BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

---

# CASE NO. 2020020214

---

PARENT ON BEHALF OF STUDENT,

v.

MENIFEE UNION SCHOOL DISTRICT.

---

# EXPEDITED DECISION

APRIL 21, 2020

On February 6, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student naming Menifee Union School District. Student's complaint contained expedited and non-expedited hearing claims. OAH set the expedited and non-expedited matters 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.

Administrative Law Judge June R. Lehrman heard this matter in Menifee on March 10, 11, and 12, 2020, via telephone on March 19, 2020 and via videoconference on March 27 and April 3, 2020.

Attorneys Rosa Hirji and Alex Rodriguez represented Student. Mother attended the first hearing day, March 10, 2020, on Student's behalf. Attorney Lisa Dennis represented Menifee. Director of Special Education Lisa Hall attended all hearing days on Menifee's behalf.

On April 3, 2020, the last day of hearing, the record was closed and the matter was submitted for decision. The ALJ allowed the parties to file closing arguments during the submittal time.

## ISSUES

1. Did Menifee have a basis of knowledge under title 20 United States Code section 1415(k)(5) that Student was a child with a disability entitling Student to the protections of the Individuals with Disabilities in Education Act, prior to the behavioral incident on August 7, 2019, that resulted in disciplinary actions, including suspension on August 8, 2019, the extension of Student's suspension on August 12, 2019, and expulsion proceedings on November 18, 2019, December 12, 2019, and January 14, 2020?
2. If Student was entitled to the protections of title 20 United States Code section 1415(k), did Menifee fail to comply with section 1415(k) by suspending Student on August 8, 2019, extending Student's suspension on August 12, 2019, and expelling him pursuant to expulsion proceedings dated November 18, 2019, December 12, 2019, and January 14, 2020, without first holding a manifestation determination?

3. If Student was entitled to the protections of title 20 United States Code section 1415(k), was Student's behavior on August 7, 2019, a manifestation of his disability?

## JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511(2006); Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) All future references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

A parent of a child with a disability who disagrees with any decision by a school district regarding a change in educational placement of the child based upon a violation of a code of student conduct, or who disagrees with a manifestation determination made by the district, may request and is entitled to receive an expedited due process hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).) An expedited due process hearing before OAH must occur within 20 school days of the date the complaint requesting the hearing 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).)

The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer ex rel. Schaffer v. Weast* (2005) 546 U.S. 49, 57–58, 62; see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this matter, Student filed the complaint and bears the burden of proof. The factual statements in this Expedited Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 12 years old and in seventh grade at the time of hearing. Student resided within Menifee's geographic boundaries at all relevant times.

## ISSUE 1: BASIS OF KNOWLEDGE

Student contends that although he had never been assessed for and made eligible for special education and related services, he was nevertheless entitled to the protections of the IDEA relating to discipline, suspension, and expulsion. Student was suspended on August 8, 2019, for a conduct infraction on August 7, 2019, and was ultimately expelled. Student relies on the provisions of the IDEA that extend its protections to students not previously identified as eligible for special education

services if the school district had a "basis of knowledge" that the student was a child with a disability. Under title 20 United States Code section 1415(k)(5)(B)(iii), a "basis of knowledge" that the student was a child with a disability exists when, before the behavior that precipitated the disciplinary action occurred "the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education or other supervisory personnel." Specifically, Student contends that, before the behavior that precipitated the disciplinary action occurred on August 7, 2019, Menifee had a "basis of knowledge" that Student was a child with a disability.

Menifee contends there was no "basis of knowledge." Menifee argues that Student's teachers had never "expressed specific concerns" about a "pattern of behavior" demonstrated by Student, "directly to the director of special education or other supervisory personnel," within the meaning of those statutory phrases as interpreted by relevant case law.

Title 20 United States Code section 1415(k), and 34 Code of Federal Regulations part 300.530 et seq., govern the discipline of special education students. (Ed. Code, § 48915.5.) A child with a disability may be suspended or expelled from school as provided by federal law. (Ed. Code, § 48915.5, subd. (a).) If a child with a disability violates a code of student conduct, school personnel may remove that 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)(1)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3).)

Under federal and state special education law, students found eligible for special education are afforded certain rights in disciplinary matters. Among those rights is the

right to a determination of whether the student's misconduct "that led to a disciplinary change of placement" was caused by or directly related to a child's disability. (20 U.S.C. § 1415 (k)(1)(E)(i)(I); 34 C.F.R. § 300.530.) The removal of a special education student from the student's placement for more than 10 consecutive school days constitutes a change of placement. (34 C.F.R. § 300.536(a)(1).) For disciplinary changes in placement greater than 10 consecutive school days, or greater than 10 non-consecutive school days that are a pattern amounting to a change of placement, the disciplinary measures applicable to students without disabilities may only 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)(1)(C); 34 C.F.R. § 300.530(c).) The IDEA prohibits the expulsion of a student with a disability for conduct that is a manifestation of her disability. (20 U.S.C. §1415(k); 34 C.F.R. § 300.530 et seq.; *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470, 1481-2, affd. sub. nom. *Honig v. Doe* (1988) 484 U.S. 305 [108 S.Ct. 592, 98 L.Ed.2d 686]).)

These protections extend to students not previously identified as eligible for special education and related services if the school district had knowledge, or is deemed to have had knowledge, that the student was a child with a disability "before the behavior that precipitated the disciplinary action occurred." (20 U.S.C. § 1415 (k)(5)(A); 34 C.F.R. § 300.534(a).) A district that meets the statutory criteria for having the requisite knowledge is considered to have a "basis of knowledge." (20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.534(b).) A local educational agency is deemed to have knowledge that a student is a child with a disability if, before the behavior that precipitated the disciplinary action occurred, either (i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and

related services; or (ii) the parent of the child has requested an evaluation of the child pursuant to title 20 United States Code section 1414(a)(1)(B); or (iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education or other supervisory personnel. (20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.534(b).)

Here, Menifee had a "basis of knowledge" prior to the August 7, 2019 behavioral incident that gave rise to the discipline and expulsion in this case, that Student was a child with a disability entitling Student to the protections of the IDEA. Student's teachers and other Menifee personnel had "expressed specific concerns" directly "to . . . supervisory personnel" about a "pattern of behavior Student demonstrated."

Student had 130 behavioral incidents in his discipline records in elementary and middle school. In the three school years Student attended third, fourth, and fifth grades at Freedom Crest Elementary School, Student had 86 behavioral entries in his discipline record. In the 2016-2017 school year, fourth grade, Freedom Crest Assistant Principal Elisha Orr called Mother on August 22, 2016, regarding an accusation Student touched a female student's bottom. On August 24, 2016, teacher Shawna Robinson logged that Student was not keeping his hands to himself and waved his hands in the faces of two female classmates. Teacher Robinson logged three events in November and six in December 2016. These recorded that Student shouted out, had outbursts, and caused disruptions. He spat food and water at a student. He took another student's snack, ate it himself, then lied about it and said the snack was his. He poked a female student in the chest with a pencil. He used his body in such a way as to make noises. On December 15, 2016, Assistant Principal Orr logged that Student slapped a female student twice in the face and called her a bitch, and did not admit to having done so.

An investigation ensued, and Student was referred to counselling "as he has several documented instances of having difficulty with female students in class."

In January 2017, Robinson logged that Student hit and touched a student during recess, slapped a female student during physical education, made outbursts and threw his body around the room all day. In February and March, Robinson logged that Student slapped a student, stole items, shouted and made noises, and threw an eraser at other students.

On February 24, 2017, Assistant Principal Orr, Robinson, and a school counsellor met and generated a document called a Response to Intervention Summary, an informal behavior support plan. It stated that Student was very smart and a quick learner, but had nine behavioral areas of concern. Student had consistent outbursts, lack of control over his body, problems in interactions with peers, used inappropriate language, showed lack of respect, lied, took things that did not belong to him, and made inappropriate physical contact with others. The document contained 10 goals. These were to work quietly in the classroom, to demonstrate self-control, to refrain from using obscenities, to demonstrate appropriate body movements, to tell the truth, to accept responsibility, and to ask for breaks when overwhelmed.

In conjunction with the discipline logs and parent contact, the Response to Intervention Summary established that as early as February 2017, Menifee was on notice that Student exhibited problematic behaviors in at least the nine areas of concern it listed.

In April 2017, another teacher logged that Student threw a rock at a student, and put his hands around another student's neck. Assistant Principal Orr called Mother on April 27 and May 1, 2017. As a result of the calls she received concerning Student's

behavior, Mother decided to get help for Student. She arranged for Student to get counselling at a clinic in Temecula starting at the end of that school year, as Student was finishing fourth grade. Student attended counselling there for several years until the sixth grade.

Student's problematic behaviors continued into the 2017-2018 school year, during fifth grade. Through the end of September 2017, administrators and teachers logged nine incidents including Student disrupting class, shouting out, numerous instances of blurting out profanity, hitting, pushing, refusing to take responsibility, slamming items, throwing items, slapping other students, and taking items that did not belong to him. Through the end of November there were 11 additional such entries.

On October 2, 2017, Menifee generated a behavior intervention plan for Student. There was limited testimony concerning the genesis of this document. It was signed by Menifee administrative personnel, including Principal Christine Rich and Assistant Principal Jennifer Fowlkes. Student's "target problem behaviors" were "fighting, bullying, intimidation, harassment, threatening and impulsively hitting other students." Student was suspended for one day for fighting on December 11, 2017.

As a result of these events, Mother got additional help for Student from a psychiatrist, Dr. Takesha Cooper at the Lake Elsinore Family Mental Health Services clinic in February 2018. Dr. Cooper diagnosed Student with attention deficit hyperactivity disorder, which is referred to as ADHD, and was ruling out a tic disorder. ADHD has different categories and Dr. Cooper selected "combined type," which meant Student exhibited both inattention and impulsivity. Student exhibited inattention by not paying attention, not listening, not following directions, avoiding tasks, lack of focus, being easily distracted and forgetful. Student exhibited impulsivity by fidgeting, leaving his

seat, running around, excessively talking, blurting things out, interrupting, and intruding. He was not vindictive, spiteful, angry, or resentful, and was not intentionally defiant, therefore Dr. Cooper ruled out oppositional defiant disorder. Student lacked control over his impulsive actions, did not know why he did them, did not consider their consequences, and felt remorseful about them afterward. These were consistent with a diagnosis of ADHD. Fighting is often a consequence of impulsivity, and was consistent with a diagnosis of ADHD.

A tic disorder would involve either motor or vocal tics and could include Tourette Syndrome. Dr. Cooper did not yet diagnose Student with a tic disorder. She was observing his symptoms to determine their etiology.

On March 22, 2018, Mother signed a release of information permitting Menifee to discuss Student with Dr. Cooper, and to administer to Student the medication Dr. Cooper prescribed him. Dr. Cooper treated Student until September 2019, seeing him approximately once per month and managing his medications.

On May 22, 2018, Student was suspended for fighting.

In sum, Student had numerous behavioral entries in his discipline record by the end of elementary school. Assistant Principal Elisha Orr called Mother about these incidents. Teacher Shawna Robinson and other staff logged Student's outbursts, disruptions, spitting, stealing, lying, poking, hitting, touching, pushing, slapping, and throwing. Menifee generated a Response to Intervention document that listed areas of concern of Student's consistent outbursts, lack of control over his body, problems in interactions with peers, inappropriate language, lack of respect, lying, taking things that did not belong to him, and inappropriate physical contact. Menifee generated a behavior intervention plan that targeted "fighting, bullying, intimidation, harassment,

[and] threatening and impulsively hitting other students." Student was suspended twice for fighting. Mother informed Menifee of Student's diagnosis of ADHD, and that he was under the care of a psychiatrist who prescribed him medication.

In July 2018, before the beginning of the 2018-2019 school year for sixth grade, Student was about to enter middle school at Hans Christensen Middle School. Mother was concerned that as he entered a new school, he could be stigmatized by his behaviors. She discussed her concerns with Dr. Cooper, who advised Mother to ask Menifee for help. In July 2018, with Dr. Cooper's assistance, Mother wrote a letter to school administrators advising Menifee that Student had recently been diagnosed with ADHD, that his condition directly impacted his educational performance and needs, and that elementary school teachers and staff at Freedom Crest had expressed concerns. Mother stated she wanted "the concerns to be addressed so that [Student] will not continue to have difficulties in his new school." To address her concerns, Mother specifically requested Menifee consider Student for an accommodation plan pursuant to section 504 of the Rehabilitation Act of 1973, referred to as Section 504.

Section 504 is an educational program created pursuant a federal anti-discrimination law. Generally, that law requires a school district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning. Section 504 is different from special education and related services under the IDEA. The jurisdiction of OAH is limited to matters arising under the IDEA. OAH does not have jurisdiction to entertain claims based on Section 504. Mother's letter's reference to Section 504 as opposed to special education under the IDEA was a considered choice on the part of Dr. Cooper, who was concerned Mother might want to avoid stigma in asking for special education and related services. Because Mother's letter referenced Section 504

specifically, and did not request special education or related services under the IDEA, it did not establish that Menifee had a basis of knowledge under subsections (i) or (ii) of title 20 United States Code section 1415(k)(5)(B).

Prior to the beginning of sixth grade, on August 2, 2018, Mother met with Kristina Lyman, the Hans Christensen principal, and told her Student had ADHD. Mother was concerned that Student's needs should be met. She was concerned he would be labeled a "bad kid" and stigmatized. Lyman had received a copy of Mother's July 2018 letter. She reassured Mother that the general education teachers knew how to accommodate students with ADHD. She proposed that the school should get to know Student first, then hold a Section 504 eligibility meeting, and in the meanwhile implement some classroom accommodations.

On September 28, 2018, Menifee convened a Section 504 meeting and generated a Section 504 plan that reflected Student's diagnosis of ADHD. It also reflected information Mother provided regarding Student's tics. Mother also told Menifee Student was receiving outside counselling. The Section 504 plan listed "appropriate language" and "defiance" as Student's problem areas.

On November 29, 2018, Menifee generated a Section 504 behavior plan. It listed one target behavior, that Student used inappropriate language when he became frustrated. There was one goal, to use self-regulation and coping strategies such as movement breaks, deep breathing, taking breaks, and other methods, and to describe his feelings instead of using profanity.

Student's tenure at middle school lasted one full school year, for the 2018-2019 year for sixth grade, and only the first day of the seventh grade in the 2019-2020 school year, August 7, 2019. On August 8, 2019, Student was suspended and later expelled for

the events that occurred on August 7, which are detailed below in conjunction with Issue 3. In middle school at Hans Christensen, prior to August 7, 2019, Student had at least 44 behavioral incidents. In sixth grade, Student's teachers were Nicole Gilliland, Jennifer Rudolph, Rachel Regus and Erik Thompson, each of whom taught different subjects. Lyman was the principal and Vanessa Westmoreland the vice principal. Lisa Benson was a discipline clerk, whose duties were to issue detentions and revoke social privileges when appropriate, and when instructed by administrators Lyman and Westmoreland. Sherelle Talboom was a school counsellor.

In sixth grade, there were four entries in August through September 2018, nine entries in October, three entries in November, two of which concerned a single incident, one entry in December, two in January 2019, two in February that both concerned a single incident, two in March, ten in April, nine in May, and two in June. The entries were made by personnel including Benson, Gilliland, Regus, Thompson, and Lyman, all of whom testified at hearing, and by other personnel who were not called as witnesses, including Westmoreland. The entries concerned physical contact like poking a female student and slapping, profanity, calling out, arguing, disrespect, hitting, and throwing items including a jump rope, a Chromebook, and a whiteboard. Not all incidents were logged, for example Regus did not log every incident of Student's lack of self-control, and Benson did not log every time Student was sent to her during the 2018-2019 school year for exhibiting lack of self-control both inside and outside the classroom. Student told Benson that he "did not know why he did what he did."

Erik Thompson, the physical education teacher, logged multiple incidents in April and May 2019 of Student's use of profanity, yelling, screaming, running around, chasing, and the like. On April 1, Student threw a trash can into the gym floor. On April 2, Student chased and grabbed other students. On April 9, Student used the "F"

word repeatedly. On April 9, Student swung a jump rope around his head, then threw the rope against the gym wall. On April 25, Student flipped the teacher off. On May 3, he threw his shoe against the back of another student.

Menifee contacted Mother regarding some of the incidents. On November 6, 2018, Gilliland advised Mother that Student had been off task and very disruptive and disrespectful in class with a substitute teacher. He had refused to take any responsibility for his actions. On February 12, 2019, Student threw his Chromebook and when it was taken away from him, he told the teacher to perform a sexual act. On March 27 and 29, 2019, Talboom called Mother about Student's behavior, which the school was investigating. On April 3, 2019, Westmoreland called Mother about multiple behavior incidents. The next day, Talboom called Mother about Student flipping his seat around, shouting out, making noises, slamming things, arguing, and blaming others. On June 3, 2019, Lyman met with Mother to discuss Student blurting out profanities almost daily in class.

These facts all occurred before the August 7, 2019 behavior that precipitated the disciplinary action. These facts establish that Menifee should be deemed to have had knowledge that Student was a child with a disability. Before August 7, 2019, the teachers and other personnel had expressed specific concerns about a pattern of behavior directly to supervisory personnel. (20 U.S.C. § 1415(k)(5)(B)(3); 34 C.F.R. § 300.534(b).)

Menifee argues none of Student's teachers or other personnel expressed "specific concerns" about a "pattern of behavior" demonstrated by Student, "directly to" the Director of Special Education or to other supervisory personnel. This argument is unconvincing. It is undisputed that no one alerted Lisa Hall, the Director of Special

Education. But, Orr, Lyman and Westmoreland were supervisory personnel, and the teachers notified them. The logs indicated the concerns were specific, "rather than casual comments regarding the behaviors demonstrated by the child." (71 Fed. Reg. 46727 (Aug. 14, 2006).) The evidence established that teachers provided much more than casual comments. There were numerous, specific, and direct communications from teachers and staff to the administrators sufficient to establish a basis of knowledge that Student might be a child with a disability and possibly eligible for special education.

Menifee argues that the behavior logs were not "created for the purposes of communication between teachers and administrators," nor were they "sent by teachers and directly addressed to an administrator." Lyman testified that during the 2018-2019 school year, it was not the practice of administrators to review individual behavior logs for specific students. Orr and Lyman both testified that the purpose of the incident logs was not to communicate concerns about individual students, but rather to inform the development of the school's overall program of positive behavior intervention strategies. They testified that administrators, as part of a school site team, looked at aggregate data generated from all student logs and used this information to identify trouble spots in the school overall. This testimony was unconvincing.

The teachers' testimony, particularly Robinson, established that even when they did not explicitly bring the logged event to administrators' attention, they had an expectation that their entries would be reviewed by the supervisors. Per Robinson, the logging software, called "Illuminate," had a button a teacher could press to request administrative review of that entry. It was her practice to press that button for each entry, so as to bring the incident to the attention of the administration. Moreover, both Robinson and Regus at hearing acknowledged that they had, in addition to logging behaviors, specifically discussed Student with the administrators at their schools.

Gilliland at hearing established that her administrators at Hans Christensen, were aware of Student's behaviors. At Freedom Crest Elementary, Orr, was a supervisor, and at Hans Christensen Middle School, Lyman and Westmoreland were the supervisory personnel and were aware of Student's behaviors, in that they themselves logged their own entries and repeatedly called Mother. Moreover, their testimony was contradictory as to whether the administrators did or did not review the logs. At one point Orr testified he did review the logs, then stated that he could have reviewed them but did not necessarily always do so. And, while entries marked "draft" in the Illuminate software might not yet have been reviewed by supervisory personnel, numerous entries in the log were marked either "complete" or "pending administrator review," which indicated they either had already been reviewed, or that review was pending. Moreover, each of these administrators attended meetings and made calls discussing Student's behaviors. (*See, e.g., Anaheim Union High Sch. Dist. v. J.E.* (C.D. Cal., May 21, 2013, No. CV 12-6588-MWF (JCx) 2013 WL 2359651, at *6 [basis of knowledge established where assistant principal attended a Section 504 meeting at which teachers discussed the student's panic attacks and inability to complete work].) Thus, Menifee is deemed to have a basis of knowledge.

Menifee next argues that Student's prior behavioral incidents did not constitute a "pattern of behavior." This argument, too, is unpersuasive. Lyman at later expulsion proceedings testified that Student exhibited a "pattern" of impulsive behaviors. Menifee's own expulsion panel concluded that Student's "previous misconduct as described in his discipline record . . . are related to this [August 7, 2019] incident as they demonstrate a pattern of inappropriate choices/conduct." A "pattern" is recurrent, similar, or related events of behavior implicating outwardly observable characteristics and actions. (*Anaheim Union High Sch. Dist. v. J.E.*, *supra*, at *4.) Student's discipline record reflected over three years of outbursts, disruptions, lying, touching, pushing,

slapping, lack of control over his body, inappropriate language, lack of respect, and impulsively hitting other students. Under any reasonable definition, this constitutes a pattern of behavior.

Menifee argues, correctly, that the "basis of knowledge" criteria is clearly stated and should not be expanded or broadened. The IDEA 2004 reauthorization made several changes to title 20 United States Code section 1415 (k)(5)(A), narrowing the circumstances under which a district is deemed to have knowledge that a child is a child with a disability. Under previous law, a district was deemed to have knowledge that a child is a child with a disability if the behavior or performance of the child demonstrated the need for such services. This provision was deleted because a teacher could make a stray, isolated comment to another teacher expressing concern about behavior, and that could trigger the protections. (Sen. Rep. No. 108-185, pp. 45-46, 1st Session (2003).) Thus Congress, when reauthorizing the IDEA, narrowed the "basis of knowledge" criteria due to the "unintended consequence of providing a shield against the ability of a school to be able to appropriately discipline a student." (*See* 71 Fed. Reg. 46726-27 (Aug. 14, 2006) [quoting Sen. Rep. No. 108-185, p. 46, 1st Session (2003).]) The intent of Congress was to ensure that "schools can appropriately discipline students, while maintaining protections for students whom the school had a valid reason to know had a disability." (*Id.*) Congress struck this balance by requiring specific facts about patterns and communications before imputing knowledge to a school district. Such facts are amply demonstrated here.

Because, before August 7, 2019, teachers and other personnel had expressed specific concerns about a pattern of behavior demonstrated by Student, directly to supervisory personnel, under subsection (iii) of title 20 United States Code section 1415(k)(5)(B), Menifee had a basis of knowledge that Student was a child with a

disability. Therefore, certain rights and protections extended to Student even though he was not previously identified as eligible for special education and related services. (20 U.S.C. § 1415 (k)(5)(A); 34 C.F.R. § 300.534(a).) Among those rights is the right to a determination of whether Student's misconduct that led to a disciplinary change of placement was caused by or directly related to his disability. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530.) Student therefore prevails on Issue One.

This Expedited Decision determines only that Menifee had a basis of knowledge under subsection (iii) of title 20 United States Code section 1415(k)(5)(B). That section specifies the rights of children not already eligible for special education and related services. No findings are made herein as to Student's pending "child find" claim, or as to any claim regarding eligibility.

## ISSUE 2: DID MENIFEE FAIL TO COMPLY WITH SECTION 1415(K) BY SUSPENDING AND EXPELLING STUDENT WITHOUT FIRST HOLDING A MANIFESTATION DETERMINATION?

Student contends he was entitled to, and not provided, a manifestation determination meeting under the IDEA prior to being suspended and eventually expelled for his August 7, 2019 behavior. Menifee contends that because there was no "basis of knowledge," Student was not so entitled. Menifee further argues even if there were such an obligation, it substantially complied by holding an equivalent procedure on August 12, 2019, pursuant to Section 504.

Student contends the August 12, 2019 Section 504 manifestation determination meeting was procedurally improper and cannot pass muster under IDEA as being equivalent to the manifestation determination to which Student was entitled. Student

contends Mother was not given the legally required notice, was not notified of her procedural rights as the law requires, not all required meeting attendees were invited, and the people at the meeting did not review all the necessary information as required by law.

When a district seeks to change a special education student's educational placement for more than 10 school days as a result of a violation of a student code of conduct, the district must convene a meeting to determine whether the child's conduct was a manifestation of the child's disability. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e).) This is known as a manifestation determination. A manifestation determination must be made by the school district, the parent, and relevant members of the individualized education program team as determined by the parent and the school district. (*Ibid.*) A manifestation determination must be accomplished within 10 school days of the decision to change the student's placement. (*Ibid.*) All relevant information in the student's file, including 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 individualized education program. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1).)

The requirements for notice for individualized education program team meetings are not expressly applicable to manifestation determination team meetings. In the case of a manifestation determination team meeting, the notice must be given no later than the date on which the decision to take disciplinary action is made, it shall notify the parents of that decision, and it must be accompanied by a copy of the parent's procedural safeguards under the IDEA. (20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. § 300.530(h).)

On August 12, 2019, Menifee convened a meeting that they called a Section "504 manifestation determination meeting." The Section 504 manifestation determination did not comply with the IDEA.

Mother could not recall how she got invited to the meeting, but she recalled the notification was oral not written. Lyman agreed there was no written notice, only by telephone. Mother received no paperwork pertaining to the meeting beforehand. She was not told she could bring any documents or persons with her. She was not told she could help determine the relevant members of the manifestation determination team.

The notice was inappropriate, lacking an invitation to Mother to bring team members she felt were relevant, including professional advisors. The law specifically provides that a manifestation determination must be made by relevant members of the manifestation determination team "*as determined by the parent and the* [*school district*.]" (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e) (emphasis added).) Mother convincingly testified she was not given an opportunity to help determine who should attend. She would have brought Dr. Cooper to the meeting, had she known she had that right. At hearing, Lyman testified that although she knew Student was seeing a psychiatrist who was prescribing medications for ADHD, she did "not believe that would have been relevant to determining if his behavior was a manifestation of his disability." Talboom was aware that in the 2018-2019 school year Student saw Dr. Cooper, but Talboom never asked for a release to speak with Dr. Cooper, stating that it would be "outside her scope" and there would be "no reason to do so," because as a school counsellor she did not handle medications. As discussed in further detail below in Issue 3, Dr. Cooper's input would have been highly relevant and informative to the question of whether Student's conduct on August 7, 2019, was caused by or directly and substantially related to his disability.

The meeting attendees, as determined solely by Menifee, were Mother, Talboom, Lyman, school psychologist Nohemi Diaz, Pupil Personnel Services Director Carolyn Luke, whose role was not clarified by any testimony, and general education teacher Gary Thrapp. Thrapp had been Student's teacher only for one day. Student's prior teachers from the preceding school years were not invited. In sum, Menifee did not "convene a group of knowledgeable persons, as determined by the parent and the [district], who would be able to conduct the [manifestation determination] even before the [district] has made its eligibility determination." (*Letter to Nathan* (OSEP January 29, 2019).) Because Mother was not accorded the right to participate in determining the members of the team, the resulting Section 504 manifestation determination meeting was not legally sufficient under the IDEA.

At the meeting, Lyman gave Mother a document concerning her Section 504 procedural rights. Notably, this Section 504 document did not concern procedural rights under the IDEA. The document Menifee gave Mother did not notify her of her right under the IDEA to participate in determining the attendees, nor of her right to an expedited appeal of the manifestation determination team's decision. Menifee maintained a different Notice of Procedural Rights concerning IDEA, that it did *not* give to Mother, because Student was not in special education. Had Mother been given the special education Notice of Procedural Rights, she would have been informed that, during the meeting, "the team members will discuss the alleged misconduct and the student's relevant disciplinary history, current IEP, educational placement, behavior supports, attendance and health records, and assessment reports on file. They will also consider teacher observations, relevant information from the parent/guardian, and other relevant unique circumstances." Nor was Mother informed that "if you disagree with the [manifestation determination] team's decision, you may request an expedited hearing."

Thus, the Section 504 document was not legally compliant with the rights Student and Mother had under the IDEA, based on Menifee having a "basis of knowledge" that Student was a child with a disability.

The law specifically provides that notice of the IDEA manifestation determination meeting must be given no later than the date on which the decision to take disciplinary action is made, it shall notify the parents of that decision, and it *must be accompanied by a copy of the parent's procedural safeguards under the IDEA*. (20 U.S.C. § 1415(k)(1)(H); *see Letter to Nathan* (OSEP January 29, 2019) [District must provide, with the notice of the manifestation determination meeting, a printed copy to parents of the procedural safeguards notice under IDEA, containing all the information about IDEA procedural rights described in title 20 United States Code section 1415(d) and 34 Code of Federal Regulations part 300.504].)

Finally, the IDEA requires that at the meeting, "all relevant information in the student's file, including . . . any teacher observations, and any relevant information provided by the parents" shall 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); 34 C.F.R. § 300.530(e)(1).) The statutory list of relevant information to be reviewed is "not exhaustive and may include other relevant information in the child's file." (71 Fed. Reg. 46719 (Aug. 14, 2006).)

Here, the information that was reviewed was incomplete. None of the attendees at the Section 504 manifestation determination meeting who testified at hearing could recall what documents were reviewed, and their testimony conflicted. Thrapp could not recall whether *any* documents were reviewed at the meeting. School psychologist Diaz

recalled having seen the February 24, 2017 Response to Intervention document at the meeting, and vaguely recalled reviewing a behavior support plan. Lyman and Talboom recalled that the team discussed Student's Section 504 plan and his Section 504 behavior support plan. Lyman's testimony was particularly vague and conflicting. First, she testified that the manifestation determination team "had access to" Student's "entire cum[ulative] file" because Diaz had brought it to the meeting. Then, she backtracked, admitting that she was not actually aware which documents Diaz had brought, which might have been only "the relevant" documents, which Lyman was unable to specify. And Diaz herself did not recall having generated a file for the meeting, nor what it might have contained.

All team members who testified at hearing, however, agreed that the team did not physically review, nor specifically discuss, Student's discipline record. The Illuminate logs were not printed out nor reviewed by the team. Thrapp pulled up Student's Illuminate logs on his own device at the meeting, to see for himself what had previously transpired in Student's behaviors. However, he was the only team member to review Student's behavioral history. Student's Section 504 behavior plan targeted "inappropriate language . . . when [Student] becomes frustrated," and this was the only behavior the team discussed. The team did not discuss Student's history of altercations and physical contact. No one looked at Student's discipline log in the Illuminate software except Thrapp, who had just met Student on the same date the incident occurred, August 7, 2019. Thrapp "deferred to the school psychologist" in determining whether Student's conduct on August 7 had been a manifestation of his disability. At hearing, Talboom's testimony established that she was unaware of the extent of Student's past varieties of behavior, and she did not recall the manifestation determination team discussing his screaming, touching, throwing, or other disruptive

behaviors. Thus, the team did not "consider the information that served as the [district's] basis of knowledge that the child may be a child with a disability under IDEA." (*Letter to Nathan* (OSEP January 29, 2019).) Menifee had a duty to review "[a]ll relevant information" "across settings and across times." (*Jay F. v. William S. Hart Union High Sch. Dist.*, (C.D. Cal., Aug. 2, 2017, No. CV 16-05117 TJH (GJSx) 2017 WL 6549911, at *7, affd. mem. (9th Cir. 2019) 772 Fed. Appen. 578 [the duty to review relevant evidence extended to ten years' worth of behavioral incidents].)

In sum, the Section 504 manifestation determination meeting Menifee convened was not legally compliant with the IDEA. (*See. e.g., Student v. Hayward Unified Sch. Dist.* (2018) OAH Case No. 2017120638 [where district had a basis of knowledge, student was entitled to a manifestation determination under the IDEA, and district's legal obligation was not discharged by conducting a Section 504 manifestation determination].) Because Menifee suspended and later expelled Student without first holding a manifestation determination meeting that complied with IDEA, Student prevails on Issue 2.

## ISSUE 3: WAS STUDENT'S AUGUST 7, 2019 CONDUCT A MANIFESTATION OF HIS DISABILITY?

Student contends the August 7, 2019 behavior for which he was disciplined and later expelled was a manifestation of his disability, as established by his extensive behavioral history and the opinions of two testifying experts. Menifee contends Student's behavior was planned and not impulsive, not consistent with Student's primary behaviors of verbal outbursts when frustrated, and therefore not a manifestation of his disability.

Conduct is a manifestation of the student's disability if:

1. the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
2. the conduct in question was the direct result of the local education agency's failure to implement an individualized education program.

(20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1) (i) & (ii).)

On the first day of seventh grade, August 7, 2019, Student took a knife to school. Menifee investigated, taking witness statements from Student and a number of other students. According to the evidence of that investigation adduced at this hearing, the facts are as follows. The knife had a three or four-inch blade and was curved in the shape of a scythe. Student showed the knife to others on three or four occasions that day. The first time Student showed the knife, another student asked Student whether Student actually had a knife and why. In response, Student showed the knife, and said, "To stab you." That interaction was witnessed by one other student.

Later in the day, two other students asked Student did he really have a knife. Student showed it to them, and they both told him it was not smart to have a knife in school.

Later, Student showed the knife to another student and told her to "look, [Name One]." At least two other students witnessed this interaction. One of them took a very brief video of this interaction because the colors of the knife were "cool," and posted it to Snapchat. The three-to-four seconds long video was admitted into evidence, in which Student showed others the knife, and said, "F[]king hell, [Name Two]." An unclear

number of other students, who were not percipient witnesses, viewed the video when it was posted to Snapchat.

No one was injured. None of the other students involved in these interactions felt threatened by Student. Student's actions were not aggressive. Student had no intent to use the knife or to harm anyone with it.

The next day, August 8, 2019, a parent of an unidentified student complained, and Menifee undertook its investigation. On August 8, Student wrote two written incident statements, which were in some respects inconsistent with each other and with the other witness statements.

In the first written statement, Student said he had brought the knife to school to protect himself from homeless people while walking home. Name One reached for the knife and it opened. Later, during nutrition, the knife fell out of Student's pocket, so he picked it up and Name Two and Name Three kept saying "you won't stab me" over and over. Student responded "yeah I won't stab you because that's not right for me to stab a CHILD for no reason EVER." In the second statement, Student wrote that he did not know why Name One was asking to see the knife, he assumed that Name Two or Name Three had told Name One about it. At nutrition, the knife fell out of his pocket, he picked it up and put it away and knew he had "messed up." At the end of the day, Name One told him to take the knife out and Student said "why," but Name One tried to grab it and she triggered something that made it open.

On August 8, 2019, Menifee sent Student home with Mother. Student reported to Mother that the knife had been given to him by an older cousin who was staying with the family.

Westmoreland reported the incident to non-emergency police, who viewed the video and told her that the knife was a "fighting knife," given its length, its curved profile, holes, and a locking mechanism.

August 8, 2019, was Student's last day at school. Menifee did not permit him to return. Lyman issued a five-day suspension to Student on August 8, 2019. The suspension was extended on August 12, 2019, pending an expulsion hearing. August 12, 2019 was the day of both the Section 504 manifestation determination meeting and the extension of suspension, pending expulsion.

At the manifestation determination meeting, the team addressed the allegation that "Student was in possession of a large knife. He pulled the knife out toward students."

The team determined Student's behavior was not a result of his medical diagnosis of ADHD. They determined Student "planned to bring a knife to school and was showing it to [others] multiple times." They determined he had planned, because he discussed the knife with his cousin, and intended to use it for self-protection. Also, the team determined that showing the knife to others multiple times was not impulsive. The team rejected Mother's input that she believed his diagnosis may have played a part in how his mind works, because he had never done this before. The team also determined that the behavior was not the result of failure to implement his Section 504 plan.

At hearing, Lyman, Talboom, and Diaz all explained that the August 7, 2019 behaviors were not consistent with Student's ADHD, which manifested itself primarily as verbal outbursts when he was frustrated or upset. This explanation was at odds with Student's extensive disciplinary history of many different behaviors other than verbal

outbursts, which the team did not review. Thus, the team took a narrow view of how Student's disability manifested itself, which might have been consistent with the Section 504 plan but not with the rest of Student's educational history. Then, they determined that the August 7, 2019 behaviors were not caused by or related to the narrow definition of his disability they were applying.

The team came to the wrong conclusion. They were unaware of or willfully disregarded available information about Student's behavioral history. They were only aware of Student's verbal outbursts when he was frustrated. They also lacked appropriate expertise to inform their decision, having not invited Dr. Cooper nor informed Mother she could do so.

School Psychologist Diaz had been a school psychologist for four and a half years. She had attended only two or three manifestation determination meetings. She had attended only one manifestation determination meeting of a student who was not yet eligible for special education, that being the student at issue here. She was unaware of the difference between Section 504 procedural rights and those provided under IDEA. Talboom established no professional credentials or education sufficient to lend credence to her manifestation determination. She was a licensed school counsellor and a psychotherapy intern, but her resume was not introduced into evidence nor any of her credentials explored.

Moreover, the manifestation determination decision-makers gave testimony that was vague and contradictory. For these reasons their opinions are accorded little weight. As described above, Lyman's recollection of the documents at the meeting contradicted itself. Talboom's recollections were vague in the extreme. Her recordkeeping of her school counselling sessions was disorganized and chaotic, as was

the scheduling of her sessions with Student. She could not coherently explain what occurred in her sessions with Student or when they occurred. She could not distinguish between social skills training and counselling, and appeared flummoxed, ignorant, and defensive about whether these two terms did or did not signify the same services. Her recollection was confused about whether, and when, she was aware that Student was receiving outside counselling. When asked about Student's self-awareness or defiance, she gave almost incomprehensible testimony, stating she could not opine on those subjects because she was not inside Student's head and "cannot read people's minds."

Talboom described the manifestation determination decision itself in vague terms. "The feeling by the people present was he did not bring the knife [to school] because of his ADHD because "the correlation wasn't there." Thrapp, the only member of the team to have reviewed Student's Illuminate discipline log, explained that in addition to deferring to Diaz, he agreed with the team because in his 15 year teaching history he "has not seen" ADHD contribute to student behaviors other than disruptiveness. These circular and broadly generalized conclusions are not the type of considered decision-making the IDEA requires. (*See Student v. Los Angeles Unified Sch. Dist.* (2017) OAH Case No. 2017080154 [claim that student's behavior typically did not manifest in physical ways was contrary to the records, leading to reversal of the manifestation determination].)

It is also notable that, on August 8, 2019, immediately after Menifee suspended Student, Menifee sent Mother written notice of an "extension of suspension" conference set to occur on August 12, 2019, at 8:00 a.m., but no written notice of the manifestation determination meeting. Lyman's oral notice to Mother of the manifestation determination meeting then scheduled the two meetings simultaneously, with the manifestation determination meeting first and the extension of suspension conference

immediately afterward. After the manifestation determination meeting, Diaz, Thrapp, and Talboom were excused, and the extension of suspension conference proceeded immediately with Lyman, Luke, and Mother. The timing of the written and oral notices leads to the inference that the manifestation determination meeting was an afterthought, and that it was conducted only to facilitate the extension of suspension. This inference is borne out by the incomplete review actually undertaken at the manifestation determination meeting.

Dr. Robert Rome was a psychologist with extensive experience conducting psycho-educational evaluations, with particular emphasis in the area of misconduct and behavior. He consulted, conducted evaluations, and gave recommendations to regional centers, and juvenile delinquency courts, and contracted with over 30 school districts to conduct independent educational evaluations. As a regional center vendor he supervised 40 other licensed psychologists. He conducted literally thousands of assessments. At hearing, Dr. Rome answered questions thoughtfully, knowledgably, thoroughly, non-defensively, and consistently. In accordance with his extensive expertise and the credibility of his demeanor while testifying, his opinions are accorded great weight.

In this matter, he conducted a private psycho-educational evaluation of Student on September 22, 2019. He interviewed Student and Mother, administered a variety of cognitive functioning, social-emotional functioning, and behavioral assessment instruments, and reviewed Student's records extensively. Dr. Rome diagnosed Student with ADHD, unspecified Tic Disorder, and Intermittent Explosive Disorder. After further review of the records and observations, Dr. Rome opined that Student's Tic Disorder more closely resembled Tourette Syndrome because of the frequency with which Student was displaying both motor and verbal tics. He opined Student's actions on

August 7, 2019, were caused by or had a direct and substantial relationship to his disabilities. Dr. Rome testified Student was so interested in the "cool-looking" knife, and the attention the knife was getting, that he did not consider the ramifications of bringing to or having the knife at school. His actions were impulsive and without self-awareness.

Menifee argues that Dr. Rome's opinion should be discounted because it did not exist yet and was not available to the manifestation determination team. This argument is unpersuasive. Menifee cites inapposite case law, that stands only for the proposition that the "basis of knowledge" must exist prior to the disciplinary incident. Menifee cites no authority that after-acquired evidence should not be relied on when deciding whether a student's conduct was or was not a manifestation of his disability.

Dr. Cooper's very impressive credentials included her medical doctor degree from University of Southern California and a fellowship at Stanford in child and adolescent psychiatry. She was double Board-Certified in two specialties, psychiatry and child and adolescent psychiatry, by the American Board of Psychiatry and Neurology. At the time of hearing, she was an assistant clinical professor at the University of California Riverside School of Medicine, where she taught psychiatry and child and adolescent psychiatry. She also was an Associate Training Director in the medical school's child and adolescent psychiatry fellow training program. She also served as the medical school's Chair of the Admissions Committee. From 2008-2013, she had a private practice, during which time she treated patients, primarily children. Patients with ADHD comprised 50 percent of her practice, and she treated over 1,000 such patients. She had a particular interest in mood disorders, anxiety disorders, and disruptive behavior disorders like ADHD, oppositional defiance disorder, and conduct disorders. Because of Dr. Cooper's superb

credentials and her thoughtful, consistent testimony at hearing, her opinions are given great weight.

Dr. Cooper testified that Student, as a child with ADHD, could often get into fights with peers because his impulsivity made him unable to control his actions. Furthermore, Dr. Cooper believed Student made impulsive decisions without regard to consequences. She opined that Student's actions on August 7, 2019 – agreeing with his cousin's suggestions, taking the knife to school, believing it was cool, showing it to kids, and his statements made in response to questions about the knife – were impulsive, and without self-awareness. Each of these actions occurred during unstructured times and involved social interactions. Student's statement "F[]king Hell [Name Two]" was uncontrollable. At hearing, she disagreed with the manifestation determination team's conclusion that Student planned to bring the knife to school and show it, because his disability impaired his ability to understand the consequences, and to control the behavior.

Menifee argues Dr. Cooper's opinion should be discounted because her opinions were not shared with the manifestation determination team. However, as established by both Lyman and Talboom, it was Menifee who convened the team without inviting Dr. Cooper, who Menifee knew had diagnosed and was continuing to treat Student, and without advising Mother of her right to do so.

Dr. Rome and Dr. Cooper both opined Student's actions in the incident in question were impulsive, without self-awareness, without regard to consequences, and involved uncontrolled outbursts. The underlying acts were behaviors that were consistent with his long behavioral history in that they were caused by or substantially related to his disabilities. Menifee presented no contrary expert opinion.

The evidence presented at hearing amply proved Student's conduct on August 7, 2019, for which he was suspended and ultimately expelled, was indeed a manifestation of his disability. (*Jay F. v. William S. Hart Union High Sch. Dist.*, *supra*, 2017 WL 6549911 at p. *7 [district psychologist's opinion that the behavior was pre-planned and thus not a manifestation of ADHD could not be reconciled with the student's extensive behavioral history going back ten years]; *Student v. San Diego Unified Sch. Dist.* (2009) OAH Case No. 2009060881 [district reached the wrong conclusion when it failed to connect a teenager's ADHD to his involvement in a single sale of marijuana seeds because the evidence showed that his ADHD-related impulsivity led him to join the transaction without thinking of the consequences].) Student prevails on Issue 3.

## CONCLUSIONS AND PREVAILING PARTY

As required by 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. Student prevailed on all issues.

1. Menifee had a basis of knowledge under title 20 United States Code section 1415(k)(5) that Student was a child with a disability entitling Student to the protections of the IDEA, prior to the behavioral incident on August 7, 2019, that resulted in disciplinary actions, including suspension on August 8, 2019, the extension of Student's suspension on August 12, 2019, and expulsion proceedings on November 18, 2019, December 12, 2019, and January 14, 2020. Student prevailed on Issue 1.

2. Student was entitled to the protections of title 20 United States Code section 1415(k), and Menifee failed to comply with section 1415(k) by suspending Student on August 8, 2019, extending Student's suspension on August 12, 2019, and expelling him

pursuant to expulsion proceedings dated November 18, 2019, December 12, 2019, and January 14, 2020, without first holding a manifestation determination team meeting that complied with the IDEA. Student prevails on Issue 2.

3. Student's behavior on August 7, 2019, was a manifestation of his disability because it was caused by or substantially related to his disabilities. Student prevails on Issue 3.

## REMEDIES

From August 8, 2019, to January 14, 2020, Student was suspended pending expulsion. Expulsion hearings occurred on multiple dates between August 30, 2019, and December 2019. On January 15, 2020, Menifee issued its decision expelling Student. Since his January 2020 expulsion, Student attended a community day school.

During the pendency of the expulsion proceedings, Menifee conducted a multidisciplinary psychoeducational assessment, held an individualized education program team meeting, and determined Student was not eligible for special education and related services. The appropriateness of the assessment and eligibility determination are not at issue in this expedited portion of this hearing. Those issues will be determined in the upcoming non-expedited phase.

As a remedy in this expedited portion of the case, Student requests the reversal of his expulsion. The IDEA prohibits the expulsion of a student with a disability for conduct that is a manifestation of his disability. (*Doe v. Maher, supra,* 793 F.2d at pp. 1481-2 ["the [IDEA] prohibits the expulsion of a handicapped student for misbehavior that is a manifestation of his handicap]."

After an expedited hearing pursuant to title 20 United States Code section 1415(k)(3), the hearing officer may return a child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of the district's obligations pertaining to manifestation determinations, or that the child's behavior was a manifestation of the child's disability. (20 U.S.C. § 1415(k)(3)(b); 34 C.F.R. §§ 300.530, 300.532(b)(2)(i).)

Student is entitled to an appropriate remedy for Menifee's failure to conduct an appropriate manifestation determination under the IDEA, and its failure to find that his August 7, 2019 conduct was a manifestation of his disability. Because Menifee expelled Student without first holding a manifestation determination in accordance with the IDEA, and because Student's conduct on August 7, 2019 was a manifestation of his disability, the expulsion is ordered reversed. (*See*, *e.g.*, *Jay F. v. William S. Hart Union High Sch. Dist.*, (9th Cir. 2019) 772 Fed. Appx. 578 ["[i]n affirming the district court's finding that Student's . . . misconduct was a manifestation of his disability, we also affirm the district court's expungement of Student's expulsion . . . resulting from the . . . misconduct]; *Parent v. Los Angeles Unified Sch. Dist.*, (2017) OAH Case No. 2017081054 [where manifestation determination was incorrect and student's conduct was a manifestation of the disability, expulsion decision was rescinded and references to the expulsion were ordered expunged from student's records]; *Parent v. William S. Hart Union High Sch. Dist.*, (2017) OAH Case No. 2017081232 [ordering immediate reinstatement of student at her comprehensive high school and expungement of all references to expulsion from her school records, where district had failed to review all relevant information as part of its manifestation determination, and where the conduct in question did have a direct and substantial relationship to Student's disability]; *Parent v. Fairfield-Suisun Unified Sch. Dist.*, (2012) OAH Case No. 2012030917 [reinstating

student after expulsion, where general education student was expelled with no manifestation determination but district had a basis of knowledge]; *Student v. Capistrano Unified Sch. Dist.*, (2006) OAH Case No. 2006051005 [ordering immediate termination of pending expulsion proceedings, where district had a basis of knowledge and expelled student without a manifestation determination].)

Until due process hearing procedures are complete, a student is entitled to remain in his or her current educational placement, with certain exceptions not applicable here, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a); Ed. Code, § 56505, subd. (d).) This is referred to as "stay put." Courts have recognized, however, that the status quo cannot always be replicated exactly for purposes of stay put. (*Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds, 20 U.S.C. § 1414(d)(1)(B).) Student's placement prior to the due process hearing request was in general education in middle school. Student is entitled to stay put placement in general education at Hans Christensen Middle School pending the final outcome of this due process proceeding. (*See, e.g., Student v. Moreno Valley Unified Sch. Dist.* (March 9, 2010) OAH Case No. 2010021027 (Order Granting Motion for Stay Put) [stay put was general education pending resolution of Student's due process complaint concerning eligibility and placement, where district had a basis of knowledge, and Student had been subject to expulsion].) However, stay put cannot exactly be replicated because at the time of the expedited hearing, Menifee was not in session due to the Governor's proclamation of a State of Emergency and Executive Order N-25-20, consistent with the safety precautions determined by the Center for Disease Control, the California Department of Public Health, and the Department of Governmental Services, in response to the novel coronavirus outbreak, known as COVID-19. Therefore, Student shall be afforded the

same instructional services as are being provided to other students at Hans Christensen Middle School during the school closure. When school re-opens, Student shall be returned to Hans Christensen Middle school at grade level, unless otherwise ordered.

## ORDER

1. Menifee had a basis of knowledge that Student had a suspected disability prior to the conduct on August 7, 2019, that led to discipline.
2. Student's behavior on August 7, 2019, was caused by, or had a direct and substantial relationship to, his disability.
3. Menifee's expulsion of Student as a result of the August 7, 2019 incident is reversed.
4. Within 15 days of this Decision, Menifee shall expunge Student's educational records by purging all references to his expulsion.
5. Student shall immediately be reinstated at his general education school, Hans Christensen Middle School.
6. Unless and until otherwise ordered in the non-expedited portion of this due process proceeding, Menifee shall provide all educational services to Student as are provided to other general education students while Menifee is closed due to COVID-19 precautions.
7. Unless and until otherwise ordered in the non-expedited portion of this due process proceeding, Menifee shall upon re-opening ensure that Student is enrolled in general education at grade level at Hans Christensen Middle School.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Expedited Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

June R. Lehrman

Administrative Law Judge

Office of Administrative Hearings