

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SOUTHERN KERN UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2017070207

EXPEDITED DECISION

Parent on behalf of Student filed an expedited due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on July 6, 2017, naming Southern Kern Unified School District. District filed a response to Student's complaint on July 14, 2017, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

Administrative Law Judge Chris Butchko, Office of Administrative Hearings, State of California, heard this matter in Rosamond, California, on August 8, 9, 10, and 11, 2017, and conducted further hearing by telephone on August 14 and 15, 2017. Hearing was concluded on August 15, 2017.

David Grey, Attorney at Law, of Grey and Grey, represented Student. Student's Parent was present on all hearing days in Rosamond, although she did not attend all proceedings. Student did not attend the hearing.

Darren Bogie and Stephanie Gutcher, Attorneys at Law, of Schools Legal Service, represented District. Sheryl Taylor, Special Education Director, attended all portions of

the hearing on behalf of District.

Student's complaint requested an expedited appeal of a school disciplinary manifestation determination. The complaint raised no other issues. By order dated July 7, 2017, OAH set the expedited matter for hearing on August 3, 2017. Because of the unavailability of District's counsel due to injury, the parties agreed at the prehearing conference to delay hearing to August 8, 2017. Since school was not in session during that time due to summer recess, the start of hearing was timely under 34 CFR 300.530(e).

At the parties' request, the ALJ allowed the parties to submit written closing argument by August 19, 2017. The parties submitted their closing briefs and the expedited matter was submitted for decision on August 19, 2017.

EXPEDITED ISSUE

Was Student's behavior on April 21, 2017, for which he was disciplined, caused by, or had a direct and substantial relationship to, his disability or disabilities or the direct result of District's failure to implement his Individualized Education Program?

REQUESTED REMEDY

Student requests that OAH issue an order directing District to reverse its manifestation determination and subsequent expulsion, and find that his conduct was a manifestation of his qualifying special education disabilities of Other Health Impairment, based on an underlying disability of Attention Deficit Hyperactivity Disorder, and Emotional Disturbance.

CONTENTIONS OF THE PARTIES

Student contends that District improperly determined that Student's conduct was not a manifestation of his disability because his conduct on April 21, 2017, of punching

another student in the head was impulsive, unplanned, and caused by, or directly and substantially related to, his ADHD and emotional disturbance. Additionally, Student contends that his IEP was not implemented as District failed to provide non-public agency behavioral support hours, resource support classes, and counselling services, and that failure caused the incident for which he was disciplined.

District contends that Student's IEP was fully implemented and that his conduct was not a manifestation of a disability because it was not impulsive and therefore not a manifestation of his ADHD. District argues that emotional disturbance is not a disability, and that the manifestation determination team only needed to consider whether Student's misbehavior was a manifestation of his ADHD.

SUMMARY OF DECISION

Student established that the manifestation determination team's decision failed to properly consider whether his behavior was a manifestation of his disability. On the evidence presented, it is more likely than not that Student's punching of another child on April 21, 2017, was a manifestation of either his ADHD or his emotional disturbance disabilities. Student must be returned to his placement within District.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student resides with Parent in Rosamond. Student was 11-years-old and in the fifth grade at Rosamond Elementary School in District at the time of the disciplinary incident on April 21, 2017, until he was expelled following the manifestation determination meeting on May 5, 2017.

2. Student entered District in December of the 2015-2016 school year after transferring from an elementary school in the Palmdale District. Student was eligible for special education services under the ADHD eligibility category at the time he entered

District based on a 2014 psychoeducational assessment made by the Westside Union School District. Since that assessment, Student has attended two elementary schools in the Westside Union District, one in Palmdale District, and Rosamond Elementary.

3. Although Student's academic potential is at least average and may approach gifted status in some areas, his achievement and behavior has been a long-standing concern. At the Westside Union District, Student was given a psychoeducational assessment to evaluate his need for special education services. Student was observed to have poor work production and disruptive behaviors, including defiance, disruptions, theft, threatening others, assaults, swearing, spitting, breaking rules, forging his mother's signature, leaving class without permission, and pulling down the pants of other students. At the time these behaviors were observed, Student was eight years old.

4. Shortly after his entry into District, Student filed for due process against District. In that case, OAH Case No. 2016080409, Student asserted that District failed to timely conduct his entry IEP team meeting and that he had been punished because of behaviors related to his disability. The complaint alleged that in his four months of attendance before District held an IEP team meeting, Student been given campus clean-up duty three days, given detention eight days, and was suspended seven times. Student asserted that counselling service to address his need for self-regulation, social skills, and behavior improvement was then effectively reduced to "as-needed" service under his new IEP.

SOCIAL-EMOTIONAL EVALUATION

5. On August 8, 2016, District filed a response to Student's complaint admitting liability to the issues presented in Student's complaint, and stated that it would implement the remedies identified in Student's complaint if the parties were unable to reach settlement of the matter. In his request for remedies, Student included

requests for District to conduct a functional behavior analysis (FBA), generate a behavior improvement plan (BIP), discontinue use of the discipline code and punishment as a means of addressing Student's behavior, and provide services to address his needs in self-regulation and for coping and social skills.

6. During the time Student's prior complaint was pending, District began work on a social-emotional evaluation and a FBA. Michael Goldberg was assigned to do the social emotional analysis. Mr. Goldberg was a school psychologist within District. Mr. Goldberg attended Pierce Junior College and California State University at Northridge to obtain his undergraduate degree in psychology. He obtained a Masters of Science degree in Psychology from California State University at Northridge in 2005 and credentials in counselling and school psychology. He also holds certification as a Behavioral Intervention Case Manager. Mr. Goldberg worked for 12 years as a school psychologist for District and is now retired.

7. Mr. Goldberg was not doing a psychoeducational assessment of Student. He understood the purpose of his social-emotional evaluation as determining whether or not Student met the eligibility criteria as a student with Emotional Disturbance. Mr. Goldberg began work on his evaluation in September 2016.

8. Mr. Goldberg's 2016 evaluation found that Student met the criteria for emotional disturbance. In conducting the evaluation, Mr. Goldberg reviewed Student's records, interviewed and observed Student, and reviewed rating scales that were filled out by Student's teachers. Student's parent did not return the rating scales provided to her and declined to complete them over the telephone, so her input was not included in Mr. Goldberg's evaluation.

9. The prior evaluation reviewed by Mr. Goldberg was the psychoeducational assessment from November 10, 2014, when Student was at Westside Union District. The 2014 assessment noted that Student presented with "very elevated" scores for

emotional distress, social anxiety, aggressive behavior, social problems, and violent behavior. According to Mr. Goldberg's report, the Westside Union assessment did not find Student to "demonstrate a profile consistent for [sic] a student with Emotional Disturbance."

10. The discipline records reviewed by Mr. Goldberg covered the period between September 11, 2015, and September 26, 2016. In that time, Student was written up 19 times for bad behavior. In slightly over one month at Palmdale, he was reported as "disruptive/defiant" four times, for sexual harassment once, and for obscene acts or habitual vulgarity once. Beginning in February of 2016 through September 26, 2017, at Rosamond Elementary, Student was disciplined for inappropriate behavior five times, for disruption three times, for profanity twice, and once each for violation of rules, sexual harassment, and assault of another student. Mr. Goldberg's report did not include or reference any incident after September 26, 2017, although he tried to keep current on Student's behavior. On September 27, 2016, Student was suspended for pinning another child to the ground and punching him in the head.¹

¹ In rebuttal to Mr. Goldberg's testimony, Student attempted to introduce a statement by Tristan Martinez describing the assault. District objected because the statement had not been part of the document exchange five days before the start of hearing. Student was directed to prepare a declaration explaining the failure to provide the document. Upon review of the declaration, it does not provide sufficient good cause to admit the document. The occurrence of the incident was testified to by Ms. Roney and is corroborated by her contemporaneous Data Assessment Plan Notes received in evidence.

11. Student was observed three times in class.² In the first observation, Student was sometimes off-task but was attentive, participatory, and well-behaved. In the second, the observer was told Student had just refused to do academics and was playing a game on his laptop, but during the observation Student rejoined the class and participated. Student was on-task in engaged throughout the third observation.

12. The Vineland Adaptive Behavior Scales, Second Edition, reported that Student's teacher Tara Schank saw him as having socialization skills in the first percentile. The Behavior Evaluation Scale was given to four of Student's teachers, all of whom reported serious maladaptive behaviors. Student's current teachers, Ms. Schenk and Kari Geiger, reported that he would not follow directions, refused to do assignments, verbally or physically threatened other students, made derogatory or inappropriate comments to students and teachers, made inappropriate physical or verbal responses to others' attempts to interact, had sudden or dramatic mood changes, talked at inappropriate times or made irrelevant comments, used obscene language, and would not react emotionally to events that would normally provoke emotional responses.

13. Student completed the self-report form for the Behavior Assessment System for Children under the direction of Mr. Goldberg. Student's reporting described himself as average in all respects, including for hyperactivity and personal adjustment, which covers peer relations.

14. In his summary, Mr. Goldberg reported that Student was "a pleasant young man who has difficulty paying attention and controlling his behavior." Mr.

² It is unclear whether Mr. Goldberg or Heather Conklin, another school psychologist who worked on the evaluation, conducted the observations. Mr. Goldberg completed and signed the evaluation report.

Goldberg found that Student had an inability to learn which could not be explained by intellectual, sensory, or health factors, had an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, and demonstrated inappropriate types of behavior or feelings under normal circumstances. These traits of emotional disturbance were reported by Mr. Goldberg to have been observed for longer than one school year and not primarily as a result of social maladjustment. Student was found to meet eligibility criteria for special education under both emotional disturbance and other health impairment due to ADHD. Mr. Goldberg completed his report on October 23, 2016.

THE FUNCTIONAL BEHAVIOR ASSESSMENT

15. Raquel Mills was the school psychologist assigned to do an FBA for Student. Ms. Mills attended a few schools before obtaining her bachelor of arts degree in psychology from San Diego State University and she earned a masters degree in school psychology and a pupil personnel services credential from National University in 2015. She is in her third year as a school psychologist for District. Prior to obtaining her degree she worked as a behavior interventionist for children with autism and had been a private-school preschool teacher for five years.

16. Ms. Mills was conducting an FBA to be used by the IEP team in formulating a behavior intervention plan for Student. She began her work in the first week of September 2016. She looked at three target behaviors that were to be managed: leaving the classroom without permission, non-compliance with staff, and antagonizing other students. Ms. Mills instructed Ms. Schank to direct other staff in doing data collection for the FBA, which mainly consisted of observing student and noting occurrences of targeted behaviors.

17. Ms. Mills reviewed the 2014 psychoeducational assessment which reported on Student's misbehaviors in Westside Union District, but she did not review Student's

disciplinary history in her District.

18. To gather direct information on Student, Ms. Mills interviewed Ms. Schenk, Student's Parent, and Student. Ms. Schenk reported that Student could behave and perform well in class, but on most days he misbehaves. Ms. Schenk could not pinpoint a trigger for Student's bad behavior incidents. She stated that Student would leave class without permission, cheat on tests, crumple up tests or homework, cause multiple disruptions, be tardy, and be disrespectful to students, teacher, administrators, and campus safety officers.

19. Parent told Ms. Mills that Student was the victim of poor communication between school administration and staff and that Student was being moved around too much. She reported that Student played well with his neighbors and would do chores without being asked. Parent was concerned that Student would be affected educationally and social-emotionally by the "negative things" surrounding his education. Student was interviewed by Ms. Mills to get a sense of what would motivate him in school.

20. Ms. Mills observed Student at school on four occasions. On the first three occasions Student's behavior was appropriate, although he did require some prompting. During the fourth observation Student was given a science test, which he crumpled and threw away. Staff attempted four times to get him to work on it by returning in to him and smoothing it out before Student poured water on it and left the classroom. When he returned the other students transitioned to reading a novel aloud, which excited most of the pupils. Student did not react as the plot unfolded and moved to sit on a wall by some playground equipment, and did not move back when directed to do so.

