BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. CENTER UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2011120597

AMENDED EXPEDITED DECISION[1]

Administrative Law Judge (ALJ) Deidre L. Johnson, State of California Office of Administrative Hearings (OAH), heard this expedited disciplinary matter on January 31, February 1, 2, and 9, 2012, in Antelope, California.[2]

Mother represented Student at the hearing. Student and her Father did not appear during the hearing or testify. Mother and Father are referred to collectively as Parents.

Attorney Heather Edwards represented Center Unified School District (District). Cynthia Wachob, a program specialist, was present as the District's designated

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[1] The Expedited Decision issued on March 2, 2012, is amended on page 2, to correct various findings related to the closing arguments, to reflect OAH's timely receipt of Student's Closing Argument on February 17, 2012, and to revise the description of Student's second closing argument received on February 23, 2012. In addition, it is amended to add a new Footnote 5 on page 2, and a new Footnote16 to Paragraph 37 on page 13 of this decision.

[2] Administrative Law Judge Theresa Ravandi observed the hearing.

representative for most of the hearing, and District's Superintendent Scott Loehr appeared as the representative on the last day of hearing.

Student filed a request for a due process hearing (complaint) on December 19, 2011, that listed several problems, some of which involved an appeal of a school disciplinary manifestation determination, and others which alleged a denial of a free appropriate public education (FAPE). On January 23, 2012, this ALJ issued a prehearing conference (PHC) order which bifurcated Student's FAPE problems from her disciplinary problems, and ordered the disciplinary problems to proceed in this separate, expedited hearing.

At the expedited hearing, sworn testimony and documentary evidence were admitted. At the parties' request, the ALJ continued the case to allow the parties to submit written closing argument by February 17, 2012. On February 13, 2012, District filed a request to move District's Exhibit D3 into evidence on the ground that District had inadvertently withdrawn the exhibit from its exhibit binder on the last day of the hearing. Parent did not file a reply. On February 21, 2012, the ALJ issued an order granting the motion.[3] Exhibit D3, an individualized education program (IEP) dated August 10, 2010, was marked for identification and admitted into evidence. On February 17, 2012, District filed a written closing argument. On the same date, Parent timely submitted a closing argument to OAH. The record was closed and the expedited matter was submitted for decision on February 17, 2012.

On February 23, 2011, Parent submitted a second closing argument dated February 21, 2012, which was deemed to include a motion to reopen the record.

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[3] Since the record was still open when the motion and exhibit were received, the record did not need to be reopened and the prior finding "reopening" the record was inadvertent and therefore corrected.

However, Parent did not provide any indication that she served the attorney for the District with her argument, rendering the letter an ex parte contact with the ALJ. On March 1, 2012, the ALJ issued a Notice of Ex Parte Communication and Order Denying Request to Reopen the Record, in which Student's motion to reopen the record to permit a belated filing was denied.[4] The Expedited Decision was issued on March 2, 2012.

Student's first closing argument was not logged into the OAH case record or received by the ALJ until March 5, 2012. However, there was no indication the argument was served on the District, rendering it another ex parte contact with the ALJ. Therefore, on March 8, 2012, the ALJ issued a Second Notice of Ex Parte Communication, and indicated that an Amended Expedited Decision would be filed to consider Student's closing argument.[5]

The ALJ has now considered Student's first closing argument, which was timely filed and therefore did not require the record to be reopened. It is determined that, with one exception regarding Student's record of prior tardy class arrivals, Student's closing argument did not persuade the ALJ that any changes to the substantive Factual Findings, Legal Conclusions, or determinations of law in this decision are required. As to the tardy record, new findings are added in a new footnote, Footnote 16 to Factual Finding 37, on page 13 of the decision.

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[4] Moreover, as indicated in both ex parte communication notices dated March 1, and 8, 2012, Student's second, belatedly-filed argument contained points replying to or refuting District's closing argument; however, the ALJ had previously ordered that neither party had a right to reply.

[5] The March 8, 2012 Order was served by OAH on the parties on March 19, 2012.

EXPEDITED ISSUES[6]

Was District's determination that Student's conduct on school grounds on October 11, 2011, was not a manifestation of her disability in compliance with the law, as follows:

1. Was Student's conduct on October 11, 2011, a manifestation of her disability because the conduct was caused by, or had a direct and substantial relationship to her disability?
2. Was Student's conduct on October 11, 2011, a manifestation of her disability because the conduct was the direct result of the District's failure to implement Student's IEP?
3. In connection with the manifestation determination review team meeting on October 24, 2011, did the District commit a procedural violation by predetermining that Student's conduct on October 11, 2011, was not a manifestation of her disability?

REQUESTED REMEDIES

Student requests that OAH issue an order for the District to reverse its manifestation determination decision and subsequent expulsion, and find that her conduct in smoking marijuana in the school restroom with several other girls was a

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[6] On January 12, 2012, OAH issued a determination of sufficiency order that dismissed Student's allegations involving discrimination and negligence under state civil tort law. The PHC order dated January 23, 2012, bifurcated two FAPE problems for a regular due process hearing. The expedited issues have been reframed, reorganized, and clarified.

manifestation of her special education disability, Other Health Impairment (OHI), based on an underlying medical disability of Attention Deficit Hyperactivity Disorder (ADHD).

CONTENTIONS OF THE PARTIES

Student contends that the District had already predetermined that Student's conduct was not a manifestation of her disability when it held a manifestation determination review meeting on October 24, 2012. She claims that her conduct on October 11, 2012, was impulsive, unplanned, and caused by, or directly and substantially related to her ADHD and her failure to timely take her ADHD medication that morning. In addition, Student argues that the District failed to fully implement Student's IEP, which also contributed to her conduct at school on the day in question.

District contends that Student's conduct was not impulsive but planned, and started the previous day, and therefore was not a manifestation of her disability. In addition, District asserts that it implemented Student's operative IEP in the fall of 2011, and it did not predetermine the outcome of the manifestation determination review meeting.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student resides with Parents in Antelope, within the jurisdictional boundaries of the District. Student is a 15-year-old girl, and was in the 10th grade at Center High School (CHS) in the District until she was expelled in November 2011, based on the incident that is the subject of this expedited decision. Student was home schooled until sixth grade. The evidence is undisputed that Student is eligible for special education and related services under the category of OHI, primarily based on a medical

diagnosis of ADHD. Student has also been diagnosed with asthma and allergies.[7] She was first made eligible for special education in August 2010 in connection with her matriculation to high school.

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, by either 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 LEA's failure to implement the IEP.

3. On Tuesday, October 11, 2011, Student engaged in conduct that violated the law and school rules at CHS, when she smoked marijuana in a school restroom with two other girls. Student was initially suspended from school for five school days, and the suspension was extended. District determined that Student would be recommended for expulsion and provided written notice to Parents of a pre-expulsion manifestation determination review meeting and IEP meeting on October 24, 2011.

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

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[7] In addition, in 2010, Student's pediatrician referred her to a psychiatrist who issued a "rule out" diagnosis of possible depression.

(a) Section 48900, subdivision (c)(1): "Unlawfully possessed, used, sold or otherwise furnished, or been under the influence of any controlled substance, and alcoholic beverage, or and [sic] intoxicant of any kind."[8]

(b) Section 48900, subdivision (k)(1): "Refusal and/or repeated failure to follow school rules and regulations and/or severe disruption of school activities."

(c) Section 48915, subdivision (a)(3): "Unlawful possession of any controlled substance listed in Chapter 2 Division 10 of the Health and Safety Code."

5. At the manifestation determination review meeting, the District members of the review team determined that the behavioral incident on October 11, 2011, was not a manifestation of Student's disability.

6. On November 9, 2011, the District held an expulsion hearing. On December 13, 2011, the District's governing board issued the hearing panel's Findings of Fact and Recommendations for Student's expulsion through the second semester of the 2011-2012 school year (May 24, 2012), with a rehabilitation plan.

STUDENT'S HIGH SCHOOL IEP'S

Initial August 2010 IEP

7. Student's prior IEPs at CHS, from her entry into high school in 2010 through the behavioral incident in the fall of 2011, are relevant to evaluate whether District was implementing Student's IEP during the period in question, and whether any failure to implement her IEP directly resulted in Student's conduct on October 11, 2011.

[8] District's expulsion hearing panel ultimately found that Student did not violate this statute because "this was her first offense for possessing not more than an ounce of marijuana," and dismissed the charge.

8. In April 2010, when Student was in eighth grade at Wilson C. Riles Middle School in the District, she was assessed and the District members of an IEP team found her ineligible for special education. District developed a "504 Plan" for Student.[9] Parents disagreed with those actions, and the District conducted further assessments.

9. On August 10, 2010, when Student was 13 years old, and entered ninth grade at CHS, the District held an IEP team meeting to review all of the assessments. District school psychologist Tracie Daubenmire informed the IEP team, including Mother, that Student had academic difficulties as her reading fluency and comprehension, and writing skills were "slightly below basic," and her mathematic "struggles were noted." The IEP documents showed that Ms. Daubenmire reported to the IEP team that Student's overall social-emotional and behavioral levels of performance were in the average range, but that she received some "at risk" scores related to poor attention and a tendency toward hyperactivity, and one teacher's "significant concern" ("clinically significant" scores) about somatization and internalizing problems. Student's strengths included her athletic abilities, and she was viewed as polite, cooperative and honest.

10. Based on all the information presented to the IEP team, District offered Student eligibility for special education under the OHI category, and offered her special education and related services, including numerous accommodations, modifications and

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[9] A 504 plan is a document created pursuant to the federal anti-discrimination law commonly known as Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; implementing regulations at 34 C.F.R. § 104.1 *et. seq.*) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

supports. The supports included differential grading; use of reference books and materials; daily use of a planner and calendar with the assistance of each of her teachers; checks for understanding and consistent, positive instruction; use of the lavatory when in need; and encouragement to drink water (due to her medications). In addition, the IEP offered Student participation in specialized instruction in a study skills class once a day to support her work in her general education classes, and to build her organizational skills. The placement resulted in 84 percent of Student's time in general education, and the remaining 16 percent of her time in special education. The IEP also provided for testing accommodations: "small group, directions read and explained, frequent breaks."

11. The August 2010 IEP provided three annual academic goals to meet Student's unique needs related to her disability in the areas of math (Algebra), writing skills, and "school success." The school success goal was for Student to independently maintain a calendar to prioritize tasks and seek help as needed to turn in completed assignments by designated due dates 85 percent of the time by August 10, 2011, because Student had organizational struggles related to her disability and often misplaced class work and homework. Finally, the IEP also included a transition plan with career and college awareness services because Student wanted to go to college.

12. Mother provided written consent to the IEP on September 17, 2010.[10]

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[10] While Mother signed her consent to the 15-page August 2010 IEP without exceptions to the contents of those pages, she also inserted a request to add a 16th page, which was apparently an "IEP at a Glance" summary sheet of Student's IEP given to the teachers. However, the 16th page was not added to the IEP in evidence. That document was not presented at hearing and the record is unclear whether Mother or the District prepared that sheet. There was no evidence that the summary sheet constituted Student's counter offer to any of the programs and services offered to

Behavioral Incident in October 2010

13. On October 21, 2010, Student got into a fight at school with another female pupil, Pupil A, who had been taunting or bullying Student to fight with her. Many pupils urged Student and Pupil A to fight so they could record it. Mother established that Student was experienced in karate, a martial art that includes ethical training in avoiding a fight. Mother was persuasive that Student had previously tried to avoid the fight using those avoidance skills. However, while Student was doing makeup work in a classroom after school on that day, Pupil A and many other pupils stood outside waiting for her, and a fight ensued. District staff who investigated the incident determined that the altercation constituted "mutual combat" and both Student and Pupil A received five-day suspensions. Parents asserted that the fight was not Student's fault and that she was unfairly punished.

December 2010 IEP

14. Thereafter, Student became ill with strep throat. She missed at least 10 school days due to illness in addition to the five days of suspension, did not make up a lot of the missed assignments, turned in some assignments late, and fell behind academically. Mother became concerned and requested an emergency IEP team meeting to review Student's then present levels of performance and address Parents' concerns. District convened an IEP team meeting on December 16, 2010, attended by

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Student in the IEP. Therefore, District did not counter and accepted Mother's consent to the IEP. Had Mother's addition requested to substantively change or make a counter offer to District's proposed IEP, that would have negated Mother's "consent," and the IEP would not have been agreed upon.

Mother, Student, and 12 District personnel, including the school psychologist Dr. Joseph Whalen.

15. Mother informed the IEP team that Student took her ADHD-related stimulant medication (Adderall) at about 6:00 a.m. daily and school started at 7:40 a.m. Student's medication wore off after about four hours, and she had an appointment with her physician to adjust the medication. The IEP team verified that Student was using her "Cougar Planner" to write down her class assignments, and the planner was checked during the Study Skills class. However, Student had difficulties sustaining her attention and keeping organized. Mother was persuasive that Student often forgot her homework, misplaced her homework in her school backpack, or would redo homework she had already done. In addition, Student appeared not know how to turn her in homework. The evidence established that these were areas of school-related conduct that were impacted by Student's disability. After a discussion regarding Student's confusion about to whom she should turn in her homework, and how late her homework could be before it would not be accepted by particular teachers, the District members of the IEP team offered to modify Student's accommodations in her August 2010 IEP.

16. The December 2010 IEP supplemented the accommodations provided in Student's August 2010 IEP, as set forth in Factual Findings 10 above, by adding an accommodations and modifications page to her IEP that offered reduced or shortened assignments; books on tape; use of manipulatives for math and science; cues, prompts, and reminders of rules; use of sensory strategies (discreetly chew gum in most classes, and use an iPod at the teacher's discretion); and extended time to complete assignments, provided that "work will be turned in within the week of the due date." In addition, organizational supports were added for both Mother, at home, and staff in the Study Skills class to check, and initial, Student's completed work in her planner; and for

Student's backpack to be checked every Friday in the Study Skills class for missing assignments, so that any assignments found would be turned in to the appropriate teacher's box.

17. Mother signed her consent to the December 2010 IEP on February 14, 2011. The evidence established that Student's August 2010 IEP, as modified by the December 2010 IEP, was her last agreed-upon IEP. Aside from a food fight in the school cafeteria, for which Student received a detention that did not affect her disciplinary record, Student had no further behavioral episodes at school until October 2011.

August 2011 IEP

18. On August 23, 2011, District convened Student's annual IEP team meeting for her 10th grade school year. This meeting was attended by Mother, Student, and various District staff. Student had B grades in most of her general education academic classes, an A in the Study Skills class, and a D in Health, reportedly due to "poor test performance, short attention span, easily distracted, talkative...." District offered revised annual goals for school success, reading comprehension, postsecondary transition, and writing skills, with the same accommodations, modifications, and supports as those contained in the December 2010 IEP. However, the IEP provided that the goals and the supports would be further reviewed by District support services manager Susan Radi and Mother.

19. The evidence established that Parents did not consent to the August 2011 IEP offer. Therefore, it is not relevant to the inquiry as to whether District was implementing Student's IEP in October 2011, when the disciplinary incident occurred.

STUDENT'S DISABILITY

20. The eligibility criteria for the special education disability category of OHI include that a pupil has limited strength, vitality or alertness, due to a chronic or acute

health problem. Attention Deficit Disorder (ADD) and ADHD are not among the statutory examples for this category of disability. ADD and ADHD are not statutory categories of disability in either federal or California special education law. They are often included within the disability category of OHI under the rationale of "limited alertness," involving inattention and/or hyperactivity-impulsivity.

21. Dr. Whalen testified and established that Student's OHI eligibility was based on ADHD. He has been a school psychologist with the District for four years. Dr. Whalen holds a Ph.D. in psychology and became licensed as a clinical psychologist by the State in 1990, and has a State waiver to act as a school psychologist. He established that there are three primary categories of ADHD. ADHD involves behaviors of: (1) impulsiveness and hyperactivity; (2) inattention or poor sustained attention and lack of focus; and (3) a combination of both of the above types. Children with ADHD exhibit a range of symptoms and levels of severity. Medication is often used to control behaviors associated with ADHD, along with various strategies and supports. Dr. Whalen did not discuss ADD as a separate category. He established that Adderall is used to help with all four main symptoms of ADHD: lack of sustained attention, distractibility, impulsiveness, and hyperactivity.[11]

22. Based on Dr. Whalen's review of Student's school records, including District's 2010 assessments, he was persuasive that Student's OHI was based primarily on her manifestation of ADHD symptoms of poor sustained attention and poor

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[11] At Mother's request, Official notice was taken of the Diagnostic and Statistical Manual for Mental Disorders, Fourth Edition, Text Revision (DSM-IV TR, 2000) sections 314.00 and 314.01 regarding ADHD. In the DSM-IV, ADD is not referred to. Instead, in section 314.00, it is called "Attention-Deficit/Hyperactivity Disorder, Predominantly Inattentive Type."

organization skills in the school setting. In March and May 2010, District school psychologist Tracie Daubenmire assessed Student using many assessment tools, including: the Behavior Assessment System for Children, 2nd Ed. (BASC-2) to assess Student's social-emotional and behavioral skills, and the Connors' Rating Scales 3.

23. However, Dr. Whalen was not persuasive that impulsivity or hyperactivity were not known behaviors in the school environment. First, Dr. Whalen testified that Parents had rated Student "highly" for impulsivity or hyperactivity on the Connors 3 assessment test in March 2010. The evidence established that the Connors 3 is "a standardized survey which has been used for decades to assess behaviors associated with attention disorders." Both Mother and Father rated Student on the Connors 3 as clinically significant for hyperactivity and impulsivity with T-scores of 90, equal to the scores they gave for Student's inattention. Dr. Whalen testified that he had no information from school staff that Student exhibited such behaviors at school. However, Ms. Daubenmire did not administer the Connors 3 to any of Student's teachers. Second, in contrast, the BASC-2 was administered to both Parents and teachers. On the BASC-2, all teachers and Mother had rated Student as at risk for inattention, involving "day dreaming or being easily distracted and unable to concentrate more than momentarily." In addition to Mother's at risk rating for hyperactivity, one teacher rated Student as at risk for hyperactivity on the BASC-2, meaning that some hyperactive behaviors were observed in the school environment, at least in middle school. In addition, as noted above, in late August 2011, at CHS, Student was getting a D in Health, a sixth period class at the end of the school day, where she was distracted, talkative, and her medications were wearing off.

24. Student's private physician, Dr. Heshani Abeysekera testified that it was her understanding that Student was diagnosed by a prior doctor with ADD. Dr. Abeysekera has been licensed since 2007, and has been Student's pediatrician for

almost two years. Dr. Abeysekera is not a psychiatrist or psychologist, and conceded that she had no training or experience in working with youth with either ADD or ADHD, aside from medication management. In general, however, Dr. Abeysekera was persuasive that Student's historical symptoms, reported to the physician, involved the ADD or inattentive type of ADHD, including academic difficulties and poor attention and focus in class, daydreaming and forgetting things in her backpack. Those symptoms caused Dr. Abeysekera to refer Student to a neurologist, Dr. Nadine Yasser, to rule out a seizure disorder. Dr. Yasser reportedly advised Parents and Dr. Abeysekera of the possibility that Student could be depressed. Dr. Abeysekera had no record of any complaints from Parents or Student about symptoms of hyperactivity, impulsivity or social acting out. In July 2010, Dr. Abeysekera recommended that Student could seek mental health services related to the possibility of depression. Thereafter, neither Parents nor Student reported any symptoms of depression to Dr. Abeysekera, such as flat affect, unexplained sadness, or extreme negativity.

25. As to medication management, Dr. Abeysekera established that Student had difficulties with the Adderall as the stimulant drug both wore off too quickly in school and contributed to insomnia at night. Dr. Abeysekera adjusted the dosage by adding a second, smaller dose in the middle of the day, and adding a nonstimulant drug, Strattera, to take in the evening to help Student sleep. The modified dosages and drugs were in place and effective prior to the October 2011 disciplinary incident. Dr. Abeysekera testified that if Student's medications were not taken or were not working, Student would be less likely to be able to focus in class, take notes, or complete assignments, but would not become more prone to act out behaviorally because behavioral impulsivity or hyperactivity was not a known symptom for Student. However, Dr. Abeysekera's opinion on this point was not persuasive because of her admitted lack of training and experience in neuropsychiatry in general, and ADHD in particular, and

her lack of knowledge of Student's school-based assessments and educational levels of performance and functioning.

BEHAVIORAL INCIDENT OF OCTOBER 11, 2011

26. According to Student's statement taken by the District on October 11, 2011, during its investigation of the incident, Student had been talking with friends before school on Monday, October 10, 2011, about the fact that her birthday was on October 12. Pupil A offered her marijuana ("some weed") as a present and Student accepted it "because I never tried it." The marijuana was a small, usable amount in a small black film canister. The group also included Pupil B and Pupil C. The next morning, on October 11, 2012, Student and Pupil B met at the beginning of first period in the girls' restroom and used binder paper to roll the marijuana and smoke it. However, in addition to not having cigarette paper, they also did not have a lighter or matches, so Student sent a text to Pupil C, who was in a class, to bring a lighter to the restroom. Pupil C complied and the three girls smoked or attempted to smoke the controlled substance. Student wrote: "I realize that what I did was wrong and I acted impulsively."

27. Peter Graham, a teacher at CHS since 1986, was teaching an advanced placement Government class for seniors during first period on October 11, 2011. He established that one of his female pupils asked to use the restroom, then came back in upset, and informed him that someone was smoking marijuana in the restroom. Mr. Graham stepped out into the hall, saw Student and Pupil B step out of the restroom heading toward the attendance office for passes and directed them to the campus monitor, who escorted them to the school office.

28. CHS Vice Principal Steve Jackson immediately conducted an investigation. Mr. Jackson has worked in the District since 1989, as a vice principal at several schools, and as a teacher. He holds a master's degree in educational administration. Mr. Jackson placed the girls in separate rooms for questioning. Mr. Jackson credibly testified that

Student admitted smoking marijuana with the other two girls in the restroom and explained to him that she had received it as a gift the day before, but denied knowing where the remaining marijuana was.[12] He then called Pupil C into his office, who informed him that Student still had the substance and had tucked it in her bra. Mr. Jackson called Officer Emily Kelly of the Twin Rivers Police Department and she immediately responded and investigated the incident. Mr. Jackson established that Officer Kelly interviewed Student. After initially denying she had it, Student produced the canister. Officer Kelly inspected the contents and based on her experience and training, confirmed to Mr. Jackson that it was marijuana. Mr. Jackson notified all three families. Based on his investigation, Mr. Jackson prepared a written site incident report. District did not refer Student to law enforcement for criminal prosecution but dealt with the incident as a school discipline problem.

29. Mother testified that Student told her the person who offered the marijuana to Student was Pupil A, the pupil who had bullied and fought with Student in October 2010, and that Student had informed Mother that she only accepted the marijuana because she did not know what Pupil A would do to her if she refused it. Mother was not present when the incidents occurred. Student did not testify at the hearing and the reason for her absence was not explained. Student was sworn in at an expulsion proceeding on November 9, 2011, and provided some testimony supplemental to that of her Mother and did not contradict Mother's explanation. As found above, Student's statements are exceptions to hearsay.

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[12] Although Student's statement to Mr. Jackson is an out-of-court hearsay statement, Student is a party to this action. The statement is therefore an admission of a party or a statement against her own interest, both of which are exceptions to hearsay. (Evid. Code §§ 1200, 1220, 1230; *In Re Ricky B* (1978) 82 Cal.App.3rd 106.)

30. Mother was persuasive that she did not check Student's backpack during the evening of October 10, 2011, because her mother, Student's grandmother, was dying and Mother was with her. Mother returned home late that night. Normally, Mother gave Student her medication at about 5:30 to 5:45 a.m. Both Mother and Dr. Abeysekera established that it took about 40 to 60 minutes for the medication to take effect. However, on the morning of October 11, 2012, Mother overslept and did not wake Student or administer the medication to her until about 7:15 a.m. Mother then drove Student hurriedly to school, during which they had an argument. They arrived at school and Student got out of the car just as the first period bell was ringing. Therefore, Student did not plan to come to school late on that day, but was late by the time she entered the campus. Mother did not see where Student went and assumed she went to her first period class. Student's medication had not yet taken effect.

31. Student informed Mother and the District expulsion panel that when Student was walking to her first period class, she saw Pupil B heading to the restroom, and followed her into the restroom instead of going to her first period class. Mother argues that this was impulsive and just a coincidence and did not constitute a plan made the day before. However, Pupil B wrote in her statement to the school authorities that "[y]esterday[Student] received weed from [Pupil A]. We made a plan to smoke it today. Ditch 1st period. So then, we met up in the bathroom and she showed me the weed." While Pupil B's statement is hearsay, it is admissible to explain and supplement other evidence.[13] Here, the evidence established that Pupil B's conduct in meeting Student at the beginning of school was consistent with Pupil B's written statement.

[13] See title 5, California Code of Regulations, section 3082, subdivision (b).

DISTRICT'S MANIFESTATION DETERMINATION

32. When a special education pupil is suspended for disciplinary reasons for more than ten days, federal law requires that the appropriate members of the IEP team meet to determine whether his conduct was a manifestation of his disability.

33. On October 24, 2011, District held a combination IEP team meeting and manifestation determination review meeting. The following people attended the meeting: Mother, Father, Student, CHS principal Mike Jordan, program specialist Cynthia Wachob, school counselor Elizabeth McCloskey, general education teacher Peter Graham, special education case carrier Susan Radi, Dr. Whalen, and vice principal Jackson.

34. Dr. Whalen facilitated the team meeting, including providing all parties with the standards to be used to evaluate whether Student's conduct was a manifestation of her disability. The meeting was almost two hours long, during which Parents and Student presented information in an effort to exculpate Student. For example, they explained that Student was afraid to refuse to accept the marijuana from a "bully;" and that the substance was probably not marijuana but an herb. They argued that Ms. Radi should have checked Student's backpack for missing homework on Monday, October 10, 2011, although the IEP in effect called for the homework check to be done on Fridays. In addition, they contended that the school's failure to stop drug activity on campus and infrequent reminders of the consequences lowered Student's "awareness of the inappropriateness of the behavior and its potential consequences.[14]

[14] District established that at the beginning of each school year, including the 2011-2012 year, parents were required to sign a notice of receipt of District's disciplinary matrix. In addition, at that time District provided all pupils the school handbook

Further, Parents informed the team that Student's ADHD medication was not in full effect at the time the smoking incident occurred on October 11, because the medication had been taken much later than normal.

35. Mr. Graham liked Student and taught her in his fourth period social studies class in the fall of 2011. He was aware that Student was a special education pupil with an IEP, and persuasively established that he was aware of, and implemented her IEP accommodations and modification in his class.[15] Mr. Graham described Student as a quiet pupil who never had a discipline issue, was never tardy, usually worked "below the radar," and was then receiving an A minus in his class. He found that Student tended to be passive, became overly preoccupied, took longer than other pupils to complete assignments, and was often be disorganized. He did not recall any impulsive, erratic or hyperactive behaviors in his class. Mr. Graham was saddened and disappointed by Student's conduct and his responsibility to turn her in.

36. Until the review meeting, Mr. Graham was unaware that Student had been medicated in his class. His class started at 11:30 a.m. The evidence established that Student's morning medication often wore off by about 11:00 a.m., and Dr. Abeysekera had prescribed another, smaller dose that Student was supposed to self-administer during her lunch between 11:00 and 11:30 a.m. The evidence also established that

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containing the rules, and had an advocacy class during the first week of school in order to review all of the school rules and expectations for success.

[15] Mother testified persuasively that some of Student's general education teachers were not aware of her IEP until a back-to-school night held within the first few weeks of school. However, Mother made sure all of Student's teachers were aware of her IEP after that.

Student often did not take that second dosage. However, Mr. Graham did not recall any times when Student had acted differently on days when her medication was not taken or had worn off.

37. The meeting notes reflect that the manifestation determination review team discussed Student's IEP, teacher observations, grades, prior school records, including disciplinary records, and relevant information provided by Parents.[16] The team also discussed the facts and events relating to the drug incident. The review team considered Student's unique needs, and whether her IEP had been implemented. The team also discussed Student's ability to understand the impact and consequences of her conduct regarding the incident. After listening to Parents and Student, all members of the review team voted out loud and all District members of the IEP team did not find anything in the information and explanations provided by all present, including Parents and Student, to persuade them that Student's conduct was caused by or had a direct and substantial relationship to her disability. In addition, the District members of the review team did not find that any school personnel had failed to implement Student's IEP. The evidence supported their findings.

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[16] Student contends that the District members of the review team placed unfair emphasis on Student's middle school record of being tardy to a particular class. The evidence did not support Student's contention because, while the review team saw that information, they remained focused on the manifestation determination questions before them about the incident. Mother established that Student's difficulties getting to her middle school class involved the distance and short passing time, and not any deliberate behavior. There was some evidence that the District's expulsion panel may have placed additional emphasis on Student's pre-high school tardies. However, the expulsion panel's actions are beyond the OAH jurisdiction in this proceeding.

38. Student presented the testimony of Vera Karabinus Marez on the issue whether Student's conduct in accepting and smoking marijuana at school was a manifestation of her disability. Ms. Marez has a master's degree in marriage and family therapy (MFT), is licensed as an MFT, and works for Peace for Families, where she primarily works with victims of domestic violence and sexual assault. She worked for three years at a special education nonpublic school and has experience with disabilities and IEP's. In addition, Mrs. Marez' daughter has severe ADHD, with hyperactivity and impulsivity. Mrs. Marez has met Student but has not treated her and is not familiar with her academic functioning. Mrs. Marez declined to give Student an opinion about how a pupil with ADHD might act without prescribed ADHD medication because she testified that it would be very subjective. Overall, her testimony was not given much weight.

39. Mother testified as to her opinions that Student's conduct was a manifestation of her ADHD and reflected her ADHD symptoms of impulsivity and poor judgment. Mother has a master's degree in psychology with an emphasis on MFT, and also worked as a therapist at a nonpublic school. Mother described her experience that Student's symptoms of ADHD included impulsivity. However, even though Parents observed Student to act excessively impulsive in the home, and Student exhibited some impulsiveness at school, the evidence did not show that impulsivity was a significant problem that affected Student's educational experience. Mother has given much thought to what happened, loves her daughter very much, and thinks that Mother's role in waking up late on the morning of October 11, 2011, failing to give Student her medication timely, and getting into an argument with her while driving to school all contributed to trigger Student's impulsiveness that morning. Mother is upset that the District expelled Student; however, since the District's manifestation determination was not in error, OAH has no further jurisdiction over District's expulsion actions.

40. Student did not sustain her burden to present evidence to prove that her conduct was *caused by* her disability based on ADHD. The evidence established that District's decisions at the manifestation determination review meeting were supported by the evidence and complied with the law. Student's conduct may have involved some impulsivity and poor judgment, similar to that of other teenagers who do not always act carefully and thoughtfully. The evidence established that the primary manifestations of Student's symptoms at school were a lack of sustained attention and focus, and disorganization. While Student sometimes acted impulsively at school, it was primarily shown to be talking inappropriately in class.

41. Student did not sustain her burden to establish that the conduct in question was *directly and substantially related to* her disability for the same reasons. Overall, Student's special education program addressed her academic deficits related to her disability, in the areas of math, writing skills, reading, focus, attention, distractibility, and organization. The evidence did not establish that Student suffered sustained impulsivity, hyperactivity, social skill or behavioral problems related to her ADHD. Impulsiveness generally involves "acting on the spur of the moment."

42. Dr. Whalen was persuasive that, even if Student displayed more impulsive behaviors than he was aware of, it would not change his opinion that Student's behaviors on October 10 and 11, 2012, were not caused by, or had a direct and substantial relationship to Student's OHI based on ADD/ADHD. Dr. Whalen was also persuasive that Student was capable of knowing what behaviors were acceptable at school.

Predetermination

43. The principles of due process require fairness and an opportunity to be heard. Under the Individuals with Disabilities Education Act (IDEA), parents of a child with a disability must be afforded an opportunity to participate in IEP team meetings

with respect to the provision of a FAPE to their child, and the school district must fairly and honestly consider parents' concerns. School officials may discuss the issues and concerns in advance of the IEP team meeting, but they may not arrive at an IEP team meeting with a "take it or leave it" attitude. While the manifestation review meeting in this case was combined with an IEP team meeting, the manifestation review itself is not by law an IEP meeting. Although the law is not clear, if the same principles are applied here as for IEP team meetings, Student did not establish that District predetermined the outcome.

44. Parents experienced the manifestation determination review team meeting on October 24, 2011 as a predetermined meeting where the District members in attendance had already made up their minds. However, Mother testified that she could not point out anything specific about any particular person, just a feeling that the decision was a "done deal." No objective evidence was presented to support her assertion.

45. Mr. Graham, Mr. Jackson, and Dr. Whalen testified during the hearing. Their testimony was credible and consistent with the IEP and review team meeting notes and with each other. Mr. Jackson credibly conceded that he came to the meeting prepared, and with the knowledge gleaned from his personal investigation of the incident on the date that it occurred, including his discussions with Officer Kelly and the four girls involved. However, he, and the other District members of the team, came with an open mind to hear what Parents and Student had to say, including any explanations, insights or information that they could bring to the table.

46. Mr. Graham was also persuasive that he did not want to have to make the decision he did regarding the lack of manifestation of Student's disability in the circumstances involved. Dr. Whalen was persuasive that the information about Student's tardy medication on the morning of the incident was not relevant to him because the

incident began the day before, and Student had multiple opportunities to stop and reconsider after her medication became fully effective.

47. Each District member voted verbally and was able to express his or her opinion. Based on the foregoing, there was no evidence that District personnel predetermined the result of the manifestation determination review 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 issues were bifurcated as noted above, and this 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 FAPE is defined as special education and related services that are available to the pupil at no cost to the parent or guardian, that meet the State educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) A special education placement is adequate if it is reasonably calculated to provide educational benefit to the pupil at the time the offer is made. (*Gregory K.* v. *Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

3. Pupils receiving special education are subject to disciplinary measures such as suspension or expulsion by a school district for violation of the law or its rules of conduct. (20 U.S.C. §1412(a)(1)(A).) However, the IDEA prohibits the expulsion of a pupil with a disability for misbehavior that is a manifestation of the disability. (20 U.S.C. § 1415(k); 34 Code of Fed. Regs. § 300.530, et seq.; *Doe v. Maher* (9th Cir. 1986) 793 f.2d 1470.) The federal law governs when and how schools may change the educational placement of a child with a disability because of his or her offence.

4. A "change of placement" is a fundamental change in, or elimination of, a basic element of a pupil's educational program. A change of placement is defined as (a) a removal for more than 10 consecutive school days, or (b) a series of removals that cumulate to more than 10 consecutive school days and constitute a pattern based on listed factors. (34 C.F.R. § 300.536(a).) Thus, depending on its form and duration, suspension of a pupil receiving special education and related services due to a disability may constitute a change in his or her educational placement. School personnel may remove a child with a disability to an interim alternative educational setting, another setting, or to suspension for not more than 10 school days without triggering the "change of placement" protections of the law. Expulsion or suspension for more than ten days is a change of placement. (*Honig v. Doe* (1988) 484 U.S. 305.)

MANIFESTATION DETERMINATION

5. Within 10 school days of any decision to change the educational placement of a pupil with a disability because of a violation of law or code of conduct, the local educational agency (LEA), the parent, and relevant members of the pupil's IEP team shall review all relevant information in the pupil's file, "including the child's IEP, any teacher observations, and any relevant information provided by the parents." (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1) and (h).) If the review team determines that

either of the following is applicable, the pupil's conduct "shall be determined to be a manifestation of the child's disability."

(a) If the conduct in question was caused by, or had a direct and substantial relationship to, the pupil's disability; or

(b) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

6. If school personnel seek to order a change of placement that would exceed 10 school days, and if it is determined that the behavior that gave rise to the conduct violation was *not* a manifestation of the pupil's disability, then the following apply:

(a) The school may apply the same disciplinary procedures that are applicable to children without disabilities "in the same manner and for the same duration in which the procedures would be applied to children without disabilities. (20 U.S.C. § 1415(k)(1)(C)."

(b) The pupil must still receive a FAPE, although it may be provided in an interim alternative educational setting. (20 U.S.C. § 1415(k)(1)(D)(i).[17]

(c) In addition, the pupil shall receive, as appropriate, a functional behavioral assessment (FBA) and behavioral intervention services and modifications "that are designed to address the behavior violation so that it does not recur." (20 U.S.C. § 1415(k)(1)(D)(ii).)

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[17] Commentary distinguishes between the review team that does the manifestation determination and the IEP team that makes decision about 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).)

7. If the review team makes a determination that the pupil's conduct *was* a manifestation of the pupil's disability, then the pupil's IEP team is required to take action, as follows (20 U.S.C. § 1415(k)(1)(F):

(a) The IEP team must conduct a FBA and implement a behavioral intervention plan for the child, if the LEA had not already conducted one prior to the behavior at issue.

(b) Where a behavioral intervention plan was already developed, the IEP team must review it, and modify it, as necessary, to address the problematic behavior.

(c) The IEP team must return the pupil to the special educational placement from which the pupil had been removed, unless the parent and the LEA agree to a change of placement "as part of the modification of the behavioral intervention plan."

8. The parent of a pupil with a disability who disagrees with either a school's decision to change the pupil's educational placement as a disciplinary measure, or the manifestation determination may appeal by requesting a due process hearing. (20 U.S.C. § 1415(k)(3)(a).[18] An expedited hearing shall be held within 20 school days of the date the hearing is requested. A decision or "determination" shall be made by the hearing officer within 10 school days after the hearing. (20 U.S.C. § 1415(k)(4)(B).)

9. With some exceptions, when an appeal has been requested, the pupil shall remain in the then-current educational placement. (20 U.S.C. § 1415(j). This is commonly referred to as "stay put." One exception to the general stay put rule is in a disciplinary matter involving a weapon, drugs, or "serious bodily injury," where an alternative educational placement is made, the child shall remain in the interim alternative

[18] The LEA may also request a hearing in specified circumstances.

educational setting pending the decision of the hearing officer. (20 U.S.C. § 1415(k)(4)(A). In those circumstances, 20 U.S.C. section 1415(k)(1)(G) permits school personnel to remove a pupil to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability. In this case Student did not file an appeal before her expulsion.

10. The IDEA states that, when dealing with pupils with disabilities who have violated a code of conduct, school personnel are expressly permitted to consider "any unique circumstances on a case-by-case basis" in determining whether a change of placement order would be appropriate. (20 U.S.C. § 1415(k)(1)(A).)

11. California law is in accord with federal law. California law refers to a "child with a disability" as an "individual with exceptional needs" who is identified as disabled by an IEP team and requires special education and services. Under California Education Code section 48915.5, an individual with exceptional needs may be suspended or expelled from school in accordance with subsection (k) of Section 1415 of title 20 of the United States Code, including the discipline provisions in federal regulations and other provisions of California law that do not conflict with the federal law and regulations.

12. Education Code section 48900 provides that a pupil may not be suspended from school or recommended for expulsion unless the superintendent or school principal determines that the pupil has committed an act "related to school activity or school attendance occurring within a school" as defined in subsections (a) through (q).[19]

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[19] Other Education Code sections define additional acts that may be grounds for discipline.

13. The court in *Doe v. Maher*, *supra,* (9th Cir. 1986) 793 F.2d 1470, 1480, discussed the meaning of various phrases describing "conduct that is a manifestation of the child's handicap." The court explained: "As we use them, these phrases are terms intended to mean the same thing. They refer to conduct that is caused by, or has a direct and substantial relationship to, the child's handicap. Put another way, a handicapped child's conduct is covered by this definition 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." The court went on to say: "If the child's misbehavior is properly determined *not* to be a manifestation of his handicap, the handicapped child can be expelled. [cites] ...When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him [or her] 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 that is not so." (Emphasis original.) (*Doe v. Maher, supra,* at 1482.)

14. Education Code section 56339 provides that a pupil whose educational performance is adversely affected by a diagnosis of ADHD may be entitled to special education and related services if he or she demonstrates a need for special education and related services by meeting the eligibility criteria specified in subdivision (f), (i), or (j) of section 3030 of title 5 of the California Code of Regulations, for the disability categories of other health impairments, serious emotional disturbance, or specific learning disabilities.

15. The eligibility criteria for OHI under subdivision (f) of title 5 of the California Code of Regulations, section 3030 are: "A pupil has limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis,

severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, and hematological disorders such as sickle cell anemia and hemophilia which adversely affects a pupil's educational performance. In accordance with Section 56026(e) of the Education Code, such physical disabilities shall not be temporary in nature as defined by Section 3001(v)."

ISSUE 1: WAS STUDENT'S CONDUCT ON OCTOBER 11, 2011, A MANIFESTATION OF HER DISABILITY BECAUSE THE CONDUCT WAS CAUSED BY, OR HAD A DIRECT AND SUBSTANTIAL RELATIONSHIP TO HER DISABILITY?

16. As set forth in Factual Findings 1 through 42, and Legal Conclusions 1 through 15, the evidence established that Student's OHI disability, based on ADHD, resulted in special education accommodations, modifications, and supports in her operative IEP that addressed her academic struggles related to her lack of sustained attention and focus, distractibility, and lack of organization skills. Student's IEP thus focused on helping her make academic progress and be able to remember, to be organized, and to complete, and turn in her class work and home work assignments. While hyperactivity-impulsivity was an area of some concern in the 2010 psychoeducational assessment, there was no evidence that Student engaged in such behaviors in the school setting to any significant degree and she behaved well in class. District did not have an IEP goal to address hyperactivity-impulsivity as an area of unique need that adversely impacted Student's education. There was no competent evidence to support a finding that Student's OHI played any significant role in the incident of October 11, 2011. At best, Student's initial decision to accept the marijuana may have been impulsive and that impulsiveness may have had an attenuated relationship to her disability.

17. The marijuana smoking incident on the next day was not precipitated by Student's sudden, unpremeditated impulsiveness. Student did not spontaneously accept

a marijuana cigarette from someone and smoke it. Rather, Student accepted the marijuana one day before the incident. In this case, Student's birthday was on October 12, 2011, and she wanted to try it for her birthday. If Student did not know how to say "no" to Pupil A, Student would have had further instances of trouble with Pupil A during the year from the October 2010 fight episode to the October 2011 drug incident. There is no record of any such problems. Student, Pupil B and Pupil C agreed to meet and smoke the marijuana at some point. This may have been the extent of the plan and it involved poor judgment. The fact that further plans were not made does not negate the existence of the general plan. Student's participation in the plan involved decision-making, and an opportunity overnight to reflect and change her mind. There was also an opportunity to make further plans, such as getting cigarette rolling paper. Mother's argument that Student often forgot that she put her homework in her backpack does not lead to the conclusion that Student forgot that she placed the canister in her backpack. Even if Student did forget about it overnight, she remembered when she and Pupil B were in the restroom the next day. Pupil B met Student at the beginning of first period to follow through with the general plan. Student knew who had a lighter, Pupil C, and invited her to join them. There was no evidence that Pupil A was present in the restroom or was otherwise part of the plan to smoke the illegal substance such that Student was bullied to do so. Therefore, based on a preponderance of the evidence, Student did not establish that her conduct on October 11, 2011, was caused by, or directly and substantially related to her disability.

ISSUE 2: WAS STUDENT'S CONDUCT ON OCTOBER 11, 2011, A MANIFESTATION OF HER DISABILITY BECAUSE THE CONDUCT WAS THE DIRECT RESULT OF THE DISTRICT'S FAILURE TO IMPLEMENT STUDENT'S IEP?

18. As set forth in Factual Findings 1 through 19, and 32 through 37, and Legal Conclusions 1 through 17, Student did not sustain her burden to present evidence

establishing that the District failed to implement her IEP in any significant way. Absent other evidence, District, as a public agency, is presumed to have performed its duties required by Student's IEP.[20] Student did not present sufficient evidence to overcome that presumption. The evidence showed that her teachers were aware of her IEP and the accommodations, modifications, and supports to enable her to obtain educational benefit. District did not fail to implement Student's IEP because Ms. Radi did not check Student's backpack on the afternoon of October 10, 2011, a Monday. The operative IEP provided that the backpack would be checked on Friday afternoons to help her stay organized. The marijuana remained in Student's backpack overnight consistent with the understanding that the girls would meet somewhere, sometime, for Student's birthday and smoke it. Accordingly, Student did not establish that District failed to implement her IEP, or that such a failure directly resulted in her conduct on October 11, 2011.[21]

PREDETERMINATION

19. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.,* (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child's programming

[20] See Evidence Code section 664.

[21] These findings and legal conclusions do not constitute rulings on whether Student's operative IEP provided a FAPE. As initially indicated, the FAPE issues have been bifurcated and are set for a separate hearing.

in advance of an IEP team meeting. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688 at p. 693, fn. 3.) As noted in Footnote 12, federal commentators distinguish the review team from the IEP team. Some courts have applied the same principles to manifestation determination review meetings, although the law is not clear. (See *Fitzgerald v. Fairfax County Sch. Bd.* (2008) 556 F.Supp. 2d 543, at p. 559-561 [principles of fundamental fairness and predetermination applied to review team meeting]; *Student v. San Diego Unified School District,* (2009) Cal.Ofc. Admin.Hrngs. Case No. 2009060881, p. 9-10 [review team did not predetermine outcome].)

ISSUE 3: IN CONNECTION WITH THE MANIFESTATION DETERMINATION REVIEW TEAM MEETING ON OCTOBER 24, 2011, DID THE DISTRICT COMMIT A PROCEDURAL VIOLATION BY PREDETERMINING THAT STUDENT'S CONDUCT ON OCTOBER 11, 2011, WAS NOT A MANIFESTATION OF HER DISABILITY?

20. As set forth in Factual Findings 32 through 37, and 43 through 47, and Legal Conclusion 19, the evidence did not support Student's claim that the District members of the manifestation determination review team predetermined their votes or the outcome of that meeting. Most of the District staff who attended the meeting on October 24, 2011 were aware of the incident, as Mr. Graham had turned Student in, and Mr. Jackson had investigated the incident. However, the fact that District staff would know of the details of a school-based disciplinary incident is to be expected. Certain officials, such as Mr. Jackson, had a duty to investigate, and their knowledge and participation did not disqualify them from being on the review team. Other District personnel on the team had no direct involvement in the incident. All of them listened to Parents and Student and carefully discussed the issues and Parents' concerns for about two hours. District team members disagreed that Parents' concerns should persuade them to vote that Student's conduct directly and significantly involved her disability or that District failed to implement her IEP. That disagreement did not prove that District

predetermined the outcome of the meeting. Therefore, Student did not meet her burden to establish that the District members of the review team predetermined the outcome of the meeting.

ORDER

Student's request for relief from District's manifestation determination is denied.

PREVAILING PARTY

District prevailed on all issues for hearing in this case. (Ed. Code § 56507, subd. (d).)

NOTICE OF APPEAL RIGHTS

This is a final administrative decision, and all parties are bound by this Decision. The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals 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: March 28, 2012

/s/

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Deidre L. Johnson

Administrative Law Judge

Office of Administrative Hearings