

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022120336
CASE NO. 2022120719

THE CONSOLIDATED MATTERS INVOLVING PARENT ON BEHALF
OF STUDENT,

V.

DOWNEY UNIFIED SCHOOL DISTRICT.

EXPEDITED DECISION

January 23, 2023

On December 9, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Downey Unified School District. The due process hearing request included both expedited and non-expedited claims. The statutory hearing and decision timeline requirements governing expedited and

non-expedited issues are different. This Decision addresses the expedited issue only. Administrative Law Judge Tiffany Gilmartin heard this matter via videoconference on January 18 and 19, 2023.

Attorney Damian Fragoso represented Student. Father and stepmother attended the hearing each day on Student's behalf. Attorneys Alefia Mithaiwala and Denise Lee represented Downey. Dr. Rebekah Ruswick, director of special education, attended all hearing days on behalf of Downey.

On January 19, 2023, the expedited record was closed, and the matter was submitted. The administrative law judge granted Downey's request to submit a written closing brief during the submittal time. Both parties timely submitted a written closing brief on January 20, 2023. No continuance was granted to accommodate the briefing schedule.

ISSUE

The issue has been reorganized for the purpose of analysis in this decision. The ALJ has authority to reword and re-organize a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

Did Downey Unified fail to conduct an appropriate manifestation determination review meeting on November 29, 2022, by determining that Student's conduct on October 20, 2022, was not a manifestation of his disability?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- 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 further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

At issue in this case is an appeal of a manifestation determination review team meeting. In such instances, 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).)

The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); Schaffer v. Weast (2005)

546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student filed for hearing and has the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 10 years old and in fifth grade at the time of hearing. Student resided within Downey's school boundaries at all relevant times. Student became eligible for special education in 2018 and is currently eligible under the primary category of other health impairment.

Student has a history of behavior related incidents. During his fourth-grade year, his needs increased significantly, and he had 20 behavior related incidents that involved verbal and physical aggression towards other students and staff. During the current school year, Student had 16 behavior related incidents between August 15, 2022 and October 20, 2022. The evidence established that Student demonstrated elevated levels of inattention, hyperactivity and impulsivity, difficulty with peer relations, and elevated defiance and aggression. He also demonstrated deficiencies in auditory and visual processing.

On October 20, 2022, Student chest bumped a pregnant classroom aide. The aide subsequently went to the emergency room to ensure the contact did not impact her pregnancy. Student was suspended for five school days for the incident, which was October 21, 24, 25, 26, and 27, 2022. On October 27, 2022 Student was recommended for expulsion. A manifestation determination review meeting was held on November 29, 2022, where the team concluded Student's "caused, attempted to cause, or threatened to cause injury to another person" by chest bumping a school aide.

ISSUE: DID DOWNEY UNIFIED FAIL TO CONDUCT AN APPROPRIATE MANIFESTATION DETERMINATION REVIEW MEETING ON NOVEMBER 29, 2022 BY DETERMING STUDENT'S CONDUCT ON OCTOBER 20, 2022 WAS NOT A MANIFESTATION OF HIS DISABILITY?

Student contends that his conduct for which Downey suspended him is a manifestation his disability. Student contends his disabilities include attention deficit hyperactivity disorder and difficulty controlling his impulsivity that results in verbally and physically aggressive outbursts. Student further contends that these disabilities were known to the manifestation determination review team based on

- Student's inability to regulate his emotions and behaviors,
- his behavior intervention plan that recognized his maladaptive use of verbal and physical aggression to generate attention, and
- difficulty managing unstructured settings such as transitions and recess.

Downey contends that Student's conduct was not related to Student's identified disability of other health impairment due to inattentiveness. Downey asserts that the manifestation determination review team had no reasonable basis to conclude that Student's conduct was a manifestation of other disabilities, and instead was a result of Student's home environment and the influence of his Father.

VIOLATION OF CODE OF CONDUCT

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 or her educational placement to an appropriate interim alternative 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. § 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 or her current placement for 10 school days or less in that 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 1415(k).

Student was suspended for five school days, October 21, 24, 25, 26, and 27, 2022, pursuant to Education Code Section 48900(a)(1), for causing, attempting to cause, or threatening to cause injury to another person. On October 27, 2022, Student was recommended for expulsion. Student's suspension was extended until a decision was rendered on the recommendation for expulsion.

The details of Student's suspension will be discussed below in determining whether they were a manifestation of Student's disability or disabilities. The evidence established Downey changed his educational placement for more than 10 days based on the determination that Student violated a code of conduct.

MANIFESTATION DETERMINATION REVIEW

A manifestation determination must be accomplished within 10 school days of the decision to change the placement of a student with a disability because of a violation of a code of conduct. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).) All relevant information in the student's file, including the IEP, 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. If either of these determinations are made by the manifestation team, the conduct shall be determined to be a manifestation of the child's disability. (20 U.S.C. § 1415(k)(1)(E)(i) and (ii); 34 C.F.R. § 300.530(e)(1) and (2).)

A manifestation determination review is not an IEP team meeting and different rules apply to notice and attendance requirements. A manifestation determination must be made by the school district, the parent, and relevant members of the IEP team as determined by the parent and the school district. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1) & (h).) A school district must notify parents of a manifestation determination review team meeting early enough to ensure that they will have an opportunity to attend, and must schedule the meeting at a mutually agreed upon time and place. (34 C.F.R. § 300.322(a)(1), (2); Ed. Code, § 56341.5, subs. (a)-(c).) In the case of a manifestation determination review team meeting, the notice must inform the parent of the decision to change the student's placement and must be accompanied by a copy of the parent's procedural safeguards. (20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. § 300.530(h).)

If the local educational agency, the parent, and relevant members of the IEP team make the determination that conduct for which a student was disciplined was a manifestation of his disability, the IEP team shall conduct a functional behavior assessment and implement a behavioral intervention plan for the student provided that the local educational agency had not conducted such an assessment prior to such determination before the behavior that resulted in the proposed change of placement of over 10 days. (20 U.S.C. § 1415 (k)(1)(F); 34 C.F.R. § 300.530(f)(1)(i).) In the situation where a behavioral intervention plan has been developed, the IEP team shall review the behavioral intervention plan and modify it as necessary to address the behavior and return the student to the placement from which the student was removed, unless the parent and the local educational agency agree to a change of placement as part the modification of the behavioral intervention plan. (20 U.S.C. § 1415 (k)(1)(F); 34 C.F.R. § 300.530(f)(1)(ii).)

For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities. (20 U.S.C. § 1415 (k)(1)(C); 34 C.F.R. § 300.530(c).)

On October 27, 2022, Downey gave Parents notice of a manifestation determination meeting to be held on November 2, 2022. The meeting was rescheduled. The meeting was subsequently held on November 29, 2022. In attendance was

- Father and Student's stepmother;
- Susana Serrato, Student's special education teacher;

- Kaiya Wright, clinical school therapist;
- Diana Israwi, assistant principal;
- David Cid, principal;
- Alison Box, principal;
- Lauren Pastor, school psychologist;
- Robert Jaigeslky, director of Downey's student support services;
- Yaneli Mascorro, program administrator;
- Rebeka Ruswick, director of special education;
- Student's attorney Damian Fragoso; and
- Downey's attorney Alefia Mithaiwala.

The Downey members of the manifestation determination review team determined that Student's conduct that violated the school's conduct code was not a manifestation of his disability, namely other health impairment for inattention. Parents disagreed. Parents appealed the determination and this hearing followed.

Student was found eligible for special education under the eligibility category of other health impairment on October 17, 2018. Starting in January 2020, Student received his specialized academic instruction in a special day class. He was returned to a general education setting from August 17, 2020 until November 16, 2020. Student has remained in a special day class placement since November 16, 2020.

Student's October 7, 2022 annual individualized education program provided Student the following:

- specialized academic instruction for 1,560 minutes per week in a mild-to-moderate special day class,
- 120 minutes per week of individual counseling,

- 1,560 minutes per week of intensive individual services of a one-to-one aide to assist with behavior management,
- supplemental aids and services such as extended time on tests and quizzes,
- preferential seating,
- additional processing time for writing activities, and
- reduced work or alternative work requirements to test for comprehension.

Student also received a behavior intervention plan to address Student's moderate-to-severe verbal aggression, moderate-to-severe physical aggression, and mild-to-moderate work refusal. Student had seven goals, including one social-emotional learning goal to address emotional regulation and behavior. In Student's previous IEP he failed to meet several goals, but of specific note, he failed to meet his goals in compliance and social emotional learning. Student's October 7, 2022 IEP noted his behavior impeded his learning and others, specifically his defiance, inability to filter negative behaviors, and difficulty with redirection. Father consented to the IEP in all areas except counseling services on October 7, 2022.

Student's behavior significantly deteriorated at the beginning of the 2022-2023 school year. Student's first behavior incident occurred on September 9, 2022, after Student arrived late for school and then got into an argument with his brother. The week of September 12-16, 2022, Student was involved in nine behavior incidents including unauthorized cell phone usage, using profanity, threatening other students, and attempting to steal a bracelet from another student. The following week Student had three behavior incidents including physically hitting other students, defiant and

disrespectful behavior to others, and harassing and intimidating behavior toward staff by recording his interactions with them on his cell phone. The evidence established Downey was on notice of Student's escalating intensity of behaviors.

On September 26, 2022, Father and stepmother met with Principal Cid, Assistant Principal Israwi, and Jagieski, the director of student safety, wellness and engagement to develop a behavior contract to address behavior concerns school personnel had with Student. The contract addressed Student's

- frequent tardiness,
- his unauthorized use of his cell phone during the school day,
- fighting on campus,
- verbal aggressiveness towards other students and staff, and
- following directions and defiant behaviors.

Both Father and Student signed the contract on September 26, 2022. The next day, Student was involved in a physical altercation with another student. On October 5, 2022, Student was again involved in a physical altercation with another student.

On October 20, 2022, Downey participated in California's Great Shakeout earthquake drill. Serrato, Student's special day class teacher, established that all students were directed to leave their classroom around nine that morning. Students were instructed to bring their iPad with them and access an educational app while they waited for the earthquake drill to complete.

Student did not do as instructed. Instead, he logged onto YouTube where he viewed a music video his uncle made. Serrato instructed Student to turn the video off. Student refused and yelled at Serrato. Serrato then asked Student's individual aide,

Mareea Phillips, who also testified, to get Student to comply. Phillips was also unsuccessful. Serrato eventually moved the other students away from Student. At the conclusion of the drill, students returned to the classroom.

Student then yelled at Karol Ortiz, to stop talking. Ortiz, a senior instructional aide for behaviorally challenged students, testified at this hearing. Ortiz established that Student entered the classroom first, was near the doorway when the incident occurred.

Father testified that according to Student once he returned to the classroom he went to his seat. He then got up and went across the room to get hand sanitizer. Ortiz, Father testified, was blocking Student's way so he moved her to the side to get his hand sanitizer.

Ortiz testified she observed Student walking toward her, his hands were fisted, and his chest was puffed up. She attempted to walk around Student, but he blocked her, Student then bumped Ortiz with his chest as he proceeded to the hand sanitizer station behind her. Ortiz was visibly pregnant at the time.

Principal Cid was immediately contacted by Serrato and the staff members all produced incident reports of the event. The staff members and Student's version of the events are all similar in that Student's chest did make physical contact with Ortiz's abdomen. This was the second time Student made physical contact with a staff member at the school. The first time occurred on January 31, 2022, when Student pushed two after school supervisors. Student was suspended for this altercation as well. Central to the dispute is not whether Student made contact, but whether it was a manifestation of his disabilities.

MANIFESTATION DETERMINATION REVIEW TEAM CONCLUSIONS

Downey relied on the following documents for the manifestation determination review:

- attendance records,
- behavior records,
- staff observations of Student in class,
- interactions with Student in class,
- Student's behavior contract from September 26, 2022,
- the results of his last psychoeducational assessment report,
- his IEP,
- Serrato's observations of Student, and
- Father's input.

Lauren Pastor, school psychologist, testified at the hearing and provided an overview of Student's assessment history and current educational placement to the manifestation determination review team. Pastor testified that Student's disability eligibility was only other health impairment due to inattention. Pastor noted she was not aware of Student's medical ADHD diagnosis. Pastor further testified that despite Student's last psychoeducational assessment showing clinically significant levels of inattention, hyperactivity/impulsivity, and difficulty with peer relations, Student's only disability was inattention and she did not believe Student's behavior was a manifestation of his inattention. Pastor acknowledged; however, that Student's behavior had become so significant a behavior intervention plan was required. Pastor further testified she would need more information to determine if Student's disability extended beyond his

eligibility for other health impairment due to inattention. Pastor, however, was highly critical of Student's home life and comfortable positing his behavior was the result of the environmental conditions at home.

Cid reviewed Student's behavioral record. Documented in Student's record were the 16 office referrals for behavior during the 2022-2023 school year. The number and escalating intensity of the incidents demonstrate Downey was on notice of Student's continued struggles with dysregulation and impulse control.

The Downey team members determined Student's conduct on October 20, 2022 was not a manifestation of his identified disability. The Downey team members concluded Student's behavior was not a manifestation of the disability for which he is eligible, other health impairment. The team further narrowed the consideration of his eligibility to inattention. The team concluded further evaluation of Student needed to occur, but Parent's refusal to consent had prevented them from obtaining all the necessary data. As a result, the manifestation determination team concluded Student's behavior was the result of his home environment and not inattention.

STUDENT'S CONDUCT WAS A MANIFESTATION OF HIS DISABILITY

District's argument that Student's conduct was purposeful and unrelated to his identified disability of other health impairment is unpersuasive. First, the manifestation determination review team applied an impermissibly narrow view of his disability. The manifestation determination must be made by the child's parent and relevant members of the child's IEP team reviewing "all relevant information in the child's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents." 34 C.F.R. §300.530(e). "Before reaching a manifestation determination, the

team must review the information pertinent to that decision"Fitzgerald v. Fairfax Cnty. Sch. Bd., 556 F. Supp. 2d 543, 559 (E.D. Va. 2008). Importantly, the conversation must focus directly on the relationship between the behavior and the student's disability, not whether the student knew right from wrong or a global or generalized discussion of the typical expression of student's disability. See, eg. Bristol Twp. Sch. Dist. V. Z.B., 67 IDELR 9 (E.D. Pa. 2016) (holding that an MDR team violated the IDEA when it focused on the typical traits of individuals with ADHD).

Here, the Downey members of the team, led by Pastor, only considered whether the conduct, namely bumping Oritz in the abdomen, was a manifestation of his inattention. They concluded it was not. However, this impermissibly narrow view of Student's disabilities was inconsistent with Downey's school records, Student's documented history of maladaptive behaviors, and Student's IEP's.

After concluding the manifestation determination review team applied the wrong standard, the question remains, was Student's conduct a manifestation of his disabilities? It is undisputed by Downey that Father informed Student's IEP team and the manifestation determination review team that Student had a medical diagnosis of ADHD. The eligibility category other health impairment includes attention deficit disorder and attention deficit hyperactivity disorder. 34 C.F.R. § 300.8 (c)(9). Student has a demonstrated history of impulsive control issues that manifests itself in verbally and physically aggressive ways. Pastor testified impulsivity and emotional dysregulation can be symptoms of ADHD. Student was subject to 16 behavior related incidents between August 15, 2022 and October 20, 2022. These incidents were escalating in frequency and severity. Student's IEP team agreed Student's behavior impeded his and other

student's learning. Student's operative IEP offered him a behavior intervention plan. The behavior intervention plan addressed Student's physical and verbal aggression issues, as well as his propensity for defiance.

Student's IEP included a behavior goal to address his inability to regulate his emotional and behavioral responses to frustrating circumstances. Student's baseline for avoiding emotional and behavioral outbursts was zero days per week. Downey knew Student was emotionally dysregulated and he frequently lacked the ability to control his impulsive behavior. Student's IEP provided him a one-to-one aide to support his behavior management. The manifestation determination team incorrectly determined Student's conduct on October 20, 2022, was not caused by, or had a direct and substantial relationship to his disabilities. The manifestation determination team had substantial evidence produced by Downey to support the conclusion Student's behavior was a manifestation of his disability.

The evidence established that Student's conduct was a manifestation of his disability. Following a determination that the conduct was a manifestation of Student's disability the law requires that the,

"IEP team shall conduct a functional behavior assessment and implement a behavioral intervention plan for the student provided that the local educational agency had not conducted such an assessment prior to such determination before the behavior that resulted in the proposed change of placement of over 10 days." (20 U.S.C. § 1415 (k)(1)(F)(i); 34 C.F.R. § 300.530(f)(1)(i).)

In the situation where a behavioral intervention plan has been developed, the

“IEP team shall review the behavioral intervention plan and modify it as necessary to address the behavior, and return the student to the placement from which the student was removed, unless the parent and the local educational agency agree to a change of placement as part the modification of the behavioral intervention plan.” (20 U.S.C. § 1415 (k)(1)(F)(ii) and (iii); 34 C.F.R. § 300.530(f)(1)(ii) and (2).)

There was no evidence presented that Downey has completed a functional behavior assessment. Given the conclusions reached herein, Student is entitled to such.

In making a determination in an appeal of a manifestation determination, a hearing officer may return the student to the placement from which he or she was removed. Alternatively, the hearing officer may order a change in placement to an appropriate interim alternative educational setting for not more than 45 school days, if it is determined that maintaining the current placement of such child is substantially likely to result in injury to the child or to others. (20 U.S.C. § 1415(k)(3)(B)(ii)(I) and (II); 34 C.F.R. § 532(b)(2)(i) and (ii).)

The question of whether maintaining Student in his current placement is substantially likely to result in injury to Student or others is not reached in this decision. Even if such were true, there was no evidence presented at hearing regarding any possible interim alternative educational settings, nor any request for such by the parties. Accordingly, Student is ordered back to the placement from which he was removed unless the parties reach an agreement otherwise.

CONCLUSIONS AND PREVAILING PARTY

As required by 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.

ISSUE:

Did downey unified fail to conduct an appropriate manifestation determination review meeting on November 29, 2022, by determining that student's conduct on October 20, 2022 was not a manifestation of his disability?

Student prevailed on the only issue.

REMEDIES

1. Within 10 days of this decision, Downey shall provide Parent an assessment plan to conduct a functional behavior assessment. The functional behavior assessment will be initiated within 15 days of parental consent followed by an IEP team meeting to review the assessment. Student's IEP team will review Student's existing behavior intervention plan and modify it as necessary.
2. Downey will reinstate Student's enrollment at Rio San Gabriel Elementary School unless the parties agree otherwise.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

TIFFANY GILMARTIN

Administrative Law Judge

Office of Administrative Hearings