



Hayley Wood, Patricia Thomas, Donna Atherton, EdD, and Carrie Lippencott, OTR/L. The District was represented by Mr. Cohn-Lee. The District presented testimony from Dan Sterling, Leslie McKenna, Scott Reese, James Sanders, PhD, and Patrick Tomblin.

The evidentiary record closed on January 11, 2010. The hearing transcript was provided on January 12, 2010. Written closing arguments from both sides were received on the deadline of January 15, 2010. The deadline for issuance of the Expedited Final Order was January 26, 2010.

### **ISSUES**

- 1) Whether the District failed to complete a manifestation determination regarding Student's removal from the existing educational placement within the required 10 school day time period.
- 2) Whether the District erroneously concluded that the conduct for which Student was removed from the existing educational placement was not a manifestation of his/her disability;
- 3) Whether the District failed to provide Parents prior written notice to Parents; and
- 4) Whether the District's actions amounted to a denial of FAPE.

### **EVIDENTIARY RULINGS**

The District offered Exhibits D1 through D20. Exhibits D3 through D20 were admitted into evidence without objection. The District withdrew Exhibits D1 and D2.

The parents offered Exhibits S1 through S43. Exhibits S1 through S9, Exhibits S11 through S36, and Exhibits S38 through S43 were admitted into the record without objection. The District objected to Exhibit S10 as hearsay and objected to Exhibit S37 as not being best evidence. Those objections were overruled and Exhibits S10 and S37 were admitted into evidence.

### **FINDINGS OF FACT**

(1) Student has been a resident of the District since entering Kindergarten. Student attended Kindergarten and First Grade at the District's Palisades Elementary School. In October 2007, Parents placed Student in a private school, Willow Cottage. (Ex. S5 at 1; Ex. S14 at 5.)

(2) Student has been diagnosed with Sensory Processing Disorder (SPD). The District identified student as needing special services based on that diagnosis under the category of Other Health Impaired (OHI). (Test. of Sterling, Tr. at 185.) The District has never determined that Student qualifies for special services on the basis of an emotional disturbance. (Test. of Tomblin, Tr. at 1671.)

(3) As a result of his SPD, Student has difficulty with auditory and touch processing which is confusing and frustrating for him. He has a poor tolerance when there is significant

sensory input in his environment often resulting in emotional outbursts. (Ex. S5 at 2.) SPD is a diagnosis typically used in the field of occupational therapy, and not in the field of psychology. There is a split of authority as to whether SPD is a stand-alone diagnosis or is a constellation of symptoms associated with other diagnoses. (Test. of Sanders, Tr. at 982-985.) While there is agreement that Student has SPD, no one has developed a complete understanding of how it affects him. (Test. of Kopet, Tr. at 644-45.)

(4) On April 8, 2009, Student's IEP team met at the District's Bryant Elementary School to discuss the possibility of Student reentering the public school system. Parents attended the meeting, as did Dan Sterling (Bryant's Principal), Mark Snook (a general education teacher), Patrick Tomblin (LOSD's Director of Special Services), Tim Kopet (Student's psychologist), James Sanders (LOSD's clinical psychologist), and other District personnel. As a result of the meeting, the team developed an IEP and a Behavioral Support Plan (BSP.) (Ex. S14.)

(5) Student began attending Bryant on May 14, 2009. (Ex. D20 at 1.)

(6) On June 2, 2009, Student had a miniature plastic toy rifle at school. Another student told Student s/he was not allowed to bring the rifle to school. Student kicked the other student in the crotch. (Ex. D5 at 1.)

(7) Also on June 2, 2009, Student pulled a large weed out of the school garden area and threw it on the sidewalk. A teacher asked Student to pick it up. Student first hid, and then refused. When another teacher asked him to sit on a bench with other children, Student answered "Why don't you see that I don't want to do that crappy thing?" (Ex. D5 at 2; test. of Sterling, Tr. at 168.)

(8) On June 4, 2009, Student was in class with a paper bag on his/her head. Another student tapped the side of the bag to get Student's attention. Because the bag amplified the sound of the noise, Student thought the other student was slapping him. Student punched the boy in the head, said "what the hell?" and then kicked the student in the back. When Student's teacher, Mr. Snook, called Student over to discuss it, Student said "What the [ ] hell?" (Ex. D5 at 1.)

(9) On June 8, 2009, Student got angry near the end of a PE class because s/he believed that another student was not following the rules. Student pulled the child by the hair and punched him in the chest. (Ex. D5 at 1.)

(10) Right after PE, Student was waiting to use a drinking fountain when another student tried to cut in front of Student. Student pushed other student on his/her face, causing him to fall. (Ex. D5 at 1.)

(11) Student was sent to the school's office to speak with the Principal, Mr. Sterling. While waiting, a school secretary asked Student to sit in a chair. Student stated that s/he did not want to sit in the "[ ] chair." (Ex. D5 at 1.) S/he then threw pens and rulers backwards across the room, nearly striking a secretary. (*Id.*)

(12) On June 10, 2009, Student punched another student in the face when playing a game. The other student had placed his hand on Student's shoulder just before Student hit him. Student ran away and hid behind some bushes. Later in the day, Student punched a student in the cheek and then kicked him in the area of his/her upper thigh or crotch. Student then ran toward a

neighboring middle school. When another student asked what was wrong, Student slapped her across the face. (*Id.*)

(13) Mr. Sterling met with Student after every behavioral incident in June 2009 and also spoke with Student's Mother. Mr. Sterling did not think it was in Student's best interests to suspend him/her for the incidents in part because Student was new to the school. Mr. Sterling also believed that Student was making progress in trying to improve his/her behavior and to recognize signs that his/her SPD was causing him to be over-stressed. Mr. Sterling also believed that s/he was getting significant support from Mother in dealing with Student's behavior. (Test. of Sterling, Tr. at 71-75.)

(14) On September 18, 2009, Mother called Mr. Sterling and told him that Student did not want to come to school. Mr. Sterling then spoke on the phone with Student. Student told Mr. Sterling that s/he was afraid that something bad was going to happen because of a couple of events the previous evening. Student told Mr. Sterling that s/he believed that in the past poor behavioral incidents occurred in clusters of four. Mr. Sterling persuaded Student to come to school. (Test. of Sterling, Tr. at 82-84; Ex. D5 at 2.)

(15) On September 23, 2009, Student ripped up a worksheet in class. Student left the class and spoke with another teacher. A brief time later, Student returned to the classroom and was reminded to complete his/her work. Student called the teacher a "[ ] head." The teacher sent Student to the school office. As student left the classroom, s/he threw a large box of pencils on the ground. (Ex. D5 at 2.)

(16) On September 24, 2009, Student became upset with an educational assistant who was helping Student to organize his/her desk. Student became increasingly upset, and directed loud and abusive profanity at the assistant. Student then kicked the assistant in the abdomen. (Ex. D5 at 2.) The assistant had a hysterectomy over the summer and had to go to the hospital as a result of the kick. (Test. of Sterling, Tr. at 86.) After kicking the assistant, Student picked up a large container of pencils and threw it at the assistant and the teacher. Student then kicked a wagon, scattered his/her lunch on the floor, and ripped posters off of the wall. (Ex. D5 at 2; Test. of Sterling at 86-88.)

(17) As a result of the September 24, 2009 incident, the District suspended Student through October 7, 2009. (Ex. D5 at 3.) The school scheduled an IEP meeting for October 7, 2009 to review Student's IEP and placement. (Ex. D6 at 1.)

(18) Parents attended the October 7, 2009 IEP meeting. At the meeting, Mr. Tomblin stated that the disciplinary matter had been resolved, but that the incident caused the District to want to review the IEP. (Ex. D6 at 15.) The members of the team discussed a number of placement options. Ultimately, the District offered to place Student in its DELTA program.<sup>1</sup> (Ex. D6.) Although Parents did not agree to that placement, they agreed to visit the program for an intake meeting. (Test. of Tomblin, Tr. at 1600-1603.)

(19) The District told Parents that it would schedule a meeting at DELTA on Monday, October 12, 2009. Parents did not understand that a meeting at DELTA was scheduled for that day, but believed that the IEP team would be holding another placement meeting. (Ex. D7.)

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<sup>1</sup> DELTA stands for Daily Educational Learning Tools for Achievement and is self-contained class designed for students with behavioral problems. (Test. of Sanders at 965-969.)

(20) Student had been suspended a total of eight days as of October 7, 2009. Because the District was not ready to admit Student to the DELTA program as of October 8, 2009, Student was not scheduled to attend classes. Mr. Sterling viewed this as an extension of the suspension. However, because Mr. Sterling understood that there would be an intake meeting at DELTA on October 12, 2009, s/he did not believe that day was part of the suspension. (Test. of Sterling, Tr. at 225-227.) The District thus concluded that Student had been suspended for a total of nine days. (Ex. D20 at 1.)

(21) On October 12, 2009, Parents did not visit the DELTA program, but filed a request for a due process hearing.<sup>2</sup> As part of that request, the Parents invoked the “stay put” provisions of the IDEA and intended to have Student return to his/her regular education classroom. (Ex. S1; Test. of Mother at 1746.) On October 13, 2009, an attorney for the District e-mailed Mother and told her that the District would not allow student to return to the regular education classroom and would be seeking a temporary restraining order (TRO) to prevent such a return. (Ex. S28 at 6.)

(22) On October 15, 2009, the District filed a complaint with the Clackamas County Circuit Court seeking a TRO. The Parents filed a response. Later, on that same date, the Court denied the District’s request. (Ex. S11.)

(23) As a result of the denial of the TRO, the District made plans to allow Student to return to school. Dr. Sanders, the District’s clinical psychologist, assigned two staff members from the District’s high school DELTA program to work with Student each day. Mr. Tomblin, initially opposed using those staff members because he believed it was important to have them continue working in their current assignment. However, Dr. Sanders eventually convinced Mr. Tomblin to assign those staff members to Student. (Test. of Sanders, Tr. at 1033-34.)

(24) The staff members, Leslie McKenna and Scott Reese, met with Dr. Sanders to discuss Student’s SPD and his/her IEP. Ms. McKenna and Mr. Reese reviewed Student’s IEP and his/her behavioral support plan (BSP). (Test. of Sanders, Tr. at 992-996.) They were also instructed on how to administer Student’s “sensory diet.” A sensory diet is not related to food, but is a method for addressing individuals with sensory processing difficulties. The diet consists of specific types of sensory stimulation designed to lower stress levels associated with sensory processing problems. (Test. of Sanders, Tr. at 1062-63.)

(25) Student returned to Bryant Elementary in the regular education program on October 21, 2009. (Ex. D20 at 1.) Each day, s/he was accompanied by Ms. McKenna and Mr. Reese. Student developed a close relationship with Mr. Reese.

(26) On October 29, 2009, Student attended class at Bryant Elementary as scheduled. In the morning, Student received the results of a math test. Student was disappointed in the score which was well below his/her tested math ability. (Test. of McKenna, Tr. at 449-50; Test. of Kopet, Tr. at 552.) S/he also received a progress report showing a grade of D for his first quarter tests. (Ex. S28 at 3.) Student was also disappointed in this score. Student crumpled up the progress report and threw it on the ground. Ms. McKenna picked it up, straightened it, and placed it back on Student’s desk. A few minutes later, Student took a red rubber wrist band and used a pencil to fling it across the room. Ms. McKenna told Student that his/her behavior was inappropriate and told Student not to fling the wrist band. Student looked at Ms. McKenna and, at the same time, used the pencil to fling the wrist band. Mr. Reese then told Student that it was

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<sup>2</sup> The hearing on that request, Case No. DP 09-121, is scheduled to be heard on January 25 through 29, 2010.

time to go. Mr. Reese wanted to remove Student from the situation so that s/he could de-escalate or “chill.” Mr. Reese asked Student where s/he wanted to go. Student suggested going to the computer center in the library so that s/he could play a computer game. Mr. Reese and Ms. McKenna then took Student to the computer center where Student began playing a game called “Fun Brain.” Mr. Reese had never played the game before. Student showed Mr. Reese how the game was played. In addition, Student and Mr. Reese engaged in casual conversation while Student played the game. (Test. of McKenna, Tr. 449-54; test. of Reese, Tr. 777-81.)

(27) Shortly thereafter, Mr. Reese and Ms. McKenna took Student to his/her scheduled PE class. During the class, the students played a game called “Steal the Gold” using bean bags and hula hoops. Students worked in pairs with one student in each pair designated as a “guard.” At the end of the game, the PE teacher asked the students to stop and sit down. Student sat down with his/her partner. The PE teacher told the students that the guards were bring the hula hoops to the front of the class to put them away. Student was not a guard, but wanted to put the hula hoop away. Student and the other student exchanged a few words about the issue, Student then stood up, grabbed the hula hoop, and kicked the other student in the testicles. Ms. McKenna and Mr. Reese, who were standing approximately 15 feet from Student observed the incident. Mr. Reese immediately escorted Student from the room and walked with Student to Mr. Sterling’s office. Neither Mr. Reese nor Ms. McKenna noticed anything unusual about Student’s behavior prior to the incident. Notably, they did not see any physical antecedents that they had observed in the past when Student was becoming overwhelmed by SPD. (Test. of McKenna, Tr. 454-63; test. of Reese, Tr. 781-90.) On the way to the office, Student told Mr. Reese that it was too bad for the other student that Student was wearing his/her PE shoes. Mr. Reese thought that Student was being sarcastic. Student did not tell Mr. Reese that he felt any pain during the struggle with the hula hoop. (Test. of Reese, Tr. at 783-84, 803.)

(28) Student met with Mr. Sterling within a few minutes after the incident. Mr. Sterling noted that Student appeared very calm which was unlike prior behavioral problems in which Student became extremely agitated and used profanity. Also unlike prior behavioral incidents, Student was unwilling to apologize to the other student or to express remorse. Student did not admit to feeling pain during the incident. Student told Mr. Sterling “Nobody learns at this school. Nobody learns that I will kick them or hurt them or swear at them, and that makes it hard for me.” Mr. Sterling believed that Student was frustrated over the situation. (Test. of Sterling, Tr. at 121-38.)

(29) Student’s mother came to the school to pick Student up approximately four hours later. Student was still unwilling to apologize. The next day, Mother called Mr. Sterling and reported that Student was ready to apologize. Student got on the phone and told Mr. Sterling that he was “sort of” sorry. (Test. of Sterling, Tr. at 136-142.)

(30) As a result of the October 29, 2009 incident, the District suspended Student beginning on October 30, 2009. The District considered this the 10<sup>th</sup> cumulative day of suspension and scheduled meeting for Monday, November 2, 2009 to determine whether the October 29, 2009 incident was a manifestation of Student’s SPD. (Ex. D20 at 1.)

(31) Parents attended the November 2, 2009 Manifestation Determination Meeting along with Student’s treating psychologist, Timothy Kopet, Ph.D, and Student’s Occupational Therapist, Carrie Lippencott, and with their attorney, Kevin Brague. The District was represented at the meeting by Mr. Tomblin, Mr. Snook, Dr. Sanders, Ms. McKenna, Mr. Reese, Laef

Swanson, Student's PE teacher, and Pat Ginn, the District's Supported Education Specialist. After discussing the matter, all District representatives agreed that the October 29, 2009 incident was not a manifestation of his disability. Parents, Dr. Kopet and Ms. Lippencott disagreed. (Ex. D12.)

(32) At the end of the November 2, 2009 manifestation determination meeting, Mr. Tomblin asserted that the interim placement for Student would be Heron Creek. Prior to that placement, Mr. Tomblin stated that Student would be given one hour of tutoring. (Ex. D12 at 10.)

(33) Immediately following the manifestation determination meeting, Mr. Brague, acting on Parents' behalf, asked District representatives if they would be willing to enter into a settlement. Under the proposal the Parents would agree to have Student placed at Heron Creek (a program operated by the Clackamas Educational Service District). In exchange, the District agreed to withdraw its expedited hearing request in which the District sought to place Student in its DELTA program. The District also agreed not to expel Student given the anticipated placement at Heron Creek. (Test. of Tomblin, Tr. at 1632-37.) In a November 2, 2009 e-mail, the District's attorney wrote to Parents' attorney and summarized the agreement. The e-mail stated that the District would provide tutoring for Student pending placement at Heron Creek, which could take "a couple of weeks." Mother, who was copied on the e-mail, responded a short time later. Mother did not object to the content of the e-mail, but wanted clarification on whom to contact regarding tutoring. (Ex. D14.)

(34) Mother visited Heron Creek later in November 2009. Ultimately she decided that the school was not appropriate for Student and elected not to accept it as a placement. (Test. of Mother, Tr. at 1789-94.)

(35) Pursuant to its understanding of the terms of the proposed settlement, the District scheduled a tutor to come to Student's home on November 9, 10, and 11. Parent cancelled the tutoring sessions on November 9 and 10. (Ex. D15 at 2-3.) The tutor went to Student's home on the morning of November 11 and stayed for nearly two hours. Mother told the tutor that she had located another school for Student to attend and that tutor's services would no longer be needed. (Ex. D15 at 7.)

(36) The District held another IEP meeting on November 24, 2009 to adjust the IEP, if needed, for the Heron Creek placement. (Test. of Tomblin, Tr. at 1646.) Parents informed the District for the first time that they had elected to reject the proposed settlement and wanted the District to pay for private placement at Children's Hour Academy. (Test. of Tomblin, Tr. at 1637-1645.) On December 1, 2009, the District provided a Prior Written Notice stating that the District was willing to offer five hours of tutoring per week per the terms of the settlement agreement. (Ex. D17 at 10.)

(37) If the District had not believed that it had reached a settlement with Parents, it would, following its normal procedure, have scheduled an expulsion hearing within approximately one week after the manifestation determination meeting. (Test. of Tomblin, Tr. at 1632.) Under the District's normal disciplinary process, the school can recommend expulsion, but the decision to expel is made by a hearing officer following a hearing. (Test. of Atherton.) If after the expulsion hearing does the District meet with an IEP team to discuss an appropriate IAES. (Test. of Tomblin, Tr. at 1655-56.)

(38) After learning that the parents would not accept placement at Heron Creek, the District scheduled an expulsion hearing which was held on December 8, 2009. One week later, on December 15, 2009, the expulsion hearing officer issued a ruling expelling Student through December 18, 2009; three days later. (Ex. S29.) Because of the short period of time remaining on the expulsion, the District did not convene a meeting of the IEP team to determine an IAES. (Test. of Tomblin, Tr. at 1656.)

(39) Timothy Kopet, Ph.D., is an expert in the field of clinical psychology. (Tr. at 527.) For the last 11 years he has been working in private practice and works part time for the Portland Public School. He has been Student's treating psychologist since 2005. (Test. of Kopet, Tr. at 517.) Dr. Kopet has reviewed reports from evaluations from occupational therapists and other experts regarding Student's SPD. However, SPD is not a mental health condition and is not recognized by the DSM-IV. (Test. of Kopet, Tr. at 523-540.) Dr. Kopet believes that the October 29, 2009 incident was a direct result of Student's SPD. Dr. Kopet believes that Student became overwhelmed earlier in the day and was not effectively de-escalated. He also believes that Student's condition was worsened as a result of participating in PE, which he understands is typically noisy. (Test. of Kopet, Tr. at 543-49.) Dr. Kopet believes that Student's act of kicking the other student was impulsive and not within Student's control. He does not believe that Student's behavior was volitional or premeditated. (Test. of Kopet, Tr. at 648-49.) Dr. Kopet respects Dr. Sanders and, although he disagrees, believes that Dr. Sanders's opinion that the October 29, 2009 incident was not a direct result of SPD was reasonable. (Test. of Kopet, Tr. at 619.)

(40) James Sanders, Ph.D., is an expert in the areas of student disabilities, behaviors and mental health. (Tr. at 973.) For three years Dr. Sanders was the supervisor of an adolescent day center specializing in the treatment of adolescents. (Test. of Sander, Tr. at 955.) He has worked for the District for approximately six years where he serves as a placement coordinator. (Test. of Sanders, Tr. at 959.) Dr. Sanders has been involved in Student's education since 2007 when Student was still enrolled in a District school. On several occasions, he has personally observed Student in the school setting both in 2007 and in 2009. (Test. of Sanders, Tr. at 975-979.)

(41) Dr. Sanders believes that Student's SPD may have played some part in the incident at issue, but does not believe that it was a major variable that led up to the incident. (Test. of Sanders, Tr. at 1004) Dr. Sanders believes that there may have been some "residue" of the events that took place earlier in the day, but he did not believe that the residue overrode Student's ability to control his/her behavior. Had SPD played a major role, Dr. Sanders would have expected to see more indications of a "fight or flight" response, where Student was out of control. (Test. of Sanders, Tr. at 1010-1011 and 1054-55.) When the fight of flight response is triggered, it cause chemical changes to the body which take time to dissipate. A person experiencing such a reaction will typically exhibit physical signs such as shaking, swearing, or other indications that the person is not in control of his or her behavior. There were no such signs reported for Student on October 29, 2009 in contrast to past incidents where such markers were present. (Test. of Sanders, Tr. at 999-1001.)

(42) Carrie Lippencott is an expert in the field of occupational therapy, SPD, and in working with students with SPD. (Tr. at 1243.) She is one of only six occupational therapists in the State of Oregon who has received a certification in sensory integration. (Test. of Lippencott, Tr. at 1240-41.) She has been licensed as an occupational therapist since 1990 and has spent approximately the last 10 years specializing in treating children with sensory processing

difficulties. (Test. of Lippencott, Tr. at 1231, 1239.)

(43) Ms. Lippencott first evaluated Student on October 29, 2009, after s/he left school for the day. As part of that evaluation, Ms. Lippencott spoke to Student about the incident at school. But Ms. Lippencott did not focus on that event. (Test. of Lippencott, Tr. at 1309.) Ms. Lippencott attended the December 8, 2009 expulsion hearing and carefully observed Student. Ms. Lippencott believed that it was “very telling” that s/he demonstrated his/her memory of the precise location of the pain by pulling on the ring and pinky fingers of his/her right hand. Ms. Lippencott believed that Student’s memory of the pain was a “physical memory” and was not “something conscious.” (Test. of Lippencott, Tr. at 1309-10.) Ms. Lippencott is unsure if she knew that Student had experienced pain prior to learning about it at the expulsion hearing. (Test. of Lippencott, Tr. at 1370-71.)

(44) Ms. Lippencott believes that Student was experiencing stress on October 29, 2009 as a direct result of SPD. Student’s use of elastic bands (“Dyna-Bands”) as part of his/her sensory diet at the beginning of the day, in Ms. Lippencott’s view was well-intentioned but had the unfortunate consequence of aggravating Student’s SPD. Later in the day, Student’s stress was increased as a result of receiving a disappointing test score and progress report. Ms. Lippencott believes that the stress was either not alleviated, and may have been aggravated, by playing a computer game. Next, Student went to PE in which s/he played a game that involved a lot of movement and noise, further aggravating the negative effects of SPD. All of these events, in Ms. Lippencott’s view gradually increased the effects of Student’s SPD. Finally, Ms. Lippencott believed that Student’s fight of flight impulse was triggered when s/he experienced pain caused by pulling on the hula hoop. (Test. of Lippencott, Tr. at 1319-21.)

(45) Glen Zielinski, DC, DACNB, is a Board Certified chiropractor and chiropractic neurologist. Dr. Zielinski has been treating Student since 2008. (Test. of Zielinski, Tr. at 917-18.) Dr. Zielinski has diagnosed Student with sensory integration dysfunction caused by physiologic disorders in Student’s brain. As a result of that dysfunction, Student loses the ability to modulate his behavior during times of elevated stress or pain which triggers the fight of flight response. When that response is triggered, Student is unable to control his/her emotional responses. (Test. of Zielinski, Tr. at 919-925.) Dr. Zielinski believes that the incident on October 29, 2009 could have resulted from Student experiencing pain during the struggle with the hula hoop. Dr. Zielinski believes that it is “less plausible” that stress alone, in the absence of pain, would have triggered Student’s response. However, the amount of pain required would vary depending on the individual’s tolerance and the context in which the painful stimulus occurred. (Test. of Zielinski, Tr. at 927-930.) If Student did not experience pain during the incident, Dr. Zielinski believes that Student’s response could have resulted from being upset and having an emotional response to the other child. (Test. of Zielinski, Tr. at 947.)

## **CONCLUSIONS OF LAW**

- 1) The District completed a manifestation determination regarding the Student’s removal from an existing educational placement within the required 10 school day time period.
- 2) The District correctly concluded that the conduct for which Student was removed from the existing educational placement was not a manifestation of his/her disability;

- 3) The District provided appropriate Prior Written Notice to Parents; and
- 4) The District's actions did not amount to a denial of FAPE.

### **OPINION**

The burden of proof in an administrative hearing challenging an IEP is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005). The standard of proof applicable to an administrative hearing is preponderance of the evidence. *Cook v. Employment Div.* 47 Or App 437 (1980) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

### **Public Education Requirements under the IDEA**

The IDEA provides for a free appropriate public education (FAPE) for children with disabilities. The purpose of the IDEA is to ensure that all children with disabilities are provided a FAPE, emphasizing special education and related services designed to meet the unique needs of the child and to ensure the rights of children with disabilities and parents of those children are protected. 20 USC §1400(d)(1).

Student qualifies for and has been provided special education services by District under the IDEA. Student attended the District's Palisades Elementary School in Kindergarten and first grade. From that time until May 2009, Student was placed in a private home school setting. In May 2009, Student re-entered the public school system and began attending the District's Bryant Elementary School.

On November 2, 2009, Student's IEP team held a manifestation determination meeting with regard to an incident that took place on October 29, 2009. District members of the team concluded that the behavior was not a manifestation of Student's disability and expelled Student following its regular disciplinary procedures. Parents filed a request for Due Process Hearing to contest the District's actions. As stated in the Notice of Hearing, the issues raised by the hearing request are:

- 1) Whether the District failed to complete a manifestation determination regarding Student's removal from an existing educational placement within the required 10 school day time period.
- 2) Whether the District erroneously concluded that the conduct for which Student was removed from the existing educational placement was not a manifestation of his/her disability;
- 3) Whether the District failed to provide Prior Written Notice to Parents; and
- 4) Whether the District's actions amounted to a denial of FAPE.

Each of these contentions is addressed separately below:

### **1. Timeliness of Manifestation Determination**

Parents alleged that the manifestation meeting on November 2, 2009 was untimely because Student had previously been excluded from school for more than ten days based on a prior behavioral incident. By Parents' count, Student had been excluded from school for 17 school days, cumulatively, as of November 2, 2009. Parents have challenged the alleged failure to conduct a manifestation determination with regard to the September 24 incident in a separate hearing request. The hearing on that request is scheduled to be heard beginning on January 25, 2010. Thus, the issue of whether the District should have conducted a manifestation determination with regard to the September 24 incident is not within the scope of this expedited hearing.

However, Parents seemingly assert that the failure to conduct a manifestation determination with regard to the September 24 incident essentially made *any* future manifestation determination untimely. OAR 581-015-2415(3) provides:

Manifestation determination. Within 10 school days of *any decision* to change the placement of a child with a disability because of *a violation* of a code of student conduct, the school district must determine whether the child's behavior is a manifestation of the student's disability in accordance with OAR 581-015-2420.

(Emphasis added.)

The language of the rule requires a school district to conduct a manifestation determination based on each separate violation of code of student conduct when the District seeks to change the placement of the child. Thus, under the rule the District was required to conduct a manifestation determination once it decided to suspend Student based on the October 29 incident. This would have been true whether or not the District had previously conducted a manifestation determination on the prior incident. In addition, the rule requires the determination to be conducted within 10 school days of *any* decision to change a student's placement. Thus, although non-consecutive days of exclusion may be considered together when they are part of a pattern (*see* OAR 581-015-2415(1)(b)), the District was, nevertheless, obligated to conduct a new manifestation determination within 10 days of its October 29 decision to exclude Student. The District held a manifestation determination meeting on November 2, the second school day following the October 29 incident. That was well within the 10 day period contemplated by the rule.

It is possible that the District erred by failing to conduct a manifestation determination with regard to the September 24, 2009 incident. However, that is not an issue in the present case. The issue in this case is whether the District conducted a timely manifestation determination with regard to the October 29, 2009 incident. Because it conducted the determination within two school days of that incident, the determination was timely regardless of the alleged failure to conduct such a determination based on a previous incident.

## 2. Manifestation Determination

The District suspended, and ultimately expelled, Student for an incident on October 29, 2009 when Student kicked a classmate in the crotch during a dispute over a Hula Hoop. Suspension or expulsion of special education students is governed by 20 USC § 1415(k)(1)(E), 34 CFR §300.530, and OAR 581-015-2415. When a school district changes the placement of a student receiving special education services based on behavior that violates a student code of conduct, the District is required to conduct a review to ascertain whether the behavior was a manifestation of the student's disability. That review must be conducted within ten days of the decision to change the student's placement. If the IEP team, including the parents and necessary school personnel, determines that the behavior was a manifestation of the disability, then the school district must follow specific statutory criteria to address the incident; the district may not apply its normal disciplinary process. On the other hand, if the IEP team determines that the behavior is not a manifestation of the student's disability, then the school may apply the same disciplinary standards applicable to regular education students. 20 U.S.C. § 1415(k)(C); 34 C.F.R. § 300.530(c); OAR 581-015-2415(5)

For conduct to constitute a manifestation of a disability, the conduct in question must be caused by, or have a direct and substantial relationship to, the student's disability. 20 USC 1415(k)(E)(i). This legal standard, adopted as part of the 2004 amendments to IDEA, was intended to require a close relationship between the disability and the conduct at issue; an attenuated relationship is not sufficient. *See, e.g., Merced Union High School District*, 109 LRP 26949 (California SEA, May 4, 2009).

The legal standard applicable to a manifestation determination was summarized in *Okemos Public Schools*, 45 IDELR 115 (Michigan SEA, March 6, 2006) as follows:

With the recent changes to IDEA in 2004, the standard for determining whether a student's conduct is a manifestation of his or her disability has been simplified. The manifestation determination review IEPT must review all relevant information to determine: 1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or, 2) if the conduct in question was the direct result of the [District's] failure to implement the IEP (20 U.S.C. 1415(k)(1)(E)). As noted above, the latter inquiry is not being asserted here by the Parents. Accordingly, only the first inquiry need be addressed.

In promulgating this new standard, Congress expressed its clear intent to require that the behavior was a "direct result of the child's disability" in order to determine that it was a manifestation, stating that an "attenuated association, such as low self-esteem" is insufficient to deem the conduct a manifestation of the child's disability. H. R. Conf. Rep. No. 108-779, at p. 225 (2004).

As in *Okemos Public Schools*, in their due process hearing request, the Parents in this case did not assert that the conduct in question resulted from the District's failure to implement the IEP. Thus, the question is whether the Parents established that the conduct in question was a direct result of Student's disability.<sup>3</sup>

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<sup>3</sup> The Parents argued that the District's attorney provided an incorrect legal standard to members of the IEP team at the manifestation determination. I am not bound by any legal advice given at that meeting and am required to apply

In this case, Dr. Sanders, a clinical psychologist for the District, acknowledged that Student's SPD may have played *some* part in the incident at issue. However, he did not believe it was a major variable that led up to the incident. Rather, Dr. Sanders believed that there may have been some "residue" of the events that took place earlier in the day, but he did not believe that the residue overrode Student's ability to control his/her behavior. Such an attenuated relationship to the behavior in question does not meet the applicable legal standard.

Dr. Kopet, Student's treating psychologist, in contrast, believed that SPD was a direct and substantial cause of the incident. Specifically, Dr. Kopet believes that Student's behavior was not volitional or premeditated but resulted directly from his/her SPD. However, Dr. Kopet acknowledged that Dr. Sanders's conclusion was reasonable.

Parents also presented testimony from Student's Occupational Therapist, Carrie Lippencott, and his/her chiropractor, Dr. Zalienski, both of whom opined that the incident was directly related to SPD. First, Ms. Lippencott believed that activities throughout the day failed to reduce Student's stress level. Ms. Lippencott opined that the use of Dyna-Bands at the beginning of the day, while well-intentioned, had the unfortunate consequence of aggravating Student's SPD. Later in the day, Student's stress was further increased when s/he received a disappointing test score and progress report. Ms. Lippencott then believes that the stress was not effectively de-escalated because Student was taken to a computer lab to play a computer game. In Ms. Lippencott's view, this activity would not be expected to lower Student's stress. Immediately after the game, Student went to PE which required that s/he play a game that involved a lot of movement and noise, further aggravating the negative effects of SPD. Finally, Ms. Lippencott believed that Student's fight or flight impulse was triggered when s/he experienced pain caused by pulling on the hula hoop. Ms. Lippencott noted that Student, without being asked, held out his/her right hand and demonstrated precisely where it hurt: his/her right ring and pinky fingers. (P. 1310.) Ms. Lippencott believed that this demonstrated that Student had a physical memory of the pain. (1310.) According to Ms. Lippencott, Student experienced pain and kicked. (1321.) In her view, Student was not able to control his/her behavior as a result of his/her SPD.

However, Ms. Lippencott's assumption that Student had a physical memory of the pain is undercut by Student's own testimony. Ms. Lippencott noted that Student indicated that the pain was in his/her right ring and pinky fingers. Ms. Lippencott appeared to put significant stock in the idea that Student had a "physical," as opposed to a conscious, memory of where the pain was located. At the hearing, however, Student identified the pain as occurring in the index, middle and ring fingers, not in the pinky. (1470)

Similarly, Dr. Zalienski believed that pain played a significant role in the incident. Dr. Zalienski testified that in such circumstances, as a result of a physiological disorder in Student's brain, Student would be incapable of controlling his/her behavior, but would act impulsively. Thus, the sensation of pain would trigger an immediate fight of flight reflex which manifested itself with a kick. However, in the absence of pain, Dr. Zalienski believed that Student's response could have been simply an emotional response to Student's disagreement with the other child. (947)

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the applicable legal standards regardless of the legal opinions expressed at the meeting. Furthermore, I would note that Parents had two attorneys present at the manifestation determination meeting and could have corrected the advice had they disagreed.

Dr. Zalienski clarified that pain is inherently a subjective experience and that even mild stimulus could be perceived as painful by some individuals. However, Dr. Hoffman's report, prepared in late 2007, indicates that Student has a high pain tolerance. Nothing about the mild tugging suggests that Student, with a high pain tolerance, would have experienced the kind of triggering event described by Dr. Zalienski. It is also significant that Student did not mention any pain to Mr. Reese or Mr. Sterling immediately after the incident. Had pain been the triggering event, it is likely that Student would have mentioned that to explain his/her behavior. Student did not mention the pain until several hours later and only in response to a leading question from Mother.

Student's own testimony, and his/her statements to Mr. Sterling following the incident, suggests that Student's behavior may have been the result of an emotional response. Student testified that s/he was mad at the other student when s/he pulled hula hoop. S/he stated that his/her anger was primarily due to the pain s/he experience in his/her fingers. S/he also testified that s/he was still mad at the other student when s/he spoke with Mr. Sterling but "not as much." After the incident, Student expressed his/her frustration with other children at the school for not learning that s/he will hurt them if they make Student "mad." That statement, and his/her testimony at the hearing, is consistent with an emotional response to the situation, and not an autonomic response to painful stimuli suggested by Dr. Zalienski and Ms. Lippencott. Unlike past incidents, Student was unwilling to apologize or express remorse. Indeed, it was not until the following day that Student told Mr. Sterling that s/he was sorry, but in a very qualified way.

The opinions of both Dr. Zalienski and Ms. Lippencott depend, in large part, on an assumption that Student experienced pain while pulling the hula hoop. However, as explained above, that assumption was not borne out by evidence produced at the hearing.

While the testimony of Drs. Kopet and Zalienski, along with the testimony of Ms. Lippencott, provided a plausible explanation of the events of October 29, 2009, their opinions were heavily dependent upon an assumption that Student experienced pain. It is entirely possible that these opinions, and that assumption, are correct. But to meet their burden of proof, Parents had to establish, more likely than not, that the October 29 incident was a manifestation of Student's SPD; a possibility is not enough. The opinions of Dr. Sanders, Mr. Sterling, and Mr. Tomblin were at least as plausible, particularly given the lack of sufficient proof that Student experienced pain immediately prior to the event. Dr. Kopet acknowledged that Dr. Sanders's opinion was reasonable in this case. Dr. Zalienski conceded that Student's behavior was consistent with an emotional response, giving further support to the District's position.

Both Dr. Kopet and Dr. Sanders conceded that whether this event was a manifestation of Student's disability was a close call upon which reasonable minds could differ. The District was not required to accept the Parents' position merely because the evidence was close. At the hearing level, the Parents' had the burden to prove, by a preponderance of the evidence, that the behavior was a manifestation of Student's SPD. They did not meet that burden. Rather, a preponderance of the evidence established that Student's behavior on October 29, 2009 was part of an emotional outburst; s/he was angry because the other student wanted to take the hula hoop. Student's SPD was not directly and substantially related to the incident. Therefore, the District appropriately determined that the incident was not a manifestation of Student's disability.

### 3. Prior Written Notice

In their hearing request, filed November 30, 2009, Parents asserted that the District failed to provide a Prior Written Notice of the change in placement that occurred as of October 29, 2009. In their post-hearing brief, Parents re-cast the issue as whether the District failed to provide Prior Written Notice of a decision to change Student's placement to "parentally supervised one hour of tutoring per day." (Student's Closing Brief at 13.)

OAR 581-015-2310 provides, in relevant part:

(1) Prior written notice must be given to the parent of a child, and to the adult student after rights have transferred, within a reasonable period of time before a school district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(2) Prior written notice must be given after a decision is made and *a reasonable time before that decision is implemented.*

(Emphasis added.)

At the end of the November 2, 2009 manifestation determination meeting, Mr. Tomblin asserted that the interim placement for Student would be Heron Creek. Prior to that placement, Mr. Tomblin stated that Student would be given one hour of tutoring.

However, following the meeting, Parents' attorney, acting on Parents' behalf, entered into an agreement in principle, whereby the Parents would agree to have Student placed at Heron Creek. In exchange, the District agreed to withdraw its expedited hearing request in which the District sought to place Student in its DELTA program. The District also agreed not to expel Student given the anticipated placement at Heron Creek. In a November 2, 2009 e-mail, the District's attorney wrote to Parents' attorney and summarized the agreement. The e-mail stated that the District would provide tutoring for Student pending placement at Heron Creek, which could take "a couple of weeks." Mother, who was copied on the e-mail, responded a short time later. Mother did not object to the content of the e-mail, but wanted clarification on whom to contact regarding tutoring.

The District scheduled a tutor to come to Student's home on November 9, 10, and 11. Parent cancelled the tutoring sessions on November 9 and 10. The tutor went to Student's home on the morning of November 11 and stayed for nearly two hours. Mother told the tutor that she had located another school for Student to attend and that tutor's services would no longer be needed.

On November 24, 2009, Parents informed the District that it they had elected to reject the proposed settlement. On December 1, 2009, the District provided a Prior Written Notice stating that the District was willing to offer five hours of tutoring per week per the terms of the settlement agreement. Parents never accepted the offer of tutoring.

The District did not provide Prior Written Notice of a change in placement until nearly one month after the manifestation determination meeting. However, OAR 581-015-2310(2) does

not provide a specific time-frame for such a notice. Rather, the rule requires such notice to be given a reasonable time before the change in placement is implemented. In this case, the District actually provided tutoring as part of a proposed settlement agreement. At the time it provided the tutoring, the District had no reason to believe that Parents would eventually reject the proposed agreement. Once the District learned that the Parents had rejected the settlement, it provided Prior Written Notice one week later. Furthermore, because Parents rejected the offer of tutoring, the change in placement was never actually implemented. Given the unusual circumstances of this case, the District provided the required written notice within a reasonable time.

#### **4. Denial of FAPE**

In their hearing request, Parents asserted that the District failed to provide FAPE because “the District’s only offer of services since November 3, 2009 is one hour of tutoring per day.” The parents alleged that such tutoring would not provide Student with an opportunity to work on his/her IEP goals or to participate in other academic activities.<sup>4</sup>

OAR 581-015-2415(5) sets forth a school district’s obligations when it determines that a violation of a code of student conduct was not a manifestation of a disability:

No manifestation. If the determination under subsection (3) is that the child's behavior is not a manifestation of the child's disability:

(a) The school district may proceed with disciplinary action applicable to children without disabilities under section (1) of this rule, in the same manner and for the same duration in which the procedures would be applied to children without disabilities.

(b) If the school district takes such action applicable to all children, the school district must:

(A) On the date on which the decision is made to remove the student under subsection (5), notify the parents of that decision and provide the parents with notice of procedural safeguards under OAR 581-015-2315.

(B) Provide services to the student in an interim alternative educational setting, determined by the IEP team, in accordance with OAR 581-015-2435; and

(C) Provide, as appropriate, a functional behavioral assessment, and behavior intervention services and modifications that are designed to address the behavior violation so that it does not recur.

(6) Placement pending due process hearing. If a parent requests a due process hearing because of a disagreement with the manifestation determination or any decision about placement related to the disciplinary removal in section (1) of this

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<sup>4</sup> In their post-hearing brief, Parents also assert that the denial of FAPE occurred as a result of the District’s suspension of Student following the September 24, 2009 incident. As explained above, the District’s actions with regard to the September 24, 2009 incident are not within the scope of this expedited hearing.

rule, the child remains in the interim alternative educational setting pending the decision of the administrative law judge under OAR 581-015-2445, or until the end of the disciplinary removal under subsection (1), whichever occurs first, unless the parent and school district agree otherwise.

Consistent with the above rule, the District proceeded forward with the expulsion process which is applicable to all children in the District. That process was delayed, however, as a result of the proposed settlement agreement. The proposed settlement, which was implemented in part, was agreed to in principle on November 2, 2009 following the manifestation determination meeting. Significantly, as part of the proposed settlement, the District offered to place Student at Heron Creek. That proposal was memorialized in an e-mail sent to Mother and Parents' attorney the same day as the manifestation determination meeting. Thus, Parents' allegation that tutoring was the "only" offer of services is incorrect.

The District's normal procedure is first to proceed with expulsion which requires a hearing. Only after the expulsion hearing does the District meet with an IEP team to discuss an appropriate IAES. Had the parties not agreed to settlement in principle, an expulsion hearing would have been scheduled "within the next week or so." As part of the proposed settlement agreement, the District did not schedule an expulsion hearing and the parties worked together towards an agreed upon placement at Heron Creek.

After learning that the parents would not accept placement at Heron Creek, the District moved forward with the expulsion process. That resulted in a hearing on December 8, 2009. One week later, on December 15, 2009, the expulsion hearings officer issued a ruling expelling Student through December 18, 2009; three days later. Because of the short period of time remaining on the expulsion, the District did not convene a meeting of the IEP team to determine an IAES.

As correctly noted by the District, OAR 581-015-2415(5)(b) requires the District to offer an IAES, as determined by the IEP team, *if* the District takes disciplinary action applicable to all students. Because of the delay caused by the proposed settlement, the District did not take such disciplinary action until December 15, 2009, more than a month after the manifestation determination meeting. Consequently, the District's obligation to offer an IAES was also delayed until the expulsion was accomplished. Given the short time between the expulsion decision and the end of the expulsion period, it was not reasonably practical for the IEP team to meet to consider an appropriate IAES.

Under the unusual circumstances of this case, Parents did not demonstrate that the failure to provide services to Student pending the outcome of the expulsion hearing did not constitute a denial of FAPE. Unfortunately, the Student was not provided the advantages of FAPE during the months of November and December. The only services actually provided by the District during this period of time was a single tutoring session on November 11, 2009. However, the delay in getting Student services through the District was caused by the failure of the parties to finalize an earlier tentative agreement that would have placed Student at Heron Creek. While Parents may have had a legitimate reason for opting out of that placement, they may not rely upon the delay in securing an appropriate placement to assert a denial of FAPE.

For the reasons explained above, I conclude that the incident on October 29, 2009 that led to Student's expulsion was not a manifestation of his/her disability. I also conclude that the

District conducted a manifestation determination regarding the incident within the time allowed by law and provided Parents with an adequate Prior Written Notice. Finally, I conclude that the Parents failed to establish that the District's actions constituted a denial of FAPE.

In their hearing request, Parents sought reimbursement for costs incurred for tuition and occupational therapy. Parents also requested that the District be required to place Student at a private school, Children's Hour Academy. Because Parents failed to demonstrate the District violated its legal obligations, the requested relief must be denied.

### **ORDER**

Parents' request for relief, pursuant to the request for due process hearing dated November 30, 2009, is **DENIED**.

Dated this 26 day of January, 2010

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John Mann  
Senior Administrative Law Judge  
Office of Administrative Hearings

### **APPEAL PROCEDURE**

**NOTICE TO ALL PARTIES:** If you are dissatisfied with this Order you may, within 90 days after the mailing date on this Order, commence a nonjury civil action in any state court of competent jurisdiction, ORS 343.175, or in the United States District Court, 20 U.S.C. § 1415(i)(2). Failure to request review within the time allowed will result in **LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER**.

**ENTERED** at Salem, Oregon this 26th day of January, 2010 with copies mailed to:

Jan Burgoyne, Oregon Department of Education, Public Services Building, 255 Capitol Street NE, Salem, OR 97310-0203.