

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,  
v.

SEQUOIA UNION HIGH SCHOOL  
DISTRICT.

OAH Case No. 2017020648

EXPEDITED DECISION

Student filed a due process hearing request (complaint) which contained both expedited and non-expedited issues with the Office of Administrative Hearings, State of California, on February 15, 2017, naming the Sequoia Union High School District. Administrative Law Judge Charles Marson heard the expedited portion of this matter in Redwood City, California, on March 14, 15, and 16, 2017.

Margaret P. Roberts, Attorney at Law, represented Student. Mother was present every hearing day except for brief absences. Student did not attend.

Kathryn Meola, Attorney at Law, represented Sequoia. Dr. Deborah M. Toups, Sequoia's Director of Special Education, attended the hearing on behalf of Sequoia.

On March 16, 2017, the last day of hearing, the record was closed and the matter was submitted. The parties filed written closing arguments March 24, 2017.

ISSUES

*Issue No. 1:* Was Student's November 9, 2016 conduct, which resulted in a recommendation for expulsion, caused by or have a direct and substantial relationship to her disability?

*Issue No. 2:* Did Sequoia commit material procedural violations in conducting the November 18, 2016 manifestation determination by:

- a. failing to review and consider all relevant information in Student's education file, in conjunction with information presented at the manifestation determination;
- b. failing to consider, or address, input from parent and from Student's case manager regarding Student's behavior being caused by, or substantially related to, Student's medication, which is prescribed to treat her disability;
- c. ignoring Parent's request to seek a medical opinion regarding the side effects of Student's medication;
- d. limiting consideration to the relationship between Student's conduct and Moyamoya disease, and not considering the relationship between the conduct and her seizure disorder or the medications used to treat the seizure disorder; and
- e. failing to provide Parent with legally adequate prior written notice prior to removing Student from her placement?

## SUMMARY OF DECISION

Student contends that her assault on another student on November 9, 2016, had a direct and substantial relationship to her disability, Moyamoya Disease, because the assault was a side effect of Keppra, the anti-convulsive medication she was prescribed to prevent seizures caused by the disease. She also contends that there were several procedural errors in the manifestation determination conducted by Sequoia that determined the assault did not have a direct and substantial relationship to her disability.

Sequoia contends that her assault was premeditated and caused by tensions following the presidential election, not by her medication, which only rarely causes

impulsive violent behavior. It also contends that there was no legal error in the procedures involved in the manifestation determination.

This Decision holds that there was no direct or substantial relationship between the assault and Student's disability. Keppra very rarely causes outbursts of violence against others, and those outbursts are always impulsive. Student's conduct on November 9, 2016, was planned over a period of more than three hours and was motivated by political, racial, and social tensions on the campus on the day after the presidential election, not by the effect of her medication. It also holds that there was only one procedural defect in the procedures by which Sequoia reached that conclusion at the manifestation determination, and that defect was harmless.

## FACTUAL FINDINGS

1. Student is a fifteen-year-old girl who lives with her Mother within Sequoia's boundaries and receives special education and related services in the category of other health impaired. She has Moyamoya Disease, a rare cerebrovascular disorder caused by the contraction of arteries at the base of the brain. The disease is progressive, can cause serious seizures and stroke, and can be fatal. It is normally treated with anti-convulsive medication such as Keppra, which Student had been taking for almost four years at the time of the incident that led to her suspension and possible expulsion.

2. In fall 2016, Student was a sophomore enrolled in general education classes at Sequoia's Woodside High School. On November 9, 2016, the morning after the presidential election, Student sought out another student (Jane Doe, a pseudonym) and assaulted her. Sequoia suspended Student and began expulsion proceedings.

3. On November 18, 2016, Sequoia held a manifestation determination meeting and determined, over Mother's objection, that Student's conduct on November 9 was not a manifestation of her disability. Sequoia then placed Student in an alternative educational setting. Mother filed this request for due process hearing challenging the

manifestation determination. On February 17, 2017, a hearing officer recommended to Sequoia's School Board that Student be expelled from Woodside. The Board is scheduled to meet in April on that recommendation.

#### THE ASSAULT ON NOVEMBER 9, 2016

4. November 8, 2016, was Election Day, and the election of President Trump came as a surprise to many students and staff at Woodside. Students and others were posting opinions about the election on social media, including Instagram. At some point during the evening of Election Day, or the following morning, Jane Doe posted a comment on Instagram that caused Student to believe Jane Doe was a Trump supporter and a racist. Although the facts are not clear, it is known that someone posted "Fuck Mexicans" on Instagram, and a message from Jane Doe beginning "On that we can agree" appeared just below that message, or nearly below it, in the Instagram message queue. The evidence did not establish whether Jane Doe was actually referring to the racial slur; she has since denied that she was. Student, who is African-American, believed that she was.

5. Just before 9:00 a.m. on the morning after the election, Student arrived on campus angry at Jane Doe, whom she did not know. She entered the office of Leslie Pedrin, her gym teacher, demanding to know who Jane Doe, "the Trump supporter," was. She stated: "I am going to ask her if she wants to grab my crotch" and that Jane Doe was a "racist white girl." Ms. Pedrin promptly ordered her to cease that kind of talk, lectured her on its impropriety and the importance of the right of people to their own opinions and votes, and told her never to say such things in her office again. Student said: "OK Mrs. Pedrin, I understand," and Ms. Pedrin thought the incident was over. Student had a good day in gym class, and left that class at 10:35 a.m.

6. However, Student had not been able to put her anger at Jane Doe aside. In the late morning there may have been more social media traffic adding to Student's

desire for a confrontation. At lunch time, Student went looking for Jane Doe. She went to a lunch area where Jane Doe commonly ate, but she was not there at the time, and Student left. Student returned a short while later with a group of friends, still looking for Jane Doe, and at about 12:20 p.m., found her at a lunch table.

