

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LIBERTY UNION HIGH SCHOOL DISTRICT.

OAH Case No. 2017040078

EXPEDITED DECISION

Student filed a due process hearing request (complaint) which contained both expedited and non-expedited issues with the Office of Administrative Hearings, State of California, on February 15, 2017, naming the Liberty Union High School District. Administrative Law Judge Charles Marson heard the expedited portion of this matter in Brentwood, California, on May 2 and 3, 2017.

Betsy Brazy, Attorney at Law, represented Student. Mother was present throughout the hearing. Student did not attend.

David R. Mishook, Attorney at Law, represented Liberty. John Saylor, Liberty's Director of Student Services, attended the hearing on its behalf. Dr. Tony Shah, Liberty's Assistant Superintendent, also attended most of the hearing.

On May 3, 2017, the record was closed and the matter was submitted. The parties filed written closing arguments on May 10 and 11, 2017.

ISSUE

Did Liberty wrongfully determine that Student's conduct on January 19, 2017, for which he was suspended and expelled, was:

- a. Not caused by, or have a direct and substantial relationship to, his disabilities; or
- b. Not a direct result of Liberty's failure to implement his March 2, 2016 individualized education program?¹

SUMMARY OF DECISION

Student contends that Liberty's manifestation determination on February 2, 2017, was incorrect because his assault on another student on January 19, 2017, had a direct and substantial relationship to one of his disabilities, Attention Deficit Hyperactivity Disorder, which leads him to anger, impulsiveness, frustration, and acting out. He also contends that the assault occurred because his behavior intervention plan was not implemented.

Liberty contends that the manifestation determination was correct because Student's assault was premeditated and caused by tensions following personal conflicts between the students involved, not by Student's disabilities, which have not in the past led him to aggressive violence.

¹ The issue has been slightly reworded for clarity. The ALJ has authority to rephrase a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443; *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090; but see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 852 F.3d 840, 847, fn. 2 [dictum].)

This Decision holds that there was no direct or substantial relationship between the assault and Student's ADHD because it was neither impulsive nor foreshadowed by his previous behavior. It also holds that the assault, which occurred outside of class, was not caused by any failure to implement Student's behavior intervention plan, which applied only to his behavior in class with adults.

FACTUAL FINDINGS

JURISDICTION

1. Student is a seventeen-year-old boy who lives with his Mother within Liberty's boundaries and receives special education and related services in the category of specific learning disability because of an auditory processing deficit. He has also been diagnosed as having ADHD. He is bright, social, physically healthy, charismatic and a leader among his peers, but he has trouble paying attention and is frequently oppositional and defiant to adults in class. In the last two school years his previously good grades have declined, and, due to frequent absences, tardies and cutting classes, he has been failing most of his courses.

2. In January 2017, Student was in general education classes in the eleventh grade at Liberty's Heritage High School. On January 19, 2017, he engaged in a physical fight with another student for which he was suspended, recommended for expulsion, and moved to an alternative educational setting. At a manifestation determination meeting on February 2, 2017, Liberty decided that his conduct on January 19 was not caused by, and did not have a direct and substantial relationship to his disabilities, nor was it a direct result of Liberty's failure to implement his IEP. On April 12, 2017, Liberty's school board expelled Student but suspended his expulsion on various conditions.

THE FIGHT ON JANUARY 19, 2017

3. The fight had its origins in a previous incident. On or about January 10, 2017, student Jane Doe (a pseudonym) went to Student's home, accosted Student's younger sister about her interest in Doe's boyfriend John Roe (also a pseudonym), and started an argument, and perhaps a physical fight. Student defended his sister and either hit Doe in the head or slapped her in the process. Student then called Roe and asked whether the two had "a problem," but Roe told him they did not. Later in the week Student heard a rumor Roe was talking about wanting to fight him, so he called Roe again to ask if the rumor was true, and Roe said "No."

4. About midday on January 19, 2017, Student was walking across an open area of the campus in front of the Principal's office, carrying a backpack and wearing headphones. He was suffering from sinus problems, had been excused from class, and was on his way to see the school nurse. Roe approached Student from behind and tapped him on the shoulder. Student turned around, and insults were exchanged. According to Student, Roe put a protective mouthpiece in his mouth to prepare for a fight, but started gagging on it and fell to the ground. According to a Liberty staff member who later interviewed Roe, Roe said he fell because he was ill from anxiety about the impending fight. In any event, there was no evidence that either student hit the other at that time.

5. Alerted by his secretary, Principal Larry Oshodi looked out the window, saw Student in an aggressive posture, and went out to investigate. He saw student Roe on the ground several feet from Student, in distress. Mr. Oshodi took Student into his office, where Student slammed his backpack down angrily. Mr. Oshodi told Student to stay in his office and went back outside to deal with Roe, making sure the door to his office was closed.

6. Mr. Oshodi's secretary had called campus security, and a security officer arrived in a golf cart. Mr. Oshodi and the officer helped student Roe into the golf cart as two other security officers arrived. But Student, who was looking through the window of the principal's office, perceived that Roe was insulting him again with facial expressions, gestures or words. Student emerged angrily from the principal's office and strode aggressively toward Roe, cursing, making threats, ignoring orders to stop, saying "[D]on't disrespect me like that again," and appearing intent on attacking Roe. Student Roe responded in kind, stepped off the golf cart, and swung the first punch. A melee ensued during which Student and student Roe hit each other while the four adults tried to separate them. At some point Student's hoodie was pulled down over his face and he could not see, but he kept swinging wildly and in the process inadvertently hit a security guard several times in the head. Student received several blows from student Roe, but kept fighting so vigorously that it took the four adults two to four minutes to separate the boys. As he was taken into an office, Student yelled: "This isn't over."

7. About an hour later, Mr. Oshodi asked Student to explain the incident. Student declined, but did say something like "He's not going to do that to me." Mr. Oshodi tried to calm him down, but Student said "I'm going to do what I'm going to do," and walked off.

THE SUSPENSION AND INVESTIGATION

8. Liberty suspended Student on the day of the assault and issued a suspension notice that charged him with two violations of the Education Code: "Caused/attempted/ threatened physical injury to another person". (§ 48900, subd. (a)(1)); and "Assault or battery, as defined by Sections 240 and 242 of the Penal Code upon any school employee" (§ 48915, subd. (a)(1)(E).) Assistant Principal Heather Harper

began an investigation.² Ms. Harper knew Student well, having counseled him several times after behavioral incidents in class.

9. Ms. Harper gathered statements from the participants in the fight and witnesses to it.³ Student would not talk to her immediately, but furnished a written statement in a day or two. School psychologist Anthony Meehlis brought together the witness accounts, Student's IEPs, his disciplinary and other records, and statements from his teachers in a written report that was distributed to those who attended the manifestation determination meeting.

THE MANIFESTATION DETERMINATION

10. On February 2, 2017, Liberty held a manifestation determination meeting attended by several Liberty staff and by Mother, Student, and Student's attorney. The team considered both the Education Code charges in the suspension notice. The recording of the meeting shows that the team extensively discussed whether there was anything in Student's previous records to suggest that his disabilities, including ADHD,⁴

² Ms. Harper has a master's degree in education and single subject and administrative credentials. She has taught in three other school districts. Ms. Harper came to Liberty in 2009 to teach biology, and was promoted to Assistant Principal. She has extensive experience in special education and has received a number of recognitions and awards.

³ These statements were introduced in evidence. They were hearsay but explained and supplemented Mr. Oshodi's direct testimony. (See Cal. Code Regs., tit. 5, § 3082, subd. (b).)

⁴ Liberty knew Student had an outside diagnosis of ADHD, but had nothing in its files explaining the potential impact of that condition on Student's education or

had caused conduct similar to his conduct on January 19th. Student's attorney argued that his behavior on January 19th was a consequence of lack of impulse control, foreshadowed by previous incidents, and also perhaps failure to understand instructions. She also argued that Liberty had failed to implement the behavior intervention plan in Student's IEP. Student spoke up briefly four times, but said nothing about the cause of the fight.

11. The Liberty members of the manifestation determination team unanimously decided that Student's disabilities did not have a direct or substantial relationship to his conduct on January 19th, and therefore that his conduct was not a manifestation of his disabilities. They also found that Student's behavior on January 19th was not caused by any failure to implement the behavior intervention plan in his IEP. They memorialized these decisions in a written finding given to Mother the same day. After the meeting, expulsion proceedings were continued, and Student was transferred to a different school.

12. Two weeks after the manifestation determination meeting, Liberty amended the suspension notice to eliminate the charge of striking a school employee, because Ms. Harper had decided at the end of her investigation (but before the manifestation determination meeting) that Student struck the employee only inadvertently. Liberty did not explain at hearing why it waited until well after the manifestation determination to eliminate the second charge.

13. Student's triennial review was due in March 2017. On February 6, 2017, Liberty offered to finish the triennial assessments "and reconvene the manifestation

behavior. Student's representatives did not furnish any such information at the meeting. However, the parties appear to agree that for the purpose of this hearing ADHD ought to be considered as one of Student's disabilities, so the plural "disabilities" is used here.

determination to consider the result and any potential contribution of any new findings to student's behaviors" if Student would waive the timelines for the upcoming expulsion process to allow time for that reconsideration. Student declined to waive the timeline and declined the offer.

STUDENT'S PREVIOUS BEHAVIORS AS PREDICTORS

14. Student's school records and the testimony at hearing both show that Student has long had difficulties paying attention and controlling his tendency to argue with adults in class. In high school he has frequently interrupted classes by blurting out inappropriate remarks, interrupting others, socializing with other students, and arguing with adults. His most consistent difficulty has been his oppositional attitude. He has refused to follow instructions, challenged policies, and attempted to rally other students against teachers (particularly in their policy of forbidding use of cell phones in class). He responds negatively to any criticism in front of his peers and frequently escalates his verbal behavior when that occurs, although he does not threaten or engage in violence. The consensus among his teachers and case manager is that he does this to impress his peers and bring attention to himself.

15. Student's arguments in class have frequently been accompanied by frustration and anger, and it takes him several minutes to calm down after such an argument. In May 2016 a behavior intervention plan was added to his IEP that emphasizes allowing Student to leave the class briefly when having trouble refraining from arguments, and counseling him in private rather than reprimanding him in front of his peers. The plan set up a "break card" system in which Student could show a card and leave class briefly, and seek counseling if he desired. The plan was directed entirely to in-class verbal behavior and arguments with adults. It does not contain any provision concerning Student's conduct out of class or with peers. The plan has sometimes been successful and sometimes not.

16. Student's records and Mother's testimony support the conclusion that he has difficulty controlling his verbal impulses in class and is quick to anger. He is sometimes slow to understand instructions. He is frequently off task. However, nothing in his previous behavior indicates any tendency toward physical assault. In two and a half years in high school, Student's disciplinary history shows only two incidents arguably involving violence. In the first, his disciplinary log states that he was suspended for three days in November 2015 for a "fight" before school. Mother testified that the fight was between two students who were late for school, and that Student did not start it. Other than that, there was no evidence from which any conclusion about the November 2015 incident can be drawn. Student was also disciplined once for throwing some pencils at a peer during a class. There was no evidence that either event was related to Student's disabilities; Mother's view that Student did not start the fight suggests that the fight had other causes. These events do not constitute a pattern of assaultive violence that would have illustrated the effects of Student's disabilities or made his conduct on January 19 foreseeable.

SPECIFIC LEARNING DISORDER / AUDITORY PROCESSING DELAY

17. Student's attorney argued at the manifestation determination meeting that it was possible that Student did not hear the principal's order to remain in his office, to return to his office, or to cease hitting student Roe, or was slow to process these orders, due to his auditory processing disorder. However, there was no evidence at hearing that this was the case, and Student no longer pursues that argument.

ATTENTION DEFICIT HYPERACTIVITY DISORDER

18. Student's only witnesses at hearing were Mother, several Liberty staff members, and Dr. Jaime Garcia, a well-qualified pediatrician who has monitored

Student's ADHD medication Vyvanse, since 2012.⁵ Dr. Garcia sees Student every month for that purpose, or every other month if Student has not had recent problems with the dosage or the medicine.

19. Dr. Garcia confirmed that Student has ADHD/ADD, which implies inattentiveness, distractibility, and impulsivity. He takes Vyvanse primarily for his attentiveness to his academics and to curb any of the impulsivity he might have as a result of his ADHD. The goals of administering it are to balance his brain biochemistry, bring his concentration closer to the norm for his age group, and help him control his impulsivity. The medicine succeeds in those goals, but not always.

20. On January 18, 2017, the day before the fight, Dr. Garcia saw Student for medication monitoring. He also treated Student for sinus infection and coughing that affected him that day. Dr. Garcia testified that his treatment of those conditions would not lessen the effect of Vyvanse; generally sinus infection, coughing, and treatment for those conditions might cause sluggishness or lethargy instead.

21. Dr. Garcia did not address Student's conduct on January 19th. He was not asked for, and did not state, an opinion on the possible relationship of Student's ADHD to the disciplinary incident. Nothing in his testimony suggested he was aware of the incident.

22. Dr. James Bylund, a well-qualified and experienced school psychologist,⁶ testified about the effect of ADHD on Student's behavior generally. Dr. Bylund

⁵ Dr. Garcia is a 1993 graduate of the University of Southern California Medical School. He spent three years as a general pediatric intern and resident at Children's Hospital in Oakland, and was invited back for a fourth year to be its chief pediatric resident. Dr. Garcia has extensive experience treating children who have ADHD.

conducted a psychoeducational assessment of Student in February 2017, about a month after the fight, as part of Liberty's preparation for Student's triennial review in March. He met with Student on two different days and administered to him a wide variety of standardized tests and other measures such as rating scales. He was unable to observe Student in class because Student was suspended, but he reviewed Student's health and developmental history and his educational records, interviewed Parents, collected information from teachers, and reviewed previous assessments. He also reviewed Student' academic and disciplinary records.

23. From his assessment, Dr. Bylund concluded that Student may no longer qualify for special education due to an auditory processing disorder, but does qualify in the category of other health impaired due to his ADHD. He also concluded that Student's oppositional and defiant behaviors in class function as a way of bringing attention to himself and obtaining positive reinforcement from his peers.

24. Dr. Bylund established that Student displays both the inattentive and attentive forms of ADHD. The former leads him to have difficulty attending to details, sustaining attention, appearing not to listen, and completing tasks. The latter leads

⁶ Dr. Bylund has a doctorate in educational psychology from Alliant International University and is both a credentialed school psychologist and a state-licensed psychologist. He owns and directs Bylund Neuro-Educational Services, which provides evaluation and consultation to parents and school districts about psychological disorders in children. Dr. Bylund has taught widely and published numerous papers in his field. He also has experience as a program specialist and special education administrator. Dr. Bylund has conducted many assessments of students who are or may be disabled.

Student to have difficulty remaining still or seated in class, to interrupt others, and to talk excessively.

25. He explained that Student also displays characteristics that are not core characteristics of ADHD, although many young people with ADHD also display them. These characteristics inhibit Student's emotional regulation and include a short temper, a tendency to argue with authority figures, and a tendency not to comply with something required of him. There may be many variables leading to these characteristics other than ADHD, and many teenage boys are oppositional without having ADHD. Student's ADHD does not define him.

26. Dr. Bylund stressed that a disability such as ADHD would be expected to manifest across environments and over time; there are no six-hour disabilities. If Student's poor impulse control led to physical aggression, Dr. Bylund would expect to see it in his records over time and across settings such as school, home, and the outside community. There would be a consistent pattern of it. Dr. Byland did not find such a pattern in Student's records. Student did not present any evidence to the contrary.

27. He also observed that Student's typical oppositional behavior is not impulsive, such as the repeated incidences in his records of refusing to take his hat off or surrender his cell phone.

28. Liberty also presented four witnesses who spoke directly to the relationship between Student's conduct on January 19th and his disabilities. Anthony Meehlis is an experienced school psychologist employed by Liberty at Heritage.⁷ He

⁷ Mr. Meehlis has a master's degree in school psychology. He was a special education teacher from 1996 until he received his school psychology credential in 2002. Mr. Meehlis has worked in that capacity for three school districts and the Los Angeles County Office of Education. He has completed more than 1000 assessments.

attended the manifestation determination meeting after assembling and writing a report on Student's school history for the meeting. He opined at hearing that there was no relationship between Student's conduct on January 19th and his disabilities. Student did have a record of impulsivity, which is acting without thinking, but his qualifying disability was specific learning disorder occasioned by an auditory processing problem. Anger is not a disability and can occur with or without a disability. The manifestation determination team accepted that Student had a diagnosis of ADHD but did not think the fight on January 19th was foreshadowed by or consistent with his previous behaviors.

29. Patricia Wright, a teacher with extensive special education experience,⁸ has been Student's teacher in his tutorial support class, which is akin to a resource room. She is also Student's case manager. Her experience with Student has led her to conclude that his behavioral difficulties occur in the classroom and involve confrontations with adults. For example, last September he was disciplined for disobedience for refusing to surrender his cell phone to a teacher. The behavior support plan was added to his IEP in March 2016 was intended to address his behavior in class with adults. Ms. Wright has counseled Student privately after incidents in which he left the classroom in anger or frustration, as the plan permits, and went outside briefly to cool down. That usually takes him about five minutes, or sometimes longer. In Ms. Wright's experiences after the

⁸ Ms. Wright received a master's degree in special education from the University of the Pacific in 1992 and has multi-subject, learning handicapped and special education credentials. She has taught in several school districts and spent 17 years teaching a special day class for the Castro Valley Unified School District. She has also taught at the nonprofit Spectrum Center, where she encountered many children with serious emotional and behavioral difficulties.

behavior plan was adopted, its application was usually successful in calming student and allowing him to return to class.

30. Ms. Wright testified that in her extensive experience with children who are impulsive, they make a quick uncalculated decision to hurt somebody and afterward are unable to explain what they did or should have done. Student's confrontations in the classroom are not impulsive; they are progressive. She pointed out that his oppositional behavior occurs only in the classrooms of teachers he does not like or respect; in the classes of teachers he likes, that behavior does not occur.

31. Ms. Wright attended the manifestation determination meeting and remembered that the IEP team did not dispute Student's diagnosis of ADHD; instead, its possible effect on Student's conduct was discussed. But she concluded at the meeting that his previous behaviors at school were not in any way predictive of his behavior on January 19th, which was not the sort of behavior addressed by his behavior intervention plan. Ms. Wright concluded at the meeting that Student's behavior on January 19th was not the product of his disabilities.

32. Assistant Principal Harper has been a counselor to Student in his 4-person Small Learning Community, and has counseled him after several classroom incidents. She explained that his behavior intervention plan discourages staff from criticizing him in front of his peers because that usually causes him to escalate. Its overall purposes are to enable him to return to class so he does not miss instruction, and to assist him when he has difficulty with classroom rules. In her experience, Ms. Harper does not view Student as acting impulsively; his oppositional behavior usually involved being instructed to do something he does not want to do, like take off his hat or surrender his cell phone. He has not been regularly assaultive on campus and his escalations of verbal conflict have not led to violence.

33. Ms. Harper remembers discussing the possible effect of Student's ADHD on his behavior on January 19th at the manifestation determination meeting. She concluded from the discussion that there was no direct relationship between that behavior and his ADHD.

34. John Saylor, Liberty's Director of Special Services,⁹ chaired the manifestation determination meeting. He confirmed at hearing that the team discussed the possible effect of Student's ADHD on his behavior, and also discussed whether his behavior had been previously seen at school or in other places. Like the other Liberty members of the team, he did not see any connection between Student's disabilities and previous behaviors and his conduct on January 19th.

35. The testimony of Dr. Bylund, Mr. Meehlis, Ms. Wright, Ms. Harper, and Mr. Saylor was convincing. Each knew the details of Student's disabilities and his conduct, testified with clarity, testified consistently with contemporary records, and was not undermined by cross-examination. Collectively their testimony was credible and is given substantial weight here.

36. Mother was the only witness at hearing who saw a connection between Student's ADHD and his disabilities. She testified that he suffers from sensory overload, has a diminished ability to regulate his behavior, and gets upset quickly. He would regard a tap on the shoulder more like a punch.

37. Mother testified she disagreed with the manifestation determination because Student has "an impulse issue and an auditory issue" and that the principal did

⁹ Mr. Saylor has a master's degree in psychology and pupil personnel services and administrative credentials. He is also credentialed as a school psychologist, and worked in that capacity for Liberty from 2000 to 2005, when he was promoted to his present position.

not give him appropriate time to calm himself down before he reacted quickly to the boy on the ground. She believes that Student's behavior implementation plan was not properly followed on January 19th because district personnel were aware of his past impulse and behavior issues and that day "it could have been approached differently." Mother's information about the incident came entirely from Student. No other witness supported her views.

STUDENT'S PERSPECTIVE

38. In his written statement submitted a day or two after the fight, Student attributed the event to the animosity between student Roe and himself. He accidentally hit the campus security guard and freely apologized for that, but he did not express any remorse for hitting Roe, or for the incident itself. Nor did he mention anything about the possible effect of his disabilities on the event.

39. Student attended the manifestation determination meeting and for the most part listened quietly while the others discussed whether he could have heard instructions to stay in the principal's office and stop fighting, and whether impulsiveness related to his ADHD had played a role in the events. He spoke up briefly four times about his dislike of the card system that was part of his behavior plan, his tardies, and his accommodations. His only mention of the fight was a single statement about being four feet away from Roe and not sitting down. He said nothing about the effect of his disabilities on his conduct, did not claim he could not hear instructions, and did not claim he acted on impulse.

CONCLUSIONS OF LAW

INTRODUCTION: LEGAL FRAMEWORK FOR STUDENT DISCIPLINE UNDER THE IDEA¹⁰

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.)(2006).¹¹ The main purposes of the IDEA are: (1) to ensure that 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 employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. Title 20 United States Code section 1415(k) and title 34 Code of Federal Regulations, part 300.530 et seq., govern the discipline of special education students. (Ed. Code, § 48915.5.) A student receiving special education services may be suspended or expelled from school as provided by federal law. (Ed. Code, § 48915.5, subd. (a).) If a special education student violates a code of student conduct, the local educational agency may remove the student from his 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

¹⁰ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹¹ All references to the Federal Regulations are to the 2006 version unless otherwise specified.

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

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

4. The party requesting a due process hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii).)

ISSUE: WAS LIBERTY'S MANIFESTATION DETERMINATION CORRECT?

Relationship of Student's Conduct to His Disabilities

5. Student contends that his fight with John Roe on January 19, 2017, was caused by or directly related to his ADHD. Liberty contends that his conduct was unrelated to his disability because he had no history of such outbreaks; his conduct was not impulsive; and that the sustained nature of the act, in the context of his ongoing

dispute with John Roe, was different in kind from the sort of impulsiveness or anger to which ADHD can contribute.

6. A student's conduct is a manifestation of his 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 his IEP. (34 C.F.R. § 300.530(e)(i) & (ii).) In *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470, 1480, fn. 8, affd. sub nom. *Honig v. Doe* (1988) 484 U.S. 305 [98 L.Ed.2d 686], the Ninth Circuit held that "conduct that is a manifestation of the child's handicap" occurs "only if the handicap significantly impairs the child's behavioral controls it does not embrace conduct that bears only an attenuated relationship to the child's handicap. . . ."

7. The evidence did not show that Student's conduct was caused by, or had a direct and substantial relationship to, his disabilities. Mother was the only witness who connected the two, and her testimony, though motivated by love and concern, did not clearly demonstrate a relationship between Student's conduct and his ADHD. Mother testified there was such a relationship because Liberty knew Student had "an impulse issue and an auditory issue." Impulsiveness is not a disability; it is only one characteristic that appears sometimes in some children who have ADHD. Student's specific learning disability does stem from his auditory processing deficit, but there was no evidence his difficulty with auditory processing had anything to do with his conduct. He was alone in the principal's office when he decided to leave it and attack John Doe.

8. For the several reasons that follow, the evidence at hearing independently supported the conclusion that Student's conduct on January 19th was not caused by, nor did it have a direct and substantial relationship to, either his auditory processing deficit or his ADHD.

9. Student's behavior on January 19th was not impulsive. It is possible to speculate that his decision to leave the principal's office and attack John Roe was impulsive, though there was no evidence that it was. To the contrary, the evidence showed he left the office because he thought Roe "disrespected" him. In any event, it is not accurate to characterize Student's next actions as impulsive, which Mr. Meehlis defined at hearing as acting without thinking. Student had ample time to think about his conduct as he charged toward student Roe issuing curses and threats, ignored the orders of all adults to cease, and fought Roe so hard that it took two to four minutes for the four adults present to separate the boys. Even an hour later he was still angry and impliedly threatened further action against Roe. These actions show sustained rage rather than impulsive conduct.

10. Liberty presented substantial credible evidence, in the form of the opinions of Mr. Meehlis, Ms. Wright, Ms. Harper, and Mr. Saylor, that Student's conduct on January 19, 2017, was not related to his disabilities. Except for Mother's testimony, Student presented no evidence to contradict their opinions. Dr. Garcia, the only professional who testified for Student, did not address the question presented here.

11. There is a clear, specific, and persuasive explanation for Student's conduct that is unrelated to his disabilities. The confrontation between the two boys had been building for a week. Student was subject to serious provocation by Roe, who sought him out, came up behind him, tapped him on the shoulder, insulted him, threatened a fight, and put a protective mouthpiece in his mouth. These facts do not justify Student's subsequent conduct, but they do explain its origins.

12. Student's previous behavior does not show a pattern of assaultive conduct. Though Student has had ADHD for years, it had not driven him to assault anyone before January 19th. Dr. Bylund was convincing in establishing that, if Student's ADHD led to assaultive behavior, a pattern of such behavior would appear in previous

years and across settings. The evidence showed no such pattern existed. Student presented no evidence about the “fight” in November 2015 except the bare entry in Student’s disciplinary log and Mother’s testimony that two boys fought at the start of school but Student did not start it. This is insufficient to show that the incident was serious or that it had anything to do with his disabilities. That and a pencil-throwing incident, throughout two and a half years of high school, do not make up the sort of pattern of violence that Dr. Bylund persuasively testified would appear if ADHD impelled Student to assaultive behavior. And Student’s verbal outbursts of argumentative anger in class appear only in some classes in which he does not like the teacher, not in all of them, which strongly suggests that it is not disability-driven.

13. Student, in his closing brief, is not persuasive in equating his reported impulsiveness in class (interrupting, blurting out inappropriate remarks, and the like) with his conduct on January 19th; none of those earlier events involved sustained rage or violence. In arguing that his conduct on January 19th was predicted by his past behavior, Student fails entirely to distinguish between violent and nonviolent conduct, or between the sort of anger that leads to an argument and the sort of anger that leads to an assault. Thus Student’s claims that his conduct on January 19th was part of a pattern of impulsiveness and anger, and was so “predictable” that Liberty should have known to put a guard with him in the principal’s office and put him somewhere without a window, are without support in the record.

14. There was no evidence that Student himself believes there was any connection between his conduct and his disabilities. His hostile statements soon after the fight (“He’s not going to do that to me” and “I’m going to do what I’m going to do”) displayed a personal animosity toward student Roe, not an impulsive, disability-related reaction. His written explanation of the incident also supported the conclusion that it occurred because of his hostile relationship with Roe, not because he had a sudden

impulse or failed to hear anything. Student is 17 years old, intelligent and articulate. He could have claimed to the manifestation determination team that his disabilities caused his conduct, but he chose not to do so.

15. Student argues that his conduct on January 19th was self-defense; that the manifestation determination team should have found it was self-defense; and that such a finding "would nullify both conduct charges and cancel the manifestation determination review." No evidence supported that conclusion. Assistant Principal Harper established that Students are disciplined even when they engage in self-defense; it is regarded as part of "mutual combat" under the code of student conduct. The fact that Roe swung the first punch did not relieve Student of his own violations. A finding of self-defense, even if appropriate, would not have relieved Student of charges of violating the code of student conduct.

16. In addition, it is inaccurate to characterize Student's course of conduct on January 19th as self-defense. Roe's original challenge went no further than a tap on the shoulder; then Roe for some reason fell to the ground sick. Principal Oshodi successfully had separated the two boys, and he and a security guard had helped Roe to get up and get on the golf cart. That portion of the incident was over, although the effects of the argument and the insults were not. It was Student who re-opened hostilities by charging out of the principal's office cursing and threatening Roe, with the obvious intent of attacking him. The fact that Roe got off the cart and swung the first punch is minor in comparison to Student's instigation of the confrontation, and when that first punch was thrown Student did not retreat; he kept trying to attack Roe for two to four minutes. This went far beyond defending himself from one punch. The incident was a single event from Roe's shoulder-tapping to the end, and certainly Student was provoked. Nonetheless, the portion of the event that actually led to combat was instigated by Student.

17. Student faults the manifestation determination team for relying on assessments from Student's fifth and eighth grades rather than conducting a new assessment before the manifestation determination meeting. However, the team's obligation was to review the information that existed, not to create new information. (20 U.S.C. §1415(k)(1)(E); 34 C.F.R. § 300.530(e).) As Mr. Meehlis pointed out, a manifestation determination review must occur within 10 days of a decision to change the student's placement, which leaves insufficient time for assessment. Liberty did offer to re-open the manifestation determination after the triennial assessments, but Student declined. And Student does not identify anything a new assessment might have shown that would likely have changed the outcome of the manifestation determination.

18. The record does not show why Liberty did not amend the suspension notice earlier in order to drop the charge of assaulting an employee before the manifestation determination, which would have been the better practice. Student argues, however, that if Liberty had done so the result would have been different. No evidence supports that conclusion. Ms. Harper testified that she and the team would have come to the same conclusion in the absence of the second charge because their decision was based on the same course of conduct, whether there were two charges or only one. This testimony was persuasive; Student's underlying behavior was the same whether his wild blows while blinded by the hoodie struck John Roe or someone else. Student did not prove that Liberty's tardiness in amending the suspension notice had any effect on the outcome of the manifestation determination, and on this record it is quite unlikely that it did.

19. Student argues, without evidentiary support, that if the manifestation determination meeting had proceeded without the charge of assaulting an employee, he would have been suspended for five days as Roe was, rather than expelled. This is only speculation, and it incorrectly assumes that the two boys were equally culpable; the

evidence showed they were not. Roe's original tap-on-the-shoulder challenge was not accompanied by violence and came to nothing. The fight by the golf cart was instigated and maintained by Student and led to serious violence and injury. That speculation also disregards the prospect that there may have been other reasons for the level of discipline selected for Roe, which the confidentiality of Roe's records would have prohibited Liberty from mentioning.

20. For the reasons above, the manifestation determination was correct. Student's conduct on January 19, 2017, was not caused by, and did not have a direct and substantial relationship to, Student's disabilities. It was sustained and mostly premeditated rather than impulsive, and was the product of student Roe's animosity toward him and his response.

Implementation of Behavior Plan

21. Student argues that his conduct was also the consequence of Liberty's failure to implement the behavior intervention plan in his March 2, 2016 IEP. Mother testified that the incident could have been avoided if only Mr. Oshodi had allowed Student time to cool off.

22. A student's violation of a code of student conduct may also be a manifestation of his disability if the conduct was the direct result of the local education agency's failure to implement his IEP. (34 C.F.R. § 300.530(e)(1)(ii).)

23. Student argues that "[t]here was no data to show whether the IEP's behavior plan was implement correctly." This disregards the fact that the burden of proof was on Student to show that it was not.

24. Student also argues that there were several flaws in the behavior plan: that it was insufficiently detailed; that it was over-reliant on Student to develop his own strategies for self-control; and that it should have required teaching him more and different coping skills. These arguments are premature; they are pertinent to the non-

expedited hearing, not this expedited hearing. The only issue here is whether the behavior plan, as written, was in fact implemented, not whether it could have been a better plan.

25. Student's argument that the behavior plan should have been distributed widely to administrators and campus security is unpersuasive. The plan solely addressed Student's conduct in class with adults. It contained no provision about his interaction with peers, and no provision for any contingency outside of class. Student's closing brief does not identify any particular provision of the plan that should have been applied, and on the face of the plan there was no such provision.

26. The plan did generally employ the strategy of removing Student from a tense situation and letting him cool off, and Mr. Oshodi was aware that such a strategy was being used with Student. His act in removing Student from the situation and putting him in his office with instructions to remain there was entirely consistent with the general strategy of the behavior plan. The fact that the strategy was ineffective on this occasion does not mean that the plan was not followed. Student's rage was so pronounced that it was extremely unlikely anything Mr. Oshodi could have done short of physical restraint would have been effective, and Student produced no evidence that he would have done anything differently if a different strategy had been used.

27. Student did not prove that his conduct on January 19, 2017, was related to any failure to implement his IEP.

ORDER

1. The manifestation determination of February 2, 2017, that Student's conduct on January 19, 2017, was not a manifestation of his disabilities is affirmed.

2. All relief sought by Student from the expedited hearing is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Liberty prevailed on the sole issue decided.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: May 17, 2017

/s/

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings