

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH Case No. 2017081054

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

EXPEDITED DECISION

Student filed an expedited due process hearing request with the Office of Administrative Hearings, State of California, on August 23, 2017, naming Los Angeles Unified School District.¹

Administrative Law Judge Laurie Gorsline heard this matter in Van Nuys, California, on September 21, 26, 27 and 28, 2017.

Eli Economou and Wesley Garlick, Attorneys at Law, represented Student. Mother attended part of the first and second days of hearing. Student did not attend the hearing. Spanish interpreters Bernadette Buckley and Eduardo Kogan interpreted and

¹ The complaint contained expedited and non-expedited claims. OAH set the expedited and non-expedited claims for separate hearings. The expedited claims proceeded to hearing with no continuances. (34 C.F.R. § 300.532(c)(2).) This Expedited Decision resolves only the expedited claims identified and not withdrawn by Student.

translated the proceedings for Parent.

Mary Kellogg, Attorney at Law, represented District. Patrick Johnson, District representative, attended the first day of hearing on behalf of District. Juan Tajoya, District representative, attended the second and last day of hearing on behalf of District. Francine Metcalf, District representative, attended the third day of hearing on behalf of District.

The record was closed and the matter was submitted for decision on September 28, 2017, the last day of hearing. The parties submitted written closing argument on October 2, 2017.

ISSUES²

1. Did District violate Student's rights under title 20 United States Code section 1415(k)(1)(E) when it failed to determine at the April 5, 2017 manifestation determination that Student's behavior was a manifestation of his disability, specifically, that the conduct in question was caused by, or had a direct and substantial relationship to, Student's disability?

2. Did District violate Student's rights under title 20 United States Code section 1415(k)(1)(E) when it failed to determine at the April 5, 2017 manifestation

² During the September 18, 2017 prehearing conference, as reflected in the record, the issues were clarified for hearing, which the ALJ renumbered and rephrased. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) Student also voluntarily withdrew as separate procedural claim(s) that District's violated Student's rights under 20 United States Code section 1415(k) when it failed to conduct a corresponding assessment or review Student's school records as part of the April 5, 2017 manifestation determination.

determination that Student's behavior was a manifestation of his disability, specifically, that the conduct in question was the direct result of District's failure to implement his individualized education program?

SUMMARY OF DECISION

Student proved District violated his rights under 20 United States Code section 1415(k)(1)(E) because it failed to determine that his conduct on March 16, 2017, which resulted in his expulsion, was caused by, or had a direct and substantial relationship to, Student's disability. Student's conduct on March 16, 2017, was unequivocally a manifestation of his emotional disturbance disability. Student had a documented history of issues with self-regulation, emotional instability, and aggressive conduct, which included physically aggressive conduct. Student's disability manifested itself in the form of aggressive conduct, which escalated into physical aggression. Any small delay in Student's retaliatory behavior during the incident at issue was an insufficient amount of time for Student's anger to deescalate given his disability and documented history of declining psychological health, depression, history of aggression, and attentional issues. As a result of its violation of the IDEA, District improperly expelled him.

Student did not meet his burden of establishing that the conduct in question was the direct result of District's failure to implement his individualized education program. District failed to implement seven sessions of educationally related intensive counseling services. However, Student's conduct was not the direct result of District's failure to deliver those sessions because the services would not have sustained a change in Student's behaviors over such a short period of time.

FACTUAL FINDINGS

1. Student was a fourteen-year-old male, who resided in the District at all relevant times, and was eligible for special education under the primary category of

emotional disturbance. He began attending District's Maclay Middle School during the 2014-2015 school year when he was in sixth grade. At that time, he was eligible for special education under the eligibility category of specific learning disability.

2. At Maclay, District staff could make written referrals for discipline and counseling of students which were then put into a District online database. The information in the database pertaining to a particular student was referred to as the student's social adjustment report, which District staff updated periodically. Updates included information as to whether the referral was a disciplinary or counseling referral, the reason for the referral, a description of the incident, the date of the referral, the person who updated the report, the date it was updated, the action or intervention taken with regard to the incident in question and the outcome of those interventions. Teachers and staff were expected to make referrals whenever a student engaged in physical contact or made verbal threats, or in other situations where administration should be made aware of the incident. Not every incident involving aggression, or physical aggression, involving a student was put into the social adjustment report.

3. During the 2014-2015 school year, Student had one discipline referral and five counseling referrals for, among other things, using profanity, throwing and kicking objects, not respecting others, and defiance.

THE 2015-2016 SCHOOL YEAR – SEVENTH GRADE

4. During the 2015-2016 school year, Student had 35 referrals for discipline and 11 referrals for counseling for various types of conduct, including: attempting to cause physical injury; threatening to cause physical injury; causing physical injury; harassing behavior; using profanity; violating classroom rules; acting rude and defiant; threatening other students; not following directions; using force; engaging in name calling; and arguing with teachers and peers.

5. On January 12, 2016, a teacher reported that Student was harassing

another student. He went up to the peer's face, threatened to beat him up, and threw his backpack up onto the lights in the classroom. District added the report to Student's social adjustment report on January 12, 2016, under the caption "HARASSED/THREATENED PUPIL OTHER FACTORS." District's follow-up included conflict resolution, counseling, detention, and parent contact.

6. On February 1, 2016, District convened Student's annual individualized education program team meeting. Student failed to meet any of his goals or incremental goal objectives. District's offer of a free appropriate public education included placement at Maclay in a general education classroom with a general education curriculum 100 percent of the time, and resource specialist program support for 180 minutes per week. On February 9, 2016, Parent consented to all components of the February 1, 2016 IEP.

7. On April 6, 2016, Student's teacher Zina Dixon reported Student walked up to another student and punched him in the face as she was helping another student. Student said that he did it because the other student was talking about him. This incident was added to Student's social adjustment report on April 6, 2016, under the caption "CAUSED PHYSICAL INJURY." No follow-up was noted.

8. On April 7, 2016, a teacher reported he saw Student kick a peer and Student became upset and used profanity in referring to the teacher. This was added to Student's social adjustment report on April 7, 2016, under the caption "OBSCENITY/ PROFANITY/ VULGARITY." No follow-up was noted.

9. On April 15, 2016, a teacher reported Student was swearing in the hallway while walking to class, called another student "bitch", and, when the teacher tried to speak with Student, he ignored the teacher and pushed the teacher out of his way. This was added to Student's social adjustment report on April 15, 2016, under the caption "WILLFUL USE OF FORCE/VIOLENCE NOT SELF-DEFENSE." No follow-up was noted.

10. On May 23, 2016, a teacher reported that Student threatened to punch the teacher in the face. This was added to Student's social adjustment report on May 23, 2016, under the heading "HARRASSED/THREATENED SCHOOL DISTRICT PERSONNEL" and "THREATENED TO CAUSE PHYSICAL INJURY." No follow-up was noted.

11. On June 2, 2016, it was reported Student entered the classroom and stated "give me my breakfast or I will start shooting people." This was added to Student's social adjustment report on June 2, 2016, under the heading "THREATENED TO CAUSE PHYSICAL INJURY." No follow-up was noted.

12. Silvia Chavez-Andalon was one of Student's general education teachers at Maclay for the 2015-2016 and 2016-2017 school years. She held a bachelor's degree in liberal studies and a multiple subject teaching credential. She was a District teacher since 2007.

13. On June 9, 2016, Student came into Ms. Chavez-Andalon's class late. As he approached his desk, he threw an open soda can on the floor. Ms. Chavez-Andalon asked him to pick it up and he refused. Student began calling the classroom aide names and threatened to hurt him and damage his vehicle. Student rushed toward the aide attempting to hurt him. At hearing, Ms. Chavez-Andalon explained she had to step in between Student and the classroom aide to prevent Student from hitting the aide. The incident was documented in Student's social adjustment report on June 9, 2016, under the heading "ATTEMPTED TO CAUSE PHYSICAL INJURY" and "THREATENED TO CAUSE PHYSICAL INJURY."

2016-2017 SCHOOL YEAR – EIGHTH GRADE

14. Student attended Maclay during the 2016-2017 school year for eighth grade. Student's social adjustment report documented that on September 13, 2016, Student had a fight with another student.

15. Maria Gonzalez was District's intervention prevention support coordinator

at Maclay since 2015. She obtained a master's degree in education in 2016. Her duties included scheduling IEPs, acting as administrative designee at most IEP team meetings, coordinating and meeting with parents regarding consenting to IEP's, and assisting in coordinating IEP services. She knew Student since he was in seventh grade.

16. Ms. Gonzalez attended Maclay's weekly behavior support team meetings during Student's eighth grade year, along with out-of-classroom personnel, school principal Carlos Tobar, assistant principal Jose Contreras, school counselor Scott Barkman, and, occasionally, school psychologist Francine Vizcarra. The purpose of these meetings was to identify students having difficulties at school, and offer interventions and support. They discussed concerns regarding Student's behavior, including Student's elopement and tardiness from class, as well as his emotional and aggressive behavior.

NOVEMBER 7, 2016 PSYCHOEDUCATIONAL ASSESSMENT

17. Ms. Vizcarra was a school psychologist and a District employee since 2015. She held a credential in school psychology, a bachelor's degree in psychology and obtained a master's degree in education in 2014 from Azusa Pacific University. In October and November 2016, Ms. Vizcarra conducted Student's triennial psychoeducational evaluation, and prepared a written assessment report dated November 7, 2016. The assessment included but was not limited to interviews with Parent, core curriculum teachers Ms. Chavez-Andalon and Ms. Segovia, and Student; the Behavior Assessment System for Children, Second Edition, rating scales; Conners' Third Edition, Short rating scales; the Children's Depression Inventory, Second Edition; the Anger Regulation and Expression Scale; and review of Student's social adjustment report. A behavior analysis was included in the report.

18. The Behavior Assessment was a broad-band rating scale designed to assess and identify a variety of social-emotional and behavioral concerns, and measured social emotional adjustment. "Clinically Significant" scores suggest a high level of

maladjustment. The Conners was an assessment tool used to obtain observations from parents and teachers about a child. The test was designed to assist in the identification of children experiencing problems with attention, hyperactivity, impulsivity, and other behavior difficulties. The Children's Depression Inventory was used to evaluate depressive symptoms in children. The Anger Regulation Scale was a comprehensive self-report assessment of the expression and regulation of anger in children, and how they express anger.

19. Ms. Vizcarra reported that when Student was in fifth grade, the school's behavior support team met with Parent to address concerns that he had been exhibiting inappropriate behavior in the schoolyard. He had a hard time controlling his emotions and following directions. At that time, outside mental health counseling services were recommended by the school, but there was no record Student was receiving such services. Student received multiple referrals from District for outside mental health services since seventh grade due to concerns about his emotional responses.

20. Student's discipline history as reported in the assessment stated that there were 55 disciplinary referral documents which date from January 29, 2015, to October 14, 2016. The report stated that "incidents include but not limited to: caused physical injury to another person, attempted to cause physical injury to another person, threatened to cause physical harm/injury to another person, obscenity/profanity/vulgarity, harassed/threatened pupil based on race/color/national origin, damaged/attempted to damage school or private property, bullying/cyber toward pupil based on other factors, inconsistent behavior, negative attitude, violates school and class rules, excessive absences and tardiness, and does not respect others." This summary did not describe the details included in Student's social adjustment report.

21. Ms. Vizcarra included the disciplinary history in her report to determine if

Student had behavioral issues. At hearing, Ms. Vizcarra was not candid in describing what the social adjustment report revealed about physically aggressive behavior. She initially testified Student had a history of making threats, being verbally aggressive and defiant, but mentioned nothing about his physically aggressive behavior. When she was asked if he had ever physically harmed another student, she reluctantly admitted she read an incident that he had punched another student in the seventh grade, but claimed she was unable to provide any further details. Later, she disclosed that Ms. Dixon was the teacher who reported the incident, demonstrating a lack of candor in answering the earlier question. Ms. Vizcarra also appeared defensive in responding to questions about her failure to contact Ms. Dixon, whom she claimed had left the school, which negatively affected her credibility. She made no attempt to follow up with Ms. Dixon or anyone else about this incident because she viewed it as an isolated incident. Ms. Vizcarra denied there were other incidents of Student causing physical harm in the social adjustment report. She was evasive as to whether she would consider the incident Ms. Dixon reported as physically aggressive behavior, claiming she did not know anything about it.

22. Ms. Vizcarra unpersuasively claimed that if she thought Student had a history or pattern of harming other students, she would have called it physical aggression and bodily harm. Ms. Vizcarra claimed that at the time of her assessment she had no data to support the conclusion that Student attacked and harmed students on a regular basis. She described Student's pattern of behavior recorded in his social adjustment report as merely verbal aggression, being disrespectful, using foul language, poor attendance, elopement, sadness, withdrawal, and crying. She dismissed the incident Ms. Dixon reported as indicative of Student's typical behavior, claiming it did not fit Student's pattern of behavior. She opined that injuring others and causing bodily harm was not a significant component of Student's issues.

The Teacher Reports, Rating Scales and Forms

23. During Ms. Vizcarra's assessment, Ms. Chavez-Andalon reported that depending on Student's mood, his social emotional responses varied. He had a short fuse and experienced difficulty controlling his temper. He was extremely aggressive toward adults and peers. He could be attentive and ask clarifying questions when he needed to. Her concerns included Student's mood, behavior, and his day-to-day interaction fluctuations. He could be a threat to peers and adults due to his lack of appropriate social skills and capability in solving issues in an orderly manner. He displayed tendencies of aggression and violence in the classroom. There was a significant decline in his grades in all academic areas.

24. During the assessment, Ms. Segovia reported some of Student's friends were afraid of him because he could become very aggressive. He could be sweet one moment and then suddenly get upset and tell the teacher to "f---off" and walk out of class because he was told to be quiet or to start working. Her concerns were documented in the assessment report as Student's unpredictable mood swings and aggressiveness. His lack of control caused him to confront others in a split second. He used foul language, kicked and threw furniture, and acted in an aggressive manner towards peers and teacher. He displayed physically aggressive behavior during interactions with his girlfriend such as pushing and pulling her when she did not obey him. During parent conferences, Parent reported Student was explosive and aggressive at home, and that Parent wanted to take him to the doctor for an evaluation of a possible chemical imbalance, but she was afraid of his reaction.

25. Ms. Chavez-Andalon and Ms. Segovia filled out behavior rating scales as part of Student's November 2016 psychoeducational assessment. In response to how often Student displayed certain behaviors, Ms. Chavez-Andalon reported that Student was "always": overly aggressive; overly emotional; got into trouble; complained of pain;

reacted negatively; broke the rules; seemed out of touch with reality; overreacted to stressful situations; lost control when angry; got angry easily; was easily upset; had poor self-control; acted without thinking; lost temper too easily; and disobeyed. Student "never": demonstrated critical thinking skills; annoyed others on purpose; accepted things as they are; planned well; analyzed the nature of a problem before starting to solve it; was resilient; made decisions easily; had good coping skills; or planned ahead. Student "often": argued when denied his own way; was easily stressed and irritable; threatened to hurt others; acted out of control; and retaliated against others. He "sometimes" hit other adolescents. At hearing, Ms. Chavez-Andalon explained that she never saw Student actually hit another student in an aggressive manner. Student's form of aggression depended on his mood and the situation.

26. Based on Ms. Chavez-Andalon's and Ms. Segovia's answers on the Behavior Assessment, the following areas were reported to be "clinically significant": hyperactivity (almost always disrupts the schoolwork of other students and acts out of control); aggression (almost always argues when denied own way and loses temper too easily); conduct problems (almost always gets into trouble and breaks the rules); depression (almost always is irritable and negative about things); learning problems; and study skills.

27. Ms. Chavez-Andalon and Ms. Segovia filled out the Conners rating scale to evaluate Student's behavior. Ms. Chavez-Andalon reported her concerns included his attendance, lying, and aggressive behavior toward adults and peers. At hearing, she explained that he used foul language, did not want to listen to his peers and wanted to get his own way.

28. On the Conners, Ms. Chavez-Andalon reported "very elevated" scores for defiance/aggression (may be argumentative; may defy request from adults; may have poor control of anger; may display aggressive behaviors including bullying; may be

manipulative). On the scale for hyperactivity/impulsivity, Ms. Chavez-Andalon reported Student was in the “high average” range. At hearing, Ms. Vizcarra explained that “high average” meant that there was an issue but it was not significant, and “very elevated” meant that the issues were significant and a substantial issue for Student.

29. On the Conners, Ms. Segovia reported “very elevated” scores for inattention (poor concentration and attention; difficulty keeping his mind on work; careless mistakes, easily distracted); hyperactivity/impulsivity (high anxiety levels, restless-impulsive; easily excited); defiance/aggression (may be argumentative; may defy requests from adults; may have poor anger control; may display aggressive behaviors including bullying; and may be manipulative).

30. At hearing, Ms. Vizcarra admitted that Ms. Chavez-Andalon’s description of Student’s conduct included physical aggression. Ms. Vizcarra was dismissive of Ms. Segovia’s comments about Student’s physically aggressive behavior with his girlfriend. Her testimony was not credible because her testimony was inconsistent as to what she knew about the incident.

Parent Interview, Rating Scales and Forms

31. Ms. Vizcarra interviewed Parent as part of her assessment. Parent reported that when Student was upset, he raised his voice, slammed doors, and demanded to be left alone. Parent’s concerns included depression, anger management, and anxiety.

32. Parent’s answers on the Behavior Assessment noted “clinically significant” concerns in adaptability (never recovers quickly after a set-back and almost always stubborn). On the Conners, Parent reported “very elevated” scores for executive functioning, and defiance/aggression (may have poor control of anger; may display physically and/or verbally aggressive behaviors). Parent rated Student’s impulsivity in the average range.

Student Interview, Rating Scales and Forms

33. As part of the assessment, Student reported to Ms. Vizcarra that he would like to do better and needed help with academics. When asked what he would like to change about himself, he identified his temper.

34. Student filled out behavior rating scales as part of Student's November 2016 psychoeducational assessment. The areas Student rated as "clinically significant" included: locus of control, depression, self-reliance, sense of inadequacy, somatization, relations with parents, and self-esteem.

35. On the Conners, Student self-reported "very elevated" scores for Inattention, and Family Relations, and a "high average" score for defiance/aggression. Student reported his impulsivity in the average range.

Children's Depression Inventory

36. On the Children's Depression Inventory, his teachers indicated "very elevated" or "elevated" scores in all areas of emotional problems, and overall depression total score. Based on the teacher's responses, Student demonstrated characteristics of a person experiencing depressive symptoms, emotional lability, interpersonal problems, social distress and trouble regulating his emotions at school. The areas of concern were impacting his ability to function on a daily basis at school. Parent reported "high average" scores for functional problems (specifically, the child may have problems interacting with peers and maintaining school performance and an impaired capacity to be cooperative and enjoy school activities). Student self-reported "very elevated" scores for emotional problems (the child may be experiencing negative mood, physical symptoms, and negative self-esteem, and negative mood/physical symptoms (the child may have depressive symptoms that manifest as sadness or irritability, as well as physical symptoms.) He also reported "elevated" scores for functional problems.

Anger Regulation Scales Self-Report

37. On the internalizing anger cluster, he scored in the “slightly elevated” range on the subscales for rejection, bitterness, resentment, and suspiciousness. This indicated that Student’s anger may be triggered by the perceptions that others are rejecting him or that others are not treating him with respect or care that he desires; that Student might focus on resentment of those who have transgressed against him in the past and suspicious thoughts that others purposefully want to harm him; that he may focus on unfairness; and he may be suspicious of others’ intentions and attribute hostile motives to their neutral behavior.

38. On the revenge scale for the externalized cluster, Student scored in the “slightly elevated” range, indicating that when angered Student was likely to be motivated by revenge, and likely to spend time and energy pursuing ways to get even with those who have transgressed against him.

39. The “Extent of Anger Cluster” consists of the following scales: scope of triggers, problem duration, and episode duration. It was reported that Student scored in the “slightly elevated” range. He was likely to experience high trait anger. He may experience anger across a wide variety of situations. He may stay angry for an extended period of time, and he is likely to have suffered from anger difficulties for a considerable length of time. On the problem duration scale, Student scored in the “slightly elevated” range. Student was likely to have had a problem experiencing or expressing anger for a considerable period of time. The duration of his anger difficulties suggests a significant clinical problem and a potential disorder. On the episode duration scale, Student scored in the “slightly elevated” range. When Student becomes angry, his anger was likely to last for hours or days, and that the long duration of his anger episodes was likely to interfere with his concentration, focus and interpersonal relationships.

40. At hearing, Ms. Vizcarra opined that Student mostly internalized his anger

and that the scales could provide an indication of whether Student could cause physical harm to others.

Indicators for Educationally Related Intensive Counseling Services

41. Educationally related intensive counseling services was the most intensive level of counseling services District could offer a student. Ms. Vizcarra recommended in her report that Student receive these services, based on Student's numerous negative incidents with teachers, adults, and peers at school which had escalated into verbal and physical aggression. Student appeared to be unhappy, withdrawn and struggling with being able to respond emotionally to everyday situations. When Student had issues with his girlfriend, he became inconsolable, very depressed, irritable, and easily triggered for aggression. Student appeared to be experiencing depressive symptoms, trouble regulating his emotions, feelings of low self-esteem and an inability to cope with his immediate environment. Student had a history of significant aggression towards people, with numerous referrals which included referrals for verbal and physical aggression towards teachers, classroom aides and peers. Student was emotionally unstable and did not think about the consequences of his behavior. His mood changed often and quickly from sad to aggressive. He had a history of defiance. Depending on his mood, he had difficulty following directions, making appropriate decisions, using good coping skills and solving conflicts. He was easily frustrated and cried. Student was noted to have difficulties monitoring his behavior and was easily misled into inappropriate situations when he was having a bad day. Though he tried, his lack of self-control and awareness to identify triggers of his significant mood swings caused his inappropriate school behavior.

42. At hearing, Ms. Vizcarra claimed that when she used the phrase "physical aggression" in her report, she meant he was using his body with force toward an object, as opposed to a person. Her testimony was not believable and conflicted with the

information in her report.

Conclusions and Recommendations

43. In social emotional functioning, Student demonstrated difficulties with attention, hyperactivity, aggression, depression, and learning problems across settings. He usually acted out his negative emotions by eloping, arguing, not doing work, withdrawal, and not being focused or following instruction. He could be rude and disrespectful to teachers, staff, and students when he was angry or moody. There were significant concerns with his unpredictable acts of aggression which created safety issues for peers and adults around him as well as for himself. Based on the formal rating scales, Student showed characteristics of a person experiencing emotional instability, interpersonal problems, attention problems, impulsivity, social distress, and difficulty regulating his emotions including symptoms of depression at school and home.

44. At hearing, Ms. Vizcarra gave as an example of Student's unpredictable acts of aggression and safety concerns, that it had been reported to her that Student became upset and swung a chair, scaring other students, but she admitted there were other examples in his social adjustment report. She also admitted his teachers reported to her they and Student's peers did not feel safe around him. She attempted to minimize concerns regarding Student's physically aggressive behavior, unpersuasively claiming that his depressive mood was more of a concern. She later admitted all of the behaviors identified as part of Student's social emotional functioning were concerning. She acknowledged Student had problems with self-control, but minimized the connection between that and his aggressive conduct, which negatively affected her credibility. She agreed that a student suffering from depression and attention deficits may manifest his disability in aggressive behavior, and a lack of self-control.

45. In her report, Ms. Vizcarra concluded that Student met the special education eligibility criteria for emotional disturbance because his social emotional

functioning was adversely impacting his access to the curriculum, and he exhibited these characteristics over several situations over a long period of time to a marked degree. Student had an inability to learn which could not be explained by intellectual, sensory or other health factors. He also engaged in inappropriate types of behaviors under normal circumstances and he had a general pervasive mood of unhappiness or depression. Specifically, Student displayed inappropriate types of behaviors of inability to cope with his immediate environment with appropriate emotions and behavior. Student appeared to be emotionally unstable as his mood changed often and quickly from content, to depressed and aggressive. Based upon the Behavior Assessments and Children's Depressive Disorder Inventory, Student was reported to experience "very elevated" behaviors of depression. Parent reported Student had "clinically significant" adaptability difficulties, and an inability to cope with his immediate environment, and Student self-reported "very elevated" scores for depression, sense of inadequacy, emotional problems and negative mood.

46. In her report, Ms. Vizcarra also concluded that Student had a history of inattentiveness and hyperactivity, and that Student met the eligibility criteria for other health impairment, but she recommended that this eligibility be secondary because it was not the primary reason that Student's access to the curriculum was impacted. She also recommended educationally related counseling services, and the development of a behavior support plan.

THE NOVEMBER 18, 2016 IEP

47. District held Student's triennial IEP team meeting on November 18, 2016. Parent, Student, Ms. Vizcarra, Mr. Barkman, and Ms. Chavez-Andalon attended the IEP team meeting along with Diana Bosinger, Student's case carrier since sixth grade and resource support program specialist.

48. District's offer of FAPE included a change in eligibility from specific

learning disability to emotional disturbance. Maclay did not offer a special day class for students with emotional disturbance. District offered placement beginning on January 9, 2017, at Pacoima special day class for students with emotional disturbance, except for advisory and physical education classes. Effective upon Parent's consent, District offered educationally related intensive counseling services for 180 minutes per month delivered as a direct service by a single provider for the period beginning December 15, 2016. District also offered Student resource specialist program support for 180 minutes per week.

49. District offered Student a behavior support plan to address attendance and a social emotional goal to address aggression. Student's first incremental objective regarding his social emotional annual goal required Student to recognize emotional states that contribute to or detract from his own ability to solve problems in one out of five trials per week with maximum adult support as measured by teachers and counselors by April 2017. At hearing, Ms. Vizcarra testified inconsistently as to the purpose of Student's social emotional goal, but admitted it was meant to address aggression.

50. On December 13, 2016, Parent consented to the November 18, 2016 IEP.

AFTER WINTER BREAK DURING THE 2016-2017 SCHOOL YEAR

51. The last day of school prior to District's winter break was December 16, 2016. No classes were held between December 16, 2016 and January 8, 2017. The first day of school after District's winter break was January 9, 2017.

52. Between January 9 and 25, 2017, Student did not attend school. Student never attended Pacoima. Around January 25, 2017, Parent told Ms. Gonzalez that Student did not want to attend Pacoima because someone at Pacoima had threatened him. Student re-enrolled at Maclay on January 25, 2017. On January 26, 2017, Parent withdrew her consent to District's offer of an instructional setting at Pacoima. Parent did

not withdraw her consent to the other components of the November 18, 2016 IEP, including the educationally related intensive counseling services. All services offered in the November 18, 2016 IEP were available at Maclay. Student began attending Maclay on January 26, 2017.

53. Between February and April 2017, District assigned a teacher's assistant to collect written data on Student's behaviors. The written data collected by the teaching assistant was never provided to Parent, or school personnel other than Ms. Vizcarra, Ms. Gonzalez and Ms. Bosinger, and was not in evidence.

THE EDUCATIONALLY RELATED INTENSIVE COUNSELING SERVICES

54. Margrit Boghosian has been a District psychiatric social worker since 2004 and provided educationally related intensive counseling services to District students since August 2014. She held a bachelor's degree in psychology and a master's degree in social work, and was credentialed to provide educationally related intensive counseling services to District students.

55. On January 19, 2017, Ms. Boghosian attempted to summon Student from class to conduct her first counseling session with him, but Student was not in class. After contacting the school's attendance counselor, Ms. Boghosian learned that Student had not registered or been attending school at Pacoima.

56. On January 20, 2017, Ms. Boghosian contacted Parent and expressed her concern about Student's absences from school and his need for counseling services, including a psychiatric/medication evaluation. Parent reported Student refused to attend Pacoima because he had issues with another student there, and that Parent preferred he attend Maclay. Parent reported she kept Student out of school, that she had not enrolled him at Pacoima, and agreed to contact Maclay staff to discuss the placement decision that was made at the November 18, 2016 IEP team meeting.

57. On January 26, 2017, Ms. Boghosian contacted Ms. Gonzalez regarding

Student's school enrollment, and was told that Parent had disagreed with the November 18, 2016 IEP in its entirety. As a result, Ms. Boghosian did not provide counseling services to Student. Ms. Boghosian was typically on campus on Thursday mornings to provide counseling services. She did not provide counseling services to Student on January 26, 2017, February 2, 9, 16, and 23, 2017, and March 2, and 9, 2017, because Maclay school personnel notified her that Parent had requested "stay put" and the November 18, 2016 IEP was no longer in effect. Ms. Boghosian would have delivered counseling services to Student once a week for a total of 180 minutes per month but for Ms. Gonzalez informing her that Parent had requested "stay put." Ms. Boghosian opined that a failure to provide counseling services could have a detrimental effect on a student who needed such services.

58. Educationally related intensive counseling services are split into direct and indirect services. Ms. Gonzalez explained that direct services are face-to-face contact with Student and indirect services are consultations with family and staff. Consultations with family and staff were an important part of the counseling services because parent involvement was important. District offered Student educationally related intensive counseling services delivered directly to Student. Ms. Gonzalez later stated that the direct services offered Student included the provider's consultations with Parent and District staff. Her testimony was not persuasive because it was obtained through leading questions by District's counsel, and was inconsistent with her prior testimony. Ms. Boghosian's testimony that the counseling services offered to Student included consultations with Parent and staff was not reliable because her testimony was inconsistent, conflicted with the credible portions of Ms. Gonzalez testimony about this issue and District's offer of direct counseling services in Student's November 2016 IEP.

59. Ms. Gonzalez's testimony that the IEP could not be written to accurately reflect which part of the counseling service was to be provided to Student directly and

which part of the service was to be provided indirectly was unpersuasive. Ms. Gonzalez stated that the school psychologist usually explained what the counseling entailed, but there was no persuasive evidence this was ever done at Student's November 2016 IEP team meeting.

THE MARCH 9, 2017 IEP

60. Student's annual IEP was held on March 9, 2017. Parent, Ms. Gonzalez, Ms. Vizcarra, Ms. Bosinger, general education teacher Jose Campos, least restrictive environment specialist, Natasha Dimas, and another teacher attended the meeting.

61. Student did not meet his social emotional goal or the incremental objectives. The reason stated in the IEP was that Ms. Boghosian did not meet with Student due to "stay put." In his present levels of performance regarding behavior, the IEP stated that Student struggled with self-control. In social-emotional functioning, information about Student was cut and pasted from his November 2016 IEP. Student demonstrated difficulties with attention, hyperactivity, aggression, depression, and learning problems across all settings. He usually acted out his negative emotions by eloping, arguing, not doing work, withdrawal, and not being focused or following instruction. He was rude and disrespectful to teachers, staff, and students when he was angry or moody. There were significant concerns with his unpredictable acts of aggression which created safety issues for peers and adults around him as well as for himself. He was showing characteristics of a person with emotional instability, interpersonal problems, attention problems, impulsivity, social distress, and difficulty regulating his emotions, including symptoms of depression at school and home. The areas were impacting his ability to function on a daily basis at school and home.

62. At hearing, Ms. Vizcarra unconvincingly testified she did not know if an identical present level of performance from one IEP to the next indicated significant progress. Ms. Vizcarra admitted Student's behavior did not change significantly between

November 2016 and March 9, 2017.

63. As administrative designee for the IEP, Ms. Gonzalez was responsible for ensuring that all required topics were discussed at the March 2017 IEP. At hearing, Ms. Gonzalez had no recollection of discussing at the March 2017 IEP any significant changes in Student's behavior since his November 2016 IEP.

64. As FAPE, District offered placement in a general education classroom and educationally related intensive counseling services for 180 minutes as a direct service by a single provider and 240 minutes per week of resource support program services. District offered Student a behavior support plan to address attendance and the same social emotional goal as offered in the November 2016 IEP, which was intended to address aggression. Parent consented to the March 9, 2017 IEP on the same date.

THE MARCH 16, 2017 INCIDENT

65. Student was on the Maclay campus on March 16, 2017, but he did not attend classes. At 12:56 p.m., Student was reported to have passed the psychologist's room, screaming profanities and yelling "I am gonna kill you nigga." School personnel had a conference with Student and Parent was contacted. The incident was recorded in Student's social adjustment report on March 16, 2017, under the heading "THREATENED TO CAUSE PHYSICAL INJURY".

66. Also on March 16, 2017, at approximately 4:30 p.m. while participating in an after school program, Student was in the gym eating soup. A peer playing nearby kicked a ball and struck Student with the ball. Student became upset, confronted the peer and grabbed him by the neck or collar. The peer pushed Student away. Student walked away a few feet, took off his backpack, and announced his intention to hit the other student. His friend told him not to do it, but Student returned to confront the peer. Student punched him in the mouth and broke his jaw. The entire event lasted no more than 10 minutes.

67. On March 20, 2017, Student wrote a statement admitting he punched the peer. The principal interviewed Student. Student stated he told the peer to go outside, but he did not listen. He also added that it was self-defense because the peer pushed him.

68. District conducted an investigation of the event, which included interviewing witnesses and obtaining witness statements. District suspended Student for five days beginning on March 29, 2017, and ending on April 5, 2017.

EDUCATIONALLY RELATED INTENSIVE COUNSELING SERVICES AFTER THE MARCH 9, 2017 IEP

69. On March 16, 2017, Ms. Boghosian attempted to summon Student from class to conduct a counseling session with him, but his teacher informed her that Student was absent. On March 23, 2017, Student attended a counseling session with Ms. Boghosian. He was fully engaged, expressed positive feelings about counseling, and stated he felt "great" about the services. He expressed relief and strong desire for mental health services. Student expressed guilt about the March 16, 2017 incident.

70. On March 24, 2017, Ms. Boghosian contacted Ms. Vizcarra and Mr. Barkman regarding the March 16, 2017 after-school incident. She instructed them to follow up with referrals for outside counseling for Student. Ms. Boghosian also reported in her notes that Student had failed to make any progress on his first incremental objective regarding his social emotional annual goal.

71. On March 30, 2017, Ms. Boghosian, was unable to meet with Student because Student was absent from school due to his suspension. The same day, Ms. Boghosian spoke to Parent and discussed the importance of Student receiving mental health services and a psychiatric evaluation. Parent reported that Student was in contact with outside counseling service agencies for anger management and she had signed papers to begin counseling services. At hearing, Ms. Boghosian explained that her focus

in speaking to Parent was to help her understand that Student needed more services than the District could provide which was why District repeatedly made referrals to outside agencies for additional services. Ms. Boghosian believed at the time that Student needed a psychiatric evaluation and a medication evaluation for his depression.

THE MARCH 2017 PRE-EXPULSION MEETING

72. Justin Berenson was a District behavior specialist since 2017. He held a bachelor's degree in psychology, and a mild/moderate special education preliminary credential. His duties included assisting schools with behavior interventions, and development and implementation of behavior strategies. He also assisted school personnel with the manifestation determination process, offering guidance for conducting a compliant manifestation determination.

73. District staff held a meeting at Maclay in late March 2017 to prepare for Student's manifestation determination meeting. Mr. Berenson, Mr. Tobar, Ms. Vizcarra, Ms. Bosinger, and Ms. Dimas attended. Mr. Contreras did not attend. Ms. Gonzalez attended the first 10 minutes of the meeting. Parent was not invited to the meeting and did not attend. District took no notes of the meeting. District witnesses testified inconsistently as to what occurred at the meeting.

74. Mr. Berenson claimed they discussed what occurred on March 16, 2017, reviewed some of Student's educational records, including Student's psychoeducational assessment, and discussed the basis of Student's eligibility for special education. He was uncertain whether they reviewed Student's entire social adjustment history or just the entries during his eighth-grade year. Other than the November 2016 IEP, he could not recall exactly which IEP's District staff reviewed at the meeting. Mr. Berenson demonstrated an inability to recall the specific details of the meeting, which negatively affected his credibility.

75. Ms. Vizcarra could not recall who attended the meeting, or what was

discussed at the meeting other than who would be invited to the manifestation determination meeting, and who could help with the manifestation determination meeting. She could not recall if any records were reviewed at the meeting. Ms. Gonzalez's testimony that Student's social adjustment report was reviewed at the pre-expulsion meeting was not credible because she was only there for 10 minutes.

THE APRIL 5, 2017 IEP/MANIFESTATION DETERMINATION MEETING

76. Ms. Gonzalez was in charge of scheduling the manifestation determination meeting and selecting the teacher participants. Parent was not consulted in deciding who would attend that meeting.

77. On April 5, 2017, District convened a combined manifestation determination meeting and IEP team meeting, labeled on the IEP as expulsion analysis.³ District combined the manifestation determination meeting with elements of an IEP team meeting. The purpose of the meeting was to determine if Student's March 16, 2017 after-school conduct was a manifestation of Student's disability and whether District would proceed with Student's expulsion. Parent, Mr. Contreras, Ms. Gonzalez, Ms. Bosinger, Ms. Vizcarra, Ms. Dimas, a representative from an outside counseling service and Student's eighth grade science teacher, Melissa Portillo, attended the meeting. Mr. Berenson attended the first 45 minutes of the meeting which lasted at least an hour. District provided Parent her procedural rights and safeguards in Spanish. Ms. Gonzalez attended as administrative designee and interpreter. District informed Parent she was permitted to give input and that District considered her an equal partner in the

³ The references among witnesses and documents to a pre-expulsion IEP, expulsion IEP, manifestation determination IEP, expulsion analysis IEP meeting, and manifestation determination meeting all refer to the same meeting, the meeting held to determine whether Student's conduct was a manifestation of his disability.

meeting. District witnesses testified inconsistently as to what occurred at the meeting.

78. Mr. Contreras, assistant principal at Maclay since 2012, presented the results of his investigation, describing what happened on March 16, 2017.

79. The team considered information presented by other individual team members. Parent reported Student's version of the events of March 16, 2017. Ms. Vizcarra discussed parts of her November 2016 psychoeducational assessment, including Student's change in eligibility to emotional disturbance, some observational data she had collected regarding Student's behaviors noted in her report and his tendency to manifest his disability as depression. Ms. Gonzalez, Ms. Portillo and Ms. Bosinger shared with the team their experiences with Student. Ms. Gonzalez had seen Student engage in verbal aggression, hitting a locker and storming out of class, and a lot of depressive behavior, but she had not seen Student engage in this type of aggressive behavior. Ms. Portillo reported that when Student got upset he reacted immediately, related an episode where Student got upset and threw a chair against the wall, startling everyone. The team discussed Student's typical behaviors, including that he usually shut down, was nonresponsive, became angry, walked out of class, cursed at teachers, but he never physically hit people.

80. Ms. Bosinger prepared Student's present levels of performance regarding behavior, which included information on Student's attendance and grades, in the April 5, 2017 IEP generated as part of the manifestation determination meeting. It stated that Student was easily agitated, would shut down, refused to do any work and became non-responsive. If redirected by a teacher or adult he became upset and walked out of class. He struggled to engage in conversations with his teachers regarding his behavior. When upset, he verbally assaulted peers, teachers, and staff and was disrespectful. Although Student was given adult assistance in developing positive peer/adult interactions, lessons in empathy and anger management, and staff used deescalating techniques with

him, Student did not utilize the strategies/interventions. His disciplinary history consisted of a four-line summary of the number of referrals Student had since August 2014 and listed the captions/headings of some of those incidents. The only details of the incidents contained in his social adjustment report was stated as follows: "the majority of the referrals were for threatening to cause physical injury, harassed/threatened school district personnel, violating class rules, and obscenity/profanity/vulgarity." This summary did not adequately describe what was in Student's social adjustment report.

81. Ms. Boghosian did not attend the manifestation determination review meeting, but wrote Student's present levels of performance for educationally related intensive counseling services as documented in the April 5, 2017 IEP generated as part of the manifestation determination meeting. Student's present level was based upon Student's social adjustment report and reports from his eighth grade teachers, and contained the same information from Student's November 2016 and March 2017 IEP's regarding his social emotional functioning. It also stated Student met once with the provider, and that Student's aggressive behaviors resulted in severe harm and hospitalization of a peer. Teacher reports indicated that there were escalating behaviors in physical aggression and verbal threats to harm others. Student "cursed out" a teacher when he was not allowed to leave the classroom. Per school reports, numerous recommendations had been made for outside counseling and psychiatric services as Student's mental health needs went beyond the scope of what the school could provide. Student's emotional disturbance disability impacted his social emotional functioning. Student evidenced difficulty in the areas of inattention, hyperactivity, aggression, depression, and learning problems. These behaviors impeded his ability to work independently, complete assignments, and engage in positive interactions with others. Student continued to be eligible for educationally related intensive counseling services

because his behaviors impeded his ability to benefit from his educational plan.

82. With the exception of the November 2016 assessment which was partially discussed by Ms. Vizcarra with the team, the participants of the meeting reviewed no other records and did not conduct a record review of all relevant information in Student's file as part of the manifestation determination. The participants had a four-line summary of Student's disciplinary history as presented in the present levels for behavior which did not include Student's full history, in particular, those prior instances where he hit or assaulted someone or was physically aggressive or threatening to people. Although the team discussed some of the behaviors Student tended to exhibit when he got angry, the participants did not review the social adjustment report as part of the manifestation determination.

83. At hearing, Mr. Berenson claimed he participated in the discussion; however, none of the other witnesses who attended the meeting, and testified, corroborated his recollection. Based on his testimony, he appeared confused between what happened at the March 2017 pre-expulsion meeting, where Parent was not present, and what occurred at the April 5, 2017 manifestation determination meeting. For example, he testified that Mr. Tobar gave a statement as to what happened during the incident at issue and how the incident came to his attention; however, Mr. Tobar did not attend the April 5, 2017 meeting. Mr. Tobar attended the March 2017 pre-expulsion meeting. Mr. Berenson later claimed he could not recall if Mr. Tobar was at the April 2017 meeting, and also claimed he was not present when the March 16, 2017 incident was described to the team. He did not remember if a special education teacher attended the April 2017 meeting, whether the team reviewed Student's present levels of performance regarding his social emotional functioning, and could not recall what the team was doing or whether the team had made a determination at the time he left the meeting. However, he later stated, in response to leading questions from District's

counsel, he was not at the manifestation determination meeting when the team made its determination. Mr. Berenson testified inconsistently as to whether the manifestation determination team reviewed the assessment report, IEP's and social adjustment report at the April 2017 meeting. He later admitted that the team did not review records at that meeting and then claimed he could not remember. Mr. Berenson's inability to accurately recall the specifics of the April 5, 2017 meeting, and the inconsistencies in his testimony negatively affected his credibility and the weight given to his testimony.

84. Ms. Vizcarra's testimony that the social adjustment report was at the meeting and reviewed by the team "to an extent" was not persuasive and inconsistent with the testimony of other District witnesses and her own testimony. Ms. Vizcarra was also evasive as to whether the team reviewed Student's entire social adjustment history at the April 2017 meeting. She was equivocal about the portions of his social adjustment history which were reviewed. She claimed the team looked at Student's behaviors that occurred most often, and she had no recollection of discussing the incident Ms. Dixon reported where Student punched a peer. Other than her assessment report, she could not specifically recall which other documents the team reviewed at the meeting or whether the team reviewed the November 2016 IEP. She was also evasive in responding to questions about Student's social emotional functioning present levels of performance, claiming she could not offer an opinion about it because she did not write it. Yet, she offered opinions on other present levels of performance she did not author, later admitted that Student's behavior had not changed, but later inconsistently stated "there was no progress, there was not a lack of progress...."

85. Mr. Contreras hesitated and was evasive when asked if Student's disciplinary history was reviewed as part of the April 2017 meeting. His answer was equivocal, claiming that the team talked about some of the behaviors Student tended to exhibit when he got upset. Although Mr. Contreras claimed he reviewed Student's social

adjustment report before the meeting, his testimony was not believable, and he said very little about Student's prior behaviors at the April 2017 meeting. He had no recollection of reviewing Student's social emotional present levels of performance with the manifestation determination team.

86. At hearing, Ms. Gonzalez did not recall Ms. Bosinger reporting or sharing at the April 2017 meeting any accounts of Student physically harming others. She recalled that the team discussed that they had seen physical aggression from Student before and that he had threatened other students, but the District team members distinguished the March 16, 2017 incident because it was a different level of aggression. Ms. Gonzalez believed all of the information from the teaching assistant's data collection was included in the behavior present levels of performance. Her testimony was not convincing because it was equivocal and it was unclear if she recalled everything stated in the data collection. She did not recall whether the manifestation review team discussed Student's difficulty with self-control, anger management or coping skills, but agreed these things were prevalent with Student. She could not recall if the meeting participants discussed Student's attention deficits and depression or whether they reviewed teacher reports, standardized testing results and the reasons documented in the assessment for Student qualifying for educationally related intensive counseling services.

The Manifestation Determination Outcome

87. District members of the team who attended the April 2017 manifestation determination meeting concluded that Student's misconduct during the March 2017 after-school incident was not caused by or directly and substantially related to Student's disability. They based their decision on their determination that Student's emotional disturbance exhibited itself by cursing, walking out of class, not completing tasks, making rude comments to teachers and sometimes crying when going through difficult

moments with peers. They concluded Student's disability typically manifested itself as depression when having peer issues and that the physical response was not a typical manifestation for Student. As further documented in the April 5, 2017 IEP, the team determined that Student walked away from the victim and talked to friend about it who encouraged him not to hit the victim, evidencing that Student had time to deescalate and make a different choice, but that Student chose to go back and hit the victim.

88. District members of the team concluded that Student's misconduct after school on March 16, 2017, was also not the direct result of the District's failure to implement his IEP. District members of the team concluded that Student received all services documented in his March 9, 2017 IEP, and that the behavior support plan and other supports were fully implemented after that IEP team meeting. They based their conclusions on Ms. Bosinger's report that she had a meeting with all of Student's teachers who confirmed that Student's IEP accommodations and supports had been implemented. The April 5, 2017 IEP also documented that they also relied on the fact that Student refused to attend the Pacoima placement offered at his November 2016 IEP, and a "stay put" placement had been implemented in January 2017.

89. Parent believed the behavior was a manifestation of Student's disability because he angered quickly and lacked self-control, but she did not express her concerns at the meeting. No one at the meeting prevented her from voicing her concerns.

90. At hearing, Ms. Gonzalez explained that she did not think Student's conduct was a manifestation of his disability. The team considered whether the conduct was typical behavior for Student. Ms. Gonzalez did not believe it was typical because Student had not demonstrated this level of aggression before and reacted immediately when he got upset. She opined that, during the March 2017 incident, Student walked away, and had time to process what he was doing. He previously hit objects and was

verbally aggressive, but she had not seen him hit people. She believed Student typically presented in a depressive state and not as someone hitting so strongly that it broke another student's jaw. However, she inconsistently agreed that the victim's resulting injury had no bearing on whether the behavior was a manifestation of his disability. Ms. Gonzalez agreed that Student's conduct was an unpredictable act of aggression.

91. At hearing, Mr. Contreras explained he did not believe Student's conduct was a manifestation of Student's disability. Although he had no involvement in Student's prior IEP's, he had known Student since sixth grade. Most of the time, Student yelled and cursed at people, but it did not get to a point that he would physically attack people. According to Mr. Contreras, with the exception of two instances, Student did not have a tendency to hit or harm other students. In his opinion, in order for a student's conduct to be a manifestation of his disability, the conduct has to be a typical behavior of the student. In his opinion, Student did not have a tendency to exhibit this type of physical aggression; therefore the conduct was not a manifestation of his disability. In addition, in his opinion, the team determined Student had an opportunity to make a choice when he left and told his friend what he was going to do; and Student chose to return and hit the other student.

92. In Mr. Berenson's opinion, the team correctly concluded that Student's conduct was not a manifestation of his disability. Mr. Berenson's opinion was not credible and given no weight. Mr. Berenson opined that, in determining whether conduct is a manifestation of a disability, the most significant part of the record review was looking at past behavior, and whether Student exhibited a pattern of that behavior that was tied to the reason for special education eligibility. He explained that he had reviewed Student's November 2016 psychoeducational assessment, IEP and at least part of his social adjustment report. Mr. Berenson could not recall ever reading anything in Student's history that he had ever physically harmed anyone. In his opinion, Student was

made eligible for special education under the category of emotional disturbance mainly because of depression. Mr. Berenson was impeached on his opinions which negatively affected his credibility. He admitted that, in the psychoeducational report, aggression was listed as one of the behaviors exhibited in qualifying Student for emotional disturbance eligibility. He also agreed that the psychoeducational assessment indicated Student had a history of causing physical injury. He admitted Student's present level of performance in the area of social emotional functioning indicated a concern with aggression, and that Student's conduct was an act of aggression and emotional instability. He agreed there could be patterns of behaviors displayed by a student that went beyond eligibility category, and those behaviors could be relevant to the determination of whether student's conduct was a manifestation of the disability. Mr. Berenson also admitted he was unfamiliar with the legal standard used at manifestation determination meetings for determining whether conduct was a manifestation of a student's disability.

93. At hearing, Ms. Vizcarra opined that Student's conduct was not a manifestation of his disability. She described Student as angry when he initially grabbed the peer and the peer pushed him. In her opinion, Student decided to hit the peer, but could not do it with his backpack on, so he took the time to remove it before punching the other child after his friend told him not to do it. She unpersuasively opined that to cause the type of bodily injury to the peer's face meant Student planned to hit the peer. She explained that the team determined that Student thought about hitting the peer, rather than immediately hitting the peer, which was different than his typical behavior. Yet, when asked if the behavior at issue had to be a typical manifestation of a student's behavior in order to be a manifestation of the student's disability, she responded she could not answer the question without typical behavior being defined.

94. According to Ms. Vizcarra, whether Student had a history of causing this

type of injury had a bearing on whether the conduct was a manifestation of his disability. She unpersuasively denied Student's physically aggressive behaviors had escalated, dismissing the April 2016 punching incident reported by Ms. Dixon as an isolated incident even though she had never investigated it, and denied Student's social adjustment report evidenced a pattern of him hitting others.

95. Ms. Vizcarra opined that part of the team's job was to look for patterns of behavior and they did not see a pattern of behavior similar to the March 16, 2017 incident. In her opinion, Student did not have a significant history of causing bodily harm to others and usually acted immediately. Her testimony as to what the team relied upon in making this determination was inconsistent, claiming, on the one hand, that the team made this determination based on Student's history and admitting, on the other hand, that other than her report, she could not recall any other documents reviewed at the April 5, 2017 meeting, or if any documents were reviewed at the March 2017 pre-expulsion meeting to which Parent was not invited.

96. At hearing, Ms. Vizcarra opined the team did not believe Student's issues with impulsivity and self-control or anger management caused him to engage in the conduct, but she admitted the team did not discuss Student's issues with anger management at the meeting. She also agreed that Student's problems in experiencing or expressing anger, using good coping skills, having difficulties making appropriate decisions and solving conflicts, could have contributed to his actions on March 16, 2017. Later, she inconsistently opined that those issues did not contribute to the events of March 16, 2017. She also agreed that Student manifested his disability in more than one type of behavior, but was not credible, and evasive in describing the ways in which Student manifested his disability. Ms. Vizcarra's evasiveness and inconsistent testimony negatively impacted the reliability of her opinions.

97. Once the team concluded that Student's misconduct was not a

manifestation of his disability or the direct result of the District's failure to implement Student's IEP, District proceeded with Student's expulsion. District determined that it would place Student in an alternate interim placement pending the results of the expulsion process. If the expulsion proceedings determined that expulsion was not recommended, Student would return to Maclay; otherwise Student would remain in an alternative placement.

98. In the April 5, 2017 IEP, District's offer of FAPE included placement at a District community day school in a general education classroom and 180 minutes of educationally related intensive counseling services per month as a direct service by single provider, and a behavior support plan to address outbursts, rage and explosive reactions. Although attendance was still an issue for Student, the team determined Student's needs necessitated a change in what the behavior support plan addressed. Parent consented to all components of this IEP.

99. Student's last day at Maclay was April 5, 2017. Student began attending District's Community Day School on April 24, 2017. His last day at Community Day School was June 5, 2017.

STUDENT'S EXPULSION

100. District expelled Student on June 13, 2017, through December 15, 2017. District suspended enforcement of the expulsion and assigned Student to an alternative placement with special education services. At the time of the due process hearing, Student was not attending school. On September 20, 2017, pursuant to a stipulation between the parties, District agreed to provide Student with a functional behavior assessment and to provide Parent with an assessment plan for purposes of conducting this assessment within 15 days of Student's enrollment at a District school.

STUDENT'S EXPERT – DR. NICHOLAS THAYLER

101. Nicholas Thayler was a licensed clinical psychologist, with a specialty in neuropsychology. He has a bachelor's degree in psychology from the University of California at San Diego. He has a master's degree in psychology, specializing in clinical psychology, which he obtained in 2008. While doing his graduate work between 2008 and 2013, he specialized in clinical neuropsychology with emphasis in pediatric neuropsychology. In 2013, he was awarded his Ph.D. in neuropsychology.

102. Dr. Thayler has been in private practice since 2015. In addition to his private practice, he was concurrently an assistant clinical professor and clinical supervisor at the University of California at Los Angeles, and supervised post-doctoral students and interns who were conducting neuropsychological evaluations. He taught specific topics for advanced training of residents, post-doctoral students and interns, and supervised the cases of patients at the Semel Institute for Neuroscience and Human Behavior.

103. Dr. Thayler has conducted over 300 psychoeducational evaluations on behalf of both parents and districts, including independent educational evaluations funded by school districts. He assessed children with depression and attention deficits since 2006. Most of the children he assessed had an emotional disturbance, including depression and other conditions that contribute to depression. His assessment process included a determination of the extent to which depression was contributing to the child's presenting problems. Children with attention deficits in the classroom were one of the most common issues in the students he has assessed. He regularly assessed children with attention deficits and assessed children exhibiting aggressive behaviors, including violent physical behaviors. Behavioral problems are more likely in children with attention deficits and depression, who are also exhibiting aggressive behaviors, including academic problems and disciplinary problems and other inappropriate

behaviors at school and at home.

104. Dr. Thayler did not assess Student. In preparation for hearing, he reviewed Student's educational file, including his report cards and academic records, the November 2016 psychoeducational assessment, IEP's, and social adjustment report, which he referred to as interoffice correspondence. His review provided him with basis for his opinions and he was able to gain enough information from his review to develop his opinions. He was familiar with the standard of review for a manifestation determination. He did not have to work with Student to understand how his behavior manifested. Because Student was previously assessed, he could take that information and look at it, and develop opinions based on it. He relied on that information and Student's file to form his opinions regarding whether Student's behavior was a manifestation of his disability. Dr. Thayler prepared a report regarding his opinion dated September 17, 2017.

105. In Dr. Thayler's opinion, Student's conduct on March 16, 2017, was a manifestation of his disability. Student's history of prior aggressive behaviors established that aggressive behavior was part of his disability. The records he reviewed included a consistent discussion of aggression, conduct problems, behavior and attention problems since elementary school. Incidents of physical aggression were documented in the years preceding the March 16, 2017 incident, including Student's conduct in the seventh grade. During seventh grade, Student punched another child who said something Student did not like. He also engaged in other acts of aggression. Student's conduct on March 16, 2017 was consistent with previous reported acts of aggression.

106. In Dr. Thayler's opinion, the November 2016 psychoeducational evaluation documented numerous examples of Student's aggressive behaviors. Based on that information, the evaluator recommended emotional disturbance special education eligibility. The November 2016 assessment discussed aggressive behaviors by

referencing the danger of aggression and Student's history of threatening to hurt others, and some of the aggressive behavior was documented in the rating scales. In Dr. Thayler's credible opinion, Student's social emotional functioning, as described by the assessor in November 2016, contributed to Student's aggressive conduct in March 2017.

107. In the November 2016 assessment report, Student's teachers referenced incidents of physical aggression by Student, including pushing and pulling his girlfriend, kicking and throwing furniture, and acting in an aggressive fashion toward his peers and teachers. In order for an act of physical aggression to be a manifestation of a disability, there must be a pattern of that behavior over a long period of time. Dr. Thayler credibly explained that for emotional disturbance eligibility, a pattern had to be established to obtain that qualification. With Student, he had a pattern of less severe aggressive behaviors, but he gradually became more aggressive. By November 2016, he was pushing and pulling his girlfriend when she did not obey him and regularly acting out in class, which in Dr. Thayler's credible opinion, was a part of his emotional disturbance disability.

108. Dr. Thayler reviewed the rating scales from the November 2016 assessment. On the Behavior Assessment rating scales, Student's clinically significant scores in aggression and conduct problems suggested that at the time of the evaluation that teachers perceived Student to have unusually high symptoms in these areas as compared to other students in the class. Student's scores indicated that the teacher who filled out the subscale found that Student had a very high level of depression as compared to other students. When a behavior on the Conners is very elevated it meant the child was exhibiting very high levels of that symptom or behavior as compared to students of his age and gender. The Conner's scores on defiance and aggression demonstrated that Student was exhibiting high levels of those behaviors at the time and that he had those levels in the time leading up to the March 2017 incident.

109. Self-rating scales allow a child to report their subjective experiences, which they otherwise may not report to the assessor. Dr. Thayler was not familiar with the Anger Regulation Scale, but he reviewed the protocol in developing his opinion. In response to one question, Student responded "always" to the statement, "When I get angry, I just want to hurt the person I am angry at." Student was expressing this cognition or feeling in October 2016 when he filled out the scale. In Dr. Thayler's opinion, this answer is related to the March 16, 2017 incident.

110. Dr. Thayler opined that Student's aggressive behaviors worsened and evolved over time, and he was making a lot of verbal threats and acting in a hostile manner, leading up to the behavior in March 2017. Verbal threats and physical posturing, are not discrete behaviors, but are intermingled with depression and attention issues to lead to a child toward worsening behavior without intervention. Student's conduct on March 16, 2017 was an expression of his emotional disturbance.

111. The interval between the psychoeducational evaluation and the March 16, 2017 incident did not provide enough time for amelioration of Student's behavioral issues. The probability that these behaviors went away on their own during this interval of time is extremely low given Student's long history of behavior problems. Student had consistent behavior problems since grade school, the aggressive behavior started in fifth grade, and year after year, his problems worsened. The idea that Student's issues would suddenly improve in four months was highly unlikely. Student's behavior did not improve in this interval, as further evidenced by the fact the March 16, 2017 incident occurred. This was a short period of time, and the conduct issues, hyperactivity and extent of his aggression were substantial in November 2016, as documented in the psychoeducational assessment report.

112. The fact that Student may have turned away and came back prior to striking the other student did not affect Dr. Thayler's opinion that Student's conduct was

a manifestation of his disability. Whether Student retaliated immediately or took a small amount of time to retaliate, it was still a reflection of Student's emotional disturbance. Dr. Thayler worked with many students with attentional issues, including many with comorbid attention deficit hyperactivity disorder and an emotional disturbance such as depression. When a child is exhibiting issues associated with attentional issues such as difficulties with self-control, a substantial neurodevelopmental delay exists in the ability to inhibit inappropriate responses. This was underscored by the fact Student was an adolescent, and his executive functioning and ability to restrain himself was still developing. He was in a hostile situation and his autonomic nervous system was aroused; he was feeling angry and upset, and he had attentional issues and longstanding history of depression and aggressive behavior. All those factors culminated in the presentation where he walked away, but was still in a very agitated state, and then punched the child. If a long period of time passed between when Student walked away and returned to punch the other student, Dr. Thayler's opinion may have changed. However, based on the actual circumstances, Dr. Thayler opined Student's reaction occurred within a short enough interval, even assuming it was 15 minutes, where his disability affected his behavior on March 16, 2017.

113. Whether or not the other student initiated the conflict, or said anything to Student, did not change Dr. Thayler's analysis in determining whether Student's behaviors were a manifestation of Student's disability. Student's behaviors were consistent historically and he was declining in his psychological health. Even if Student first declared his intent to hit the other student before doing so, Dr. Thayler's opinion would not change based upon Student's history of declining psychological health, depression, history of aggression, and attentional issues. The way a child reacts to peer pressure can be a manifestation of his disability because he might feel bad about himself or feel insecure, and react by hitting whereas a student without emotional

disturbance would not.

114. Dr. Thayler has provided mental health counseling. Mental health counseling is generally appropriate for a child when the child is exhibiting impairments which impact social, interpersonal or educational functioning and impairments are related to an emotional disturbance. Without counseling, the behaviors might become worse or remain stable. If Student had received very aggressive psychotherapeutic treatment between November 2016 and March 2017, there may have been some remittance of Student's behaviors. However, if he had no therapy or only a small amount, four months was not enough time to change the behaviors.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK FOR STUDENT DISCIPLINE UNDER THE IDEA⁴

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)⁵ 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 free appropriate public education. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A free appropriate public education is defined as appropriate special education, and related services, that are available to the child at no cost to the parent or guardian, that meet the state educational standards, and that conform to the child's individualized education program. (20 U.S.C. § 1401(9); Ed. Code, §§ 56031 and 56040.) A child's unique educational needs are to be broadly construed to include the child's

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵ All references to the Code of Federal Regulations are to the 2006 version.

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, 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, school personnel may remove the special education student from his or her educational placement without providing services for a period not to exceed 10 days per school year, provided typical children are not provided services during disciplinary removal. (20 U.S.C. § 1415(k)(B); 34 C.F.R. § 300.530(b)(1) and (d)(3).)

3. For disciplinary changes in placement greater than 10 consecutive school days (or a pattern of disciplinary action 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) and (2).) The law also provides that school personnel may remove a special education student to an interim alternative educational setting for not more than 45 school days, regardless of whether the student's behavior was determined to be a manifestation of the student's disability, under certain specific circumstances. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).)

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)(3); 34 C.F.R. 300.532.) 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)(4)(B); 34 C.F.R. 300.532(c)(2).)

5. 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, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student has the burden of proof in this case.

ISSUE 1: STUDENT'S BEHAVIOR WAS CAUSED BY OR RELATED TO STUDENT'S DISABILITY

6. Student contends that the conduct on March 16, 2017 resulting in his expulsion from District was caused by or directly related to his disability because Student had difficulties with attention, hyperactivity, aggression, and depression, a documented history of engaging in unpredictable acts of aggression creating safety concerns for peers, and exhibited characteristics of a person experiencing emotional instability, interpersonal problems, impulsivity, social distress and difficulty regulating his emotions. Student contends that the manifestation determination was skewed by the team's failure to properly consider his history of aggression, and failed to consider Student's anger management, self-control and coping skills deficits. Student also contends the team failed to properly review Student's educational records, and made their decision using the wrong standard.

7. District contends that its file review was appropriate, that District was not required to have all documents available in Student's file present at the April 5, 2017 meeting, that staff members reviewed part of Student's file at the March 2017 pre-expulsion meeting and that that information was incorporated into the April 2017 IEP, specifically Student's present levels of performance. District argues that Student's

actions were not impulsive or the result of insufficient behavioral control, that physical violence and Student's delayed response in striking the other student was not a typical manifestation of Student's disability, and that Dr. Thayler's opinion was not credible.

Legal Authority

8. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to a student with exceptional needs. (Cal. Code Regs., tit. 5, § 3042(a).) A "change of placement" is a fundamental change in, or elimination of, a basic element of a pupil's educational program. A change of placement is defined as (a) a removal for more than 10 consecutive school days, or (b) a series of removals that cumulate to more than 10 consecutive school days and constitute a pattern based on listed factors. (34 C.F.R. § 300.536(a).)

9. When a district seeks 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 district must convene a meeting with relevant members of the child's IEP team to determine whether the child's violation was a manifestation of the child's disability. (20 U.S.C. § 1415(k); 34 C.F.R. § 300.530 .) This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) A manifestation determination must be accomplished within 10 school days of the decision to change the student's placement. (*Ibid.*) If it is determined that the student's conduct was a manifestation of the student's disability, the IEP team reviews and modifies the student's IEP to address the behavior and returns the student to the special educational placement from which the student was removed, unless the parent and the local education agency agree to a change of placement. (20 U.S.C. § 1415(k)(1)(F).) If it is determined that the student's conduct was a manifestation of student's disability because the conduct was the direct result of the school district's failure to implement student's IEP, the district must remedy the failure. (34 C.F.R. §

300.530(e)(3).) If it is determined that the student's conduct was not a manifestation of the student's disability, then regular school disciplinary procedures may be used to address the incident in the same way the procedures would be applied to non-disabled students. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c).)

10. 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 student's disability; or (ii) If the conduct in question was the direct result of the local education agency's failure to implement the student's IEP. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1) and (2).) The student's behavior as demonstrated across settings and across times is analyzed in the manifestation determination. 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. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).) However, that list of relevant information is not exhaustive. (71 Fed. Reg. 46,719 (2006).)

11. The manifestation determination is not an IEP team meeting and different rules apply to notice and attendance requirements. 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) and (ii); 34 C.F.R. § 300.530(e)(1) and (2).) A school district must notify parents of a manifestation determination team meeting early enough to ensure that they will have an opportunity to attend, and must schedule the meeting at a mutually agreed upon time and place. (34 C.F.R. § 300.322(a)(1) and (2); Ed. Code, § 56341.5, subds. (a) through (c).) In the case of a manifestation determination team meeting, the notice must inform the parent of the decision to change the student's placement and must be accompanied by a copy of

the parent's procedural safeguards. (20 U.S.C. § 1415(k)(1)(H).)

12. Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to 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 feeling under normal circumstances; (D) A general pervasive mood of unhappiness or depression; or (E) a tendency to develop physical symptoms or fears associated with personal or school problems. (Cal. Code Regs., tit. 5, § 3030 (b)(4) (2014).) The term "emotional disturbance" does not apply to children who are socially maladjusted, unless it is determined they have an emotional disturbance as defined in subdivision (b)(4) of California Code of Regulations, title 5 section 3030. (Cal. Code Regs., tit. 5, § 3030 (b)(4)(F) (2014).)

Analysis

13. Student established by a preponderance of evidence that District violated Student's rights under title 20 United States Code section 1415(k)(1)(E) when it failed to determine at the April 5, 2017 manifestation determination that Student's behavior was a manifestation of his disability. Student's conduct on March 16, 2017, which led to his expulsion in June 2017, was caused by, or had a direct and substantial relationship to, Student's disability of emotional disturbance.

14. Dr. Thayler, a highly qualified clinical neuropsychologist with extensive experience assessing children with emotional disturbance and attention issues, credibly opined that Student's conduct on March 16, 2017 was a direct expression of Student's emotional disturbance. He examined Student's educational file, including but not limited to, Student's discipline history since grade school and the November 2016 psychoeducational assessment prepared by Ms. Vizcarra. Relying on the various

documents he reviewed along with his extensive experience and expertise, Dr. Thayler persuasively explained that Student had an extensive history of aggression, conduct problems and attention issues which escalated during middle school. The conduct Student exhibited on March 16, 2017 was consistent with Student's prior behavior. Student's history of aggressive behavior was documented in the psychoeducational assessment, the notes of the teacher interviews, and in the social adjustment report. Dr. Thayler gave specific examples of that behavior, including the incident which occurred in April 2016 when Student was reported to have punched another peer in the face. He credibly opined that all of the symptoms described by Ms. Vizcarra in the November 2016 assessment report regarding Student's social emotional functioning, were behaviors that contributed to Student's physically aggressive conduct in March 2017. That information was the basis for District recommending Student's emotional disturbance eligibility for special education.

15. District's position that Student's conduct was not a manifestation of his disability because Student did not have a significant history of causing or attempting to cause physical harm was not convincing. The evidence established Student had a pattern of engaging in aggression, including physically aggressive conduct. Dr. Thayler's testimony was more convincing than District's witnesses on this issue. Dr. Thayler persuasively opined that Student's aggressive behaviors were not discrete, but were intermingled with his depression and attention issues leading to worsening behaviors because of the lack of intervention. Student had a pattern of less severe aggressive behaviors, which gradually became more aggressive, leading to Student regularly acting out. Dr. Thayler gave examples of incidents involving physically aggressive behavior by Student, including the April 2016 incident where he punched another student in the face. Adding to his credibility, Dr. Thayler acknowledged that he could identify no specific incidents of aggressive behaviors by Student between November 2016 and

March 2017, until the incident at issue happened. Nonetheless, he was convincing in explaining that, without adequate counseling, Student's behaviors would not have improved by March 16, 2017. This testimony was corroborated by Ms. Vizcarra who admitted Student's behavior did not change significantly between November 2016 and March 9, 2017. Dr. Thayler's opinion that Student's aggressive behaviors had not improved was also supported by the information in Student's April 2017 IEP present levels of performance. The IEP documented that Student's eighth grade teachers had reported he had escalating behaviors in physical aggression and verbal threats to harm others. Student's conduct on March 16, 2017 was consistent with Student's pattern of aggression.

16. District's finding at the April 5, 2017 meeting that Student's disability did not typically manifest in the form of a physical response was contrary to the evidence. Although Student's disability exhibited itself by cursing, walking out of class, not completing tasks, making rude comments, depression and crying, it also frequently manifested itself in the form of a physical response. Student's social adjustment report documented several incidents of physical aggression or threats of physical aggression besides the April 2016 incident Ms. Dixon reported where Student walked up and punched a peer in the face. As of March 16, 2017, it was reported that Student kicked a peer, pushed a teacher, punched two children in the face, threatened to shoot people and attempted to physically harm an aide, among other things. Student's other physical responses were documented in the psychoeducational assessment and his educational file, and still others were shared during the manifestation determination meeting. For example, during the assessment, Ms. Chavez-Andalon reported he was violent in the classroom. Ms. Segovia reported Student kicked and threw furniture, and displayed physically aggressive behavior, such as pushing and pulling his girlfriend when she did not obey him. Parent reported he slammed doors. Ms. Portillo reported, during the April

2017 meeting, that Student threw a chair in the classroom, scaring other students.

17. The assessment report and the November 2016 and March 2017 IEP's described Student's social emotional functioning, noting Student's "unpredictable acts of aggression which created safety issues for peers." District offered Student educationally related intensive counseling services in November 2016, because he had "numerous" negative incidents with teachers, adults and peers at school which escalated into verbal and "physical aggression." Although at hearing Ms. Vizcarra attempted to re-characterize her use of the phrase "physical aggression" as meaning toward an object as opposed to people, her testimony was unpersuasive and misleading since it was directly contradicted by her assessment, which negatively impacted her credibility. Ms. Vizcarra's assessment report documented that Student's disability often manifested itself in the form of a physical response, which was later further documented in the April 2017 present levels of performance of escalating behaviors in physical aggression and verbal threats.

18. District's position that Student's conduct was not impulsive or the result of insufficient behavioral control was not supported by the evidence. Dr. Thayler's testimony was more convincing than District's witnesses on this issue. Dr. Thayler convincingly testified that although Student may have initially walked away during the March 2017 incident, and there was even as much as a 15-minute delay before Student struck the other child, Student's conduct was nonetheless caused by his disability. Based on his particular expertise and extensive experience, Dr. Thayler credibly explained that the likely short interval of time between Student being hit with the ball and Student punching the peer after walking away was insufficient for Student to restrain himself given his age and social emotional profile. Dr. Thayler was also persuasive in explaining that even if Student declared his intent to hit the peer before striking him, Student's conduct was caused by or substantially related to his disability. District's finding on April

5, 2017, that Student had time to deescalate and make a different choice as his friend encouraged him to do was contrary to the evidence.

19. Student's file contained substantial evidence corroborating Dr. Thayler's opinions, and contradicting the findings reached by the manifest determination team on April 5, 2017. For example, the results of the Anger Regulation Scale, reported in the November 2016 psychoeducational assessment, stated Student was likely to have had a problem with anger for considerable period of time, suggesting a potential disorder. Once angry, Student's anger was likely to last for hours or days. When angered Student was likely to be motivated by revenge, and likely to pursue revenge against those who had acted against him. Although Ms. Vizcarra unpersuasively attempted to minimize Student's responses to that test, Dr. Thayler pointed out that, although he was unfamiliar with the test instrument, in October 2016, Student had self-reported that when he got angry he "always" wanted to hurt the person at whom he was angry.

20. According to the November 2016 assessment report, Student had difficulties controlling his emotions as early as fifth grade. In fall 2016, Ms. Chavez-Andalon reported Student had a short fuse, had difficulty controlling his temper, had become extremely aggressive toward adults and peers, could be a threat to peers and adults due to his lack of appropriate social skills and capability in solving issues in an orderly manner, and displayed tendencies of aggression and violence in the classroom. Parent reported Student was explosive and aggressive at home. Ms. Segovia reported that Student displayed physically aggressive behavior, kicked and threw furniture, and acted in an aggressive manner towards peers and teacher. Ms. Chavez-Andalon also reported Student "always" had poor self-control, acted without thinking, and that he "never" demonstrated critical thinking skills, analyzed the nature of a problem before starting to solve it, had good coping skills, or planned ahead. The assessment documented that Student had a lack of self-control and had difficulty making

appropriate decisions, using good coping skills and solving conflicts, and that he did not did not think about the consequences of his behavior. The IEP team reported in November 2016 Student demonstrated difficulties with attention, hyperactivity, aggression, depression, and learning problems across all settings, and the team had significant concerns with his unpredictable acts of aggression which created safety issues for peers and adults around him. He showed characteristics of a person with emotional instability, impulsivity, and difficulty regulating his emotions, which were impacting his ability to function on a daily basis at school and home. Just one week prior to the incident, District documented in Student's March 9, 2017 IEP that Student struggled with self-control; his social-emotional functioning had not changed since the November 2016 IEP.

21. Dr. Thayler's testimony was given more weight than Ms. Vizcarra's testimony because, notwithstanding District's attacks on his credibility, his testimony was more persuasive. Dr. Thayler was candid in his responses, and his testimony was based on his experience and expertise and was supported by other evidence. He demonstrated no bias in tone or demeanor when he responded to questions. In comparison, Ms. Vizcarra demonstrated a lack of candor in responding to questions, and was evasive and inconsistent in many parts of her testimony, which revealed that she was biased. This negatively affected her overall credibility and the weight given her testimony. For example, at hearing, Ms. Vizcarra attempted to minimize Student's history of aggression, often in direct contradiction to the information in Student's file and documented in her own assessment report. She claimed she investigated whether Student had a history of injuring others, but admitted she made no attempt to investigate the April 2016 punching incident because she had determined it was an isolated incident. She denied having significant concerns that Student might hurt others, but admitted that his teachers reported feeling unsafe around him. She claimed she

could not answer questions from Student's counsel without having the word "typical" defined for her, but demonstrated no such difficulty with the term when responding to questions from District's counsel. She also testified inconsistently as to whether Student's issues with anger, coping skills, and making appropriate decisions could have contributed to his conduct on March 16, 2017.

22. Ms. Vizcarra was evasive in her testimony about the social adjustment report, which recorded numerous incidents of aggression, including physical aggression. She sounded reluctant in disclosing the April 2016 punching incident reported by Ms. Dixon, and was evasive as to whether the punching incident constituted physically aggressive behavior. Although she claimed she reviewed the social adjustment report, she never revealed during her testimony the other incidents of Student kicking or pushing others, attempting to hurt an aide, fighting with another student, or his threats of physical violence, all documented in the report.

23. Ms. Vizcarra was evasive in responding to questions about Student's social emotional present levels of performance, claiming it showed both no progress and no lack of progress, and unconvincingly claimed she could not offer an opinion about whether an identical present level of performance from one IEP to the next demonstrated progress because she did not write it. She testified inconsistently and evasively as to the purpose of Student's November 2016 IEP social emotional goal, but ultimately admitted it was intended to address aggression.

24. The manifestation determination team failed to review as a team all relevant information in Student's file, including Student's discipline history and IEP's. Because the team failed to properly review all such information, District witnesses' opinions as to whether Student's conduct was a manifestation of his disability were not reliable.

25. The preponderance of evidence established that the manifestation

determination team did not review as a team all relevant information in Student's file at the March 2017 pre-expulsion meeting. Not all members of the manifest determination team attended the March 2017 pre-expulsion meeting. The members of the April 5, 2017 manifestation determination team included Parent, Mr. Contreras, Ms. Gonzalez, Ms. Bosinge, Ms. Vizcarra, Ms. Dimas, Ms. Portillo, a representative from an outside counseling service, and Mr. Berenson, who claimed he participated but did not stay for the entire meeting. Although they were members of the manifestation determination team, Parent, Mr. Contreras and the representative from the outside counseling agency were not at the March 2017 pre-expulsion meeting where District claimed some of Student's records were reviewed. Ms. Gonzalez was only at the March 2017 pre-expulsion meeting for 10 minutes. Her testimony that the social adjustment report was reviewed at the meeting was not credible since she was only there for 10 minutes, and that was an inadequate amount of time to review Student's file. Although Mr. Berenson claimed that those in attendance reviewed Student's records, his testimony was not credible because it was inconsistent and he could not recall specifically which records were reviewed. He could not recall whether or not the entire social adjustment report was reviewed or just the entries for the eighth grade. Other than the November 2016 IEP, he could not recall exactly which IEP's District staff reviewed at the meeting. Ms. Vizcarra could not recall if any documents were reviewed or what was discussed at the March 2017 meeting, other than who would be invited to assist with the manifestation determination meeting.

26. The manifestation determination team did not review all relevant information in Student's file at the April 5, 2017 manifest determination meeting, including the relevant information from Student's social adjustment report and his IEP's. Nor was the information from Student's file adequately summarized at or during the April 5, 2017 meeting, or properly reviewed by the team, as evidenced by the testimony

of District witnesses. District witnesses confirmed that the team did not review the social adjustment report detailing the numerous counseling and discipline referrals. Student's discipline history as contained in the social adjustment report was extensive, 19 pages in length. In contrast, Student's discipline history in the April 2017 IEP present levels of performance consisted of four lines, and only seven lines in the November 2016 assessment report, and neither provided the specific details of the reported incidents as set forth in the social adjustment report. The summary of Student's discipline history in the present levels of performance and in the assessment report was an inadequate summary of Student's disciplinary history for purposes of the manifestation determination.

27. In addition, Mr. Berenson admitted that the team did not review any records at the April 5, 2017 meeting. He could not recall ever reading any report of Student harming anyone, and he could not recall if a special education teacher attended the April 2017 meeting, or whether the team reviewed Student's present levels of performance regarding his social emotional functioning. Mr. Berenson seemed unaware of the April 2016 incident reported by Ms. Dixon or of the other specific episodes of physical aggression toward others described in the social emotional adjustment report. Although he claimed he participated in the manifestation determination meeting, he did not attend the entire meeting.

28. Other than discussing part of her psychoeducational assessment, Ms. Vizcarra could not specifically recall which documents the manifestation determination team reviewed at the April 5, 2017 meeting, or whether the team reviewed the November 2016 IEP. Her testimony was evasive as to whether the team reviewed the entire social adjustment report, and she had no recollection of discussing the prior April 2016 incident where Student was reported to have punched a peer in the face. She also denied that there were any other incidents of Student causing physical harm in the

social adjustment report.

29. Ms. Gonzalez admitted no records were reviewed at the April 5, 2017 meeting and could not recall any presentation of the incidents of Student physically assaulting others, except with reference to the fact that the team had never seen the type of aggression Student displayed on March 16, 2017. Ms. Gonzalez seemed unaware of the April 2016 incident or of all of the other specific episodes of physical aggression toward others described in the social emotional adjustment report. She had no recollection of reviewing at the April 5, 2017 meeting, the teacher reports and social emotional standardized test results from the November 2016 assessment. She also had no recollection of reviewing with the manifestation determination team, the basis for recommending educationally related intensive counseling services from the November 2016 assessment, or the behavior analysis which was done at that time.

30. Mr. Contreras also admitted no records were reviewed at the April 5, 2017 meeting. He had no recollection of reviewing Student's social emotional present levels of performance and was evasive when asked if Student's disciplinary history was reviewed as part of the April 2017 meeting. Although he claimed he read the social adjustment report before the April 2017 meeting, his testimony was not believable. In any event, he said very little about Student's prior behaviors at the April 2017 meeting. His opinions were unpersuasive because they, like the opinions of all of District's witnesses, were contradicted by the weight of evidence establishing that Student's conduct on March 16, 2017 was a manifestation of his disability.

31. In summary, Student met his burden of proof that his behavior on March 16, 2017, was a manifestation of his disability of emotional disturbance. His remedies are discussed below.

ISSUE 2: FAILURE TO IMPLEMENT STUDENT'S IEP

32. Student contends District violated his rights under 20 United States Code

section 1415(k)(1)(E) by failing to implement the educationally related intensive counseling services in his November 18, 2016 IEP, and that Student's conduct on March 16, 2017 was the direct result of District's failure to implement those services. District admits Student did not receive counseling services between January 26 and March 9, 2017, due to a mistaken interpretation of the application of "stay put." District argues its failure to implement counseling services did not directly result in Student's March 16, 2017 behavior.

33. Legal conclusions 8 through 12, and 14 through 30 are incorporated by reference.

Analysis

34. Student had the burden of proving Student's conduct during the March 16, 2017 incident was the direct result of District's failure to implement the November 2016 and/or March 2017 IEP's, specifically, the educationally related intensive counseling services offered. Parent did not consent to those services until December 13, 2016. District was on winter break between December 16, 2016 and January 9, 2017. Parent kept Student out of school until January 26, 2017. Although Parent withdrew her consent to the instructional setting at Pacoima on January 26, 2017, she never withdrew her consent for services. As a result of District's improper application of stay put, Student did not receive counseling services between January 26 and March 9, 2017, or seven sessions, assuming Student was in school during at the time those sessions would have been provided. Parent consented to Student's March 9, 2017 IEP, which included counseling services. District attempted to deliver services to Student on March 16, 2017, but Student was absent. District failed to implement Student's November 2016, specifically seven sessions of educationally related intensive counseling services.

35. District's claim that Student received the offered counseling sessions when Ms. Boghosian consulted with Parent and staff in January 2017 was not persuasive. The

preponderance of evidence established that the services offered to Student as part of the November 2016 IEP were direct services to Student. Although consultations with parent and staff may have been an important part of the educationally related intensive counseling services, those indirect services were not specified as part of Student's IEP. Ms. Boghosian's testimony that the counseling services offered to Student included indirect services was not credible because her testimony was inconsistent, and conflicted with the credible portions of Ms. Gonzalez testimony and Student's November 2016 IEP. Ms. Gonzalez failed to persuasively explain why the indirect service could not be written into Student's IEP to accurately reflect the type of service offered. The limitations of District's computer program are not a valid justification for failing to state a clear offer of FAPE.

36. District offered the counseling services to address, among other behaviors, Student's emotional instability, coping skills, conflict resolution, and aggressive behaviors. Although Dr. Thayler testified that the lack of counseling might cause a student's behaviors to remain the same or worsen, he also persuasively opined that Student would have needed very aggressive therapy between November 2016 and March 2017 in order to see a change in Student's behaviors. He opined a small amount of therapy during that four-month period would not have been enough to sustain a change in Student's behaviors. Student did not meet his burden that District's failure to implement delivery of those services between January 26, 2017, and March 16, 2017, caused Student to engage in the conduct on March 16, 2017 which resulted in his suspension.

37. In summary, Student did not prove that his conduct on March 16, 2017, was the direct result of District's failure to deliver counseling services pursuant to Student's November 2016 or March 2017 IEP's.

REMEDIES

1. Student proved in Issue 1 that his March 16, 2017 behavior was a manifestation of his disability of emotional disturbance. As a remedy, Student requested rescission of District's decision to expel Student; placement onto an appropriate comprehensive campus; expungement of any record of expulsion from Student's cumulative school record; and a functional behavior assessment. District did not address Student's requested remedies in its closing brief.

2. An ALJ may order that a special education student be returned to his or her original placement if the ALJ determines that the conduct was a manifestation of the student's disability or the result of the failure to implement the student's IEP. (20 U.S.C. § 1415(k)(3)(A) and (B); 34 C.F.R. § 300.532(a) and (c).) Section 1415(k)(3) does not limit a hearing officer from awarding other equitable remedy to craft appropriate relief. (20 U.S.C. § 1415(k)(3); see e.g. *Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.)

3. If the conduct was a manifestation of the child's disability, the district must: conduct a functional behavioral assessment, unless one had been conducted before the behavior that resulted in the change of placement, and implement a behavioral intervention plan for the child; or review the child's behavioral intervention plan and modify it, as necessary to address the behavior. (20 U.S.C. § 1415(k)(1)(F)(i) and (ii); 34 C.F.R. § 300.530(f)(1)(i) and (ii).)

4. In California, "specific educational placement" is defined as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs," as specified in the IEP. (Cal. Code Regs. tit. 5, § 3042, subd. (a).)

5. District incorrectly concluded that Student's March 16, 2017 conduct was not a manifestation of his disability, resulting in a change of placement including

expulsion. The preponderance of evidence established that Student's conduct was caused by or had a direct and substantial relationship to Student's disability. Student is entitled to rescission of District's decision to expel Student, and expungement of any record of expulsion from Student's cumulative school record. Student is also entitled to return to school in his original IEP placement on a comprehensive campus; however, Student is now in the ninth grade and the parties failed to present evidence as to whether Maclay includes ninth grade. As such, Student shall be entitled to attend school, consistent with his placement called for in his March 9, 2017 IEP, on the comprehensive campus he would have attended had he not been expelled by District. District stipulated to conducting a functional behavior assessment. Student is also entitled to a functional behavior assessment, and an IEP meeting to review the assessment within 60 days of Parent's consent to the assessment, and to modify Student's behavior intervention plan as necessary to address any inappropriate behaviors.

ORDER

1. Student's behavior on March 16, 2017, was a manifestation of his disability of emotional disturbance. District's manifestation determination that the March 16, 2017 incident was not a manifestation of Student's disability is reversed.

2. District's decision to expel Student as a result of the March 16, 2017 incident is rescinded. Within 15 days of this Decision, District shall take all steps necessary to reverse Student's expulsion as a result of the March 16, 2017 incident.

3. Within 15 days of this Decision, District shall expunge and remove all references to his expulsion from Student's educational records from his cumulative file.

4. Upon Parent's written request, District shall enroll Student on a comprehensive campus, consistent with his March 9, 2017 IEP placement and considering his matriculation to ninth grade.

5. District shall hold an IEP team meeting to consider modification of Student's behavior intervention plan within 15 days of Student's enrollment at a District school.

6. District shall provide Parent with an assessment plan within 15 days of Student's enrollment at a District school. The assessment plan shall include a functional behavioral assessment by a qualified assessor. Within 15 days of Parent's consent to the assessment plan, District shall conduct a functional behavior assessment. District shall hold an IEP team meeting to review the assessment within 60 calendar days of Parent's consent to the assessment.

7. All other requests for relief sought by Student are 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, Student was the prevailing party on Issue 1 and District was the prevailing party on Issue 2.

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).)

DATED: October 12, 2017

_____/s/

LAURIE GORSLINE

Administrative Law Judge

Office of Administrative Hearings