

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

v.

SALINAS UNION HIGH SCHOOL DISTRICT.

CASE NO. 2023040286

EXPEDITED DECISION

May 22, 2023

On April 7, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student naming Salinas Union High School District as respondent. Administrative Law Judge Rita Defilippis heard this matter on May 3, 4, 5, 8, 9, and 10, 2023.

Attorney Joshua Cruz represented Student. Parent attended all hearing days on Student's behalf. Attorney Haley Fagan represented Salinas. Attorneys Jennifer Baldassari and Roxanne Khan were present on some days of hearing. Jennifer Smith, director of special education, attended all hearing days on Salinas's behalf.

The record remained open until May 15, 2023, for the submission of closing briefs. On May 15, 2023, the record was closed.

ISSUE

1. Did Salinas fail to conduct an appropriate manifestation determination meeting on January 9, 2023, by:
 - a. inaccurately determining that Student's conduct was not a manifestation of his disability, and
 - b. inaccurately determining that Student's conduct was not the direct result of Salinas' failure to implement Student's individualized education program, called an IEP?

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).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision

of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) 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 has the burden of proof on the issue in this matter. 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).)

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)(3). 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).)

Student was 13 years old and in eighth grade at the time of hearing. Student resided within Salinas's geographic boundaries at all relevant times. Student was eligible for special education under specific learning disability and other health impairment due to attention deficit hyperactivity disorder.

ISSUE 1a: DID SALINAS FAIL TO CONDUCT AN APPROPRIATE
MANIFESTATION DETERMINATION MEETING ON JANUARY 9, 2023,
BY INACCURATELY DETERMINING THAT STUDENT'S CONDUCT WAS
NOT A MANIFESTATION OF HIS DISABILITY?

Student contends that the conduct for which he was removed from his placement, was related to his disability, specifically, attention deficit-hyperactivity disorder. Student contends Salinas's analysis to determine whether Student's conduct was a manifestation of his disabilities was too narrow, omitting a review of past educational records and limiting Student's disability to "impulsivity". Student contends that the conduct at issue here is similar to conduct a month earlier that Salinas found was related to Student's disability, in a prior manifestation determination review meeting, and thus demands the same result. Student also maintains that Salinas predetermined its decision at the January 9, 2023 manifestation review team meeting. Lastly, Student asserts that Student's conduct was the direct result of Salinas's failure to implement Student's individualized education program, called an IEP.

Salinas contends that Student's conduct was not a manifestation of his disability because his actions were intentional, and pre-planned, as opposed to unintentional and impulsive. Salinas contends that it implemented Student's IEP with fidelity.

VIOLATION OF CONDUCT CODE

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 20 U.S.C. § 1415(k).

Leading up to the incident at issue in this case, which occurred on December 9, 2022, Student was disciplined for

- shoving a male peer into the girl's restroom;
- attempting to pants a peer during class;
- attempting to physically engage with another student over a video posting;
- harassing and pushing a peer in violation of a no contact order;
- taunting another student;
- making inappropriate comments about a peer;
- taking a female student's backpack and attempting to hide it in another classroom;
- cursing at students in his class;

- attacking another student based on Student's belief that the other Student took his Chromebook; and
- pushing a peer down to the ground in the school hallway.

The last incident occurred on November 29, 2022.

On the day of the November 29, 2022 incident, Assistant Principal Shilstone reviewed the video footage captured on a security camera. Shilstone determined the incident was unprovoked, and suspended Student for two days. Shilstone met with Student and Parents. He instructed Student not to make contact with the victim, and cautioned that doing so would result in "greater consequences" than a two-day suspension. Shilstone added the incident to Student's discipline record including the admonition regarding "greater consequences," if he had contact with the victim.

Following the November suspension, Salinas conducted a manifestation determination review meeting. The team determined Student's conduct of pushing the other student to the ground was a manifestation of his disability. Specifically, the team concluded Student's conduct was unprovoked and impulsive which was consistent with attention deficit hyperactivity disorder.

On December 9, 2022, Student engaged in the conduct at issue in this case. Specifically, while walking home from school, Student approached the same student that he pushed to the ground on November 29, 2022, a week prior, called the student a liar, and punched the student on the side of his head. Thereafter, Student took possession of, and carried away, the student's backpack. When confronted shortly thereafter by a school security person, Student handed him the backpack, although reluctantly at first request. Student was suspended and recommended for expulsion

based on this incident for violating two codes of conduct: Education Code section 48900(a)(2), willingly using force on another student, and Education Code 48900(e), committing or attempting to commit a robbery.

Assistant Principal Leland Hansen testified at hearing. Hansen was aware of Shilstone's discipline note for the November 29, 2022 behavior incident and Shilstone's admonition regarding "greater consequences." Hansen testified that Assistant Principals "back each other up" to maintain consistency regarding student discipline. Accordingly, Hansen began working on Student's expulsion packet immediately following the December 9, 2022, incident.

The expulsion review committee meeting was scheduled for January 9, 2023, immediately following Student's manifestation determination review meeting. On December 21, 2022, Hansen prepared an expulsion summary and checked the box indicating that Student's conduct for which he was being expelled, was not a manifestation of his disability. Yisell Lopez, school psychologist, was tasked with preparing materials for Student's manifestation determination review meeting. Hansen did not provide Lopez with any percipient witness statements, despite her request for such. Some witness statements undermined Hansen's conclusion that the incident was pre-planned. Instead, he orally communicated the incident and provided selective information to Lopez, including his version of events that Student preplanned the assault of December 9, 2023, and attempted robbery of the other student's backpack.

On January 9, 2023, Salinas convened a manifestation determination review meeting and the Salinas members of the team determined that Student's conduct was not a manifestation of his disability. Student was again recommended for expulsion.

On March 28, 2023, Student was expelled for his conduct, and the following day, Parent was directed to contact Carr Lake Community Day School for educational placement until May 26, 2023. Student established that Salinas changed Student's placement for more than 10 days for Student's violations of its code of conduct. Accordingly, Salinas must meet the requirements of 20 U.S.C. § 1415(k).

A manifestation determination review 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).)

STUDENT'S CONDUCT WAS RELATED TO HIS DISABILITY, SPECIFICALLY ATTENTION DEFICIT HYPERACTIVITY DISORDER

Student has been eligible for special education since May 3, 2018. From that date to September 20, 2022, Student was eligible as a student with a specific learning disability. On September 20, 2022, Salinas added other health impairment due to attention deficit-hyperactivity disorder as a secondary eligibility. That determination followed a recent assessment to determine if Student also qualified for special education as Student with autism. As of the time of hearing that issue remained disputed; however, it is unnecessary to resolve that herein.

Student's special education testing results and reports dating back to April 2021, establish that Student, now in eighth grade, has had behavior challenges including physical aggression toward peers, disruptive classroom behavior, inattentiveness, impulsivity, peer conflicts, social struggles, and defiance of authority, since kindergarten. His behavior challenges have become more serious and intensive through the years. Student's test results and assessment reports corroborate Student's worsening social emotional functioning and growing teacher concern. From Kindergarten to third grade, student study team meetings were held to discuss Student's

- low self-esteem,
- low self-confidence,
- tendency to shut down immediate
- difficulty attending and
- challenging and disruptive behavior, including physical aggression.

In third grade, Student was assessed and qualified for special education services under specific learning disability due to discrepancy between his cognitive abilities and achievement in basic reading and reading comprehension due to a psychological process disorder in the areas of attention and conceptualization. In addition, a behavior intervention plan was recommended due to Student's significant behaviors in aggression, verbal outbursts, and disruptive behaviors. Student was provided one to one behavioral aide support to help with daily interaction, a social skills group, and check-in with Student at beginning and end of school day.

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By sixth grade, Student's triennial assessment established that he was at least two years behind his peers academically in reading and math. Assessments of Student's auditory attention established that Student was functioning in the borderline range. Student was at risk of problems in the areas of

- hyperactivity,
- aggression,
- conduct problems,
- externalizing,
- depression,
- attention problems,
- learning problems,
- school problems,
- withdrawal,
- behavioral symptoms index,
- adaptability,
- social skills,
- leadership,
- study skills, and
- functional communication.

In seventh grade, Student initially attended school in the Salinas catchment area. His disciplinary records reflect Student's worsened behavior, corroborating his "at risk" scores in the prior assessments. Between the beginning of the school year and October 21, 2021, Student was disciplined for multiple incidents including smacking another student in the back of the head while in lunch line. Student was rude and defiant when asked to

provide his ID number to staff following the incident. Other incidents involved name calling, flipping-off other students, refusal to comply with adult directions, bullying of other students, and defiance.

In October of seventh grade, Student was stabbed by a student or students with a pencil during unstructured time. Although the parties dispute the exact facts of this incident, Parents removed Student and enrolled him in another school district pursuant to an interdistrict transfer. Parents viewed Student as wrongfully attacked and traumatized.

The receiving school district placed Student on a behavior contract as good behavior was a condition of his attendance under the interdistrict transfer. From January to April 2022, Student had numerous discipline incidents including

- inappropriate use of technology,
- physical aggression with peers,
- taking other student's property,
- name calling,
- running around at a dance play fighting with other students,
- using a "spork" pretending to stab a student,
- disrupting class,
- refusing to comply with adult redirection, and
- defiance.

Student returned to Salinas for the 2022-2023 school year. Parent and Student's prior teacher suspected Student may be on the autism spectrum. Upon re-enrollment in Salinas, school psychologist Lopez assessed Student. Lopez testified at hearing about her assessment and her assessment report, which was admitted into evidence. Lopez

also chaired the manifestation determination review team meeting which resulted in Salinas's determination that Student's conduct on December 9, 2022, was not a manifestation of his disability.

Lopez's manifestation determination report conclusions and her testimony at hearing, differed sharply from her assessment report three months before the December 9, 2022 behavior incident. For example, as part of her prior assessment, Lopez observed Student's off-task behavior, disruption of class by engaging other students, and refusals to work when requested by teacher. Lopez determined Student's disruptive behavior was to get attention and avoid classwork. Additionally, Lopez administered the Behavior Assessment System for Children- Third Edition, called BASC-3, to assess Student's social emotional functioning, and the Connors-Third Edition, to assess attention deficit-hyperactivity disorder, which each utilize teacher and parent questionnaires in the form of rating scales.

On the BASC-3, Student's scores established his overall level of disruptive behavior such as aggression, hyperactivity, and delinquency, and overall level of problem behavior including

- hyperactivity,
- aggression,
- depression,
- attention problems,
- atypicality, and
- withdrawal.

On the Connors-3, Student's scores established his elevated propensity for problematic behavior in the areas of areas of defiance/aggression, peer relations, inattention and hyperactivity/impulsivity. Overall, Student is impacted by his symptoms of attention deficit-hyperactivity disorder by behaviors such as

- poor concentration and attention;
- difficulty keeping his mind on work;
- careless mistakes;
- easily distracted, high activity levels;
- restless-impulsive behavior;
- easily excited;
- may be argumentative;
- may defy requests from adults;
- may have poor control of anger;
- may display aggressive behaviors, including bullying; and
- may be manipulative.

Student's 2022-2023 school year discipline history following Lopez's assessment unfortunately corroborates and confirms the accuracy of her assessment results.

Despite this assessment history, Lopez determined at the manifestation determination review meeting, and testified again at hearing, that Student's conduct was not a manifestation of his disability. Her testimony was not persuasive. Lopez was not aware of conflicting and exculpatory witness statements or of Student's past discipline history involving physical aggression. Additionally, she narrowly construed Student's disability as "impulsivity".

Lopez drafted a manifestation determination report in preparation for the January 9, 2023, meeting regarding Student's December 9, 2022, conduct. Her report described Student's conduct based only on how it was relayed to her by Hansen, who was simultaneously preparing Student's expulsion recommendation. As noted previously, Lopez was not given the percipient witness statements. Lopez interviewed Parent regarding the December 9, 2022, incident. Parent reported that the student that was punched had been verbally abusing Student and calling him vulgarities. The victim's sister gave Hansen a statement confirming that for two months before the incident, she and her brother had many verbal cussing exchanges with Student after school. Hansen never shared that witness statement with Lopez either. Parent refused to allow Student to be interviewed because the victim's Parent filed criminal charges against Student.

Lopez's report described the incident as follows:

"On December 9, 2022, after school on the corner of the school [Student] called the same student a "liar", then socked/punched the student on the cheek near the ear. As the student tried to run away, [Student] grabbed the student's backpack. This occurred on 12/9/2022 one week after he had pushed him on 11/29/2022."

Lopez's manifestation determination report concluded, based on the information she was provided by Hansen, that Student engaged with the same student on November 29,

2022 and December 9, 2022. Lopez explained in the report that the victim's sister was not with him and that Student found the student after school, punched him, and took his backpack. Lopez explained:

"In this case, [Student] used planning and decision-making to find this student. This demonstrates that the act was not impulsive. In the incident on 12-9-2022 [Student] found the same student that he pushed on 11/29/2022, therefore this act was not impulsive but directed towards a particular student which involves a decision to be made and therefore cannot be a manifestation of his disability or other health impairment for ADHD or SLD. This incident was not impulsive in nature. Furthermore, on the day of the incident the school psychologist met with Student in the morning during first period to remind him of his contract to earn a meal from a fast-food restaurant for staying safe and keeping his hands to himself as well as the rules and consequences. [Student's] behavior Intervention Plan was made aware to all teachers and he was receiving support from the special education department for the SLD. "

It was clear that Lopez's conclusion was heavily influenced by Hansen's opinion. On January 9, 2023, a manifestation determination team met, Lopez presented her manifestation determination report, and when asked by Lopez if Student's conduct was related to his disability, the team determined it was not.

In preparing for her manifestation determination report, Lopez confined her review of Student's disciplinary records to the 2022-2023 school year. However, Lopez was unaware of some incidences of Student's behavior and discipline records during the 2022-2023 school year regarding Student's physical aggression with peers and peer

conflicts. Lopez's manifestation determination report recommendation, that Student's disability related to impulsivity, was based on her limited review of Student's records and limited information shared with her by Hansen.

Lopez's limiting Student's disability to impulsivity was also not supported by her own assessment on September 20, 2022, which resulted in her finding that Student qualified for special education under other health impairment due to Student exhibiting behaviors similar to, or the same as, students with attention deficit-hyperactivity disorder. Symptoms of attention deficit-hyperactivity disorder were detailed in her assessment report as behaviors including:

- poor concentration and attention;
- difficulty keeping his mind on work;
- careless mistakes;
- easily distracted, high activity levels;
- restless-impulsive behavior;
- easily excited;
- may be argumentative;
- may defy requests from adults;
- may have poor control of anger;
- may display aggressive behaviors, including bullying; and
- may be manipulative.

There was nothing in Lopez's September 20, 2022 assessment report limiting Student's manifestation of attention deficit hyperactivity disorder to impulsivity. Accordingly, Lopez's testimony and manifestation determination report conclusion that if Student's

conduct was not impulsive, the conduct was not a manifestation of his disability is rejected. Instead, the evidence established that her manifestation report contained information that she was pressured by Hansen to provide.

Student's discipline history, prior educational assessments, and recent behaviors manifested his attention deficit-hyperactivity disorder in that they included

- impulsivity,
- poor control of anger,
- defiance,
- aggressive behaviors,
- bullying, and
- manipulation.

A great deal of testimony by Student's witnesses and Salinas's witnesses regarding whether Student impulsively assaulted the other student while walking home in response to ongoing mutual verbal attacks, or actually waited and planned to attack the other student related to his anger for the other student resulting from prior disputes.

However, there was no evidence presented that the attack was planned. There was no testimony, for example, that Student told others ahead of time that he intended to attack the victim after school or social media posts laying out a plan. Salinas's conclusion that Student was waiting for the other student prior to the attack and pre-planned the attack due to Student harboring anger or resentment over past conflict with the student, is rejected. Those opinions, at most, were supposition. Salinas provided no direct

evidence proving such an interpretation of Student's conduct other than speculation as to Student's state of mind at the time of the incident. Speculation cannot be the basis of actions resulting in expulsion of a 13-year-old student.

The evidence at hearing established Student's conduct on December 9, 2022, was impulsive and a manifestation of his disability, specifically attention deficit hyperactivity disorder. Therefore, Salinas failed to conduct an appropriate manifestation determination review meeting on January 9, 2023 by inaccurately determining Student's conduct was not a manifestation of his disability.

Student sustained his burden of proof that Salinas inaccurately determined his conduct in the December 9, 2022 incident was not related to his disability. Having so decided, Student's Issue 1(b) is not reached.

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 1(a):

Salinas failed to conduct an appropriate manifestation determination meeting on January 9, 2023, by inaccurately determining that Student's conduct is not related to his disability.

Student prevailed on Issue 1(a).

ISSUE 1(b):

As a result of Student prevailing on Issue 1(a), Issue 1(b) was not reached.

REMEDIES

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).)

School psychologist Lopez conducted a functional behavior assessment in response to Student's prior conduct where Student pushed another student to the ground in the school hallway. Lopez developed a behavior intervention plan which was presented to the manifestation determination review team on December 2, 2022, regarding the hallway pushing incident. Student's behavior intervention plan was

consented to by Parents on December 2, 2022. No analysis or findings regarding the appropriateness of that behavior intervention plan is made or determined in this decision.

Salinas must review the December 2, 2022 behavior intervention plan and modify it, as necessary, to address Student's behavior, and return Student to Washington Middle School, the placement from which he was removed on December 9, 2022, unless Parent and Salinas agree to a change of placement as part of the modification of the December 2, 2022 behavior intervention plan.

Student requested as a remedy, that Salinas expunge Student's educational records by purging all references to his expulsion from his educational records related to the disciplinary incident at issue at the January 9, 2023 manifestation determination meeting. However, Student provided no authority that OAH has jurisdiction to expunge disciplinary records. Nothing in this decision precludes Student from seeking expungement in another venue. Accordingly, Student's request for expungement is denied.

ORDER

1. Within two weeks of this order, Salinas shall convene and IEP team meeting to review and modify Student's December 2, 2022 behavior intervention plan, and modify it to address Student's behavior.
2. Salinas is ordered to return Student to Washington Middle School unless Salinas and Parent agree otherwise as part of the modified behavior intervention plan.

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.

RITA DEFILIPPIS

Administrative Law Judge

Office of Administrative Hearings