

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2014040246

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

EXPEDITED DECISION

Parent on Student's behalf filed an expedited due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on April 3, 2014, naming Los Angeles Unified School District.¹

Administrative Law Judge Adrienne L. Krikorian heard this matter in Van Nuys, California, on May 6, 2014.²

Attorneys Shawna Parks and Surisa Rivers represented Student. Student, his mother, and paralegal Antonio Infante attended the hearing.

¹ Student's complaint included issues asserting that District's expulsion hearings were procedurally defective. At the beginning of the hearing the ALJ dismissed those claims as being outside of OAH's jurisdiction. This Decision is limited only to the claims alleged in the complaint that directly relate to asserted violations of the Individuals with Disabilities Education Act, specifically, Title 20 United States Code section 1415(k).

² District's school calendar for the time period after Student filed the complaint included a five-school-day spring break. Accordingly, the hearing was timely commenced within twenty school days of the filing of Student's complaint.

Attorney Donald Erwin represented District. Francine Metcalf, a specialist in District's compliance support and monitoring unit, attended the hearing on District's behalf.

The evidentiary portion of the hearing concluded on May 6, 2014. At the parties' request, the ALJ allowed the parties to submit written briefs and closing arguments by May 9, 2014. Upon timely receipt of written closing arguments, the record was closed and the matter was submitted for decision on May 9, 2014.

ISSUE³

Did District fail to comply with the provisions of Title 20 United States Code section 1415(k) following an incident on November 27, 2012?

SUMMARY OF DECISION

Student contends that District failed to comply with the provisions of Title 20 United States Code section 1415(k) when it expelled him from school on January 21, 2014, one year after District determined that when Student brought a gun and ammunition to school on November 27, 2012, the behavior was a manifestation of his disability. Student seeks an order reinstating him to the placement called for in his last individualized education program and requiring District to remove all records of the expulsion from his school records.

³ The issue has been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

District contends it complied with all provisions of Title 20 United States Code section 1415(k) in connection with Student's behavior on November 27, 2012, by finding the conduct to be a manifestation of Student's disability and providing an interim alternative educational setting for 45 days. Despite the language of Title 20 United States Code section 1415(k), District contends it was obligated to expel Student under the Federal Gun-Free Schools Act (20 U.S.C. § 7151) and California Education Code section 48915 because the safety of all students is paramount. District also contends that the Office of Administrative Hearings has no jurisdiction to consider Student's claim, because Student's appeal rights are limited to those decisions involving manifestation determinations and changes of placement, not expulsion proceedings.

Education Code section 48915 does not preempt Student's right to remain in school under 20 U.S.C. section 1415(k). The provisions of the Gun-Free Schools Act and Education Code sections 48915 and 48915.5 expressly and unambiguously require that District implement the provisions of the Gun-Free Schools Act in compliance with the Individuals with Disabilities Education Act, which limits a change of placement to 45 days when the behavior in question, including bringing a firearm to school, is a manifestation of a child's disability. Moreover, the law is clear that an expulsion is a change of placement, which falls within the jurisdiction of Office of Administrative Hearings. As such, Student's expulsion from District for conduct that District determined was a manifestation of his disability violated the letter and the intent of the IDEA. As a result, Student is entitled to reinstatement to the placement identified in his last IEP, and for removal from his school records of all reference to the expulsion proceedings.

FACTUAL FINDINGS

1. Student is a sixteen-year-old male who lives with his mother within the District's boundaries. At the time of the hearing, he attended Little Citizens Westside

Academy, a non-public school, in the ninth grade. He is eligible for special education as a student with Other Health Impairment.

2. In November, 2012, Student attended Portola Middle School for eighth grade. On November 27, 2012, Student came to school with a semi-automatic handgun and a full magazine of ammunition. A fellow student reported the gun to school administrators, who confirmed that Student had the gun. District suspended Student and he was arrested and incarcerated in Los Angeles County Juvenile Hall.

3. On January 14, 2013, District personnel met with Student and Student's mother for an "expulsion analysis."⁴ These individuals determined that Student's behavior on November 27, 2012, was a manifestation of Student's disability. The principal recommend expulsion because of the serious nature of the offense and straight expulsion proceedings without suspension were scheduled for January 30, 2013.

4. On January 29, 2013, Student was placed in an interim alternative educational setting at Gardena Community Day School. Student remained in the community day school for more than 45 days.

5. District postponed Student's January 30, 2013 expulsion proceedings at Student's request so that special education assessments could be conducted. In February 2013, District's Student Discipline and Expulsion Support Unit notified Student's mother that expulsion had been put into abeyance to allow time for assessments and an IEP team meeting.

⁴ The evidence conflicted on who actually attended the meeting, and whether this was an IEP meeting or a manifestation determination meeting which did not require attendance of all IEP team members. However, because the parties do not dispute the conclusion reached at the meeting, whether or not the appropriate District personnel attended this meeting is of no consequence.

6. On August 9, 2013, Student filed for due process naming District and challenging the interim alternative educational setting as an inappropriate placement. On August 27, 2014, District and Student entered into a final settlement agreement in which the parties agreed that District would fund Student's placement in a non-public school through the 2013-2014 school year and 2014 extended school year in the summer. Student waived all educational claims through the date of execution of the settlement agreement, including any claim that District retained Student in an interim alternative educational setting beyond the statutory 45-day period.

7. Student began attending Little Citizens Westside Academy in accordance with the August 27, 2013 settlement agreement. He made progress at Little Citizens Westside Academy and had no disciplinary actions taken against him up to the time of the hearing.

8. District held a triennial review IEP team meeting on November 21, 2013, as a result of the settlement agreement. District offered placement at a non-public school, and specifically Little Citizens Westside Academy. The IEP did not set an end date for the placement, or otherwise designate that the placement would end after the 2014 extended school year in accordance with the settlement agreement. Mother consented to the IEP.

9. On December 3, 2013, District notified Student's mother that the expulsion proceedings would be re-instituted based upon the November 27, 2012 incident. On December 16, 2013, District's Expulsion Review Committee held an expulsion hearing for Student. The Expulsion Review Committee was not informed that the relevant members of Student's IEP team determined that Student's behavior was a manifestation of his disability, or that District had entered into a settlement agreement with Student providing for District-funded placement through summer school of 2014. The Expulsion

Review Committee recommended expulsion. On January 21, 2014, the District Board of Education accepted the recommendation to expel Student.

10. District notified Student's mother that Student was expelled and instructed her to contact the Los Angeles County Office of Education to arrange for placement and services. Mother did not do so. Student remained at Little Citizens Westside Academy pursuant to the settlement agreement.

11. District's Policy Bulletin relating to Expulsion of Students provides at page 14 of 26, at section VI(C)(1), that if an IEP team determines that alleged misconduct by a special education student is a manifestation of that student's disability, "the expulsion process shall cease (except when the incident involves a firearm)."

LEGAL CONCLUSIONS

1. Student contends that District violated its obligations under the IDEA when it resumed expulsion proceedings against Student in December 2013, relating to the November 27, 2012 incident, after it determined Student's behavior was a manifestation of his disability in January 2013. As result, Student claims his expulsion on January 21, 2014, more than one year after the November 27, 2012 incident, violated the IDEA and he is therefore entitled to reinstatement to the placement in his last IEP.

2. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) Under the IDEA and California law, children with disabilities have the right to a free appropriate public education. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE is defined as appropriate special education, and related services, that are available to the pupil at no cost to the parent or guardian, that meet the state educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, §§ 56031 & 56040; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs are to be broadly

construed to include the child's academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.))

3. Title 20 United States Code section 1415(k) and title 34 Code of Federal Regulations, part 300.530 (2006),⁵ et seq., govern the discipline of special education students. (Ed. Code, § 48915.5.) A FAPE is available to all children with disabilities residing in the State between the ages of three and 21, inclusive, including children with disabilities who have been suspended or expelled from school. A school district may suspend or expel a student receiving special education services from school as provided by federal law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 48915.5, subd. (a).) If a special education student violates a code of student conduct, school personnel may remove the student from his or her educational placement without providing services for a period not to exceed 10 days per school year, provided typical children are not provided services during disciplinary removal. (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3).)

4. When a district seeks to change a special education child's educational placement for more than 10 days as a result of a violation of a student code of conduct, the district must convene a meeting with relevant members of the child's IEP team to determine whether the child's violation was a manifestation of the child's disability. (20 U.S.C. § 1415(k); 34 C.F.R. § 300.530.) This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) A manifestation determination must be accomplished within 10 school days of the decision to change the student's placement. (*Ibid.*) Conduct is a manifestation of the student's disability: (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) If the conduct in

⁵ All references to the Code of Federal Regulations are to the 2006 version.

question was the direct result of the local education agency's failure to implement the IEP. (34 C.F.R. § 300.530(e)(1) & (2).)

5. If the relevant IEP team members determine the conduct was a manifestation of the child's disability, the IEP team reviews and modifies the student's IEP to address the behavior and returns the student to the special educational placement from which the student was removed, unless the parent and the local education agency agree to a change of placement. (20 U.S.C. § 1415(k)(1)(F).) If the relevant IEP team members determine that 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 the procedures would be applied to non-disabled students. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c).)

6. 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 the student's placement for more than 10 consecutive school days constitutes a change of placement. (34 C.F.R. § 300.536(a)(i)) Expulsion is considered a "change in placement," which requires "a determination as to whether the handicapped student's misconduct bears a relationship to his handicap." (*Jonathan G. By and Through Charlie Joe G. v. Caddo Parish School Bd.* 362 (W.D.La., 1994) 875 F.Supp. 352.)

7. A district may place a special education student in an interim alternative educational setting for not more than 45 school days, regardless of whether the student's behavior is determined to be a manifestation of the child's disability, under special circumstances involving specified drug and weapons offenses, or when the child has inflicted serious bodily injury upon another person on school premises or at a school function. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. §300.530(g).) The student's IEP team

determines the interim alternative educational setting. (20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.531.)

8. One of these special circumstances is if the child carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the state or local education agency. (20 U.S.C. § 1415(k)(1)(G)(i); 34 C.F.R. § 300.530(g)(1).) A weapon for purposes of disciplinary measures resulting in a 45-day removal to an interim alternative educational setting is defined as a “dangerous weapon.” (20 U.S.C. § 1415(k)(7)(C); 34 C.F.R. § 300.530(i)(4).) A “dangerous weapon” is a weapon, device, instrument, material or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than two and one-half inches in length. (18 U.S.C. § 930(g)(2).)

9. The Gun-Free Schools Act requires each state receiving Federal funds to have a state law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that state, except that such state law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing. (20 U.S.C. § 7151(b)(1).) The Act specifically states it is to be construed in a manner consistent with the IDEA. (20 U.S.C. § 7151(c).)

10. California law requires that the principal or superintendent of schools shall immediately suspend, pursuant to Education Code section 48911, and shall recommend expulsion of a pupil that he or she determines was found possessing, selling, or otherwise furnishing a firearm on school grounds or at a school activity off school grounds. This subdivision applies to an act of possessing a firearm only if an employee

of a school district verifies the possession. (Ed. Code, § 48915(c).) However, a child with exceptional needs may be suspended or expelled from school *only if* the suspension or expulsion is in accordance with section 1415(k) of Title 20 of the United States Code, the discipline provisions contained in Sections 300.530 to 300.537, inclusive, of Title 34 of the Code of Federal Regulations, and other provisions of California law that do not conflict with federal law and regulations. (Ed. Code, § 48915.5.)

11. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) This standard applies to manifestation determination meetings. (*Danny K. ex rel. Luana K. v. Department of Educ., Hawai'i* (D.Hawai'i 2011 Civ. No. 11- 00025 ACK-KSC) 2011 WL 4527387, * 15.)

12. A parent of a special education student who disagrees with any decision by a school district regarding placement in connection with imposition of school discipline may appeal by requesting an expedited due process hearing. (20 U.S.C. § 1415(k)(1)(H)(3)(A); 34 C.F.R. 300.532(a) & (c).) The hearing must be conducted within 20 school days of the date an expedited due process hearing request is filed and a decision must be rendered within 10 school days after the hearing ends. (20 U.S.C. § 1415(k)(1)(H)(4)(B); 34 C.F.R. 300.532(c)(2).)

13. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student is the petitioning party and therefore bears the burden of persuasion.

MANIFESTATION DETERMINATION

14. Here, the evidence established that on November 27, 2012, Student carried a gun and a fully loaded magazine to school. Another student reported the incident to school administrators. Student was suspended, arrested, incarcerated, and expulsion proceedings were commenced. School personnel held a meeting with Student and Student's mother, all of whom agreed that Student's behavior in bringing the weapon to school was a manifestation of his disability. That determination was not challenged. District procedurally complied with the IDEA as to the manifestation determination.

INTERIM ALTERNATIVE EDUCATIONAL SETTING

15. Following the manifestation determination, District placed Student in an interim alternative educational setting at a community day school. Student remained in that placement for more than 45 days, which exceeded the time allowed in Title 20 United States Code section 1415(k)(1)(G). During that time, Mother filed for due process challenging the interim alternative educational setting as an inappropriate placement for Student. District suspended the expulsion proceedings at Student's request to allow the due process claim to be completed. The due process claim was resolved through a final settlement agreement on August 27, 2013, in which the parties agreed that Student's placement would be in a non-public school through the 2013-2014 school year and 2014 extended school year. The non-public school placement was documented in an IEP

dated November 21, 2013. Student waived all claims up to the date of execution of the settlement agreement.

16. Although the evidence established that District did not procedurally comply with the IDEA in connection with leaving Student in the interim alternative educational setting for more than 45 days, Student waived that claim in the settlement agreement for purposes of remedies in this case.

EXPULSION PROCEEDINGS

17. Student met his burden of persuasion by establishing that District violated the IDEA by changing Student's placement when it summarily expelled Student a year after it determined that his behavior on November 27, 2012, was a manifestation of his disability.

18. The Office of Administrative Hearings has jurisdiction to hear appeals regarding change of placement, including those caused by expulsion, and therefore District's argument that the hearing officer had no power to rule on the impact of the expulsion on Student's rights under the IDEA was unavailing. (20 U.S.C. § 1415(k)(3)(B)(i).)

19. District notified Student's mother in December 2013 that it was resuming expulsion proceedings relating to Student's behavior on November 27, 2012, notwithstanding the manifestation determination. The Expulsion Review Committee recommended expulsion to the District's Board of Education, without informing the Board that Student's behavior at issue was determined by the relevant IEP team members to be a manifestation of his disability, or that a settlement agreement existed that required District to fund Student's education through 2014 extended school year.

20. District did not explain during the hearing why it did not notify the Board of Education of the manifestation determination or the settlement agreement. District also offered no evidence or credible explanation why the Board did not consider

Student's expulsion on a "case by case basis," particularly in light of the January 2013 manifestation determination. One can only conclude that District's position is that notifying the Board of the manifestation determination or the settlement agreement was not relevant to the committee's deliberations because of District's written expulsion policy that all special education students who bring a firearm to school are subject to expulsion notwithstanding a manifestation determination. The Portola Middle School principal's decision to refer Student for expulsion in January 2013, despite the manifestation determination, is consistent with this conclusion. However, the District's policy of expelling special education students who bring a gun to school as a manifestation of their disability does not comply with the IDEA, and is not a substitute for, nor does it pre-empt, the provisions of the IDEA.

21. Although District argued that it was obligated to expel Student under Education Code section 48915, and that safety of all students is paramount, District failed to offer any persuasive authority that stands for the proposition that the Gun-Free Schools Act or corresponding California statutes pre-empt the procedural safeguards afforded to children with IEP's whose conduct of bringing a weapon to school is a manifestation of the child's disability. On the contrary, had the Congress or state legislature intended that the Gun-Free Schools Act or related state statutes were intended to pre-empt the IDEA, they could have provided for that in the relevant sections by way of amendments. Instead, as part of the Gun-Free Schools Act legislation, Congress amended the IDEA to permit children with disabilities who bring firearms to school to be placed in an interim alternative educational setting for up to 45 calendar days. (See *Magyar v. Tucson Unified School District* (D. Ariz.1997) 958 F.Supp. 1423, 1438-1439, 1441 ([t]he Gun-Free Schools Act must be construed in a manner consistent with the IDEA.) Further, although District relies on Education Code section 48915 to justify its expulsion policy, and the application of that policy to Student, District fails to

comprehend the import of Education Code section 48915.5. Education Code section 48915.5 expressly provides that a child with exceptional needs may be suspended or expelled from school *only if* the suspension or expulsion is in accordance with the provisions of IDEA. (Ed. Code, § 48915.5.)

22. Thus, in Student's case, because his behavior of bringing a weapon to school was determined by the relevant members of his IEP team to be a manifestation of his disability, the most District was permitted to do under the IDEA was to change Student's placement to an interim alternative educational setting for 45 days. The IEP team was then obligated to take the necessary steps to find an appropriate placement and offer appropriate services to address Student's behavior going forward. The November 21, 2013 IEP, albeit belatedly, purported to do so.

23. However, resuming expulsion proceedings 11 months after determining that the very behavior District was punishing was a manifestation of Student's disability was not an option for District under the IDEA, and doing so was inconsistent with the manifestation determination. Similarly the Board's failure to evaluate Student's expulsion on a "case-by-case basis" in consideration of the January 2013 manifestation determination was inconsistent with the IDEA. In effect, by expelling Student without consideration of the January 2013 manifestation determination, District impermissibly and completely disregarded the provisions of the IDEA and Education Code section 48915.5, obliterated any protections afforded by the IDEA to Student, and nullified his November 21, 2013 IEP, resulting unequivocally in an impermissible change of placement.

24. District's arguments that, notwithstanding the expulsion order, Student suffered no damages because 1) he was still in his non-public school at the time of hearing under the settlement agreement and 2) the Los Angeles County Office of Education would provide Student with placement and services going forward were

unavailing. District was obligated under the IDEA to continue providing Student a FAPE, after the 45-day interim period, and in accordance with his IEP. Deflecting that obligation to the Los Angeles County Office of Education under the guise of expulsion proceedings was not an option for District under these facts.

REMEDIES

1. Student prevailed on the only issue. Student requests an order vacating the expulsion order expunging the expulsion proceedings from his records. District argues that Student is entitled to no remedy because 1) the Office of Administrative Hearings has no jurisdiction to overturn an expulsion order, 2) Student is seeking an administrative appeal of the expulsion order that may result in conflicting remedies, and 3) Student suffered no damages. District's arguments are not persuasive and, if correct, would lead to an illusory result for Student in this case. Student is entitled to a remedy under the IDEA, regardless of the outcome of Student's appeal of the expulsion proceedings.

2. An Administrative Law Judge may, on appeal of a disciplinary proceeding under IDEA, make a determination regarding a change of placement order. (20 U.S.C. § 1415(k)(3)(B).) In particular, the hearing officer may order a change in placement, including returning a child to the placement from which the child was removed. (20 U.S.C. § 1415(k)(3)(B)(ii)(I).)

3. Here, District issued an expulsion order in violation of the IDEA which resulted in a change of placement from Student's November 21, 2013 IEP. Therefore, the outcome in the separate expulsion appeal is irrelevant to Student's remedies in this matter, because, under the facts of this case, the IDEA takes precedence.

4. As a result of the expulsion order, District has changed Student's placement to a Los Angeles County Office of Education program and services. District's argument that Student has suffered no damages because he remained at Little Citizens

Westside Academy through the time of hearing is disingenuous, at best. First, District was obligated to fund Student's placement through the 2014 extended school year, by the August 27, 2014 settlement agreement. Second, as a result of the expulsion order, District will cease funding Student's current IEP placement immediately after 2014 extended school year, unless the expulsion order is overturned and vacated. District has cited to no authority that requires that Student be denied a remedy for District's violation of the IDEA simply because he remained in the placement called for in the settlement agreement at the time of hearing.

5. Accordingly, Student is entitled to an order reinstating him to the placement provided for in his November 21, 2013 IEP thereby vacating the expulsion, and requiring District to remove from his school records all reference to expulsion proceedings.

ORDER

1. The expulsion order issued on or about January 21, 2014 shall be vacated.
2. District shall, within 45 days from the date of this Decision and Order, remove all reference to the 2013-2014 expulsion proceedings from Student's school records.
3. District shall immediately reinstate Student to the placement provided for in and pursuant to his November 21, 2013 IEP, specifically Little Citizen's Westside Academy.

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, Student was the prevailing party on the issue presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATE: May 22, 2014

/s/

ADRIENNE L. KRIKORIAN

Administrative Law Judge

Office of Administrative Hearings