21. There were 282 behavioral incidents recorded by the data collection team between September 6, 2016, and October 13, 2016. During that time there was one holiday, Student was absent three days, and Student was suspended for five days. 61

percent of the incidents were non-compliance with instructions, 22 percent were antagonizing other students, and 17 percent were leaving the classroom without permission.

22. The FBA reported that Student's behaviors of non-compliance, antagonizing others, and elopement were intended to avoid and escape from classwork. It recommended that a behavior intervention plan be drafted to give Student a means to "respectfully disagree and negotiate when he is seeking escape from academic work or classroom activities." Ms. Mills completed the FBA on October 25, 2016.

SETTLEMENT OF THE PRIOR DUE PROCESS ACTION

23. On November 1, 2016, the parties executed a settlement agreement which resolved the prior due process action. The terms material for this action were the agreement to hold a new IEP within 15 days, the provision by District of 60 hours of behavior improvement development services by a non-public agency, the discontinuance of the use of the school's discipline code and punishment as a means of addressing Student's behavior, and agreement by District "to expunge all suspensions and detentions from Student's educational record for the 2015-2016 spring and 2016-2017 fall semesters, up to date of full execution of this agreement."

24. Around this time, Student's class was combined with a fourth grade class and Student's main teacher was changed from Ms. Geiger to Mr. Shawn Bragg.

NOVEMBER 14, 2016 IEP TEAM MEETING

25. An early annual IEP team meeting was held on November 14, 2016. Because Parent was unwell, the meeting was rescheduled to and held on November 30, 2016. At the meeting, the team reviewed Mr. Goldberg's social-emotional evaluation and Ms. Mills' FBA. The team found Student continued to eligible for special education under the category of other health impairment and found that he now qualified under

the secondary eligibility of Emotional Disturbance.

26. District's offer of a free appropriate public education consisted of 30 minutes per week of specialized academic instruction, 80 minutes per month of individual counseling, and 30 minutes per month of consultative specialized academic instruction services. The behavior improvement development services were not written into the offer of FAPE.

27. Student's goals included social/emotional goals to improve his self-regulation skills, to appropriately engage with peers and adults, and to recognize opportunities to use self-regulation "tools." Other social/emotional goals involved getting Student to seek permission to leave class and to respectfully disagree and negotiate when he wanted to leave class.

28. The IEP plan included a behavior intervention plan. The predictor for Student's poor behavior was reported as his transition back to classroom from unstructured time and during independent work. Although non-compliance and antagonizing other students was described as part of the behavior to be replaced, the plan contemplated that Student would be rewarded for appropriately negotiating escape from undesired activities. In addition, Student was to be given daily direct instruction in appropriate interaction with others and opportunities to mentor others. If Student misbehaved, he was to be reminded to use appropriate negotiation skills in a warm, non-emotional tone. If he persisted, the teacher was to "increase proximity" to Student and repeat the instruction.

29. Parent agreed to the IEP on November 30, 2016, and it was executed by all parties. That IEP is the last agreed-upon plan and is still in effect.

FURTHER MISBEHAVIOR BY STUDENT

30. Student's behavior did not improve. Mr. Bragg would report Student's misbehavior to Principal Nino Torres or Assistant Principal Suzanne Grissom two or

three times a month. Mr. Bragg was responsible for keeping parent informed about Student's progress in class, and he would report a significant behavior issue almost every day.

31. Student's discipline record appears to have been expunged as of the settlement date of November 1, 2016.³ The first incident after that date is a referral from Mr. Bragg on November 2, 2016, reporting that Student was refusing to work and being disruptive. Additional disciplinary events occurred on December 2, 2016 (obscene gesture to fellow student), December 6, 2016 (shoved and punched fellow student in head; took computer home without permission), December 15, 2016 (disrupted another teacher's class), December 16, 2016 (disruptive, left detention early, and cursed at campus safety officer), January 5, 2017 (disrespectful to teacher; refused to give up cell phone), and January 9, 2017 (defied instruction not to eat in class).

MANIFESTATION DETERMINATION MEETING FOR JANUARY 23, 2017 INCIDENT

32. On January 23, 2017, Student was again being disruptive in class. Mr. Bragg was being assisted in his class by a paraeducator of Asian ancestry. Student stated that he hated Asian people and pulled up his eyes to simulate Asiatic features. Mr. Bragg reported the incident to Ms. Grissom.

33. District proposed to expel Student over this incident. An IEP team meeting to discuss Student's escalating bad behavior had been set for January 18, 2017, but it was rescheduled to January 24, 2017, due to Parent's inability to attend on the earlier date. Once the manifestation determination meeting became necessary, it was combined with the January 24, 2017, IEP team meeting. Parent could not attend on that

³ Student's disciplinary record was made an exhibit to the hearing. It covers the time period from November 2, 2016, through April 21, 2017. It was not stated whether this represented his entire disciplinary record.

date, so the meeting was rescheduled for and held on February 7, 2017.

34. Parent, Mr. Bragg, Mr. Torres, Ms. Taylor, Ms. Mills, and Mr. Goldberg attended, along with Lili Roney, Student's counselor, and Kathy Nelson, Student's resource teacher. Mr. Bragg reported on Student's general disruptions and misbehaviors in class and Ms. Nelson reported that Student was refusing to work in his resource support class. Parent disputed with Mr. Bragg and Ms. Taylor whether Parent was being informed about incidents involving Student.

35. The team then discussed whether Student's misbehavior was a manifestation of his disability. Mr. Goldberg stated that it would be very difficult to say that OHI and emotional disturbance had nothing to do with Student's behavior, and therefore believed it was a manifestation. Ms. Mills agreed, and noted that the behavior fell "under emotional disturbance behavior criteria." Ms. Nelson agreed, but Ms. Roney expressed her opinion that Student was fully aware of what he was doing so she was having a difficult time seeing his behavior as a manifestation of his disability.

36. Although Student's IEP directed that he should be getting counseling from Ms. Roney for 4 sessions per month, he only received 12 sessions between August and the end of January. Ms. Roney wanted to work with him on Aggression Replacement Training but was having difficulty establishing a rapport with him. Many of their sessions devolved into playing board games and Uno to observe his behavior and build a connection with him. At the time of the February manifestation determination meeting, Ms. Roney had not seen symptoms of ADHD in Student and believed he had some other disorder, such as Oppositional Defiant Disorder.

37. At the manifestation determination meeting, Ms. Mills told the team they had to consider Student's impulsivity as a possible cause. Ms. Taylor agreed that Student's disciplinary behavior was a manifestation of Student's disability. The views of Parent and Mr. Torres on whether Student's behavior was a manifestation of his

disability are not recorded in the manifestation determination IEP report. The team as a whole agreed that the behavior was a manifestation of Student's disability.

38. After reaching that conclusion, District members of the team then proposed to change Student's placement. Mr. Bragg, Mr. Torres, Ms. Nelson, and Ms. Mills agreed that Student was not benefitting educationally from his current placement as his behaviors were not improving and he was manipulating the tools they had provided him to his advantage. Mr. Taylor suggested that Student's placement be changed to the Ascend Academy within District.

39. The Ascend Academy was described in the manifestation determination IEP report as a special program "designed to address behaviors that are impeding upon students' educational rights through the implementation of Positive Behavioral Intervention and Support," with a low faculty to student ratio and the same curriculum as the regular school sites. The team, with the exception of Parent, agreed that the Ascend Academy would be the most appropriate placement for Student. District made an offer of FAPE consisting of placement at the Ascend Academy with weekly returns to Rosamond Elementary for physical education class and 80 minutes per month of individual counseling.

40. Parent agreed to visit Ascend Academy. However, after her visit, she refused placement of Student there. District did not file for due process for permission to implement the IEP, and appeared to let the matter drop.

41. Student's negative behavior did not improve even after threat of expulsion. Further disciplinary records were generated on February 16 (taunting student and challenging teacher), February 28 (throwing ketchup), March 1 (defiance of teacher), April 10 (knocking things off teacher's cabinet and throwing chair), and April 13 (punching student in face). The April 13 incident, which occurred after a dispute with another student on the basketball court, earned Student a three-day suspension, which

he completed on April 20th.

THE APRIL 21, 2017 INCIDENT

42. Student returned to school following that suspension on Friday, April 21, 2017. Student had his resource class with Ms. Nelson on Friday mornings, which meant “Fun Friday.” To encourage her students to work hard in her class, she would reward them with games and treats on Friday—but they had to earn Fun Friday privileges.

43. Student was a particular problem for Ms. Nelson. Student did not appreciate the opportunity her resource class provided, and would refuse to go. He did not show up for her class and when she went to get him he would frequently refuse to go with her. Sometimes she would “push in” to his class to work with him, but he did not like that. Student refused to attend her class more often than he attended. It was important to Ms. Nelson that Student not be rewarded with Fun Friday if he did not earn it.

44. Since Student had been on suspension that week, Ms. Nelson did not allow him to have Fun Friday. This disappointed Student, but Ms. Nelson did not recall any excessive reaction on his part. He left her classroom and went to the basketball court. Student appears to have been allowed to cool off by going to the basketball court as an informal accommodation, although he was supposed to negotiate his exits from class.

45. Paraeducator Jessica Gomez was watching the area around the basketball court and saw Student shooting his basketball during school time. She directed him to go to class and took his basketball from him. They scuffled, and at some point Ms. Gomez was grabbed by Student. Ms. Gomez recounted the event to Ms. Nelson, who saw that Ms. Gomez was very upset at being grabbed.

46. Student later reported that during the following lunch recess he had a dispute with another boy, who refused to let him play football and who cursed at

Student. Ms. Roney happened to encounter Student around the lunch period and saw that he was "very agitated." She asked him if something was bothering him, but he just shrugged. She asked if he wanted to come into the counseling room and talk, but he declined.

47. That day, students were released at the end of classes to go home. Student left his classroom and headed toward the gate near the bus pick-up area. To leave school, he passed Ms. Geiger's classroom. Before Student left the school, he punched another child in the head.

48. Ms. Geiger was the only staff member who witnessed the punch. She prepared two written statements regarding the event. She first prepared an undated statement, which reads in full: "After school, as I was walking to the office I saw a commotion. As I walked to see what was going on I saw [Student] hit another student. [cross-out]. I told Student to go to the office, he ran away."

49. Ms. Geiger's second statement is dated April 21, 2017 and reports: "As I was walking to the office after school, I [cross-out] witnessed [Student] hit another student. I asked [Student] to come to the office he walked away. [cross-out] Other students were around. This happened at 1:55 pm."

50. Both statements were signed on forms setting them as declarations under penalty of perjury. The only explanation for the existence of the two statements was theorizing by Mr. Torres and other staff, who supposed that Ms. Geiger rewrote her statement because there were cross-outs on it and she tended to be very neat. Mr. Torres did not direct Ms. Geiger to rewrite her statement. Mr. Torres recalled that the undated statement was written before the one with a date.

51. The school nurse helped the child who was hit prepare a statement. His account reads: "It was after school and I was walking out and [Student] came up from behind me and punched me in my right ear. I got up dizzy, off balanced, and heard

ringing in my ear. He had ran off and a teacher had come and helped me up and took me to the office.”

52. Mr. Torres conducted the investigation. Mr. Torres was in his fifth year as Principal at Rosamond Elementary, and had worked as a principal since 2003. Prior to that, he had taught for eight years. Mr. Torres believes in a progressive discipline model. When there is an incident, he tries to talk to everyone to get both sides of the story and find out why it happened. Mr. Torres was aware that Student had hit other students before.

53. On the day of the incident Mr. Torres was in possession of Student’s basketball following the incident with Ms. Gomez. Mr. Torres also saw Student at lunch, as Mr. Torres had pizza to give away. He saw Student run in, eat quickly, and then rush out to play.

54. At the close of school that day Ms. Geiger brought the student who had been punched to see the nurse, and Mr. Torres asked her what had happened. She told him that Student had punched the other child in the back of the head. Mr. Torres directed her to write a statement and told the nurse to get a statement from the victim.⁴

55. Student then came into the office to retrieve his basketball. Mr. Torres asked him if he wanted to explain what had happened and why it had happened, but Student did not want to talk about it. Student claimed that the other child had shoved Student before Student hit him. Student told Mr. Torres that all he knew was how to suspend kids, which offended Mr. Torres.

56. Mr. Torres conducted the investigation of the incident. He talked with the victim, who said he did not understand why Student hit him and stated that he had had

⁴ Mr. Torres also took a statement from the campus safety officer, but it was not discussed at hearing or introduced into evidence.

no interaction with Student that day. Mr. Torres did not specifically ask if he had pushed Student before the punch. Mr. Torres was aware that Student and the victim had a history of not getting along.

57. Mr. Torres asked the victim for the names of witnesses, and the victim provided the names of two friends. These witnesses backed the victim's account of the incident. Mr. Torres had a low opinion of Student's veracity, believing that he generally was not truthful.

58. On the Tuesday of the following week, Mr. Torres prepared his own declaration under penalty of perjury. The report states that the victim had "been hit on the head" and that Student admitted hitting him. The declaration further stated "[Student] informed me that the other student had been shoving him. This was not witnessed, the teacher, who was behind the students, saw [Student] come up from behind and hit the student in the head."

SECOND EXPULSION AND MANIFESTATION DETERMINATION MEETING

59. As a result of this incident, District decided it would seek to expel Student. A second manifestation determination meeting was scheduled for May 5, 2017. Ms. Nelson, as Student's case manager, was in charge of the manifestation determination meeting, but Ms. Taylor told her whom to invite. Student was invited, but did not attend. Ms. Mills was also invited, but did not attend.

60. Mr. Torres was invited, but had to withdraw early in the week because of a death in his family. He was not interviewed by any team member following his withdrawal regarding his investigation. Ms. Grisson substituted for him. She was in her second year as a vice principal following over twenty years of teaching experience. This was the first manifestation determination hearing she attended.

61. In addition to Ms. Nelson and Ms. Grissom, Parent, Ms. Taylor, District Administrator Patrick Homes, Mr. Bragg, Ms. Roney, and Mr. Goldberg attended as

members of the manifestation determination team.⁵ Although Ms. Taylor was the chair of the meeting, Mr. Goldberg was the dominating force.

62. No witnesses attended the manifestation determination hearing. Neither Student nor the victim attended, Ms. Geiger was not invited, and Mr. Torres was unable to attend. The written statements by Ms. Geiger, Mr. Torres, and the victim were distributed to the attendees and were read aloud at the meeting by Ms. Nelson.⁶ No other information about the day was shared with the team. Ms. Nelson did not report that she had barred Student from Fun Friday that day and that she was aware Student had a conflict with Ms. Gomez that day. Ms. Roney did not tell the team that she encountered Student that day in a state of high agitation.

63. Ms. Taylor and Ms. Grissom reported to the team that Student's IEP was being properly implemented. Ms. Grissom believed that Student was receiving the resource support classes and counseling required under his IEP because they were showing on her Google calendar, although she does not know whether he missed any sessions. Mr. Goldberg also "made sure" Student was receiving his IEP services by checking with Ms. Nelson and Ms. Roney. Ms. Nelson and Ms. Roney did not report Student's unwillingness to meet with them and the number of missed sessions to the team.

⁵ Counsel for Student and District also attended.

⁶ Some witnesses report that both statements by Ms. Geiger were read. Ms. Nelson was not sure if she read another witness statement, possibly by a transitional kindergarten teacher named Wiggins. No such statement appears in the record or was mentioned by any other witness. Although the manifestation determination meeting report states no written witness statements were provided, attendees recalled receiving them.

64. At the meeting, Mr. Bragg gave a statement about Student's current performance in class and reported that Student had been getting more aggressive and defiant and was having daily "incidents." Ms. Nelson seconded Mr. Bragg's report noting that Student's behaviors were continuously escalating and that Student was making a choice to misbehave.

65. The team then considered whether Student's IEP was being implemented. Mr. Goldberg led, stating that he believed it was being implemented, and Ms. Roney, Mr. Bragg, Ms. Grissom, and Ms. Nelson agreed. Ms. Taylor also concurred, but noted that Student sometimes refused to participate. Parent is cited in the report as conceding "that the services may have been there."

66. The team next took up the issue of whether Student's ability to understand the impact and consequences of his behavior was impacted by his disability. Mr. Goldberg stated that the pattern and recurrence of the behavior indicated that Student understood the consequences of his behavior. Ms. Roney stated that Student knew his act was improper and would bring consequences. Mr. Bragg agreed. Ms. Grissom stated that she believed Student understood the impact and consequences of his behavior, and Ms. Taylor and Ms. Nelson agreed. Parent declined to answer.

67. Student's disabilities' effect on his ability to control his behavior was then considered. Mr. Goldberg stated that based upon the pattern and his having opportunities to understand the consequences of his behavior indicated that Student's control over his behavior was not impaired by his disability. Ms. Roney, Mr. Bragg, Ms. Grissom, Ms. Nelson and Ms. Taylor agreed with Mr. Goldberg. Ms. Taylor added that she has seen Student be in control of both defiant and compliant behavior. Mother disagreed. Ms. Roney added that Student knows right from wrong.

68. The team then considered whether there was a direct and substantial relationship between the disability and the misbehavior. Mr. Goldberg stated that he

could not say that there was no relationship, but he did not believe it was substantial. Ms. Roney said she did not believe his disability caused Student to misbehave and that there was no direct and substantial relationship. Mr. Bragg, Ms. Grissom, Ms. Nelson, and Ms. Taylor agreed. Parent disagreed.

69. The District members of the team all finding that the behavior was not a manifestation of Student's disability, the team allowed the expulsion hearing to proceed.

70. Mr. Goldberg's view of the effects of Student's disability on his behavior was dictated by his view of Student's disabilities. Although Mr. Goldberg wrote a social-emotional evaluation that recommended that Student be found eligible for special education under the eligibility category of Emotional Disturbance, he does not believe that emotional disturbance is a disability. Accordingly, Mr. Goldberg believed the team only needed to consider whether Student's actions were a manifestation of his ADHD.

71. Mr. Goldberg decided that Student's behavior was not a manifestation of his ADHD. He believed that any expressions of disability that could be considered markers for emotional disturbance were explainable as aspects of Student's ADHD. He believes that ADHD is a problem derived from faulty executive functioning. Mr. Goldberg concluded that Student's behavior was not connected to any disability because Student understood that there would be consequences if he struck another child and because there was no precipitating event.

72. The absence of a precipitating event was important to Mr. Goldberg because a child with ADHD can act impulsively, and might lash out if provoked because of a lack of control caused by impairment of executive functioning. If there had been a provocation, Mr. Goldberg may have reached a different conclusion. Mr. Goldberg understood that Student ran up to the victim and punched him without any provocation. Mr. Goldberg did not talk with Ms. Geiger or other witnesses to the event and based his understanding on the written statements he received and a discussion

with Mr. Torres and Ms. Taylor. Mr. Goldberg told the team that it was his opinion as a professional that the incident was not a manifestation of Student's disability.

73. The other members of the team deferred to Mr. Goldberg's opinion. Mr. Bragg had no expertise in psychological conditions and felt he could only speculate about whether the conduct was connected to disability. Mr. Bragg went along with Mr. Goldberg because he was an expert. Ms. Nelson believed that Student does not have any disability and feels that he is manipulative, dishonest, and hurts other children surreptitiously. She agreed with Mr. Goldberg. As a therapist, Ms. Roney considers herself unqualified by training to make decisions about eligibility and disabilities. She does not understand emotional disturbance and also believed that Student did not have ADHD. She agreed with Mr. Goldberg that Student's behavior was not impulsive based upon the facts provided. Ms. Grissom was less prepared to consider the matter than she would have like because of Mr. Torres' withdrawal and was only able to "touch base" with him on the matter. Her participation was limited.

74. There was no discussion of Student's eligibilities or disabilities with the team at any time during the manifestation determination meeting. Neither Mr. Goldberg nor Ms. Roney, the metal health professionals at the meeting, presented any information about what Student's disabilities were, the severity of those disabilities, or the effects of those disabilities on Student's ability to understand the impact and consequences of and to control his behavior. Any discussion at the meeting was superficial and conclusory. There was no meaningful consideration of the effect of Student's disability on his behavior at the manifestation determination team meeting.

LEGAL CONCLUSIONS

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20

U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁷ et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) Under the IDEA and California law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE is defined as appropriate 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 individualized education program. (20 U.S.C. § 1401(9); Ed. Code, §§ 56031 & 56040; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

2. Title 20 United States Code section 1415(k) and title 34 Code of Federal Regulations part 300.530 govern the discipline of special education students. (Ed. Code, § 48915.5.) A local educational agency may suspend or expel a student receiving special education services from school as provided by federal law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 48915.5, subd. (a).)

3. For disciplinary changes in placement greater than 10 consecutive school days (or that are a pattern that amounts to a change of placement), the disciplinary measures applicable to students without disabilities may be applied to a special education student if the conduct resulting in discipline is determined not to have been a manifestation of the special education student's disability. (20 U.S.C. § 1415(k)(C); 34 C.F.R. §§ 300.530(c) & 300.536(a)(1),(2).) The district is required to conduct a review to determine if the conduct that is subject to discipline is a manifestation of the student's disability. This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) It

⁷ All references to the Code of Federal Regulations are to the 2006 version.

must be accomplished within 10 school days of the decision to change the student's placement. (*Ibid.*)

4. A parent of a special education student may appeal a school district's determination that particular conduct resulting in a disciplinary change of placement was not a manifestation of the child's disability by requesting an expedited due process hearing. (20 U.S.C. § 1415(k)(H)(3)(A); 34 C.F.R. 300.532(a) & (c).) The hearing must be conducted within 20 school days of the date an expedited due process hearing request is filed and a decision must be rendered within 10 school days after the hearing ends. (20 U.S.C. § 1415(k)(H)(4)(B); 34 C.F.R. 300.532(c)(2).)

5. A manifestation determination must be made by the school district, the parent, and relevant members of the IEP team as determined by the parent and the school district. (20 U.S.C. § 1415(k)(1)(E)(i).) The manifestation determination analyzes the child's behavior as demonstrated across settings and across times. All relevant information in the student's file, including the IEP, any observations of teachers, and any relevant information from the parents must be reviewed to determine if the conduct was caused by, or had a direct and substantial relationship to the student's disability, or was the direct result of the district's failure to implement the student's IEP. (34 C.F.R. § 300.530(e); Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed.Reg. 46540, 46720 (Aug. 14, 2006) (Comments on 2006 Regulations).) However, that list of relevant information is not exhaustive. 71 Fed. Reg. 46,719 (2006).

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

7. A parent who disagrees with any decision regarding the manifestation

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

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

CAUSATION OR RELATIONSHIP TO DISABILITY

9. For a special education student's misconduct to be a manifestation of his disability, that conduct must either be caused by, or have a direct and substantial relationship to a student's disability, or be the direct result of failure to implement the IEP. (20 U.S.C. § 1415(k)(E)(i).) Manifestation determination teams are charged with answering two, more concretely framed questions:

The Act now requires the [manifestation determination team] to determine whether a child's behavior was a manifestation of the child's disability based on two inquiries: (1) was the conduct caused by, or did it have a direct and substantial relationship to the child's disability; or (2) was the conduct a direct result of the LEAs failure to implement the child's IEP? (71 Fed.Reg. 46719 (August 14, 2006).)

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

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

PROCEDURAL REQUIREMENTS

11. In *Board of Education v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) This standard applied to MD meetings. (*Danny K. ex rel. Luana K. v. Department of Educ., Hawai'i* (D.Hawai'i 2011 Civ. No. 11-00025 ACK-KSC) 2011 WL 4527387, * 15.)

12. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification,

assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan.

(Amanda J. v. Clark County Sch. Dist. (9th Cir. 2001) 267 F.3d 877, 882.)

EMOTIONAL DISTURBANCE

13. Emotional disturbance is a term of art created by regulators in connection with IDEA-eligibility criteria, with no Diagnostic and Statistical Manual or other medical model equivalent. A student is not required to meet the Diagnostic and Statistical Manual of Mental Disorders criteria for any part of the definition to qualify as emotionally disturbed. The IDEA excludes socially maladjusted children from eligibility as having an emotional disturbance. (34 CFR 300.8 (c)(4).)

14. Under the 2006 IDEA Part B regulations, 34 Code of Federal Regulations part 300.8(c)(4)(i), "emotional disturbance" means a condition exhibiting one or more of the following characteristics "over a long period of time and to a marked degree that adversely affects a child's educational performance":

- A. An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- B. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- C. Inappropriate types of behavior or feelings under normal circumstances.
- D. A general pervasive mood of unhappiness or depression.
- E. A tendency to develop physical symptoms or fears associated with personal or school problems.

"Read naturally and as a whole, the law and the regulations identify a class of children who are disabled only in the sense that their abnormal emotional conditions prevent them from choosing normal responses to normal situations."

Independent Sch. Dist. No. 284 v. A.C., (8th Cir. 2001) 258 F.3d 769.

14. "Inappropriate behaviors under normal circumstances" is defined by a number of states to include behaviors which are psychotic or bizarre in nature or are atypical behaviors for which no observable reason exists. For example, "running away from a stressful situation, whether at home or at school, is not characteristic of the type of behavior this definition contemplates. Nor is the taking of alcohol or drugs, however harmful, such an inappropriate act under normal conditions as to come within this definition. This definition might include behavior such as assaulting teachers or students for no apparent reason." See, e.g., Letter to Anonymous, 213 IDELR 247 (OSEP 1989).

ANALYSIS

15. Student's disabilities and his behavior made him a difficult child to educate. His intelligence masked the impact of his disabilities and led observers to believe that he knew what he was doing and that he was simply choosing to be bad. While children with disabilities do not have license to misbehave, before they are punished, a school district must fairly consider whether the behavior has a direct and substantial relationship to the child's disability. Here, District failed to do so.

16. Student entered District with eligibility for special education and a record of disciplinary incidents. These incidents were much more serious than normal childhood missteps: Student had a precocious ability to swear and an undesirable familiarity with sexual slang, gestures, and innuendo. Student continued his wayward

behavior at District.

17. Following its failure to hold a timely entrance IEP team meeting for Student, District agreed to evaluate Student for Emotional Disturbance and to conduct an FBA to enable the IEP team to prepare a behavior improvement plan. To its credit, District began work on both well before the action filed against it was formally settled. As a result of the evaluation, Student was found eligible as a child with emotional disturbance at the following IEP team meeting and a behavior plan was prepared. Student's academic support was also increased and he was provided with counseling.

18. Despite the efforts of Student's teachers and support professionals, Student continued to misbehave and even escalated his misbehavior. In January 2017, District proposed to expel Student for making racial comments about a paraeducator. A manifestation determination meeting was held wherein the team decided that his actions were the result of his disability.

19. That determination is curious in light of the subsequent manifestation determination. Ms. Mills found the behavior to align with criteria for emotionally disturbed behavior, and Mr. Goldberg felt he could not rule out that the behavior was directly and substantially related to either ADHD or emotional disturbance. Although she had had very few sessions with Student and had not established a viable therapeutic relationship with Student, Ms. Roney disagreed with the psychologists and expressed her opinion that Student knew what he was doing and therefore his behavior was not a manifestation of his disabilities.

20. The team ultimately agreed that Student could not be expelled for the misbehavior because it was connected to his disability. Instead, District members of the team proposed to take him out of Rosamond Elementary and send him to Ascend Academy, a school for children with disabilities. Parent would not agree to the placement, and District took no further action to change Student's placement even

though it felt he needed a more restrictive educational placement to receive a FAPE.

21. Student continued to add to his disciplinary record and his behavior, according to District staff, worsened. The day Student returned to school from a suspension for punching a child he punched another child, prompting District again to seek to expel him and triggering the second manifestation determination hearing.

22. This hearing turned out differently for Student. The members of the manifestation determination team, with the exception of Parent, believed that this incident did not have a direct and substantial relationship to Student's disabilities and was not due to the failure of District to implement the IEP, and allowed the expulsion to proceed.

23. The May 5, 2017 manifestation determination meeting suffered from at least two fatal flaws. First, the team failed to consider all relevant information concerning the event and Student's disabilities.

24. The team as a whole, and Mr. Goldberg in particular, completely failed in their obligation under the law to consider the impact of Student's emotional disturbance on his ability to appreciate and control his behavior. As the psychologist in attendance at the meeting, Mr. Goldberg used the influence of his position to lead the team to conclude that emotional disturbance was irrelevant because it was entirely subsumed by the executive functioning deficit aspects of ADHD. As the person whose evaluation was used by the IEP team to find Student eligible for special education services under the emotional disturbance category, Mr. Goldberg may have felt somehow empowered to disregard the eligibility. Doing so usurped the role and responsibility of the manifestation determination team.

25. The testimony received at hearing made clear that most, if not all, of the other team members had no understanding of emotional disturbance. The notes of the meeting show that the team members considered the impact of Student's "disability,"

not disabilities. Mr. Goldberg did not attempt to explain the classification and its effects. Many members of the team simply deferred to his expertise and agreed with his point of view, thereby failing their duty to actually consider and determine the facts, and rendering the team's conclusion unreliable.

26. Further, the analysis that did take place regarding the impact of Student's ADHD on his behavior did not consider all relevant information. The team relied upon three brief statements by the victim, Ms. Geiger, and Mr. Torres to provide all the information they needed to understand what happened and why it happened. These statements were insufficient, contradictory, and incomplete.

27. Ms. Geiger was available to come to the manifestation determination meeting, but was not invited. She was the only adult witness to the event. She provided two statements which differ in one major respect: in her first statement, she reported seeing a commotion and looking over to see Student throw a punch. In the second, she simply witnessed Student hit the victim. At hearing, Mr. Torres offered an unconvincing explanation for the difference between the statements: the commotion, he explained, was simply the chaos that occurred every day as students are let out of class.

28. As an experienced teacher, Ms. Geiger would not be alarmed by school letting out. More precisely, her statement reports that she saw a commotion, "walked to see what was going on," and then saw Student strike the victim. No member of the manifestation determination team testified that they discussed or even recognized the difference between the two statements.⁸ This difference is material because the time

⁸ It is assumed from testimony that both statements were provided to the manifestation determination team. When witnesses at hearing were provided with both statements during their testimony, some did not recognize that they were not the same until the differences were pointed out.

lapse between when Ms. Geiger saw the commotion and when Student struck the victim allowed for some interaction to take place between the two students prior to the punch. The victim may have shoved Student, causing a commotion, whereupon Student threw the punch Ms. Geiger saw.

29. That possibility of interaction is significant because Mr. Goldberg, who led the team to its conclusion that an unprovoked punch was not a manifestation of ADHD, conceded in his testimony that if there had been provocation he might not have been able to reach the same conclusion. In addition, a manifestation determination team properly informed about Student's disabilities would have considered whether his impulsivity or emotional disturbance issues might have caused him to strike out simply because the opportunity presented itself. At the first manifestation determination, Mr. Goldberg was unable to rule out either ADHD or emotional disturbance as the cause of a racial slur directed at a paraeducator, but he was able to do so at the May manifestation determination. It is not clear from the facts of each event why this is so.

30. Review of the manifestation determination team's decision on appeal may not rehear or review the facts of the offense. It must be assumed that the school's disciplinary findings about the student's actions were correct. In analyzing whether the manifestation determination was correct, however, consideration must be given to whether the team was supplied with sufficient information about the student's perspective and mental state. This team was not. Part of this was due to the fact that Mr. Torres, who conducted the investigation, could not attend the meeting. However, his investigation was deficient. He spoke with Student, the victim, and two of the victim's friends. If he spoke to Ms. Geiger about the differences between her statements or about what she witnessed, he did not record anything about it. Although he was not inclined to believe Student, he did report that Student claimed that he was shoved by the victim prior to the punch. Mr. Torres testified at hearing that Student told him that

shortly after the incident, making it somewhat less likely that the claim was fabricated.

31. The manifestation determination team did not discuss Mr. Torres' report that Student claimed to have been pushed, despite Mr. Goldberg's need to find a trigger for the punch. This is emblematic of the second defect in the process: members of the team did not share information of which they were personally aware.

32. Although Mr. Torres asked the victim if he had had any dispute with Student that day, Mr. Torres did not report that he was aware that the two had a history with each other. Similarly, Ms. Nelson did not share that she turned Student away from Fun Friday that morning or that she was aware Student had a conflict with Ms. Gomez on the basketball court that morning that left Ms. Gomez shaken. Ms. Roney did not report seeing Student distraught after lunch time. None of these matters individually are profound, but they combine to provide context and facts that may have mattered for the team's decision-making whether Student's disciplinary conduct was simply misbehavior, an uncontrolled impulsive act of taking out his day's frustrations on someone whom he did not like, or an irrational emotional response in a normal circumstance to a peer with whom he could not relate. The district team members at the manifestation determination meeting had personal knowledge of facts concerning Student's state of mind on the day of the incident which could have materially contributed to a full consideration of Student's disciplinary conduct and did not share them.

33. The manifestation determination team's failure to discuss or examine the underlying facts and consider the effect of student's disability on his behavior renders its decision unreliable and the opinions of District witnesses as to Student's conduct not credible.

34. Student also asserts that there was a failure to implement Student's IEP that directly resulted in Student's wrongful behavior. First, Student contends that District

failed to implement the 60 hours of behavior improvement development services, noting that they were only partially delivered. Those hours were part of the settlement agreement between the parties to resolve OAH Case No. 2016080409, and were not written into the IEP. Accordingly, the failure to provide those services cannot be considered a failure to implement the IEP.

35. Student asserts that District did not provide the resource support and counseling minutes specified in the IEP. This argument is well-made. Ms. Nelson, who was the resource services provider, and Ms. Roney, the counselor, both testified that Student was skipping or refusing to attend their sessions. Ms. Nelson made a strong effort to render services to Student, converting her pull-out time to push-in service, but she testified that Student missed over half the time he was supposed to spend with her. Likewise, Ms. Roney only gave Student a fraction of the counseling he was due.

36. Student could not be physically forced to attend sessions with either provider, but his failure to attend is not something the District may shrug off. If Student was rejecting services, the required action is to assemble the IEP team, not to allow him to so do. Having shown that the IEP was not fully implemented, it is still necessary to connect that dereliction to Student's misbehavior. Given that these services were intended to help Student progress to goals which included self-regulation, appropriate interaction with peers, and use of self-regulation tools, it is likely that the failure to provide the services contributed to and caused the explosive conflict with the peer at issue here.

37. To some extent, it may seem like District faced a Catch-22 situation: if Student threw the punch because of provocation, it could be a manifestation of ADHD causing impulsive reactions. If he punched someone for no apparent reason, it could be a manifestation of emotional disturbance causing irrational and paranoid actions. That is, however, precisely the reason for manifestation determination meetings.

Generalizations about disabilities and their effects on children are improper justifications for taking actions that affect their education. Individualized consideration by the IEP team of a child's ability, circumstances, and the degree to which he or she is impacted by their disability is required to shape an education plan. A manifestation determination team in making a decision to punish or expel a child with a disability because of a rules violation must make a similarly individualized determination. If the District manifestation determination team members had carefully considered available information about the April 21, 2017 incident in the context of Student's disabilities as it did as to the prior disciplinary incident, District would have reached the decision that Student's conduct was a manifestation of his disabilities.

38. A consideration of all the circumstances that District manifestation determination team members failed to consider regarding the April 21, 2017 incident clearly established that Student's disciplinary conduct was a manifestation of his ADHD and/or his emotional disturbance. Further, District's failure to implement Student's IEP, developed after District assessments that pointed out behavioral issues similar to April 21, 2017 incident, was also a direct cause of the disciplinary incident.

ORDER

District's manifestation determination that the April 21, 2017 incident was unrelated to Student disability and not caused by District's failure to implement Student's IEP is reversed. Student is to be reinstated in his placement at Rosamond Elementary school or the District general education school Student would attend if Student has aged out of Rosamond Elementary.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided.

Student prevailed on the only issue heard in this matter.

RIGHT TO APPEAL THIS DECISION

This is a final administrative Decision, and all parties are bound by this Decision. The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: August 29, 2017

/s/

CHRIS BUTCHKO

Administrative Law Judge

Office of Administrative Hearings