

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

FRESNO UNIFIED SCHOOL DISTRICT

OAH CASE NO. 2012020842

EXPEDITED DECISION

Administrative Law Judge Peter Paul Castillo (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter in Fresno, California, on March 21, 22 and 23, 2012.

Student was represented by Martha A. Torgow, Attorney at Law. Student's Parents were present on all hearing days. Student did not attend the hearing.

Fresno Unified School District (District) was represented by Sang-Jin Nam and Melody Hawkins, Attorneys at Law. Debbi Clark-Fleming, Manager II, District Special Education, and Christie Gunther, Manager II, District Special Education, attended all portions of the hearing.

Student filed a request for a due process hearing (complaint) on February 22, 2012, that listed several problems, some of which involved an expedited appeal of a school disciplinary manifestation determination, and others which alleged a denial of a free appropriate public education (FAPE) on a nonexpedited basis. On February 27, 2011, OAH set the expedited and non-expedited matters for separate hearings. The expedited matter proceeded to hearing with no continuances. At the parties' request, the ALJ allowed the parties to submit written closing argument by March 30, 2012. The parties submitted their

closing briefs on March 30, 2012, and the expedited matter was submitted for decision.¹

EXPEDITED ISSUES²

Issue 1: Whether the District's manifestation determination (MD) is procedurally invalid because the District:

- a) Failed to give Parents adequate notice of the MD team meeting;³
- b) Failed to give Parents adequate explanations of their procedural rights related to, or the purpose and significance of, the MD team meeting;
- c) Failed to review all relevant information at the MD team meeting;
- d) Failed to ensure the attendance at the MD team meeting of a general education teacher with sufficient knowledge about Student; and
- e) Failed to properly note, or provide Parents an opportunity to properly note,

¹ To maintain a clear record, the closing briefs have been marked as exhibits. Student's brief has been marked as Exhibit S-35, and the District's brief has been marked as Exhibit D-24.

² These issues are those framed in the March 15, 2012 Order Following Prehearing Conference and as further clarified at hearing. The ALJ has reorganized the issues for this Decision. After the Prehearing Conference, Student withdrew the issue for the expedited hearing whether District failed to conduct a functional behavior assessment.

³ Federal commentary distinguishes between the review team that does the manifestation determination, which only requires "relevant members" of the individualized education program (IEP) team, and the pupil's IEP team that makes decision about educational services for the pupil who is being removed as a result of a change of placement. (Federal Register, Vol. 71, No. 156, at 46720 (8/14/06).)

Parents' disagreement with the MD.

Issue 2: Whether Student's behavior on May 9, 2011, for which he was expelled, was caused by, or had a direct and substantial relationship to, his disability or disabilities.⁴

REQUESTED REMEDIES

Student requests that OAH issue an order for the District to reverse its MD decision and subsequent expulsion, and find that his disciplinary conduct in engaging in sexual conduct with another student was a manifestation of his qualifying special education disability, Other Health Impairment (OHI), based on an underlying disability of Attention Deficit Hyperactivity Disorder (ADHD). Additionally, Student asserts that his disciplinary conduct was also related to other areas of disability that the District was aware of and which it failed to consider during the MD process. Finally, Student requests that OAH strike the District's MD decision because the District violated Parents' procedural rights, which prevented them from meaningfully participating in the educational decision making process.

CONTENTIONS OF THE PARTIES

Student contends that the District improperly determined that Student's conduct was not a manifestation of his disability because his conduct on May 9, 2011, was impulsive, unplanned, and caused by, or directly and substantially related to his ADHD. Additionally, Student's cognitive disability, which the District failed to consider during the MD process, would prevent him from purposefully carrying out the alleged disciplinary act.

⁴ Parents' contentions include, but are not limited to, claims that the District members of the MD review team failed adequately to consider Student's multiple disabilities and acted on misrepresentations of Student's success, behavior, achievements and activities.

Finally, Student contends that the District violated his procedural rights by failing to give Parents adequate notice of the MD team meeting, and not adequately explaining their parental rights during the meeting. Also, the District failed to consider all relevant information during the MD team meeting, did not have an appropriate general education teacher attend the meeting, and failed to permit Parents to adequately disagree with the District's MD findings.

The District contends that Student's conduct was not impulsive, but planned based on his selecting a vulnerable student, taking this student to the bathroom and locking the bathroom stall. The District further asserts that it considered all information as to Student's areas of suspected disability provided by Parents and in District and private assessments. Finally, the District states that it complied with the procedural requirements for a MD team meeting.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student resides with his adoptive Parents in Clovis. Student attends school in the District pursuant to an inter-district transfer. Student was 14-years-old in the eighth grade at Ahwahnee Middle School (AMS) in the District at the time of the disciplinary incident on May 9, 2011, until he was expelled in May 2011, based on the incident that is the subject of this expedited decision. Student was first made eligible for special education in 2002. Student is eligible for special education and related services under the category of OHI, primarily based on a medical diagnosis of ADHD.

SCHOOL CONDUCT CHARGES

2. While pupils with disabilities are subject to disciplinary measures such as suspension or expulsion by a school district, federal law prohibits expelling a special education pupil whose conduct was a manifestation of his or her disability. If the school

district decides to change the educational placement of a pupil with a disability, either by an expulsion or a suspension in excess of 10 days, because of a violation of law or code of conduct, the parents and relevant school district members of the pupil's IEP team must meet and review all relevant information in the pupil's file. The review team must determine: (a) if the conduct in question was caused by, or had a direct and substantial relationship to, the pupil's disability; and/or (b) if the conduct in question was the direct result of the local education agency's (LEA) failure to implement the IEP.⁵

3. On Monday, May 9, 2011, Student engaged in conduct that violated the law and school rules at AMS. Student assisted in the cafeteria during lunch, including when students from AMS' functional life skills class came for lunch, 15 minutes before the rest of the school. Students eat lunch in the AMS multi-purpose room. Student allegedly took an intellectually disabled male student from the functional life skills class to the bathroom located off the multi-purpose room, entered and locked the bathroom stall. In the stall, Student is accused of unwanted attempted sexual intercourse. A District teacher found the two students in the locked bathroom stall, partially disrobed. Student and the victim wrote statements for the school and Student was arrested and incarcerated for three days.

4. The District initially suspended Student from school for five school days. On May 10, 2011, AMS Principal Tim Liles recommended Student's expulsion, which triggered the District's obligation to hold a MD review team meeting within 10 school days thereafter, to review the disciplinary incident and determine whether the conduct was a manifestation of Student's disability or whether the District had implemented Student's IEP. On May 10, 2011, the District mailed written notice to Parents of a pre-expulsion MD review meeting to discuss the District's decision to change Student's placement due to the

⁵ The question of whether the District failed to implement Student's IEP is not at issue in this matter.

disciplinary incident and an IEP team meeting. Pursuant to District policy, the District scheduled the MD review team meeting for three school days after the requirement for such a meeting was triggered, which was May 13, 2011.

5. In connection with the incident, District charged Student with violation of the following four sections of the Education Code:

- (a) Section 48900, subdivision (a): "(1) Caused, attempted to cause, or threatened to cause physical injury to another person. (2) Willfully used force or violence upon the person of another, except in self-defense."
- (b) Section 48900, subdivision (i): "Committed an obscene act or engaged in habitual profanity or vulgarity."
- (c) Section 48900, subdivision (n): "Committed or attempted to commit a sexual assault as defined in Section 261, 266c, 286, 288, 288a, or 289 of the Penal Code or committed a sexual battery as defined in Section 243.4 of the Penal Code."
- (d) Section 48900.2: "In addition to the reasons specified in Section 48900, a pupil may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has committed sexual harassment as defined in Section 212.5."

6. At the MD review meeting on May 13, 2011, the District members of the review team determined that the behavioral incident on May 9, 2011, was not a manifestation of Student's disability.

7. On August 17, 2011, the District held an expulsion hearing. On September 15, 2011, the District's governing board notified Parents that it adopted the administrative panel's finding and decision to expel Student through December 22, 2011. The Board stayed the expulsion so Student could attend the District's Phoenix Secondary School, which is a community day school. On November 17, 2011, the Fresno County Board of

Education granted Student's appeal of the District's expulsion, and ordered the District to expunge the expulsion records. On February 14, 2012, the District filed a writ of mandate in the Superior Court of Fresno County that seeks to overturn the decision of the Fresno County Board of Education. The civil court's hearing on the District's writ is scheduled for May 2012.

PRIOR ASSESSMENTS AND IEPs

8. In January 2007, while Student was still in foster care, Howard J. Glidden, Ph.D., conducted a neuropsychological reevaluation of Student for the Fresno County Children and Family Services. Student was 10 years-old and in fourth grade. Dr. Glidden found that Student had ADHD. In addition, Dr. Glidden found that Student had a full scale IQ on the Wechsler Intelligence Scale for Children-Fourth Edition, of only 60, which was lower than Student's performance in prior assessments. A score of 60 indicates a mild level of intellectual disability. Student's cognitive functioning is therefore relevant to evaluate the adequacy of the District's MD decision. Additionally, Dr. Glidden gave a psychiatric diagnosis of "physical abuse of child, by history," but did not note any significant emotional or behavioral problems with Student at home or at school. Student's then-foster parent noted that "[i]n the past, [Student] would touch inappropriately, not now."

9. Student was placed in over 20 foster homes between the ages of two and 10-years-old, when he moved into, and was eventually adopted by Parents. After moving into Parent's home, Student attended school within the Clovis Unified School District (CUSD). CUSD assessed Student in April 2008 for his triennial IEP. Student was 11 years-old and in fifth grade, and living with Parents. The CUSD assessment notes that in 2005, Mendocino County's triennial assessment "resulted in continued special education eligibility under the Mild Mental Retardation⁶ category based on assessed cognitive and

⁶ In 2010, Congress deleted references to "mental retardation" in the IDEA, and

achievement skills within the 'low' to 'extremely low' range with adaptive behavior skills falling well below age expectations." The CUSD assessment found Student's ADHD negatively affected his school performance to such a degree as to warrant special education services. As to Student's cognitive skills, the assessor administered both the Wechsler Abbreviated Scale of Intelligence (WASI) and Universal Nonverbal Intelligence Test (UNIT). On the WASI, Student's full scale IQ was 77, which is within the borderline range. On the UNIT, Student's full scale IQ was 72, which is in the delayed range. The assessor recommended finding Student's continuing special education eligible under the category of OHI, with no discussion as to continued eligibility under intellectual disability. At the time of the assessment, Student had a behavior support plan (BSP), dated January 24, 2008, and one of the behaviors identified to be worked on was Student invading the personal space of others during transitions and recess, when his teacher was not around to provide structure.

10. CUSD found Student eligible for special education services under the eligibility category of OHI due to his ADHD at the April 22, 2008 IEP team meeting and continued the prior BSP. The IEP team agreed, based on past and present assessment information, that Student best qualified for special education under the category of OHI as Student's "impulsivity effects everything he does." The IEP meeting notes do not contain any discussion whether Student had a cognitive impairment.

11. At the start of the 2008-2009 school year (SY), Parents decided to home school Student, and enrolled him in a charter school operated by the District to oversee

replaced it with "intellectual disabilities." (Pub.L. 111-256, 124 Stat. 2643.) This decision will conform to this change in the IDEA, and use "intellectual disabilities" and not "mental retardation." (Pub.L. 111-256, § 4; [requirement that States change terminology for individuals covered by provisions of this law].)

the home schooling. Some years ago, Mother had obtained a preliminary teaching credential, but did not teach long enough to obtain a permanent credential. Student was home schooled for the entire SY 2008-2009, sixth grade. Halfway through SY 2009-2010, seventh grade, Parents decided that Student should attend a regular school in the District based on his academic and behavioral improvements with home schooling.

12. Student enrolled in AMS in January 2010. The District held an IEP team meeting on February 4, 2010, when the District decided to advance Student's triennial assessment by a year with Parents' consent. School psychologist Russell Koop conducted the psychoeducational assessment, and Student's resource specialist (RSP) teacher, Shirley Mathew, administered the academic testing, in February and March 2010. For the assessment, Mr. Koop reviewed Student's educational history, which he noted was incomplete. The assessment report referred to Dr. Glidden's 2007 assessment, but made no mention of the 2008 CUSD triennial assessment. Mr. Koop noted in his assessment report that Student had been in 26 foster care placements during a seven-a-half year period before moving in with Parents.

13. To measure Student's cognitive ability, Mr. Koop administered the Woodcock-Johnson Tests of Cognitive Ability-Third Edition (WJCOG-III). Student's overall brief intellectual ability on the WJCOG-III was a score of 80, which is in the low average range in the ninth percentile. On the WJCOG-III, the median score is 100 for the brief intellectual ability, cluster and subtest standard scores. Mr. Koop's assessment included the cluster and subtests scores, which showed a wide discrepancy in cognitive functioning from very low to average. In the cluster scores, Student's lowest standard score was 62, very low in the first percentile for cognitive fluency, which measures the ease and speed of performing cognitive tasks. Student's strengths were phonemic awareness, which measures ability to process speech sounds, and visual-spatial thinking, which measures the ability to process and manipulate visual images, in which Student had standard scores of

100 and 99, respectively.

14. Student's academic testing on the Wechsler Individual Achievement Test-Second Edition (WIAT-II) also reflected a scattering of abilities in the various subtests. The median standard score on the WIAT-II is 100, and Student had scores ranging from 77, math calculation, to 105, word reading. The WIAT-II scores indicated strengths in verbal and short-term memory and weaknesses in reasoning and long-term memory, which were consistent with his WJCOG-III performance.

15. The District's 2010 psychoeducational assessment also evaluated Student's attention and hyperactivity deficits. At the time of the assessment, Student did not have a BSP. The findings were consistent with prior assessments as to Student's difficulty in focusing and sustaining attention at school during classroom instruction and difficulty controlling his impulses and behavioral responses. These behaviors were consistent with Student's ADHD. Mother's scores on the various tests indicated Student displayed more attention and hyperactivity problems at home than Ms. Mathew observed at school.

16. The District convened an IEP team meeting on April 19, 2010, to discuss the psychoeducational assessment and to make any changes to the February 4, 2010 IEP based on the current information. The IEP team agreed to continue Student's special education eligibility under OHI due to Student's ADHD, and his placement in two RSP classes during the six-period school day. The IEP noted that Student had previously demonstrated a willful personality at school, which had lessened. The IEP did not include a BSP and all his goals related to academics. Information regarding on Student's prior assessments and IEPs will be discussed further below, beginning in Factual Finding 36, as to the District's consideration of information of Student's disability.

MEETING NOTICE

17. A district must notify parents of an IEP team meeting early enough to arrange a mutually convenient date and must ensure that they will have an opportunity to

attend. It may not conduct an IEP team meeting in the absence of parents unless the district is unable to convince the parents that they should attend; in which case it must keep a record of its attempts to arrange a mutually agreed-on time and place for the meeting. For MD review team meetings, the school district must notify parents of its decision to change a student's placement due to disciplinary action and must convene the meeting within 10 school days of that decision. The IEP meeting notice requirements are not expressly applicable to MD reviews but provide guidance in evaluating the reasonableness of notice of MD reviews to support meaningful parental participation in the process.

18. Student contends that the District failed to provide Parents with adequate notice of the MD review team meeting because the meeting notice failed to adequately inform them of the disciplinary incident at issue, and Parents did not receive the notice until the day before the meeting. Also, the District's meeting notice implied, and Parents thought, that the District planned to record the meeting, so that Parents did not feel the need to inform the District that they wanted to tape the meeting. The District contended that it properly noticed the MD team meeting, with proper notice of Parent's right to tape the meeting.

19. The District timely noticed the MD team meeting on May 10, 2011, when it made the decision to change Student's placement by expelling him from AMS. The District mailed the meeting notice to Parents. The District planned to convene the combined MD team meeting on May 13, 2012, only three days after the notice was mailed. However, District did not call Parents to inform them of the date. The MD team meeting notice stated that purpose of the meeting was for "Pre-Expulsion" and "Manifestation Determination." The District included a copy of the Notice of Procedural Rights with the meeting notice. The Notice of Procedural Rights, which Parents had received in prior IEP team meetings with the District, included a section that explains school discipline process

for special education students. The meeting notice stated that if Parents wish to record the meeting, Parents “must provide 24 hour notice, we [the District] will also audio tape the meeting.” The District did not state in the meeting notice or in any other documents mailed to Parents on May 10, 2011, the underlying basis of the disciplinary charges against Student.

20. Parents did not receive the written notice of the combined MD and IEP team meeting until May 12, 2011. The meeting notice did not include any synopsis of the disciplinary conduct that the MD team would review as possible manifestation of Student’s disability. Parents telephoned AMS about the MD team meeting and were told to come to AMS to pick up a copy of the “Report of Suspension Worksheet” that AMS Assistant Principal Dave Peters completed on May 10, 2011. Father picked up the document that afternoon. The District mailed a copy of this document to Parents on May 12, 2011. The District did not explain at hearing why it did not give Parents a copy the Worksheet or Mr. Liles’ recommendation that both set forth the disciplinary conduct at issue with the MD team meeting notice.

21. Parents knew of the general allegations against Student as they came to AMS after the school contacted them about the incident. Mr. Peters informed Parents of the allegation that Student sexually assaulted the victim in the bathroom. Parents had the chance to briefly speak to Student about the incident before the police took him away. Mr. Peters subsequently drafted the notice of suspension and discussed the incident with Mr. Liles. Mr. Liles’ letter to the assistant superintendent incorporated verbatim Mr. Peters’ description of the disciplinary incident in the notice of suspension, with the additional information as to Student’s arrest and the legal grounds for expulsion. No summary of the disciplinary incident, that was the basis of the District’s expulsion request, was included in the notice of MD team meeting, and without this knowledge Parents could not be reasonably expected to know of the conduct that the MD review team would evaluate.

22. Toby Wait, a family friend and a former principal of a District high school for five years, through SY 2010-2011, was persuasive that the District had an internal policy to hold the MD team meeting within three school days of the change of placement decision. The District never explained why it needed to hold the MD team meeting within three school days of the decision to change placement, when the Individuals with Disabilities Education Improvement Act (IDEA) allows it to hold the MD review meeting within 10 school days. The District's desire to quickly hold the MD review team meeting created the significant risk that Parents might not know quickly enough about the meeting to prepare for the meeting if the notice was mailed, especially if the District did not follow up with a telephone call to ensure that Parents were aware of the meeting.

23. In this case, the District's method of notifying Parents of the MD team meeting, along with not providing them notice of the disciplinary conduct the MD team would be evaluating, significantly impinged on Parents' ability meaningfully participate in the educational decision making process. As found above, Parents had extremely limited time to prepare for the MD team meeting. Additionally, if Parents had not decided to call the school about the MD team meeting and had not been told to come to AMS to pick up a copy of the Notice of Suspension Worksheet, they would not have known about the District's claims regarding the specific disciplinary conduct the MD review team would be evaluating. Therefore, the District's MD meeting notice failed to give Parents an adequate description of the disciplinary conduct that the team would evaluate, which significantly impeded Parents' ability to meaningfully participate in the MD review and educational decision making process by limiting their time and ability to prepare for the MD review meeting.

MAY 13, 2011 MANIFESTATION DETERMINATION MEETING

24. Student contends that the District violated Student's procedural rights at the MD team meeting by rushing through the meeting on May 13, 2011, and not informing

Parents of the importance of the meeting and their procedural rights, including the right to tape the meeting. Additionally, Student asserts that the District did not consider information Parents presented, did not have an appropriate general education teacher attend the meeting and did not permit Parents to adequately document their disagreement with the District's determination that Student's disciplinary conduct was not a manifestation of his disability. The District argued that it properly explained the purpose of the MD team meeting and that Parents never pushed the issue of taping the meeting. The District further contends that it carefully considered all information presented at the MD team meeting and permitted Parents to state their disagreement on the IEP document.

MD Review Attendees and Meeting Length

25. The MD team meeting was noticed to start at 1:30 p.m. Attending the meeting were Parents, Eric Nyberg, District Regional Instructional Manager, Ms. Peters, Mr. Koop, Richard Crowder, Student's RSP teacher and case manager, and Kristin Hurt, District physical education teacher. Mr. Nyberg was the District's administrative designee for this meeting, and this was the first MD review team meeting he had attended regarding Student. As a Regional Instructional Manager, Mr. Nyberg was very familiar with the MD team meeting process as he was called to lead this type of meeting due to its significance. Mr. Nyberg, in conjunction with Mr. Koop and Mr. Crowder, developed the draft MD document discussed at the meeting and was the meeting's note taker.

26. According to MD team meeting notes, the meeting began at 1:30 p.m. and ended at 2:40 p.m. Student contended that Parents arrived at 1:30 p.m., and then waited approximately 30 minutes before the meeting commenced in Mr. Crowder's classroom, and that the meeting lasted a little over 30 minutes. However, Mother's recollection of the length of the meeting was not as persuasive as the District attendees. Mr. Nyberg's practice is to write on the meeting notes the time the IEP team begins, not when scheduled to begin, and then to document when the meeting ended, which he did for this

IEP team meeting. Additionally, Mr. Peter's, Mr. Koop, Mr. Crowder and Ms. Hurt all recalled that the meeting lasted an hour or more, with Ms. Hurt recalling that the meeting began at the start of her free period and continued a little past the start of the next period, which would correspond with the times listed by Mr. Nyberg.

27. As to Ms. Hurt's attendance at the MD team meeting, she was not the general education teacher Mr. Crowder chose for the meeting. Mr. Crowder could not recall the teacher he selected or the reason why that teacher was not available. Ms. Hurt was in the AMS front office on other business when Mr. Peters asked her if she knew Student, which she did, and then asked to attend the MD team meeting.

28. Ms. Hurt was never one of Student's assigned teachers. When Student enrolled at AMS, his seventh grade physical education teacher was Ms. Campbell. Ms. Hurt had a physical education class during the same period and she and Ms. Campbell would regularly intermingle their students. Ms. Hurt recalled Student in Ms. Campbell's class and working with him. Ms. Campbell informed Ms. Hurt that Student was a special education student, but Ms. Hurt never reviewed Student's IEP during seventh grade. Ms. Hurt also observed and interacted with Student in eighth grade in her role as Campus Cultural Leader during school activities, and when Student participated in after school sports in her role of AMS Athletic Director. However, the first Ms. Hurt ever reviewed any of Student's IEPs was right before the MD team meeting, and she minimally participated in the meeting. Parents did not know Ms. Hurt before meeting her at the MD team meeting.

29. The IEP requirement for Student's general education teacher to attend an IEP meeting is not expressly applicable to a MD review team meeting. For MD review meetings, the law requires "relevant members" of Student's IEP team to attend. In this case, at least one of Student's general education teachers was a relevant member of the MD review meeting and needed to attend to convey important information about whether or how Student's IEP was implemented in the general education class and how Student's

disability manifested. While Ms. Hurt is a general education teacher with some knowledge of Student, she was not an appropriate or relevant general education teacher to attend the MD team meeting. Ms. Hurt never implemented any portion of Student's IEP, nor was she aware of any information in the IEP, except for what Ms. Campbell told her about Student's disability. Ms. Hurt attended the IEP only because the selected general education teacher was not available, and the District wanted to meet its self-imposed three school day period to hold the MD team meeting. The District did not present any evidence as to why it could not postpone the meeting to a time when one of Student's seventh or eighth grade general education teachers, who had read and implemented Student's IEP, was available. While Ms. Hurt knew of Student, provided some instruction, and interacted with him in non-academic settings, the fact that she had never been responsible for implementing Student's IEP as his general education teacher made her an inappropriate member of the MD review team.

30. Therefore, Ms. Hurt's attendance at the MD team meeting significantly impeded Parents' ability to participate in the educational decision making process. Ms. Hurt was not able to provide meaningful input in the meeting as to Student's disability, whether his conduct was a manifestation of his disability, and IEP implementation because she was never Student's regular general education teacher and never required to implement his IEP. Accordingly, the District failed to have all relevant members of Student's IEP team because none of Student's general education teachers attended the MD review team meeting, which significantly impeded Parents' ability to participate in the MD process.

Procedural Rights, Recording and Right to Disagree

31. At the beginning of the MD team meeting, the District gave Parents a copy of their procedural rights and asked Parents if they wanted the District to go over their rights, which Parents declined. Parents did not indicate at the MD team meeting that they

were unaware of their procedural rights, especially those that apply to MD review team meetings set forth in the Notice of Procedural Safeguards. Further, at no time during the MD team meeting did the District indicate to Parents that the meeting was not important, or obfuscate its purpose in the expulsion process.

32. Mr. Nyberg, along with Mr. Crowder and Mr. Koop, had completed a draft of the MD, on the District's special education computer system. While Mr. Nyberg did not print a copy of the draft for each team member to have, he projected a copy of the MD onto a screen in Mr. Crowder's classroom. While Mr. Nyberg did not explain explicitly at the MD team meeting that if the MD team determined that Student's disciplinary conduct was a manifestation of his disability that the expulsion process would cease, that question was on the IEP projected on the screen. The IEP stated that if the MD team made that determination that the disciplinary proceeding would cease. The District went over each page of the IEP on the screen with Parents and Mr. Nyberg made any changes as the meeting progressed. Additionally, Parents gave no indication at the MD team meeting that they did not understand the MD review team would be looking into whether Student's conduct was a manifestation of his disability and whether the District had implemented his January 2011 IEP, which was in effect at the time of the May 9, 2011 incident, and the consequence on the disciplinary action based on the answer to those questions.

33. Regarding Parents' wish to tape the MD team meeting, the District's form meeting notice gives the reader the impression that the District will tape the meeting even if parents do not tape the meeting. Parents asked the District at the start of the MD team meeting whether the District would tape the meeting, and the District informed them it would not. Parents did not ask to continue the meeting so they could bring in a recorder to tape the meeting. The District MD team members were convincing that Parents only briefly raised the issue of taping and did not object for the meeting to continue when told that the District would not tape it. Finally, Student did not establish how Parents' ability to

participate in the MD team process, both during and after the meeting, was negatively impacted.

34. Parents also claim that the District did not provide them with an opportunity to note their disagreement with the District's finding that Student's disciplinary conduct was not a manifestation of his disability. However, the May 13, 2011 MD document clearly shows Parents' disagreement in the meeting notes and their handwritten objection on the last page as the District permitted Parents to verbally express their disagreement during the MD review meeting. The District team members were under no illusion that Parents agreed with their position. Additionally, Mr. Nyberg accurately documented Parent's disagreement in the meeting notes and allowed them to document their disagreement on the IEP document.

35. Student did not establish that the District did not offer to explain to Parents their procedural rights, or that the District downplayed the significance of the MD team meeting and its role in the expulsion process. While the District's MD meeting notice needs to be rewritten to explicitly state that the District will only audio-tape the meeting if Parents record the meeting, Student did not establish that this ambiguity prevented Parents from meaningfully participating in the MD review team process. Finally, the District permitted Parents to document on the IEP their disagreement with the District's manifestation determination. Therefore, Student did not establish that the District violated Student's procedural rights because the District's conduct did not prevent Parents from meaningfully participating in the educational decision making process.

CONSIDERATION OF INFORMATION AS TO STUDENT'S DISABILITY

36. Student contends that the District failed to adequately consider any other possible disabilities during the MD team meeting as the District focused solely on Student's ADHD in the manifestation analysis. The District asserts that it considered information provided by Parents, including information from Student's treating psychiatrist

and information in prior assessments.

Dr. David Fox's September 8, 2010 Letter

37. Student has seen David A. Fox, M.D., from May 2008 through the present for the treatment of several psychiatric conditions, along with Student's ADHD. Although it is disputed whether Parents provided the District, at prior IEP meetings, with a copy of Dr. Fox's September 8, 2010 letter, Parents did provide a copy at the May 13, 2011 MD team meeting. Student contends that the District did not consider Dr. Fox's diagnoses other than ADHD, and that Student's disciplinary conduct was a manifestation of those other diagnoses. The District asserts that it considered the information in Dr. Fox's letter and provided by Parents. Dr. Fox's letter states that Student is under his care for the following diagnosed medical conditions: ADHD, dysthemia disorder,⁷ obsessive compulsive disorder (OCD),⁸ and oppositional defiant disorder (ODD).⁹ The letter also lists Student's medication, which the District already knew about as of the January 2011 IEP team meeting.

38. At hearing, Student's expert, Karen Kraus, M.D.,¹⁰ and the District's expert,

⁷ Dr. Kraus and Dr. Lebby best characterized dysthemia as chronic sadness.

⁸ From the testimony, OCD is characterized by intrusive thoughts compelling a person to perform certain acts and rituals.

⁹ From the testimony, ODD can include losing one's temper, defiance or refusing to do what one is told, doing things to deliberately annoy others, blaming others for their own misbehavior, and becoming easily annoyed with others.

¹⁰ Dr. Kraus is a friend of the family has not seen Student as a patient, and saw Student once a year at a community event after he moved in with Parents. Dr. Kraus is a licensed child and adolescent psychiatrist. She is on the faculty of the University of

Paul Lebby, Ph.D.,¹¹ provided information as to the possible effect these diagnoses might have as to the alleged disciplinary conduct. Mr. Koop testified convincingly that at the MD team meeting, he went over dysthemia, OCD and ODD with the MD team in explaining what each diagnosis encompassed and then led the IEP team discussion as to whether Student's conduct was a manifestation of any of these areas of disability. Mr. Koop's explanation of dysthemia, OCD and ODD corresponded with the definitions provided by both parties' experts. The other District members of the MD team corroborated Ms. Koop's explanation of his actions at the MD team meeting and were persuasive that they discussed Dr. Fox's letter and information provided by Parents in relation to this letter. Accordingly, Student did not establish that the District failed to consider this information.

California, San Francisco, Fresno Psychiatry Medical Education Program. Dr. Kraus obtained her medical degree from the University of Washington and completed her fellowship and residency in 1994 University of Colorado Health Sciences Center. Dr. Kraus has conducted numerous assessments related to special education eligibility and services, and attended IEP team meetings. Dr. Kraus has extensive expertise in evaluating and assessing children, including foster children, for the juvenile court. At the commencement of the hearing, the ALJ denied the District's motion to exclude Dr. Kraus as a witness because Student failed to give the District adequate notice of her testimony.

¹¹ Dr. Lebby is a neuropsychologist and obtained his Ph.D. degree in clinical neuropsychology from the University of California, Berkeley, in 1994, and was a Postdoctoral Fellow at the University of California, San Francisco Medical Center, from 1994 to 1995. He is licensed by the state of California as a clinical psychologist, is on the faculties of the University of California, San Francisco School of Medicine, and Alliant International University, is on the staff of Children's Hospital of Central California, and has a private practice.

Cognitive Disability

39. Student asserts that the District minimized his cognitive deficits during the MD team meeting and did not adequately consider whether the disciplinary conduct might be a manifestation of a cognitive disability. The District contends that Student's cognitive ability is in the low average range, and argues that it considered information as to his cognitive ability.

40. As found above, Dr. Glidden's 2007 neuropsychological assessment found that Student had a full scale IQ of 60 in the intellectual disability range. Student's IQ score steadily increased over successive assessments as it was 72 or 77 in the 2008 CUSD assessment, depending on the measure, and then 80 in Mr. Koop's 2010 assessment. Dr. Lebby persuasively reasoned that the increase in scores could be explained by environmental factors from the time Student moved in with Parents in 2007. Parents provided Student with a stable and nurturing home, and provided him academic support, all of which he had previously lacked. These environmental factors have permitted Student to advance more towards his potential, which might be in the low average range for cognitive ability based on January 2012 testing by the District. There, Student's standard score for general cognitive ability on the Kaufman Assessment Battery for Children-Second Edition was 80, with 100 being the median average score.

41. However, the District, during the MD team meeting, appeared to believe that Student had a greater cognitive ability based on his grades, since Student had over a 3.0 grade point average. The District attendees presumed that Student's grade point average was indicative of him doing slightly above average eighth grade work. While Student contended that the District misrepresented information at the MD review meeting, the District's conduct appeared to be more a general lack of understanding of what Student's grade point average encompassed. Student's grades reflected performance on modified work assignments in his general education classes. Also, Student was not working on

grade level work in his RSP classes. Student's January 2011 IEP reflected math and language arts skills mainly between the third and fifth grade equivalencies. At the MD team meeting, the District downplayed concerns raised by Parents as to Student's cognitive ability and that his grades were not reflective of middle school curriculum. Finally, the District would have had a better understanding of Student's cognitive abilities if a general education teacher who had implemented Student's IEP had attended the MD team meeting.

42. Additionally, Mr. Koop's assessment provided no explanation as to the increase in Student's IQ, especially since it had increased 20 points in three years. Also, the District never analyzed information in the CUSD assessment that Student's prior school district once considered him mildly intellectually disabled. Dr. Kraus' analysis of all the assessment information, especially the scattering of cluster and subtest scores on the WJCOG-III, persuasively raised concerns about Student's possible cognitive impairments given his history in foster care, possible childhood abuse, and his educational and social performance.

43. While the District explained some possible reasons for the increase in Student's IQ, Dr. Lebby was never asked by the District whether the assessment information he reviewed indicated that Student had a cognitive disability. Additionally, the District did not ask Dr. Lebby whether the District should have considered if Student's disciplinary conduct was a manifestation of a cognitive disability. Dr. Lebby never addressed intellectual disability in his testimony. If Student had a cognitive disability, a concern is created as long term foster children often have boundary issues and difficulty differentiating appropriate and inappropriate behavior according to both Dr. Lebby and Dr. Kraus. The District was aware of Student's numerous foster care placements as Mr. Koop noted that fact in his assessment and Parents raised concerns at the MD team meeting.

44. Dr. Kraus, based on her education and extensive experience in the juvenile justice system, described that children in long term foster care who have a history of abuse often engage in inappropriate sexual activity. Dr. Lebby explained that long term foster children do not understand boundary limitations as they do not have an internal scheme of right or wrong. This corresponds with Student's former foster parent stating in Dr. Glidden's assessment that Student had a history of inappropriate touching, which she did not see at the time of that assessment, and with the BSP at CUSD, which addressed Student not understanding boundary issues during unstructured time. Mr. Wait's analysis of Mr. Koop's assessment and his knowledge of Student's cognitive impairments and long term foster care created red flags for him that Student's disciplinary conduct might be a manifestation of his cognitive disability that the District needed to fully explore at the MD team meeting. It is therefore troubling that the District members of the MD review team minimized the possibility, did not adequately review all information, and relied on inaccurate information about Student's levels of functioning and performance.

45. While being in long term foster care is not a disability, there are behaviors often associated with long term foster children that, when coupled with a child's cognitive disability, might make those behaviors more likely to happen. This inappropriate behavior might occur if a child, due to a cognitive disability, is not able to make a rational decision not to engage in inappropriate conduct that a child who does not have a cognitive disability would most likely understand. Because the District assumed that Student did not have cognitive disability based on his grade point average and recent full scale IQ score of 80, the District failed to adequately consider, during the MD process, whether Student's conduct was a manifestation of a cognitive disability. Therefore, the District violated Parents' procedural right to meaningfully participate in the MD process because the District ignored Parents' concerns and information in the assessments of a possible cognitive impairment based simply on Student's present academic performance.

MANIFESTATION OF DISABILITY DECISION

46. Due to the District's procedural violations in improperly noticing the MD team meeting, not having a proper general education teacher attend, and not considering information as to Student's possible cognitive disability, the District's MD decision that Student's conduct was not a manifestation of his disability is void. Therefore, there is no need to analyze whether the District's decision was substantively correct. If the District wishes to continue with the expulsion process, the District needs to convene another MD team meeting.

LEGAL CONCLUSIONS

1. Student, as the party requesting relief, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) In this case, the Decision is limited to the expedited disciplinary issues only.

2. The IDEA provides states with federal funds to help educate children with disabilities if the state provides every qualified child with a FAPE that meets the federal statutory requirements. Congress enacted the IDEA "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs. . . ." (20 U.S.C. §§ 1400(c), 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) A student receiving special education services may be suspended or expelled from school as provided by federal law. (Ed. Code, § 48915.5, subd. (a).)

3. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to him. (Cal. Code Regs., tit. 5, § 3042(a).) The removal of a special education student from his

placement for more than 10 consecutive school days constitutes a change of placement. (34 C.F.R. § 300.536(a)(i)(2006)¹².)

4. When a school district changes the placement of a special education student for specific conduct in violation of a student code of conduct, the student is entitled to certain procedural protections. The district is required to conduct a review to determine if the conduct that is subject to discipline is a manifestation of the student's disability. This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) It must be accomplished within ten school days of the decision to change the student's placement. (Ibid.)

5. A school district must notify parents of an IEP team meeting early enough to ensure that they will have an opportunity to attend, and must schedule the meeting at a mutually agreed upon time and place. (34 C.F.R. § 300.322(a)(1), (2); Ed. Code, § 56341.5, subds. (a)-(c).) The requirements for IEP team meetings are not expressly applicable to MD review team meetings. In the case of a MD review team meeting, the notice must inform the parent of the decision to change the student's placement and must be accompanied by a copy of the parent's procedural safeguards. (20 U.S.C. § 1415(k)(1)(H).) If the MD review meeting and the IEP team meeting are combined, then both notice requirements must be met.

6. A manifestation determination must be made by the school district, the parent, and relevant members of the IEP team as determined by the parent and the school district. (20 U.S.C. § 1415(k)(1)(E)(i).) The manifestation determination analyzes the child's behavior as demonstrated across settings and across times. All relevant information in the student's file, including the IEP, any observations of teachers, and any relevant information

¹² All subsequent references to the Code of Federal Regulations are to the 2006 version.

from the parents must be reviewed to determine if the conduct was caused by, or had a direct and substantial relationship to the student's disability, or was the direct result of the district's failure to implement the student's IEP. (34 C.F.R. § 300.530(e); Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed.Reg. 46540, 46720 (Aug. 14, 2006) (Comments on 2006 Regulations).)

7. If the IEP team determines the conduct is not a manifestation of the student's disability, then normal school disciplinary procedures may be used to address the incident in the same way as they would be applied to non-disabled students. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c).)

8. A parent who disagrees with any decision regarding the manifestation determination may request a hearing. (20 U.S.C. § 1415(k)(3)(A).) In appropriate circumstances the ALJ hearing the dispute may order a change in placement of the student, and may return the student to the placement from which he was removed. (20 U.S.C. §1415(k)(3)(B)(ii).)

CAUSATION OR RELATIONSHIP TO DISABILITY

9. For a special education student's misconduct to be a manifestation of his disability, that conduct must either be caused by, or have a direct and substantial relationship to a student's disability, or be the direct result of failure to implement the IEP. (20 U.S.C. § 1415(k)(E)(i).) The 2004 Amendments to the IDEA changed the way MDs are to be conducted. Previous law set forth four broadly phrased questions that MD teams were required to answer. Now, MD teams are charged with answering two, more concretely framed questions:

The Act now requires the [MD team] to determine whether a child's behavior was a manifestation of the child's disability based on two inquiries: (1) was the conduct caused by, or did it

have a direct and substantial relationship to the child's disability; or (2) was the conduct a direct result of the LEAs failure to implement the child's IEP? (71 Fed.Reg. 46719 (August 14, 2006).)

10. The revised manifestation provisions were drafted to provide a simplified, commonsense manifestation determination process to be used by school personnel. (71 Fed.Reg. 46720 (August 14, 2006).) In changing the Act, Congress intended that a child's conduct be "direct and substantial" and not merely have, "an attenuated association, such as low self-esteem, to the child's disability." (Ibid.)

11. The Ninth Circuit has addressed some of the considerations relevant to a manifestation determination:

If the child's misbehavior is properly determined not to be a manifestation of his handicap, the handicapped child can be expelled. [Citations]... When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that not to be so. (*Doe v. Maher* (9th Cir, 1986 793 F.2d 1470, 1480, fn 8, affd., *sub nom.*, *Honig v. Doe* (1988) 484 U.S. 305.)

PROCEDURAL REQUIREMENTS

12. In *Board of Education v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court recognized the importance of adherence to the

procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) This standard applied to MD meetings. (*Danny K. ex rel. Luana K. v. Department of Educ., Hawai'i* (D.Hawai'i 2011 Civ. No. 11-00025 ACK-KSC) 2011 WL 4527387, * 15.

13. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

14. An IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessment results; at the discretion of the parties, other individuals; and when appropriate, the person with

exceptional needs. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].) A MD review team meeting is required to include the LEA, the parent, and relevant members of the pupil's IEP team. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1) and (h).)

ISSUE 1A: WHETHER THE DISTRICT'S MD IS PROCEDURALLY INVALID BECAUSE THE DISTRICT FAILED TO GIVE PARENTS ADEQUATE NOTICE OF THE MD TEAM MEETING.

15. Pursuant to Factual Findings 17 through 23 and Legal Conclusions 1 through 8 and 12 through 14, the District failed to provide Parents with adequate notice of the MD team meeting. The District mailed the notice on May 10, 2011, for the meeting to take place May 13, 2011. The District's notice did not include adequate notice of the District's decision because the District did not inform Parents of the disciplinary conduct to be analyzed as to whether it was a manifestation of his disability. Parents only received the meeting notice and obtained a copy of the Notice of Suspension Worksheet the day before the MD team meeting. That was not sufficient time for Parents to adequately prepare for the meeting. Therefore, the District failed to ensure that the Parents had adequate notice of the expedited meeting. While the District wanted to hold the MD team meeting within three school days of the changed placement, instead of within 10 school days as the law allows, the District failed to ensure that the Parents got the notice in a timely fashion. The District's conduct significantly deprived Parents of the opportunity to prepare for and participate in Student's educational decision making at the MD team meeting. Accordingly, the District's violation of Student's procedural rights voided the District's determinations that Student's disciplinary conduct was not a manifestation of his disability.

ISSUE 1B: WHETHER THE DISTRICT'S MD IS PROCEDURALLY INVALID BECAUSE THE DISTRICT FAILED TO GIVE PARENTS ADEQUATE EXPLANATIONS OF THEIR PROCEDURAL RIGHTS RELATED TO, OR THE PURPOSE AND SIGNIFICANCE OF, THE MD TEAM MEETING.

16. Pursuant to Factual Findings 25, 26, 31 through 35 and Legal Conclusions 1 through 8 and 12 through 14, the District provided Parents with adequate notice of their procedural rights and adequately explained the purpose of the MD team meeting, and its importance. The District mailed Parents Notice of Procedural Rights with the May 10, 2011 meeting notice. Additionally, Parents had received their parental rights at prior IEP team meetings with the District and these notices explained Student's rights if disciplined. The District explained the purpose and significance of the MD team meeting during the course of the meeting and Student did not establish that Parents did not understand the purpose and the importance of the meeting. Additionally, the MD team meeting lasted for the 70 minutes as Mr. Nyberg documented. Therefore, Student did not establish that the District violated his procedural rights by failing to adequately explain the purpose and significance of the MD team meeting or to inform Parents of their procedural rights.

ISSUE 1C: WHETHER THE DISTRICT'S MD IS PROCEDURALLY INVALID BECAUSE THE DISTRICT FAILED TO REVIEW ALL RELEVANT INFORMATION AT THE MD TEAM MEETING.

17. Pursuant to Factual Findings 37 through 45 and Legal Conclusions 1 through 8 and 12 through 14, while the District thoroughly reviewed information regarding Dr. Fox's letter as to Student's diagnoses, the District did not consider and evaluate all information concerning Student's possible cognitive disability. After receiving a copy of Dr. Fox's letter at the MD team meeting, which simply listed four diagnoses and Student's medication, Mr. Koop went over the diagnoses besides ADHD with the MD team. Mr. Koop adequately explained dysthemia, OCD and ODD, and appropriately analyzed, along with the other IEP team members, whether Student's conduct was a manifestation of ADHD, dysthemia, OCD and/or ODD. The District also considered information Parents provided

about Student in relation to Dr. Fox's letter.

18. However, the District failed to consider information that Student might have a cognitive disability and his disciplinary conduct might be a manifestation of that disability. The assessment information that the District had from Dr. Glidden, CUSD and Mr. Koop, as persuasively discussed and explained by Dr. Kraus, created real concerns that Student might have a cognitive disability. Dr. Kraus established the possibility based on previous concerns that Student might have an intellectual disability and the significant discrepancies in cluster and subtest scores in Mr. Koop's 2010 psychoeducational assessment. The District presumed that Student was closer to average cognitive ability based on his over 3.0 grade point average, despite the fact that Student's grades were based on a modified curriculum and his grade equivalent ability in math and language arts was several grades below eighth grade. Finally, Dr. Lebby did not testify about whether Student might have cognitive disability even though he reviewed the same records and assessments that Dr. Kraus reviewed. Additionally, Dr. Kraus and Dr. Lebby both noted that Student's long term foster care might impact his ability understand appropriate social boundaries. While District team members knew of Student's long term foster care based on prior assessment information and information provided by Parents, the District failed to consider the possible impact of Student's long term foster care coupled with possible cognitive impairments. Mr. Wait, as a former high school principal with the District, was convincing, based on his review of Mr. Koop's assessment, that the MD team members needed to evaluate whether Student had a cognitive disability, and not summarily dismiss that concern. Therefore, the District's failure to adequately consider and discuss the possibility a cognitive impairment was a procedural violation that significantly impeded Parent's ability to participate in Student's educational decision making process, which invalidated the District's MD decision.

ISSUE 1D: WHETHER THE DISTRICT'S MD IS PROCEDURALLY INVALID BECAUSE THE DISTRICT FAILED TO ENSURE THE ATTENDANCE AT THE MD TEAM MEETING OF A GENERAL EDUCATION TEACHER WITH SUFFICIENT KNOWLEDGE ABOUT STUDENT.

19. Pursuant to Factual Findings 25, 27 through 30 and Legal Conclusions 1 through 8 and 12 through 14, the District failed to ensure the attendance of at least one of Student's general education teachers for the MD team meeting. The District's choice to attend the MD team meeting, Ms. Hurt, was not a relevant or appropriate general education teacher. The District only had Ms. Hurt attend because of her availability, and not any relevant information she could provide. Ms. Hurt had some basic knowledge of Student because in seventh grade he was in another physical education class when she was also teaching and occasionally Ms. Hurt would instruct Student. Ms. Hurt was not an appropriate teacher to attend the MD team meeting because she was never Student's assigned teacher, her instruction of Student was not on a regular basis and she had never reviewed or implemented Student's IEP as part of her instruction. Therefore, Student established that the District's MD team meeting was procedural invalid because the District did not have an appropriate and relevant general education teacher attend the MD team meeting.

ISSUE 1E: WHETHER THE DISTRICT'S MD IS PROCEDURALLY INVALID BECAUSE THE DISTRICT FAILED TO PROPERLY NOTE, OR PROVIDE PARENTS AN OPPORTUNITY TO PROPERLY NOTE PARENTS' DISAGREEMENT WITH THE MD.

20. Pursuant to Factual Findings 31 through 35 and Legal Conclusions 1 through 8 and 12 through 14, the District properly noted Parents' disagreement with the District's MD decision. Mr. Nyberg accurately noted Parents' objections in the MD meeting notes, which also accurately reflected the start and stop times of the meeting. While the MD document should have a clearer box for parents to check if they disagree with any District MD decision, the IEP document does allow parents to object to portions of a District IEP.

Parents wrote their disagreement with the District's MD decision on the IEP form, and were encouraged by Mr. Nyberg to do so. Therefore, Student did not establish that the District failed to permit Parents to note their disagreement with the District's MD decision.

ISSUE 2: WHETHER STUDENT'S BEHAVIOR ON MAY 9, 2011, FOR WHICH HE WAS EXPELLED, WAS CAUSED BY, OR HAD A DIRECT AND SUBSTANTIAL RELATIONSHIP TO, HIS DISABILITY OR DISABILITIES.

21. Pursuant to Legal Conclusions 15, 18 and 19, because the District held a procedurally invalid MD team meeting, its decision that Student's disciplinary conduct was not a manifestation of his OHI disability, based on ADHD, is void. Accordingly, it is not necessary to evaluate the District's MD decision for this hearing because Parents did not have the opportunity to appropriately participate in the decision making process. Therefore, if the District wishes to proceed with Student's expulsion for the May 9, 2011 incident, the District needs to hold another MD review team meeting after providing Parents with appropriate notice. The District also needs to ensure that at least one proper general education teacher of Student attends the MD team meeting and that the District appropriately considers Student's possible cognitive deficits in the MD analysis.

Remedy

22. Student is presently in ninth grade in high school, so he cannot return to AMS, where he was placed in eighth grade at the time of the disciplinary incident. Student currently attends the District's Phoenix Secondary School pursuant to the District's expulsion decision. The parties are presently in the IEP process to discuss whether to change Student's placement. Although Parents might have agreed to an IEP subsequent to the District's expulsion decision that placed Student at the Phoenix Secondary School, Parents did not have any choice as to the school placement because of the expulsion order. Because of the District's procedural violations during the MD team meeting, the

District's decision that Student's conduct was not a manifestation of his disability is invalid. Accordingly, Student is entitled to attend a general education high school that he would have normally matriculated into if he had graduated from eighth grade at AMS.

ORDER

1. Student is to be reinstated at a District general education high school that he would have matriculated to and attended after AMS as of the date of this Order.
2. Within 10 school days of this order, the District shall convene a MD review team meeting if it decides to expel Student for the May 9, 2011 incident.¹³
3. If the District fails to hold a MD review team meeting within 10 school days of this order, the District shall expunge Student's educational records by purging all references to his expulsion from AMS.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issues 1a and 1d, and partially prevailed on Issue 1c. The District prevailed on Issues 1b and 1e, and partially prevailed on Issue 1c. No finding is made to Issue 2 because the District's procedural violations voided its manifestation determination decision.

RIGHT TO APPEAL THIS DECISION

This is a final administrative Decision, and all parties are bound by this Decision. The parties to this case have the right to appeal this Decision to a court of competent

¹³ This order does not intend to limit the District to just a MD review team meeting if the District decides to hold a combined MD and IEP team meeting.

jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: April 16, 2012

A handwritten signature in black ink, appearing to read 'P. P. Castillo', written over a horizontal line.

PETER PAUL CASTILLO

Administrative Law Judge

Office of Administrative Hearings