7. The ensuing incident was recorded on cell phones in audio and video by at least four bystanders. Four of the recordings were introduced in evidence at hearing, each showing the incident from a different perspective, and considered together they furnish a clear record of the event. Student asked another student: "Is this her?" and someone confirmed it was. Student accused Jane Doe of being behind or approving of the racist communication, but Jane Doe denied it. Student turned to the crowd saying something like "please tell me that she did" and "should I do it?" and then said: "I really want to do it." Student then calmly and deliberately took off her glasses, folded them, handed them to a friend, and attacked Jane Doe, striking her with her fists and pulling her hair.

8. Jane Doe did not resist the assault, but fell to the ground. Student continued to assault her, kicking her, kneeling her, and stomping on her stomach. A larger girl attempted to stop the attack by putting her body between the two and pulling Student off Jane Doe, but was not immediately able to do so. For a brief period Student reached around the intervening student and continued to strike Jane Doe with her fists. Finally she relented, and the two were separated. In vulgar language, Jane Doe demanded to know who Student was; Student defiantly responded with her full name and walked off.

9. The audio and video recordings of the event strongly suggest that at least some students in the crowd knew the event was coming. Few moved away or seemed surprised. At least two of the recordings began well before the violence, suggesting that the videographers knew a confrontation was coming. One student witness later asserted

that he or she had heard from about 10 friends that Student was going to confront Jane Doe.

10. After the attack, a campus security officer took Student to the office of Wendy Porter, the administrative vice principal. Student admitted there had been a confrontation, but repeatedly denied, orally and in writing, that she had engaged in violence. About 20 minutes after the event, Ms. Porter obtained one of the video recordings. When Student's Mother arrived, Ms. Porter played the recording for them, and only then did Student admit her role in the attack. The reasons she gave for engaging in it were that she was angry at Jane Doe's anti-Mexican statements and at her denial that she had made them.

11. Student's attack injured Jane Doe, who had a bloody nose, scrapes and bruises, and symptoms of concussion. Several of her earrings were missing and a section of her hair had been pulled out; the hair and some of the earrings were found at the scene.

#### THE INVESTIGATION AND THE MANIFESTATION DETERMINATION

12. Sequoia suspended Student the day of the assault, and began expulsion proceedings. It set a manifestation determination meeting for November 18, 2016. In preparation for both proceedings, Sequoia assigned school psychologist Dr. Rodney Aho to conduct an investigation.<sup>1</sup> He reviewed Student's individualized education

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<sup>1</sup> Dr. Aho has a doctorate in philosophy and international counseling psychology from St. Mary's College in Delaware. He has a pupil personnel services credential and a single subject teaching credential for English. He is also a behavior intervention case manager. He has worked as a school psychologist or a teacher in a wide variety of schools, has been working with special needs children since 1981, and has completed

programs and other school records back to the beginning of 9th grade, and reviewed her past assessments, including some from middle school. He obtained reports from Student's teachers, and reviewed written statements from student witnesses and from Student that had been gathered by Ms. Porter. The statements were introduced in evidence at hearing.

13. The medical staff at Woodside already had a relationship with Student's neurologist, Dr. Jorina Elbers, because it was administering Student's morning dosage of the anti-convulsive medication Keppra at school. Dr. Elbers is a pediatric neurologist and an assistant professor in the Department of Neurology at Stanford. She is also a stroke specialist who has treated 50 to 60 patients with Moyamoya.<sup>2</sup> As Sequoia staff knew, Dr. Elbers had been treating Student's Moyamoya and managing her medication since January 2013.

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more than a thousand psychoeducational assessments. At present he is the school psychologist assigned by Sequoia to Woodside High School.

<sup>2</sup> Dr. Elbers received her M.D. degree from the University of British Columbia in 2004, and then completed a five-year neurology residency and a two-year stroke fellowship at the University of Toronto. In 2014 she acquired a master's degree in epidemiology and clinical research. She has published in numerous peer-reviewed journals and won several awards. She is a board-certified specialist in neurology, has been licensed to practice medicine since 2009, and has been treating pediatric patients since 2004. She is now the director of the Stanford Pediatric Stroke Program.

14. Dr. Aho thought it wise to approach Dr. Elbers through someone medically trained, so he asked Kristin Patane,<sup>3</sup> the school nurse, to call Dr. Elbers and solicit her opinion about whether there could be a relationship between the assault and Student's disability. He specifically asked her to inquire about the possibility that Student's medication had a connection with the incident. On November 15, 2016, Ms. Patane called the doctor and then reported in an email that Dr. Elbers had said there was only a "slim chance" that the conduct and the disability were related. The email emphasized that Dr. Elbers did not want her name used in the manifestation determination due to her fragile relationship with the family and a desire not to jeopardize what was left of their doctor/patient relationship. Dr. Aho responded that he wanted to honor Dr. Elbers's request for anonymity.

15. The manifestation determination meeting on November 18, 2016, was attended by Dr. Aho, Special Education Department Chair Cara Klackle, and Sarah Lefort, a general education teacher, for Sequoia. Mother and Student brought workers from various public agencies for support. Dr. Aho reported what he had learned about Student's disability, her IEP's, her assessments, her teachers' views, her prior disciplinary record, and her conduct on November 9. Mother claimed that the Keppra Student took was a principal cause of the outburst; the Sequoia team members disagreed. Dr. Aho stated that the district had sought the opinion of an unnamed neurologist, who had advised that it was quite unlikely that there was any relationship between Student's disability and the attack. Mother agreed at hearing that Dr. Aho specifically included the possible effect of the medication in that statement. Mother requested a second medical opinion, and one of Student's supporters demanded that Sequoia get that opinion from

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<sup>3</sup> Ms. Patane is now Kristin Coronado, but her name usually appears as Patane in the record.



Student's treating physician, Dr. Elbers. Sequoia representatives did not admit that they had already done so, because of their promise of anonymity to Dr. Elbers and their concern for the doctor-patient relationship.

16. One of Student's supporters at the meeting was Casey Jackson, her case manager from a private nonprofit organization called SWAG (Students Who Achieve Greatness) Live in Peace. Student attended an afterschool program sponsored by that organization, and Mr. Jackson helped her with her homework and advocated for her with teachers and administrators at school. At the manifestation determination meeting, Mr. Jackson announced that he had researched the side effects of Keppra on Google, and had found that "aggression and violent behavior" were "common" side effects of the drug.<sup>4</sup> Mr. Jackson testified at hearing that he merely "grazed" the literature to get an overview; it was not an "in-depth search." Mr. Jackson did not (and at hearing could not) identify any of his sources for this information. He is a De Anza College student and has no training in medicine, pharmacology or special education.

17. The Sequoia members of the manifestation determination team decided that Student's disability did not have a direct or substantial relationship to her conduct on November 9, and therefore that it was not a manifestation of her disability. They found that Student understood the impact and consequences of her behavior, and could have controlled that behavior but chose not to do so. They memorialized these decisions in a written finding given to Mother the same day. After the meeting, expulsion proceedings were continued, and Student was transferred to a different school.

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<sup>4</sup> Dr. Aho and Jennifer Torres, a county social worker supporting Mother, testified that Mr. Jackson did this research on his telephone at the meeting. Mr. Jackson testified he did it before the meeting. It is not necessary to resolve this conflict.

18. Two days after the manifestation determination, Mother revoked her previously granted permission for Sequoia to share information with Dr. Elbers, so Sequoia was unable to learn of subsequent developments from Student's neurologist.

#### KEPPRA'S ROLE IN THE ASSAULT

##### Student's History of Medication and behavior

19. Student first sought medical attention for her seizures in 2009, but her condition was not properly diagnosed. In fall 2012, a physician at a clinic at Stanford University diagnosed her as having Moyamoya Disease, and in January 2013 Dr. Elbers began treating her. She prescribed Keppra for Student in two daily doses of 500 milligrams each, and aspirin as a blood thinner. From then until November 9, 2016, Student was prescribed both Keppra and aspirin.

20. Mother, Student, and Dr. Elbers have a long-running dispute about Student's noncompliance with her medication schedule. Mother has always opposed the administration of Keppra and preferred natural remedies. She has also experimented with cannabis oil instead of Keppra for the seizures. In her 9th grade year, Student had a seizure at school, and Ruth Brown, then the school nurse, investigated and discovered that Mother was giving Student garlic pills as a blood thinner instead of aspirin. Dr. Elbers discovered from a blood test that Student had not been regularly taking her Keppra. In April 2016, Dr. Elbers and Child Protective Services insisted that the school (rather than Mother) give Student her morning dose of Keppra, to make sure it was received, and threatened to start proceedings against Mother for medical neglect if she did not agree. After a heated meeting in Dr. Elbers's office, Mother capitulated and the school nurse began administering the morning dose.

21. Student has had many absences and tardies at school. Mother attributes these to Student's illness and the need to keep her home in order to be near an

emergency room in case she has seizures. Student recently also began going to school but cutting particular classes. She did not regularly report to the health aide to get her medication. As a result, the school health aide who is assigned to administer the Keppra in the morning frequently had difficulty finding Student, and sometimes had been unable to do so. Mother testified generally that she did administer the medication when Student was at home, but both Dr. Elbers and school health officials believed that her administration of the drug was sporadic.

22. Before November 9, 2016, Student had been taking Keppra for almost four years without displaying any sign that the drug encouraged her to assault anyone. To the contrary, they show that she never started a fight and was generally well-behaved. That evidence strongly supports the conclusion that Keppra was not a substantial causative factor in her conduct on November 9.

23. Before she began taking Keppra, Student's IEP's and assessments reveal some mild undesirable behavior. A 2012 IEP reported that she could sometimes get "visibly angry or upset" when frustrated by math; she would "growl, make noises that would interrupt others' learning . . ." But she had no record of assaultive behavior.

24. Mother reported to the IEP team on May 2, 2013, that Keppra was causing Student to have "mood swings and depression." In 2013 Student occasionally displayed a negative attitude or inappropriate tone, and she had a goal addressing off-task or attention-seeking behaviors. She was given a behavior support plan in May 2013 addressing behavior such as talking to a peer in class, making faces, and leaning backward. But none of the target behavior related to physical aggression against another. On a rating scale filled out in fall 2013, her 7th grade science teacher rated her hostility to others as only "average" for her age group, and her September 2013 IEP mentioned her "positive interactions with peers" as a strength. There was no mention in those records of interpersonal violence.

25. Sometime in 2014 or 2015, and at the latest by May 2015, Student's Keppra dosage was increased to 750 milligrams twice a day to keep up with her increasing body weight; Dr. Elbers explained to Mother that the effectiveness of a fixed dosage diminished as Student grew. Student continued to display no sign of assaultive behavior or personal violence. In fact her behavior improved; she no longer required a behavior plan or a behavior goal. Her September 2014 IEP stated that "her manners and behavior have been excellent to all students and teachers."

26. Student's September 2015 IEP, written near the beginning of 9th grade, repeated the observation that "her manners and behavior have been excellent to all students and teachers." It also stated she was friendly and positive and "very helpful to her peers." Her English teacher reported that her "behavior is great." In May 2016, near the end of Student's 9th grade, Dr. Aho conducted a triennial psychoeducational assessment of Student, mostly by record review. He reported "no concerns" about Student's behavior, and "appropriate social interactions" with peers and teachers. Her science teacher told Dr. Aho that Student "typically behaves fine." Dr. Aho did notice that Student's rate of attendance had been declining.

27. In 9th grade Student was involved in a single disciplinary incident, a juvenile prank in which she persuaded another girl to pull down a third girl's pants while in a crowd. But she engaged in no behavior that even suggested a tendency to assault. Each of her IEP's during these years through the end of 9th grade required the IEP team to determine whether her behavior "impede[d] learning of self or others." The answer was always: "No." Her May 2016 triennial IEP described her as "friendly and social."

28. In or about June 2016, Student suffered a series of seizures, including grand mal seizures, and her health and disposition declined. Her dosage of Keppra was increased to 1,000 milligrams twice a day to control the strokes. In the beginning weeks of 10th grade, Student was very often absent from school for health reasons, or cut

classes when she was there. She was occasionally confrontational and argumentative in class.

29. On September 27, 2016, Student got into an argument with another girl in class, and the other girl left her seat, approached Student, and assaulted her. Student defended herself, and both girls were suspended for 3 days and counseled. That is the only incident of violence in Student's school history before November 9, 2016, and it was apparently in self-defense.<sup>5</sup> In her testimony, Mother accurately referred to the incident as Student's "first fight."

#### Newly Revealed Evidence of Aggressive Behavior

30. Mother testified at hearing that, in the past, she had noticed several Keppra-related instances of aggression by Student at home. During the 9th grade, for example, Student started hitting her little sister, and once hit her so hard it bruised her arm. She kicked her uncle when told to go to her room, for no apparent reason. During the summer and fall of 2016 she would hit the walls at home in anger. She hit her older sister once in the course of an argument.

31. Frank Sinclair, Student's uncle, who lives with Mother and Student, also testified that such incidents had occurred at home. Student hit the family dog in 2014 or 2015. Once she became aggressive toward her sister in an argument over a pair of shoes. Mr. Sinclair had to take her physically into her room, and she fought him and resisted. (This was probably the same event as the one described by Mother.)

32. By November 9, 2016, Mother had not reported any of these alleged incidents to Dr. Elbers, and she testified that was because of their strained relationship.

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<sup>5</sup> Mother and Mr. Jackson testified Student acted in self-defense in this incident. Sequoia witnesses were noncommittal on that issue. The preponderance of evidence therefore showed Student was defending herself.

However, as far as the evidence showed, Mother never reported these alleged incidences to anyone else either. In 2013 she told an IEP team that the Keppra had side effects of mood swings and depression, but did not mention anger or aggression. She reported seizures to the IEP team. Mother admitted in her testimony she did not tell the team about instances of aggression at home during the many IEP team meetings preceding the November 9 incident, and the documents confirm that fact. Letters in Student's file from Dr. Elizabeth Baca and Dr. James Kaferly report on Student's condition, but contain no mention of any aggression.

#### Dr. Elbers's three opinions

33. Student relies almost entirely on the opinion of her neurologist, Dr. Elbers, to demonstrate a connection between Keppra and her assaultive behavior on November 9. Dr. Elbers testified at hearing that Keppra is the medication most commonly prescribed for seizures. It is a "pretty clean drug" that "doesn't have a huge side effect profile." Its side effects can include dizziness, tiredness, and behavioral changes. The most common side effect of Keppra is behavioral; it can range from depression to aggression, emotional lability, hostility, and (rarely) violence against another. According to the literature, approximately 10 percent of Keppra recipients experience one or more of these behavioral symptoms.

34. Dr. Elbers opined at hearing that it was more likely than not that Keppra had a direct and substantial relationship to Student's conduct on November 9. For several reasons, that opinion was not persuasive. It was her third opinion, and contradicted the other two. The development of those differing opinions shows why Dr. Elbers's opinion at hearing was unconvincing.

## THE FIRST OPINION

35. Dr. Elbers offered her first opinion on November 15, 2016, before the manifestation determination, in a telephone call from Ms. Patane, the school nurse. According to Ms. Patane in a contemporaneous email and at hearing, Dr. Elbers opined that there was only a “slim chance” that the conduct and the disability were related. Dr. Elbers testified that she told Ms. Patane she did not think Student’s Moyamoya or seizures were responsible for the conduct, but she was not considering the effect of Keppra when she offered that opinion. She stated that the two did not discuss Student’s medications and the nurse did not ask about Keppra’s side effects.

36. The preponderance of evidence supports the conclusion that Ms. Patane and Dr. Elbers did discuss the effects of medication on Student’s conduct, as Dr. Aho had requested. Ms. Patane took notes of the call, while Dr. Elbers did not, and in her email stated that Dr. Elbers told her “[Student’s] meds are aspirin and an anti-seizure drug and that those are strictly for her medical diagnosis, not mental health meds.” Ms. Patane was firm and confident in her testimony that she specifically recalled a discussion of the side effects of medication occurred, and there was no reason to doubt her. She testified that she clearly recalled that the doctor stated multiple times that her two drugs would not cause her to behave that way. Dr. Aho, Ms. Klackle, and Mother all testified that the unnamed neurologist’s opinion about the effect of the medication was discussed at the manifestation determination meeting. Dr. Elbers’s reference to a “slim chance,” if she made it, could have referred only to the effects of the medication, as no other facet of Moyamoya could account for the conduct.

37. Dr. Elbers’s version, on the other hand, is implausible. Dr. Elbers is an unusually well qualified and trained expert in pediatric neurology who has treated 50 to 60 patients with Moyamoya and has prescribed Keppra to those patients and to many others. She had been managing Student’s medications since January 2013. It is highly

unlikely that such a well-trained and experienced professional would not even consider the effect of the medication she was prescribing when asked about the relationship between Student's conduct and her disability. As Dr. Aho pointed out at hearing, given Dr. Elbers's lengthy struggle to have Student's medication administered to her at school, "I know that the doctor would consider that [the side effects of Keppra] in her answer."

38. However, taking Dr. Elbers's explanation at face value, it still supports Sequoia rather than Student. Dr. Elbers testified that the effect of Keppra did not occur to her in her conversation with Ms. Patane because she was busy cooking dinner and dealing with her children when Ms. Patane called. But she also testified that afterward she watched a video recording of the November 9 incident on YouTube, and it still did not occur to her to make the connection. She only began thinking about it when Mother and Student began to tell her new information in December. If, after seeing Student's conduct, it did not even occur to a professional of Dr. Elbers's experience with Student and with Keppra that the drug and the conduct could be connected, the possibility that they are connected seems remote.

39. The preponderance of evidence supported the conclusion that Dr. Elbers did consider the possible effect of Keppra when she opined to Ms. Patane that there could be either a slim chance, or no chance, that the drug and the conduct were connected. Dr. Elbers's first opinion is more likely an accurate measure of her thinking than the subsequent opinions she formed for the purpose of litigation.

#### THE SECOND OPINION

40. In December 2016, Dr. Elbers met Student and Mother in private. Student's expulsion was in process, and criminal charges may have been pending as well.<sup>6</sup> Student

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<sup>6</sup> Student was arrested for assault and battery because of the incident. The record does not reveal the status of that charge.



feared the effect of the incident on her future, and Dr. Elbers was sympathetic and did not think she should be expelled. She asked Mother whether she had seen behavior changes before the November 9 incident. Mother responded that Student had “ongoing difficulty” with Keppra that Mother had not previously disclosed to Dr. Elbers. Mother mentioned “a couple” of incidents, according to Dr. Elbers: Student had a period of depression and suicidal thoughts, and was “more aggressive” with her sister. Based on this new information, Dr. Elbers stopped prescribing Student Keppra and substituted another anti-convulsive medication. Student has stopped having aggressive incidents since the change.

41. Dr. Elbers’s second opinion was expressed on February 2, 2017, in a “To whom it may concern” letter distributed to decision-makers in the approaching expulsion proceeding, which was held on February 14, 2017. She stated: “Unfortunately, Keppra has a possible side effect of behavioral problems, including emotional lability, anger and aggression. It is within a reasonable medical probability that this medication contributed to aggressive behavior that led to her assault on another student.” The letter closed with a plea that Student not be expelled from the school district. This opinion was formed after, and according to Dr. Elbers because of, the new information she received from Mother and Student in her office in December.

#### THE THIRD OPINION

42. Dr. Elbers’s third opinion was the one offered at hearing: that it was more likely than not that the side effects of Keppra had a direct and substantial relationship to Student’s behavior on November 9. This was quite different from the second opinion; “within a reasonable medical probability” had become “more likely than not,” and “contributed to aggressive behavior that led” to the conduct had become “had a direct and substantial relationship” to the conduct. Dr. Elbers gave two reasons at hearing why her second opinion – which did not discharge Student’s burden of proof here – evolved

into a third opinion that was exactly tailored to that burden. She had gone back over her notes and discovered in January 2013 that Mother had mentioned something about seeing in Student some behavioral effects of Keppra. In addition, more recently, Student's attorney had told her that the school district had noticed an increase in Student's aggression. She gave no further description of those two new discoveries. Neither a note in 2013 nor private assertions by student's attorney can, by themselves, persuasively explain the change to the third opinion.

43. Another reason why Dr. Elbers's opinion at hearing is not accorded substantial weight here is that she knew remarkably little about the November 9 incident, and some of what she knew was incorrect. Ms. Patane gave Dr. Elbers a brief synopsis of the incident on the telephone; she watched one of the several videos made;<sup>7</sup> and spoke with Student about the event. When asked to describe everything she remembered about the event, she said only that it was shortly after the election; there was a discussion between students; and Student felt that the other girl harbored discriminatory feelings about Mexicans. She incorrectly thought the incident related to texting rather than social media, and incorrectly recalled that Student was screaming on the video. In fact, it was Jane Doe doing the screaming. Dr. Elbers knew nothing of any of the facts that led Sequoia to conclude that the incident was premeditated; nothing of the events leading up to the assault beyond "texting"; and nothing of the aftermath.

44. Dr. Elbers was asked at hearing to describe what she knew about any instances in which Keppra may have contributed to an assault on another person. Out of all her patients since 2004, she could recall only three incidents. One involved a young

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<sup>7</sup> The four videos in evidence vary in their coverage of the event; two of them capture less than the entire incident. The record does not identify the video Dr. Elbers saw.

girl strapped to a bed in an ICU who was having hallucinations, ripping out her IV lines, struggling with her restraints and flailing out at others. She scratched her mother in the process. A second occasion, which Dr. Elbers did not observe, involved a young girl who had ongoing tensions with her father; in the hospital she was disinhibited and having hallucinations, and struck her father. The third involved an adolescent boy who had gotten into an altercation with a peer; she knew no more of the incident than that.

45. Importantly, Dr. Elbers conceded that instances in which Keppra contributed to interpersonal violence were rare, and that they were always impulsive. The three incidences she described from her practice were all consistent with impulsive conduct and inconsistent with planning and deliberation.

46. For the reasons above, Dr. Elbers's second and third opinions, which were not before the manifestation determination team, are not in any event persuasive and are not given significant weight here.

47. Dr. Elbers's first opinion -- that there was either a slim chance or no chance that Student's disability (including the effects of medication) was related to her conduct -- was the most credible of the three. Her testimony that all Keppra-related incidences of violence were impulsive severely damaged Student's argument, since there was nothing impulsive about Student's conduct on November 9.

#### Mr. Jackson's Google search

48. The only other evidence introduced by Student to make a connection between Keppra and Student's conduct on November 9, was Mr. Jackson's cursory Google research. Mr. Jackson had no training or experience to support his opinion, and the results of his Google search were contradicted both by Dr. Elbers and by Dr. Aho. After the expulsion hearing, Dr. Aho tried to duplicate Mr. Jackson's Google research. He did not find references to personal violence as a common side effect. He learned that the literature did describe mood swings and behavioral changes as side effects of

Keppra. The most consistent information he found was that the behavioral side effects of Keppra were "spontaneous reactions." There was a pattern of immediacy; the drug caused "knee-jerk reactions." He saw nothing in this later research to change his opinion that the conduct and the medication were unrelated.

49. For the reasons above, Mr. Jackson's opinion about the side effects of Keppra, based on his Google search, is given no weight here.

## CONCLUSIONS OF LAW

### INTRODUCTION – LEGAL FRAMEWORK FOR STUDENT DISCIPLINE UNDER THE IDEA<sup>8</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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

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<sup>8</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

agency may remove the student from his or her educational placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities.) (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).) A local educational agency is required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed. (34 C.F.R. § 300.530(d)(3).) If a special education student violates a code of conduct and the local educational agency changes the educational placement of the student for more than 10 days the local educational agency must meet the requirements of section 1415(k).

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

4. The party requesting a due process hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e); Ed. Code, 56505(l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii).)

## ISSUE: MANIFESTATION DETERMINATION

5. Student contends that her assault on Jane Doe on November 9, 2016, was caused by or directly related to her disability because she was required to take Keppra to prevent seizures caused by Moyamoya Disease, and that the violence in which she engaged was a side effect of the drug. Sequoia contends that her conduct was unrelated to Keppra because she had taken it for years but had no history of such outbreaks; the opinion of her own neurologist that was before the manifestation determination team was that there was likely no relationship; and the premeditated nature of the act is different in kind from the rare instances in which Keppra contributes to impulsive striking out.

6. When a local educational agency decides to change a special education student's educational placement for more than 10 days as a result of a violation of a student code of conduct, the local educational agency, the parent and relevant members of the IEP team shall review all relevant information to determine whether the child's violation was a manifestation of the child's disability. (20 U.S.C. §1415(k)(1)(E); 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. 46720 (Aug. 14, 2006) (Comments on 2006 Regulations).) A manifestation determination must be accomplished within 10 school days of the decision to change the student's placement. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).)

7. The manifestation determination is typically is done in a meeting referred to as a manifestation determination review, and the result of the meeting is known as a manifestation determination. The relevant information that must be reviewed at the manifestation determination includes the student's IEP, any teacher observations, and information provided by the parents. (20 U.S.C. §1415(k)(1)(E); 34 C.F.R. § 300.530(e).) A manifestation determination must consider the student's behavior as demonstrated

across settings and across times. (Comments to 2006 Regulations, *supra*, 71 Fed. Reg. 46720.) A student's conduct is a manifestation of the student's disability: (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) if the conduct in question was the direct result of the local education agency's failure to implement the IEP. (34 C.F.R. § 300.530(e)(i) & (ii).)

8. If the manifestation determination team determines the conduct is not a manifestation of the student's disability, or is not due to the failure to implement the student's IEP, then the local educational agency may use normal school disciplinary procedures to address the incident in the same way as the procedures would be applied to non-disabled students. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c); see *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470, 1482, *affd.*, *sub nom.*, *Honig v. Doe* (1988) 484 U.S. 305.)

9. A parent of a special education student may appeal a determination that the conduct resulting in a disciplinary change of placement was not a manifestation of the child's disability, or the direct result of a district's failure to implement student's IEP, by requesting an expedited due process hearing. (20 U.S.C. § 1415(k)(3)(A); 34 § C.F.R. 300.532(a).) Such an appeal addresses the correctness of the manifestation determination made. (20 U.S.C. § 1415(k)(3)(A), (k)(5); see *Molina v. Board of Educ. of Los Lunas Schools* (D. New Mexico, June 15, 2015, No. 14-CV-00979 WJ/KBM) 2015 WL 9681416, pp. 6-7; cf. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

#### Relationship of Medication to Disability

10. As a threshold matter, Sequoia questions whether it is appropriate to consider the effects of Student's medication as part of her disability for the purpose of a manifestation determination. Student disagrees, relying on decisions under the Americans with Disabilities Act holding that the effects of medication should be considered part of a disability. There appears to be no IDEA decision on point, although

the Department of Education has stated in a comment to the relevant regulation that “the criteria in [34 C.F.R.] § 300.530(e)(1) . . .” are “broad and flexible, and would include such factors as the inter-related and individual challenges associated with many disabilities.” (Comments to 2006 Regulations, *supra*, 71 Fed. Reg. 46720.) That suggests the effects of necessary medications should be considered part of the disability for disciplinary purposes.

11. In this matter, fairness requires that the side effects of Keppra be considered part of Student’s disability. Student is eligible for special education in the category of other health impaired because she has “limited strength, vitality or alertness” caused by “chronic or acute health problems” that adversely affect her educational performance. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(9).) That health problem is Moyamoya Disease. The evidence showed, and the parties agree, that treatment of Moyamoya requires administration of an anti-convulsive medication, most commonly Keppra, in order to prevent serious and potentially fatal seizures. Mother was threatened with child neglect proceedings if she did not cooperate with the administration of Keppra to Student, and Sequoia actively implemented Student’s Keppra prescription by seeking her out in the morning to ensure it was administered.<sup>9</sup>

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<sup>9</sup> In her closing brief Student suggests, in the alternative, that the ALJ incorporate the effects of Student’s medication by redefining her disability as “mood and behavior dysregulation as a result of Keppra.” There is no merit in this suggestion. The evidence established that mood and behavior dysregulation is a side effect of Keppra, not a disability in itself. Mood and behavior dysregulation are addressed by the IDEA in the eligibility category of emotional disturbance (Cal. Code Regs., tit. 5, § 3030, subd. (b)(4)), the requirements of which Student does not meet on this record.



## Relationship of Disability to Conduct

12. There was little, if any, relationship between Student's taking of Keppra and her conduct on November 9. The circumstances of the November 9 assault make it highly unlikely that Keppra played a role. Student had a conscious motive for the attack in her anger at Jane Doe. She conceived of the confrontation before 9:00 a.m. that morning when she arrived at gym class. She searched for Jane Doe at the lunch area, did not find her, left, and then returned. She gathered a crowd to witness the assault and sought its approval, and calmly removed her glasses, folded them, and handed them to a friend before she began. The assault was not at all impulsive; instead it was considered for hours, planned, and then executed. There was no evidence that Keppra could substantially contribute to such sustained and deliberate conduct. Student's attempt to characterize this conduct as perhaps a series of impulsive acts, or part of the "complex and unpredictable nature of the emotional and behavioral dysregulation caused by Keppra," cannot be squared with these facts.

13. By November 9, 2016, Student had been taking Keppra for nearly four years without engaging in any conduct remotely similar to the premeditated assault on Jane Doe. Her neurologist, Dr. Elbers, informed the manifestation determination team that in her opinion, the rare disease Moyamoya either did not contribute to the conduct in question, or had only a slim chance of doing so. The preponderance of evidence showed that Dr. Elbers specifically considered the effect of Student's prescribed medications when she stated that opinion.

14. Student did not provide the manifestation determination team (or the ALJ in this hearing) any medical or pharmacological opinion that the drug could have contributed to Student's conduct except a cursory Google search by Mr. Jackson, a medically unqualified advocate. Dr. Aho, an experienced psychologist, was unable to

duplicate that search. The team correctly disregarded Mr. Jackson's claims and relied on Dr. Elbers's opinion instead.

15. Student did not testify. There was no evidence that Student herself has ever attributed the November 9 incident to Keppra. Her explanation after the incident was that she was angered by Jane Doe's racist comments and her denial of them.

16. Student's after-the-fact discovery of allegedly similar incidents was unpersuasive. Nothing in Student's history at school remotely resembled her conduct on November 9. If the incidents of aggression at home before November 9 were correctly recalled and described to the manifestation determination team, and correctly attributed to Keppra, they still demonstrated nothing more than the rare and wholly impulsive kind of aggression that Dr. Elbers attributed to Keppra, and were qualitatively different from Student's conduct on November 9.

17. Dr. Elbers's subsequent revisions of her opinion do not constitute persuasive evidence, and do not undermine Sequoia's reliance on her original opinion in the manifestation determination. Her carefully hedged second opinion was based on private revelations to her by Mother, Student, and Student's counsel of allegedly similar incidents they had never mentioned before to her or (on this record) to anyone else. The accuracy and completeness of those private revelations are unknown. The testimonies of Mother and Dr. Elbers show that the alleged incidents recounted to Dr. Elbers in preparation for litigation were also nothing more than the rare and wholly impulsive kind of aggression that Dr. Elbers attributed to Keppra, and were qualitatively different from Student's conduct on November 9.

18. Dr. Elbers's testimony that the rare interpersonal violence sometimes seen as a side effect of Keppra is always impulsive was entirely consistent with Sequoia's determination that Student's wholly premeditated conduct on November 9 was not related to her disability.

19. For the reasons above, the manifestation determination was correct. Student's conduct on November 9, 2016 was not caused by, and did not have a direct and substantial relationship to, Student's disability. Keppra neither caused nor significantly contributed to that conduct. It was premeditated rather than impulsive, and was a product of the singular political, racial, and social tensions at Woodside High School in the aftermath of the presidential election. It was a one-time failure of judgment, under unique circumstances, by an otherwise well-behaved young lady who struggles with a life-threatening disability.

#### PROCEDURAL DEFECTS IN THE MANIFESTATION DETERMINATION

##### Failing to Review and Consider All Relevant Information

20. Student contends that the manifestation determination team violated the requirement that it consider all relevant information (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1)) because it did not consider information in Student's middle school file that Student required behavioral support in 2013 shortly after she began taking Keppra. Mother reported to the IEP team on May 2, 2013, that Keppra was causing "mood swings and depression." This report by itself was not relevant to the manifestation determination; there was no evidence that mood swings and depression in a teenage girl are harbingers of physical assault.

21. Student was given a behavior support plan in May 2013 addressing behavior such as talking to a peer in class, making faces, and leaning backward. By September 2013 the IEP team reported that Student had made great progress in controlling those behaviors: "Though [Student] is generally able to make positive choices for her own behavior now, previously when she became frustrated she would growl . . . [and] interrupt . . ." Sequoia had perceived these latter behaviors in 2012, before Student started taking Keppra. The behavioral contract was not for behavior

relevant to a predilection for assault, and in any event was successful and was apparently discontinued, while Student was still taking Keppra.

22. Inconsistently, Student also faults the manifestation determination team for not considering unspecified “documents prior to her current IEP” showing an absence of emotional lability until her Keppra dosage was increased in 2016. Student did not prove that these unidentified documents were not considered. Dr. Aho testified he reviewed Student’s prior IEP’s and assessments and described them to the manifestation determination team. The absence of aggression while taking Keppra tends to support Sequoia’s position, not Student’s. Dr. Aho did not ascribe any particular importance to the last increase in the dosage of Keppra, and most of the newly recalled incidences at home mentioned by Mother and Uncle occurred before that last increase.

23. Student does identify one important piece of information that the manifestation determination team as a whole should have but did not consider. In order to honor Dr. Elbers’s request for anonymity, Sequoia did not disclose to the full team that the unnamed neurologist who had opined there was little or no chance of a relationship between Student’s disability (including the medications for it) and her conduct, was in fact Student’s own neurologist, Dr. Elbers. This was significant; a randomly chosen neurologist would not know Student, would probably not be familiar with Moyamoya, and might not have been familiar with Keppra. Dr. Elbers, on the other hand, had excellent credentials, had been treating Student for years, and was familiar with the drug she had been prescribing.

24. The IDEA requires that the full manifestation determination team, including parents, consider all relevant information. (20 U.S.C. §1415(k)(1)(E); 34 C.F.R. § 300.530(e).) Sequoia therefore violated the IDEA by failing to permit the full manifestation determination team to consider the relevant fact that the neurologist’s opinion came from Student’s own treating physician.

25. The failure of a manifestation determination team to consider all relevant information is subject to the IDEA's harmless error analysis. (*Fitzgerald v. Fairfax County Sch. Bd.* (E.D.Va. 2008) 556 F.Supp.2d 543, 559; *Farrin v. Maine School Admin. Dist.* (D. Maine 2001) 165 F.Supp.2d 37, 33-34, 51-55.) Sequoia's error in not disclosing Dr. Elbers's identity to the full manifestation determination team was harmless because it had no effect on the outcome; it would have reinforced, rather than undermined, Sequoia's decision. It therefore did not injure Student's education, and it did not significantly impede Mother's procedural participation because there is no evidence Mother would or could have said or done anything differently had she known the source of the opinion.

#### Failing to Consider Input from Student's Advocates

26. Sequoia members of the manifestation determination team did not fail to consider input from Student's advocates; they simply disagreed with it. Mr. Jackson argued on behalf of Student that his Google search showed personal violence was a common side effect of Keppra. Dr. Aho responded that according to the unnamed neurologist Sequoia had consulted, there was only a slim chance there was a connection between the two. The Sequoia members of the manifestation determination team were correct in rejecting Mr. Jackson's information. It was not the sort of evidence upon which responsible people rely in the conduct of serious affairs.

#### Ignoring Request for a Medical Opinion

27. The evidence showed that the participants in the manifestation determination meeting discussed the opinion of an unidentified neurologist that there was only a slim chance the Student's conduct was related to her medication. The Sequoia members of the team were aware that the physician who made that statement was Student's own neurologist, Dr. Elbers, but honored Dr. Elbers's request to remain

anonymous. Mother's request was for a second opinion, and social worker Ms. Torres demanded that the opinion come from Student's neurologist. Sequoia had already obtained that opinion.

28. While Sequoia's attempt to deliver Dr. Elbers's opinion anonymously may have given Student and her supporters the impression that Sequoia's medical information was inadequate, in fact the information Sequoia had was from Student's own neurologist. Sequoia did not ignore a request for a medical opinion; it had already satisfied that request.

#### Excluding the Side Effects of Keppra from the Determination

29. The evidence showed that the manifestation determination team specifically discussed the possibility that Student's conduct on November 9 could have been related to Keppra. Dr. Aho and Ms. Klackle so testified, and Mother confirmed that discussion in her testimony. The notes of the meeting stated that Mother requested "a second opinion for the medication," necessarily implying that a first opinion was discussed.

30. Sequoia did not exclude the side effects of Keppra from consideration during the manifestation determination.

#### Failing to Provide Adequate Prior Written Notice

31. A district must give parents prior written notice of a change of placement. (34 C.F.R. § 300.102(a)(3)(iii).) The notice must include (1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency made the decision; (3) a description of each evaluation procedure, assessment, record, or report on which the decision was based; (4) a reminder of parents' procedural safeguards; (5) sources for assistance; (6) the options considered and the reasons for rejecting the

others; and (7) a description of other factors relevant to the decision. (34 C.F.R. § 300.503(b); Ed. Code, § 56500.4, subd. (b).)

32. At the end of the manifestation determination meeting, Dr. Aho gave Mother a 4-page document describing the decisions made there. It was on a form from the San Mateo County Special Education Local Plan Area that required all seven of the informational items required in a prior written notice (see above), and it was fully filled in. The notes of the meeting were particularly detailed, and attempted to capture all of the viewpoints of all of the participants. On the form, Mother acknowledged receipt of her procedural safeguards, which included both sources for assistance and an advisement of her right to seek an expedited due process hearing to challenge an adverse manifestation determination.

33. Sequoia did not fail to give Student adequate prior written notice of her change of placement.<sup>10</sup>

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<sup>10</sup> Student's complaint and the Order Following Prehearing Conference defined five alleged material procedural violations for hearing. (See Issues, above.) In her closing brief, Student attempts to add a sixth: whether Sequoia predetermined the manifestation determination by making its decision before the manifestation determination meeting. The claim is not supported by the evidence; it rests upon a mischaracterization of Dr. Aho's testimony and the feeling of the meeting participants allied with Student that because Sequoia team members were not persuaded by their arguments, the arguments were not considered at all. In any event, a party who requests a due process hearing may not raise issues at the hearing that were not raised in her request, unless the opposing party agrees to the addition. (20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special*

## ORDER

1. The manifestation determination of November 18, 2016, that Student's conduct on November 9, 2016, was not a manifestation of her disability is affirmed.
2. All relief sought by Student from the expedited hearing is denied.

## PREVAILING PARTY

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

## RIGHT TO APPEAL

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

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*Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.) There was no such agreement here.



DATED: March 30, 2017

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/s/

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings