start taking notes once class began and instead was paying a lot of attention to Student K. Student K was also laughing, which led Chronopolos to believe the two might have used drugs. Chronopolos called school police by approximately 8:00 a.m.

7. According to Student, he gave in to Student K's request to supply the Ambien because he wanted to remain friends with her. Student believed that if he was caught, the consequences would be the same as the time he had brought Advil to school, i.e., that the drug would be confiscated and given back to him at the end of the day. Student did not understand why a prescription was required for Ambien based on the effect that it had on him.

8. During the two weeks prior to May 12, 2009, Mother had been preoccupied with her work as an attorney, her own health problems, and the recent death of her father. Mother did not think Student's conduct was serious because in Mother's opinion Ambien was a minor sleep aide. Like Student, Mother believed that Ambien was no worse than over-the-counter medications like Tylenol P.M. or Advil.

Mother believed that the entire incident and the subsequent discipline were the result of a "set up" by school personnel because they did not like her. At hearing, Mother attempted to offer expert opinion about ADHD based on her prior training as a nurse, however, Mother's opinions were not credited because she was not sufficiently qualified in psychology to render such opinions.

9. A manifestation determination meeting was held on May 19, 2009. Mother had been provided with a notice of procedural safeguards and attended with her attorney. Student did not attend. The team noted that Student's eligibility for special education was SLD, based on deficits in visual motor integration and attention. Mother's attorney informed the team that she had a report from Deborah Mishek, M.D. (Mishek Report) that diagnosed Student with ADHD combined type, that stated the opinion Student's judgment was impaired from the impulsivity of ADHD, and that stated Student's behavior on the date of the incident was a result of his ADHD. This was the first notice the District had received that Student had been diagnosed with ADHD. Dr. Mishek did not attend the manifestation determination meeting and did not testify at hearing. Mother's attorney conveyed the information in the Mishek Report at the meeting. Mother's attorney brought only one copy of the Mishek Report to the meeting. Although the District did not make copies of the report for the team members and it was not read at the time, the information provided by Mother's attorney regarding the Mishek Report was considered. Mother and her attorney made frequent statements at the meeting and asked questions.

10. Despite being reminded that the manifestation determination meeting was limited to the question of whether Student's conduct was related to his disability or the failure to implement his IEP, Mother and her attorney used much of the manifestation meeting time to argue that the discipline contemplated by the school was unfair and/or that Student's IEP should have contained different services. The only

evidence presented at the manifestation determination meeting that Student's conduct was the result of failure to implement his IEP was Mother's belief that Student should have, but had not, been provided with a one-to-one aide in his IEP. The District members of the team concluded that Student's conduct was not a manifestation of his disability or the result of a failure to implement the December 19, 2008 IEP. The credible testimony of Vice Principal Brandon Lemmon, Special Education Department Chair Jo McGlin and School Psychologist James Bylund (Bylund) established that the team had not predetermined the outcome prior to the meeting. Mother's testimony to the contrary, based on statements made to her by her attorney about the statements of a District administrator, was not credited because it was uncorroborated.

11. The Mishek Report was based on an examination of Student that occurred on May 18, 2009. Mother told Dr. Mishek about the prescription drug incident and the discipline proceedings. Dr. Mishek noted that Student exhibited a history of attention difficulties in home and school and of hyperactivity at home based upon Mother's report. Overall, the Mishek Report concluded that attention difficulties impacted Student's executive functioning because he had difficulty completing tasks and was "impulsive and does not think through the consequences of his actions." Dr. Mishek also stated Student "has poor judgment." Dr. Mishek noted that as of May 18, 2009, Student had begun taking medication to address his ADHD symptoms.

12. Student offered opinion testimony from Richard Buccigross, M.D. (Dr. Buccigross). Dr. Buccigross was board certified in Psychiatry and Neurology for both children and adults and had over 30 years experience in private psychiatric practice. In addition, Dr. Buccigross had experience as a clinical professor of psychiatry and pharmaceutical researcher.

13. Dr. Buccigross first saw Student in May of 2007. Dr. Buccigross had seen Student as a patient for approximately 13, 20 to 30 minute sessions in the two years

prior to the May 12, 2009 incident. Dr. Buccigross's working diagnoses of Student were: 1) attention deficit hyperactivity disorder (ADHD), primarily inattentive type; 2) general anxiety disorder; and 3) learning disorder. Dr. Buccigross believed Student's ADHD was "severe," yet Student had not been treated for ADHD prior to May 12, 2009. The ADHD symptoms observed in Student by Dr. Buccigross were impulsivity, inattention and distractibility. Dr. Buccigross concluded that Student's general anxiety disorder was related to his ADHD but had also recently been exacerbated by the deaths of Student's grandparents.

14. Student had told Dr. Buccigross that prior to the May 12, 2009 incident, Student K had nagged him for two weeks to supply the Ambien and had exchanged text messages with Student about when and how to bring the Ambien the night before the incident. Student told Dr. Buccigross that he had decided to bring the Ambien to Student K on "impulse," that he felt coerced because he did not want to lose Student K's friendship, that Student was afraid of being criticized, and that Student did not think that the consequences would be so large.

15. Dr. Buccigross agreed with the conclusions in the Mishek Report. His own opinion was that Student's conduct on May 12, 2009, was directly affected by poor judgment and poor self-control resulting from ADHD, with a secondary motive of wanting to please his friend. Student did not have a conduct disorder that caused the behavior and had the capacity to change his mind once he agreed to bring the Ambien to school. According to Dr. Buccigross, ADHD is not a behavioral disorder, but a disability of cognitive function characterized by "impaired cognition of future," meaning an impairment in predicting future consequences of behavior that results in an individual with ADHD making poor choices. To Dr. Buccigross, the "impulsivity" associated with ADHD was the equivalent of making poor choices regardless of the time frame in which the choices occurred or the amount of planning required to carry out a

particular choice. To Dr. Buccigross, Student appeared immature and was vulnerable to suggestion because his ADHD caused him to make poor choices. Dr. Buccigross disagreed with the position of School Psychologist Bylund, expressed at the manifestation determination meeting, that impulsivity from ADHD had a temporal, spur-of-the-moment quality, because in Dr. Buccigross's opinion Student's ADHD caused him difficulty with planning and assessing for future consequences. Dr. Buccigross did not attend the manifestation meeting on May 19, 2009.

16. Dr. Buccigross wrote a letter dated June 2, 2009, expressing his opposition to Student being disciplined for the May 12, 2009 incident. In addition to stating his belief that Student's ADHD caused Student's behavior because Student's "judgment was impaired and he could not adequately consider the consequences," Dr. Buccigross stated unequivocally that "Student has expressed great remorse and will not repeat this offense." At hearing, Dr. Buccigross explained his belief that this particular incident has made an impact on Student, such that Student would not repeat the behavior. Dr. Buccigross's overall opinion that Student's ADHD is the cause of an inability to make good choices is not persuasive in light of Dr. Buccigross's contradictory opinion that Student could make the right choice to not repeat the behavior if aware that severe consequences were possible.

17. Student also presented testimony from educational consultant Robert Prinz, Ph.D. (Dr. Prinz). Dr. Prinz had over 30 years experience as a school psychologist and 17 years of clinical experience prior to retiring and beginning his practice as an educational consultant. Dr. Prinz had a B.S. in psychology, an M.S. in school psychology, an educational specialist degree (a post-master's degree required for school psychology credentialing in some states) and a Ph.D. in psychology. Dr. Prinz's master's and Ph.D. thesis were in the area of "hyperkinetic impulsive disorder" (the prior name for ADHD). Dr. Prinz's work as a paid educational consultant consisted of advising families how to

get the “best possible education” for their child. His interactions with Student were interviews and observations of Student as an educational consultant and were not in a clinical setting. Dr. Prinz did not attend the May 19, 2009 manifestation determination meeting.

18. Dr. Prinz concluded that Student’s ADHD was a direct and substantial cause of the May 12, 2009 incident because Student’s executive functioning difficulties led him to make an impulsive decision without thinking through the consequences. To Dr. Prinz, the activity of texting with Student K about the plan the night before demonstrated that Student was not thinking about the consequences. Dr. Prinz’s opinion was not persuasive in light of his contradictory testimony that Student would not have acted had, for example, Student K asked him to do something clearly illegal like bring a gun to school. Dr. Prinz expressed that Student would likely be able to make the correct judgments if aware of the gravity of the consequences. Thus, rather than establishing that Student’s ADHD caused the conduct, Dr. Prinz’s testimony established that Student was capable of making appropriate decisions if sufficiently aware of the consequences.

19. School Psychologist Bylund had participated in the manifestation determination meeting. Bylund had a B.A. in sociology, an M.A. in education and an educational specialist degree (a post-master’s degree that was a prerequisite to credentialing as a school psychologist). Bylund began his career as a school psychologist as an intern for the District during the 2007-2008 school year. Bylund began carrying a full case load when assigned to Student’s high school at the beginning of the 2008-2009 school year. Prior to being involved in the manifestation determination meeting, Bylund had observed Student as part of District assessments. Bylund’s observations of Student demonstrated that in the school setting, Student demonstrated inattention consistent with ADHD, but not hyperactivity or impulsivity. Bylund’s observations were consistent

with the unique needs identified in Student's IEP and consistent with the fact that the District had no information that Student had been diagnosed with combined-type ADHD until the day of the manifestation determination meeting.

20. Bylund concluded that the incident was not related to Student's disability because the facts of the incident did not demonstrate that Student acted impulsively. To Bylund, the "impulsiveness" of ADHD appeared in a limited time frame in behaviors such as blurting out things in class. In other words, an "impulsive" behavior was spur-of-the-moment and would occur before there was time to exercise judgment. Bylund plausibly explained that an executive functioning deficit, i.e., difficulty with effective planning and follow-through, was distinct from making a bad choice based on failing to understand the consequences of an action. Bylund explained that the facts of the incident did not show a momentary impulse to act because Student and Student K communicated back and forth about him supplying the Ambien prior to May 12, 2009, and Student engaged in multiple non-impulsive behaviors to carry out the plan including obtaining the drugs, concealing the drugs and passing the drugs to Student K at school. In addition, consistent with the assurances of Dr. Buccigross and Dr. Prinz that Student would not do it again, Student had the capacity to distinguish right from wrong. Bylund's testimony was credible and persuasive, particularly because he unhesitatingly agreed with the Mishek Report with the exception of the observation that Student was "impaired in judgment and impulsivity," two areas that he had not been observed in a school setting.

21. Student's operative IEP on May 12, 2009, was dated December 19, 2008. Mother had signed her consent to the December 19, 2008 IEP on the same date as the IEP meeting. The IEP provided specialized academic instruction in general education and separate classroom settings on a general education high school campus. An IEP team meeting was also held on April 29, 2009. Student was offered specialized academic instruction in general education and separate classroom environments on a general

education campus. In addition, daily one-to-one aide assistance was offered in Student's math and science classes. Mother left the April 29, 2009 IEP team meeting before it ended and did not sign her consent to the IEP on that date. Instead, Mother's signature on April 29, 2009, was "for attending" only. Mother's attorney signed the April 29, 2009 IEP with the notation "This IEP is not an offer of FAPE." Mother signed her consent to the April 29, 2009 IEP on May 12, 2009, after Student had supplied Ambien to Student K. Student offered no evidence at hearing that the December 12, 2008 IEP had not been fully implemented during the relevant time period.

LEGAL CONCLUSIONS

1. 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].)
2. Student contends that the District erred when, on May 19, 2009, it found that his May 12, 2009 conduct of providing Ambien to Student K was not a manifestation of his ADHD. Alternatively, Student contends that his conduct was the result of the District's failure to implement the provision of a one-to-one aide that was offered to Student in the IEP dated April 29, 2009, which had not been signed prior to the date of the incident. The District contends that Student's conduct was not a manifestation of Student's attention deficits because the facts of the incident demonstrate that it was not "impulsive" consistent with ADHD. The District further contends that April 29, 2009 IEP was never operative prior to the May 12, 2009 incident and that all services in the December 19, 2008 IEP had been provided to Student. For the reasons set forth below, the determination that Student's conduct was not a manifestation of his disability is affirmed.
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.¹ (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).) 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, 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).)

¹ All subsequent references to the Code of Federal Regulations are to the 2006 revisions, unless otherwise indicated.

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. (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 Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV), lists the following diagnostic criteria for ADHD, in relevant part:

- (1) six (or more) of the following symptoms of **inattention** have persisted for at least 6 months to a degree that is maladaptive and inconsistent with developmental level:

Inattention

- (a) often fails to give close attention to details or makes careless mistakes in schoolwork, work, or other activities
- (b) often has difficulty sustaining attention in tasks or play activities
- (c) often does not seem to listen when spoken to directly
- (d) often does not follow through on instructions and fails to finish schoolwork, chores, or duties in the workplace (not due to oppositional behavior or failure to understand the instructions)
- (e) often has difficulty organizing tasks and activities
- (f) often avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort (such as schoolwork or homework)

- (g) often loses things necessary for tasks or activities (e.g., toys, school assignments, pencils, books, or tools)
- (h) is often easily distracted by extraneous stimuli
- (i) is often forgetful in daily activities
- (2) six (or more) of the following symptoms of **hyperactivity-impulsivity** have persisted for at least 6 months to a degree that is maladaptive and inconsistent with developmental level:

Hyperactivity

- (a) often fidgets with hands or feet or squirms in seat
- (b) often leaves seat in classroom or in other situations in which remaining seated is expected
- (c) often runs about or climbs excessively in situations in which it is inappropriate (in adolescents or adults, may be limited to subjective feelings of restlessness)
- (d) often has difficulty playing or engaging in leisure activities quietly
- (e) is often "on the go" or often acts as if "driven by a motor"
- (f) often talks excessively

Impulsivity

- (g) often blurts out answers before questions have been completed
 - (h) often has difficulty awaiting turn
 - (i) often interrupts or intrudes on others (e.g., butts into conversations or games)
- (Diagnostic and Statistical Manual of Mental Disorders, Text Revision (4th ed.

2000), pp. 92-93 [emphasis and punctuation in original].)

7. Even if a disability causes impulsive behavior, arranging to supply drugs to another student is not impulsive behavior if it takes place over the course of hours or

days and involves a series of decisions. (See *Farrin v. Maine School Administrative District No. 59* (D. Me. 2001) 165 F.2d 37, 52.)

8. Here, Student failed to meet his burden of demonstrating that providing his prescription medication to Student K on May 12, 2009, was caused by, or had a direct and substantial relationship to ADHD. Although Dr. Buccigross and Dr. Prinz were well-credentialed, and sincerely wanted to help Student and his family, their testimony regarding the above was not credited for two reasons. First, both witnesses made representations that Student either would not take actions that were clearly wrong or had learned his lesson in this case and would not repeat the behavior. These well-meaning representations were entirely inconsistent with their profile of Student's ADHD causing him to be impulsive and incapable of making appropriate decisions at all times, even when there was sufficient time to think before acting. Further, and more importantly, the opinions of both Dr. Buccigross and Dr. Prinz are inconsistent with the diagnostic criteria for ADHD listed in the DSM-IV. The DSM-IV contains no description of the type of cognitive impairment described by both Dr. Buccigross and Dr. Prinz. To the contrary, the "impulsivity" symptoms listed under "hyperactivity-impulsivity" refer specifically to the type of spur-of-the-moment behaviors testified to by School Psychologist Bylund. The DSM-IV simply makes no mention of a general inability to make good decisions and no mention that the "impulsivity" associated with the disorder is something other than a spur-of-the-moment, thoughtless decision. School Psychologist Bylund's explanations were consistent with the DSM-IV and did not contain the logical inconsistency of Dr. Buccigross and Dr. Prinz's testimony that Student could make the right decision if sufficiently impressed with the negative consequences of his actions. Moreover, the facts of the incident were not consistent with impulsivity given the long time period over which Student mulled whether to supply his prescription to his friend and the planning activity the night before the incident. Accordingly, Student

failed to meet his burden of proving that his conduct was caused by ADHD or had a direct and substantial relationship to it. Student presented no evidence at hearing that any other unique need identified in his IEP caused his conduct or had a direct and substantial relationship to it.

9. Student also failed to demonstrate that his conduct was caused by his IEP not being implemented. Student's Mother had not signed her consent to the April 29, 2009 IEP prior to the incident, so it could not have been put into effect to provide Student with a one-to-one aide. Student offered no evidence that the IEP dated December 19, 2009, had not been fully implemented.

10. In light of the above, the determination that Student's conduct was not a manifestation of his disability is affirmed. (Factual Findings 1-21; Legal Conclusions 1, 3-7.)

ORDER

The May 19, 2009 decision that Student's conduct on May 12, 2009, was not a manifestation of his disability is affirmed.

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 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: August 12, 2009

 /s/

RICHARD T. BREEN

Administrative Law Judge

Office of Administrative Hearings