

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LINCOLN UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2011090998

EXPEDITED DECISION

Administrative Law Judge (ALJ) Gary A. Geren, Office of Administrative Hearings (OAH), State of California, heard this expedited matter on October 25 through 27 and November 8, 2011, in Stockton, California.

Robert K. Closson, Ed.D., educational advocate, represented Student. Student's father (Father) was present for most of the hearing. Student was not present.

Anne M. Sherlock, Attorney at Law, represented Lincoln Unified School District (District). Dr. Louise King-Bassett, Director of Special Education for District, was present throughout the hearing.

Student filed a due process hearing request (complaint) on September 27, 2011. OAH scheduled this expedited hearing to address those portions of the complaint alleging he was wrongfully expelled from Lincoln High School (Lincoln).

ISSUE

Was Student's conduct on May 23, 2011, that led to his expulsion caused by, or did it have a direct and substantial relationship to, Student's disability; or was Student's conduct a direct result of District's failure to implement Student's individualized educational program (IEP)?

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. Student is 17 years of age and will turn 18 in March 2012. Since April 2010, Student has been eligible to receive special education services under the category of Specific Learning Disability (SLD) due to his mild reading disorder attributable to a deficit in phonemic awareness.

Student began the 2010-2011 school year at Lincoln, but transferred to Franklin High School (Franklin) within the Stockton Unified School District (Stockton) on September 7, 2010. Student transferred after Lincoln's football coach removed Student from the team because of his disruptive conduct towards the team. Student then enrolled in Franklin to play football for their team.

In fall 2010, while Student was at Franklin, he became involved in a physical altercation with a campus security officer. As a consequence, Stockton initiated expulsion proceedings against Student. Ultimately, Stockton abandoned those proceedings. Rather than return to Stockton, Student re-enrolled in Lincoln. He was enrolled in Lincoln from February 2011 until he was expelled on May 23, 2011. At the time of this expulsion, he resided with his Father within the boundaries of the District.

Student has a long history of school related disciplinary incidents, including multiple physical altercations. He also has a long history of making threats of physical violence, using profanity, and defiance. Student is over six feet tall and weighs approximately 160 pounds and is very athletic. While at Lincoln, Student's favorite class was a "conditioning" course, which included weight training.

STUDENT'S ATTENDANCE AND DISCIPLINARY HISTORY

2. Between February 7, 2011 and May 23, 2011, Student missed over 200 of his approximately 500 class periods. Lisa Fields is an educational assistant for a second period English class at Lincoln. Student was assigned to her class. She testified without contradiction that prior to May 23, 2011 she had seen Student in his English class only on three occasions. Generally, she observed Student "hanging around with his friends on campus," and that, "Student just didn't care about school."

Lisa Fields is a highly educated and experienced instructional aide holding a bachelor of arts degree in therapeutic recreation since 1982. She has also completed most of her coursework towards obtaining her master's degree. She has worked in special education for approximately fifteen years, having taken some time away from work to raise her children. She presented as a kind and thoughtful person with an unquestionable dedication to serving the needs of special education children.

On the three occasions, Ms. Fields observed Student as he arrived approximately ten minutes before the period ended, on each occasion he was without his course materials (textbook, paper, or pencil), and refused to participate in class. For example, Student refused Ms. Fields' request for him to pick up a pencil she provided him.

Student's disciplinary log from Lincoln was entered into the record.¹ It contains approximately 70 entries of discipline occurring from September 29, 2006 through May 23 2011. In six incidents, Student engaged in either making threats of physical violence or he actually was engaged in physical altercations with staff or fellow students. For

¹ Student's disciplinary log from Stockton was not included in the record, but testimony and documentary evidence established Student had a history of disciplinary incidents there also.

example, on September 29, 2006, Student became angry with a fellow student during a basketball game and "got him into a chokehold and proceeded to knee [him] in the groin and continued to choke him." On February 24, 2009, Student became angry at a fellow student and "wrestled [him] to the floor." On February 25, 2009, "[Student] knocked another student to the floor during an argument." On September 18, 2009, Student refused to sign a detention slip and walked out of class stating, "I'm ready to fight someone!" On December 12, 2009, "[Student] was involved in a verbal altercation with a fellow student which escalated into a physical altercation;" and on May 6, 2010, Student was involved in another fight while on campus.

STUDENT'S CONDUCT ON MAY 23, 2011

3. The May 23, 2011 incident that led to Student's expulsion started in Lincoln's library, at approximately 8:30 a.m. On that day, students from various classes were returning books, as it was near the end of the school year. Because Student was late in arriving to his second period English class, he did not walk to the library with Ms. Fields as his classmates had done, so he arrived at the library alone. His classmates had formed a line to return their books. Student did not stand at the rear of the line, but positioned himself in the middle of the queue.

Receiving the books was the librarian, Mike Whelply, who was positioned behind a counter. Mr. Whelply testified that his attention was first drawn to Student as he entered the library because Student's ear buds were playing music so loudly that it could be heard throughout the library, where approximately 30 other students were present. A school policy precluding the wearing of headphones in the library is conspicuously displayed on signs directly outside the library. Despite the signs, Mr. Whelply testified that students often do not immediately remove their headphones upon entering the library, so he typically allows them "to slide" for a few minutes before

asking them to remove their headphones. Initially, Mr. Whelply allowed Student to "slide." However, after approximately three minutes, when Student failed to remove his ear buds voluntarily, Mr. Whelply stepped from behind the counter, placed himself approximately three feet in front of Student, and made a gesture towards him as if Mr. Whelply was removing ear buds himself. Student observed Mr. Whelply's gesture, but initially ignored him. After Mr. Whelply gestured again, Student removed one of his ear buds and instantly began shouting to the effect that "I don't have to. You can't tell me what to do; you have to ask me what to do." According to Mr. Whelply, Student essentially "exploded into a tirade." Student's speech was "fast, furious, and loud" and he appeared "agitated."

Correctly sensing that Student's anger and volatility presented a school safety issue, Mr. Whelply returned to a position behind the counter and called for campus security to respond. The secretary who answered the phone at the security desk asked Mr. Whelply to identify the student involved in the incident. Since Mr. Whelply had never seen Student before, he again approached him, never getting closer than three feet away, and asked Student to produce his identification card (ID).² Student again acted defiantly, stating, "I don't have to...You have to ask me to do it; you can't tell me what to do." Accurately sensing that Mr. Whelply had been instructed to ascertain his identity, Student shouted, "Just tell them it's the boss." According to Mr. Whelply's testimony, Student was also conveying hostility through his non-verbal conduct. For example, as Student was speaking, he was aggressively posturing by "cocking his head" towards Mr. Whelply.

² Another school policy requires students to display their ID cards on lanyards draped around their necks, but Student was not displaying his ID.

In response to Student's anger, Mr. Whelpy attempted to "defuse" the situation by providing Student with what Mr. Whelpy termed a "Mulligan," or a "do over." To that end, Mr. Whelpy asked Student to step outside and review the signs prohibiting headphones and to "just start all over." Part of Mr. Whelpy's motivation in taking this approach was to allow Student an opportunity to "save face" and to "reset the situation." Student refused Mr. Whelpy's overture, which led Mr. Whelpy to conclude that "things were going downhill fast," and that "it was obvious that Student could not be reasoned with." Mr. Whelpy's testimony described the situation with Student as though he "had confronted a bear on the trail."

Before campus police arrived, Student angrily stormed out of the library, continually muttering "pussy ass" and posturing in a menacing way that Mr. Whelpy described as "something like you see football players do on the football field when one player is attempting to intimidate another." Mr. Whelpy followed Student out of the library to direct arriving campus supervisors and security personnel towards Student so that the security threat Mr. Whelpy perceived could be resolved. After Student briefly left the library, he quickly returned and threw a book on the ground in the general direction of the counter behind where Mr. Whelpy had been standing. Mr. Whelpy again followed Student out of the library, as he left for the second time. This time, Student stopped, turned and faced Mr. Whelpy, took a few steps toward him and stated: "I'm going to beat the fuck outta you!" Mr. Whelpy immediately returned to the library, fearful of the threat of physical harm posed by Student who is bigger than Mr. Whelpy. Student was then met by a campus supervisor. Student told the supervisor, "I am turning around so I don't sock him in the face [referring to Mr. Whelpy]." Student also told the campus security officer who escorted Student to the Student Services Center that he had walked away from Mr. Whelpy "to keep from knocking him out."

Mr. Whelply has been an educator for approximately 45 years, 35 of those years in high schools, and 25 of those years at Lincoln. He described Student's conduct on May 23, 2011 as "something [he] had never seen before." His testimony was consistent with written accounts of the incident that were entered into evidence. Mr. Whelply's demeanor while testifying exhibited thoughtfulness and deliberation, his testimony did not appear contrived or rehearsed, and he answered all questions asked of him directly and without evasion. Mr. Whelply's description of Student's conduct was credible, without contradiction, and corroborated by other evidence.

Ms. Fields, the educational assistant, witnessed the incident in the library. She credibly testified that she too was frightened by the swiftness and intensity of Student's outburst, and that his conduct frightened her to the extent that she did not intervene because of fear for her safety. She also saw that Student's outburst frightened the other students in the library. She persuasively testified that she believed Mr. Whelply acted "professionally and appropriately" in attempting to de-escalate the situation by calmly instructing Student to step outside the library to review the signs. Mr. Whelply did this despite Student calling him an "asshole" almost immediately after he gestured for Student to remove his ear buds. She also heard Student's loud and obscene rant. Ms. Fields testified in a patient manner, allowing appropriate time for reflection before answering questions. Her accounting of what occurred in the library was credible and was not seriously brought into question during cross-examination.

An Incident Report was prepared by District on June 9, 2011. It included several statements from witnesses. For example, a student who observed the incident reported:

[Student] was listening to his iPod and it was really loud, so Mr. Whelply told him to turn it off. [Student] took his earphone out and said, "What," and Mr. Whelply told him

again, and [Student] said, "That's all you had to say, don't just come over here demanding things." So, Mr. Whelply told him to go read the sign that was outside the door and [Student] said, "I ain't reading shit...go ahead and call who you need to call... You better tell them to hurry up before I beat your ass... I should knock these books over to make you do some work."

Student reported of Mr. Whelply's following him out of the library, "It's a good way to get your ass beat."

Student was calmed down by campus police and he was allowed to return to class. However, approximately an hour later, Student returned to the service center where he was again disruptive and aggressive. On this occasion, Student entered the service center and immediately screamed, "I ain't waiting for nobody, get someone now." While there, Student telephoned Father in an attempt to get Father's permission to leave campus. Student was screaming into the telephone and appeared irate. His conduct caused two staff secretaries to lock themselves in an assistant principal's office because they were afraid for their safety.

At approximately 10:20 a.m., Student and Father met with Vice Principal Joseph Hancock, who had called Father to the school. Father had already been called to campus by Student, so Father arrived soon after Mr. Hancock's call was made. When Mr. Hancock advised that because of Student's conduct in threatening Mr. Whelply, he was going to issue a five day suspension and recommend possible expulsion. Student then reacted and began "going ballistic." Mr. Hancock believed that Student's behavior was so "over the top" that he was surprised that he was not arrested by campus police and that after he advised Student of his intended course of discipline, Student became

"superheated," stormed out of Mr. Hancock's office, "balling up his fists and punching the air" as he walked out.

Mr. Hancock has fourteen years of experience in education, including four years directly supervising the special education program. He has attended over 100 IEP team meetings, and he is qualified to work as a trainer in a course titled "Managing Assaultive Behavior." Mr. Hancock's testimony was persuasive. He holds significant professional experience, he directly answered all questions put to him while testifying, and his testimony was generally consistent with the documentary evidence introduced into the record. Mr. Hancock's accounting of the events on May 23, 2011 was not seriously placed in dispute.

On June 24 and 27, 2011, an administrative hearing panel conducted an expulsion hearing, lasting approximately eight hours each day. At that hearing, Student's version of the incident did not materially differ from Mr. Whelply's, Ms. Fields', Mr. Hancock's, the Incident Report, and the documentary evidence produced at this hearing. Student clarified at his expulsion hearing that he believed he actually told to Mr. Whelply, "You're lucky I don't beat your ass because you're old." Student appealed his expulsion, and on September 14, 2011, the San Joaquin County Office of Education affirmed it. Accordingly, Student has been expelled from Lincoln through the completion of the 2011-2012 school year.

Because District believed Student posed a continuing security threat, on October 6, 2011, District obtained a temporary restraining order (TRO) from the San Joaquin County Superior Court preventing Student from entering any Lincoln campus or building. On October 24, 2011, the superior court extended the TRO until January 3, 2012. In light of Student's history of threats and his engaging in violence, the record in this hearing amply supports the superior court's issuance of the TRO.

THE MANIFESTATION DETERMINATION IEP (MDIEP) TEAM MEETING

4. When a special education student is suspended for disciplinary reasons for more than 10 days, the suspension constitutes a change of placement. Relevant members of the IEP team must meet to determine whether the student's conduct was a manifestation of his disability. The meeting of a student's full IEP team is not required. The manifestation determination must take place within 10 school days of the decision to change the placement.

A parent must be given reasonable notice of the MDIEP team meeting, which must be held at a mutually agreed time and place. The MDIEP meeting notice must inform the parent of the decision to change the student's placement and must be accompanied by a copy of the parent's procedural safeguards. Appropriate notice was given in this matter and Student's parents (Parents) attended and participated in the MDIEP meeting.

Student's MDIEP meeting was held on May 31, 2011. The attendees on behalf of the District were Lincoln's principal (Ms. Holmerud); Lincoln's vice principal (Mr. Hancock); Student's general education teacher (Mr. Bobrow); the school psychologist (Ms. Ruffoni); Student's behaviorist (Ms. Ireland); the Associate Superintendent of Human Resources (Mr. Tatum); and substituting for Student's special education teacher was Dr. Shelley Moreira.³ Parents were accompanied at the MDIEP meeting by Student's sister and the family was assisted by an educational advocate, Lorraine Summers.

³ Student's special education teacher/case manager, Ryan Murray, was no longer employed by District at the time of the MDIEP meeting and, therefore, did not attend the MDIEP because his contract had expired at the end of the school year. As previously noted, however, the composition of a MDIEP team may permissibly differ from the

The MDIEP team reviewed and discussed the documents in Student's file including records of his attendance and health, his academic and functional strengths and weaknesses, the individual reports prepared by each of his teachers, the results of his assessments, the nature of Student's disability and how it potentially could relate to his conduct, environmental factors affecting Student, and the entirety of Student's IEP, including his Behavioral Support Plan (BSP). The team also analyzed Student's disciplinary history. The meeting lasted approximately 90 minutes.

At the meeting, members of Student's family were allowed to express their opinions. Student's sister read excerpts from articles she had found on the internet about adolescent Depression. Father asserted that Mr. Whelply failed to properly implement Student's IEP because District had not provided him with a copy of it prior to the occurrence of the incident. The District members of the MDIEP team understood the family's presentations and considered their contentions, but ultimately rejected them by instead determining that Student's conduct on May 23, 2011 was not a manifestation of his SLD.

THE MDIEP TEAM'S DETERMINATIONS

Causation

5. In making the manifestation determination, a MDIEP team is required to answer two questions:

- (1) Was the student's conduct caused by, or did it have a direct and substantial relationship to, the student's disability; or

student's IEP team. Dr. Moreira was qualified to attend the meeting in lieu of Mr. Murray because as his supervisor she was familiar with Student and the MDIEP process.

(2) Was the student's conduct a direct result of the district's failure to implement the student's IEP?

If the answer to either question is yes, then the student's conduct is deemed a manifestation of his disability and the district may not remove him from his current placement without an order from an ALJ. If the answer to both questions is no, then the district may change the student's placement in the same manner, and for the same duration, that it could change the placement of a student not receiving special education.

The District's members of the team concluded that Student's conduct on May 23, 2011, was not caused by, nor did it have a direct and substantial relationship to, his disability; and that his conduct was not a direct result of any failure to fully implement his IEP. Their determinations were accurate.

At hearing, the interplay between Student's disability and his BSP was the subject of much inquiry, particularly by the ALJ. This was because Student's BSP all but predicted the occurrence of the conduct that ultimately led to his expulsion. In fact, District concedes that Student's behavior on May 23, 2011, is consistent with his BSP, which states:

When [Student] is confronted or redirected in an authoritative manner by school staff members, he will respond back with obscenities and verbalizing physical threats that can escalate into physically aggressive behavior.

Despite this, there was insufficient evidence at hearing to link Student's conduct to his mild reading disability. Nothing about the incident in the library suggests that Student was unable to comprehend or to understand the repeated gestures and verbal

directions provided by Mr. Whelply, or that his reading disorder prevented him from restraining his aggressive and hostile conduct. To the contrary, Student fully understood the directions given to him by Mr. Whelply, but either mistakenly assumed that Mr. Whelply lacked the authority to request him to remove his ear buds or for him to produce his ID or simply chose to defy Mr. Whelply.

Furthermore, merely because Student's conduct was related to his BSP, it does not follow that his conduct was, therefore, also related to his disability. District's witnesses credibly testified that Student's disability was his mild reading disability, and no relationship between Student's reading disorder and his conduct exists. For example, Mr. Whelply's gestures for Student to remove his ear buds did not require him to read or process any phonemes. Yet it was amply established at hearing that it was this non-verbal, non-offensive gesture that instantly sent Student's hostile behaviors into motion.

District concedes scenarios are conceivable under which Student's reading disability could lead to hostile behaviors. For example, Dr. King-Bassett cogently explained that if Student were to grow frustrated while attempting to read a passage aloud in the classroom and his frustration caused him to act out inappropriately, then a nexus may be said to exist. However, nothing like that scenario occurred on May 23, 2011. Similarly, Dr. King-Bassett persuasively answered questions about whether Mr. Whelply's instruction for Student to step outside to read the sign might be related to his phonemic awareness difficulty. She testified that she did not believe it was because Student's phonemic awareness problem arises when he attempts to read literature and "not signs." Furthermore, Dr. King noted that Student has a sixth grade reading level, a reading proficiency that in her opinion, provides Student the ability to easily read and comprehend simply worded signs, such as those located outside of the library. Her opinions were credibly expressed.

Susan Ireland is a well-qualified behavior analyst and was a member of Student's IEP and MDIEP teams. She was also involved in developing Student's BSP. She has worked for fifteen years as a behavior specialist. She persuasively testified that approximately 50 percent of the BSPs for students at Lincoln are unrelated to their disabilities, and that some students have BSPs without having any disabilities. With respect to Student, she credibly testified that the MDIEP team made a concerted effort to determine whether Student's conduct was somehow related to his disability, but that the District members of the MDIEP team concluded that "there was no relationship between Student's aggression and his reading disability." She noted that she and the other District members of the MDIEP team considered other factors, such as those presented by the family, but then focused their inquiry on whether Student's conduct in question was related to his disability, and not whether his conduct was related to his BSP, which she and the team believed posed a different inquiry. Instead, the MDIEP team focused on answering the two specific questions concerning causation and implementation of the IEP that all MDIEP teams must answer. Ms. Ireland's testimony was honest and convincing, and given her knowledge of behaviors, and particularly of Student's behavioral challenges, her testimony was given substantial weight, in determining that the MDIEP team answered the appropriate questions and reached the appropriate conclusions.

For the above reasons, the MDIEP team correctly determined that the conduct for which Student was expelled was not caused by, or had a direct and substantial relationship to, his SLD.

The Possibility of Emotional Disturbance

6. Student's extensive behavior and disciplinary record makes it essential to inquire whether he may have also been eligible for special education under the category

of Emotional Disturbance (ED), and if so, whether his ED disability led to the conduct for which he was expelled.

At various times over the last ten years, Student has been enrolled in seventeen different educational placements within the District. Most of the changes in Student's placements were necessitated by his behaviors. During Student's last enrollment at Lincoln, from February 2011 through May 2011, District held approximately one IEP meeting per month for Student. Generally speaking, these meetings were lengthy. For example, the meeting concerning Student's BSP lasted longer than eight hours and took two separate days to complete. Accordingly, District had a thorough understanding of Student's emotional condition before the occurrence of the May 23, 2011 incident. Furthermore, District took meaningful steps to assess and to identify all of Student's potential disabilities, including ED. Since 2009, Student received three comprehensive assessments, which will be discussed in turn.

Kristin Ruffoni, Lincoln's school psychologist, evaluated Student on September 22, 2009, as part of her Multidisciplinary Psycho-Educational Assessment. Her report references previous assessments conducted of Student, one completed on April 18, 2002, by the Lodi Unified School District (Lodi), and the other completed on February 6, 2006, by the Manteca Unified School District (Manteca).⁴ Ms. Ruffoni notes in her report that both Lodi and Manteca assessed Student for ED eligibility and found "[Student] did not meet eligibility for emotional disturbance as his behaviors were viewed as more conduct in nature." Similarly, Ms. Ruffoni's September 2009 assessment also reviewed

⁴ Both of these earlier assessments concluded that Student was ineligible to receive special education services despite his having a significant discrepancy between ability and achievement because "no processing disorder was evident."

whether Student was eligible under the category of ED, and she concluded he was not. The pertinent part of her report reviews the ED eligibility criteria and states:

Eligibility for Emotional Disturbance was considered. A student must exhibit one of the following over a long period of time to a marked degree which adversely affects educational performance:

- Inability to learn which cannot be explained by intellectual, sensory or health factors. Examples of this criterion may include loosening of associations, hallucinations, delusions and fragmentation of thought/memory. There are no observations or reports of this behavior. In order to meet this criterion, non-attendance, motivation, and behavioral difficulties should be ruled-out. These issues cannot be ruled out for [Student].
- Inability to build or maintain satisfactory interpersonal relationships with peers/teachers. Examples of this criterion may be that student is unable to initiate or maintain relationships, has no friends at school or in community, avoids communicating, and excessive withdrawal. The results of the social skills assessment yielded unremarkable results. [Student] socializes with peers. He does not avoid communication or exhibit excessive withdrawal behaviors.
- Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations. Examples of this criterion may include flat, distorted affect, self-abuse, severe anxiety reactions, delusions/hallucinations and obsessions. A conduct disorder should be ruled-out to meet this criterion. [Student's] behaviors historically and currently resemble conduct

disorder. [Student] tends to place blame on others for conflicts, engages in power struggles with authority figures. [Student] is observed to engage in willful rule violation and persistent defiance.

- A general pervasive mood of unhappiness or depression. Examples of this criterion may include loss of interest or pleasure, persistent feeling of depression, hopelessness, and sadness, lack of emotional responsiveness, fearfulness and crying. These behaviors have not been observed in [Student]. The results of this assessment did not indicate consistent significant findings in this area.
- Tendency to develop physical symptoms/fears associated with personal or school problems. Examples of this criterion may include physical symptoms with no organic findings, irrational fears or significant anxiety. This behavior has not been observed in [Student]. The results of this assessment did not indicate consistent significant findings in this area.

Based on this evaluation, [Student] does not meet eligibility criteria for emotional disturbance.

Because Father disagreed with parts of Ms. Ruffoni's assessment, District funded an Independent Educational Evaluation (IEE), which enabled Student to be assessed by an independent examiner. The IEE examiner was Dr. Steven Brock. Because of delays caused by Student's missed appointments, Dr. Brock's assessment was not completed until April 15, 2010. Dr. Brock's assessment is comprehensive and thorough, and generally tracks the findings of Ms. Ruffoni. (Dr. Brock had reviewed Ms. Ruffoni's assessment.) Dr. Brock's report includes a section titled "Summary and Educational Implications," which sets forth his diagnoses of Student. Dr. Brock concluded that

Student's only then-existing disability was a "mild reading disability [SLD]." Dr. Brock also concluded that Student "does not have ADHD," a contention Student asserted at hearing to explain his conduct on May 23, 2011. Furthermore, Dr. Brock's report states "because of oppositional defiant behavior... some possibility exists that [Student] could be found eligible under the category of ED." However, Dr. Brock's report recommends for the District to wait before revisiting Student's possible ED eligibility, stating:

The presence or absence of emotional disturbance (and whether or not Student might be classified as eligible for special education as a student with an emotional disturbance) should be postponed until after the mental health evaluation is concluded.

At Father's request, Student had been referred to San Joaquin County of Mental Health Services (Mental Health) by Lincoln. Kim Mompean, an intern working for Mental Health, completed the evaluation to which Dr. Brock had deferred. Mr. Mompean was appropriately credentialed to prepare Student's evaluation, as he was working under the supervision of a fully licensed psychologist. His report concludes that Student is eligible to receive mental health services because "it is expected that mental health services will assist [Student] to benefit from his education." As an "educational recommendation," Mr. Mompean's report states Student should be placed in a "classroom setting with higher teacher to student ratio." The report did not, however, provide a basis, as Dr. Brock suspected might be the case, for District to revisit whether Student was eligible as a student with an ED disability. The report also did not provide sufficient new information to have warranted District to reassess Student's ED eligibility as Mr.

Mompean's report is far less thorough and comprehensive than the three districts' assessments and the independent assessment prepared by Dr. Brock

For example, Ms. Ruffoni's assessment included her administering standardized diagnostic examinations aimed at assessing Student's potential ED eligibility. Dr. Brock's assessment did the same. Neither of these comprehensive assessments showed Student suffered ED, and Ms. Ruffoni's assessment specifically found Student did not.

By comparison, Mr. Mompean's report is far less detailed. For example, Mr. Mompean's report does not contain findings from any formal diagnostic examination or indicate that such examinations were performed. Rather, Mr. Mompean's report of Student's condition is based upon Mr. Mompean holding three individual therapy sessions, lasting less than an hour each, and two family therapy sessions with Student where Father also attended. Mr. Mompean's report notes that because of missed sessions, it was difficult for him to "establish a therapeutic rapport" with Student.

Therefore, Mr. Mompean's report does not support that Student qualified as a student with ED and in fact, his report tends to undermine that contention, stating:

[Student] has the capacity to understand if given clear directions and he has the capacity to follow directions, but will often not take accountability or responsibility for being off task or for misbehavior.

Mr. Mompean's finding in this regard is consistent with the conclusions reached by the three districts' assessments, in that, Student's behaviors are "conduct based" and not the result of his having ED, as that phrase is defined in special education law. Ms. Ruffoni persuasively testified that conduct-based behavioral problems constitute a "rule-out" for a finding of ED eligibility. In other words, if a student's inappropriate behaviors

are caused by a conduct-type disorder, then the student is not, by definition, eligible under the ED criteria. As Ms. Ruffoni's report states, Student's inappropriate behaviors "historically and currently resemble conduct disorder." Ms. Ruffoni held this same opinion at the time of the MDIEP and shared it with the other team members. Her opinion that Student's behaviors, including his behavior on May 23, 2011, stem from a conduct-type disorder and not ED was well-defended at hearing, and is given substantial weight in deciding this matter.

Ms. Ruffoni and Mr. Mompean testified at hearing; Dr. Brock did not. Ms. Ruffoni has been as a school psychologist in the District for 20 years, and worked an additional three years as a counselor. As a school psychologist, she has conducted an average of 60 to 70 psycho-educational assessments per year. Ms. Ruffoni has attended approximately ten MDIEP team meetings per year over this same time. At hearing, Ms. Ruffoni defended her report in a rational and logical fashion, despite substantial and pointed questioning on whether Student's behaviors, generally, as well as his conduct on May 23, 2011, showed that Student may indeed be eligible as a student with ED. Given her credible answers to those questions, the thoroughness of her report, her extensive first-hand knowledge of Student, and her participation in Student's IEP and MDIEP meetings, Ms. Ruffoni's opinions concluding Student only remained eligible under the category of SLD, that Student was not ED, and that Student's conduct was not related to his disability, is given substantial weight in deciding this matter.

While Mr. Mompean did not attend the MDIEP, he was a full participant at Student's May 12, 2011 IEP meeting held eleven days before the incident.⁵ Mr.

⁵ Student argues that Mr. Mompean should have been part of his MDIEP team because he was officially Student's case manager under Chapter 26.5 of the Government Code. However, on October 8, 2010, former Governor Schwarzenegger vetoed all

Mompean shared with the team that Student had recently been referred to a psychiatrist and was starting to take an antidepressant medication. This fact, however, did not provide the IEP team with sufficient information to conclude that Student suffered from a condition warranting its revisiting Student's ED eligibility. Mr. Mompean's report to the IEP team of Student's recent diagnosis of Depression does not lead to the conclusion that Student suffered Depression over a long period of time to a marked degree such that he should be considered ED. For example, Dr. Brock's independent, comprehensive assessment failed to make such a diagnosis. Nor, was the team provided a report from a psychiatrist setting forth a diagnosis of Student's condition, nor was such a report included in evidence at hearing. Also, there was no reason for the team to conclude Student's Depression was related to his behavior on the date in question, any more than it was related to his similar acts of misconduct and violence as set forth in Factual Findings 1 and 2. Lastly, Mr. Mompean reported to the team it was "His goal to help [Student] help himself to make healthier choices," thus conveying to the IEP team that Student held the ability to control his behaviors, just as Mr. Mompean's report states.

Following the May 12, 2011 IEP meeting, the notion of Student's Depression as a basis for ED eligibility was discussed on May 31, 2011 at the MDIEP meeting. Student's sister discussed with the MDIEP team her view that Depression may be part of Student's

funding for Chapter 26.5 services and suspended its mandate, and was subsequently upheld in that act by an appellate court. (Sen. Bill 870 [SB 870], 2010-11 (Reg. Sess.) (Chaptered), at p. 12; Cal. Sch. Bds. Ass'n v. Brown (2011) 192 Cal.App.4th 1507, review denied June 8, 2011.) By the time of Student's MDIEP team meeting Mr. Mompean was not required.

disability based on material she had gathered from the internet. Again, no psychiatrist's report was presented for the team's consideration. Student's sister's information was considered, however, the team concluded Student was not eligible as ED based on the information presented. Their determination in this regard was amply supported by the record.

In summary, Student's emotional condition was formally assessed five times in five years, and none of those assessments yielded findings to support the proposition that Student suffered a disability beyond his SLD, such as ED. Each assessment and report notes the presence of environmental factors such as poor sleep habits (staying up late to play video games), poor motivation, absenteeism, limited school experience, and frequent school changes, as being the potential, if not likely, causes for Student's behaviors. Likewise, Student's potential eligibility under ED was considered by the MDIEP and May 12, 2011 IEP teams. Student failed to produce sufficient evidence to conclude either of the team's decisions regarding Student's eligibility under ED was reached in error. Lastly, no expert testimony was presented to link Student's recent diagnosis of Depression to his conduct on May 23, 2011.

Implementation of Student's IEP

7. Student contends that District members of the MDIEP erred in concluding that Student's conduct was not the direct result of District's failure to implement his IEP. Student argues that Mr. Whelply did not have, nor had he reviewed, Student's IEP before the occurrence of the incident, and therefore he could not have implemented the interventions outlined therein.

District established that it has a rational policy of providing copies of IEPs only to those employees likely to work regularly with special education students. Consistent with this policy, Student's IEP/BSP was not provided to Mr. Whelply. District's policy is

based both on confidentiality and practicality. Approximately 2, 600 students attend Lincoln, with 220 students being educated under IEPs. All campus employees do not need to know the contents of each special education child's IEP. Additionally, it is implausible to assume that an employee, such as Mr. Whelply, could memorize the contents of every IEP. Nor, did the evidence establish that Mr. Whelply should have received a copy of Student's IEP because the only time Mr. Whelply saw Student was on May 23, 2011.

Despite having not reviewed Student's BSP, Mr. Whelply followed the tenets of Student's BSP based on the good student management skills he acquired over his 45 years of working as an educator. For example, the relevant portions of Student's BSP states:

When [Student] becomes angry, school staff should strive to be empathetic and employ active listening techniques, i.e., use of a calm voice, and strive to avoid backing [Student] into a corner.

This describes what Mr. Whelply did when he dealt with Student in the library. Additionally, Student's BSP states:

Staff will give [Student] at least two feet of space between themselves and [Student] when [Student] appears to be in an agitated state.

Mr. Whelply did this as well.

Student's behaviors escalated much more rapidly than the BSP contemplates. Accordingly, no interventions beyond what Mr. Whelply instituted, whether spelled out

in Student's BSP or not, could have been implemented to prevent Student's tirade that led to his making multiple threats to harm Mr. Whelply. Simply put, Student's hostility escalated too quickly for anyone to have done more. Mr. Whelply estimated the entire time student spent in the library was no more than five minutes and the first three minutes passed while Mr. Whelply was hoping Student would self-regulate his conduct and remove his ear buds. Mr. Whelply's interaction with Student took not more than a matter of seconds. Another 38 seconds passed as Mr. Whelply called security, which he verified by reviewing his phone records. Approximately 25 seconds passed from the time Student left the library and the time he threatened Mr. Whelply, and throughout that time, Student was either walking in or out of the library, posturing and constantly shouting a stream of obscenities and threats.

This finding is also supported by the testimony of Ms. Fields, who had reviewed Student's IEP prior to the incident and was aware of its contents, but chose not to intervene because, like Mr. Whelply, she feared for her personal safety.

Given the brevity and intensity of Student's conduct, it does not appear that there was anything in his IEP that could, if implemented, have restrained that conduct. The salient requirements of the IEP were in fact implemented. The weight of the evidence does not support Student's assertion that Mr. Whelply could have done more to defuse the situation had he been cognizant of Student's BSP, or that Ms. Fields could have successfully intervened using its techniques. Accordingly, the MDIEP team correctly determined that Student's conduct was not caused by, or related to, any failure to implement his IEP.

CONCLUSIONS OF LAW

BURDEN OF PROOF

1. Student, as the party seeking relief, has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed.2d 387].)

MANIFESTATION DETERMINATION

2. A student receiving special education services may be suspended or expelled from school as provided by federal law. (Ed. Code, § 48915.5, subd. (a).)

3. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to him. (Cal. Code Regs., tit. 5, § 3042(a).) The removal of a special education student from his placement for more than 10 consecutive school days constitutes a change of placement. (34 C.F.R. § 300.536(a)(i)(2006).)

4. When a school district changes the placement of a special education student for specific conduct in violation of a student code of conduct, the student is entitled to certain procedural protections. The district is required to conduct a review to determine if the conduct that is subject to discipline is a manifestation of the student's disability. This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) It must be accomplished within ten school days of the decision to change the student's placement. (*Ibid.*)

5. A school district must notify parents of an IEP meeting, including a manifestation determination IEP team meeting, early enough to ensure that they will have an opportunity to attend, and must schedule the meeting at a mutually agreed upon time and place. (34 C.F.R. § 300.322(a)(1), (2)(2006); Ed. Code, § 56341.5, subds. (a)-(c).) In the case of a manifestation determination IEP meeting, the notice must

inform the parent of the decision to change the student's placement and must be accompanied by a copy of the parent's procedural safeguards. (20 U.S.C. § 1415(k)(1)(H).)

6. A manifestation determination must be made by the district, the parent, and relevant members of the IEP team as determined by the parent and the district. (20 U.S.C. § 1415(k)(1)(E)(i).) The manifestation determination analyzes the child's behavior as demonstrated across settings and across times. All relevant information in the student's file, including the IEP, any observations of teachers, and any relevant information from the parents must be reviewed to determine if the conduct was caused by, or had a direct and substantial relationship to the student's disability, or was the direct result of the district's failure to implement the student's IEP. (34 C.F.R. § 300.530(e)(2006); Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540, 46720 (Aug. 14, 2006) (Comments on 2006 Regulations).

7. If the IEP team decides that the student's conduct was caused by, or had a direct and substantial relationship to the child's disability, then the conduct must be determined to be a manifestation of the child's disability. If the IEP team determines the conduct is not a manifestation of the student's disability, then normal school disciplinary procedures may be used to address the incident in the same way as they would be applied to non-disabled students. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c)(2006).)

8. A parent who disagrees with any decision regarding the manifestation determination may request a hearing. (20 U.S.C. § 1415(k)(3)(A).) In appropriate circumstances the ALJ hearing the dispute may order a change in placement of the

student, and may return the student to the placement from which he was removed. (20 U.S.C. §1415(k)(3)(B)(ii).)

CAUSATION OR RELATIONSHIP TO DISABILITY

9. In order for a special education student's misconduct to be a manifestation of his disability, that conduct must either be caused by, or have a direct and substantial relationship to a student's disability. (20 U.S.C. § 1415(k)(E)(i).) The 2004 Amendments to the IDEA changed the way MDIEPs are to be conducted. Previous law set forth four broadly phrased questions that MDIEP teams were required to answer. Now, MDIEP teams are charged with answering just two, more concretely framed questions:

The Act now requires the [MDIEP team] to determine whether a child's behavior was a manifestation of the child's disability based on two inquiries: (1) was the conduct caused by, or did it have a direct and substantial relationship to the child's disability; or (2) was the conduct a direct result of the LED's failure to implement the child's IEP? (71 Fed.Reg. 46719 (August 14, 2006).)

10. The revised manifestation provisions were drafted to provide a simplified, commonsense manifestation determination process to be used by school personnel. (71 Fed.Reg. 46720 (August 14, 2006).) In changing the Act, Congress intended that a child's conduct be "direct and substantial" and not merely have, "an attenuated association, such as low self-esteem, to the child's disability." (Ibid.)

11. The Ninth Circuit has addressed some of the considerations relevant to a manifestation determination:

If the child's misbehavior is properly determined not to be a manifestation of his handicap, the handicapped child can be expelled. [Citations]... When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children... To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that not to be so. (*Doe v. Maher* (9th Cir, 1986 793 F.2d 1470, 1480, fn 8, *affd.*, *sub nom.*, *Honig v. Doe* (1988) 484 U.S. 305).

12. In *Danny K. v. Department of Education* (D. Hawaii 2011) 57 IDELR 185, the district court upheld a hearing officer's decision that a student's behavior (detonating an explosive device) was not a manifestation of his disability (ADHD). The court noted student's difficulties in school stemmed in large part from environmental factors, such as, his poor attendance and work habits, lack of motivation, and disruptive behaviors, and also, that student had a Conduct Disorder that adversely impacted his behaviors. Furthermore, the court concluded that student's breaking of rules and his defiance of authority figures are behaviors that are frequently associated with one suffering a Conduct Disorder. (*Ibid.*) Despite having a BSP, the conduct for which student was expelled was found not to be substantially and directly related to his disability.

ISSUE ONE: WAS STUDENT'S CONDUCT ON MAY 23, 2011, CAUSED BY, OR DID IT HAVE A DIRECT AND SUBSTANTIAL RELATIONSHIP TO, HIS DISABILITY?

13. Based on Factual Findings 1 through 5 and 9, and Legal Conclusions 1 through 12, the District members of the MDIEP team correctly determined that Student's conduct on May 23, 2011, was not caused by, nor was it directly and substantially related to, Student's SLD. While an intuitive relationship existed between Student's conduct and his BSP, Student's conduct was not legally related to his disability as required by the manifestation determination process. As set forth in Legal Conclusion 9, the law requires an MDIEP team to determine whether there is a direct and substantial relationship between a student's *disability* and the conduct in question. The MDIEP team concluded there was no such relationship and the balance of the evidence produced at hearing supports the MDIEP team's conclusion was correctly reached. Student's conduct bore no relationship, substantial or otherwise, to the disability that qualifies him for special education and related services. District members of the MDIEP persuasively testified that despite Student's having a BSP, the team focused on whether there was a relationship between Student's handicapping condition, and his conduct, and not between Student's BSP and his conduct. This was the appropriate analysis for the MDIEP team to apply consistent with the 2004 Amendment to the IDEA, and it was the correct conclusion for the MDIEP team to reach.

The evidence clearly established that Student possesses the inherent ability to understand clear directions, as well as the capacity to follow directions. There is nothing in the record to suggest Mr. Whelply's gestures or requests were at all ambiguous, his non-verbal and verbal directions were clear. Further, there is nothing in the record to suggest that Student's reading disorder caused him to struggle in comprehending any of Mr. Whelply's communications. Accordingly, the MDIEP team correctly concluded,

based on its review of all relevant information--including Student's family input--that Student's behavior on May 23, 2011 was not caused by, nor did it have a direct and substantial relationship to, his disability.

ISSUE TWO: WAS STUDENT'S CONDUCT A DIRECT RESULT OF DISTRICT'S FAILURE TO IMPLEMENT HIS IEP?

14. As set forth in Factual Findings 1 through 4, and 7, and Legal Conclusions 1 through 12, the weight of the evidence shows that Mr. Whelply handled the incident consistent with Student's BSP. Furthermore, Student's hostilities escalated so rapidly that no time for further intervention existed. In this instance, neither Mr. Whelply nor Ms. Fields had the opportunity to do more than they did, and they reasonably perceived that further intervention would be dangerous to them and to the students around them. Lastly, Student's contention that District failed to implement Student's IEP because Mr. Whelply did not have a copy is unpersuasive because it is implausible to assume that Mr. Whelply could have memorized the contents of all special education students' IEPs and BSPs. Accordingly, Student failed to meet his burden to show that his conduct was the direct result of District's failure to implement his IEP, as implementation does not require all of a district's employees to be mindful of special education students' IEPs.

Lastly, as set forth in Factual Finding 6, the District members of the MDIEP team specifically considered whether Student was eligible under the category of emotional disturbance and they correctly concluded he was not. Their decision was consistent with both historic and recent assessment data showing Student not to be emotionally disturbed. Thus, Student did not meet his burden to show the conduct that led to his expulsion was caused by his being emotionally disturbed, and by District's failure to have an IEP in place that listed Student as being ED eligible

ORDER

Student's request for relief from the manifestation determination is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on the single issue decided.

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 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: November 30, 2011

_____/s/_____

Gary A. Geren

Administrative Law Judge

Office of Administrative Hearings