BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. BREA OLINDA UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013031109

DECISION

Administrative Law Judge Susan Ruff, Office of Administrative Hearings (OAH), State of California, heard the expedited portion of this matter on May 2, 6, and 7, 2013, in Brea, California.

Edwin Egelsee, Esq., and Elias Economou, Esq., appeared on behalf of Student and Student's parents (Student). Student's mother was present throughout the hearing. Student was not present.

Darin Barber, Esq., appeared on behalf of the Brea Olinda Unified School District (District). Jeanine Leech and Carol Christman also appeared on behalf of the District.

Student filed his request for a due process hearing on March 27, 2013. At the close of the hearing, the parties requested and received time to file written closing argument.[1] The expedited portion of this matter was taken under submission at the

[1] To maintain a clear record, Student's written closing argument has been marked as exhibit S-20. The District's written closing argument has been marked as exhibit D-7.

close of evidence on May 7, 2013. The non-expedited portion of this case is set for hearing at a later date.

EXPEDITED ISSUE

Did the District deny Student a free appropriate public education (FAPE) by failing to conduct an appropriate manifestation determination on February 28, 2013?

FACTUAL FINDINGS

1. Student is a 15-year-old who is eligible for special education and related services under the primary eligibility category of "other health impairment" (OHI) and a secondary eligibility category of "specific learning disability" (SLD).

2. Prior to October 2012, Student had qualified for a plan under Section 504 of the Rehabilitation Act of 1973 (504 plan) based on a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). In the fall of 2012, Student's sophomore year of high school, the District assessed Student to see if he qualified for special education.

3. Student contends that the District's assessment was inadequate to determine Student's unique needs and that this, in part, led to an inadequate manifestation determination in February 2013. The District disputes this contention.

4. School psychologist Steve Aguillon conducted the October 2012 assessment on behalf of the District. Dr. Aguillon had previously assessed Student in 2009. He received his bachelor's degree in philosophy in 1994, his master's degree in education and his school psychology credential in 1998, and his doctorate in educational psychology in 2002. Dr. Aguillon has worked as a teacher in the past, and has worked as a school psychologist for various school districts since 1998. Dr. Aguillon is also a licensed educational psychologist, which enables him to conduct assessments for private clients outside the school setting. He has done more than 600 psychological assessments over his career.

5. According to Dr. Aguillon's assessment report, Student was referred for the 2012 assessment "at parental request due to disruptive behavior and poor grades in most subject areas." The 2012 assessment focused on whether Student was eligible for special education under SLD, OHI, and emotional disturbance (ED).

6. In conducting his evaluation, Dr. Aguillon administered tests, reviewed records, gathered information from Student's mother and teachers, observed Student in class, and reviewed information provided by Student's mother, including a written letter from Keith Golay, Ph.D., Student's treating therapist. Dr. Aguillon did not rely upon any single test result in making his recommendations and conclusions, but instead relied upon all the information he gathered as part of the assessment.

7. To test Student's cognitive ability, Dr. Aguillon administered the Wechsler Intelligence Scale for Children – IV (WISC-IV). Student scored in the average range for verbal comprehension and working memory, in the low average range for perceptual reasoning, and in the extremely low range for processing speed, giving him a full-scale IQ score of 81, in the low average range. Dr. Aguillon also administered the attention subtests of the Cognitive Assessment System (CAS), a test which is designed to measure specialized cognitive abilities related to success in various academic skills. Student did not understand the directions on one subtest and Dr. Aguillon was required to repeat the directions, invalidating that subtest. However, Student completed the two other subtests, enabling Dr. Aguillon to derive a valid overall score for Student in the average range. During Dr. Aguillon's testimony, he explained that only two out of three of the subtests are required to obtain a valid score on the CAS.

8. Dr. Aguillon administered the Behavior Assessment System for Children 2 (BASC) as part of the assessment. The BASC consists of rating scales which are filled out by parents and teachers to obtain information about a child's socio-emotional, behavioral, and adaptive behaviors. Student's mother filled out the BASC as part of the

assessment. According to her ratings, Student exhibited behavior in the "clinically significant" range in many of the categories examined as part of the assessment. Dr. Aguillon testified that clinically significant refers to severe behavior which needs to be looked at or focused on.

9. Three of Student's fifth and sixth grade teachers from the private school Student attended during elementary school collaboratively filled out the BASC rating scale. They rated Student as "clinically significant" in the areas of school problems, hyperactivity, attention problems, and learning problems. Dr. Aguillon's report noted that: "This examiner is aware that memory for detail and a private school environment may have affected the report. These results should be interpreted with caution." During his testimony, Dr. Aguillon admitted that the BASC is supposed to be completed by people who can rate how the child has reacted within the last several months. He also admitted that the BASC calls for each rater to fill out the form separately, not for more than one rater to collaborate on answers. He explained that he gave the test to the elementary school teachers to obtain an older history for Student and to see if Student's behaviors were present at that time as well. In his understanding, to find eligibility under OHI, there must be a history of impairment – the problem cannot just arise suddenly.

10. Dr. Aguillon administered the Scale for Assessing Emotional Disturbance 2 (SAED) as part of the assessment. The SAED is a rating scale designed to assist with identifying students who may be experiencing emotional and/or behavioral difficulties within the educational setting. Three high school teachers filled out the SAED: Jonathan Gunther, Student's world history teacher, Amy Welch, Student's biology teacher, and Swati Bhakta, a special education teacher at the high school. These three teachers filled out the rating scale separately, not collectively as the elementary school teachers had done on the BASC. Their SAED responses were not indicative of either emotional disturbance or socially maladjusted behavior by Student.

11. The directions to the individual filling out the SAED, ask the rater to, "circle the rating that best describes this student's status now and over the past two months." The three teachers had not known Student for two months at the time they filled out the rating scale. The school year started on September 4, 2012, and the three teachers filled out the rating scales on October 12, 2012. Student had been a pupil in Mr. Gunther's and Ms. Welch's classes since the start of the school year. Ms. Bhakta had assisted Student in the learning center upon occasion since the start of the school year in connection with his 504 plan. All three testified at hearing that their opinions regarding Student had not changed between October 12, 2012, and the time of the hearing.

12. As part of the assessment, Dr. Aguillon administered the Conner's CT self-report (Conners) to Student, but did not include the results in his assessment report. During his testimony, he explained that his failure to include the Conners rating scale in his report was an oversight. Student's scores came up with a 75 percent probability of having a disruptive behavior disorder, a 61 percent probability of having ADHD, and a 59 percent probability of having a language and learning disorder.

13. Dr. Aguillon also administered the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI) to Student. The test is designed to evaluate the extent to which pupils can integrate their visual and motor abilities (hand-eye coordination). Student scored in the below average or low range on this test. To test Student's auditory processing, Dr. Aguillon administered the Test of Auditory Processing Skills-3 (TAPS). Student scored in the low average to average range on the TAPS.

