BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. VISTA UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017111058

EXPEDITED DECISION

Parent on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on November 28, 2017, naming Vista Unified School District.[1] District filed its response to Student's complaint on December 8, 2017, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200 (*M.C.*).)

Administrative Law Judge Darrell Lepkowsky heard this matter in Vista, California, on January 11, 2018, and telephonically on January 16 and January 26, 2018.

Meagan Nuñez and Patricia Darlin, Attorneys at Law**,** represented Student. Mother, the parent who filed the complaint on behalf of Student, attended the hearing

[1] The complaint contained expedited and non-expedited claims. OAH set the expedited and non-expedited claims for separate hearings. The expedited claims proceeded to hearing with no continuances. (34 C.F.R. § 300.532(c)(2).) This Expedited Decision resolves only the expedited claims identified and not withdrawn by Student.

to testify on January 11, 2018. Student did not attend the hearing. Christopher Fernandes and Sarah Orloff, Attorneys at Law, represented District. Dr. Kyle Ruggles, District's Executive Director of Student Support Services, attended the hearing on behalf of District on January 11, 2018, and attended telephonically on January 26, 2018.

At the end of the hearing, the ALJ granted the parties' request to file written closing briefs in lieu of oral closing arguments. The parties timely filed their briefs on January 30, 2018, at which time the matter was submitted for decision.

ISSUE FOR EXPEDITED HEARING[2]

Did District procedurally and substantively deny Student a free appropriate public education during the 2017-2018 school year by failing to hold a manifestation determination review before moving to expel him?

PROCEDURAL ISSUES

The statement of facts in Student's complaint originally alleged that Mother, Student's biological parent, requested District conduct an evaluation[3] of him during the 2016-2017 school year to determine whether he qualified for special education. On December 18, 2017, the day of the prehearing conference on the expedited issues in this

[2] On January 9, 2018, two days before the first day of the expedited hearing, Student withdrew without prejudice his second expedited issue, which alleged that District procedurally and substantively denied him a free appropriate public education during the 2017-2018 school year by failing to provide him with alternative education services pending his expulsion hearing.

[3] The terms "evaluation" and "assessment" are synonyms. The parties used them interchangeably, and they are used interchangeably in this Decision as well.

case, Student filed a motion to correct a factual error in his complaint. Student corrected his complaint to state that Trina Sanford, the Administrator of Saving Another Man's Child, the organization managing the group home where Student was placed by the Juvenile Court, was the one who requested the evaluation in January 2017, when Student began attending school in District.

In his opening statement at hearing, Student expanded his case to allege that Sharon Mayberry, the facility manager of the specific group home where he lived, also requested District evaluate him for special education eligibility on two occasions. Student further expanded his case in his opening statement by alleging that his teachers and other District personnel had expressed concerns to District supervisory personnel that he had engaged in a pattern of behavior that should have alerted District to the fact he was a child with a disability. Student alleged that District therefore had a basis of knowledge that he was a child with a disability who should have been accorded a manifestation determination review before District moved to expel him.

Although the latter two allegations were not raised in Student's complaint, they were fully litigated at hearing without objection from District. The ALJ therefore addresses them in this Decision pursuant to *M.C.*, *supra,* 858 F.3d at pp. 1195-1196.

SUMMARY OF DECISION

Student failed to prove by a preponderance of the evidence that District had a basis of knowledge that he was a child with a disability prior to the incident that gave rise to District moving to expel him. Student was not entitled to the protections of the Individuals with Disabilities Education Act. District therefore was not under any obligation to convene a manifestation determination review prior to imposing discipline on Student based on his engaging in activity that violated District's code of student conduct.

FACTUAL FINDINGS

STUDENT'S ENROLLMENT IN DISTRICT

1. Student was a male who was in seventh and eighth grades during the events of this case. Student resided in District at all relevant times by virtue of his placement by the Juvenile Court at a group home within District's boundaries. Student had not been found eligible for special education and related services at the time of the hearing.

2. Mother resided in another school district, where Student attended school up through the middle of November 2016. There was no evidence that he had been evaluated for special education eligibility or presented with any issues that would have warranted an evaluation before November 2016.

3. Trina Sanford was the Chief Executive Officer and Administrator of Saving Another Man's Child, an agency that managed several group homes where at-risk children were placed through San Diego County. In November 2016, the San Diego Juvenile Court placed Student in one of its homes, under Ms. Sanford's care. The court gave Ms. Sanford guardianship of Student. She was legally responsible for supplying shelter to Student, for ensuring Student received proper nutrition, that his health needs were addressed, that he enrolled in and attended school, and for all of Student's day-to-day needs. The court did not remove Student's educational rights from Mother and did not give his educational rights to Ms. Sanford when the court placed Student in the group home.

4. The Juvenile Court provided Ms. Sanford with a letter of residency that supported Student's enrollment in District as a resident of a group home within District's boundaries. Ms. Sanford delegated the task of enrolling Student in a District school to one of her employees. Ms. Sanford provided the letter of residency to District; it is unclear whether she did so herself or through the employee who completed Student's

enrollment package.

5. The Juvenile Court also issued paperwork placing Student in Ms. Sanford's custody. Ms. Sanford called this "guardianship papers." She testified that the paperwork gave her the responsibility for caring for Student and the ability for her to designate her staff to do the same. Ms. Sanford testified that she was not permitted to show the paperwork to anyone and therefore never provided District with a copy of it. Neither party included the paperwork with their documentary evidence. Ms. Sanford acknowledged that the guardianship papers did not originally give her Student's educational rights, which remained with Mother. Ms. Sanford never informed District that she did not hold Student's educational rights and District treated her and her designated agents as if they did.

6. Ms. Sanford employed several people who, under her contract with the court, were authorized to assist her with overseeing the needs of the children housed at Student's group home. The employees therefore were delegated tasks such as feeding the children, taking them to and from school, taking them to doctors' appointments, enrolling the children in school at District, and talking with school authorities about the children's issues at school.

7. Sharon Mayberry was the facility manager at Student's group home. She worked as a one-to-one aide for District during the school day and at the group home from approximately 3:00 p.m. to 11:00 p.m. Neither Ms. Sanford nor Ms. Mayberry lived at the group home. Ms. Sanford employed several people to assist with running the homes over which her agency had charge.

8. As the facility manager of Student's group home, Ms. Mayberry was in charge of Student's day-to-day needs. She transported him from school, made sure he was fed properly, made sure he did his homework, took him to doctor's appointments, and communicated with District personnel about school issues. Whenever there was an

issue at school involving Student, District staff contacted Ms. Mayberry as Ms. Sanford's designee. There was no paperwork from Ms. Sanford giving Ms. Mayberry that authority and District never asked for any.

9. Someone named Deshannon Richard, who was not identified at hearing, completed the online enrollment packet to enroll Student in middle school at District in late November, 2016, after the court placed Student at the group home. Student was in seventh grade at the time. Student began attending school in District on November 30, 2016. His enrollment packet listed two people as Student's "parents." The first was Ms. Mayberry. The second was Ms. Sanford. However, the enrollment packet stated that their relationship to Student was "agency representative," not that they were Student's parents or his guardians. Ms. Sanford's daughter, who Ms. Sanford employed at her agency, signed the enrollment packet.

10. The enrollment package did not reference Mother at all and did not list her address or other contact information. District did not have that information until after it moved to expel Student in November 2017.

11. District did not ask Ms. Sanford or any of her employees for a copy of the guardianship papers. It accepted the residency paperwork and Student's enrollment packet as sufficient proof that Ms. Sanford's agency was legally responsible for enrolling Student in school. No one provided District with Mother's address before District later moved to expel him and District never asked for it before that time. District never asked Ms. Sanford to provide proof of who possessed Student's educational rights. Ms. Sanford never specifically told District she did not hold Student's educational rights. However, District treated Ms. Sanford and her agency as if they had those rights. The staff at Student's school knew Ms. Sanford and her staff, including Ms. Mayberry, because other children from Ms. Sanford's group homes had attended school at District. Ms. Mayberry had enrolled other children and had attended individualized education

program team meetings for other children.

12. District accepted Student's enrollment packet filled out by Ms. Sanford's employee, permitted Ms. Sanford's employees to take Student to school and pick him up, and released Student to their custody when he had to leave for medical appointments. District sent Student's grades to his group home, and contacted either Ms. Sanford or Ms. Mayberry several times when issues arose at school concerning Student, including disciplinary issues such as detentions, suspensions, and the recommendation to expel Student after an incident on November 3, 2017, discussed below. Ms. Sanford and Ms. Mayberry had access to Student's school records. District did not question their legal authority to act on behalf of Student's educational needs or to access Student's private educational files until Student filed this case.

REQUESTS FOR ASSESSMENT

13. Ms. Sanford initially testified that she spoke with the principal at Student's school sometime in January 2017, because Student was failing all his classes. She testified that she could not recall the principal's name and if she spoke with the principal by telephone or in person. Ms. Sanford stated that she was very concerned about Student's failing all his classes so she asked the principal to have District assess Student for special education eligibility. Ms. Sanford testified that the principal told her that only Student's educational rights holder could ask for the assessment, and therefore would not agree to the assessment. The principal no longer worked at Student's school at the time of the hearing and was not called to testify.

14. Ms. Sanford's testimony was contradictory about when she had the conversation with the principal and what the subject of the conversation was. She initially testified that she discussed Student's behavior and grades with the principal on January 10, 2017, when District contacted her to let her know that Student had cut class that day and was receiving a lunch detention as a result. However, on cross-examination,

she testified that it was either an assistant principal or school counselor that contacted her that day to discuss the incident.

15. Student's report card for the first semester of the 2016-2017 school year did not show that Student was failing all his classes. He did not receive any grade in language arts, literature, or science. Although no one testified as to why his teachers did not give him grades in those classes, it can be surmised that it was due to Student only having been enrolled for a few weeks of school before the report card issued, with an intervening two-week winter break. Student received a "B" in physical education; a "C" in mathematics; an "F" in social studies; and an "F" in band. This report card did not indicate that he was failing all his classes.

16. In spite of her testimony that she was concerned about Student's failing grades, Ms. Sanford did not provide District with Mother's address, did not ask District to contact Mother, and did not contact Mother herself to suggest that Mother request the assessment. Ms. Sanford testified that she thought District would independently seek out Mother although she knew that District did not have Mother's contact information. Ms. Sanford never followed up about the assessment. She did not make any further request for assessment and did not ask anyone else to make the request.

17. There is no evidence that District was aware in January 2017, that Ms. Sanford or her agency was not the holder of Student's educational rights. Ms. Sanford never provided District with the guardianship papers from the court which supposedly delineated the legal rights accorded to Ms. Sanford and her agency concerning Student. From November 2016, when Student enrolled at District, until Student filed the instant due process case, District treated Ms. Sanford, her agency, and her employee designees, as if Ms. Sanford was the holder of Student's educational rights since she and her employees had full access to Student's educational records and were the ones contacted when disciplinary issues arose at school. It is inconsistent that District would refuse to

acknowledge Ms. Sanford's right to act on Student's behalf regarding his education on January 10, 2017, but then accord her and her employees full rights for the next 10 months.

18. For these reasons, Ms. Sanford's testimony that she asked District to assess Student in January 2017 was not persuasive.

19. District mailed its students' report cards to the address of record in their enrollment packages. Student's address of record was his group home. His report card for the second semester of the 2016-2017 school year was mailed to the group home after the school year ended on June 7, 2017. Student's grades for the second semester of the 2016-2017 school year were "Fs" in language arts, literature, social studies, science, and band. He received a "C-" in mathematics, and a "B-" in physical education.

20. Ms. Mayberry testified that she was very concerned after seeing Student's second semester grades. She testified that she contacted Michele Cain, an assistant principal at Student's school with whom she had prior contact when District disciplined Student for misbehaviors at school. Ms. Mayberry testified that she asked Ms. Cain to assess Student for special education eligibility after seeing he was failing most of his classes. Ms. Mayberry testified that Ms. Cain suggested waiting until after school started the for the fall semester to begin the assessment process. Ms. Cain denies such a conversation took place.

21. Ms. Mayberry could not recall whether the conversation with Ms. Cain took place by phone or in person, or exactly when it took place. She first stated that she spoke with Ms. Cain in July or August of 2017, before the start of the 2017-2018 school year. However, the school semester ended June 7, 2017, and there is no evidence that Student's school was open during summer 2017 or if Ms. Cain was working during the summer. Upon questioning by the ALJ, Ms. Mayberry then stated that her conversation with Ms. Cain took place right before the summer break began rather than during the

summer. Yet, second semester grades were not available until the end of the 2016-2017 school year and they were mailed to the students. It is unclear how Ms. Mayberry could have spoken with Ms. Cain about Student's failing grades before the summer break if the grades were not yet issued.

22. As discussed below, Student assaulted a classmate on October 23, 2017, and District suspended him for two days. District contacted Ms. Mayberry about the incident. Ms. Mayberry met with Ms. Cain that day to discuss the incident and the resulting suspension. Ms. Mayberry contended that she asked for an assessment that day and that Ms. Cain agreed to initiate the process. Ms. Cain denied that Ms. Mayberry asked for the assessment.

23. Student supports Ms. Mayberry's testimony by pointing to a District authorization to release and exchange information form, which Ms. Mayberry signed on October 23, 2017. The authorization was to give District permission to release and exchange information with Vista Hill, the juvenile court clinic that provided counseling services to Student and to assess him. Student points out that the form specifies that the purpose of the form was to "obtain information to assist the school team in conducting an assessment" and that no other purpose was indicated. He contends that the release forms support Ms. Mayberry's testimony that the purpose of the form was to obtain outside information about Student for District's assessment process.

24. However, a review of the forms indicates that they supported Vista Hills' assessment process rather than being a basis for District to start its assessment. If Ms. Cain had intended to start an assessment of Student in response to Ms. Mayberry's request, there is no reason that she would have asked Ms. Mayberry to sign a release and then failed to give her a District assessment plan to sign.

25. Ms. Mayberry's testimony on the issue of whether she requested an assessment on October 23, 2017, was often contradictory. She testified that she had

assisted in filing Student's original complaint, but the original complaint stated that Mother had requested an assessment, which Ms. Mayberry did not correct when the complaint was filed. The corrected complaint stated that it was Ms. Sanford who requested an assessment in January 2017, but failed to reference any request for assessment by Ms. Mayberry. During Student's opening statement, he said that the evidence would show that Ms. Mayberry requested an assessment on October 23, 2017, an assertion not included in either version of his complaint. Student's opening statement did not reference any other request for assessment by Ms. Mayberry, yet she testified to an earlier request, which apparently had not been conveyed to Student's counsel.

26. Additionally, Ms. Mayberry said that she requested Ms. Cain to get the paperwork going for Student to have an IEP on October 23, 2017, she later stated the purpose of the release form she signed was for the court-appointed clinic to get information from Student's school for its own assessment, which the clinic had initiated. Ms. Cain on the same day signed a release form from Vista Hill for exchange of information. Ms. Mayberry then stated on re-direct that Vista Hill had initiated an assessment process, further confusing the issue of which entity was seeking to assess Student.

27. Student's contention is that after asking Ms. Mayberry to sign a release of information form, Ms. Cain did not then proceed to ask her to sign an assessment plan. The contention is illogical, particularly in light of how Ms. Cain presented during her testimony. She was calm, concise, non-evasive, and none of her testimony was contradictory. She answered questions truthfully, even when her answers were damaging to District's case. For example, she made no attempt to hide the fact that she and other District staff never confirmed whether Ms. Sanford or anyone else held Student's educational rights. She also calmly and without evasion acknowledged that

District contacted Ms. Sanford or Ms. Mayberry to discuss issues involving Student rather than attempt to contact Mother. Ms. Cain also readily acknowledged that District made no attempt to locate or contact Mother before it moved to expel Student in November 2017. For these reasons, Ms. Cain's testimony was more persuasive than that of Ms. Mayberry that no request to assess Student was made to assess Student on October 23, 2017.

STUDENT'S DISCIPLINE HISTORY

28. District maintained a computerized database called "Student Assertive Discipline Record" to track disciplinary incidents involving children at its schools. The records could be filtered by a child's name to create a record specific to that child. Although all disciplinary incidents were supposed to be entered into this data base, there were times when staff failed to enter the information into the computer system.

29. Once staff entered an incident report, the system was supposed to automatically send it to the assistant principal assigned to the incident and to automatically generate a boilerplate response to the teacher or other staff member who had reported the incident. The boilerplate response stated that the incident had been noted, had been assigned to the designated assistant principal, and that the assigned assistant principal would thereafter send another email to the teacher once the incident had been further documented. However, the system did not always work as it was supposed to. The emails did not always get generated.

30. District did not always notify anyone about incidents involving Student or discipline he received. When it did decide that it was necessary to inform an adult about any incidents, District contacted either Ms. Sanford or Ms. Mayberry. No one at District made any attempt to contact Mother about any incidents involving Student until after Student filed this due process case.

31. Student began attending a District middle school in late November 2016.

The first reported incident of Student misbehaving occurred on January 10, 2017, when one of his teachers reported that Student had cut class. One of the assistant principals at the school was notified. As discipline, Student was given one day of detention during his lunch period. District notified Ms. Mayberry of the incident and the punishment Student received.

32. Another incident involving Student occurred on or about January 31, 2017. Although the boilerplate email was generated to the teacher reporting the incident, no information about the incident was contained in the email. For unknown reasons, the incident was not entered into Student's Assertive Discipline Record. The assistant principal assigned to the record no longer worked at Student's school as of the time of the hearing, and no one who testified, including Ms. Mayberry, Ms. Sanford, or former District assistant principal Michele Cain, were aware of what the incident was.

33. On March 6, 2017, a female pupil accused Student of touching her breast during physical education class. A school counselor had a discussion with Student and the female pupil. Although Student apologized, he said that he had not done the touching. The counselor asked Ms. Cain to speak with Student. He also told Ms. Cain that he had not touched the female pupil. Ms. Cain counseled Student and discussed with him the need to keep his hands to himself. Student did not receive any discipline for this incident.

34. On March 21, 2017, Student received another lunch detention for arriving tardy to school, apparently without justifiable excuse. It was the only time Student was noted as being tardy for school.

35. On April 19, 2017, Student's teacher asked him to go and wait outside the classroom for a few minutes because Student was misbehaving. Student cussed at the teacher before leaving the classroom. When the teacher went to check on him, Student was gone. Student received a two-day suspension for his actions. District notified Ms.

Mayberry of what had happened and that Student would receive the suspension.

36. Student had two disciplinary incidents on May 23, 2017. During breakfast at school, Student threw some juice at someone. He then laid down on the ground and would not get up for several minutes even after being told to do so by two staff members and an assistant principal. Student received a lunchtime detention as discipline.

37. During lunchtime the same day, Student pushed another pupil and made menacing movements to him after the pupil shouted a profanity at Student and his group of friends. An assistant principal counseled Student and gave him an after-school detention. School personnel notified Ms. Mayberry of the detention.

38. On May 24, 2017, a female student told a school counselor that Student and another boy had been slapping and squeezing her bottom during physical education class. The counselor told Student's teacher that the issue would be addressed with the two boys. The female student agreed to let the teacher know if it happened again. There is no evidence that Student had any further incidents of inappropriately touching girls.

39. The 2017-2018 school year began on August 16, 2017. On August 31, 2017, Student received a lunch detention for being out of class, running through an area in which he was not supposed to be, and not responding initially to Ms. Cain's directive to turn back from where he was running.

40. On September 1, 2017, Student was disruptive in class by talking, clowning around, and being off-task. His teacher took him outside to counsel him and had Student remain outside the classroom to reflect on his behavior. When the teacher went to check on Student, Student had left. The teacher assigned Student a study hall period during lunch so that Student could make up the quiz that the teacher gave during the period Student missed. The teacher did not give Student any discipline for the incident.

The Assertive Discipline Report system generated an automatic reply to the teacher's report in an email dated September 20, 2017. It is clear that the automatic email, which contains a description of what happened, is referencing the September 1, 2017 incident as the teacher states that it was the third week of school. September 20, 2017, was the fifth week of school. The description also references the fact that the teacher allowed Student to make up the quiz during a study hall period at lunchtime. There are no other references in Student's records to him being off-task or disruptive in class.

41. On October 5, 2017, Student overheard a classmate talking negatively about Student to a group of children at school. Student grabbed the boy and put him in a chokehold. Student was counseled about his behavior and school expectations, and warned not to repeat his actions.

42. On October 10, 2017, parents of two of Student's classmates informed District that Student wanted to fight their sons. District again counseled Student about school behavior expectations.

43. On October 23, 2017, a classmate told Student that he smelled bad. Student responded by pushing the boy and putting him in a chokehold. The incident happened in front of multiple students and staff. District suspended Student for two days for this incident. District also referred Student to a twice-a-week after-school mentoring through action program called Body, Mind and Soul, which was offered at Student's school for the first time during the 2017-2018 school year. The program took place at school and focused on helping pupils who were struggling at school. The referral was referenced in Student's Assertive Discipline Report discussing the October 23, 2017 incident. Neither party provided any specifics at hearing about this program or whether Student attended it after the referral.

44. Although not referenced in Student's Assertive Discipline Report, Ms. Cain testified that District also referred to Student to an additional program called Pass

AmeriCorp sometime in September or October 2017. The program, run by the San Diego County Office of Education, was directed at children struggling with at least of two of three behaviors: attendance issues; academic issues; or behavior concerns. Student did not have attendance issues. He met the program criteria because of his low grades and his assaulting classmates. The program helped students recover grades and work on issues that had resulted in discipline. The program took place at school during school hours. A program mentor would work with the students both in and out of the classroom. Student was not referred to the program by his teachers but by counseling staff and school administrators. It is unclear to what extent, if at all, Student participated in the program before District moved to expel him.

STUDENT'S SUSPENSION AND DISTRICT'S MOVE TO EXPEL HIM

45. On Friday, November 3, 2017, Student assaulted a classmate after school during pick up time. Student pushed the classmate and they rolled into the street where cars were stopped waiting for children. Student then punched the other boy at least once in the head. The boy sustained some abrasions. Children and parents witnessed the incident. There is no evidence of what triggered Student's actions.

46. On November 6, 2017, Heather Golly, Student's middle school principal, met with Ms. Mayberry and others to discuss the November 3, 2017 incident. It is unclear who was at this meeting. There was some generalized discussion about Student's behavior and whether he needed to be assessed, and Ms. Mayberry mentioned that perhaps Student should be assessed for a section 504 plan,[4] but nothing concrete was discussed. At that time, District suspended Student for five days pending expulsion.

[4] A section 504 accommodations plan is one developed under section 504 of the Rehabilitation Act of 1972 (29 U.S.C. § 701, et seq.)

47. On November 13, 2017, Ms. Golly convened a meeting to discuss what District's next steps would be regarding Student and the November 3, 2017 incident. Dr. Ruggles, Ms. Cain, some additional District staff, a county social worker, and Ms. Mayberry attended the meeting. Ms. Golly was still not aware at that time that Mother was the only one who held Student's educational rights. She did not attempt to contact Mother about the November 3 incident and did not attempt to contact her to attend any of the meetings held to discuss the incident. She did not ask Ms. Mayberry who held Student's educational rights and did not ask her for Mother's contact information.

48. At the November 13, 2017 meeting, Ms. Golly recommended Student's expulsion based on him assaulting a classmate on November 3, 2017. Ms. Mayberry was given the option, based on the California Education Code and District policy, of either extending Student's suspension or placing Student on independent study. Ms. Mayberry chose to have Student start the independent study. She signed a District form document agreeing to this over the line for the parent's signature. A social worker present at the meeting also asked that a section 504 and IEP team meeting be held for Student. The social worker followed this up with an email to Student's probation officer confirming that she had made the requests.

49. Mother signed a release form on November 27, 2017, permitting District and counsel of record in this case to exchange information about Student. Neither Ms. Sanford nor Ms. Mayberry signed a similar release. On November 28, 2017, Mother filed the instant due process case on behalf of Student. Neither Ms. Sanford nor Ms. Mayberry are named as petitioners.

50. At some point after the November 13, 2017 meeting, District became aware that Mother retained Student's educational rights and obtained her address. On December 11, 2017, District sent an assessment plan for a special education assessment addressed to Mother at her home address and to Ms. Mayberry at the address of

Student's group home. It is unclear if and when either of the two signed the assessment plan.

51. On December 12, 2017, the Juvenile Court granted Student's ex parte petition to, in effect, clarify who held his educational rights. The court named Mother and Ms. Sanford as co-educational rights holders for Student. The court did not grant Ms. Mayberry educational rights.

52. Neither party put on any evidence at hearing of the status of District's expulsion proceedings against Student.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK FOR STUDENT DISCIPLINE UNDER THE IDEA[5]

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 (2006)[6] 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 free appropriate public education is defined as appropriate special education, and related services, that are available to the child at no cost to the parent or guardian, that meet the state educational standards, and that conform to the child's individualized education program. (20 U.S.C. § 1401(9); Ed. Code, §§ 56031 and 56040.)

2. Title 20 United States Code section 1415(k) and title 34 Code of Federal Regulations, part 300.530, et seq., govern the discipline of special education students.

[5] Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

[6] All references to the Code of Federal Regulations are to the 2006 version.

(Ed. Code, § 48915.5.) A student receiving special education services may be suspended or expelled from school as provided by federal law. (Ed. Code, § 48915.5, subd. (a).) If a special education student violates a code of student conduct, school personnel may remove the special education student from his or her educational placement without providing services for a period not to exceed 10 days per school year, provided typical children are not provided services during disciplinary removal. (20 U.S.C. § 1415(k)(B); 34 C.F.R. § 300.530(b)(1) and (d)(3).)

3. For disciplinary changes in placement greater than 10 consecutive school days (or a pattern of disciplinary action that amounts to a change of placement), the disciplinary measures applicable to students without disabilities may be applied to a special education student if the conduct resulting in discipline is determined not to have been a manifestation of the special education student's disability. (20 U.S.C. § 1415(k)(C); 34 C.F.R. §§ 300.530(c) , 300.536(a)(1) and (2).)

4. 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).)

5. 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

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).)

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, 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].) Student has the burden of proof in this case.

ISSUE: BASIS OF KNOWLEDGE THAT STUDENT WAS A CHILD WITH A DISABILITY

Whether Student's Parent Requested an Assessment

7. Student first contends that he meets the second prong of the basis of knowledge test and that District therefore should have convened a manifestation determination review for him prior to moving to expel him from school. Student contends that Ms. Sanford and Ms. Mayberry were his de facto parents, and that both asked District to assess him prior to the incident on November 3, 2017, where he assaulted a classmate. District asserts that neither Ms. Sanford nor Ms. Mayberry requested the assessments as they contend. District also contends that even if they did make the requests, neither of them held Student's educational rights at the time of the requests and neither legally qualified as his "parent" at the time under the pertinent state and federal statutes.

Who Constituted Student's Parent

8. Title 20 United States Code section 1401(23)(C) states that the term "parent" means, in pertinent part, an individual acting in the place of a parent, with whom the child lives, or an individual who is legally responsible for the child's welfare. Title 34, Code of Federal Regulations, part 300.30(a), expands the definition of "parent." Part 300.30(a)(3) states that a "parent" is a "guardian generally authorized to act as the

child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State). Part 300.30(a)(4) follows the IDEA in stating that a "parent" is "an individual acting in the place of a biological or adoptive parent . . . .with whom the child lives, or an individual who is legally responsible for the child's welfare." Education Code section 56028, subdivision (a)(3) and (a)(4) mirror the language of the Code of Federal Regulations.

9. Student established through Ms. Sanford's testimony that Student was placed by the Juvenile Court at a group home run by the company of which she is Executive Director and that she became responsible for all aspects of Student's well-being. District provided no evidence to counter Ms. Sanford's testimony. District treated Ms. Sanford and her employees as if they had full authorization to act on Student's behalf in all aspects of his education. District accepted Student's enrollment package, which one or more of Ms. Sanford's employees had prepared. District provided Ms. Sanford and her employees with full access to Student's school and educational records, mailed Student's report cards to her or her employees at Student's group home, and contacted Ms. Sanford or her employee Ms. Mayberry in cases involving discipline of Student, discussing the reasons why District was disciplining him and what discipline he would receive. All of this information is contained in Student's private records, which, under the Family Educational Rights and Privacy Act, cannot be disclosed to anyone not authorized to receive the information or have access to it. (20 U.S.C. § 1232g, et seq; title 34 C.F.R. § 99.31; see also Ed. Code, §§ 49075, 49076.)

10. District cites to title 34 Code of Federal Regulations part 300.30(b)(1) as support for its argument that Student's only "parent" was his biological mother, the only person who held his educational rights until after District moved to expel him. That section states: "Except as provided in paragraph (b)(2) of this section, the biological or adoptive parent, when attempting to act as the parent under this part and when more

than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child."

11. District argues that because Mother was Student's only educational rights holder at all relevant times, Mother is presumed to be the "parent." District, however, misreads part 300.30(b)(1) by failing to note that the section specifies that the biological parent is presumed to be the "parent" of the child *when attempting to act as the parent under this part and when more than one party is qualified . . . . to act as the parent* (emphasis added). In other words, the regulation addresses a situation where two competing individuals – a biological parent and another qualified individual – are attempting to act as a parent. If that happens, the law presumes that it is the biological parent who retains the rights as a parent for purposes of the child's education.

12. Here, Mother did not attempt to assert any of her parental rights at any time relevant to this case. Although she knew where Student lived and went to school, she had no involvement whatsoever in providing for his educational, medical, or day-to-day needs. Rather, the Juvenile Court had transferred those responsibilities to Ms. Sanford. It is inconsistent for District to argue that Mother was the presumed parent when it made no attempt to verify Ms. Sanford's position as his guardian, made no attempt to contact Mother about any issues regarding Student, and provided Student's private and confidential records to Ms. Sanford and her employees.

13. District argues that Ms. Sanford failed to provide documentation supporting her contention that she had legal rights and responsibilities for Student. Ms. Sanford's testimony is evidence of those rights as is the fact that District relied on her representations for an entire year with regard to whom it deemed legally responsible for Student. Ms. Sanford and Ms. Mayberry both testified that they have enrolled several students in District schools and that District has never questioned the fact that Ms.

Sanford's agency was legally responsible for those students, including their education. Contrary to District's argument, the IDEA, the Code of Federal Regulations, and state law do not require that a person hold a child's educational rights to be deemed a parent. District failed to provide any evidence to dispute Ms. Sanford's testimony that the Juvenile Court had given her legal responsibility for Student's educational needs. Student has met his burden of demonstrating that Ms. Sanford was acting as his "parent" for purposes of special education law during all times relevant to this case.

14. However, Student did not meet his burden of demonstrating that Ms. Mayberry was also entitled to be considered Student's "parent." Ms. Mayberry was merely an employee of Ms. Sanford's agency, to whom Ms. Sanford delegated responsibility to act for her in meeting the needs of the children in Student's group home. It is true that it was she who was involved in the day-to-day tending of Student's needs. However, there is no persuasive evidence that the Juvenile Court specifically placed Student in Ms. Mayberry's care, any more than there is evidence that the court placed Student in the care of any of the several other employees who worked for Ms. Sanford, such as her daughter who signed Student's enrollment papers.

15. The fact that the court intended to place Student in Ms. Sanford's care and not in that of Ms. Mayberry is confirmed by the fact that the court did not confer Student's educational rights on Ms. Mayberry when it added an educational rights holder in its December 12, 2017 order. Rather, it conferred those rights jointly on Mother and Ms. Sanford, the latter of whom has been responsible for Student since November 2016. While Ms. Sanford stated that her guardianship papers permitted her to delegate responsibility to her employees that does not mean that those employees became Student's "parent." For these reasons, Student failed to prove that Ms. Mayberry was Student's "parent" under either federal or state law.

Request For Assessment

16. Student first contends that Ms. Sanford requested an assessment in January 2017. Ms. Sanford stated that she made the request of the person who was then the principal at Student's middle school after seeing that Student was failing all of his classes. Ms. Sanford stated that when she made the request, the principal told her that only Student's educational rights holder could make such a request and therefore it would not accept the request for assessment from Ms. Sanford. Ms. Sanford could not recall if she made the request by telephone or in person. District denies that the request was ever made.

17. Student's assertion is not persuasive for several reasons. First, Ms. Sanford's testimony was contradictory. She first stated that she discussed Student's failing grades and his behaviors with the principal on January 10, 2017, when the principal contacted her to inform her that Student cut a class and was given a lunch detention as a consequence. However, under questioning by District, Ms. Sanford then said that it was an assistant principal or counselor who contacted her on January 10, 2017, to discuss Student's detention.

18. Further undermining the persuasiveness of Ms. Sanford's testimony is the fact that Student was not failing all of his classes as of January 2017. His grades for the first semester of the 2016-2017 school year showed that he received passing grades in two classes, no marks in three, and that he was only failing two classes, one of which was band. Further, the day Student cut the one class on January 10, 2017, was the first time there is evidence that he misbehaved at school. There is thus no evidence of a compelling reason for Ms. Sanford to have requested an assessment at that time.

19. Additionally, Ms. Sanford's subsequent lack of action on the issue further undermines the persuasiveness of her testimony. Although she testified that it was deep concern over Student's grades that prompted her to ask for the assessment, she took no

action to follow through on having District assess him. Ms. Sanford was aware that District did not have Mother's contact information because it was her employees who enrolled Student and Mother's information is not on the enrollment papers. Mother is not mentioned at all on them. In response to District allegedly stating that only Student's educational rights holder could ask for the assessment, Ms. Sanford failed to provide District with Mother's contact information, failed to even ask District if it wanted the information, and failed to contact Mother herself to suggest that Mother request the assessment. Nor did Ms. Sanford follow up at any time to determine how she could get Student assessed by District.

20. Finally, Ms. Sanford's contention that the principal told her that only Student's educational rights holder could ask for an assessment is contradicted by the fact that there is no evidence that District was even aware at the time that Ms. Sanford did not possess Student's educational rights. Ms. Sanford never provided her guardianship papers to District and never told District that she did not have the educational rights. As discussed above, District in fact treated Ms. Sanford and her employees as if Ms. Sanford did, in fact, hold those rights. It provided Student's report cards to Ms. Sanford. It provided her or Ms. Mayberry with notification of Student's misbehaviors and the consequences of them. District provided notification of Student's suspensions to Ms. Sanford and Ms. Mayberry, and had Ms. Mayberry, as Ms. Sanford's designee, sign agreement to Student going on an independent study program while District reviewed its proposal to expel him. All of District's actions fly in the face of Ms. Sanford's contention that District told her that it could not accept her referral for District to assess Student.

21. For these reasons, Student has failed to meet his burden of persuasion that Ms. Sanford requested an assessment for Student in January 2017, 10 months before the incident for which District moved to expel him.

22. Student also contends that Ms. Mayberry asked District to assess him first sometime in summer 2017, and then later on October 23, 2017, when District suspended Student for putting a classmate in a chokehold. As discussed above, Student has failed to prove that Ms. Mayberry should also be deemed his "parent" for purposes of demonstrating that he meets the basis of knowledge criteria for the prong requiring proof that the student's parent requested an assessment prior to the student being disciplined. However, assuming that Ms. Mayberry met the definition of "parent" her contention that she asked for an assessment is not persuasive.

23. First, Student's contentions regarding whether District had a requisite basis of knowledge that he might be a student with a disability, have been ever-changing and shifting. Student's initial complaint alleged Mother requested an assessment during the 2016-2017 school year. He corrected his complaint to allege that it was Ms. Sanford who made the request in January 2017. It was not until his opening statement at the expedited hearing that Student raised for the first time his contention that Ms. Mayberry had also asked for an assessment on October 23, 2017. Student also raised for the first time in his opening statement his contention he had engaged in a pattern of behavior that should have alerted District that he was entitled to a manifestation determination review. There were no facts in Student's complaint to support either of these new contentions. And, it was only during Ms. Mayberry's testimony that District was informed for the first time that she had also asked for an assessment sometime during the summer of 2017. Student's shifting theories of liability undermine the persuasiveness of his contentions.

24. That notwithstanding, Ms. Mayberry's testimony was contradictory about both alleged requests for assessment. She testified that it was the fact that Student had failed most of his classes for the second semester of the 2016-2017 school year that prompted her first request for assessment. She first testified that she asked assistant

principal Michele Cain to assess Student during either July or August 2017. However, classes ended on June 7, 2017, and there is no evidence that Student's school was open during the summer break or that Ms. Cain was working during the summer break. Ms. Mayberry later testified that she asked for the assessment prior to the start of the summer break. However, District mailed grades to the homes of its students, so Ms. Mayberry would not have seen Student's grades before the start of the summer break. Finally, since there is no evidence that Student attended summer school, there is no reason that Ms. Mayberry would have requested an assessment when school was not in session. For these reasons, Student's contention that Ms. Mayberry requested an assessment sometime during the summer of 2017 is not persuasive.

25. Nor has Student met his burden of persuasion that Ms. Mayberry requested an assessment on October 23, 2017, when she met with Ms. Cain to discuss Student's suspension. Ms. Mayberry's testimony on this point was also contradictory. She stated that she told Ms. Cain that she wanted to get the paperwork signed for Student to get an IEP, but later acknowledged that release forms she and Ms. Cain signed were for District and Vista Hill, the court clinic that was assessing Student, to exchange information. Student asserts that it is clear from the language of the District release form that it was meant for the IEP assessment process.

26. Moreover, it is illogical for Ms. Cain to have a requested that Ms. Mayberry sign a release of information for purposes of initiating an assessment process and then fail to have Ms. Mayberry sign an assessment plan. Ms. Cain denied that Ms. Mayberry requested an assessment on October 23, 2017, or at any earlier date. Ms. Cain was forthright and non-evasive during her testimony. She did not make any contradictory statements, and made statements that were contrary to District's legal position at hearing. Ms. Cain acknowledged that neither she nor other District staff ever attempted to contact Mother about Student's educational needs. Ms. Cain further acknowledged

that she treated Ms. Sanford and Ms. Mayberry, as Ms. Sanford's designee, as if they were Student's parents, contacting them about his misbehaviors, and having them sign documents concerning his education. For these reasons, Ms. Cain's testimony that Ms. Mayberry never requested an assessment is more persuasive than Ms. Mayberry's contention to the contrary. Student failed to meet his burden of persuasion that Ms. Mayberry requested District assess him prior to the incident on November 3, 2017, which prompted District to move to expel him.

Pattern of Student's Behavior as a Basis of Knowledge That He Had a Disability

27. The third prong of the "basis of knowledge" analysis that a district knew a student was a child with a disability is if there is a preponderance of evidence that "the teacher of the child, or other personnel of the local educational agency, expressed specific concerns about a pattern of behavior by the child directly to the director of special education of the agency or to other supervisory personnel of the agency."

28. Student contends that there are multiple instances of District staff expressing concern about Student's patterns of behaviors to District administrators. Student correctly notes that a "pattern of behavior" does not refer only to behaviors involving disciplinary issues. (*Anaheim Union High Sch. Dist.* v. *J.E.* (C.D.Cal. 2013) 2013 WL 2359651, * 4 - *5 (*J.E.*).) Student points to his history of discipline and misbehaviors, as noted in his Assertive Discipline Record, to argue that he had a pattern of behavior of which District administrators were well-aware, which provided the requisite basis of knowledge that he had a disability. Student therefore concludes that District should have provided him with a manifestation determination review before moving to expel him. District counters that Student's teachers did not express specific concerns about recurrent, similar or related events. Further, District asserts that none of the reports by Student's teachers gave any indication that he might be a child with a disability.

29. Although there were about 12 instances of Student's non-compliant behavior noted in his Assertive Discipline Record or in emails about him prior to November 3, 2017, Student has failed to prove by a preponderance of the evidence that he engaged in a "pattern of behavior" that should have alerted District he might be a child with a disability. A pattern is defined as "a combination of qualities, acts, tendencies, etc., forming a consistent or characteristic arrangement,"[7] or "recurrent, similar, or related events." (*J.E., supra,* 2013 WL 2359651 at *4, citing *Caminetti v. U.S.,* 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917).) Although Student engaged in several different behaviors, there was no consistent behavior or tendencies that should have alerted District that Student might have a disability. Student has not cited to any authority for his proposition that different types of conduct can be aggregated to form a "pattern of behavior."

30. Student cut a class two times, was tardy once, and was out of the class he was supposed to be in once. None of these incidents constituted consistent behavior that indicated Student might have a disability.

31. Student inappropriately touched a female classmate twice. Student denied the first incident. However, even if it did happen, two incidents do not constitute a pattern and Student ceased the conduct after the second incident, which occurred months before the incident for which District moved to expel him.

32. There was one occasion when Student lay down on the ground during breakfast at school and initially refused staff requests that he get up. There were no further occasions when he engaged in the same conduct.

33. On one occasion, one of Student's teachers informed administrative staff that Student was disruptive in class, was clowning around, was off-task, and then left

[7] http://www.dictionary.com/browse/pattern

without permission when the teacher had Student go outside to reflect on his behavior. The email from the assistant principal regarding this incident was not generated until about three weeks after it occurred. Student treated the notations of the incident as two separate events, but it is clear from reading the notations that they address the same incident. However, even if there were two occasions when Student was off-task and disruptive in class, two incidents over a 12-month period do not constitute a pattern of behavior.

34. Before the November 3, 2017 episode for which District recommended expulsion for Student, he engaged in three incidents where he once pushed a classmate and on two occasions put a classmate in a chokehold. Student has provided no authority that these three incidents constitute a pattern of behavior that indicated he might have a disability.

35. Student also asserts that the fact District referred Student to two non-special education intervention programs is evidence of a pattern of behavior. However, Student provided no evidence that either program was anything more than general education interventions for children who demonstrated maladjusted behavior at school. The United States Department of Education specifically rejected the idea that the fact a child received early child intervention services constituted a basis of knowledge that a child had a disability. (Federal Register, Vol. 71, No. 156, p. 46727 (August 14, 2006).) Likewise, a referral to a general education intervention program where there is no evidence of what the program is, does not, ipso facto mean District had a basis of knowledge a child might have a disability.

36. Finally, the United States Department of Education noted that when Congress amended the IDEA in 2005, it was partly to ensure that school districts could appropriately discipline students and that the IDEA would not be used as a shield to hinder that ability. (*Id. at p. 46727.*) Even when focusing on Student's aggressive conduct

with his classmates, there is no evidence that this behavior was a pattern, or that it was conduct that should have alerted District that Student might have a disability. Notably missing from Student's evidence is any indication of what disability he might have based on his conduct. Student did not state in his complaint, in his opening statement at hearing, or in his closing brief, what type of disability he might have and why his conduct should have put District on notice that he might have such a disability. None of the witnesses at hearing addressed this issue.

37. The purpose of the statutes (20 U.S.C. § 1415 (k)(5)(A) & (B); 34 C.F.R. § 300.534(b)) is to determine if a school district had a basis of knowledge that a student might have a disability and therefore was entitled to a manifestation determination review. If there is no indication that a child might have a disability, it would be illogical to find that a school district could have such a basis of knowledge pursuant to these statutes.

38. In this case, the only evidence presented demonstrated that Student engaged a few times in maladjusted behavior of physical aggression with classmates. District applied progressive discipline by first warning Student, then suspending him, then moving to expel him. There is not a scintilla of evidence that Student has a qualifying disability. Nor did Student meet his burden of persuasion that he engaged in a pattern of behavior that constituted a basis of knowledge that he might be a child with a disability.

39. In conclusion, Student has failed to meet his burden of persuasion that District had a basis of knowledge that he might be a child with a disability, either because his parent requested an assessment before the incident that prompted District's move to expel him or because he engaged in a pattern of behavior that should have alerted District he might have a disability. District was not required to hold a manifestation determination review before it moved to expel Student.

ORDER

All of Student's claims 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, District prevailed on all 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: February 7, 2018

/s/

DARRELL LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings