

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022060347

PARENT ON BEHALF OF STUDENT

v.

MILLER CREEK SCHOOL DISTRICT

EXPEDITED DECISION

JULY 21, 2022

Parent on behalf of Student filed an expedited due process hearing request, called complaint, with the Office of Administrative Hearings, State of California, on June 13, 2022, naming Miller Creek School District. The Office of Administrative Hearings is called OAH. The complaint contained expedited and non-expedited hearing claims. OAH set the expedited and non-expedited matters for separate hearings. The expedited claims proceeded to hearing with no continuances. (34 C.F.R. § 300.532(c)(2).) This Decision resolves only the expedited claims. Administrative Law Judge Brian H. Krikorian heard this matter by videoconference on July 12, 2022.

Attorney Donald J. Farber represented Student. Mother attended all hearing days on Student's behalf. Attorney Jan Tomsy represented Miller Creek. A representative of the Miller Creek Superintendent attended all hearing days on Miller Creek's behalf.

On July 12, 2022, the last day of hearing, the record was closed, and the matter was submitted for decision. The ALJ allowed the parties to file closing arguments during the submittal time.

EXPEDITED ISSUE

1. Did Miller Creek School District violate Title 20 of the United States Code, section 1415(k), when Student's enrollment at Anova Center for Education, a nonpublic school, was terminated on February 2, 2022?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, called IDEA, 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 IDEA are to ensure:

- all children with disabilities have available to them a free appropriate public education, called FAPE, 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).)

Title 20 United States Code section 1415(k) and title 34 Code of Federal Regulations, part 300.530, et seq. (2006), 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. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 48915.5, subd. (a).) If a special education student violates a code of student conduct, school personnel may remove the student from his or her educational placement without providing services for a period not to exceed 10 days per school year, provided typical children are not provided services during disciplinary removal. (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3).)

A parent of a special education student may appeal a school district's determination that particular conduct resulting in a disciplinary change of placement was not a manifestation of the child's disability by requesting an expedited due process hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. 300.532(a) & (c).) The 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).)

At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student filed the complaint 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 eleven years and seven months and in fifth grade at the time of hearing. Student resided within the Miller Creek boundaries. Student was eligible for special education under autism and speech and language impairment.

EXPEDITED ISSUE: DID MILLER CREEK SCHOOL DISTRICT VIOLATE TITLE 20 OF THE UNITED STATES CODE, SECTION 1415(K), WHEN STUDENT'S ENROLLMENT AT ANOVA CENTER FOR EDUCATION, A NONPUBLIC SCHOOL, WAS TERMINATED ON FEBRUARY 2, 2022?

Student was placed by Miller Creek at Anova Center for Education, a nonpublic school referred to as Anova. On February 4, 2022, Anova provided a 20-day notice to Miller Creek that it would be terminating its contract for Student's placement. Although the issue references a February 2, 2022, termination, neither party offered any facts that Student's enrollment at Anova was terminated on February 2, 2022.

Student contended that Anova's termination violated Section 1415(k) of the IDEA because the termination was due to Student's behavior and constituted an expulsion or suspension from the program. Miller Creek disputed this contention. Miller Creek first contended that it did not take disciplinary action against Student, and that any actions were conducted by a third party, Anova. Second, Miller Creek argued that the actions taken by Anova were governed by the placement contract, which permitted Anova or Miller Creek to terminate their agreement at any time on 20-days' notice, consistent with California law. Finally, Miller Creek asserts that Student was neither expelled nor

suspended for any reason, including disciplinary reasons. As soon as Anova provided notice of termination, Miller Creek identified a suitable placement for Student within the 20-day period, which Parent rejected. Student did not prove by a preponderance of the evidence that Miller Creek, the responsible local educational agency, violated section 1415(k) of the IDEA.

Beginning in mid-March 2020, Student was receiving education services through Miller Creek and Anova virtually. Miller Creek and Anova entered into an Individual Service Agreement, referred to as an ISA, for Student effective July 1, 2021. Pursuant to Student's June 22, 2021, Individualized Education Program, referred to as an IEP, Student was to be placed at Anova for the 2021 to 2022 school year. At the June 22, 2021 IEP meeting, Heidi Adler, the Director of Anova, indicated that Anova was not going to conduct distance learning in the 2021-2022 school year, and that all students would be returning to campus. Parent was concerned about Student physically returning to school due to Parent's own health concerns. Adler and the Miller Creek representatives told Parent that neither Miller Creek nor Anova planned to provide any distance learning programs beginning in the fall of 2021.

Parent did not enroll Student at Anova for in-person learning in the fall of 2021, and instead Anova provided him "virtual" independent study courses and therapy sessions. Miller Creek and Anova held a follow up IEP meeting on December 15, 2021, and Parent attended. At this meeting representatives of Miller Creek and Anova indicated Student was still being offered individual placement at Anova, in person. The parties agreed to transition Student back to in-person learning at Anova in February of 2022.

Student offered several emails exchanges amongst representatives of Anova, as well as emails between Anova and Miller Creek as evidence that Student's bad behavior had escalated due to his autism. On December 16, 2021, Student's occupational therapist reported an incident during a virtual session where Student was throwing a tantrum, and that it involved cussing and swearing between Parent and Student. Adler provided this information to Phillipa Rosenblatt, the Superintendent of Miller Creek at the time. On January 11, 2022, and January 25, 2022, specialists of Anova again reported examples of Student's outbursts, including conflicts with Parent, cussing, and swearing, and some screaming. Again, these emails were exchanged between Adler and Rosenblatt.

According to Adler, Anova was approved by the California Department of Education, referred to as the CDE, as both a nonpublic school and private school. It accepted students through contracts with school districts and private placement. Anova's program was set up for younger students, but not middle school or high school age students. Adler opined that as the students get older, and bigger, it becomes more difficult for Anova's staff to implement its learning program. On January 25, 2022, Adler emailed Rosenblatt and indicated that Student was not making progress and spent most of the time yelling and swearing at staff. Adler concluded that due to Student's lack of progress and aging-out, Anova could no longer meet Student's special education needs at its campus. After conferring with Rosenblatt over several days, on February 4, 2022, Anova sent a 20-Day Written Notice terminating the ISA, with the last day of service to be February 25, 2022. The contract termination had nothing to do with Student violating a school code of conduct, but instead reflected Anova's inability to continue serving Student's needs.

On February 8, 2022, a representative of the Marin County Self Education Local Plan Area, referred to as SELPA, emailed Parent requesting an IEP meeting be held on February 16, 2022, to discuss the contract termination and placement of Student at a new nonpublic school. On February 14, 2022, Rosenblatt emailed Parent and her attorney indicating that Student was not an expelled or disciplined. Rosenblatt indicated that under both the Master Contract and California law, either party (Anova or Miller Creek) can terminate the agreement on 20 days written notice. Rosenblatt indicated that to comply with Student's IEP placement at a nonpublic school, she had secured a space for him at another CDE certified nonpublic school identified as Irene M. Hunt School in San Anselmo, California. Parent rejected that placement, although she testified at hearing she had no "inherent objection" to the Hunt school.

A special education student's placement is that unique combination of facilities, personnel, location, or equipment necessary to provide instructional services to him. (Cal. Code Regs., tit. 5, § 3042(a).) The removal of a special education student from the student's placement for more than 10 consecutive school days constitutes a change of placement. (34 C.F.R. § 300.536(a)(i).)

When a district seeks to change a special education child's educational placement for more than 10 days as a result of a violation of a student code of conduct, the district must convene an IEP meeting to determine whether the child's violation was a manifestation of the child's disability. (20 U.S.C. § 1415(k); 34 C.F.R. § 300.530.) This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) A manifestation determination must be accomplished within 10 school days of the decision to change the student's placement. (*Ibid.*)

Conduct is a manifestation of the student's disability: (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) If the conduct in question was the direct result of the local education agency's failure to implement the IEP. (34 C.F.R. § 300.530(e)(1) & (2).) The manifestation determination analyzes the child's behavior as demonstrated across settings and across times. 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. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1).)

Pointing to the email correspondence between the Anova specialists, Student argued that his termination by Anova was, in effect, an expulsion due to his autistic behavior, thereby requiring a manifestation hearing or determination. However, the evidence did not support this contention. The Master Contract between Anova and Miller Creek provided that the agreement may be terminated with or without cause by either party and that, pursuant to California Education Code section 56366(a)(4), either party shall give 20-day written notice of the termination. Adler opined that Anova's decision to terminate the agreement was not related to Student's outbursts. Anova was more concerned that Student would not physically return to the program in February as promised, and that its substantive program was no longer meeting Student's needs due to his age and his virtual attendance. Student offered no credible evidence that contradicted Adler's opinions.

The facts in this case do not support Student's claim under Title 20 United States Code section 1415(k). Miller Creek was the local educational agency for Student's educational needs, and Miller Creek was responsible for ensuring that Student had a placement offer when the contract terminated, which the evidence established Miller Creek did. Neither Miller Creek nor Anova removed Student from his placement because of disciplinary reasons, which may have otherwise triggered the mandates of section 1415(k). Neither Miller Creek nor Anova expelled or suspended Student for disciplinary reasons.

Student was also not deprived of educational services during the 20-day notice period. As soon as Miller Creek received the termination notice, Miller Creek secured a spot for Student at the Hunt nonpublic school. This was communicated to Parent on February 14, 2022, which was within the 20-day period Anova was still providing services. Parent chose to reject that option and did not move forward with the proposed IEP meeting. Any delays in having Student return to a school placement were not caused by Anova's termination notice. As such, Miller Creek did not violate 20 USC § 1415(k).

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.

EXPEDITED ISSUE:

Miller Creek School District did not violate Title 20 of the United States Code, section 1415(k), when Student's enrollment at Anova Center for Education,

a nonpublic school, was terminated by correspondence from Anova Center for Education dated February 4, 2022.

Miller Creek prevailed on the Expedited Issue.

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.

/s/

Brian H. Krikorian

Administrative Law Judge

Office of Administrative Hearings