

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

VICTOR VALLEY UNION HIGH SCHOOL
DISTRICT.

OAH Case No. 2017120839

EXPEDITED DECISION

Student filed a due process hearing request (complaint) which contained both expedited and non-expedited issues with the Office of Administrative Hearings, State of California. Administrative Law Judge Judith L. Pasewark heard the expedited portion of this matter in Victorville, California on January 31, February 1 and 2, 2018.

Tony Tai Nguyen and Brian Sciacca, Attorneys at Law, represented Student. Mother attended the hearing on January 31, 2018. Father attended the hearing on February 1, 2018. Neither parent attended the hearing on February 2, 2018. Student did not attend the hearing.

Vivian E. Billups, Attorney at Law, represented Victor Valley Union High School District. Denise Edge, Director of Desert/Mountain Special Education Local Plan, and Margaret Akinnusi, Director of Special Education, attended on behalf of District.

On the last day of hearing, the parties presented oral arguments, the record was closed, and the matter submitted.

ISSUES¹

1. Did District fail to comply with the provisions of Title 20 United States Code section 1415(k) involving an incident on November 1, 2017, by committing material procedural violations in conducting the manifestation determination, specifically by:

(a) failing to conduct a comprehensive assessment prior to the manifestation determination;

(b) failing to consider all suspected areas of Student's disabilities in making the manifestation determination;

(c) failing to consider the Parents' input in making the manifestation determination; and

(d) predetermining the outcome of the manifestation determination review?

2. Did District fail to comply with the provisions of Title 20 United States Code section 1415(k) by improperly determining that Student's conduct was not a manifestation of his disability at the manifestation determination meeting of November 3, 2017?

SUMMARY OF DECISION

Student contends his conduct on November 1, 2017, was a manifestation of his fragile emotional state, and District failed to provide him with counseling services which had been requested by Parents and should have been included in Student's IEP since the 2015-2016 school year. Student's contentions are not persuasive. There was no evidence to suggest that counseling services were ever included in Student's IEP, nor did

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to restate the issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

Student carry his burden of proof to suggest counseling should have been part of Student's IEP. Student's eligibility for special education and related services was based upon a specific learning disability and speech and language deficits which bore no nexus to his conduct of bringing a .45 Glock handgun to school. The evidence presented at hearing did not support a finding that Student had suspected disabilities which required prior assessment, nor did District fail to consider all relevant information in determining Student's conduct was a manifestation of his disabilities.

FACTUAL FINDINGS

BACKGROUND

1. Student was a 16-year-old boy in the 10th grade at Silverado High School, who resided with his Parents within the boundaries of District. Student transitioned from Adelanto Elementary School District to District for his freshman year of 2016-2017. Student was initially enrolled in District as a general education student as District was unaware Student received special education and related services while attending school in Adelanto.

2. Father informed District staff of Student's IEP approximately six weeks after the beginning of the school year. District reinstated Student's last agreed upon IEP from Adelanto from April 6, 2016. Adelanto determined Student was eligible for special education under the category of specific learning disability based upon a deficit in his visual motor integration skills, resulting in a severe discrepancy between his educational performance and his perceived intellectual functioning. Student also received speech and language services to address deficits in expressive and receptive language. The Adelanto IEP was largely based upon Student's multi-disciplinary assessments conducted in 2015.

3. District conducted Student's annual IEP on April 24, 2017. Father and

Student attended this meeting. The IEP team reviewed Student's strengths and areas of concern. Student's grades were low, but improved to a 2.75 grade point average by the end of the 2016-2017 school year. Student completed 25 of 30 credits attempted. The IEP team identified four areas of need: (1) Student struggled to read and comprehend material at an instructional level; (2) Student struggled to create complex, multi-paragraph essays; (3) Student struggled to add, subtract, multiply, and divide fractions; and (4) Student exhibited a deficit in the area of semantics, particularly with vocabulary and word meaning. There were no reported concerns regarding Student's behavior or social emotional status before or during this IEP team meeting. Student made the football team, and was reported as a student with good behavior, who followed school rules, and who got along well with both staff and students. The April 24, 2017 IEP provided Student with special education and related services in the form of specialized academic instruction four times a day for 55 minutes per period, speech and language services from a non-public agency, twice a month for 30 minutes per session, and transition services twice a year for 60-minutes per session. The IEP notes indicated Father participated in the meeting and expressed concerns regarding Student's grades in math, as well as Student's unexcused absences. No further discussion of Student's behavior was mentioned in the IEP notes. Father consented to the IEP.

4. Corey Allen, Student's physical education teacher in spring 2016, testified at hearing. He recalled Student as a good student, who had a lazy side, the same as the other kids in the class. He described Student as quiet and standoffish, although Student had no difficulties responding to directions. Student got along well with peers, and was not involved in any fights or altercations in his physical education class.

5. Warren Ellis was Student's physical education teacher for the fall 2016 and fall 2017 semesters, due to Student's participation on the football team. He found Student to be an average kid in his class. Student always smiled, did not talk much,

followed directions and participated in activities. Mr. Ellis was unaware of any history of behavior problems with Student. To the contrary, based upon his experience with Student, Mr. Ellis found no need for additional behavioral or social/emotional assessments or for a behavior intervention plan. Mr. Ellis, a member of the manifestation determination team, did not believe Student's conduct was a manifestation of his disability.

STUDENT'S CONDUCT

6. On November 1, 2017, Student brought a gun to school. Student showed the gun to another student, who reported it to District personnel. District responded by detaining Student in a campus bathroom, where the security team discovered a .45 Glock handgun with a fully loaded magazine clip in his backpack. Student initially indicated he had found the gun at a party and brought it to school because he had received a death threat from another student. After further investigation and witness interviews, it was determined that Student's girlfriend had been attacked by another student at a Halloween party on October 31, 2017. On November 1, 2017, Student took the gun from his parent's bedroom, and brought it to school, intending to confront the student who attacked his girlfriend. District determined Student was in violation of Education Code, section 48915(c)(1), possession of a firearm on school property. Student was taken into custody by San Bernardino Sheriff's Department, and transported to the county juvenile hall. District suspended Student for five days, and subsequently decided to seek an extension of Student's suspension pending District's expulsion process.

THE MANIFESTATION DETERMINATION REVIEW

7. On November 3, 2017, District held a manifestation determination review (review hearing) for Student. Michael Lee, Kareema Abdul-Khabir, Pamela Davis,

Matthew Ratajesak,² and Warren Ellis attended the review hearing on behalf of District. Parents attended on behalf of Student. Student did not attend the review hearing.

8. Michael Lee, Dean of Students at Silverado, prepared Student's expulsion packet, which included a summary of the incident and witness statements. The packet included a summary of Mr. Lee's interview with Student. Accordingly, Student claimed he brought the gun to school for protection due to an incident the night before. He later indicated he was threatened after he brought the gun to school. Student fully intended to use the gun if needed. Mr. Lee reported that Student knew the difference between right and wrong; was not confused or delusional; and he was fully aware of his actions.

9. Mr. Lee recalled that his first real interaction with Student came on September 18, 2017, due to a suspension. Student was "not on his radar" as a problem student. Student's behavior was consistent with other students on campus. Mr. Lee recalled speaking to Father in 2016, when he was informed that Student had previously had an IEP at Adelanto. Father never mentioned counseling or requested counseling services prior to the manifestation determination review; however Father was adamant about counseling during the review hearing. Therefore, after the review hearing, Mr. Lee assisted in providing Parents with a referral to Desert Mountain Children's Center, which provided behavioral health services for District. This was done strictly in response to parental request during the review hearing, and did not indicate a belief that Student required counseling. To the contrary, Mr. Lee emphasized that counseling was not part of Student's IEP nor had Student's behaviors been ignored prior to November 1, 2017. There was no nexus between Student's learning disability and bringing a gun to school.

² Mr. Ratajesak was a school psychologist intern at District. While he attended the manifestation determination review, he was not an active participant.

Counseling services would not have prevented the conduct.

10. Although documents other than the Manifestation Determination Report were not physically provided to team members, the team discussion included: (1) a summary of Student's special education eligibility and his current IEP; (2) a summary of Student's behavior and progress at Silverado; and (3) a discussion of the two elements of a manifestation determination. While the attendees were not provided hard copies of the documents, the team was able to view computer generated information relevant to the manifestation determination. Parents were provided a hard copy of the Expulsion Packet.

11. Ms. Abdul-Khabir, a credentialed special education teacher, was Student's case carrier from August 2016 to 2018. While Ms. Abdul-Khabir, had not been Student's special education teacher, she was responsible for Student's IEPs and their implementation. Ms. Abdul-Khabir's interaction with Student was limited. She met with him only four-to-five times, primarily for testing his progress on goals.

12. Ms. Abdul-Khabir's preparation for the review hearing consisted of reviewing Student's education and disciplinary files. It was also her responsibility to interview Student's teachers to inquire if the teachers had any information to be presented at the review hearing. None of Student's teachers indicated any problems with Student in the classroom. Therefore, she did not include their responses in the notes for the review hearing. At the review hearing, Ms. Abdul-Khabir reiterated, she felt the teachers would have reported behavioral incidents if they were significant or important. Additionally, as Student's case carrier, Ms. Abdul-Khabir did not interview, observe or assess Student for the review hearing. She could not do so as Student had been arrested and incarcerated in juvenile hall on November 1, 2017, which transferred responsibility for Student's education and special education services from District to the County of San Bernardino as Student's local educational agency.

13. Ms. Abdul-Khabir was aware of Student's disciplinary records from Adelanto prior to the 2016-2017 school year, but did not report this information for the review hearing team. The information was based upon incidents which had occurred at Adelanto, in a different educational setting. Student had made a good transition to high school. The records from Adelanto for the eighth grade reported a total of 20 incidents throughout the 2015-2016 school year. Student had several minor infractions ranging from several incidents of public display of affection with his girlfriend to selling candy on campus to horseplay to dress code violations. Student, however, was also involved in several more intense incidents involving verbal confrontations and physical aggression. One incident in 2015, resulted in an injury to another student. Overall, Student was involved in three fights, which resulted in increasing discipline starting with an in-house suspension to one-day suspension and culminating with a three-day suspension after the third fight.

14. The review hearing team was only informed of Student's disciplinary history while attending Silverado. Student was disciplined three times, prior to November 1, 2017. On May 20, 2017, Student received a referral for defiance, for walking out of class without permission. On September 11, 2017, Student was removed from his classroom for disruptive behavior. On September 18, 2017, Student, along with two of his brothers, was involved in a physical altercation. This resulted in a three-day suspension. Ms. Abdul-Khabir determined the 2017 events did not constitute a serious history of violence towards others. To the contrary, she concurred that Student was "not on the radar" as a problem student, and he was functioning well at school.

15. Ms. Abdul-Khabir came to the review hearing with an open mind to hear what everyone had to say. No one, including Parents, presented any persuasive information to suggest Student's behavior was a manifestation of his learning disability. She noted that Parents maintained Student's behavior was in issue. They insisted

Student has previously been provided counseling at Adelanto, which if it had been continued in District, would have impacted Student's behavior. Contrary to Parent's recollections, District had no record of counseling having been a service Adelanto previously provided to Student, or any record suggesting a need for counseling.

16. Pamela Davis, attended the review hearing as District's school psychologist. Ms. Davis had participated in approximately 40 manifestation determination reviews. She had had training in manifestation determinations, and was confident she understood the manifestation determination process. In explaining the process, as followed by District, Ms. Davis indicated the case carrier was the liaison with Student's teachers. In this case, Ms. Abdul-Khabir interviewed the teachers, and reported back to the review hearing team. Ms. Abdul-Khabir had little information to provide as Student's teachers did not report negative behaviors in his classrooms. The teachers did not indicate or suggest Student had an attention deficit or exhibited significant classroom behaviors.

17. Ms. Davis had never met Student, and only knew of him through her review of his educational records, including the 2015 psychoeducational assessments from Adelanto, his IEP, grades and the 2016-17 disciplinary records. While Ms. Davis reviewed the Adelanto assessments, she did not review the Adelanto disciplinary reports at the review hearing, as she did not believe the prior incidents were relevant to Student's current situation. She explained that Student's pattern of disciplinary incidents were varied and not serious. Fights were common in the high school setting. Student exhibited age appropriate behaviors.

18. Ms. Davis provided a summary of Student's 2015 assessments. Assessments indicated Student had above average adaptive behaviors. Although Student had no significant deficits in his auditory processing skills he exhibited a significant deficit in his visual motor integration skills. Student's academic testing

established a severe discrepancy between his educational performance and perceived intellectual functioning, placing him in the low to very low range.

19. Student was given the Behavior Assessment System for Children, Second Edition, in 2015, to survey Student's social/emotional behaviors. Student scored in the average range on 16 of 20 areas rated. Student scored in the at risk range for attention problems and functional communication. Student scored in the clinically significant range in learning problems and school problems. Ms. Davis agreed with the Adelanto assessors, who concluded the areas of Student's heightened symptoms were associated more with a possible learning disability and/or attention disorder. Moreover, Adelanto specifically reported, "Student's common sense, practical judgments, and social maturity are within the above average range. Student appears to be capable of understanding the school's code of conduct. These factors should be taken into consideration if disciplinary consequences are being considered."

20. Student also qualified for special education and related services due to speech and language deficits in the area of expressive and receptive language skills. Assessment results suggested Student focus on speech therapy in the area of syntax for oral production of grammatically correct sentences with correct verb tense and vocabulary usage, and that Student read for 30-minutes per day to build his language and comprehension skills. The speech and language assessment scores paralleled the psychoeducational scores. Nothing in Student's speech and language assessments suggested behavioral or social/emotional deficits. Student's receptive and expressive deficits did not relate to Student's conduct considered at the review hearing.

21. Overall, Student was reported as polite, friendly, pleasant, and cooperative. His assessment scores did not suggest any social/emotional or behavioral concerns. His test scores did not "red flag" or suggest any other areas of suspected disability beyond his known deficits in academics and speech. None of Student's teachers had expressed

concern about other potential areas of concern.

22. Student's April 24, 2017 IEP was briefly discussed at the review hearing. Student had made progress on his goals. His classroom behaviors were not a concern. No one had requested additional assessments, nor was there any evidence to suggest additional assessments were needed. Student required academic help only. While Student's grades were not stellar, he was on the football team, which required a minimum 2.0 grade point average. Student's subsequent removal from the football team was due to Student's involvement in the fight on September 18, 2017, which was reported to the review hearing team.

23. Ms. Davis acknowledged that best practices for manifestation determinations included observations. Ms. Abdul-Khabir had contacted Student's teachers for their observations and input, however, there was no relevant information to be told. Mr. Ellis, Student's physical education teacher, attended the review hearing, and had no negative behavioral information to report. District was unable to observe Student, as he was incarcerated in juvenile hall.

24. Ms. Davis also explained that while discussion of a student's ongoing placement and services is part of a manifestation determination review, District was unable to do so, once Student was transferred to county facilities on November 1, 2017. At that point, Student's local educational agency became San Bernardo County, and therefore, District was no longer responsible for Student's special education and related services.

25. Ms. Davis reported that each person individually was asked for their opinion and independently voted on the two manifestation issues, specifically: (1) Was Student's conduct in question caused by or have a direct and substantial relationship to his disability; (2) Was the conduct in question a direct result of District's failure to implement Student's IEP? Each of District's members concluded that Student's conduct

was not a manifestation of his disability, nor had District failed to implement Student's IEP. Student did not have an intellectual disability; he had a learning disability which affected his academic performance only. Student knew what he was doing when he brought a gun to school.

26. Parents, on the other hand, concluded Student's conduct was a manifestation of his disabilities, which had been ignored by both Adelanto and District. Father expressed concern that no one attending the review hearing on behalf of District personally knew anything about Student or his behavioral difficulties. Parents vehemently expressed their contention that District failed to honor their repeated requests to provide Student with counseling. Parents insisted Adelanto provided Student with counseling while at Adelanto, and those services should have transferred to District when Student came to Silverado. As reiterated by Father at the review hearing, if Student had received the counseling services he needed, he would have made better choices.

27. Father wanted to expand the review hearing team discussion beyond the two manifestation issues pending in the review hearing. He perceived he was being shut down by District team members each time he tried to speak about his son, and was frustrated that no one appeared to know much about Student. Father was critical of Ms. Abdul-Khabir for her lack of information about counseling services for Student. As a result, Parents felt their opinions were of no consequence to District, and District team members "had made their minds up before they walked in the door."

28. At hearing, Father recalled his concerns regarding Student's education. Like most parents, Father wanted Student to be successful in life. In 2015, Father became concerned with Student's understanding and social interaction skills, which he brought to the attention of Adelanto staff. As a result, in 2015, Student was assessed, made eligible for special education and related services, and obtained an IEP. Father

maintained that counseling was part of Student's IEP and that Student actually received counseling services.

29. When Student transitioned to Silverado, District was unaware of Student's IEP. Father was concerned about potential emotional issues regarding Student's transition to high school. Student was struggling academically, and was almost removed from the football team due to poor grades. Father met with Mr. Lee and informed him of Student's Adelanto IEP. Father continued to believe counseling was part of the IEP.

30. A meeting was set with Ms. Abdul-Khabir, who Father thought was the counselor who would provide Student services. Father wanted Student's IEP implemented. He reported Student was struggling and stressed. He requested "any and all services available to make Student successful." Subsequently, an IEP team meeting was called, and Student's IEP from Adelanto was reinstated. Parents consented; however, counseling was not part of the Adelanto IEP or District's IEP.

31. Father acknowledged that Student was considered a good kid by his teachers. Student was popular and had friends. However, as Father explained, Student's moods could be up or down and Student "put on a good show." During spring 2017, Student had a meltdown which resulted in his hospitalization for a panic attack. Student was out of school for a week. Father did not indicate whether he spoke to District personnel regarding Student's meltdown. He only recalled that District was aware of the incident because Student's attendance was excused due to a doctor's note. It was unclear at hearing whether this hospitalization took place before or after Student's April 24, 2017 IEP team meeting. The April 24, 2017 IEP did not reference any mental health issues or discussion of behaviors or stress. The April 24, 2017 IEP did not contain counseling services or request further behavioral or social emotional assessments. Parents consented to the IEP.

32. Father reported that Student's emotional status spiraled downward after

his September 18, 2017 suspension and removal from the football team. Student was depressed and felt worthless. Father contacted Student's football coach and asked him to talk to Student. The talk never took place. Father was certain District did not care about helping Student. He supported his opinion by describing an incident in which Student was threatened by another student, which was significant enough for Mr. Lee to contact Father. Although Father requested that Mr. Lee contact the police, no such action was taken. Father was convinced District did not care about Student, and District's failure to act on his repeated requests for counseling, resulted in Student's conduct on November 1, 2017.

33. After the review hearing, in response to Father's allegations, Margaret Akinnusi, Director of Special Education, conducted a records search for any evidence of counseling service having been requested or provided to Student. Ms. Akinnusi contacted Adelanto to verify the contents of Student's IEP and actions taken by Adelanto. Adelanto's IEPs did not provide for counseling, and no counseling services had been provided to him. Ms. Akinnusi also contacted Desert Mountain Children's Center to verify whether Student had ever been a client or referred for behavioral services. Student had never received mental health or behavioral services from Desert Mountain. Additionally, there were no requests for assessments, referrals, or services presented to District. Further, Father acknowledged he had never received any information regarding counseling services, requests for referral, authorizations for counseling or progress reports regarding counseling.

CONCLUSIONS OF LAW

INTRODUCTION – LEGAL FRAMEWORK FOR STUDENT DISCIPLINE UNDER IDEA³

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) et seq⁴; 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 with a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepares them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. 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. (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, the local educational agency may remove the student from his/her educational placement to an appropriate interim alternate educational setting, another setting, or suspension for not more than 10 school days (to the extent such alternatives are applied to children without disabilities.) (20 U.S.C.

³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁴ All citations to the Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.

§ 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).) A local educational agency is required to provide services during periods of removal to a child with a disability who has been removed from his/her current placement for 10 days or less in the school year, if it provides services to a child without disabilities, who is similarly removed. (34 C.F.R. § 300.530(d)(3).) If a special education student violates a code of conduct and the local educational agency changes the educational placement of the student for more than 10 days, the local educational agency must meet the requirements of section 1414(k).

3. Parents and local educational agencies may request an expedited due process hearing of claims based upon a disciplinary change of educational placement under section 1415(k). An expedited hearing must be conducted within 20 school days of the date an expedited due process hearing request is filed, and a decision must be rendered within 10 school days after the hearing ends. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2).)

4. If the manifestation determination team determines the conduct is not a manifestation of the student's disability, or is not due to the failure to implement the student's IEP, then the local educational agency may use normal disciplinary procedures to address the incident in the same way as the procedures would be applied to non-disabled students. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530 (c); see *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470, 1482, *affd.*, *sub nom.*, *Honig v. Doe* (1988) 484 U.S. 305.)

5. 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).) Subject to limited exceptions, a request for due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e); Ed. Code, § 56505, subd. (1).) 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, 62 [126 S.Ct. 528; 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii).)

DID DISTRICT COMMIT MATERIAL PROCEDURAL VIOLATIONS IN CONDUCTING THE MANIFESTATION DETERMINATION?

6. When a local educational agency decides to change a special education student's educational placement for more than 10 days as a result of a violation of a student code of conduct, the local educational agency, the parent and relevant members of the IEP team shall review all relevant information to determine whether the child's violation was a manifestation of the child's disability. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e);

7. The relevant information that must be reviewed at the manifestation determination includes the student's IEP, any teacher observations, and information provided by the parents. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e).)

8. Student contends District failed to include and review relevant information at the manifestation determination review by failing to consider information from Student's records, including a discussion of Student's 2015-2016 disciplinary records from Adelanto, Student's 2015 psychoeducational assessments and Student's IEPs. Student supported this contention by arguing (1) the Adelanto disciplinary records were withheld from the review hearing team; (2) team members were not provided with paper copies of Student's records or information; and (3) District team members generally did not know Student, and therefore without the relevant information, were unable to make a valid manifestation determination.

9. Student was unable to sustain his burden of proof. As argued by District, a manifestation determination review is a review of relevant information, not an assessment, nor an IEP team meeting. A full IEP team is not required, nor did Student present any evidence to suggest that specific personal knowledge of Student was

required of the members of the team. In this matter, District provided the relevant members of Student's IEP team including Mr. Lee, the school administrator, Ms. Davis, the school psychologist, Ms. Abdul-Khabir, Student's special education case carrier, and Mr. Ellis, Student's general education teacher. Relevant information, specific to Student, was reviewed at the review hearing. Although hard copies of the information under discussion were not provided to each team member, computer generated copies of documents were projected on screens in the hearing room for viewing reference of team members.

10. The failure of a manifestation determination team to consider all relevant information is subject to the IDEA's harmless error analysis. (*Fitzgerald v. Fairfax County Sch. Bd.* (E.D. Va. 2008) 556 F.Supp.2d 543, 559; *Farrin v. Maine School Admin. Dist.* (D. Maine 2001) 165 F. Supp.2d 37, 51-55; *Danny K. ex rel. Luana K. v. Department of Educ., Hawai'i* (D. Hawai'i September 27, 2011, Civ. No. 11-00025 ACK-KSC.) 2011 WL 4527387, **14-15.)

11. Ms. Abdul-Khabir reviewed relevant information obtained from Student's teachers, none of which observed any behavioral or social emotional concerns in their classrooms. While Ms. Abdul-Khabir shared what little information she obtained with the team, she could not create behavioral information where none existed.

12. While it may have been more prudent for District to provide Student's entire disciplinary record [commencing in 2015] for the team to consider, it did not create a material or persuasive omission. As indicated in testimony, the Adelanto disciplinary records were for Student's middle school year prior to his transition to high school in District. Student had transitioned well to District, and had no behavioral problems during 2016-2017. The Adelanto records primarily described minor infractions of student conduct, typical of adolescents. Although Student had been suspended for fighting, District team members familiar with high school student conduct did not find

sporadic fights unusual on a high school campus, or indicative of more pervasive behavioral or emotional problems. The evidence supports a finding that in spite of Student's 2015-2016 behaviors, Student was for all accounts, considered a good kid, a popular boy, and member of the football team whose common sense, practical judgments, and social maturity were within the above average range. This information, if presented and discussed at length in the review hearing, would not have supported Student's position that his conduct was the manifestation of his disability or that, had he been provided counseling services as Parents requested, he would not have brought a gun to school.

13. Likewise, Student's contentions regarding District's failure to consider all areas of suspected disability or to conduct a comprehensive assessment prior to the manifestation determination, fail for the same reasons. The evidence supports a finding that Student's educational records, including his 2015 assessment, and each of his IEPs, did not contain suggestions that Student's behavior or emotional status required counseling services or that counseling services were ever provided to Student through his special education program or otherwise. The assessment did not establish behavioral or social/emotional skills as areas of suspected disability. Although Student gleaned four elevated ratings on the Behavior Assessment System for Children, the elevated scores were more closely related to Student's learning deficits, rather than an area of additional need. Again, the manifestation determination review hearing was a review, not an assessment in and of itself. Nor is it a determination of a free appropriate public education. For purposes of the manifestation determination review, Student was unable to convincingly establish that District was required to assess Student based upon Father's requests for implementation of the 2015-2016 IEP which contained no counseling services or his references to counseling made to District personnel, or that any information existed that would have put District on notice that Student had

emotional or behavioral issues that warranted further concern.

14. Student also contends District had predetermined the outcome of the manifestation determination review before team members walked in the door. This perception was closely related to Father's perception that District refused to allow him to explain his son, his personality and his stress to the rest of the team. Father was undiplomatically silenced when he would veer off the very limited subject matter before the review hearing team. Although Father continued to aver that counseling should have been implemented as part of Student's IEP, the documentary evidence available to the team did not support that contention. Failure to agree is not the same as failure to consider. Other information Father sought to discuss was important to the family, and may ultimately relate to a determination of a free appropriate public education. However, it did not directly relate to Student's conduct within the confines of the manifestation determination. As example, Student may have been threatened by another student, to which District did not contact law enforcement as requested by Father. That incident, however, bore little relevance to Student's specific learning disability. Having a perceived reason to bring a weapon to school, did not justify Student's conduct. Exceptions are based only upon the two criteria found in title 34 Code of Federal Regulations section 300.530(e)(i) & (ii). The evidence did not support a finding of predetermination or constitute a material failure to consider information presented by Student as Student did not demonstrate that he had emotional or behavior suspected disabilities for the review team to consider.

DID DISTRICT IMPROPERLY DETERMINE THAT STUDENT'S CONDUCT WAS NOT A MANIFESTATION OF HIS DISABILITY AT A MANIFESTATION DETERMINATION MEETING OF NOVEMBER 3, 2017?

15. A student's conduct is a manifestation of the student's disability if the conduct in question was caused by, or had a direct and substantial relationship to, the

child's disability. (34 C.F.R. § 300.530(e)(i) & (ii).)

16. Student contends his conduct on November 1, 2017, was caused by or directly related to his disability. Student's contentions were not persuasive. Student was eligible for special education and related services under the primary category of specific learning disability. A special learning disability is defined as:

A disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. Disorders not included in specific learning disability include learning problems that are primarily a result of visual, hearing, motor disabilities, mental retardation, emotional disturbance, or of environmental, cultural or economic disadvantage. (Ed. Code, § 56337, subd (a).)

17. Student also qualified for special education services for a secondary disability consisting of a speech and language disorder. Student's speech and language disorder was defined under Education Code section 56333, subdivision (d), as:

A disorder which results from inappropriate or inadequate acquisition, comprehension or expression of spoken language such that the student's language performance level is found to be significantly below the language performance of his peers.

18. Student's areas of deficit related to academic areas identified by District. Student struggled to read and comprehend material at an instructional level. Student struggled to create complex, multi-paragraph essays. Student struggled to add, subtract multiply, and divide fractions. Student exhibited a deficit in the area of semantics, particularly with vocabulary and word meaning. None of these identified areas of need related to Student's conduct of bringing a .45 Glock handgun to school. Further, Student's 2015 assessment from Adelanto clearly stated that Student's common sense, practical judgments, and social maturity were within the above average range, and he was capable of understanding the school's code of conduct. None of the information that District possessed indicated that Student had a suspected disability related to emotional or behavioral issues that it needed to consider as part of the manifestation review process.

19. Student relied on Father's contention that Student was entitled to counseling services prior to November 1, 2017. This remains unsubstantiated. However, even if counseling had been provided in Student's IEP, Student supplied no more than supposition that counseling would have addressed issues which would have prevented Student's conduct, or would have made Student more aware of the consequences of his conduct.⁵

20. A student's conduct is also a manifestation of the student's disability if the conduct in question was the direct result of the local educational agency's failure to implement the IEP. (34 C.F.R. § 300.530(e)(i) & (ii).)

21. Student 2015 IEP from Adelanto was not initially implemented by District

⁵ Nothing in the evidence or testimony suggested Student did not know the consequences of his actions, and in fact Student initially lied about why he had the gun and where he got it, in an attempt to avoid known consequences.

at the beginning of the 2016-2017 school year. Father made District aware of Student's IEP approximately six weeks into the school year, when he noted Student struggling academically. District implemented the IEP, and Student's grades began to improve. As such District failed to implement Student's 2015 IEP at the beginning of the 2016-2017 school year. This failure to implement the 2015 IEP was harmless error in relation to Student's conduct. First, Student's 2015 IEP provided for specialized academic instruction and speech and language services only. There was no nexus between the lack of academic or speech and language services and Student's conduct. Secondly, District's failure to implement the IEP services occurred for a short period of time over one year prior to Student's conduct. In the meantime, Student had successfully completed the 2016-2017 school year.⁶

22. Student also contends District failed to implement Student's counseling services which Father believed were contained in Student's IEP. Although Parents may have believed Student was receiving counseling services, and those services should have been implemented by District, no evidence was provided to indicate counseling was ever part of Student's IEP or that counseling services had ever been provided to Student. Father was unable to offer any evidence to support his contentions of a District obligation to provide Student with counseling services.

23. In summary, any procedural error committed by District was harmless as it had no effect on the outcome. Additional information or more teacher participation would have reinforced rather than undermined District's decision. Nor did District significantly impede Parent's procedural participation. There was no information

⁶ The decision herein is not intended as a determination of non-expedited issues, as different factual interpretation and legal standards are applied in the determination of a free appropriate public education.

suggested by Parents other than supposition which could suggest District could have done anything differently. District allowed Parents to fully argue their every grievance with District during the review hearing. Further, District appropriately sought input from each member of the review team, and required each member to vote independently. With the exception of Parents, all members of the review hearing team agreed that Student's conduct of bringing a .45 Glock handgun to school was not a manifestation of Student's specific learning disability or his speech and language deficit.

ORDER

Student's requested relief is 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. In this matter, District prevailed on the expedited issue decided.

RIGHT TO APPEAL DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code § 56505, subd. (h).) The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

DATE: February 14, 2018

/s/

JUDITH PASEWARK

Administrative Law Judge

Office of Administrative Hearings