14. Special education teacher Swati Bhakta conducted the academic achievement testing for the assessment. Ms. Bhakta received her bachelor's degree in psychology in 2000 and her master's degree in special education in 2008. She holds a mild/moderate special education credential and has worked for the District since 2005. She administered the Woodcock-Johnson III Tests of Achievement to Student. Student

scored in the low average to average range on the various subtests, with standard scores ranging from 80 in passage comprehension to 102 in spelling.

15. Dr. Aguillon also obtained verbal input from Student's current teachers as part of the assessment. In general, the teachers indicated that Student got along well with his peers, but needed help with starting and completing assignments. Student had difficulty focusing and maintaining attention in class. They also reported that Student engaged in occasional oppositional and defiant behaviors, such as refusing to put on his shirt when asked to do so by his physical education (PE) teacher.

16. Dr. Aguillon obtained information from Student's mother both through interview and through her responses to the BASC. According to Dr. Aguillon's report, Student's mother told him that Student hated doing homework, became frustrated and angry very easily, had difficulty concentrating, and had problems with "learning in general, adjusting to the classroom setting, and challenging authority."

17. There was a dispute in the testimony as to what Student's mother told Dr. Aguillon as part of the assessment. In his written closing argument, Student questioned Dr. Aguillon's credibility, in part, because of that disagreement. According to Dr. Aguillon's testimony, Student's mother told him that Student had ADHD, ODD, dyslexia, and anger issues. She said that Student had attacked her with a knife, and that she was looking for weapons in the home. She asked him not to disclose to the IEP team that she was searching for weapons in the home. Student's mother reported to him that Student was using marijuana frequently, that she did not always trust him, and that Student would lie, cheat, and was cruel to animals. She told him that Student's father also had anger issues similar to Student's. Student's mother asked to be the point of contact between the school and the family, rather than Student's father. Dr. Aguillon got the impression that Student's mother did not want to get Student's father involved as much because there was a familial dynamic/tension that might result from his contact.

18. On her direct examination, Student's mother denied that she had told Dr. Aguillon some of these things. Although she was honest in her answers to the specific questions asked on direct examination, her cross-examination and the documentary evidence in the case supported Dr. Aguillon's testimony. For example, on direct examination, Student's mother denied that she told Dr. Aguillon that Student was searching for weapons in her home. However, on cross-examination she admitted that an incident occurred in which Student had lunged at her with a knife and that she had answered "yes" when Dr. Aguillon asked her if she had checked her home for weapons. She denied she told Dr. Aguillon that Student was cruel to animals. However her responses to the BASC indicated Student was sometimes cruel to animals. She also admitted on cross-examination that she asked Dr. Aguillon not to tell the IEP manifestation team about the knife incident.

19. Student's written closing argument asserts that "Mother's testimony refuted Dr. Aguillon's contention of Student's habitual marijuana use in 9th grade." However, the responses of Student's mother to the BASC during Dr. Aguillon's assessment indicated that Student sometimes used illegal drugs. Student himself admitted marijuana use to Student's expert Dr. Gunn. Whether or not Student's mother used the exact words "habitual marijuana use" in a conversation with Dr. Aguillon, Dr. Aguillon still had a reasonable basis for being concerned about Student's marijuana use. The testimony of Student's mother was not sufficient to call Dr. Aguillon's credibility into question.

20. Student's mother also denied telling Dr. Aguillon that she tried to exclude Student's father from the IEP process because of a family dynamic. She testified that she asked to be the point of contact between the school and the family because it was difficult to reach Student's father at his teaching job. She admitted that Student's father carried a cell phone with him when he was on the field as a PE teacher and that he had

attended IEP's as part of his work, but explained that it was easier to reach her at her medical office. Student's mother is a medical doctor with a family practice. However, the report of Student's expert supported Dr. Aguillon's testimony. Dr. Gunn's report noted that Student's father had similar anger/frustration issues to Student and had a tendency to "butt heads" with Student as a result of this. Once again, even if Student's mother never told Dr. Aguillon that she tried to exclude Student's father from Student's education, there was support for Dr. Aguillon's conclusions regarding the family dynamic. The testimony of Student's mother was not sufficient to undermine Dr. Aguillon's credibility or his conclusions.

21. Dr. Aguillon spent about two and one-half to three hours observing Student in various environments as part of the assessment. He observed Student in the classroom, during snack time and lunch, and during PE class.

22. He reviewed Student's school discipline record, noting infractions relating to defiance, shooting "spit wads" on the school bus, academic disruption in the classroom, use of profanity, and similar conduct.

23. Prior to the assessment, Student's treating psychologist Dr. Golay had written a letter regarding his treatment of Student and Student's diagnosis. Dr. Golay did not testify at the hearing, but according to his letter, Dr. Golay is a licensed educational psychologist and marriage, family therapist. He holds a school psychology credential and practiced as a school psychologist, as well as working for a time as an associate professor at California State University Fullerton. In his letter dated August 30, 2012, Dr. Golay stated that Student "displays an Adjustment Disorder with a Disturbance of Conduct (DSM IV 309.3)." Dr. Golay discussed Student's history of ADHD and failure in school. Dr. Golay wrote several pages of detailed comments about what he thought should be placed in Student's IEP, and recommended a behavior plan. He was highly

critical of Student's past education. Dr. Aguillon reviewed and considered Dr. Golay's letter as part of the assessment.

24. Based on his assessment, Dr. Aguillon concluded that Student met the eligibility criteria for special education services under OHI due to Student's ADHD, and that Student met the criteria for SLD. He concluded that Student did not meet the eligibility criteria for ED, finding that the behavioral and emotional concerns reported by Student's mother were not present in the school setting to a marked degree and therefore were not pervasive across school and home settings. In his opinion, Student's behaviors were more consistent with a socially maladjusted pupil. He recommended that the IEP team find Student eligible for special education and discontinue Student's 504 plan.

25. During the hearing, Dr. Aguillon explained that he based his conclusion that Student exhibited socially maladjusted behaviors on comments the teachers made regarding oppositional behaviors and acts of defiance, Student's mother's input that Student had been diagnosed with oppositional defiant disorder (ODD) and Dr. Golay's letter which stated that Student suffered from Adjustment Disorder with a Disturbance of Conduct. He did not speak with Dr. Golay either before or after his assessment. He testified that he also relied upon the criteria from the Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM) in forming his opinion, although he did not specifically list the DSM information in his report. He testified that Student's mother verbally informed him several times that Student had ODD. Because Student's mother is a medical doctor, he felt she should know the criteria for ODD. During her testimony, Student's mother denied that she had raised the term ODD to Dr. Aguillon. She said Dr. Aguillon was the one who raised the possibility of ODD.

26. Dr. Aguillon also noted that Student had problems with executive functioning. The term executive functioning refers to self-regulatory processes that the

brain has to regulate emotion, behavior, planning, and similar functions. In Dr. Aguillon's opinion, Student's difficulties with executive functioning would cause him to have problems with planning, organizing, keeping an agenda, and following through on tasks. Dr. Aguillon also found that, at times, Student had problems with impulse control. Student exhibited attention difficulties, verbal impulsivity, and inattentiveness. Student's verbal impulsivity might lead him to blurt out comments on occasion, including obscenities. In Dr. Aguillon's opinion, Student, at times, also displayed willful defiance and goal-oriented, defiant behavior.

27. Student's expert Timothy Gunn, Psy.D., testified about Dr. Aguillon's assessment. Dr. Gunn is a licensed clinical psychologist who received his bachelor's degree in 2000, his master's degree in clinical psychology in 2005, and his doctorate in clinical psychology in 2008. He works in private practice as a clinical psychologist, and has been licensed in California as a psychologist since 2009. He was a professor at the Graduate School of Psychology, Azusa Pacific University, beginning in approximately 2007, and has been an adjunct professor at Alliant University since 2010. During part of his supervised hours prior to receiving his psychology license, he worked at Garden Grove Unified School District. He testified that he is familiar with the manifestation determination process and has completed more than 100 assessments in his career.

28. Dr. Gunn assessed Student in April 2013, approximately six months after Dr. Aguillon's assessment and approximately two months after the incident that led to the manifestation determination at issue in this case. The specifics of Dr. Gunn's assessment and his ultimate conclusions will be discussed in more detail in Factual Findings 79 – 86 below.

29. Dr. Gunn agreed with parts of Dr. Aguillon's assessment. Dr. Gunn agreed with the findings in Dr. Aguillon's report regarding Student's challenges with executive functioning, cognitive flexibility, conduct related behavior, and low tolerance for

frustration. Dr. Gunn testified that those findings were almost exactly what his testing discovered. Dr. Gunn did not dispute Dr. Aguillon's findings regarding Student's eligibility under OHI (based on ADHD) or SLD.

30. Dr. Gunn's opinion regarding whether Student should have been found eligible under ED was somewhat contradictory. His assessment report dated April 25, 2013, found that "the bulk of the evidence demonstrates that an emotional disturbance was present at the time of the incident on February 21st, 2013 and this fact should have (or, at least, could have) been known by the school district." During his testimony at hearing, he originally opined that Student had ED based on an inability to learn. However, he subsequently changed his testimony when he realized that he had used the wrong standard to determine ED. When the District's counsel asked him on cross-examination if the eligibility standard for ED required a finding of more than one of the factors listed in the code, not just inability to learn, Dr. Gunn admitted that was correct. He then testified that Student did not have ED.

31. Dr. Gunn was highly critical of two portions of Dr. Aguillon's assessment – the administration of the BASC and the SAED. In Dr. Gunn's opinion, the administration of the BASC to the fifth and sixth grade teachers by Dr. Aguillon was an egregious violation. Dr. Gunn explained that each rating scale of the BASC is designed to be completed by a single teacher. Multiple teachers are not supposed to fill out the rating scale jointly, particularly teachers who taught the pupil in two different school years (fifth and sixth grade). The BASC is scored according to the pupil's grade level. A pupil's expected behavior at fifth and sixth grade is far different from the expected behavior in 10th grade, so there could be no accurate comparison between the scores of the elementary school teachers with the scores of Student's mother. Dr. Gunn found no explanation in Dr. Aguillon's report for why the test was given to the fifth and sixth grade teachers instead of Student's current teachers.

32. He also disagreed with Dr. Aguillon's decision to administer the SAED to three teachers who had known Student for less than two months. In Dr. Gunn's opinion, Dr. Aguillon should not have administered this test at all, if there was not a teacher who had known Student for the required amount of time. Instead, Dr. Aguillon should have relied upon other testing or information in the assessment to make a determination as to whether or not Student was eligible under ED.

33. During his testimony, Dr. Aguillon explained that he chose Student's current (sophomore year) teachers to fill out the SAED, rather than the teachers from Student's freshman year, because Student's mother told him that Student had been using marijuana during his freshman year. Dr. Aguillon was concerned that Student's drug use might influence the answers of the teachers. Because Student's mother told him that Student no longer used marijuana during his sophomore year, Dr. Aguillon felt that the sophomore year teachers would give more accurate responses to the SAED. During the hearing, the three teachers who filled out the SAED each testified that their opinions of Student had not changed from the time they filled out the rating scale to the time of their testimony.

34. Dr. Aguillon's explanation for his administration of the SAED makes sense. Because the assessment began at the start of the new school year, the District only had two choices – to use current teachers who had only known Student since the beginning of the school year or to use the teachers from the year before, who would have only past knowledge of Student from the prior year. When asked what the District should have done, Dr. Gunn opined that Dr. Aguillon should not have administered the SAED, and should have relied on other information instead. It was clear during Dr. Aguillon's testimony that he did, in fact, rely on other information in forming his opinion, so the SAED was just one factor for him to consider. It did not invalidate the assessment.

35. On the other hand, Dr. Gunn's opinions regarding the BASC have merit. It is not at all clear why Dr. Aguillon chose to administer the rating scales to Student's fifth and sixth grade teachers and then to compare those results to the current BASC responses from Student's mother. While there is nothing wrong with obtaining a historical perspective as part of an assessment, Dr. Aguillon could have referred to his own 2009 assessment for historical data or he could have asked Student's current teachers to fill out the BASC in addition to his elementary school teachers.

36. However, the problems with the BASC are not enough to invalidate the entire assessment. Dr. Aguillon was very clear that he relied upon multiple factors in forming his opinions, including input from Student's current teachers and Student's mother, his own observations of Student, the remaining tests, and the letter from Dr. Golay. He did not rely solely on the BASC or the SAED in forming his conclusions. Aside from the conclusion regarding social maladjustment, Dr. Gunn agreed with much of what Dr. Aguillon found in his report. Dr. Gunn never questioned Student's eligibility for special education under either category recommended by Dr. Aguillon. Although Dr. Gunn was confused at first about the standards for finding ED, he ultimately concluded during the hearing that Student did not meet the eligibility criteria for ED, just as Dr. Aguillon had done.

37. While the District's 2012 assessment was not a model of excellence, the problems with one or two of the many tests given were not enough to invalidate it, nor did those problems make the later manifestation determination invalid.

THE OCTOBER 2012 IEP

38. On October 17, 2012, Student's individualized education program (IEP) team met to review the District's assessment and determine Student's eligibility for special education. At the time, Student was 15 years old and in the 10th grade. Student and Student's mother attended the IEP meeting. The IEP team found that Student was

eligible for special education under the categories of OHI and SLD. The team ruled out eligibility under ED, finding that the behavioral and emotional concerns reported by Student's mother were not present in the school setting to a marked degree and because "the behaviors that [Student] presents with are more consistent with a Socially Maladjusted student."

39. At the meeting, all the IEP team members, including Student's mother, were in agreement with the assessment results. There was also no disagreement among the IEP team members that Student had ADHD. Student's mother initialed the document indicating receipt of the procedural safeguards.

40. The IEP noted that Student "has had a history of displaying minor acts of oppositional and defiant like behavior at school which have included refusal to follow directions, refusal to stay on task, and being overly social during unstructured time which may lead to rule breaking and disciplinary action." The IEP team determined that Student's behavior impeded his learning or that of others and added a social emotional/problem solving goal to address that area of concern. The IEP included multiple accommodations including, but not limited to, extra time for test taking, preferential seating, and access to the learning center as needed to receive support on classroom assignments and tests.

41. The IEP contained four goals: a reading comprehension goal, a homework completion goal, a social emotional/problem solving goal, and a goal regarding use of an agenda to keep track of assignments. The baseline for the social emotional goal repeated the language regarding Student's minor acts of oppositional defiant behavior described in the Factual Finding above. The goal called for Student to increase his ability to control his words or actions by developing and implementing a self-management/problem solving plan.

42. The IEP called for Student to receive the following special education instruction and services: 1) specialized academic instruction in the learning center five times a week, 20 minutes per session, for a total of 100 minutes per week; 2) individual counseling sessions once a week for 25 minutes per session from October 17, 2012, to November 17, 2012; 3) individual counseling sessions from November 17, 2012, to January 31, 2013, twice a month for 25 minutes per session. The IEP called for Student to meet with his case carrier at least once a month to discuss progress toward graduation and transition goals. The IEP also contained a post-secondary transition plan.

43. The IEP did not include a behavior support plan for Student. At the time of the IEP meeting, Dr. Aguillon did not believe that Student displayed a significant history of misconduct – Student had only three incidents in eighth grade, four in ninth grade, and two disciplinary incidents in10th grade prior to the IEP meeting. Dr. Aguillon thought he could address Student's needs through the IEP goal and counseling. In his opinion, Student's minor incidents did not warrant a behavior support plan.

44. Student's mother did not sign her agreement to the IEP on the day of the meeting. Instead, she told the team that she wanted to take the document home to consult with her husband before Student's parents decided whether or not to agree with it.

45. On October 21, 2012, Student's mother emailed a multi-page letter to Ms. Bhakta, with a request that the letter be forwarded to Dr. Aguillon. The letter raised concerns about the IEP. Student's mother wrote the letter in collaboration with Dr. Golay. The letter questioned the program and services that would be provided to Student, asked for more specificity in many areas of the IEP including a request that educational methodology be specified in the document, and recommended additions to the IEP such as a behavior plan. The letter indicated that Student's parents were prepared to hire an educational attorney to enforce their son's rights, and demanded

"prior written notice" from the District if all the suggestions set forth in the letter were not accepted by the IEP team.

46. After Dr. Aguillon received and reviewed the letter, he had a telephone conversation with Student's mother. During their testimony, Dr. Aguillon and Student's mother disagreed sharply on the nature of that conversation. Dr. Aguillon testified that he was able to answer the questions and concerns raised in the letter to the satisfaction of Student's mother, and that she subsequently withdrew the letter and agreed to the IEP.

47. Student's mother testified that Dr. Aguillon told her that the letter had generated concerns at the District office. He was advised by his supervisor that he would have to show the letter to the attorneys for the District. According to the testimony of Student's mother, Dr. Aguillon told her that if this happened, it could delay the implementation of Student's IEP by four to six months. Student's mother asked Dr. Aguillon how they could implement the IEP right away and he told her that it might be possible for her to take the letter back. He said that, since the letter had not yet gone to the District's lawyers, she could rescind the letter to get the IEP going.

48. For purposes of this expedited proceeding, it is not necessary to decide which version of the telephone conversation was correct. The important point is the result of that conversation – Student's mother withdrew the letter and agreed to the IEP as of October 23, 2012. The District thereafter implemented the IEP.

EVENTS BETWEEN THE SIGNING OF THE IEP AND THE FEBRUARY DISCIPLINARY INCIDENT

49. After the IEP meeting, Dr. Aguillon and/or Jeffrey Wood, a psychology intern working with Dr. Aguillon, provided counseling services to Student in accordance with the IEP requirements. For the first month, Student received counseling once a week. After that, Student received counseling every other week until approximately February

2013. Student provided no evidence at hearing that the District failed to implement Student's IEP between the date it was signed and the date of the disciplinary incident that led to this case.

50. After the IEP was signed, Student engaged in occasional violations of school rules. On October 24, 2012, during an assembly, Student called a teacher "queer" and made an obscene gesture. Student was counseled for his actions by Dr. Aguillon and his IEP case carrier Ms. Bhakta. Initially he showed no remorse for his conduct, but after approximately 20 minutes of discussion, he stated that he would try not to use that word again, and he was sent back to class without punishment.

51. On October 31, 2012, Student engaged in misconduct during a shop class. His conduct included taking a student aide's hat and putting it on top of the shop lights, standing on a workbench, jumping up to the light and off the table while the class was working around him. He was given a warning.

52. On November 5, 2012, Student was defiant in class when asked to move his seat and the teacher called for the campus supervisor. Student told a staff member that he hated the teacher and was going to slap her. Student was suspended for three days and informed that threats of that type to staff members could lead to expulsion.

53. On November 30, 2012, Student drew an obscene picture on the school bus window while it was occupied. He was suspended from riding the school bus for 10 days.[2]

54. On January 23, 2013, when a teacher asked Student to get his homework out, Student responded by asking, "Are you on your period? Do you want a Tampon?"

[2] Student rode the regular school bus to school; transportation was not a related service called for in his IEP.

The teacher was indignant, but Student thought the comment was funny. Student was suspended for three days for the conduct.

55. By February 2013, it was becoming apparent that Student no longer wished to attend the high school. One of his friends was expelled from the high school in January and sent to a school called Access, which has an independent study component. Student made comments about being through with high school and wanting to go to Access instead.

56. Student's mother and District staff began to explore the possibility of changing Student's placement. There was a discussion regarding an independent study program but the District staff did not believe it would be appropriate, given Student's disabilities. There was talk of having a meeting to discuss placement. However, that meeting never occurred because of the February 21, 2013 incident which is described below.

THE FEBRUARY 21, 2013 INCIDENT

57. During lunch on February 20, 2013, Student was seen throwing food by a counseling intern. Student was told to pick up the trash, but refused to do so. He was highly argumentative and stated that he understood the consequences, but still refused to obey.

58. As a result of that incident, Student was called into the counselor's office the next day, February 21, 2013. Robert Stelmar, the school counselor assigned to Student, met with Student in his office. Mr. Stelmar has been employed by the District as a co-lead counselor at the high school for the past eight years. He has a caseload of approximately 400 students, ranging from grades 10 through 12. He has been employed in the field of education for 17 years and has dealt with pupils on IEP's and on 504 plans. He does not have a special education credential. He had counseled Student prior to February 21, 2013.

59. Mr. Stelmar described Student as a youth who did not like to sit still. He said Student had many friends with whom he socialized during the school day. When Mr. Stelmar had counseled Student about misconduct in the past, Student had not expressed remorse. Mr Stelmar believed that Student understood Student's prior conduct was wrong. Mr. Stelmar felt that Student wanted to attend Access instead of the high school because attending Access would give him time to hang out at the skateboard park with his friends.

60. When Student was in Mr. Stelmar's office on February 21, he first informed Mr. Stelmar that he did not know why he was there and he did not know what happened the day before. He was impatient and told Mr. Stelmar to "get this moving." Student took out his cell phone to use it. Mr. Stelmar told Student to give him the phone. Mr. Stelmar asked several times for the phone, and Student finally gave it to him. Mr. Stelmar put the phone on the desk and Student accused him of slamming the phone. Mr. Stelmar said he did not slam it and Student swore at him.

61. Swearing at a staff member constitutes grounds for an automatic five-day suspension from the high school, so what had been a counseling session now became a more serious disciplinary action. The staff member assigned to oversee discipline that day was Assistant Principal Bob Parish. Mr. Parish has worked in the field of education for 34 years and has been employed by the District for 10 years. Mr. Parish helps supervise pupils during the lunch recess, and he saw Student often while on that duty. He explained that Student typically sat with a group of children who liked to ride skateboards. Mr. Parish was involved with the discipline for Student when Student drew the obscene picture on the bus window. During that incident Student stated he did not care if he was disciplined.

62. As Mr. Stelmar started walking Student to Mr. Parish's office, Student told Mr. Stelmar, "I'm going to backhand you." They walked about 10 feet more and Mr.

Stelmar asked Student what he had said. Student repeated in front of witnesses, "I'm going to backhand you."

63. They continued walking to Mr. Parish's office. When they arrived, Student sat down and Mr. Stelmar put Student's cell phone on Mr. Parish's desk. Student rose from his seat, took the phone from the desk, and put it in his pocket. He refused to give it to back to Mr. Parish or Mr. Stelmar, despite repeated demands for the phone. Student continued swearing at both men. Mr. Parish warned Student that his continued defiance would take the disciplinary incident to a higher level and necessitate involvement by Officer Moon. Student continued his use of obscene language and defiant behavior, apparently uncaring of the consequences.

64. Officer Moon has been a police officer with the Brea Police Department for over 20 years. He is assigned as a school resource officer at Brea High School to assist with campus safety. He also responds to calls from the other District schools. Officer Moon was familiar with Student's family because his daughter had played soccer with Student's sister a few years before. Officer Moon's past interactions with Student had been friendly.

65. It took approximately 10 minutes for Officer Moon to arrive at Mr. Parish's office. During that time, Mr. Parish attempted to explain to Student the consequences of his continued defiance and refusal to relinquish his cell phone. Student said he did not care and continued to defy the adults present.

66. When Officer Moon arrived, he first asked Student to give him the cell phone. Student refused. Officer Moon explained that he would have to search Student and take the phone. He told Student to stand up and face the wall. Student complied.

67. When Officer Moon touched Student to retrieve the phone from him, Student turned around and shoved Officer Moon in the chest with both arms, palms open. A struggle ensued as Officer Moon attempted to restrain Student without hurting

him. Student shouted obscenities at Officer Moon and yelled comments such as, "I'm a 504 student. You can't do this to me!" Mr. Parish's office was rather small and Officer Moon had to be careful as he attempted to subdue Student to make sure Student did not hit his head on the furniture. Officer Moon was injured in the struggle, and ended up bleeding. The officer kept directing Student to comply and stop resisting. Student continued to shout obscenities and made mocking comments about Officer's Moon's competence as a police officer.

68. Mr. Parish moved to assist Officer Moon. Student attempted to strike Mr. Parish, called him a "fat ass," and continued swearing at the adults. Student continued to make mocking comments to Officer Moon, such as saying that Officer Moon did not even know how to put on handcuffs right.

69. After Mr. Parish intervened, Officer Moon was able to subdue Student. He handcuffed Student and placed Student back in the chair. Officer Moon called for back-up police officers, but Student had ceased struggling by that time. Student's cell phone had fallen out during the struggle, and Officer Moon gave it to Mr. Parish. After Student stopped struggling and was seated, Student commented that he wanted to take one of the painted rocks from Mr. Parish's desk and bash Mr. Parish's face with it.

70. Student told the other officers who arrived on the scene that he had not complied with the requests to relinquish his phone because he disrespects authority. Officer Moon felt that Student understood what was being asked of him in Mr. Parish's office, but chose not to comply. Mr. Parish also believed Student had understood what was going on during the incident.

THE MANIFESTATION DETERMINATION

71. After the incident, a manifestation determination report was prepared by Dr. Aguillon.[3] Dr. Aguillon interviewed the case carrier, the guidance counselor, the assistant principal, two office clerks, Officer Moon, Student and both of Student's parents. A review was also made of Student's records, including his discipline records and attendance records, the 2012 assessment, and Student's October 2012 IEP.

72. In the report, Dr. Aguillon concluded that Student's SLD was not related to his misconduct. With respect to ADHD, the report noted:

> [Student's] ADHD did not appear to impair [Student's] judgment in this incident. The school team and [Student] indicated that the incident initially beginning with the counselor and ending with [Student] being handcuffed to a chair occurred over a 25 minute time period. Witness' state that the counselor, assistant principal, and police officer gave [Student] ample time to process questions/directives and encouraged him to think before he acted. [Student] reports that he consistently chose to defy directives and resist the disciplinary procedures knowing that it was wrong. It should be noted that most students with ADHD only, do not have

[3] Dr. Aguillon had the assistance of Mr. Wood throughout the events at issue in this case. The parties stipulated that Dr. Aguillon could testify as to the October 2012 assessment, the counseling services, and the manifestation report, without the need for Mr. Wood to testify at the hearing. For purposes of this Decision, Dr. Aguillon will be identified as the individual who conducted the manifestation evaluation and prepared the report, even if part of the work was done by Mr. Wood.

> the oppositional defiance, anti-authority, and rule breaking behaviors present with [Student].

73. The manifestation report found that Student's Adjustment Disorder with a Disturbance of Conduct "more accurately characterizes" Student's actions in the incident. The report noted that the "Disorder subtype should be used when the predominant manifestation is a disturbance in conduct which there is violation of the rights of others or of major age appropriate societal norms and rules. [Student] has had a long history of rule breaking, anger, and defiant related behaviors." The report went on to note the times in the past that Student had been warned regarding appropriate behavior, and then stated:

> In summary, the incident in question can be better explained by [Student's] difficulty with managing his temper/anger, his distorted perception of fairness and applicability of rules to him, and disdain for authority and staff members in authority related positions. Parents recognize that [Student] has struggled with these issues at home, too.

74. The report also examined the implementation of the IEP and concluded that Student's misconduct was not due to a failure to implement the IEP.

75. The manifestation determination meeting was held on February 28, 2013. The meeting was held at Student's mother's medical office in order to accommodate her. The District personnel in attendance at the meeting included Ms. Bhakta, Mr. Wood, and Mr. Parish. At the meeting, the District personnel gave Student's mother a copy of the manifestation determination report and read the report to her in its entirety.

76. According to the manifestation determination findings, Student was recommended for expulsion based on the following conduct:

> . . . his violation of Educational Code 48900 (a.1) Caused, attempted to cause, or threaten to cause physical injury to another person, 48900 (a.2) Willfully used force or violence on another person, 48900 (i) Committed an obscene act or engaged in habitual profanity or vulgarity, 48900 (k) Disruption of school activities; defiance of authority, 48915 (a.5) Assault or battery upon any school employee, 48915 (b.1) Other means of correction are not feasible or have repeatedly failed to bring about proper conduct, 48915 (b.2) Due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others.

77. The team determined that Student's conduct was not caused by and did not have a direct and substantial relationship to his disability. The team also determined that Student's conduct was not the direct result of a failure to implement his IEP.

78. Student's mother signed her agreement to the manifestation determination at that meeting. During the hearing she explained that she had signed because she thought she had no other options. Ms. Bhakta testified regarding Student's mother's participation in the meeting – for example, Student's mother asked how Student's ODD would change the determination and why the District had not considered ODD as being the disability that led to Student's conduct. Dr. Aguillon told her that ODD was not an eligibility category for special education. During her testimony, Ms. Bhakta could not remember if the two boxes on the manifestation determination form that represented the team's conclusions had been checked off prior to the start of meeting, but she thought they might have been.

DR. GUNN'S ASSESSMENT AND EXPERT OPINION

79. Between approximately April 19, 2013, and April 25, 2013, Student's expert Dr. Gunn conducted his assessment and drafted his report. As part of his assessment, Dr. Gunn reviewed records from Student's education dating back to elementary school, interviewed Dr. Golay, interviewed some of Student's teachers at the high school, interviewed Student, administered numerous tests and rating scales to Student and Student's parents, and made behavioral observations during testing. He reported that, during his interview with Dr. Golay, Dr. Golay avoided talking about the conduct that led him to diagnose Student with the Adjustment Disorder with Disturbance of Conduct. Dr. Golay was critical of the District's decision to expel Student, and told Dr. Gunn that the school district was "punishing" Student "for their own lack of appropriate interventions." Dr. Golay also complained about the way the District staff dealt with Student. Because of poor health, Dr. Golay discontinued therapy with Student prior to the February 21, 2013 incident.

80. Dr. Gunn agreed with Student's ADHD diagnosis. Dr. Gunn found Student to have average cognitive ability, as well as average visual memory and verbal memory. He found the Student scored in the average range on some aspects of executive functioning, but had significant difficulty with others, particularly in the area of cognitive flexibility. He determined that the testing "suggests that [Student] has an organically-based difficulty monitoring his own behavior and maintaining adherence to rules sets." In his opinion, Student's ability to exercise proper executive functioning skills would decrease under circumstances in which he had anger or frustration.

81. Dr. Gunn was highly critical of the District's 2009 assessment (which is not at issue in this case) as well as the District's 2012 assessment. As noted above, with respect to the 2012 District assessment, Dr. Gunn was critical of the way Dr. Aguillon administered the BASC and the SAED. Because of the problems with those two tests, Dr.

Gunn concluded that the District had not sufficiently evaluated the possibility of ED. He was also critical of the October 2012 IEP. In his opinion, the behavior goal and counseling sessions were not sufficient to address Student's behavior needs. He felt that the "history of minimal and ineffective interventions" had a direct relationship to the February 21, 2013 misconduct.

82. Dr. Gunn also took issue with Dr. Aguillon's finding that Student's behavior exhibited social maladjustment. Dr. Gunn felt that minor acts of oppositional and defiant behavior were not consistent with social maladjustment. He believed that, as of the time of the manifestation hearing, there was no basis for Dr. Aguillon to find that Student had an Adjustment Disorder with Disturbance of Conduct. The only evidence he saw for an Adjustment Disorder was in Dr. Golay's letter, but that diagnosis had been made as of August 2012 at the latest. According to Dr. Gunn, an adjustment disorder cannot last longer than six months by definition, so Dr. Golay's findings in this regard possibly were no longer applicable at the time of the manifestation determination. Because Dr. Golay avoided Dr. Gunn's questions regarding the events underlying the diagnosis of Adjustment Disorder, Dr. Gunn could not state with certainty whether the diagnosis still applied.

83. In Dr. Gunn's opinion, Student's behavior on February 21, 2013, was a manifestation of his ADHD. In his opinion, ADHD is a "general disorder of executive functioning of which inattention, impulse control and hyperactivity are but a few of many manifestations." According to his report "executive functions that can be impacted by ADHD are such higher level cognitive functions as impulse control, adaptability, emotional control/tolerating frustration, working memory and flexibility of thinking." He found that all those deficits were documented regarding Student. Based on Student's history of frustration tolerance, he believed that the District should have conducted a

functional behavior assessment and drafted a behavior plan for Student. He concluded that Student's:

> diagnoses of ADHD and dyslexia resulting in academic failure and consistent disciplinary problems did indeed play a substantial and direct role in his behavior on February 21, 2013. He is a student known to struggle with frustration tolerance in addition to other executive functioning delays. Frustration tolerance is a symptom that does present in ADHD and it is exacerbated by learning disorders and school failure. However there was no behavioral plan in place to address these known problems with which [Student] struggles. Therefore, I would agree that the school had implemented [Student's] current IEP, but I would argue that the current IEP was inadequate to meet [Student's] unique need.

84. Dr. Gunn concluded, in part, that the District's failure to provide Student with appropriate special education interventions over the years beginning in approximately 2006 led to the February 2013 incident. In Dr. Gunn's words: "[a]lthough an evaluation was performed in 2012 and he was re-qualified for special education at that time, history seems to suggest the interventions were too little, too late." He felt that the District's ineffective interventions over the years had contributed to Student's disdain for school. He recommended that the expulsion be rescinded and Student placed in a structured educational environment with a very low student to teacher ratio.

85. During the hearing, he explained that there were a number of actions by Student on February 21, 2013, that appeared to be the result of the impulse control

problems, such as taking the phone off the desk, pushing people away and swearing. In Dr. Gunn's opinion, Student does not have a filter to stop himself. He has a reaction and cannot stop himself from behavioral or verbal outbursts. Dr. Gunn believes that Student's executive functioning problems and cognitive inflexibility caused Student to refuse to back down once the verbal altercation with the school staff began. He opined that, throughout the events of February 21, 2013, Student exhibited frustration tolerance and continual impulsive errors that were both consistent with his ADHD.

86. In Dr. Gunn's opinion, social maladjustment referred to a child who was willfully doing harm with malice. He did not see any evidence of social maladjustment by Student during his testing of Student or his review of records. Dr. Gunn explained that he has worked with children who are socially maladjusted, but Student did not exhibit those behaviors during testing. Dr. Gunn also did not see anything in the events of February 21, 2013, that indicated a socially maladjusted child. In his opinion, Student's behaviors on that date were ADHD-related behaviors. On cross-examination he qualified his statements to explain that he did not believe Student had no ability to control his impulses. He admitted that Student had some ability, but compared to other children his same age, it was markedly more difficult for Student to control his impulses.

WAS STUDENT'S CONDUCT A MANIFESTATION OF HIS ADHD?

87. Dr. Gunn opined in his assessment report that the failure of the District to properly address Student's behavioral needs over the years was the cause of the February 21, 2013 incident. However, as will be discussed in the Legal Conclusions below, Dr. Gunn appeared to be relying on an older version of the law. Current federal law no longer places at issue the appropriateness or effectiveness of a pupil's IEP during an expedited hearing to review a manifestation determination. The only two questions to be determined in an expedited hearing are whether the IEP was implemented and whether the conduct was a manifestation of the pupil's disability.

88. Both Dr. Gunn and Dr. Aguillon were in agreement that Student's February 21, 2013 behavior was not a manifestation of his SLD. They also both believed that Student did not meet the eligibility criteria for ED. Student introduced no evidence to show that the District failed to implement the October 2012 IEP.

89. Therefore, the only issue to be decided in this expedited portion of the case is whether Student's conduct which led to the expulsion was a manifestation of Student's ADHD. The primary evidence regarding that issue was contained within the testimony of the two competing experts: Dr. Aguillon and Dr. Gunn.

90. As set forth above in Factual Findings 79 – 86, Dr. Gunn believed that Student's conduct was a manifestation of his ADHD.

91. Dr. Aguillon disagreed, and believed that Student's conduct on the day in question was not a manifestation of his ADHD. In Dr. Aguillon's opinion, Student had logical thought processes, average intelligence, and was capable of understanding and following the school rules. When Student was interviewed about the incident, Student said that he understood the consequences of his actions. Student said that he engaged in the conduct because he did not like authority, did not want to give up his cell phone, and did not like being touched. Dr. Aguillon had previously counseled Student about the consequences of threatening a teacher, and Student understood those consequences. Student also knew he was supposed to surrender his cell phone when told to do so – Student had previously been told to surrender his cell phone on earlier occasions, and had done so willingly.

92. There are factors which weaken Dr. Gunn's testimony. As explained above in Factual Findings 30 and 87, Dr. Gunn was unfamiliar with some of the standards for special education law. In his report, he implied that Student exhibited emotional disturbance on February 21, 2013, and during his testimony he implied that Student's inability to learn showed that Student suffered from emotional disturbance. Given the

rest of his findings about the lack of serious behavior problems by Student, his testimony that Student had ED was surprising. He quickly backed down from that position when the correct standard for determining ED under the Education Code was pointed out to him, but it is still troubling that he was so quick to jump to that conclusion.

93. Likewise, much of his assessment report was a criticism of the 2012 IEP and the District's actions over the years, and he blamed those things for the February 21, 2013 incident. However, as will be explained in the Legal Conclusions below, under current law the manifestation review focuses solely on two narrow issues. It is unclear whether Dr. Gunn understood what is at issue in a manifestation determination and whether his opinion would have changed had he used the correct legal standard.

94. In addition, the rationale for Dr. Gunn's opinion about Student's ADHD causing the February 21, 2013 incident seems overbroad to the point where it defies common sense. If Dr. Gunn is correct that Student's behavior is a manifestation of his ADHD both during the times that Student is impulsive and during the times that Student is goal-oriented, perseverative and willful, it is difficult to imagine any conduct that Dr. Gunn could not explain away under the heading of ADHD. It is doubtful that the Congress, in enacting the special education laws, intended ADHD to become a disability that could prevent all pupil discipline, no matter how defiant or serious the pupil's misconduct might be. However, Dr. Gunn's broad definition of ADHD could do just that. Certainly that is the way Student perceived it – during the events of February 21, 2013, he even yelled, "I'm a 504 student. You can't do this to me!"

95. On the other hand, there were also weaknesses with Dr. Aguillon's opinion. As pointed out in Factual Findings 4 – 37 above, Dr. Aguillon's assessment in October 2012 had problems. However, Dr. Aguillon did not rely solely on the BASC and SAED results during the manifestation review process, nor did he rely solely on the October

2012 assessment. By February 2013, Student had been involved with ongoing counseling with Dr. Aguillon and/or Mr. Wood. Dr. Aguillon had that counseling experience to rely upon as well as the various discussions with Student during the other behavioral incidents that had occurred in Student's sophomore year. Dr. Aguillon testified that he did not rely solely upon one thing in making his opinions regarding the manifestation determination, but instead considered all the information and knowledge that he had.

96. Under these circumstances, the opinion of Dr. Aguillon is more persuasive than that of Dr. Gunn. Student's actions on February 21, 2013, including Student's threats of physical violence to District staff, his ongoing defiance of District staff and law enforcement, and his physical attack on a police officer who was acting in the line of duty, were not a manifestation of his ADHD. The February 21, 2013 events lasted for almost a half hour and Student had plenty of opportunity to consider his actions and what he was doing. His continuing refusal to obey a simple request from District staff cannot be explained by mere impulse alone; it was willful misconduct. Student even said as much when he was interviewed after the fact.

97. Dr. Aguillon's opinion was supported by the testimony of Officer Moon, Mr. Parish and Mr. Stelmar regarding Student's actions on the day in question. While Officer Moon and Mr. Parish might not be special education teachers, they were able to observe Student's conduct and assess whether Student understood the nature of his actions.

98. Dr. Aguillon's opinion was also supported by the testimony of Ms. Bhakta, the special education teacher who worked with Student during his sophomore year. She agreed that Student's conduct was not a manifestation of his disability. She described Student as being goal-oriented in his behavior, rather than impulsive. She testified regarding Student's lack of remorse during prior disciplinary incidents and Student's

statements to her that he would continue to engage in wrongful conduct in the future. In her opinion, Student knew right from wrong, but did not really care.

99. Student failed to meet his burden to show that his February 21, 2013 conduct was a manifestation of his ADHD.

LEGAL CONCLUSIONS

1. The party filing a due process case has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) In the instant case, Student is the petitioning party and has the burden of proof.

2. Special education law mandates procedures that a school district must follow when seeking to expel a special education student based on violation of a code of student conduct. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct:

> the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine –
>
> (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(20 U.S.C. § 1415(k)(1)(E)(i).)

3. This procedure is referred to as a manifestation determination review. If the manifestation determination review team decides that either of the two factors listed

above applies, then the child's conduct is considered to be a manifestation of his disability. If that is the case, the child's placement cannot be changed unless certain specified circumstances (such as a danger to the child or others) apply. (20 U.S.C. § 1415(k)(1)(F).)

4. If the manifestation determination review does not find one of the two factors listed above applicable, then the school may continue with the student discipline (including expulsion) just as the school would for any pupil without an IEP. (20 U.S.C. § 1415 (k)(1)(C).)

5. Prior to 2006, the law regarding manifestation determinations contained different factors to be considered. In particular, the prior version of the law provided that the IEP team could determine that the behavior of the child was not a manifestation of the child's disability only if the IEP Team determined that--

(I) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(Former 20 U.S.C. 1415(k)(4)(C)(ii).)

6. The section requiring the manifestation team to determine whether the child's IEP was appropriate was removed by the Congress in the 2005 amendments to the law. It is no longer a factor to be considered in a manifestation review or an expedited hearing regarding that manifestation review. The only two factors considered

are those set forth in the current version of the law and listed in Factual Finding 2 above: was it a manifestation of the child's disability and was the IEP implemented?

7. As set forth in Factual Findings 49, 74, and 88 above, Student presented no evidence that the October 2012 IEP was not implemented. To the contrary, all evidence at hearing indicated that it was implemented by the District. There is no reason to overturn the District's manifestation determination on that basis.

8. As set forth in Factual Findings 29, 30 and 88 above, both Student's expert Dr. Gunn and the District's expert Dr. Aguillon were in agreement that Student did not have ED and that his conduct was not a manifestation of his SLD.

9. Therefore, the real question is whether the District correctly determined that Student's conduct on February 21, 2013, was not a manifestation of his ADHD (OHI). In order for conduct to be a manifestation of the child's disability, the conduct must either be caused by, or have a direct and substantial relationship to, the pupil's disability. (20 U.S.C. § 1415(k)(1)(E)(i).) The commentary to the federal regulations notes:

> The intent of Congress in developing section [1415(k)(1)(E)] was that, in determining that a child's conduct was a manifestation of his or her disability, it must be determined that "the conduct in question was caused by or had a direct and substantial relationship to, the child's disability, and was not an attenuated association, such as low self-esteem, to the child's disability." (Note 237 – 245 of the Conf. Rpt., p. 225)

(71 Fed. Reg. 46720 (August 14, 2006); see also *Doe v, Maher* (9th Cir. 1986) 793 F.2d 1470, 1480 [discussing a similar example of attenuated association under an older version of the law].)

10. As stated in Factual Findings 4 – 37 and 79 – 99 above, Dr. Aguillon's opinion was more persuasive than Dr. Gunn's opinion regarding the question of whether Student's conduct was a manifestation of his ADHD. Student's conduct was not caused by, nor did it have a direct and substantial relationship to his ADHD. Student had plenty of time while the incident was ongoing to understand and consider his actions and the consequences of those actions. Although there were problems with Dr. Aguillon's assessment report, he did not rely solely on his assessment report in forming his opinions at hearing, but instead considered a multitude of information – including Student's counseling, Dr. Aguillon's observations of Student in the classroom, the 2009 assessment, Student's actions during prior disciplinary incidents, information Dr. Aguillon received from Student's mother, Dr. Golay's letter, and the criteria from the DSM-IV. Dr. Aguillon is a very experienced school psychologist who has conducted hundreds of assessments.

11. Dr. Gunn, on the other hand, has less experience as a psychologist, particularly in a school environment. As set forth in Factual Findings 30 and 79 – 99, during the hearing, Dr. Gunn at first misunderstood the requirements for finding ED. It also appears that Dr. Gunn relied, at least in part, on the pre-2006 law in finding a manifestation – he stated in his report that Student's conduct was due to an improper IEP and improper actions by the District prior to that IEP. However, that is not the current law for an expedited manifestation determination. Further, Dr. Gunn's definition of ADHD was so broad and expansive that it defied common sense – if Dr. Gunn is correct that Student's impulsiveness coupled with his cognitive inflexibility made his February 21 conduct a manifestation of his ADHD, it is difficult to imagine any misconduct, no matter how willful or egregious, that would not also be a manifestation of Student's ADHD in Dr. Gunn's opinion.

12. In his written closing argument, Student takes issue with the mention of social maladjustment in the manifestation determination report and argues that the District had no evidence to back up that finding. However, whether or not Student's conduct on the day in question was "socially maladjusted" is not the issue – the issue is whether his conduct that day was a manifestation of his ADHD. Student failed to meet his burden to show that it was a manifestation of Student's ADHD. It was not necessary for the District to prove Student's conduct evidenced social maladjustment. It was also not necessary for the District to show that Student had an Adjustment Disorder or exhibited ODD. Those are only relevant to this expedited case to the extent that they assisted Dr. Aguillon in forming his opinion.

13. In Student's written closing argument, Student raises some procedural issues regarding the February 28, 2013 manifestation determination meeting. Student contends that the manifestation determination was improper because no general education teacher attended the meeting. However, unlike a normal IEP meeting, there is no requirement for a general education teacher to participate in a manifestation determination review. Instead, the law only requires "relevant" members of the IEP team, as determined by the parent and the local educational agency, to be involved. (20 U.S.C. § 1415(k)(1)(E)(i).) Student's February 21, 2013 misconduct did not happen in the general education classroom and there is no evidence that anyone suggested, prior to the manifestation determination, that a general education teacher was a relevant team member. There was no procedural violation.

14. Student also alleges that the District predetermined the manifestation determination. Student relies upon the testimony of Ms. Bhakta that she was not sure if the boxes regarding the findings of the manifestation team were checked before or during the manifestation determination meeting. However, as set forth in Factual Findings 71 – 78, Ms. Bhakta's testimony was tentative at best; she really could not

remember. Her testimony is not sufficient to create a procedural violation or invalidate the manifestation determination.

15. Student also relies on the statement of Student's mother that she thought she had no choice but to accept the District's decision to expel, as set forth in Factual Findings 71 – 78 above. While it is true that Student's mother is a medical doctor, not a special educator, as set forth in Factual Findings 20, 39, and 78, she was previously provided with a copy of her procedural safeguards. She also had a husband who worked as a teacher and had attended IEP meetings. The District did not seek to exclude her from the manifestation process – the District staff even went to her office as a convenience to her. As Ms. Bhakta testified, Student's mother participated and asked questions about Student's ODD during the meeting. There was no procedural violation.

16. However, even if there was a procedural violation, that procedural violation did not prevent the team from properly determining that Student's conduct was not a manifestation of his disability and properly determining that it did not result from a failure to implement the IEP. (See Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484.)

17. Student failed to meet his burden with respect to the manifestation determination. The District properly determined that his misconduct on February 21, 2013, was not a manifestation of his disability and did not result from a failure to implement the IEP.

ORDER

Student is not entitled to any relief on the expedited issue. The expedited portion of Student's due process proceeding is dismissed.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed Code, § 56505, subd. (k).)

Dated: May 20, 2013

/s/

SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings