

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

HIGH TECH MIDDLE NORTH COUNTY.

OAH Case No. 2014080899

DECISION

Student's parents on behalf of Student filed an expedited due process hearing request with the Office of Administrative Hearings, State of California, on August 26, 2014, naming High Tech Middle North County.

Administrative Law Judge Susan Ruff heard this matter in San Marcos, California, on September 23, 24, and 25, 2014.

Brian Sciacca, Attorney at Law, represented Student. Student's father and mother attended the hearing on behalf of Student. Student did not attend.

Megan Moore, Attorney at Law, represented High Tech.<sup>1</sup> Katie Wright, Special Education Director, attended the hearing on behalf of High Tech. Denise Edge, Program Manager, attended the hearing on behalf of the Desert/Mountain Special Education Local Plan Area.

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<sup>1</sup> On the first day of the hearing, Attorney Moore was assisted by Barbara Hagberg, Attorney at Law.

On September 25, 2014, the last day of hearing, the record was closed and the matter was submitted for decision.

## ISSUES<sup>2</sup>

1. Did High Tech fail to conduct a procedurally valid manifestation determination review meeting by failing to properly consider parental input in making the manifestation determination?

2. Did High Tech fail to conduct a procedurally valid manifestation determination review meeting by failing to properly consider input from Student's experts presented by the parents during the manifestation determination review meeting?

3. Did High Tech improperly determine that the alleged behavior was not a manifestation of Student's disability?

4. Did High Tech deny Student a FAPE by failing to offer an alternative educational placement and accompanying services to allow Student to participate in the general education curriculum and to make progress on his individualized education program goals?<sup>3</sup>

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<sup>2</sup> The issues have been rephrased 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.)

<sup>3</sup> Student's complaint initially contained an additional issue: Did High Tech deny Student a FAPE by predetermining the outcome of the manifestation determination? Student withdrew that issue during the hearing.

## SUMMARY OF DECISION

This case involves a pupil who was expelled for bringing a knife to school. Student contends that Student's conduct was caused by or had a direct and substantial relationship to his disability of attention deficit hyperactivity disorder, inattentive type. According to Student, he had put the knife in his pocket that morning and forgot it was there; he did not intend to take it to school that day. Student contends that forgetfulness and inattention are aspects of his disability. Student also contends that the manifestation review team did not properly consider the input of Student's mother, including expert opinion letters she brought to the meeting. Finally, Student contends that High Tech did not take the necessary steps to secure educational services for Student after he was expelled.

High Tech contends that the team at the manifestation review meeting properly concluded that Student's conduct was not caused by and did not have a direct and substantial relationship to his disability. High Tech argues that the totality of the circumstances considered by the manifestation review team – including Student's individual characteristics and past behavior, the information and documentation provided by Student's mother during the meeting, and Student's conduct on the day in question – properly led the manifestation review team to conclude that Student's conduct was not a manifestation of his disability. High Tech also contends that the team members considered all input provided by Student's mother. High Tech believes that it properly complied with all legal requirements that a charter school must follow after it expels a pupil.

This Decision concludes that High Tech properly considered all input of Student's mother, including the letters from Student's experts, during the manifestation review meeting. High Tech was correct in concluding that Student's conduct in bringing the knife to school was not caused by and did not have a direct and substantial relationship

to his disability. However, High Tech did not follow the proper procedures to ensure that Student received educational services after he was expelled. As requested by Student, High Tech is ordered to hold an IEP team meeting to make an appropriate offer of educational services.

## FACTUAL FINDINGS

1. Student is a 13-year-old boy who is eligible for special education under the categories of specific learning disability and other health impairment. Student has been diagnosed with attention deficit hyperactivity disorder, inattentive type.

2. Prior to the events in question, Student attended middle school at High Tech. All witnesses described him as a good boy who followed the school rules. He struggled with some academic subjects, such as math. He had been shy when he started sixth grade, but by seventh grade he had blossomed and was more capable socially. He was not prone to violence or misbehavior, and, aside from the events described below, he was an honest boy.

3. On June 10, 2014, Student went to school with a knife in his pocket. The knife had the words "Smith & Wesson" and "OASIS" on the blade. It had approximately a four-inch metal handle and a three and one-half inch blade. The blade could be opened or folded into the handle.

4. At some point during the morning, Student was in the restroom and another pupil saw the knife. The parties dispute why Student brought the knife to school and what happened when the other pupil saw the knife in the school restroom.

5. Student's mother testified that Student was a boy scout and used the knife when he attended boy scout camp and similar activities. The knife had been misplaced and was found in a drawer prior to the day of the events in question. According to Student's mother, on the morning of June 10, Student had picked up the knife, intending to put it back where it belonged, but forgot about it and accidentally kept it in

his pocket when he went to school. She said that Student did not realize he had the knife with him until he pulled it out of his pocket in the restroom at school. When he noticed it, he immediately put it back in his pocket. Another pupil saw him with the knife and reported it.

6. Student's mother also testified that Student had not yet taken his ADHD medicine for the day at the time he put the knife in his pocket. She said she typically administers his medicine on the way to school. She believes that Student is better able to focus after he has taken his medicine.

7. The educators who investigated the incident told a different story of what happened that day. Jessica Caenepeel-Knust, the inclusion specialist who works with Student, testified that she received a call from a teacher that morning. The teacher told Ms. Caenepeel-Knust that a pupil reported he saw Student with a knife in the restroom. According to the other pupil, Student took out the knife, opened it, showed it to the other pupil, and then put it away.

8. Ms. Caenepeel-Knust then spoke with Student. She asked Student if he had brought anything with him that should not be at school. He said, "No." She asked him if it was possible that another pupil had seen him with something that did not belong at school. He told her that he had a pen in his pocket, and that was what he had shown the other pupil. She asked him if he still had the pen on him, and he said he had put it on the teacher's desk. Ms. Caenepeel-Knust and Student checked the teacher's desk and did not find the pen Student described, although they saw a pen that Student said "kind of looked like" the pen.

9. Ms. Caenepeel-Knust then sent a text message to Emilio Torres-Lumsden,<sup>4</sup> who was assisting the Director of the school at that time, to ask for help. She asked Student to empty his backpack and pockets, but the knife was not found. Ms. Caenepeel-Knust went to speak with the other pupil who witnessed the knife in the restroom. She asked that pupil to draw a picture of what he saw.

10. That picture was entered into evidence at the hearing, along with photographs of the knife which were taken later. The pupil's drawing is detailed and shows a fully open knife with a reasonably accurate depiction of the shape of the blade and the knife handle. The name "Smith Wesson" was included on the drawing in approximately the same position it appears on the blade when the knife is open.

11. When Ms. Caenepeel-Knust saw the detailed drawing of the open knife that the other pupil rendered, she became very concerned that Student did, in fact, have a knife. She went to Mr. Torres and showed him the picture. Mr. Torres asked to have Student escorted to his room.

12. On the way to Mr. Torres' room, Student asked to use the restroom. Ms. Caenepeel-Knust was concerned that Student might have left the knife in the upstairs restroom earlier, so she let him use the downstairs restroom instead, while another adult searched the upstairs restroom.

13. While Student was in the downstairs restroom, he hid the knife inside the seat cover dispenser in the last toilet stall. When he was questioned by Mr. Torres, Student continued to deny that he had brought a knife to school. Mr. Torres telephoned Student's father. Student's father said they owned a Smith & Wesson knife and asked Student why he had taken it out of the dresser. Student did not respond.

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<sup>4</sup> Most of the High Tech staff referred to Mr. Torres-Lumsden as Mr. Torres during the hearing. He will be referred to as Mr. Torres in the remainder of this Decision.

14. Mr. Torres testified that he was surprised by the response of Student's father. He would have expected Student's father to ask, "Do you have a knife?" Instead, Student's father assumed that Student had taken the knife.

15. Mr. Torres explained to Student that he was concerned about school safety. He told Student that the school would have to call the police who would conduct a search of the premises for the knife. At that point, Student finally admitted he had brought the knife to school and took Mr. Torres to see where it was hidden.

16. On the day of the events, the other pupil gave the following account which was typed on a sheet of paper:

I walked into the bathroom and [Student] was by the sinks stretching, and he pulled out something long skinny and gray. I said to [Student] why do you have that. He pulled it out Again and I saw it better, he then shoved it back in his front right pocket. So I walked out of the bathroom and that was it.<sup>5</sup>

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<sup>5</sup> The typed statement was produced in rebuttal after all the High Tech witnesses had finished testifying, and it is not clear whether the pupil typed the statement himself or if it was typed by an adult. There was another typed statement on the same exhibit page that might have been written by Mr. Torres, but there was no name on it, so there is no way to be certain. It was an account of a statement given by the other pupil the day after the incident. According to that written statement, the other pupil reported that Student opened the knife "half way" to show to the other pupil. Student's mother testified that this written statement contradicted what Mr. Torres told the manifestation review team (that Student opened the knife fully).

17. The verbal account that the other pupil gave to Mr. Torres was more detailed. According to Mr. Torres' testimony, the other pupil saw Student take out the knife and put it back in his pocket. The other pupil asked if it was a folding comb. Student took out the knife again to show the other pupil, opened it, closed it, and put it back in his pocket.

18. After the knife was found, Student was very quiet and sat in the corner with his head down and shoulders slumped. When Mr. Torres asked how he was, Student replied that he was really disappointed in himself. Student's parents came to pick him up and take him home. The police were called and arrived at the school, but High Tech declined to press charges.

19. The evidence supports the testimony of the High Tech witnesses with respect to what happened in the restroom on June 10, 2014. Student did not merely pull the knife out, realize what it was, and immediately put it back in his pocket as he told his mother. Instead, he showed it to the other pupil and opened the knife, either partially or fully, for the other pupil to see. The other pupil was able to make a detailed and reasonably accurate drawing of the open knife with the logo in the proper position on the open blade.

20. During her testimony, Student's mother pointed out that the logo is also visible when the knife is closed. That is correct, but if Student had merely taken the knife out and put it back in his pocket immediately, it is unlikely that the other pupil would have seen the logo. Even if the other pupil had somehow seen the logo after a short glimpse of a closed knife, he would not have known where the logo appeared on the blade when opened. The story Student initially told to Ms. Caenepeel-Knust also supports a finding that he showed the other pupil the knife – in his original version of the story, Student told Ms. Caenepeel-Knust that he "showed" the other pupil a pen.

21. Student's mother was sincere and honest in her testimony. There is no question that she believed what her son told her. However, her version of the events was based solely on Student's report of what happened and there was no other evidence to back up that version of the story.<sup>6</sup>

22. Student was suspended from school on June 10, 2014. High Tech held a discipline review meeting on June 13, 2014. The result of that meeting was a recommendation that Student be referred for expulsion from school.

23. High Tech then noticed a manifestation review meeting. The meeting was originally scheduled for June 17, 2014, but Student's mother asked to have it postponed until June 20, 2014, to allow time for Student's parents to retain counsel. Because June 20 was after the last day of school, High Tech instead moved the meeting to the last day of school, June 18, 2014. Student's mother attended the meeting on June 18, 2014.

#### THE MANIFESTATION REVIEW MEETING AND FINDINGS

24. The key events in this matter involve the manifestation review meeting that was held on June 18, 2014. The people in attendance at that meeting included Student's mother, Ms. Caenepeel-Knust, Mr. Torres, Katie Wright (Director of Special Education), Robert Parker (a school psychologist who was also co-director of special education at that time), Susan Battistuz (administrator), Elissa Kelley (speech and language pathologist), Tracy Nathan (Student's teacher during "advisory" period in sixth and seventh grade), Shana Barnett (Student's humanities teacher), Fernando Vega (Student's performing arts teacher), and Ashley Bagnell (Student's math/science teacher).

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<sup>6</sup> The other main factual dispute – regarding Student's intent or lack of intent in bringing the knife to school – will be addressed below in connection with the findings of the manifestation review meeting.

25. The High Tech members of the team had a short pre-meeting prior to the manifestation review meeting. During that pre-meeting, Ms. Wright shared with the High Tech employees the purpose of the upcoming manifestation review meeting. She did not give an opinion as to whether Student's conduct had been a manifestation of his disability. Instead she discussed the process that would occur and answered questions for the team members.

26. Ms. Wright also facilitated the manifestation review meeting. At the outset of the meeting, she explained to the team the purpose of the meeting and described the two questions the team would have to answer: 1) Was the conduct in question caused by or directly and substantially related to Student's disability; and 2) Was the conduct in question the direct result of High Tech's failure to implement Student's IEP?<sup>7</sup>

27. Student's mother participated in the manifestation review meeting. She brought four letters with her to the meeting from health care professionals who worked with Student. The four letters were written by: 1) Timothy Murphy, M.D., Student's psychiatrist; 2) Frank Winton, M.D., Student's medical doctor; 3) Lewis Ribner, Ph.D., the psychologist who had previously assessed Student for ADHD; and 4) Paul Zeltner, a marriage and family therapist who worked with Student through his church's young men's program. The members of the manifestation review team read the letters during the meeting.

28. Student's mother also told the team about Student's forgetfulness and his problems with inattention. She shared anecdotes from Student's past to illustrate the effect of his disabilities on Student's behavior. Student's teachers shared their

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<sup>7</sup> The second question was not at issue in this expedited hearing. There was no evidence whatsoever that Student's conduct was the result of High Tech's failure to implement the IEP. Instead, this Decision will focus on the first question.

observations about Student with the team and answered questions. Ms. Caenepeel-Knust reviewed the IEP services and accommodations with the team.

29. The parties dispute whether the team considered the four letters and the verbal input Student's mother provided. Student's mother testified that the High Tech members of the team quickly dismissed the letters after reading them. No one asked her to sign a waiver to allow High Tech staff to speak to the individuals who wrote the letters. No one offered to hold another meeting so she could bring the health care professionals who wrote the letters to the meeting. She believes High Tech wanted to find the conduct was not a manifestation of Student's disability so it could proceed with the expulsion.

30. Student's mother testified that no one ever told her before the meeting that she could bring people with knowledge of Student to the meeting. However, the written meeting notice sent to her specifically stated that she could "invite other individuals who possess expertise or knowledge necessary" for the development of Student's IEP.

31. The High Tech witnesses were consistent in their testimony that they reviewed and considered all information provided by Student's mother at the manifestation review meeting, including the four expert letters and the verbal information shared by Student's mother about Student's disabilities and past conduct.

32. As stated above, Student's mother was a very sincere and believable witness. However, on this issue, the High Tech witnesses were more persuasive. While Student's mother genuinely believed that they dismissed the letters, their testimony indicated otherwise. Each of the High Tech witnesses who attended the meeting confirmed that he or she read and considered the letters during the meeting.

33. Ms. Wright testified that she read the four letters but found the language in them to be tentative in nature and not compelling. For example, Dr. Murphy's letter

only stated that ADHD was “a factor” in Student’s conduct; Dr. Ribner used tentative language such as, “it is very possible that [Student] absent-mindedly put the knife in his pocket;” and Dr. Winton’s letter used phrases such as “apparently inadvertently forgot” and “it is reasonable that this was simply an honest mistake.” Ms. Wright felt that Mr. Zeltner’s letter was mostly a plea to consider Student as a good young man which discussed a lot of typical behavior for middle-school boys.

34. Mr. Parker concurred that the letters were not strongly written and were not persuasive on the issue of whether Student’s disability caused Student to bring the knife to school.

35. The High Tech witnesses also testified that they listened to and considered the verbal information provided by Student’s mother during the meeting. Ms. Wright remembered an anecdote that Student’s mother had shared about Student’s conduct on a family outing regarding a box of cookies. Ms. Bagnell recalled the cookie anecdote and also that Student’s mother told the team about Student’s disabilities. Mr. Vega recalled Student’s mother discussing a story about Student getting sunstroke at the beach and not asking for assistance. Ms. Nathan recalled Student’s mother talking about situations in which Student had difficulty expressing himself and standing up for himself. Mr. Torres recalled that Student’s mother had disputed during the meeting whether Student had opened the knife at school. Mr. Parker testified that Student’s mother had told the team about Student’s forgetfulness, absentmindedness and impulsivity.

36. During the meeting, no one described to the team members what the typical symptoms of someone with ADHD, inattentive type might be. Instead, the team focused on Student’s particular challenges in the school setting and his functioning in the classroom in light of his unique needs and disabilities. Although the team did not review Student’s past assessments during the meeting, team members such as Ms.

Wright and Mr. Parker had reviewed those assessments, including Dr. Ribner's independent assessment, in preparation for the meeting. Other team members had reviewed and considered those assessments at prior IEP meetings.

37. At the end of the meeting, the High Tech team members concluded that Student's conduct in bringing the knife to school was not a manifestation of his disability. They determined the conduct was not caused by and did not have a direct and substantial relationship to his specific learning disability or his ADHD, inattentive type. During the hearing, each of the High Tech witnesses described his or her reasons for that conclusion.

38. Mr. Parker believed that, if Student had taken the knife to school accidentally, he would not have opened it in front of the other pupil. That conduct, as well as Student's deliberate attempts to cover things up afterwards, convinced Mr. Parker that the presence of the knife at school was more than an oversight by Student. Mr. Parker has worked in the field of education for more than 30 years. In the past, he has been a school psychologist, a school principal, a program manager, and a director of special education. In his opinion, Student's behavior was not a manifestation of his disability.

39. Ms. Wright testified that, given the size and weight of the knife, it was difficult for her to accept that Student could have it in his pocket and not be aware of it. She also considered Student's conduct afterwards when he lied about the knife and executed a plan to hide it. In her opinion, Student's conduct was not directly and substantially related to his disability. She felt that, although Student could be forgetful and absentminded in class, the act of bringing a knife to school is a novel act that a pupil with ADHD would be very aware of – putting a knife in your pocket is not an everyday act. In her opinion, Student had plenty of time to step back and think things through. She felt his conduct in bringing the knife to school was deliberate.

40. Ms. Bagnell felt that, given Student's past behavior, if he had really forgotten the knife was in his pocket, he would have gone to a teacher and explained that. She also felt that Student could not have a knife of that size in his pocket for that long and not realize it.

41. Mr. Vega testified that Student's actions – opening the knife and showing it to the other pupil and his refusal to tell his father and High Tech staff the truth about the knife – convinced him that Student's conduct in bringing the knife to school was a conscious effort, not accidental. He agreed with the team's conclusion that the conduct was not a manifestation of Student's disability.

42. Ms. Nathan testified that she considered what she had experienced with Student in her advisory period over the past two years. The picture that Student's mother presented during the manifestation meeting did not match the characteristics of Student's disabilities as Ms. Nathan had seen them. Ms. Nathan had never experienced Student to be any more impulsive or forgetful than a typical boy his age. She agreed with the team's conclusion that Student's conduct was not a manifestation of his disability.

43. Ms. Caenepeel-Knust also agreed that Student's conduct was not a manifestation of his disability. She said that Student's conduct on June 10 was not characteristic for him – she had seen how his disabilities operated in the classroom. She found it surprising that he had lied several times, including lying about the knife being a pen. Based on her experience with Student, she felt that if he had forgotten about the knife, he would have admitted his mistake sooner. During cross examination she described two minor conflicts Student had had with another child prior to the day in question; on both of those occasions she found him to be truthful about what had occurred.

44. Student disputes the manifestation review team's determination that Student's conduct was not a manifestation of his disability, and disputes that he deliberately brought the knife to school. In addition to the testimony of Student's mother set forth in Factual Findings 5 – 6 above, Student relied on the opinions of two experts at the hearing to show that Student's conduct was a manifestation of his disability.

45. The first was Dr. Murphy, the psychiatrist who had written one of the letters presented by Student's mother at the manifestation review meeting.

46. Dr. Murphy received his bachelor's degree in biophysics from the University of California at Berkeley in 1976 and his medical degree from Dartmouth Medical School in 1979. He received his certification from the American Board of Psychiatry and Neurology in 1989. He has been in private practice for over 25 years, belongs to numerous professional societies, and has received multiple awards and honors over the years, including being named as one of the country's top doctors by San Diego Magazine in 2004. He has many years of experience treating children with ADHD and was a contributor to the recent revisions to the Diagnostic and Statistical Manual.

47. Dr. Murphy first saw Student as a patient in January 2014.<sup>8</sup> Dr. Murphy prescribed ADHD medicine for Student. He said that the medication he prescribed can assist a child with ADHD, inattentive type to pay more attention.

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<sup>8</sup> In the letter Student's mother presented to the manifestation review meeting, Dr. Murphy stated that Student had been under his care for two years. During the hearing, Dr. Murphy explained that the statement was in error – Dr. Murphy also treats Student's sibling and must have confused them at the time he wrote the letter.

48. He explained that pupils with ADHD, inattentive type can be forgetful, impulsive, lose things, and have difficulty listening and staying on task. In Student's case, Student had difficulty paying attention, staying on task, and focusing at school.

49. Dr. Murphy spoke with Student within a day of the incident. When Dr. Murphy asked Student why he brought a knife to school, Student said, "I don't know, I wasn't thinking." In Dr. Murphy's opinion, that showed the conduct to be impulsive – Student had not yet taken his medicine on the morning of the incident and did not think it through. Dr. Murphy felt that Student's conduct was typical of the "goofy mistakes" that kids with ADHD make. He said that Student did not know why he put the knife in his pocket. Student did not give Dr. Murphy a specific reason.

50. In Dr. Murphy's opinion, Student's conduct in bringing the knife to school was substantially related to his ADHD. When asked for the basis for his opinion, he gave the following reasons: 1) There was compelling evidence that Student has ADHD; 2) The incident began in the morning before Student had been medicated for his ADHD; and 3) Student's behavior, which was a mistake in judgment, was very typical of individuals with ADHD. In addition, Dr. Murphy explained that he came to that conclusion because he could not come up with any other explanation for the behavior after talking to Student.

51. Student's second expert, Steven Herrick, Ph.D., is a licensed psychologist who began treating Student in August 2014. Dr. Herrick received his bachelor's degree from California State University, Northridge in 1969, his master's degree from California State University, Los Angeles in 1973, and his doctorate from California Graduate Institute, Los Angeles in 1985. He holds a California teaching credential and a school psychology authorization. He has been in private practice as a psychologist for 28 years, and worked as a school psychologist back in the 1970's and 1980's.

52. Dr. Herrick testified that he has discussed the incident with Student during their counseling sessions. He said that Student and Student's mother told him about the events leading to the incident – about the knife being missing and its discovery. Student told Dr. Herrick that he put the knife in his pocket, intending to put it in his Boy Scout drawer. At school, he felt something heavy in his pocket, but he had no recollection of bringing the knife to school.

53. In Dr. Herrick's opinion, Student's account of the events was very sincere and believable. Dr. Herrick explained that ADHD is not just about attention. It is a cognitive disorder with multiple ramifications. Children with ADHD do not pay attention to things around them. He found it very believable that Student could put the knife in his pocket, intending to move it, and then forget that he had it. He does not believe that Student intended to bring the knife to school.

54. Dr. Herrick also testified that Student is under a great deal of stress as a result of these events. Student has panic attacks, anxiety and depression. Dr. Herrick sees Student once a week to address these conditions. He anticipates that Student will continue to need therapy into the foreseeable future.

55. In determining the disputed factual issue of whether Student brought the knife to school accidentally, there is evidence in favor of Student's position. There is no dispute that Student had ADHD and had not yet taken his medicine that morning when he put the knife in his pocket. There is also evidence that his ADHD affected his memory to a certain extent. Student's IEP and assessments talked about his problems with remembering things. Ms. Caenepeel-Knust testified that High Tech staff had to help him with organization, staying on task, and remembering to turn in assignments. She admitted that, when she gave Student a paper to bring home to his parents, she sent an email to his mother to let her know the paper was coming. As stated above, both Dr.

Murphy and Dr. Herrick testified that Student's conduct in forgetting the knife in his pocket would be typical for a child with ADHD.

56. Likewise, Student's past adherence to school rules provides some evidence that he did not intentionally seek to break the rules on June 10, 2014. The two experts who testified on behalf of Student were well qualified and credible.

57. However, the stronger evidence supports the position of the High Tech witnesses. Student's conduct on June 10, 2014, did not indicate that he brought the knife to school by accident. If Student had truly discovered the knife in his pocket and realized his mistake, it is doubtful that he would have opened the knife and displayed it to the other pupil. Instead, he would have reported the mistake to a teacher immediately. If his story was true, it is likely he would have told *someone* that day that he put the knife in his pocket to move it to his Boy Scout drawer and then had forgotten about it. However, he never told that story to any of the school personnel, either before or after the knife was discovered.

58. Even when he spoke with Dr. Murphy, his own psychiatrist, on June 10 or 11, 2014, he apparently never mentioned the story about finding the misplaced knife and putting it in his pocket to move it. Dr. Murphy testified that Student did not know why he put the knife in his pocket or why he brought it to school. Only Dr. Herrick, who first spoke with Student about two months later, recounted the story about Student putting the knife in his pocket to return it to his Boy Scout drawer. Neither Dr. Herrick nor Dr. Murphy spoke with anyone from High Tech about the incident in forming their opinions; they relied solely upon the information provided to them by Student and his mother.

59. There was evidence that Student was generally quiet and had IEP goals relating to self-advocacy. However, his self-advocacy difficulties do not explain his failure to relate his story to the High Tech adults on June 10, 2014. Student was capable

enough on that day to come up with a false story about showing a pen to the other pupil. He was able to empty his pockets without displaying the knife and then was clever enough to hide the knife in a seat-cover dispenser in a restroom. It seems odd that the one story he never told anyone that day, even after he was caught, was the story he now claims is the truth.

60. In addition, as discussed by the High Tech personnel, the knife was not a “simple pocket knife” as described in Dr. Murphy’s letter that Student’s mother gave to the manifestation review team. It was a heavy metal knife with a three and a half inch blade. It was reasonable for the High Tech educators at the meeting to question whether Student could have forgotten such a heavy object in his pocket for all that time.

61. Most of the High Tech personnel who testified at the hearing had worked with Student in the past and were familiar with his conduct at school. They had seen how his disabilities manifested in the school environment and knew what type of behavior to expect from him. Their testimony regarding his conduct is persuasive. The evidence supports a finding that Student’s conduct in bringing the knife to school was not the result of an accident.<sup>9</sup>

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<sup>9</sup> There was a question during the hearing as to when High Tech first learned that Student was taking medication for his ADHD, and whether the manifestation review team knew about the medication during the meeting. However, it is not necessary to decide that issue. Even if the team was informed of Student’s ADHD medication during or before the meeting, their conclusions were still valid – Student’s conduct on June 10, 2014, indicated that the knife at school was no accident, whether Student was medicated or not at the time he put it in his pocket.

## EVENTS AFTER THE MANIFESTATION REVIEW MEETING

62. On June 19, 2014, a disciplinary hearing was held. As a result of that hearing, Student was expelled from school. High Tech is a charter school that functions as its own local educational agency, within the Desert/Mountain Special Education Local Plan Area. High Tech is not chartered by the school district where Student's parents reside. Mr. Torres testified that a charter school which expels a pupil must notify the school district where the pupil's parents reside about the expulsion. He said that High Tech complied with that requirement and notified the school district where Student's parents resided. According to High Tech, Student then became the responsibility of that other school district.

63. Student's IEP did not call for him to receive any extended school year services. Prior to his expulsion, Student had signed up to receive general education summer school classes from High Tech. Student had been scheduled to take a summer school math class because of his low grade in math and a "bridge" class in which older pupils, such as Student, assisted incoming sixth graders who were going to begin school at High Tech in the fall. The summer school was scheduled to run for 15 days. As a result of his expulsion, Student was not permitted to take either of those classes.

64. The new school year at High Tech started on August 25, 2014. High Tech did not offer Student any further educational services after June 10, 2014, up to and

including the day that Student filed this due process hearing request on August 26, 2014.<sup>10</sup>

## LEGAL CONCLUSIONS

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 et seq. (2006); Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. Federal laws and regulations establish a detailed system for addressing disciplinary action involving a special education child. When a local educational agency 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 local educational agency must convene a meeting to determine if the child's conduct was a manifestation of the child's disability. (20 U.S.C. § 1415(k); 34 C.F.R. § 300.530 (2006).) The team must determine if the "conduct in question was caused by, or had a direct and substantial relationship to, the child's disability" or if the conduct "was the direct result of the local

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<sup>10</sup> After the due process case was filed, High Tech offered Student placement in an interim alternative educational setting. That offer was apparently made without a meeting of Student's IEP team. Because that offer was made after this due process request was filed, it is not necessary to determine in this Decision whether the offer was appropriate.

educational agency's failure to implement the IEP." (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e) (2006).) If either question is answered in the affirmative, then the conduct was a manifestation of the child's disability. (20 U.S.C. § 1415(k)(1)(E)(ii); 34 C.F.R. § 300.530(e) (2006).)

3. If the team determines that the conduct was a manifestation of the child's disability, the local educational agency must, among other things, return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the child's behavioral intervention plan. (20 U.S.C. § 1415(k)(1)(F)(iii); 34 C.F.R. § 300.530(f)(2) (2006).)

4. If the team determines that the conduct was not a manifestation of the child's disability, then the child may be disciplined in the same manner and for the same duration as a non-disabled child (20 U.S.C. § 1415(k)(1)(C)), except that a FAPE must be available to that child, "although it may be provided in an interim alternative educational setting." (*Ibid.*; 20 U.S.C. § 1412(a)(1)). The special education child who is removed from his or her placement shall:

(i) continue to receive educational services, as provided in section 1412(a)(1) of this title, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. . . .  
(20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d) (2006).)

5. The "interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP team." (20 U.S.C. § 1415(k)(2); see also 34 C.F.R. § 300.530(d)(5) (2006) ["If the removal is a change in placement under § 300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section."])

6. 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. 49 [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].) Student filed the instant case, and has the burden of persuasion in this matter.

ISSUE 1: DID HIGH TECH FAIL TO CONDUCT A PROCEDURALLY VALID MANIFESTATION REVIEW MEETING BY FAILING TO PROPERLY CONSIDER PARENTAL INPUT IN MAKING THE MANIFESTATION DETERMINATION?

7. The law requires a manifestation review team to review all relevant information, including “any relevant information provided by the parents. . . .” (20 U.S.C § 1415(k)(1)(E); 34 C.F.R. § 300.530(e) (2006).)

8. Student contends that the High Tech members of the manifestation determination team failed to properly consider the input provided by Student’s mother during the meeting. However, the evidence at hearing indicated otherwise. Not only did each of the High Tech witnesses testify that they had considered the information, but they were also able to recount information provided by Student’s mother during their testimony. Their testimony was thoughtful and sincere, and the reasons that they gave for their ultimate conclusions made sense. They clearly gave all the information presented at the meeting a great deal of thought. Just because Student’s mother disagreed with their ultimate conclusion does not mean they failed to consider her input.

9. Student had the burden to show that High Tech failed to properly consider parental input. Student did not meet that burden.

ISSUE 2: DID HIGH TECH FAIL TO CONDUCT A PROCEDURALLY VALID MANIFESTATION REVIEW MEETING BY FAILING TO PROPERLY CONSIDER INPUT FROM

## STUDENT'S EXPERTS PRESENTED BY THE PARENTS DURING THE MANIFESTATION REVIEW MEETING?

10. It was clear from the testimony of the High Tech witnesses that they read and considered the letters brought by Student's mother to the manifestation review meeting. Ms. Wright discussed the letters in detail during her testimony, explaining why she found the language tentative and unpersuasive.

11. A review of the letters supports Ms. Wright's characterization of them. The language in the letters is very tentative and does little to support Student's contention that his conduct was a manifestation of his disability. Dr. Murphy's letter incorrectly described the knife as a "simple pocket knife" which indicated that he did not fully understand all the facts at the time he wrote the letter. His description of ADHD as "a factor" in the incident was far from an opinion that Student's conduct was caused by or had a direct and substantial relationship to Student's ADHD.

12. The language in Dr. Winton's letter was even more tentative: he said that Student "apparently inadvertently forgot" about the knife, and "it is reasonable that this was simply an honest mistake." Dr. Ribner's letter also described the knife as a "pocketknife" and only opined that "it is very possible" that Student forgot about the knife in his pocket. As Ms. Wright described, Mr. Zeltner's letter indicated that Student's behavior was typical for a boy his age. While the language of the letter is less tentative than some of the others, it is not alone enough to show a direct and substantial relationship.

13. In Student's written closing argument, Student criticizes High Tech for failing to get additional information from the four professionals who wrote the letters. However, there was no need for High Tech to do so. The letters did not leave open any unanswered questions – the letters simply did not provide a sufficient basis to find that Student's conduct was a manifestation of his disability.

14. Student presented no persuasive evidence to show that the manifestation team did not consider these letters. Student had the burden to show that the team members failed to consider the input from Student's experts. Student failed to meet that burden.

**ISSUE 3: DID HIGH TECH IMPROPERLY DETERMINE THAT THE ALLEGED BEHAVIOR WAS NOT A MANIFESTATION OF STUDENT'S DISABILITY?**

15 Federal law provides that school personnel "may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct." (20 U.S.C. § 1415(k)(1)(A); 34 C.F.R. § 300.530(a) (2006).) The manifestation review team must "review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents. . . ." (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e) (2006).)

16. Before moving on to what is at issue in this case, it is important to recount what is not at issue – there was no evidence whatsoever that Student's conduct was the direct result of the local educational agency's failure to implement the IEP. The second question of a manifestation review is not at issue here. Instead, only the first question is at issue – was the conduct in question caused by, or did it have a direct and substantial relationship to Student's disability of ADHD, inattentive type.<sup>11</sup>

17. The first step in reviewing the evidence on this issue is to establish the legal framework under which the evidence must be considered. In general, an administrative tribunal reviews the determinations of an IEP team in light of what was

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<sup>11</sup> As stated above, Student was also eligible for special education under the category of specific learning disability, but no one has suggested that Student's conduct was caused by or directly and substantially related to that disability.

objectively reasonable given the information possessed by the team at the time. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141 (*Adams*)). The *Adams* court noted: "Actions of the school systems cannot . . . be judged exclusively in hindsight. . . . An [IEP] is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Id.* at p. 1149 (quoting from *Fuhrmann v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041).)

18. Although no federal court case was cited by either party to show whether the rule of *Adams* applies to an expedited due process case reviewing a manifestation determination, it makes sense to apply the rule. The manifestation review team's conclusions should be reviewed in light of what was objectively reasonable for the team to decide given the information available to the team on the day of the meeting.

19. If the *Adams* snapshot rule applies to a manifestation determination due process case, then the team's conclusion that the conduct was not a manifestation of Student's disability must be upheld. Based on the evidence before the team on June 18, 2014, it was objectively reasonable for the team to conclude that Student's conduct in bringing the knife to school was not caused by, and was not directly and substantially related to, his disability. The team had knowledge of Student's past conduct and how his disabilities affected him at school. The team knew about the events of the day, including Student's action in opening the knife in front of another pupil, as well as his lies and attempt to hide the knife. The expert letters provided by Student's mother were tentative at best. The verbal information provided by Student's mother, although important, was not sufficient to show a direct and substantial relationship.

20. Even if the snapshot rule of *Adams* does not apply to this case, the result would be the same. Looking at the additional evidence available as of the date of the due process hearing in September 2014, Student has still failed to meet his burden to

show that his conduct was caused by, or had a direct and substantial relationship to, his ADHD. The testimony of Dr. Murphy, although stronger than the tentative language in his letter, relied heavily on what was told to him about the incident and his knowledge of usual conduct for ADHD children. He never talked to any of Student's teachers or other High Tech personnel.

21. Dr. Herrick first spoke to Student about two months after the incident, and he based his opinion entirely on the version of the facts related to him by Student and Student's mother. His opinion that the conduct was a manifestation of Student's ADHD is only valid to the extent that the facts underlying that opinion are also valid. However, as stated above, Dr. Herrick's version of the facts is not supported by the record. For that reason, his opinion is not persuasive.

22. In Student's written closing argument, Student contends that the manifestation review team erred by considering all of Student's behavior on the day in question rather than just Student's conduct in bringing the knife to school. Student relies upon the case of *Danny K. v. Department of Education, State of Hawaii* (D. Hawaii 2011) 57 IDELR 185 (*Danny K.*) for the proposition that the manifestation team should consider only the specific behavior that led to the disciplinary action, not the behavior that surrounded it. However, the *Danny K.* court did not establish such a rule. The case held that the purpose of the due process hearing is not to retry the underlying disciplinary case. It did not say that the manifestation team could not consider all circumstances in determining whether a pupil's conduct was a manifestation of the pupil's disability.

23. It was clear from the testimony of the witnesses and the evidence presented at the hearing that the manifestation review team members considered all of Student's actions on June 10 to determine whether his conduct in bringing the knife to school was a manifestation of his disability. It was proper for the team to do so.

Student's actions on June 10 – including opening the knife to show the other pupil and his attempts to cover up his deeds later – were a strong indicator that Student's conduct in bringing the knife to school was not accidental and not directly and substantially related to his ADHD, inattentive type.

24. In Student's written closing argument, Student cites at length to portions of Student's IEP and assessments which discuss his problems with memory and forgetfulness. Student contends that the manifestation review team improperly failed to consider that information. However, the team members were well aware of the nature of Student's disability from IEP meetings at which those assessments were discussed and their own months of working with Student. Those two team members who had not directly worked with Student – Mr. Parker and Ms. Wright – familiarized themselves with Student's IEP's and assessments prior to the meeting.

25. Student also argues that the manifestation review team was not informed of the typical symptoms of ADHD, inattentive type. There was no violation for the failure to do so. Instead the team considered Student's unique disabilities and his conduct on that occasion. The team properly made its decision based on Student's disabilities and circumstances, not on his ADHD label.

26. Student had the burden to prove that the manifestation review team erred. Student did not meet that burden.

#### ISSUE 4: DID HIGH TECH DENY STUDENT A FAPE BY FAILING TO OFFER AN ALTERNATIVE EDUCATIONAL PLACEMENT AND ACCOMPANYING SERVICES TO ALLOW STUDENT TO PARTICIPATE IN THE GENERAL EDUCATION CURRICULUM AND TO MAKE PROGRESS ON HIS IEP GOALS?

27. The remaining question for this Decision involves whether High Tech had any responsibility to offer educational services to Student after the expulsion. As stated in the Legal Conclusions above, a traditional school district which expels a special

education pupil is still required to offer an educational placement and services to that child. However, High Tech contends that, because it is a charter school, its only responsibility was to notify the school district where the pupil's parents reside. It has no further responsibility to the pupil once it does that.

28. High Tech's contentions in this regard are not supported by the law or by the policies underlying the IDEA. Children with disabilities who attend public charter schools retain all rights under federal and state special education laws. (34 C.F.R. § 300.209(a) (2006); Ed. Code, § 56145; see also *Letter to Anonymous* 2009) 53 IDELR 127.) A charter school that chooses to operate as a local educational agency is required to follow federal special education laws and regulations. (See Ed. Code, § 47640.)

29. High Tech relies upon the case of *Student v. Sequoia Union High School District* (2009) OAH case number 2008080102/2008100144, for the proposition that, once a pupil is no longer enrolled in a charter school, the charter school has no more responsibility to the pupil. However, that case was focused on the responsibilities of a traditional school district, not a charter school. The case did not consider whether a charter school, which acts as its own local educational agency, must follow the requirements of federal law when it expels a special education pupil.

30. In addition, High Tech relies upon Education Code section 47605, subdivision (d)(3), which provides, in part, that if a "pupil is expelled or leaves the charter school without graduating or completing the school year for any reason, the charter school shall notify the superintendent of the school district of the pupil's last known address within 30 days, and shall, upon request, provide that school district with a copy of the cumulative record of the pupil. . . ." However, nothing in the language of that section exempts a charter school from the requirements of federal law relating to expulsion of special education pupils.

31. A charter school which chooses to operate as its own local educational agency for purposes of special education law and thereby gain the benefits of that status cannot shirk the responsibilities that come with that status. When High Tech determined that Student's conduct was not a manifestation of his disability and thereafter expelled Student, High Tech was required to follow federal law, just as any other local educational agency would. High Tech was required to hold an IEP team meeting to offer educational services that would allow Student to participate in the general education curriculum and to make progress on his IEP goals. High Tech did not do so. That omission constituted a violation of special education law.

32. In arguing that it was no longer responsible for Student once he was expelled, High Tech compares Student's situation to a child who moves from one school district to another. However, that is not an apt comparison. Student's parents made no conscious choice to move Student out of High Tech. Indeed, Student's parents objected to High Tech's findings at the manifestation review meeting and subsequent expulsion of Student.

33. High Tech also argues that there was no violation because Student was suspended for seven school days during the 2013-2014 school year, and only two days of the new school year by the time Student filed the instant due process case.

34. High Tech ignores the reality of what happened – High Tech did not merely suspend Student for less than ten days over two school years; High Tech *expelled* Student. High Tech held no IEP meeting after the expulsion, and made no educational offer up to and including the date of filing of Student's due process hearing request. When the new school year started, Student had no educational placement or services offered by High Tech.

35. Finally, High Tech argues that, even if it committed a procedural violation by failure to convene an IEP team meeting to offer Student educational services as

required by title 20 United States Code sections 1415(k)(1)(D)(i) and 1412(a)(1), that procedural violation did not give rise to a substantive denial of FAPE.

36. Not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it: (A) Impeded the right of the child to a FAPE; (B) Significantly impeded the opportunity of the parents to participate in the decision making process regarding the provision of a FAPE to the child of the parents; or (C) Caused a deprivation of educational benefits.

37. Even assuming that the failure to make any offer of educational placement and services constituted a procedural violation rather than a substantive violation, High Tech's actions significantly impeded the opportunity of Student's parents to participate in the decision making process. High Tech failed to hold a required IEP team meeting, foreclosing any opportunity for Student's parents to participate. High Tech's actions gave rise to a substantive denial of FAPE.

38. As a remedy, Student has requested that High Tech be ordered to convene an IEP team meeting to make an offer of placement and services. That requested remedy is appropriate and will be ordered.

## ORDER

1. High Tech Middle North County is ordered to hold an IEP team meeting, in accordance with title 20 United States Code sections 1415(k)(1)(D)(i) and 1412(a)(1), within 30 days of the date of this Decision or on some other date agreed upon by High Tech and Student's parents to decide upon an appropriate educational program, which may be in an alternative setting, that will enable Student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the Student's IEP.

2. All of Student's other requests for relief are 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, Student was the prevailing party on issue number four and High Tech prevailed on the remaining issues.

## 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).)

DATED: October 9, 2014

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/s/

SUSAN RUFF

Administrative Law Judge

Office of Administrative Hearings