

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ANAHEIM UNION HIGH SCHOOL
DISTRICT.

OAH CASE NO. 2012031076

EXPEDITED DECISION

Administrative Law Judge (ALJ) Darrell Lepkowsky of the Office of Administrative Hearings (OAH), State of California, heard this matter in Anaheim, California, on April 24, 25, and 26, 2012.

Tania Whiteleather, Esq., represented Student and his parents (Student). Advocate Dr. Susan Burnett also appeared on behalf of Student and his parents. Student's mother (Mother) was present for the entire hearing. Student was not present.

Jeffrey Riel, Esq., represented the Anaheim Union High School District (District). Dr. Barbara Moore, the District's Director of Special Youth Services, also appeared on behalf of the District for most of the hearing.

Student filed his due process request (complaint) on March 26, 2012. On March 29, 2012, OAH issued a scheduling order setting this case for dual hearing dates based upon the fact that some of the allegations in Student's complaint, by statute, require an expedited hearing. The expedited portion of Student's complaint is the subject of this decision. At the close of the hearing, the ALJ granted the parties' request to file written closing briefs in lieu of oral closing arguments. Student timely filed his closing brief on

May 2, 2012. The District timely filed its closing brief on May 3, 2012, at which time the ALJ deemed the matter submitted.

ISSUE

The sole issue for this expedited hearing is as follows: Did the District have a “basis of knowledge” that Student was a child with a disability prior to the conduct leading to a recommendation for expulsion?¹

OVERVIEW OF THE CASE

Student is in 10th grade. He originally attended Kennedy High School (Kennedy) in the District. Student has never been assessed or found eligible for special education but has been covered by an accommodation plan under Section 504 of the Rehabilitation Act of 1973 (504 plan) since September 22, 2011. Student later was accused of attempting to buy marijuana at school. Based upon this incident, which occurred in mid-February 2012, the District suspended Student and removed him from Kennedy. The District placed Student at one of its community day schools. Student contends that the District should have offered him the procedural protections provided to pupils eligible for special education and related services under the Individuals with Disabilities Education Act (IDEA) before removing him permanently from his placement at Kennedy. Student contends that he was, and is, entitled to these protections because the District had a “basis of knowledge” that he was a child with a disability as defined by the IDEA. Student contends that the District had this knowledge based upon Mother’s communications with the District through a letter written by Student’s psychiatrist,

¹ The issue for hearing is based upon Student’s complaint and discussion with the parties at the prehearing conference in the expedited case.

which Mother sent to the District. Student also contends that the District had a “basis of knowledge” based upon the information regarding Student’s pattern of behavior, which his teachers provided to Kennedy’s Assistant Principal at the meeting where Student was found eligible for a 504 plan.

The District disagrees that it had any basis of knowledge that Student was a child with a disability. It contends that Mother has never requested that the District assess Student for special education eligibility and that she has never communicated to the District that Student is in need of special education and related services. The District also contends that the reference in the IDEA and its implementing regulations to a “pattern of behavior” does not refer to behavior that is related to school performance. Rather, the District contends that changes in the IDEA and its implementing regulations subsequent to the re-authorization of the IDEA, effective July 1, 2005, clearly indicate that Congress intended the definition of “pattern of behavior” to refer only to disruptive or maladaptive behaviors that could give rise to disciplinary proceedings that might result in a child’s removal to an alternate educational setting.

This Decision finds unpersuasive Student’s argument that any time a school district holds a 504 plan meeting it is per se on notice that the pupil for whom the meeting is held may be a child in need of special education services. However, this Decision also finds unpersuasive the District’s contention that only a pattern of maladaptive or disruptive behaviors constitute a “pattern of behavior” under the IDEA and its implementing regulations. Based upon the unique factors in this case, this Decision finds that the District was on notice that Student may be a child eligible for special education and therefore it should have provided him with a manifestation determination hearing under the IDEA and placement in an interim alternative educational setting rather than permanently removing Student from Kennedy.

FACTUAL FINDINGS

EVENTS LEADING TO STUDENT'S 504 PLAN

1. Student is a 16-year-old young man who lives within the jurisdiction of the District. He has not been found eligible for special education and related services.

2. Student has always had academic difficulties. Although he has had excellent teachers throughout his school history, his problems escalated as he grew older. The transition from elementary school to middle school was hard for Student. He found it difficult to have seven teachers instead of one and had difficulty adjusting to the increased amount of students in school. Mother helped Student through his middle school years by providing assistance to him at home with his school work and with his organization. She also kept in contact with Student's teachers and counselors.

3. Student started high school in school year 2010-2011, Student's ninth grade year. Prior to Student's first day at school, Mother contacted school counselor Helen Yee to discuss Student's issues with her. Mother has been president of the Parent-Teacher-Student Association (PTSA) for three years and has a long history of involvement in school and community issues. She has been involved extensively in Student's education both through contacts with his teachers and school administrators as well as by providing him with extensive assistance with organizing and completing his assignments. Mother was very aware that Student's difficulties at school increased as he grew older. Student's brother, who had recently graduated from Kennedy, is academically gifted and had been school valedictorian. Mother wanted Ms. Yee and staff at Kennedy to be aware that Student did not share his brother's academic talents. Mother informed Ms. Yee that Student was nervous and anxious, and struggled in school.

4. Student's academic difficulties during his freshman year at Kennedy were primarily in mathematics. Student was enrolled in an Algebra I class taught by Terence

Rollerson. This was the second time Student took Algebra I. Student did not demonstrate any misbehavior in Mr. Rollerson's class. However, he had difficulty learning the material and completing his class assignments and homework. Mr. Rollerson spoke with Mother and some of the school counselors about Student's difficulties. The consensus was that Student would benefit from tutoring. Even with the tutoring, Student almost failed the class. His grade for the first semester was a D. His grade for the second semester was a D-. Because of Student's low grade, instead of advancing to Geometry in 10th grade, Student is now taking a class entitled "Algebra I – Plus," which is a more intensive version of Algebra I for students who are not ready to advance to the next level of mathematics.

5. Student continued to have anxiety about school throughout ninth grade. Toward the end of the school year, Mother's concerns for Student prompted her to make an appointment for him with a psychiatrist. Student had especially been having difficulties in his Spanish class. His teacher, Mary Jesperson,² was having difficulty reading Student's writing. She had noticed that Student was getting agitated in class when she corrected him. A couple of days before the appointment with the psychiatrist, Student had an anxiety attack while in Ms. Jesperson's class. She escorted Student to the health office. Student was hyperventilating on the way there. When they reached the health office, Student burst out crying. Ms. Jesperson was concerned about Student's anxiety attack and the fact that he had starting crying at school. She informed Mother by email of her concern and told Mother that she was going to excuse Student from taking an upcoming exam. At some point during this time, Ms. Jesperson suggested to Mother that she think about requesting a 504 plan for Student.

² Ms. Jesperson did not testify at this hearing.

6. Student's psychiatrist determined that Student suffered from anxiety and attention deficit hyperactivity disorder (ADHD). He prescribed medication to address these issues. In emails to Mr. Rollerson, Mother discussed Student's struggles with anxiety throughout the second semester of ninth grade and his anxiety attack in Spanish class. She also informed Mr. Rollerson of the psychiatrist's diagnosis and the fact that Student was prescribed medication to address his anxiety and ADHD. Mother praised Mr. Rollerson for all his assistance to Student and said she hoped Student would be able to raise his grade by the end of the semester. However, as discussed above, despite Mr. Rollerson's help in class and despite the afterschool tutoring, Student almost failed Algebra I.

7. Student had a difficult summer in 2011 after finishing ninth grade. For reasons not presented at this hearing, Student's mental health declined significantly. Sometime in late summer, he had a crisis in which he attempted suicide. Student was admitted to a psychiatric hospital for a number of days for treatment.

8. As president of the PTSA and because of her involvement in other school and community activities, Mother was aware that there were children in the District who had been found eligible for special education. She also was given a Parent-Student Handbook at the beginning of each school year when enrolling Student at school that contains a series of important notifications to parents. One of the notifications is identified under a section of the Handbook entitled "Educational Programs and Services." The subheading is entitled "Special Education Programs." This subsection references pertinent special education provisions of the Education Code, 504 plans, and the IDEA. The subsection informs parents of the existence of available programs and advises parents to contact school administrators for more information. Mother acknowledged receiving the Handbook at the beginning of the 2011-2012 school year. However, she explained at hearing that she never read the Handbook notification in

detail and never believed that Student had a disability that would qualify him for special education. Mother also reviewed a pamphlet distributed by Kennedy addressing student interventions and accommodations, but it is not clear when she first saw it.

9. Mother worked at the PTSA table during school registration in August 2011, before the 2011-2012 school year began. She spent time talking with a school clerical staff member from the Kennedy counseling office named Linda Zubiata who was also working during registration. Although not a school administrator, Mother has always believed Ms. Zubiata to be one of the people most knowledgeable about school operations and procedures. Mother discussed Student's problems during the summer with Ms. Zubiata and asked her if she believed that Student needed special education. Ms. Zubiata told Mother that she did not believe Student qualified for special education because he had high test scores. Prior to the disciplinary action taken against Student, Mother did not attempt to discuss Ms. Zubiata's opinions regarding special education eligibility with any teachers, supervisors, or administrators at the District.

10. In addition to Ms. Jespersen, Mother had discussed Student's possible need for a 504 plan with one of Student's teachers when he was in eighth grade. Because of these discussions, her conversation with Ms. Zubiata, and her belief at the time that only children with extreme learning disabilities qualified for Special Education, Mother did not believe in August 2011 that Student qualified for special education. She therefore never requested the District to assess Student for special education eligibility and never expressed her concern to any District supervisors or administrators, verbally or in writing, that Student needed special education interventions or assistance.

