

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

HAYWARD UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017120638

EXPEDITED DECISION

On December 14, 2017, Student filed with the Office of Administrative Hearings a request for an expedited due process hearing naming Hayward Unified School District.¹ Administrative Law Judge Theresa Ravandi heard the expedited portion of this matter in Hayward, California on January 24, 25, and 26, 2018.

Rosa Bay and Fanna Gamal, Attorneys at Law, represented Mother and Student.² Mother and Father attended each day of hearing, and Student was present the final day.

David R. Mishook, Attorney at Law, represented Hayward Unified School District. Karen Mates, Hayward's Compliance Coordinator, attended the hearing.

¹ Student's complaint contained expedited and non-expedited claims, which OAH calendared for separate hearings. The expedited claim proceeded to hearing within 20 school days of the date of filing. (20 U.S.C 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2).) This Expedited Decision resolves only the expedited claim.

² Mother is referred to as "Parent" throughout this Decision.

On January 26, 2018, the evidentiary record was closed and the matter was submitted for Decision. At their request, the ALJ allowed the parties to file written closing arguments by January 30, 2018. The parties timely filed their closing briefs.

ISSUE³

Did Hayward have a “basis of knowledge” that Student was a student with a disability prior to the November 8, 2017 incident, thus entitling her to procedural safeguards under the Individuals with Disabilities Education Act, specifically those found at title 20 of the United States Code, section 1415(k)?

PROCEDURAL MATTERS

HAYWARD’S REQUEST FOR A ONE-DAY CONTINUANCE

On January 23, 2018, Hayward filed a request to continue the expedited hearing for one day because its counsel of record had come down with the flu. Hayward was able to proceed to hearing with representation by a substitute attorney on January 25, 2018, the second day scheduled for hearing. Student filed an opposition on the grounds

³ On January 17, 2018, Hayward moved to dismiss Student’s Issue 2, which asserted that her conduct was a manifestation of her disability and that Hayward had improperly determined otherwise. In doing so, Hayward elected to not prove the legal sufficiency of the manifestation determination it conducted pursuant to Section 504 of the Rehabilitation Act of 1973, in light of the requirements of the Individuals with Disabilities Education Act. On January 22, 2018, OAH granted the motion to dismiss on the grounds that OAH has no jurisdiction over Section 504 proceedings and that the issue of whether Student’s conduct was a manifestation of her disability was not ripe for review.

that a one-day continuance may impact the availability of one of her witnesses; would violate the requirement that an expedited hearing occur within 20 school days of the date of filing the complaint; and would delay resolution. Student contended that Hayward should have foreseen a need to assign more than one attorney to try this matter.

OAH ordered the parties to appear for hearing on the date originally scheduled, January 24, 2018, to address the continuance request, with Hayward's attorney given leave to appear telephonically. Student's expedited due process hearing was timely convened on January 24, 2018. Hayward established good cause to continue the matter one day so another attorney could provide legal representation.

HAYWARD'S MOTION TO DISMISS STUDENT'S EXPEDITED ISSUE

During its opening statement on January 25, 2018, Hayward moved to dismiss Student's expedited issue on the grounds that this tribunal could afford no effective remedy, and Student's issue was moot. Hayward argued that it was already in the process of conducting an expedited assessment of Student for special education eligibility, and that it was committed to convening a manifestation determination review team meeting if Student was found eligible. Hayward alleged that the issue of Student's educational placement was moot because on January 24, 2018, Hayward's Governing Board approved the recommendation to expel Student. Hayward argued that OAH has no jurisdiction to set aside the expulsion order. Student opposed the motion to dismiss, arguing that this hearing is of consequence as Hayward has denied Student her procedural safeguards and wrongfully removed her from school, resulting in educational harm which OAH may equitably address.

Although OAH will grant motions to dismiss allegations that are facially outside of OAH's jurisdiction (e.g., civil rights claims, Section 504 claims, enforcement of settlement agreements, incorrect parties, etc.), special education law does not provide

for a summary judgment procedure. The ALJ denied Hayward's motion to dismiss as OAH has jurisdiction over Student's expedited issue; Student was entitled to a full evidentiary hearing; and the motion was untimely. At the outset of the hearing, a controversy existed as to whether Hayward had a basis of knowledge under one or more of the statutory prongs. Further, there was a dispute as to what remedy Student would be entitled to and that OAH could order, if Student established that Hayward had a basis of knowledge that Student was a student with a disability yet failed to conduct a manifestation determination review under the IDEA.

STIPULATION THAT HAYWARD HAD A BASIS OF KNOWLEDGE

After the conclusion of the first witness' testimony, the parties entered into a stipulation that on May 16, 2017, a school office manager employed by Hayward at Martin Luther King Middle School received an email from Parent requesting that Student be evaluated for special education. Further, the parties stipulated that based on this Parental request, Hayward had a basis of knowledge that Student was a student with a disability at the time of the November 8, 2017 incident pursuant to title 20 of the United States Code, section 1415(k)(5)(B)(ii).

SUMMARY OF DECISION

Hayward concedes that at the time of the November 8, 2017 disciplinary incident, it had a basis of knowledge that Student was a student with a disability based on Parent's May 2017 request that Student be evaluated for special education. As such, Student was entitled to a manifestation determination review under the IDEA within 10 school days of Hayward's decision to suspend her for more than 10 days. Hayward failed to provide Student with her federal right to an important procedural safeguard that may have altered the course of her disciplinary proceedings. Hayward is ordered to convene a manifestation determination review in accordance with the IDEA within 10 school days

of this Decision. Student did not establish that she is entitled to any additional remedy in the context of this hearing.

FACTUAL FINDINGS

1. Student is a 15-year-old ninth grader who resides with Parent within Hayward's jurisdictional boundaries. She has attended Hayward schools since kindergarten. Following her suspension in November 2017, she participated in an independent study program through one of Hayward's continuation high schools.⁴ As of the time of hearing, Student had not been found eligible for special education. Parent is dedicated to ensuring the wellbeing of her daughter, committed to her educational success, and is very involved with her schooling.

2. On May 16, 2017, when Student was in eighth grade, Parent sent an email to the school office manager at Student's middle school informing Hayward of Student's struggles and asking whether Student could be tested for special education in high school. The office manager responded and informed Parent that she would immediately forward Parent's email to "Mrs. Santos and Ms. Knox (A.P.);" for them to reply to her questions. At hearing, both counsel stipulated that the email was referring to the principal and assistant principal of Student's middle school. Hayward did not further respond to Parent's request.

2017-2018 SCHOOL YEAR

3. Student began ninth grade on August 28, 2017. Near the start of the school year, Parent provided a copy of Student's medical diagnosis of attention deficit hyperactivity disorder to administrator Vickie Sargent, a youth intervention specialist at

⁴ To further safeguard Student's anonymity, this Decision does not identify the names of Student's high schools.

Student's high school. Parent also informed one of the high school counselors, Jagdeep Nesbit, that Student was on medication to treat the symptoms of her medical diagnosis, including her short attention span; that she needed help to stay organized and turn in assignments; and that her doctor had recommended school counseling. Ms. Nesbit met with Parent near the beginning of October 2017 and suggested that Student be placed on a "Section 504 Plan."⁵

Section 504 Meeting and Plan

4. Hayward convened a Section 504 meeting on October 18, 2017, to address Student's academic needs. Ms. Sargent attended as Hayward's administrator. Ms. Nesbit, Student's biology teacher Cynthia White, another teacher, Student, and Parent also attended.⁶ Ms. White informed the team that Student was in danger of failing as she was disorganized and not turning in her work, socialized during class, needed reminders to stay focused, and had a pattern of several tardies and absences. Parent shared that Student struggled with work completion; being dishonest about turning in her work; poor study habits; disorganization; forgetfulness; getting to class on time; and had difficulty asking for help and following instructions.

⁵ A "Section 504 plan" is an educational program created pursuant to the federal anti-discrimination law commonly known as Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

⁶ Ms. White holds a single subject credential and an administrative credential and has taught for 20 years. This is her first year teaching at Hayward.

5. At this meeting, the Section 504 team agreed that Student qualified for a Section 504 accommodation plan because of her disability of ADHD which interfered with her ability to learn. Hayward developed and shortly thereafter began to implement a Section 504 Plan for Student. The plan notes that Student's disability manifests in a failure to complete work; difficulty tracking assignments and due dates; and a lack of focus in class resulting in a need to review and relearn objectives. The plan targets this pattern of behavior by providing several accommodations including a smaller testing environment; extra time; use of notes during tests; the option of retaking tests; assistance with use of a planner; and sitting at the front of the class.

November 8, 2017 Disciplinary Incident

6. On November 8, 2017, Student had two knives in her possession at school. During biology class, Student cut the back of a peer's hand with a knife. The victim sustained a two and a half inch long by three-fourths of an inch wide gash that cut through the skin and underlying tissue, and required at least seven stitches to close. The cut was deep, serious, and consistent with a blade slash. The school called paramedics to attend to the victim who was bleeding, in pain, and panicky. Two and a half months later, the victim presented with a mark where the cut had been. Student admitted to unintentionally injuring her classmate but insisted that she did not have a knife and, instead, caused the injury with her pen.⁷ Hayward quarantined the classroom, and conducted an extensive search for the weapon, but did not locate it.

7. Student was arrested. Ms. Sargent testified that she was informed by the police that they found two knives on Student's person concealed in her undergarment. Hayward immediately suspended Student and recommended that she be expelled

⁷ Student did not testify. Student's statements fall within the hearsay exception for party admissions. (Evid. Code, § 1220.)

pursuant to violations of Education Code sections 48900, subdivisions (A)(1) [caused, attempted or threatened physical injury]; (A)(2) [willful use of force or violence not in self-defense]; and (B)[possession of knife or other dangerous object]; section 48915, subdivisions (a)(i)(A) [caused serious bodily injury not in self-defense]; (a)(i)(B) [possession of any knife or other dangerous object of no reasonable use to pupil]; and (c)(2)[brandishing a knife at another]. On November 14, 2017, Hayward issued a notice of extension of Student's suspension. Student was incarcerated at Alameda County Juvenile Hall for one week.

8. On November 15, 2017, Hayward mailed and emailed a letter to Parent informing her that the principal had recommended expulsion and that an expulsion hearing would be held on December 11, 2017. The letter informed Parent that she was entitled to request one continuance of not more than 30 days. The letter also notified Parent that Student was being referred to Hayward's independent study program at a continuation high school campus and provided Parent a contact person and a number to call to enroll Student.

Section 504 Manifestation Determination

9. On November 27, 2017, Hayward convened a Section 504 manifestation determination review team meeting. Ms. Sargent again served as Hayward's administrator. A school psychologist, a program specialist, Ms. White, two other teachers, Parent, and Student and their attorney also attended. The purpose of this meeting was to determine whether Student's conduct on November 8, 2017, was a manifestation of her disability of ADHD under Section 504. Parent presented the team with a letter from a social worker at Oakland's Children's Hospital and an email from Student's middle school counselor in support of her position that Student's ADHD resulted in poor impulse control.

10. Hayward members of the team determined that Student's conduct was not caused by, nor did it have a direct and substantial relationship to, her disability. The Hayward members of the team also determined that Student's conduct was not the direct result of a failure to implement Student's Section 504 Plan. Based on the Section 504 manifestation determination review, Hayward proceeded with its recommendation to expel Student. Parent disagreed with Hayward's manifestation determination findings and once again requested that Student be assessed for special education eligibility.

Assessment Process

11. Pursuant to Parent's November 27, 2017 request for assessment, Hayward prepared an assessment plan dated December 11, 2017, proposing to assess Student in the areas of academic achievement, intellectual development, motor development, and adaptive behavior. Parent signed consent to this assessment plan on December 18, 2017, and hand delivered it to Hayward on December 20, 2017. Hayward considered this to be an "expedited assessment," and as of the time of hearing, had completed its psychological and academic testing sessions with Student. On January 19, 2018, Hayward prepared an additional assessment plan proposing to assess Student in the area of speech and language. Parent provided written consent on January 19, 2018. As of the time of hearing, Hayward had not conducted any speech testing with Student, nor convened an IEP team meeting to review the assessment results.

Independent Study Program

12. Pending the expulsion hearing, Student enrolled in independent study as of November 29, 2017. This program typically affords a student two hours of weekly instructional services. For the first three weeks of enrollment, Hayward provided Student work packets to complete on her own. It was not until approximately January 16, 2018,

that Hayward began to provide Student with two hours per week of independent study instructional services.

Expulsion Proceeding

13. At Student's request, Hayward continued the December 11, 2017 expulsion hearing, and scheduled it for January 8, 2018. On December 22, 2017, Student's attorney requested that Hayward agree to again continue the expulsion hearing until after the conclusion of the expedited due process hearing. Hayward's attorney replied that Hayward wanted to maintain the current date of January 8, 2018.

14. Student's expulsion hearing proceeded as scheduled on January 8, 2018, and Hayward's expulsion panel recommended expulsion. On January 24, 2018, Hayward's Governing Board adopted the panel's recommendation and voted to expel Student. Hayward officially expelled Student effective January 24, 2018.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA FOR DISCIPLINARY REMOVALS

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)⁸ et seq.; 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 free appropriate public education 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

⁸ All references to the Code of Federal Regulations are to the 2006 edition.

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. Title 20 of the United States Code at section 1415(k), and title 34 of the Code of Federal Regulations, part 300.530, et seq., govern the discipline of special education students. (Ed. Code, § 48915.5.) A child with a disability may be suspended or expelled from school as provided by federal law. (20 U.S.C. §1415(a)(1)(A); Ed. Code, § 48915.5, subd. (a).) If a child with a disability violates a code of student conduct, school personnel may remove that student from his or her educational placement without providing services for a period not to exceed 10 days per school year, provided typical children are not provided services during disciplinary removal. (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3).)

3. Under federal and state special education law, students found eligible for special education are afforded certain rights in disciplinary matters. Among those rights is the right to a determination of whether the student's misconduct "that led to a disciplinary change of placement" was caused by or directly related to a child's disability. (20 U.S.C. § 1415 (k)(1)(E)(i)(II); 34 C.F.R § 300.530; Ed. Code, § 48915.5, subd. (a) and (b).) The removal of a special education student from the student's placement for more than 10 consecutive school days constitutes a change of placement. (34 C.F.R. § 300.536(a)(1).) For disciplinary changes in placement greater than 10 consecutive school days (or that are a pattern 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)(1)(C); 34 C.F.R. § 300.530(c).) However, the IDEA prohibits the expulsion of a student with a disability for conduct that is a manifestation of her disability. (20 U.S.C. § 1415(k); 34

C.F.R. § 300.530, et seq.; *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470 (*Mahe*), affd. *sub. nom. Honig v. Doe* (1988) 484 U.S. 305 [108 S.Ct. 592, 98 L.Ed.2d 686]).

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); 34 C.F.R. 300.534(a).) A district which meets the statutory criteria for having the requisite knowledge is considered to have a “basis of knowledge.” (20 U.S.C. § 1415 (k)(5)(B); 34 C.F.R. 300.534(b).)

5. A parent of a child with a disability who disagrees with any decision by a school district regarding a change in educational placement of the child based upon a violation of a code of student conduct, or who disagrees with a manifestation determination made by the district, may request, and is entitled to receive, an expedited due process hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).) An expedited due process hearing before OAH must occur within 20 school days of the date the complaint requesting the hearing is filed, and a decision must be rendered within 10 school days after the hearing ends. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2).) The rules for a due process hearing under title 20 of the United States Code at section 1415(k) must be consistent with those of other IDEA hearings. (34 C.F.R. § 300.532(c)(1).)

6. The party requesting a due process hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d).) 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[.]) Here, Student is the filing party and has the burden of persuasion as to the sole issue.

HAYWARD HAD A BASIS OF KNOWLEDGE BASED ON PARENT REQUEST FOR AN ELIGIBILITY EVALUATION

7. A local educational agency is deemed to have knowledge that a student is a child with a disability if, before the behavior that precipitated the disciplinary action occurred, either: (i) the parent of the child has 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; or (ii) the parent of the child has requested an evaluation of the child pursuant to title 20 United States Code section 1414 (a)(1)(B); or (iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education or other supervisory personnel. (20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.534(b).)

8. During the expedited due process hearing, the parties stipulated that Hayward had a basis of knowledge that Student was a student with a disability at the time of the November 8, 2017 incident, based on Parent's May 16, 2017 request that Student be assessed for special education.

9. Evidence of the applicability of any one of the three legal prongs is sufficient to establish a basis of knowledge. In light of Hayward's basis of knowledge under title 20 of the United States Code, section 1415(k)(5)(B)(ii), it is not necessary to determine whether either of the two alternate grounds are applicable.

STUDENT'S ENTITLEMENT TO DISCIPLINARY PROTECTIONS

10. On November 8, 2017, Student violated a code of student conduct by

possessing a knife at school and using it to inflict bodily injury to a classmate on campus. Hayward first suspended and then, as of January 24, 2018, formally expelled Student for her conduct. Parent's May 16, 2017 email constituted a request that Hayward assess Student for special education eligibility. Student met her burden of proof that Hayward had a basis of knowledge that she was a child with a disability prior to the November 8, 2017 disciplinary incident. Because Hayward had this basis of knowledge, Student was entitled to the disciplinary procedural safeguards under the IDEA.

REMEDIES

THE PARTIES' PROPOSED RESOLUTIONS

1. The primary dispute in this matter is what constitutes an appropriate remedy for Hayward's failure to afford Student her procedural safeguard of a manifestation determination in accordance with the IDEA. Student contends that Hayward's unlawful disciplinary removal caused her educational harm, and it should not be afforded the opportunity to correct its mistake at the expense of keeping Student out of her high school placement. Student asks that OAH rescind Hayward's expulsion order, reinstate her at her prior high school placement if not immediately, then on February 15, 2018, upon the expiration of what she asserts constitutes a "45-day interim alternative educational setting" of independent study at the continuation high school; expunge all references to the expulsion proceeding; and award an independent educational evaluation and 28.5 hours of compensatory academic instruction.

2. Hayward argues that OAH can afford Student no effective remedy in this case as Student is only entitled to an "expedited assessment" which is already underway. Hayward maintains that it is not required to convene a manifestation determination unless Student is found eligible for special education. Further, Hayward contends that

even if Student had been a special education student at the time of her disciplinary conduct, regardless of whether or not her conduct was a manifestation of her disability, it would have been authorized to effectuate a special circumstances removal because she possessed two weapons on campus and inflicted serious bodily injury on another student during class. It is Hayward's position that OAH is without jurisdiction to rescind Student's expulsion.

3. Should OAH determine that a remedy is warranted, Hayward proposes the following: within 10 days of completing Student's assessment, and if she is found eligible for special education, Hayward will conduct a manifestation determination; pending the assessment and possible manifestation determination, Student's educational placement will be that delineated in the expulsion order⁹ or a program of independent study; if Hayward either finds Student ineligible for special education or that her conduct was not a manifestation of her disability, the expulsion stands; and if Student is found eligible and her conduct was a manifestation of her disability, then she will be reinstated at her former high school and the expulsion order will be vacated.

THE REQUIREMENT OF A MANIFESTATION DETERMINATION

4. When a district seeks to change a special education student's educational placement for more than 10 school days as a result of a violation of a student code of conduct, the district must convene a meeting to determine whether the child's conduct was a manifestation of the child's disability. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e).) This is known as a manifestation determination. A manifestation determination must be made by the school district, the parent, and relevant members of the individualized education program team as determined by the parent and the school

⁹ There was no evidence regarding the terms of the expulsion order.

district. (*Ibid.*) A manifestation determination must be accomplished within 10 school days of the decision to change the student's placement. (*Ibid.*)

5. Conduct is a manifestation of the student's disability if: (i) the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) the conduct in question was the direct result of the local education agency's failure to implement the IEP. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1) & (2).) All relevant information in the student's file, including any observations of teachers, and any relevant information from the parents must be reviewed to determine if the conduct was caused by, or had a direct and substantial relationship to the student's disability, or was the direct result of the district's failure to implement the student's IEP. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1); *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46540, 46720 (Aug. 14, 2006).)

6. If the manifestation review team determines the conduct is not a manifestation of the student's disability, then the local educational agency may use normal school disciplinary procedures to address the incident in the same way as the procedures would be applied to students without a disability, although it may be provided in an interim alternative educational setting. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c); see *Maier, supra*, 793 F.2d 1470, 1480, fn. 8, [when a child's misbehavior does not result from his disability no justification exists for exempting him from the rules applicable to other children].)

Special Circumstances Removal

7. A district may place a student in an interim alternative educational setting for not more than 45 school days, regardless of whether the student's behavior is determined to be a manifestation of the child's disability, under certain enumerated "special circumstances." (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).) These

exceptions to the general rule address school safety considerations. Special circumstances are defined as (a) carrying or possessing a weapon to or at school, on school premises, or at a school function; (b) knowingly possessing or using illegal drugs, or selling or soliciting the sale of a controlled substance, while at school, on school premises, or at a school function; or (c) inflicting serious bodily injury upon another person while at school, on school premises or at a school function. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. §300.530(g).) The term weapon includes a pocket knife with a blade at least two and one half inches in length. (20 U.S.C. § 1415(k)(7); 34 C.F.R. §300.530 (i)(4) [incorporating the definition of “dangerous weapon” under 18 U.S.C. § 930(g)].) The term “serious bodily injury” for the purpose of these disciplinary measures is defined as: bodily injury that involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. (20 U.S.C. § 1415(k)(7)(D) ; 34 C.F.R. § 300.530(i)(3) [adopting the definition as found in 18 U.S.C. § 1365(h)(3)]). (20 U.S.C. § 1415(k)(7)(D); 34 C.F.R. § 300.530(i)(3).)

8. An ALJ may order a school district to conduct a manifestation determination under title 20 of the United States Code, section 1415(k) if the ALJ determines that the district was required to conduct one, yet failed to do so. (20 U.S.C. § 1415(k)(3)(A) & (B)(i); 34 C.F.R. 300.532(a) & (c).) However, section 1415(k)(3) does not limit a hearing officer from awarding other equitable remedies in order to craft appropriate relief. (20 U.S.C. § 1415(k)(3); *Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.)

Student is Entitled to a Manifestation Determination

9. Despite Hayward’s basis of knowledge that Student was a student with a disability at the time of the November 8, 2017 incident, Hayward decided to effectuate a disciplinary change in placement for more than 10 school days. Therefore, the

disciplinary protections of a manifestation determination apply to Student. Hayward was required to presume Student was eligible for special education and conduct a timely manifestation determination under the IDEA with regard to Student's conduct on November 8, 2017. Hayward failed to do so. Its legal obligation was not discharged by conducting a Section 504 manifestation determination on November 27, 2017.

10. Hayward's contention that it is not required to conduct a manifestation determination review unless it finds that Student is eligible for special education runs counter to the law which expressly affords Student the right to assert any of the disciplinary protections. (20 U.S.C. § 1415(k)(5)(A).) Student's right to a manifestation determination is not contingent on whether Hayward later finds that she is eligible for special education. Hayward's proposed interpretation, in justification of its pursuit of a disciplinary change in Student's placement, is not consistent with IDEA's purpose to protect the educational rights of a student with a disability, which includes Student, given the basis of knowledge provisions. (See *Jay F. v. William S. Hart Union High School District* (C.D. Cal. Aug. 2, 2017, No. CV 16-05117 TJH (GJSx)) at p.10, citing *Doug C. v. Hawaii Department of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1046.) The Ninth Circuit Court of Appeals has determined that it is not necessary for a district to identify a child as having a disability before procedural safeguards can be invoked under the IDEA. (*Hacienda v. Honig* (9th Cir. 1992) 976 F.2d. 487.)

11. Hayward is correct in its assertion that the law provides only limited procedural safeguards to those students who are not already eligible for special education. However, a manifestation determination is clearly one such safeguard. As to Hayward's argument that special circumstances exist such that it was justified to remove Student for not more than 45 school days regardless of whether her behavior was a manifestation of her disability, whether Student's conduct constituted any of the special circumstances that permit removal from school despite conduct being the manifestation

of a disability was not at issue and was not litigated in this hearing. Indeed, there was no evidence as to the length of the blades of the knives and whether either would meet the legal definition of a “weapon.” Nor was there evidence of whether the victim’s pain rose to the level of “extreme physical pain” or if the mark observed on the victim’s hand two and a half months after the injury constitutes a “protracted and obvious disfigurement.” No determination is made herein regarding a special circumstances removal. Further, the provisions regarding a special circumstances removal do not eviscerate the procedural safeguard of a manifestation determination, and they additionally require that the IEP team determine the appropriate interim alternative educational setting. (20 U.S.C. § 1415(k)(2).)

12. Given the facts of this case, it is disingenuous for Hayward to assert that it should be allowed to first complete its assessment of Student, and if the IEP team decides she is eligible for special education, only then must Hayward conduct a manifestation determination. This renders the basis of knowledge provision meaningless. There are three circumscribed situations designated by the legislature to trigger deemed knowledge and the disciplinary protections for a not-yet-eligible student. These situations all require specific expressions, by specific individuals, meant to alert specific responsible personnel that a student may have a disability. The basis of knowledge provision captures those students for whom a district is presumed to have sufficient knowledge upon which to act, whether that action be initiating an assessment for special education or conducting a required manifestation determination based on known concerns about a student’s pattern of behavior impacting her education.

13. In May of 2017, Hayward was imputed knowledge that Student was a student with a disability when Parent requested a special education evaluation. Hayward failed to act upon this request for assessment. The consequence for its failure to assess is that it must proceed, in a disciplinary case of removal for more than 10 school days, as

it would for a student with a disability who is eligible for special education. Because Hayward is deemed to have had knowledge that Student is a student with a disability, Hayward must, without assessments, presume Student is eligible for special education and determine whether her conduct was a manifestation of the disability of which it is deemed to have had knowledge. Under Hayward's interpretation, a district could expel a student it was required to presume was eligible for special education, and who, therefore, was entitled to disciplinary protections which may have altered the course of the expulsion proceedings, but deny the student those very protections; and leave the student with no recourse because she was expelled and no longer served by the district. This interpretation makes a sham of the basis of knowledge provision, and is rejected.¹⁰

14. Hayward also appears to argue that in allowing the expulsion proceeding to run its course without formally requesting a second continuance, Student has given up her federal rights under the IDEA. This position runs counter to the law. As determined by the Ninth Circuit Court of Appeals, "[P]articipating educational agencies cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents." (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055; see also *W.G. v. Board of Trustees of Target Range School Dist., No. 23* (9th Cir. 1992) 960 F.2d

¹⁰ Providing the statutory protection of a manifestation determination for a not-yet-eligible student does not create an impossible task. Further, requiring Hayward to afford Student her procedural right to a manifestation determination based on a presumption of special education eligibility, only for the purposes of conducting a manifestation determination, is not at odds with the Ninth Circuit's holding in *R.B. v. Napa Valley School Dist.* (9th Cir. 2007) 496 F.3d 932, 942 [a procedural violation cannot qualify an otherwise ineligible student for IDEA relief].)

1479, 1485 [school district cannot blame parents' choice to leave an IEP meeting for its own failure to create an IEP with the participation of the appropriate parties].)

15. Hayward expelled Student without conducting a manifestation determination review under the IDEA, despite having a basis of knowledge since May 16, 2017, that she was a student with a disability and entitled to federal IDEA protections in accordance with section 1415(k)(5)(A) & (B).¹¹ Hayward violated Student's federal procedural rights pertaining to the special education discipline process by pursuing expulsion proceedings without conducting a manifestation determination review under the IDEA. Hayward is required to conduct a manifestation determination regarding Student's conduct of November 8, 2017. In the context of this narrow expedited hearing, the law entitles Student to a manifestation determination based on a presumption, only for the purposes of conducting a manifestation determination, of eligibility for special education, and the right to appeal and request a further expedited hearing under title 20 of the United States Code, section 1415(k)(3).¹²

DENIAL OF OTHER REMEDIES

16. Student's requested remedies of rescinding the expulsion order and

¹¹ This section specifies the rights of children not already eligible for special education and related services. No findings are made herein as to Student's pending Child Find claim, or as to any future claim regarding eligibility.

¹² Nothing herein prevents Student from filing a due process complaint alleging eligibility and a denial of a free appropriate public education, and seeking compensatory services or other remedies.

reinstating her at her high school placement are denied as premature in this case.¹³ Both parties cite numerous OAH Orders and Decisions in support of their respective positions. These orders may be persuasive, but they are not binding. (Cal. Code of Regs., tit. 5, § 3085.) While OAH has exercised its discretion to order the return of a student to her former placement when it was established that the student's conduct was not a manifestation of her disability, the ALJ declines to extend that relief to the situation presented here, where there has been no manifestation determination under the IDEA. In addition, Student's requests for compensatory education and an independent educational evaluation are denied. In the context of disciplinary proceedings, the law entitles a student to continue to receive educational services, although in another setting, when there has been a determination that her behavior is not a manifestation of her disability or in a special circumstance removal. (20 U.S.C. § 1415(k)(1)(D).) Neither of those situations were at issue in this expedited hearing. Student has not persuaded this tribunal that she is entitled to any remedy other than a manifestation determination under the IDEA.

ORDER

1. Prior to Student's disciplinary conduct on November 8, 2017, Hayward had a basis of knowledge under title 20 of the United States Code, section 1415(k)(5)(B)(ii) that Student was a student with a disability.

2. Within 10 school days of this Decision, Hayward shall conduct a

¹³ Student argues in her closing brief that OAH should reinstate her and rescind the expulsion order because Hayward's Governing Board never had jurisdiction to expel Student. No determination is made as to whether Hayward had jurisdiction to expel Student.

manifestation determination regarding Student's November 8, 2017 disciplinary conduct in accordance with the requirements of the IDEA, if it has not already done so.

3. Student's other requested remedies 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. Student prevailed as to the sole issue.

RIGHT TO APPEAL

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

DATE: February 7, 2018

/s/

THERESA RAVANDI

Administrative Law Judge

Office of Administrative Hearings