

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022060339

PARENTS ON BEHALF OF STUDENT,

V.

ATASCADERO UNIFIED SCHOOL DISTRICT.

EXPEDITED DECISION

AUGUST 4, 2022

On June 13, 2022, Parents on behalf of Student filed a due process hearing request, called a complaint, with the Office of Administrative Hearings, called OAH, naming Atascadero Unified School District, called Atascadero. Student's complaint requested an appeal of a school disciplinary manifestation determination decision. Administrative Law Judge Cynthia Fritz heard this matter by videoconference on July 12, 13, 14, 19, 20, 21, and 22, 2022.

Attorneys David Grey and Barbara Grey represented Student. Parent attended all hearing days.

Attorneys Sarah Garcia and Karina Demirchyan represented Atascadero and law clerk Ethan Hicks assisted. Atascadero Director of Student Intervention Services Cynthia Ravalin attended all hearing days.

On July 22, 2022, the record was closed, and the matter was submitted. The ALJ granted the parties' joint request to submit written closing briefs during the submittal time. The parties timely submitted closing briefs on July 25, 2022.

EXPEDITED ISSUE

On July 7, 2022, Student filed an objection to the framing of the issue as stated in the July 1, 2022 prehearing conference order. At hearing, the issue was clarified and rephrased following discussion and agreement of the parties. The administrative law judge has authority to renumber and redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

1. Was Student's violation of the school code of conduct on May 3, 2022:
 - a. caused by, or had a direct and substantial relationship to, Student's disability; or
 - b. a direct result of Atascadero's failure to implement Student's individualized education program, called IEP?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, called IDEA, 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.) 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. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 48915.5, subd. (a).) If a special education student violates a code of student conduct, school personnel may remove the 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) (2006).)

For disciplinary charges in placement greater than 10 consecutive school days (or that are a pattern that amounts to a change in placement), the disciplinary measures applicable to students without disabilities may be applied to 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) (2006) & 300.536(a)(1)(2) (2006).)

The parent of a child with a disability who disagrees with the manifestation determination may appeal the decision by requesting a hearing. (34 C.F.R. § 300.532(a) (2006).) 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) (2006).)

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 v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Student filed the complaint and bore the burden of proof. The factual statements in this 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 16 years old and entering tenth grade at the time of hearing. Student resided within Atascadero's school boundaries at all relevant times. Student is eligible for special education under the primary category of speech and language impairment and the secondary category of other health impairment. Student has

- expressive and receptive language deficits;
- central auditory processing disorder with deficits in temporal processing, binaural integration, and auditory sequencing;
- borderline intellectual functioning with deficits in comprehension knowledge, fluid reasoning, long-term storage and retrieval, short-term working memory, visual processing, auditory processing, and processing speed; and
- attention deficit hyperactivity disorder, combined type, called ADHD, with difficulties in attentional and behavioral control and executive function.

Student has a behavior intervention plan, called a BIP, that addresses physical and verbal aggression, off-task behavior, and elopement.

ISSUE 1(a): WAS STUDENT'S VIOLATION OF THE SCHOOL CODE OF CONDUCT ON MAY 3, 2022, CAUSED BY, OR HAVE A DIRECT AND SUBSTANTIAL RELATIONSHIP TO, STUDENT'S DISABILITY?

Student contends that Atascadero improperly determined that Student's conduct on May 3, 2022, was not caused by or had a direct and substantial relationship to Student's speech and language impairment, ADHD, central auditory processing disorder, and borderline intellectual functioning, because Student's disability caused impulsiveness, frustration, and physical aggression. Further, Student maintained he did not understand the situation and could not process and communicate properly throughout the incident.

Atascadero asserts that Student's behavior was not impulsive but planned, and Student was able to understand what was going on and used functional communication throughout the incident. Thus, Atascadero maintains that Student's conduct was not caused by, or had a direct and substantial relationship to Student's disability.

Conduct is a manifestation of the student's disability if the conduct was caused by, or had a direct and substantial relationship to, the child's disability, or if the conduct was the direct result of the school district's failure to implement the student's IEP. (34 C.F.R. § 300.530(e)(1) & (2) (2006.)

In *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470, fn. 8, (*Maher*) *affd. Sub. nom. Honig v. Doe* (1988) 484 U.S. 305 [98. L.Ed.2d 686], the Ninth Circuit discussed the meaning of "conduct that is a manifestation of the child's handicap." The court explained:

As we use them, these phrases are terms intended to mean the same thing. They refer to conduct that is caused by, or has a direct and

substantial relationship to, the child's handicap. Put another way, a handicapped child's conduct is covered by this definition only if the handicap significantly impairs the child's behavioral controls ... it does not embrace conduct that bears only an attenuated relationship to the child's handicap ... If the child's misbehavior is properly determined not to be a manifestation of his handicap, the handicapped child can be expelled. [Citations.] ... When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children ... To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not so.

When a school district seeks to discipline a child with a disability for violating a code of student conduct, it 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); 34 C.F.R. § 300.530 (2006).) This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) It must be accomplished within 10 school days of the decision to change the student's placement. (*Ibid.*)

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); 34 C.F.R. § 300.530(e)(1) & (h) (2006); *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46540, 46720 (Aug. 14, 2006) (*Comments on 2006 Regulations*).) The manifestation determination team analyzes the child's behavior as

demonstrated across settings and across times. (*Comments to 2006 Regulations, supra*, 71 Fed. Reg. 46720.) All relevant information in the student's file, including the IEP, observations of teachers, and any relevant information from the parents, must be reviewed as part of the manifestation determination process. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1) (2006); *Comments to 2006 Regulations, supra*, 71 Fed. Reg. 46720.)

STUDENT'S PREVIOUS BEHAVIORS

Student's school records and witness testimony established, and Atascadero was aware, that Student had difficulties with physical and verbal aggression, elopement, and off-task behavior since elementary school and needed the support of a board-certified behavioral analyst, called BCBA, since middle school.

Since 2017, Student was suspended five times before the 2020-2021 school year, with four incidents involving physical aggression. During the 2021-2022 school year and before the May 3, 2022 incident, Student's disciplinary record showed one suspension for eloping on a golf cart and scratching a staff member which resulted in police involvement and Student being handcuffed.

THE MAY 3, 2022 INCIDENT

The May 3, 2022 incident spanned over 90 minutes involving multiple staff members, and multiple areas of Atascadero High School. Student's behavior involved

- off-task behavior,
- elopement,
- verbal threats,
- gestures of physical harm to staff,

- cursing, and
- instances of unwanted physical contact upon one staff member.

However, the physical aggression was the only conduct alleged to violate the school code of conduct at the manifestation determination meeting.

The witness statements were introduced into evidence at hearing. They were hearsay but explained and supplemented by the direct testimony of the witnesses that authored them, except Student's statement. Hearsay evidence may be used to supplement or explain other evidence, although it is insufficient to support a factual finding. (Cal. Code Regs., tit. 5 § 3082, subd. (b).) Thus, only portions of Student's statement were corroborated by direct evidence.

According to the direct evidence in this matter, the May 3, 2022 incident began toward the end of lunch recess when Student refused to leave a fenced area of an active construction site on campus and return to class. At that time, special circumstances instructional aide Stacy Steck attended to Student. The first school bell rang which allowed time to get to the next class which started at 1:00 PM. Steck prompted Student to return to class.

Rob Robertson, an Atascadero teacher, noticed Student toward the end of lunch recess at the construction site fence with debris flying everywhere as the construction workers were attempting to remove a tree stump. Student was pacing back and forth along the construction site fence after the second bell rang for class. From a distance, Roberson requested that Student step back to a safe distance. In response, Student said that Roberson was not the boss of him, and Student put on his glasses to try to be safe.

Roberson returned to his class and Student remained with Steck. During this time, as Roberson interacted with Student, Steck would fall back giving Student extra space. Steck and Roberson did not engage Student simultaneously.

Steck was alone with Student and gave Student a choice of a break if Student would move to a safer space to watch the construction or go to class. During this time, Student moved between the safe space offered and the unsafe space closer to the construction. Steck gave empathic responses to Student. Steck contacted Ashley Hale, Student's English teacher and case manager, to allow her to take a break. Steck left around 1:30 p.m.

Hale replaced Steck and was alone with Student and communicating from a distance and prompting Student to move to a safer area or to go to class, gave space, and modeled behavior by moving to a safer space. Hale engaged Student about every 10 minutes. Student responded by stating that nothing was wrong, and he did not want to go to class. Watching the school construction was a preferred activity of Student. Student also stated Hale could not tell him what to do, that he would not move, and that he did not care if he got hurt. Hale attempted to contact the administration about the incident and the school nurse to administer Student's medications which are given at 2:00 PM each day. At around 1:40 PM, Student approached the school nurse in the construction area to receive medication, and student refused to take it. The school nurse left, and Hale was alone with Student again. During this time, Hale and the school nurse did not simultaneously engage Student and gave Student space.

Hale continued to try to reach administration for support and the construction ensued. Hale also attempted to reach Ally Allison, Atascadero's BCBA. Hale continued

to prompt Student, provide choices, used Student's choice communication board, and gave him space. Student continued to remain around the construction fence and did not return to class.

Around 2:00 PM, Hale approached the construction fence line as debris was flying over the construction fence in proximity to Student. Hale placed her body between the construction fence to block debris from harming Student. Hale then stated "It looks like something is bothering you. I'm here to help." Hale prompted Student to make safe choices. Student then walked over to Hale reached into Hale's back pocket and took out a pen and patted Hale on the buttocks with his hand. The time between pulling out the pen and patting Hale on the buttocks was quick. Hale told Student it was inappropriate to touch her like that and prompted Student to take a break. Student postured to stab Hale with an object in his hand, and said "Fuck you Ms. Hale, you are mean and a bitch."

Soon after, Roberson arrived on the scene again and Hale requested that he contact the principal. Steck also returned from her break. Hale explained to Steck and Roberson that she did not feel safe and needed to step away and left the construction area about 20 feet away.

Principal Daniel Andrus arrived at the construction site and engaged Student while the other staff stayed four feet or more away from Student. Andrus asked Student how he was doing, and said he needed to talk to him about what was going on. Student swore at Andrus. Andrus prompted Student to engage in "green" or acceptable behavior or he would have to call his Parents. Student cursed at Andrus.

Steck then took over and asked Student to use a calming strategy and Student took several breaths. Steck prompted Student to take his medication. Student then walked quickly toward the nurse's office which is in the administration building. Steck was following far behind and could not keep up with him. During this time, no staff members simultaneously engaged Student and provided distance to him.

Allison arrived and was talking to Hale a distance away and closer to the administration building. They noticed Student far ahead of Steck and approaching them. As Student passed Hale and Allison, he told Hale "You know where I'm going" and "don't follow me" and cursed at her. Hale and Allison followed Student into the administration building to ensure his and others safety. The office Student entered had multiple hallways. Hale went toward the entrance to the hallway by the nurse's office and Allison went down a different hallway. They were trying to block entrances to other parts of the administration building for safety but not the nurse's office. This permitted Student an unobstructed path to the nurse's office.

At that time, Hale was alone with Student and about three feet behind him as he was walking in front of her toward the nurse's office. Student then stopped walking toward the office, ran backwards, and pushed Hale against a wall with his backpack. Hale had to push the backpack away to get free and asked him to stop. Student then told Hale "Let's go Ms. Hale. Let's do this," and pushed her up against the wall a second time. Student then walked away from Hale, entered the nurse's office, and slammed the door. Steck arrived and entered the nurse's office and observed Student take his medication. Student waited for Steck to arrive to take his medication as was their practice. Student was calm when he took the medication and showed her his empty

mouth. Student left the nurse's office and held the door for Steck behind him. As he went through the hallway, Student passed Hale and Roberson. Both stood with their backs against the wall to give Student space and did not engage him. As Student passed Hale, he swung a pen backwards in a downward stabbing motion, and Roberson put an arm out to protect Hale as Hale attempted to jump behind Roberson. Hale left the building in fear of her safety. The incident continued with other conduct until Student's Parents were contacted and Student was picked up from school, but it does not involve the conduct in question at the manifestation determination meeting.

ATASCADERO'S CONDUCT CHARGES

Atascadero suspended Student on the day of the incident for three days and extended the suspension for two more days while investigating the incident. On May 9, 2022, Andrus gave notice to Parent recommending Student for expulsion under Education Code section 48915 (a)(1)(E), for assault and battery upon a school employee, as defined in California Penal Code sections 240 and 242 regarding the May 3, 2022 incident. Specifically, Atascadero charged Student with grabbing/patting the buttocks of a staff member and shoving a staff member against a wall twice.

THE MANIFESTATION DETERMINATION MEETING

Atascadero school psychologist Eric Mowinckel

- gathered statements from the participants involved in the May 3, 2022 incident,
- contacted some school staff for clarifications,
- interviewed Student, and

- brought together the witness accounts and documentation regarding Student's disabilities, IEP, behavior intervention plan, assessments, health records, Student observations, and disciplinary record in a written manifestation determination report.

The report was written before the meeting, but the determination portion of the document was left blank so that the IEP team could make the manifestation determination decision.

On May 19, 2022, Atascadero held a manifestation determination meeting attended by several Atascadero staff and Parent. Mowinkel read through the manifestation determination report. Mowinkel explained that while a correlation exists with ADHD and difficulties with attentional and behavioral control and aggression could exist, both the level of intensity and severity of aggression demonstrated by Student were unwarranted by the intervention and the environmental circumstances. Andrus also discussed Student's behavior and historical conduct and whether there was a correlation between the behavior and Student's disabilities. Mowinkel recommended to the team that Student's conduct was not caused by or had a direct or substantial relationship to Student's disabilities, and that Atascadero implemented the IEP. Parent read through portions of Student's IEP and a previous 2017 private assessment, and other documents arguing that Student's conduct was a manifestation of Student's disabilities.

The Atascadero members of the manifestation determination team unanimously agreed with Mowinkel's recommendation and decided that Student's conduct was not caused by or had a direct or substantial relationship to Student's disabilities on May 3,

2022, and therefore not a manifestation of Student's disabilities. They also found that Student's May 3, 2022 conduct was not a direct result of Student's failure to implement the IEP and allowed the expulsion to proceed. All manifestation determination team members that testified at hearing, except Parent, believed Mowinkel provided adequate information for the team to appropriately determine whether Student's behavior was a manifestation of his disabilities.

After the May 3, 2022 incident, Hale requested and received a transfer out of Atascadero High School for the upcoming school year. On June 3, 2022, the last day of the 2021-2022 school year, Atascadero rescinded the expulsion recommendation and Student was reinstated to regular school status.

OAH DOES NOT HAVE JURISDICTION TO DETERMINE FACTUAL DISPUTES OF THE CHARGED CONDUCT

Doctor Randall Ball, Student's expert and Parent, dispute that Student patted Hale's buttocks. They also dispute Atascadero's claim that Hale was behind Student when he walked backward and pushed Hale into the wall twice.

Dr. Ball described Student as concomitantly touching Hale's buttocks as Student took the pen out of Hale's back pocket. Parent went as far as to say that Student made no physical contact with Hale when pulling the pen out of her back pocket. Both argued that Hale blocked the nurse's office door which prompted Student to back into her in the hallway.

Decisions of federal courts confirm that it is not the job of a manifestation determination team to decide factual disputes of the incident. The manifestation determination team “typically does not determine the facts of the incident for which an eligible student is subject to discipline.” (*Patrick v. Success Acad. Charter Schs., Inc.* (E.D.N.Y. 2018) 354 F. Supp. 3d 185, 220 (quoting *Bristol Township. Sch. Dist. v. Z.B.* (E.D. Pa. Jan. 14, 2016, No. 15-CV-4604 (SRD)), 2016 WL 161600, p. 4.)

Review of the manifestation determination team’s decision on appeal may not rehear or review the facts of the offense (*Danny K. v. Department of Educ.* (D. Hawai’i, Sept. 27, 2011, Civ. No. 11–00025 ACK–KSC) 2011 WL 4527387, (*Danny K.*.) In *Danny K.*, the student set off a firework or bomb in a bathroom. (*Id.*, p. 1.) He was suspended, and his IEP team conducted a manifestation determination review which found that his conduct was not related to his disability. At the manifestation determination review, the student and his mother argued that the student did not set off the bomb; he merely falsely confessed to get money from the actual perpetrator. (*Danny K., supra*, 2011 WL 4527387, p. 12.) On appeal to the District Court, the student faulted the manifestation determination team for not considering his claim that he falsely confessed and that another student engaged in the prohibited conduct. The court rejected the argument, holding that the determination that student was the perpetrator was not the business of the manifestation determination team.

The *Danny K.* court also held that there was no authority to suggest that “a manifestation determination team must review the merits of a school’s findings as to how a student violated the code of student conduct.” It added that such a requirement

"would essentially deputize manifestation determination teams, and in turn, administrative hearings officers and federal courts, as appellate deans of students." (*Danny K.*, *supra*, 2011 WL 4527387, p. 12.) And it noted:

"If Plaintiffs wished to challenge Defendant's finding that Student set off the firework, they should have followed Defendant's typical procedures for contesting findings of student misconduct ... {T]he IDEA was not intended to provide disabled students an additional avenue with which to challenge a school's underlying findings of misconduct." (*Id.*, fn. 20.)

Because Dr. Ball and Parent did not analyze Student patting Hale's buttocks, and only acknowledged inadvertent contact or no contact, and a different rendition of the backpack assault, their opinions were unpersuasive. Both failed to analyze the charged conduct at all as was the case with Student patting Hale's buttocks or presupposed facts not in evidence regarding the backpack assault. Thus, their opinions were given less weight.

STUDENT'S CONDUCT WAS NOT CAUSED BY, OR A DIRECT OR SUBSTANTIAL RELATIONSHIP TO, STUDENT'S DISABILITIES

This Decision holds that there was no direct or substantial relationship between Student patting Hale's buttocks at the construction site and later backing into Hale with a backpack and pushing her up against the wall twice in the administration building. Student's conduct in these two instances were not impulsive, rather it was planned. Student further understood the situation and staff's prompting and used functional communication throughout the incident.

ADHD, COGNITIVE FUNCTIONING, AND PROCESSING

Student's conduct was not caused by or a direct or substantial relationship to Student's cognitive functioning, processing, and ADHD. Mowinkel, the only psychologist at hearing, spoke to the relationship between Student's conduct on May 3, 2022, and his disabilities, and testified that there was no relationship between Student's conduct and his ADHD and cognitive functioning. Mowinkel explained that neither the interventions provided, nor the environmental circumstances would have resulted in Student's disabilities causing his physical aggression. There were no intense antecedents likely to invoke the physical aggression, and the aggression was unwarranted given Atascadero's interventions and the environmental circumstances that day. While Mowinkel conceded that Student's difficulties with attentional and behavioral control can sometimes correlate with aggressive behavior, he did not believe it to be the case on May 3, 2022, for several reasons.

Mowinkel explained that Student's behavior was not impulsive as Student had attempted to get what he wanted with functional behaviors prior, but that did not result in his intended outcome, so he was angry and planned out what to do instead. Student had ample time to make choices about whether to engage in physically aggressive conduct. Student used functional communication in continued attempts to gain what he wanted, thus cognitively understanding the situation. Further, Mowinkel maintained, like Hale, that Student targeted Hale and waited until she was alone without preferred staff present to engage in physical aggression. Student knew what he was doing and how to differentiate between preferred and non-preferred staff. This showed planning. Mowinkel was thorough and knowledgeable and had training and experience in Student's disabilities. Thus, Mowinkel's opinions were convincing.

Atascadero's speech and language pathologist Samuel Weber, and the only speech and language pathologist that testified at hearing, testified that Student could process the language and information throughout the incident. In fact, the evidence by all accounts, except Dr. Ball and Parent, believed Student cognitively understood the situation, with no processing issues, and had time to make his choices. Thus, Weber's opinion on this point was persuasive.

Conversely, Dr. Randall Ball, Student's expert, believed Student's conduct was caused by and had a direct and substantial relationship to his disabilities. Dr. Ball's opinions were speculative and unreliable. Dr. Ball is a Doctor of Education and has a master's in counseling. He is a licensed marriage and family therapist and is a BCBA. Dr. Ball conceded that he is not a psychologist or a speech and language pathologist and had little knowledge of central auditory processing disorder.

Throughout the hearing, Dr. Ball couched his opinions with uncertainty using phrases such as "probably," "may," and "likely". At times, he admitted he was speculating. Dr. Ball opined that Student's conduct likely was impulsive and his cognitive ability may have contributed to Student's behavior that day. Dr. Ball did not know for certain.

Dr. Ball's last contact with Student before the May 3, 2022 incident was in 2017 when he conducted a private functional behavior assessment for Student. At that time, he stated in his functional behavior report that Student did not need a robust program for emotional regulation or that Student had anxiety or a mood disorder. At hearing, he testified that he had no new information that Student needed a robust program for emotional regulation or that Student currently has anxiety or a mood disorder. Dr. Ball

had no contact with Parent or Student since 2017 until June 2022, after the incident. He failed to conduct any further testing or assessments of Student and at times cited assessments dating back to Student's kindergarten and second grade as a basis for his opinion, although more recent assessments were available, and he acknowledged that a child's behavior changed over time. Dr. Ball reviewed school records, interviewed Parent and Student, but did not question either of them regarding the May 3, 2022 incident, or any other witness to the incident. He did not visit Atascadero High School to view the scene of the incident, had not observed Student at Atascadero, and had no personal knowledge of Student's functioning since 2017. All these things negatively impacted Dr. Ball's persuasiveness and the reliability of his opinions in this matter.

Dr. Ball explored the possibility that Student's grabbing of the pen and simultaneous touching of Hale's buttocks was due to Student's desire and impulsivity to get the pen. Although uncorroborated hearsay and not the conduct charged, it also does not explain the next intentional action of patting Hale's buttocks after getting supposedly what he wanted. Dr. Ball did not give an opinion regarding the charged conduct because he believed it not to be true.

Dr. Ball further speculated that Student's behavior in the hallway and pushing Hale to the wall was an impulsive act so that Hale could not block entry to the nurse's office. Hale's testimony and statements, and Student's own statement corroborated that Student backed into Hale and she was behind him, not blocking the nurse's office door. Thus, Dr. Ball did not account for Student's ability to change his route by backing into Hale while going to the nurse's office in front of him, and that his conduct occurred more than once. He also did not explain how Student making a statement "Let's do

this,” to Hale in between the two assaults with the backpack supported Dr. Ball’s opinion that it was impulsive. Student had time to use language and push Hale into the wall a second time. This was not impulsive behavior.

Other school witnesses testified in support of Atascadero including Steck, Allison, and Andrus, asserting that Student’s conduct was not caused by or a direct or substantial relationship to Student’s disabilities. Each school witness was familiar with Student and his IEP. Each school witness was an experienced educator and qualified to testify in their discipline. Each witness had observed Student at school. Much testimony was elicited at hearing regarding all participants step by step conduct throughout the incident. While some testimony was inconsistent between witnesses, most corroborated each other’s testimony. Thus, Atascadero’s witness testimony was credible.

Hale was the only witness at hearing that testified to the physical aggression with direct knowledge, and her testimony was uncontroverted. Hale testified that she believed Student used functional communication, understood what was going on, and made choices. Hale believed she was being targeted by Student and did not believe his conduct was caused by or a direct and substantial relationship to his disabilities. Hale was sincere and believable, and her testimony was consistent with other witnesses’ opinions of Student’s abilities at various times throughout the incident. Thus, it was persuasive and given great weight.

Parent testified in support of Student’s behavior being the cause of or a direct and substantial relationship to his disabilities. However, there were problems with Parent’s testimony. For example, Parent testified that all of Student’s behaviors are a result of his disabilities. This statement directly conflicts with the Ninth Circuit’s opinion,

and Dr. Ball's opinion that all people can exhibit volitional behavior. (*Maheer, supra*, 793 F.2d at 8.) Further, throughout Parent's testimony, Parent was careful when responding as to not shed any negative light on Student and at times would not answer questions by Atascadero's counsel that may be negative. Parent argued at hearing that her current recollection of the manifestation determination meeting, two months prior, was more accurate than the notes taken by Atascadero at the time of the meeting. At other times, Parent's testimony was inconsistent. Additionally, Parent was not a witness to the incident and her opinion was tied to Student's rendition of events. Moreover, much of Student's statement was inconsistent with the direct evidence at hearing and uncorroborated, thus unreliable. Her testimony as double hearsay did not make it more credible. While well intentioned and a strong advocate for Student, Parent's testimony was unpersuasive because it lacked objectivity and reliability.

Student's statement during the incident showed he understood the situation. He responded throughout the incident to staff that he did not want to comply, did not care if he got hurt, and that people were not the boss of him. He put on glasses at one point at the construction site so that he would not get hurt. This demonstrated he understood the situation. Student politely opened a door for preferred staff member Steck at the nurse's office then soon after swung an object at Hale, showing Student's ability to decipher between preferred and unpreferred staff. Student's physical aggression toward Hale was not impulsive, and Student processed the situation and understood it. Thus, the evidence showed that Student's conduct on May 3, 2022, was not caused by or had a direct or substantial relationship to Student's ADHD, cognitive abilities, and processing issues.

SPEECH AND LANGUAGE

Student's conduct was not caused by or a direct or substantial relationship to Student's speech and language deficits. Weber, a member of the manifestation determination meeting, conducted Student's speech and language therapy sessions since October 2021. Based on Weber's competency as a speech and language pathologist and experience working with Student, Weber opined that Student's behavior throughout the incident did not result from his speech and language deficits. Weber believed Student's abilities to comprehend linguistically what was happening in a situation would not have impaired his understanding of what was happening on May 3, 2022. Nor would have his ability to comprehend language have caused him to pat Hale's buttocks or push her into the wall twice. Weber stated that Student was given short directives throughout the incident which he was linguistically capable of processing, and believed he used functional language demonstrating both his cognitive understanding as well as his receptive and expressive processing of what was going on. Weber's testimony withstood cross-examination and was not challenged by another speech and language pathologist. He was thorough and knowledgeable of Student and his speech and language deficits at the time of the incident, and his testimony was given great weight.

Dr. Ball disagreed with Weber. However, Dr. Ball's testimony was general and speculative. He opined that Student could not expressively communicate that he wanted Hale's pen. Yet, as already stated, Dr. Ball did not analyze the conduct of Student patting Hale's buttocks. Thus, even if that were true, although unsupported by the evidence, it fails to account for the further intentional act of patting his teacher's buttocks after getting the pen, if that was the goal as speculated to by Dr. Ball. Dr. Ball also conceded that he did not know Student's motivations.

Dr. Ball also believed that Student could not expressively communicate when he pushed Hale with his backpack into the wall twice. However, the uncontroverted testimony established that Student verbalized "Let's do this," between the two times he backed her into the wall, showing functional communication. Thus, Dr. Ball's testimony was unpersuasive. Further, Dr. Ball made statements such as Student's speech and language deficits "may have" had an impact on Student. And "I feel that" his conduct was a manifestation of Student's disabilities. Conversely, Weber's testimony was definite, detailed, based on personal knowledge of Student, and his training and experience in the field, and convincing. Thus, Student failed to show that Student's May 3, 2022 charged conduct was not caused by, or had a direct or substantial relationship to speech and language disability. Accordingly, Student's May 3, 2022 conduct was not cause by or had a direct or substantial relationship to Student's disabilities.

ISSUE 1(b): WAS STUDENT'S VIOLATION OF THE SCHOOL CODE OF CONDUCT ON MAY 3, 2022, A DIRECT RESULT OF ATASCADERO'S FAILURE TO IMPLEMENT STUDENT'S IEP?

Student contends that Atascadero failed to implement: the 1200 minutes per month of BCBA consultation hours, the BIP on May 3, 2022, and the BIP on March 29, 2022. Because of Atascadero's failures to implement the IEP, including the BIP, it caused the behavior for which Student is being disciplined. Atascadero maintained that the IEP and BIP were implemented throughout the 2021-2022 school year and if not, Student failed to show any direct relationship of any IEP or BIP failure to Student's conduct.

STUDENT'S MAY 3, 2022 CONDUCT WAS NOT A DIRECT RESULT OF ANY FAILURES OF ATASCADERO TO IMPLEMENT STUDENT'S IEP

In May 2021, Atascadero offered Student 720 minutes weekly individual and group specialized academic instruction; 180 monthly individual and group speech and language services; 20 hours monthly consultation between the contracted BCBA and Atascadero's BCBA, and other accommodations, supports, and consultation services and Parent consented to this offer. Atascadero had previously contracted with Monarch Behavioral Services, called Monarch, to perform the BCBA consultation services.

In August 2021, Monarch changed its service model and no longer provided consultation services; however, made an exception for some consultation for Student during the transition. On September 8, 2021, Atascadero held an IEP team meeting to change the 20 hours monthly consultation between the contacted BCBA and Atascadero's BCBA and clarified the new offer on October 1, 2022, to 1200 minutes monthly BCBA consultation includes: BIP development; BIP implementation; BIP fidelity checks; BIP training with Atascadero staff; consultation with administration, teachers, and support staff; and consultation with the previous outside provider of BCBB services. Parent consented to the amendment on December 10, 2021. Thus, the operative IEP at the time of the incident was the May 21, 2021 IEP and included the amendment consented to on December 10, 2021.

Student proved that Atascadero failed to provide the full amount of 1200 minutes monthly of BCBA consultation services throughout the 2021-2022 school year

during the months of August, September, October, November, December of 2021, and January, March, and April of 2022. Student received

- 580 minutes in August,
- 1140 minutes in September,
- 930 minutes in October,
- 660 minutes in November,
- 615 minutes in December,
- 705 minutes in January,
- 1095 minutes in March, and
- 1020 minutes in April.

Allison explained that at times she provided BCBA consultation services regarding Student's brother and would consult at the same time regarding Student but did not enter those minutes into the log. Further, Allison explained that if less consultation time was provided in a month, it was a result of Student absences or school holidays, but Student's attendance record was not in evidence. For purposes of this hearing, Student established a failure to implement the BCBA consultation hours for the 2021-2022 school year through April 2022, except during the month of February 2022.

The only witnesses that opined that the failure to implement Student's consultation services directly resulting in Student's conduct on May 3, 2022, was Parent and Dr. Ball. Parent's testimony was unconvincing. Parent believed that Atascadero deprived Student the behavior support needed to avoid his actions on May 3, 2022. Although Parent was trained as a behavioral technician, Parent's testimony was unpersuasive for the same reasons as previously described. Parent focused more on her

assertion that she did not agree to BCBA consultation IEP amendments, which was not supported by the evidence. Parent and Dr. Ball also maintained that more BCBA minutes would have allowed for more direct BCBA consultation but gave no specific explanation as to why this failure directly resulted in Student's May 3, 2022 physical aggression on Hale.

Further, Parent and Dr. Ball had a different rendition of the conduct because they did not believe Student intentionally patted Hale on the buttocks and believed Hale was trying to block Student from entering the nurse's office, which was not established. Thus, Parent and Dr. Ball failed to directly connect the failure to implement the BCBA consultation hours to Student's specifically charged conduct. Accordingly, Student's charged conduct on May 3, 2022, did not directly result in Atascadero's failure to implement his IEP.

STUDENT'S MAY 3, 2022 CONDUCT WAS NOT A DIRECT RESULT OF ANY FAILURES OF ATASCADERO TO PROPERLY IMPLEMENT STUDENT'S BIP

Atascadero drafted a BIP to address behaviors such as off task behavior, verbal aggression, physical aggression, and elopement which was attached to the May 2021 IEP. Atascadero used a green, yellow, and red behavior tracking system that delineated specific procedures for staff to take when Student exhibited green, yellow, or red behavior. Student could also earn tallies to enable him to participate in preferred activities.

For example, if Student is exhibiting red behavior for elopement, physical aggression, or property aggression, Student should be given an empathic response and

a reminder that a change of behavior can earn him tallies for being green. He should be given immediate feedback that he is exhibiting red behavior. If the behavior involves property aggression or physical aggression, Student should be asked to step outside and take a break. Student should not be given any further directives or attention and appropriate support should be notified. Staff should keep distance until Student deescalates. Nonviolent crisis intervention, called NCI, should be followed throughout, and parents should be notified of all red behaviors.

If Student exhibited yellow behavior for off-task behavior or verbal aggression, Student should be given an empathetic response and a reminder that if he changes his behavior, he will earn a reinforcement tally. If Student does not change his behavior, he will be given an empathetic response and a reminder that he can earn a tally.

CHARGE ONE: STUDENT PATTING HALE'S BUTTOCKS

At the construction site, Student eloped and was in red behavior once the bell rang and he did not return to class. Student maintained that based on the BIP, Atascadero staff did not fully implement it because they continued to engage Student with directives and gave him attention. Further, Hale approached close to him by the fence line to block debris from hitting Student and engaged him at that time, violating the red behavior protocols in Student's BIP.

Atascadero witnesses Hale, Roberson, Andrus, Steck, and Allison maintained that due to the unsafe environment, they instituted NCI strategies in conformance with Student's BIP. Dr. Ball also endorsed Atascadero's position that NCI strategies should be implemented when safety is a concern. Although no documentation was presented regarding Atascadero's NCI procedures, every witness at hearing that was familiar with

NCI, including Parent, endorsed that NCI allowed for verbal strategies to deescalate a situation to avoid the need for physical intervention. Dr. Ball endorsed that NCI programs leave the specific appropriate de-escalation strategy to the discretion of the individual. This is what Hale did when she approached Student to block debris from hitting him and let him know she was there to help him. No evidence was presented that Atascadero staff's conduct at the construction site contradicted NCI strategies, and the NCI method was contemplated in Student's BIP. Thus, Atascadero properly implemented Student's BIP at the construction site when Student patted Hale's buttocks.

Even if Atascadero's conduct at the construction site can be construed as a failure to implement Student's BIP, Student failed to show that Student's conduct of patting Hale's buttocks was a direct result of Atascadero's failure to properly implement the BIP. Parent asserted that Atascadero's failure to implement Student's BIP directed caused Student's behavior because it failed to implement Student's BIP with fidelity. However, the evidence did not support her assertion. Hale testified that she consulted with Allison multiple times a week regarding Student. Steck, Hale, and Allison would speak at least once a week regarding implementation and fidelity of Student's BIP, and Allison observed Steck and Hale's implementation of Student's BIP weekly. Allison opined that both Steck and Hale implemented Student's BIP with fidelity throughout the 2021-2022 school year. Parent conceded that an aide, like Steck, could conduct a fidelity check on herself. And Steck opined that she implemented Student's BIP with fidelity.

Although Dr. Ball also opined that Atascadero's BIP was not implemented, he also conceded that fidelity checks could only be conducted in person. Dr. Ball never saw the BIP implemented and failed to speak or ask to speak to any individuals involved in

implementing Student's BIP. Further, no evidence was presented that Parent observed Hale or Steck implementing the BIP. Thus, their assertions were speculative and unpersuasive.

Dr. Ball also opined that the failure to follow Student's BIP on May 3, 2022, maintained Student's maladaptive behavior and caused a response chain throughout the incident causing Student's conduct. However, Dr. Ball's opinion failed to explain how Student could be calm and respectful to some staff like Steck and lash out at others like Hale. If the failure to implement the BIP caused a reaction chain of maladaptive behavior, the facts would show Student's consistent maladaptive behavior throughout the incident. Here, the facts showed the opposite. Student chose who he wanted to target and could be calm one minute and physically aggressive the next. Thus, Dr. Ball's opinion was unpersuasive on that point as well.

Additionally, as discussed, since Dr. Ball and Parent did not agree to the allegations related to patting Hale's butt, their opinions were speculative and unbelievable. No other witnesses endorsed Dr. Ball and Parent's opinions. Thus, Student failed to prove Student's patting Hale's buttocks was a direct result of Atascadero's failure to implement Student's BIP on May 3, 2022.

CHARGE TWO: STUDENT PUSHING HALE INTO THE WALL TWICE WITH HIS BACKPACK

When Student left the construction area and headed to the nurse's office, he was exhibiting green behavior because he was supposed to take his medication at 2:00 p.m. each day at school. As he passed by Allison and Hale, and threatened Hale, he exhibited yellow behavior, and then green behavior again when he continued to the nurse's office.

However, both Allison and Hale did not realize at that time Student was complying with Steck's request to take his medication and followed him to investigate and make sure Student and staff were safe. They did not engage Student at any time before he physically assaulted Hale. They followed him but stayed a distance behind and blocked other entry ways to the building but not the one he was entering. Hale ended up in the same hallway as Student and was three feet behind him. It is unreasonable to disallow teachers and school staff to investigate situations if they believe there is a possible safety issue. School staff are charged to do this as part of their job, to keep students safe, regardless of whether a student has an IEP or not.

Student then engaged Hale, not the other way around, and chose to change his route and move backwards hitting his backpack against her and pushing her to the wall. She then instituted NCI strategies by letting him know to stop, and he did it again. No conduct by Atascadero staff after leaving the construction area and the assault showed that they failed to implement Student's BIP. The evidence showed that Hale's conduct was in line with NCI strategies. No evidence established that Hale's behavior or behavior of other staff from the time at the construction site until the backpack incident, was in violation of Student's BIP.

Mowinckel opined that the interventions used by staff were not at all aversive or potentially stressful; they would not have reasonably stress or aggression from Student. All Atascadero witnesses endorsed the utilization of proper strategies during the incident. No evidence beyond mere speculation established that Atascadero failed to implement Student's BIP. Thus, Atascadero properly implemented Student's BIP from the time at the construction area through the time Student assaulted Hale in the hallway.

However, if an argument can be made that Atascadero failed to implement Student's BIP at that time, Student failed to show a direct connection between Student's behavior and any BIP implementation failure. Dr. Ball opined that Hale should not have been so close to Student in the hallway and that it triggered his conduct. However, Hale's conduct was not in violation of Student's BIP. Hale could follow a student to determine if a safety issue was underway and she did not engage Student while three feet behind him.

Additionally, Dr. Ball and Parent made the same arguments regarding a failure to implement Student's BIP for this conduct as the previous conduct at the construction site. For the reasons already stated, their opinions were unpersuasive. And, while both Dr. Ball and Parent acknowledged that Student's actions in the backpack incident occurred, as Student acknowledged the same in his statement to Mowinckel, Student claimed to Parent that Hale blocked the door which was neither corroborated by anyone nor mentioned in Student's own statement soon after the incident. Dr. Hale adopted this version of events when making his opinions as well. Thus, as stated, much of their testimony could not be relied upon as speculative and uncorroborated. Student failed to prove Student's pushing Hale with his backpack against a wall twice was a direct result of Atascadero's failure to implement Student's BIP on May 3, 2022.

THE MARCH 29, 2022 INCIDENT

Although not mentioned in Student's closing brief, both Dr. Ball and Parent opined at hearing that Atascadero's failure to implement Student's BIP on March 29, 2022, directly contributed to Student's behavior on May 3, 2022. Parent asserted that an administrator grabbed Student during the March 29, 2022, incident and now Student is in fear generally of Atascadero administration and on May 3, 2002, feared Andrus or

Roberson would grab him which triggered his response chain and physical aggression toward Hale. Dr. Ball endorsed Parent's sentiments, however, couched his opinion with uncertainty.

Student failed to prove that any failure to implement Student's IEP or BIP on March 29, 2022, directly resulted in Student's physical aggression on May 3, 2022. First, there was no reliable evidence presented that Student was grabbed on March 29, 2022, and that Atascadero failed to implement Student's BIP or IEP. Both Parent and Dr. Ball's opinions derived from uncorroborated hearsay.

Second, a fear of Roberson or Andrus does not account for Student's behavior targeted at Hale, as Student had opportunities to physically assault either one and did not. Instead, he waited for Hale to be alone to physically assault her, and according to Parent and Dr. Ball, only feared Roberson and Andrus. Thus, even if Student could prove a failure to implement Student's BIP or IEP on March 29, 2022, which he did not; he also failed to establish a direct connection between Student's assaultive behavior toward Hale and a fear of Roberson, Andrus, and the administration in general. Thus, Student's conduct was not a direct result of Atascadero's failure to implement Student's BIP or IEP on March 29, 2022.

PROCEDURAL VIOLATIONS

In Student's closing brief, Student raised procedural defects that were not pled as issues in Student's complaint. Specifically, Student asserted that the manifestation determination team did not review all relevant information, and failed to provide Parent

the witness statements, the behavior tracker, and ABC sheets before or during the manifestation determination meeting depriving Parent the ability to participate in the meeting.

On June 13, 2022, Student filed a three-page complaint challenging the findings of the May 19, 2022 manifestation determination team. However, in the background portion of the complaint, Student stated that the IEP team did not consider all relevant information that was available in Student's records and that relevant information was not provided to the family.

On June 28, 2022, Student filed a prehearing conference statement and alleged one issue in this matter "Was Student's violation of the School Code of Conduct on 5/3/22 a manifestation of his disabilities, or a result of failure to implement his IEP?" Student failed to include requests to determine procedural defects of the manifestation determination meeting.

On July 1, 2022, OAH held a prehearing conference and the administrative law judge clarified the issue separating Student's issue into two issues that did not include any requests to determine procedural defects of the manifestation determination meeting.

On July 7, 2022, Student objected to the framing of the issues and requested that Student's issue, as stated in Student's June 28, 2022 prehearing conference statement, remain as the sole issue in this matter.

On the first day of hearing, the undersigned administrative law judge clarified the issue in this matter and Student agreed to the framing of the issue as stated above. At

no time did Student raise procedural challenges associated with the manifestation determination review meeting during the clarification of the issues at hearing.

Accordingly, Atascadero had no notice of these procedural challenges for hearing. Therefore, any allegations regarding any procedural defects at the May 19, 2022 manifestation determination meeting are not determined in this Decision.

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.

ISSUE 1(a):

Student failed to prove that Student's May 3, 2022 conduct was caused by, or had a direct or substantial relationship to, Student's disabilities.

Atascadero prevailed on Issue 1(a).

ISSUE 1(b):

Student failed to prove that the failure to implement Student's IEP or BIP was a direct result of Student's conduct on May 3, 2022.

Atascadero prevailed on Issue 1(b).

ORDER

1. The May 19, 2022 manifestation determination, that Student's conduct was not caused by, or a direct or substantial relationship to, Student's disabilities is affirmed.
2. The May 19, 2022 manifestation determination, that any failure to implement the IEP was not a direct result of Student's conduct is affirmed.
3. All relief sought by Student from the expedited hearing is denied.

RIGHT TO APPEAL THIS DECISION

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

/s/

Cynthia C. Fritz

Administrative Law Judge

Office of Administrative Hearings