11. Instead, Mother determined to request a 504 plan for Student. Student's psychiatrist, Dr. Jeffrey Litzinger,³ wrote a letter on September 2, 2011, addressed to

³ Dr. Litzinger did not testify at this hearing.

“whom it may concern,” explaining that Student suffered from anxiety and ADHD. Dr. Litzinger stated that Student would benefit from a 504 plan. He suggested numerous classroom accommodations that he believed would assist Student. Dr. Litzinger also stated that Student should be provided “any other special programs that the school offers to meet [Student’s] needs.”

12. Mother faxed a copy of Dr. Litzinger’s letter to Ms. Yee on September 8, 2011, shortly after the start of the 211-2012 school year, along with a letter of her own. In her letter, Mother requested a 504 plan for Student because she believed that Student was at risk of failure without a clear plan in place to address his disabilities. Ms. Yee immediately began preparations to convene the 504 plan meeting for Student. The meeting took place on September 22, 2011.

STUDENT’S 504 PLAN MEETING

13. Ms. Yee was present at the 504 plan meeting and took the meeting notes. Assistant Principal Yousef Nasouf attended as the administrative representative. Four of Student’s teachers also attended: Colin Cornforth, Student’s history teacher; David Wiskus, Student’s Algebra I-Plus teacher; Cynthia Esparza, Student’s Three-D art teacher; and Marlene Wu, Student’s English teacher. Mother and Student attended the meeting as well. Ms. Yee gave an introduction to the meeting and explained to the participants that they were there to create a 504 plan for Student based on his diagnosis of ADHD and anxiety by his treating psychiatrist.

14. Each of the teachers present at the meeting discussed Student’s performance and behavior in their respective classrooms. Mr. Cornforth noted that Student had been anxious in his class and that the medications Student was taking for his ADHD and anxiety were making him drowsy in class. Student also frequently requested permission to leave class and use the restroom. He would be gone 10 to 15 minutes. Student also asked to go to the health office occasionally.

15. David Wiskus, Student's Algebra I-Plus teacher, discussed Student's struggles with math and the daily problems Student had remaining focused in class. He discussed that Student was lethargic and was not using class time wisely. Mr. Wiskus had spoken to Mr. Nasouf before the 504 meeting about Student's difficulties and discussed the possibility of reducing Student's homework problems.

16. Cynthia Esparza, Student's art teacher, discussed that Student was restless in her class and needed to take many breaks. Although school had only been in session a few weeks at the time of the 504 meeting, Student had already used up his allotted hall passes for the semester in Ms. Esparza's class.

17. Ms. Wu discussed the fact that Student had great difficulty concentrating in her class. He could not sit still and frequently would ask for restroom breaks. Student's writing was sloppy. He had difficulties with attention and could not focus on his work. Student did not misbehave in class but he seemed anxious. At times he would discuss his feelings of anxiety with Ms. Wu but was unable to articulate why he felt anxious. Ms. Wu also informed the 504 team that Student had organizational issues. He was unable to keep his notebook in order and had problems completing homework on time.

18. All teachers present at the 504 meeting reported on Student's problems in their respective classes. Some left immediately after their presentations to return to their classes. The remaining people present at the meeting, including Mother, Student, Ms. Yee and Mr. Nasouf, then turned the discussion to Student's diagnosis of ADHD and anxiety, and Student's psychiatric hospitalization the previous summer. The team discussed that Student's anxiety was negatively impacting his ability to focus in class and was therefore impeding his ability to learn. The team also discussed that Student was taking prescribed medication for anxiety, for his ADHD, and for his moods, and that the medication could be negatively affecting Student's focus in class.

19. Ms. Yee stated at hearing that the District was fairly certain Student would qualify for a 504 plan even before the meeting convened based upon Dr. Litzinger's letter. At the meeting, all 504 team members agreed that Student was eligible for a 504 plan based on his anxiety and ADHD. All team members agreed that Student required accommodations because his ability to learn was impaired due to his anxiety and ADHD. The team developed 14 accommodations for Student, including the accommodations recommended by Dr. Litzinger in his letter of September 2, 2011. The accommodations consisted of preferential classroom seating; extended time for assignments when necessary; copies of notes to be emailed to Mother; the use of a daily planner to be checked by Mother; alternative environments in which to take tests as needed; teacher monitoring of Student's needs; before and after school support from Student's teachers; permission for Student to take small breaks as needed when he felt anxious; permission for Student to email assignments to his teachers; permission to work with another student in class to review class work; creation of "to do" and "due" folders to organize class assignments; oral exams rather than written exams in History and English; reduced number of problems in math, to be increased as Student progressed; and ongoing advance communication with Mother regarding Student's upcoming class assignments.

20. Mother did not request a special education assessment⁴ for Student at this meeting and did not express any concerns that the 504 plan was inadequate. None of Student's teachers, Ms. Yee, or Mr. Nasouf discussed the possibility of a special education assessment for Student or that Student qualified or might qualify for special

⁴ The term "assessment" is used under California law while the term "evaluation" is used under federal law. The terms both refer to the administration of testing instruments to children to determine if they qualify for special education. The terms are used interchangeably in this Decision.

education interventions. All of the teachers present, Ms. Yee, and Mr. Nasouf signed the 504 plan. Mother and Student did so as well.

EVENTS SUBSEQUENT TO 504 MEETING

21. There is no evidence that any of Student's teachers failed to implement his 504 plan. However, the parties dispute whether the 504 plan accommodations for Student were successful. While the testimony of Student's teachers did indicate that Student improved somewhat, each teacher acknowledged that Student continued to have problems after the 504 plan was effectuated.

22. Even after Mr. Cornforth began implementing the 504 plan accommodations, Student continued to take breaks by going to the restroom or to the health office. Student would sometimes be gone for as long as 15 minutes when he went to the restroom. Since those types of breaks were part of Student's accommodations, Mr. Cornforth did not confront Student about the frequency or length of the breaks and did not report them to anyone else.

23. Although Mr. Cornforth believes that the 504 plan was sufficient to address Student's needs, he acknowledged that Student was still "zoning out" frequently in his class even after he implemented Student's 504 plan. Student would still look at the desk or a point in the wall and often did not seem to be engaged in what was going on in class. He sometimes neglected to do portions of his classwork. Student worked better when Mr. Cornforth was able to work with him on a one-to-one basis.

24. Student received a C- in Mr. Cornforth's class for the first semester of 10th grade, which ended sometime in January, 2012. Although this was an improvement over the failing grades Student had been receiving at the beginning of the school year, Mr. Cornforth acknowledged that Student's improvement was based not only on the 504 plan but also on the assistance Mother provided Student at home by doing the homework assignments with him. Mother therefore was a factor in Student's ability to

complete his school work. Mother also constantly communicated with Mr. Cornforth about missing assignments and dropped off Student's homework assignments at school when Student forgot to bring them. Mr. Cornforth admitted that Student did not earn the C- on his own.

25. Mr. Wiskus also implemented Student's 504 plan. However, he stated at hearing that the plan only partially addressed Student's inattentive behavior. Although Student's lethargy improved, he was still lethargic in class. Mr. Wiskus was uncertain of the causes of the lethargy. Mr. Wiskus thought that the lethargy could even be related to illicit drug use, based on similar behavior he had seen in other pupils. However, he did not think it was significant enough to discuss with school administrators.

26. Student also continued struggled to use class time wisely in Mr. Wiskus's class and continued to leave class on a daily basis to go to the restroom. At times, Mr. Wiskus looked out the classroom door when Student left and saw Student talking to friends in the hallway rather than going to the restroom.

27. Student was also still having trouble with organization in Mr. Wiskus's class and was not doing his work independently. Mr. Wiskus was aware that Mother was constantly helping Student at home with his work and that she regularly brought math homework and quizzes back to school. In mid-January 2012, Mother wrote to Mr. Wiskus that she was sending "mounds and mounds" of Student's make-up work to him. She informed Mr. Wiskus that although Student was making some progress, the semester had been difficult beyond anything Student or she had ever experienced. However, although Student never reached a point where he could do all his work independently, Mr. Wiskus does not believe that Student requires special education interventions or that the 504 plan was insufficient to meet Student's educational needs.

28. Ms. Wu believes that Student's attention and focus improved in her class after she began implementing his 504 plan and that he decreased the amount of times

he left class to take breaks in the restroom. However, she acknowledged that Student still had difficulty turning in assignments, that Mother was giving Student considerable assistance in organizing his work, and that Student continued to leave class to take breaks. In an email to Mother in early December 2011, Ms. Wu stated that Student was leaving class about three times a week to take breaks even though Student was in her class right after lunch. Ms. Wu indicated that the breaks were interfering with Student's class time. She asked Mother to work with Student to get him to take his breaks during lunch.

29. Student continued to have some problems in his non-academic art class even after Ms. Esparza implemented his 504 plan. He still had problems keeping motivated and staying on task. However, by the beginning of the second semester of 10th grade, Student showed some improvement. Although he would sometimes forget instructions, he would listen to them. Ms. Esparza found it helpful to repeat the instructions for Student or change the way she gave him directions. She acknowledged that Student continued to take breaks and leave the classroom for a few minutes on a daily basis.

30. None of Student's 10th grade teachers at Kennedy believe that Student should have been referred for special education assessment. They all agree that he did not misbehave in their classes and that the 504 plan with its wealth of accommodations was meeting his educational needs. However, they all acknowledged at hearing that in varying degrees, the 504 plan had not resolved all of Student's anxiety and inattention issues.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a special education administrative proceeding, the party seeking relief has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*).) Here, Student has brought the complaint and has the burden of proof.

FREE APPROPRIATE PUBLIC EDUCATION

2. Special education law derives from the Individuals with Disabilities Education Act (IDEA or Act). (20 U.S.C. § 1400 et seq.) The IDEA is a comprehensive educational scheme that confers upon the disabled child a substantive right to public education. (*Honig v. Doe* (1988) 484 U.S. 305, 310 [108 S.Ct. 592, 98 L.Ed.2d 686] (*Honig*).) The primary goal of the IDEA is to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes public education and related services.” (20 U.S.C. § 1400(d)(a)(A); see *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 947 (*Mercer Island*).)

3. The Supreme Court established a two-part test to determine whether an educational agency has provided a free appropriate public education (FAPE) for a disabled child. (*Mercer Island, supra*, 592 F.3d at p. 947.) “First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program [IEP] developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” (*Board of Educ. of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 206-207 [102 S.Ct. 3034, 73 L.Ed.2d 690]) “If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” (*Id.* at p. 207.)

4. “Procedural flaws in the IEP process do not always amount to the denial of FAPE.” (*L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 909.) A

violation of procedure amounts to a denial of FAPE only when the oversight (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or (3) caused a deprivation of educational benefit. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2) (2006)⁵; Ed. Code, § 56505, subd. (f)(2).)

5. Under federal and state special education law, students found eligible for special education are afforded certain rights in disciplinary matters. Among those rights is the right to a determination of whether the student's misconduct "that led to a disciplinary change of placement" was caused by or directly related to a child's disability. (20 U.S.C. § 1415 (k)(1)(E)(I)(II); 34 C.F.R. § 300.530; Ed. Code, § 48915.5, subd. (a) and (b).) These protections extend to students not previously identified as eligible for special education services only if the following factors are met: (1) the student has engaged in behavior that violated any rule or code of conduct of the school district and, (2) the school district had knowledge, or is deemed to have had knowledge, that the student was a child with a disability "before the behavior that precipitated the disciplinary action occurred." (20 U.S.C. § 1415 (k)(5)(A).)

6. The "basis of knowledge" or "deemed" knowledge exists when one or more of the following has occurred: (1) the parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services; (2) the parent of the child has requested an evaluation of the child; or (3) the teacher of the child, or other personnel of the local educational agency, expressed specific concerns about a pattern of behavior demonstrated by the child

⁵ All references in this Decision to Title 34, Code of Federal Regulations are to the 2006 edition.

directly to the director of special education of the agency or to other supervisory personnel of the agency. (20 U.S.C. § 1415 (k)(5)(B); 34 C.F.R. § 300.534(b).)

DETERMINATION OF ISSUES

7. In the instant case, the primary issue for the ALJ to determine is whether the District had the requisite basis of knowledge to be under notice that Student should have been considered a child with a disability and therefore afforded the procedural safeguards available to children already found eligible for special education. Student contends that the District should have convened a manifestation determination hearing for him at which time a team would decide whether the behavior giving rise to the disciplinary action against him was due to Student's disability and, if so, whether he needed to remain in the alternative placement. The District contends that it had no legal basis of knowledge of Student's potential disability and therefore was not required to offer procedural protections of any kind to Student.

8. The facts of this case up to the time of Student's 504 meeting are not substantially disputed by the parties. Both agree that Student displayed some aspects of ADHD and anxiety prior to his 504 plan meeting on September 22, 2011. Both agree that Dr. Litzinger's letter and Mother's subsequent request for a 504 plan on September 8, 2011, prompted the District to convene a 504 team meeting. (Factual Findings 2-13.) Ms. Yee testified that the District had basically determined, based upon Dr. Litzinger's letter, that Student qualified for a 504 plan by the time the District convened the meeting. (Factual Findings 19.) The parties agree that Student's teachers, Ms. Yee, Mr. Nasouf, and Mother discussed Student's anxiety, lack of focus, and disorganization in class and the effect this was having on his ability to learn. (Factual Findings 2-19.) And all parties agree that the discussion resulted in the development of a 504 plan for Student that incorporated Dr. Litzinger's recommendations. (Factual Findings 2-19.)

9. Where the parties substantially diverge is in what they claim are the implications of these facts and whether any of the communications with the District should be deemed adequate notification to the District of Student's potential disability. Additionally, Student contends that there was substantial evidence that the 504 plan was unsuccessful in addressing his ADHD and anxiety, thereby additionally putting the District on notice that Student might be a child with a disability and therefore entitled to the procedural protections of the IDEA. The District disagrees and argues that the 504 plan was substantially addressing Student's 504 needs. (Factual Findings 2-12.)

10. Student does not contend that Mother requested the District to assess him; therefore 34 Code of Federal Regulations part 300.534(b)(2) is not at issue here.

11. Student also does not contend that Mother directly made a written request for special education services to anyone at the District. Rather, Student contends that Dr. Litzenger was acting as Mother's agent and that his letter, in which he requested section 504 accommodations for Student and "any other programs that the school offers to meet [Student's] needs" should be deemed a request for special education services. Student acknowledges that Dr. Litzinger's letter does not specifically request special education services. Student instead asserts that the request should have prompted the knowledgeable District educators to inquire further of Dr. Litzinger as to what he really was requesting. Student offers no statutory or case law support for his contentions. (Factual Findings 6, and 11-12.)

12. Student's arguments are unpersuasive for two reasons. First, he offers no support for his contention that a doctor, who does not even hold Student's educational rights, can or should legally be deemed Mother's or Student's agent for educational purposes. Mother forwarded Dr. Litzinger's letter to the District but failed to adopt all of Dr. Litzinger's language in her accompanying letter. Mother's cover letter only requested the District to provide Student with a 504 plan. (Factual Findings 11-12.)

13. However, even assuming Mother adopted Dr. Litzinger's letter verbatim by virtue of forwarding it to the District, there is nothing in the letter that puts the District on notice that Mother was requesting special education services for Student. Student offers no support for his contention that a District is required to delve into the literal meanings of communications it receives to ascertain if the party *really means* something other than what is written. Student has therefore failed to meet his burden of persuasion that the District had legally valid notice under 34 Code of Federal Regulations part 300.534(b)(1) that Mother had requested special education services for Student at any time prior to the incident which resulted in the disciplinary action against Student. (Factual Findings 2-12; Legal Conclusions 1, 5-6, and 7-13.)

14. The parties' primary dispute in this case is whether the District had a basis of knowledge under 34 Code of Federal Regulations part 300.534(b)(3) based upon the concerns raised by Student's teachers at his 504 plan meeting on September 22, 2011. Based upon Factual Findings 13-19, the evidence is clear that a full discussion occurred at that meeting and that all teachers present expressed concerns about Student's anxiety, lack of focus, and lack of organization in class to Mr. Nasouf, who was the District administrator in attendance. However, the District contends that Student's demonstrated anxiety, lack of focus, and organizational issues do not constitute "a pattern of behavior" under the re-authorized IDEA and the 2006 version of the IDEA's implementing regulations.

15. The District bases its contention on the fact that the re-authorized IDEA, and later the 2006 regulations, deleted the reference in the prior version of 20 United States Code, section 1415(k)(5)(B)(iii) to a teacher expressing concern to a district

administrator about a child's "behavior or performance."⁶ As indicated in paragraph 6 above of the Legal Conclusions, the present concern expressed by a teacher must be with regard to a child's "pattern of behavior." The District argues that the deletion of the terminology "child's. . . performance" was a deliberate step by Congress to focus solely on behaviors that would clearly and unambiguously trigger a district's child find obligations. The District cites to Senate Report Number 108-185, at page 46 (November 3, 2003) in support of this argument.

16. In this Senate Report, the Senate noted that there had been concerns regarding abuses of the statutory protections to children not yet found eligible for special education. The Senate committee believed that the former provisions of the IDEA had sometimes provided a shield against the ability of a school district to be able to appropriately discipline a student. Therefore, the Senate committee stated that the re-authorized IDEA revised the provisions to ensure that schools could appropriately discipline students while still maintaining protections for students for whom the school has a valid reason to know has a disability. (Senate Report Number 108-185, *supra* at page 46).

17. The flaw in the District's argument is that neither the Senate Report nor the Federal Register commentary concerning the 2006 Regulations (Federal Register, Vol. 71, No. 156 (August 14, 2006)) define the term "pattern of behavior" or address whether behavior is only negative, disruptive, or maladaptive behavior (such as destroying property or causing injury to others) that could be the basis of an expulsion. Nor does the District cite any case law in support of its contention that "pattern of behavior" only refers to maladaptive or disruptive behavior.

⁶ The corresponding regulation in the 1999 version of the Code of Regulations is found at 34 Code of Federal Regulations part 300.527(b)(4).

18. There is, in fact, a paucity of case law subsequent to the re-authorization of the IDEA that addresses the issue of whether a district has a “basis of knowledge” that a child had a disability and therefore was entitled to the procedural protections of 34 Code of Federal Regulations part 300.530, et seq. Only one OAH case appears to address the question of basis of knowledge. However, that case is not helpful in resolving the District’s contentions here. The child in the case of *Student v. Capistrano Unified School District* (2006) Cal.Offc.Admin.Hrngs. Case No. 2006051005, (*Capistrano*) had engaged in the maladaptive behavior that the District here argues is the only type of conduct that could constitute a “pattern of behavior.” OAH found that the school district had a “basis of knowledge” that the student might be a child with a disability because the student’s mother had made a specific, written request for a special education assessment. The decision did not analyze the changes in the IDEA or what constituted a “pattern of behavior.”

19. There are also few cases from other jurisdictions. In *Greater Lowell Technical High School* (SEA Mass. 2006) 45 IDELR 28, 106 LRP 4788, the hearing officer found that the student was not entitled to IDEA procedural protections after having been suspended for drug possession because there was no adequate basis of knowledge on the part of the school district and because the district had assessed the student after his suspension but before he was expelled, and found him not eligible for special education. However, in dicta, the hearing officer found that attention deficient disorder could have been a pattern of behavior had it been properly brought to the district’s attention.

20. The case of *South Eastern School District* (SEA Penn. 2007) 107 LRP 10363 also does not shed light on the District’s contentions. In that case, a middle school student was suspended and later expelled for drug possession. After the suspension, the student’s parents requested that the district assess him. The student’s doctor then

diagnosed him with ADHD and prescribed medication for him. The school district conducted an expedited assessment which determined that Student was not eligible for special education. However, the assessor recommended, and the district concurred, that the student was eligible for a 504 plan. The district then held a manifestation hearing for the student under section 504 and determined that the student's conduct was not a manifestation of his section 504 disability. The district then expelled student for the remainder of the school year. The hearing officer, in an expedited proceeding, ordered the school district to reinstate the student immediately and hold an IEP meeting for him. However, the Pennsylvania second-tier reviewing board reversed the hearing officer, specifically finding that the issues in the case did not implicate the three bases of knowledge exceptions in the re-authorized IDEA. Rather, the focus of the case was whether the school district had conducted an expedited hearing upon the parent's request (which it had) and that stay-put did not apply while the expedited evaluation was being conducted.

21. Finally, the case of *Jackson v. Northwest Local School District* (S.D.Ohio 2010) 55 IDELR 104, 110 LRP 49939 (*Jackson*), is equally unhelpful in supporting the District's contentions concerning patterns of behaviors. There, the court determined that the school district had knowledge of the child's potential disability because the district had determined that the child should be referred to an outside agency for a mental health evaluation. The court did not analyze what type of behavior constitutes "a pattern of behavior" under the re-authorized IDEA. Rather, it found a basis of knowledge based upon the school district's referral of the student for the mental health evaluation.

22. The District has therefore failed to provide persuasive support for its argument that Student's history of anxiety and his inattentive and unfocused conduct in class cannot constitute a "pattern of behavior" that could give rise to a basis of

knowledge that he was a child with a disability. (Factual Findings 2-19 and 21-30; Legal Conclusions 1, 5-6, and 15-22.)

23. The analysis must now focus on the facts of Student's 504 plan meeting and whether the information as discussed by Student's teachers at the meeting was enough to give the District the requisite basis of knowledge that would trigger the requirement for a manifestation determination hearing.

24. Student urges the ALJ to find that the fact a school district has held a 504 meeting for a child is per se notice to a district that a child may be in need of special education support under the IDEA. The cases cited by Student for this argument are inapposite. *Student v. Irvine Unified School District* (2009) Cal.Offc.Admin.Hrngs. Case No. 2009050088, is a child find case which did not involve a basis of knowledge analysis. *Jackson, supra*, also fails to conclude, or even offer in dicta, that any time a district holds a 504 meeting for a child or finds a child eligible for a 504 plan, the district has a basis of knowledge that the child might be eligible for special education. Adopting Student's argument would require school districts to hold manifestation determination hearings for every child who has ever been provided a 504 meeting. There is simply no evidence that Congress intended such a result when it re-authorized the IDEA. To the contrary, as the District argued in its closing brief, Senate Report 108-185, *supra*, indicates that Congress intended to stifle abuses of manifestation determination protections, not broaden the coverage of those protections. The ALJ therefore finds unpersuasive, and declines to adopt, Student's argument that the mere holding of a 504 meeting constitutes per se basis of knowledge of the possibility that a child may be eligible for special education. (Factual Findings 13-19; Legal Conclusions 1, 5-6, and 23-24.)

25. However, the concerns that Student's teachers articulated at the 504 meeting for Student in *this* case, coupled with the evidence of Student's continued in class behavior, support Student's contention that he met the requirements of 34 Code

of Federal Regulations part 300.534(b)(3). All four of Student's teachers present at the 504 meeting discussed his anxiety, inattentiveness, and lack of focus, and how all were negatively affecting Student's ability to access his education. Student's issues were not just based on his ADHD and did not just require minor accommodations in the classroom. Student had demonstrated a history of anxiety of which his teachers and the District were aware. The 504 team discussed Student's anxiety in the context of his difficulties with school work and in the context of his suicide attempt and resulting hospitalization. The District was aware of Student's prescriptions for medications to address his anxiety and moods as well as to address his ADHD and referenced the medications on the 504 plan. The plan also specifically addressed Student's anxiety and offered accommodations for it as well as for his ADHD. (Factual Findings 2-19.)

26. Additionally, there is persuasive evidence that Student's patterns of anxiety and inattentiveness, which negatively impacted his success in school, continued in the less than five months between the implementation of his 504 plan and his alleged violation of school conduct in mid-February 2012. Student continued to be lethargic in math class. He "zoned out" in his history class. He continued to have difficulty completing assignments in all of his academic classes and continued to leave class to take breaks in the restroom, sometimes on a daily basis. Student's teachers acknowledged at hearing that it was only due to Mother's interventions in helping Student complete assignments and then bringing them to school herself that Student was able to pass his classes. Student has therefore met his burden of persuasion that the District had a basis of knowledge that he might be a child entitled to special education. Student has therefore proven that he was entitled to the procedural safeguards of 34 Code of Regulations part 300.530, et seq. (Factual Findings 2-19 and 21-30; Legal Conclusions 1-3, 5-6, and 8-26.)

27. Because the District did not provide Student with an assessment for special education eligibility and did not provide him with a manifestation determination, the District impeded Mother's right to participate in the decision to remove Student from Kennedy and place him in an alternative educational setting. Since Student was not offered these protections, he has suffered a loss of educational benefit by his removal from general education classes on a comprehensive high school campus to a community day school. Student has therefore demonstrated by a preponderance of the evidence that the District's procedural violations resulted in substantive harm to his rights and those of his mother. (Factual Findings 2-30; Legal Conclusions¹ and 4.)

28. In sum, Student has met his burden of proof by a preponderance of the evidence that the District had a "basis of knowledge" that Student was a child with a disability prior to the conduct leading to a recommendation for his expulsion. (Factual Findings 2-30; Legal Conclusions 1-28.)

REMEDIES

29. The final question to address is what constitutes a proper remedy for this violation. Student urges that he be returned to Kennedy after he completes 45 school days of attendance at the community day school he now attends, in accord with the provisions of 34 Code of Regulations part 300.530(g)(2) for placing a child in an interim alternative educational setting where the child has been found to solicit the sale of a controlled substance. Student also urges that the ALJ order the District to provide Student with a manifestation determination hearing.

30. The District asserts that, assuming that the ALJ finds as she has here, the District had a basis of knowledge for Student's alleged disability, the only appropriate remedy is an order that the District conduct a manifestation hearing for Student. The District contends that while the manifestation hearing is proceeding, and during any appeal of a manifestation determination that is adverse to him, Student must remain in

his interim alternative educational setting. The District cites to OAH's decision in *Capistrano, supra*, OAH 2006051005 at p. 5, in support of its contention that all that Student is entitled to is a manifestation determination. However, the District overlooks the fact that in *Capistrano*, OAH ordered the school district to provide a manifestation hearing *and* to suspend all current discipline proceedings against Student until the manifestation hearing was held.

31. The District, however, raises pertinent questions about the scope of a remedy in this case. As it points out in its closing brief, the 10-day period for holding a manifestation determination hearing pursuant to 34 Code of Federal Regulations part 300.530(e) has long since passed. The added difficulty is that the purpose of a manifestation determination is to decide if a student's misconduct was in fact due to his or her disability. It is impossible to make that determination if a student, as is this case, has never been assessed and determined to have a disability as defined by the IDEA. Additionally, even if a student receives a manifestation hearing and his or her conduct is determined to be a manifestation of that disability, the student may only be removed to an alternate setting for a maximum of 45 school days unless the entire IEP team, including parents, agrees to continue the placement or a continuation is ordered through a due process hearing. (See, 34 C.F.R. §§ 300.530(g) and 300.533.)

32. Courts have long recognized that equitable considerations are appropriate when fashioning relief for violations of the IDEA. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496, citing *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996, 85 L.Ed.2d 385] (hereafter, *Burlington*); *Greenland Sch. Dist. v. Amy N.* (1st Cir. 2004) 358 F.3d 150, 157; 20 U.S.C. § 1412(a)(10)(C)(i), (ii), (iii) & (iv).)

33. Since the ALJ has found that the District had the requisite basis of knowledge, the District should have held a manifestation determination under the IDEA

for Student prior to removing him to an alternate placement. The appropriate remedy is therefore to order that the District now hold the manifestation determination hearing. The parties stated at the hearing in this matter that the District was in the process of assessing Student. The ALJ shall therefore order the District to conduct a manifestation hearing for Student within 10 days from the date this Decision issues, or 10 days from the date the District completes its assessment of Student, whichever date comes **last**. (Factual Findings 2-30; Legal Conclusions 1, 5-6, and 29-33.)

34. The District shall return Student to his placement at Kennedy once he has completed 45 days of actual school attendance in his interim alternative educational placement at the community day school. Once the District has held a manifestation determination hearing for Student, the provisions of 34 Code of Federal Regulations part 300.530, et seq. shall apply in determining Student's placement subsequent to the manifestation determination. (Factual Findings 2-30; Legal Conclusions 1-34.)

35. This Decision does not determine whether the District breached its child find obligations to Student or whether Student is, in fact, eligible for special education and related services under the IDEA and corresponding state law.

ORDER

1. Within 10 days of the issuance of this Decision or within 10 days of the completion of the District's assessments of Student, whichever comes **last**, the District shall convene a manifestation determination hearing for Student.

2. The District shall return Student to his original educational placement at Kennedy High School as soon as Student has completed 45 days of actual school attendance in his interim alternative educational placement at the District community day school.

3. All other relief requested by Student is denied.

PREVAILING PARTY

Pursuant to 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. In accordance with that section the following finding is made: Student prevailed on the sole issue heard and decided in the expedited portion of this case.

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 in accordance with Education Code section 56505, subdivision (k).

Dated: May 9, 2012

/s/
DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings