BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. NEW HAVEN UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013031128

EXPEDITED DECISION

Administrative Law Judge (ALJ) Theresa Ravandi, from the Office of Administrative Hearings (OAH), State of California, heard this expedited matter in Union City, California, on April 25, May 2, 6 and 7, 2013.

Attorney Nicole Hodge Amey appeared on behalf of Parents and Student (Student). Student's Mother was present each day of hearing and Student's Step-Father was present at various times throughout the hearing. Student was present to testify and attended portions of the hearing. Attorney Judondi Bolton observed the first day of hearing.

Attorney Laurie E. Reynolds appeared on behalf of the New Haven Unified School District (District). District's Director of Special Education, Sarah Kappler, attended the hearing with the exception of the last day when House Principal, Ramon Camacho, attended as the District's representative.[1]

[1] Logan High School has over 4,000 students, each of whom are randomly assigned to a particular "house" which is staffed by a house principal, two vice principals

Student's Expedited Request for Due Process Hearing was filed on March 28, 2013.[2] At the conclusion of the hearing, the parties were given until 12:00 p.m. on May 13, 2013, to file any closing briefs. Both parties timely submitted their respective closing briefs and the record was closed on May 13, 2013.[3]

ISSUES[4]

Issue One: Was Student's October 26, 2012 physical altercation with a school principal caused by, or did it have a direct and substantial relationship to, her disability of attention deficit hyperactivity disorder (ADHD)?[5]

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and other support personnel. Student was assigned to House Three and Mr. Camacho was her house principal.

[2] The scheduling of the expedited hearing to commence on April 25, 2013, complied with the mandate that an expedited hearing occur within 20 school days of the filing of the expedited due process request. School was not in session March 29, 2013, a furlough day, and April 1 through 5, 2013, Spring Break; therefore, these days are not counted toward the timeline.

[3] To maintain a clear record, Student's closing brief has been marked for identification as exhibit S-22 and the District's closing brief is marked for identification as exhibit D-10.

[4] The ALJ re-worded and re-ordered the issues for clarity and consistency with federal law. No substantive changes were made.

[5] On the final day of hearing, Student withdrew her contention that her conduct was a manifestation of her specific learning disability (SLD) including visual processing deficits.

Issue Two: Was Student's October 26, 2012 disciplinary conduct the direct result of the District's failure to implement Student's individualized education program (IEP)?

CONTENTIONS OF THE PARTIES

Student contends that her disciplinary conduct was a manifestation of her ADHD. Additionally, Student maintains that the District was required to implement her 2011 behavior support plan (BSP) as well as her 2012 behavior goal and that it failed to do so. Student contends that the behavior goal could not be, and was not, implemented. It is Student's position that her conduct was a direct result of the District's failure to implement her IEP. The District contends that Student's conduct was not a manifestation of her ADHD. The District asserts that Student's disciplinary conduct was not an impulsive act and even if it were impulsive, it was not caused by her disability as her impulsivity has never manifested in physical aggression. The District maintains that at all times it implemented Student's operative IEP of September 24, 2012, including her behavior goal.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. Student is a 16-year-old young woman who resides with her Parents within the District's boundaries. She originally attended school in the District from the 2004-2005 school year through the 2007-2008 school year, and then transferred back into the District in August of 2012. She last attended James Logan High School (Logan) from the start of the 2012-2013 school year until her suspension from school on October 26, 2012.

2. The District originally qualified Student for special education in April of 2008 under the category of SLD due to a severe discrepancy between her ability and academic achievement in reading, along with visual and attention processing deficits.

Since her initial eligibility, Student has attended general education classes and received support through the resource specialist program (RSP).

3. Student was diagnosed with ADHD when she was six years old. She is prescribed Adderall which she takes in the morning to help control her symptoms of impulsivity. The undisputed evidence is that Student's ADHD manifests in class as disruptive socialization consisting of talking with peers during class time, not coming to class prepared, and needing frequent reminders to follow class procedures.

STUDENT'S OPERATIVE IEP

Previous 2011 IEP and BSP

4. California law allows a school district to create an interim placement for a special education student who transfers into the district from one special education local planning area (SELPA) to another between school years. The interim placement is not an IEP and does not require parental consent. It is intended only as a temporary program to be implemented before the first IEP team meeting, which must be held within 30 days. A district's obligations during that time are to consult with parents about the placement and to provide the student a free appropriate public education (FAPE). A district may choose to, but is not required, to implement a previous IEP under these circumstances.

5. Student transferred into the District from the Elk Grove Unified School District at the start of the 2012-2013 school year. Her prior IEP from Elk Grove, dated October 21, 2011, included academic, transition, and work completion goals, placement in general education with RSP support, academic accommodations, and a BSP with a behavior goal that called for Student to attend school regularly, be on time to each class, arrive with materials and books, and socialize at appropriate times. At hearing, the parties introduced extensive testimony regarding Student's 2011 BSP, what efforts the

District took to obtain the complete written BSP, what purpose it served, and whether the District implemented the BSP. This testimony was irrelevant to a determination of the issues for two reasons: (1) the District had no legal obligation to implement Student's prior IEP upon her transfer into the District at the start of the 2012-2013 school year; and (2) the District offered Student a new IEP dated September 24, 2012, to which Parent provided written consent. As discussed below, Student's operative IEP at the time of her disciplinary conduct was the September 2012 IEP.

September 24, 2012 IEP and Behavior Goal

6. A district must have an IEP in effect for each student with exceptional needs at the beginning of each school year. On September 24, 2012, the District convened Student's 30-day transition and annual IEP team meeting. All relevant members of the IEP team attended including Student, Parents, Mr. Camacho, Abby Jaffe-Bird, District's resource specialist, and Angela Higgerson, Student's general education biology teacher. The team reviewed Student's present levels of performance. Parent reported that Student required reminders at home to complete tasks and is more successful with one task at a time. Teachers reported that Student inappropriately socialized in class, talked out of turn, carried on conversations, and had displayed inappropriate public affection towards a male student. The IEP team determined that Student's areas of need continued to be reading, writing, math and transition, and carried forward all of her prior goals, as well as her transition plan. The team determined that Student should remain placed in a general education placement with RSP support and receive academic accommodations such as extra time, repeat instructions, check for understanding, and use of an organizer.

7. Ms. Jaffe-Bird served as Student's case carrier and study skills teacher.[6] As a case carrier her duties include drafting goals, meeting with Student and monitoring her needs and progress, ensuring implementation of her IEP, making schedule changes, and collaborating and consulting with teachers. The evidence established that Ms. Jaffe-Bird prepared an initial "IEP at a glance"[7] within the first two weeks of the school year and distributed this to each of Student's teachers electronically and in their in-box, along with a note inviting the teachers to come see her, call, or send an email, if they had any concerns with Student's behaviors or academics. Additionally, Ms. Jaffe-Bird instructed the teachers to document any behavior concerns so they could determine if there was a pattern that needed to be addressed through a new strategy, and to refer Student to the office if she engaged in behavior that warranted a referral.

8. Ms. Jaffe-Bird's testimony established that by the time of the September 2012 IEP team meeting, Student's primary challenge was her difficulty accepting responsibility for her inappropriate classroom behaviors. She proposed that the team adopt a behavior goal to encourage Student to accept consequences without talking

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[6] Ms. Jaffe-Bird received her bachelor's degree in behavior and social sciences from San Francisco State University in 1992 and her master's degree in special education from Chapman University approximately three years ago. She holds clear multiple subject and special education credentials, as well as an English language learner's and autism certificates. She has been teaching for over 20 years and has held her current position with the District for three years.

[7] An "IEP at a glance" is a summary of Student's IEP and provides a handy reference for each teacher as to Student's needs. It includes a description of Student's disability, all of her goals and accommodations, learning strengths, and a summary of past teacher notes.

back and being disrespectful.[8] Ms. Jaffe-Bird persuasively testified that the development of a behavioral goal, the lowest level of intervention, would meet Student's needs since she was not demonstrating more serious behaviors indicating a need for higher level of intervention, such as a BSP. Documentary evidence, including Student's Profile and Visit Log which detailed behavior incidents, and other witness testimony corroborated Ms. Jaffe-Bird's testimony that Student had not exhibited any disciplinary behavior at the time of the September 2012 IEP.

9. It is undisputed that Ms. Jaffe-Bird drafted a proposed behavior goal which called for Student to accept consequences for inappropriate behavior without angry outbursts.[9] The evidence established that Student had no history of angry outbursts at school although she did get angry and loud in class when Ms. Jaffe-Bird instructed her to stop hugging a male classmate. The IEP identified as a positive behavior intervention, strategy and support that Student would meet weekly with her case manager. On the same day as the IEP team meeting, September 24, 2012, Parent consented to all parts of the IEP which substituted the behavior goal for the prior BSP.[10]

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[8] Student's prior BSP identified Student's behaviors impeding learning to be: frequently tardy to class, occasionally absent, does not bring materials (lacks organization), is talkative and rolls her eyes. The testimony of two of Student's teachers established that they had difficulty getting Student to comply with class procedures.

[9] Whether this goal, which lacked a baseline, was measurable, reasonably related to Student's present level of performance, and appropriately targeted Student's area of need were not at issue in this hearing.

[10] Student challenges the "removal" of the BSP and asserts that the District committed procedural violations. However, the issue of whether the District violated Student's rights to a FAPE in the development of the September 2012 IEP is not an issue

STUDENT'S DISCIPLINARY CONDUCT OF OCTOBER 26, 2012

10. The evidence established that on October 26, 2012, Student engaged in a mutual fight on campus outside the girls' locker room in the "60's hallway" with another female student (Girl 1) immediately prior to the start of first period. Student established that a second student (Girl 2) jumped into the fray attacking Student from behind. Annette Blanford, a physical education (P.E.) teacher at Logan, arrived and observed that Girl 1 had obviously been in a fight and took her to House Office Two. She witnessed no fighting at that time and did not recall seeing Student. Ms. Blanford informed Abhijit Brar, House Two principal, of the fight, and he responded to the 60's hallway where he encountered Student yelling and upset.

11. During the hearing, there were several different eyewitness accounts regarding Student's ensuing altercation with the principal. Witnesses provided their accounts from different vantage points within a crowded hallway described as being filled with students during passing period. All of the witnesses provided important information from which to piece together what occurred. Principal Brar provided detailed testimony consistent with his written statement which he prepared shortly after the incident. He presented as sincere, thoughtfully considered each question, and was very open and non-defensive as to his hands-on involvement with Student. Other witnesses and documentary evidence corroborated his account which was highly credited.

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in this case. The issue relevant to the determination of this matter is whether the September 2012 IEP was the operative IEP in place when the behavior incident, that is the subject of this hearing, occurred.

12. At hearing, Mr. Brar provided clear, credible testimony as to his hands-on involvement with Student.[11] His testimony established the following account. Mr. Brar first observed Student walking away from a crowd of students near the girls' locker room, and yelling in the 60's hallway. He instructed her to stop and informed her that she needed to come with him. He was yelling loud enough for Student to hear over the noise of the crowded hall which had between 20-50 students nearby. When she failed to comply, he again yelled, "Don't walk away. Stop!" After 30-45 seconds, Student turned and started to walk towards him. He again instructed her to stop and told her he needed to speak with her. He was dressed in a suit and tie and carrying his walkie-talkie. He and Student had never met. Student then tried to evade him several times by moving from side-to-side in the 15 to 20 foot wide hallway. He again instructed her to stop but she did not comply. As she was about to walk past him, he reached out to the side and grabbed her upper arm. Student immediately turned to face him and kicked him. She struggled to break free and punched him in the chest. He then held both her arms around her stomach in what he called a "bear hug" to prevent her from further assaulting him. Christopher Perry, a campus security technician (CST), arrived to assist Mr. Brar in escorting Student to the office. Student dropped her weight to the floor; Mr.

[11] Mr. Brar has a master's degree in educational leadership and holds a special education mild/moderate teaching credential and administrative credential. He worked for three years at a non-public school with Families First, a group home for severely emotionally disturbed children, where he taught special education classes. He then taught a special day class and resource class and served as a case manager for three years prior to his employment with the District. He started with the District four years ago as an assistant principal for grade nine students and the last three years he has served as a house principal at Logan.

Brar let go of her; and she vomited. She was breathing heavy and crying, so he attempted to calm her. The incident was over quickly. No more than five minutes elapsed from the time he got involved at 8:15 a.m. until he placed Student in a hold.

13. Mr. Brar's testimony established that he received weekly training in de-escalation and physical restraints during the three years he worked at Families First. He was persuasive in his testimony that it is important in a crisis situation to first address a student, attempt to calm her, then move physically closer, and if a hold is necessary, to hold away from any joints to avoid injury. His testimony established that he followed these steps.

14. It was Student's perception that when Ms. Blanford took Girl 1 away, Girl 2 still had a hold of Student. However, Ms. Blanford persuasively established that when she arrived, the fight was over. Furthermore, the testimony of Student's friend credibly established that when Ms. Blanford arrived, Girl 2 immediately raised her hands proclaiming her innocence that she was not part of the fight. The evidence established that once school personnel arrived on scene, the fight ended and the crowd began to disperse.

15. Student testified that as soon as she stood up from the fight, the first thing she recalled was someone grabbing her from behind with both arms around her stomach; she was scared and kicked backwards without turning around. This version is at odds with her statement to Student's expert Rebecca Branstetter, Ph.D., that she tried to get around Mr. Brar.[12] Student's perception and recall of the incident are affected by

[12] Dr. Branstetter was qualified at hearing as an expert in ADHD and manifestation determination assessments. She obtained her master's degree in education with an emphasis in school psychology in 2000 from the University of California at Berkeley along with a Ph.D. in 2004. She obtained her school psychologist credential in 2001, is a licensed educational psychologist and received her California

her sense that she was under attack and her own description to Parent of "blacking out" until being restrained by Mr. Brar. Dr. Branstetter's opinion, discussed below, was that Student's conduct resulted from impaired self-regulation. She based her opinion on Student's self-report that she was "going crazy" and "enraged" and did not know it was the principal. Student's expert did not account for Student's report that she tried to get past the principal which undermines her conclusion that Student's conduct was caused by her ADHD.[13]

16. Mr. Camacho completed an investigation which included interviewing Student, Mr. Brar, CST Perry, and two other students including Girl 1, at Student's request.[14] He wrote an expulsion report and prepared the expulsion documents. His report of how the event unfolded is consistent in most respects with Principal Brar's account.[15]

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state license in 2009. She worked as a school psychologist for San Francisco Unified School District from 2001-2007 and for Oakland Unified School District from 2007-2011. She has operated a private practice counseling service since 2007.

[13] Dr. Branstetter wrote in her report, "She [Student] admits she tried to get past the principal" and quotes Student as saying, "I'm not going to say that didn't happen."

[14] Mr. Camacho received a master's degree in educational leadership and holds a teaching credential and two administrative credentials, tier 1 and 2. This is his fourth year as a house principal at Logan. Prior to this, he taught math for seven years at Logan and served for two years as the assistant principal for grade nine.

[15] One difference is that Mr. Camacho reports that Student punched Mr. Brar two times. Logan school psychologist Michael Piette also recalled Mr. Brar telling him that Student hit him twice. Mr. Brar testified at hearing as to one punch. Student testified

17. On October 26, 2012, the District suspended Student for violation of (1) Education Code section 48900, subdivision (a)(1): caused, attempted to cause, or threatened to cause physical injury to another person; (2) section 48900, subdivision (k): disrupted school activities, or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties; and (3) section 48915, subdivision (a)(5): assault or battery upon a school employee, an automatic mandatory recommendation for expulsion. Student's conduct violated school rules, and, in addition, law enforcement cited Student for assaulting the principal, although she was not booked into juvenile hall and no charges were filed.

ORIGINAL MANIFESTATION DETERMINATION MEETING, OCTOBER 30, 2012

18. When a special education student is suspended for disciplinary reasons for more than 10 days, the suspension constitutes a change of placement. Relevant members of the IEP team must meet to determine whether the student's conduct was a manifestation of her disability. In making the manifestation determination, the IEP team is required to answer two questions: (1) was the student's conduct caused by, or did it have a direct and substantial relationship to, her disability; and (2) was the student's conduct a direct result of the district's failure to implement the student's IEP? If the answer to either question is yes, then the student's conduct is deemed a manifestation of her disability and the district may not remove her from her current placement without an order of an ALJ. If the answer to both questions is no, then the district may change the student's placement in the same manner, and for the same duration, that it could change the placement of a student not receiving special education services.

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that she could have quickly hit him two times. Whether she punched the principal once or twice is not critical to resolution of the two issues for hearing.

19. The District held Student's initial manifestation determination meeting on October 30, 2012. Parents, John Larkin, school psychologist, Mr. Camacho, Ms. Jaffe-Bird and John Pierce, Student's world studies teacher attended. The team determined that Student's behavior was unrelated to her qualifying disability of an SLD, and that her IEP was being implemented. Mother provided the team a three page letter expressing her believe that Student's ADHD caused Student to kick and hit the principal.

JANUARY 2013 SETTLEMENT AGREEMENT[16]

20. During the fall of 2012, Student filed a due process complaint against the District. The parties resolved this complaint by way of a settlement agreement dated January 7, 2013. Among other things, the parties agreed that the District would assign a different psychologist to review Student's educational file including all assessments from the past three years and all IEP's. The District agreed to convene a new manifestation determination review after the records review to determine whether Student's conduct was caused by, or had a direct and substantial relationship to, Student's ADHD.

21. The stated purpose of the February 2013 manifestation determination review was *solely* to address Student's disability of ADHD. However, the evidence showed that the February 2013 manifestation determination review incorporated the prior findings from the October 2012 manifestation meeting, namely, that Student's conduct was not a result of her SLD or of the District's failure to implement her IEP.

[16] Although settlement agreements are confidential documents, this agreement provided the context for the narrow issues pertinent to the expedited hearing and constituted relevant, admissible evidence of the scope of the February 2013 manifestation determination meeting. (Gov. Code, § 11513, subd. (c).)

Therefore, Student is entitled to challenge both prongs of the February 2013 manifestation determination review.[17]

FEBRUARY 19, 2013 MANIFESTATION DETERMINATION REVIEW

22. The District assigned psychologist Michael Piette to conduct the agreed upon review and prepare a new manifestation determination report. Mr. Piette is a credentialed school psychologist and has served in this capacity with the District for nine years.[18] During this time he has prepared approximately 20 manifestation reports. He has received ongoing training on manifestation determination findings and competently demonstrated his knowledge of the process during his testimony. Those in attendance at the February 2013 manifestation determination review included Parents, Student and their counsel, Ms. Jaffe-Bird, Ms. Higgerson, Mr. Piette, Mr. Camacho and the District's counsel.

23. At the February 2013 manifestation determination meeting, Mr. Piette reviewed his report with the team. In preparation for his report, he conducted a review of records and interviewed Mr. Brar, Mr. Camacho and Ms. Jaffe-Bird. He credibly established that current testing of Student was not required to conduct a manifestation determination review as he did not require this additional data to reach a determination, and he had access to her 2011 triennial assessment. His testimony persuasively

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[17] Student, however, is no longer challenging the finding that her conduct was not caused by nor had a direct and substantial relationship to her SLD; Student's challenge as to the first prong is regarding her ADHD only.

[18] Mr. Piette earned his master's degree in counseling as well as his school psychologist credential at California State University, East Bay. He is board certified with the American Board of School Neuropsychology, a peer review board.

established that the big picture of how Student functions at school as provided by a record review is more telling than testing scores from self-reported rating scales, and he credibly countered Student's expert's reliance on such scores.

24. Student hired Dr. Branstetter to conduct a current behavior assessment to determine her *present* functioning and to render an opinion as to whether her disabilities *impacted* her behavior in October of 2012.[19] In addition to a record review and interview of Parent and Student, Dr. Branstetter administered rating scales to Parents and Student from the Behavior Assessment Scales for Children, 2nd Edition (BASC-2), and the Delis Rating of Executive Functioning (DREF).[20] Data from these rating scales was not highly credited in that it provided, in Dr. Branstetter's words, a current "snapshot" of Student's functioning and the scales could have yielded very different results if administered at the time of the incident. Additionally, the data was based upon self-report of Parents and Student and did not include teacher rating scales. Although Dr. Branstetter testified that teacher rating scales were not indicated as they would be based upon retrospective data since Student had not attended school for five months, the evidence established that she gave Parent the teacher rating scales to give to Student's teachers. Parent did not receive the completed scales back from the

[19] Student's expert agreed with the District team members that Student's conduct had no relation to her SLD.

[20] Dr. Branstetter's testimony established that the BASC-2 rating scales are surveys in which the rater endorses whether certain behaviors or emotions occur and with what frequency. A computer program generates a score based upon a comparison to similar-aged peers. The DREF, in addition to a survey, asks the rater to identify the top five of 25 identified stressors. Student also completed a sentence projection test.

teachers.[21] Mr. Piette's testimony persuasively established that teachers are a critical source of information on Student's functioning in the school setting, and the BASC-2 includes parent, student and teacher rating forms so that information can be gathered across environments from different perspectives.

Caused by, or Substantially Related to, Student's ADHD

25. In his report, Mr. Piette adopted Principal Brar's account of events, and based on that account, he concluded that Student's conduct was not a manifestation of her ADHD. In accord with Mr. Piette's report, the District members of the team concluded that Student's conduct was not caused by, nor substantially related to her ADHD. Student disagreed and filed an appeal of this manifestation determination.

26. The heart of this case involves competing expert opinions regarding the nature of Student's response to Principal Brar. Dr. Branstetter was not persuasive in her testimony that only a clinical expert, such as herself, is able to assess Student's ADHD and its manifestation. Both Dr. Branstetter and Mr. Piette are well qualified in the area of ADHD, executive functioning, and manifestation determination reviews. Additionally, Ms. Jaffe-Bird, Mr. Brar, Ms. Kappler, Mr. Camacho, and several teachers provided competent and credible testimony, based upon their extensive experience and training, as to the nature of Student's conduct in relation to her ADHD.

27. The evidence established that ADHD is characterized by inattention, impulsivity and hyperactivity, as identified in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM- IV). Physical aggression is not a characteristic of the disorder. One criterion for ADHD is that it occurs across environments and situations. Student was diagnosed at age six with ADHD-combined type, meaning her

[21] Parent testified she provided the scales to the teachers the week that Dr. Branstetter completed her report.

disability manifests with a combination of all three characteristics. Parent's testimony and her October 30, 2012 letter to the original manifestation determination IEP team, established that she is familiar with ADHD and how it specifically impacts her daughter.[22]

28. Parent testified that it is difficult for Student to sit still and she moves a lot because of her ADHD.[23] Parent contends that ADHD is not simply a disorder of the "hyper child" but rather entails cognitive deficits of executive brain functions which prevent Student from thinking before acting.[24] The evidence established that Student is impulsive at times. Normally, she takes the medication Adderall each morning to help control her ADHD symptoms. However, Student did not take her medication the morning of the incident.[25] Parent firmly believes that Student's poor impulse control is what caused the altercation with Mr. Brar.

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[22] Parent is a third year student in a doctorate clinical psychology program at Argosy University.

[23] This ALJ observed Student to sit quietly during her testimony and for a period of time in excess of an hour while she listened to witness testimony throughout the hearing.

[24] Parent was not qualified as an expert. Therefore, her testimony about brain function was not credited, although Student's expert and the school psychologist both addressed this topic.

[25] Parent admitted that Student has forgotten to take her Adderall at other times. There are no reports of Student exhibiting deficits in her coping skills on those days or similar behaviors.

29. The undisputed evidence is that Student's ADHD manifests as class disruption through talking in class, blurting things out, being disorganized, not getting her work in on time, and not having her planner and materials ready to go. Student has no history of physical aggression.[26] Most recently, she received three referrals in her English class for throwing an item in class, insubordination and defiance, and class disruption.

30. Mr. Piette credibly established the overriding importance of history and record review in determining whether conduct is a manifestation of Student's ADHD. His testified persuasively that students with ADHD typically have a pattern in which their impulsivity manifests over time. Here, Student has a history of impulse control in the class setting which manifests in very specific, non-aggressive ways which supports the conclusion that Student's conduct was not a manifestation of her ADHD. Parent agreed that Student has no history of any prior fights, but contended that Student could not have a pattern of hitting or kicking as she had never before felt attacked.[27] Ms. Jaffe-Bird persuasively testified that based upon her direct work with Student and her

[26] When presented with her old District records showing one incident of "mutual combat" from April of 2007, and three "unnecessary physical contacts" and two "rough plays" between February 28, 2006 and March 2008, both Mr. Camacho and Mr. Piette persuasively testified that these incidents, few and far between, did not establish a pattern of physical aggression and did not change their opinion given that the incidents occurred over four years ago, youth do change, and ADHD or not, their brains mature over time.

[27] Student had been attacked by Girl 1 at McDonald's the night prior to her altercation with the principal. Even though a McDonald's employee grabbed her and held her back, the evidence established that she did not kick or strike him.

experience of working with students with ADHD over her 20 year career, she did not see Student's ADHD taking her to the point of kicking and hitting the principal.

31. Dr. Branstetter testified that it is short-sighted to conclude that Student's ADHD could not manifest as aggression simply because she had no history of aggression. However, she was not persuasive in her opinion that Student's assault on the principal was a manifestation of her disability. There was no corroborating evidence that Student exhibited deficits in her ability to cope with stressful or anxiety-inducing situations which impacted her ability to respond appropriately to those situations. District witnesses acknowledged that impulsivity may have played a part, but they persuasively established that Student's ADHD had an attenuated relationship, if any, to her disciplinary conduct.

32. District witnesses credibly established that Student's in-class behaviors went beyond impulsivity when she argued back and refused to comply with class procedures when prompted and redirected. The evidence showed Student exhibited a pattern of willful disrespect for authority unrelated to her ADHD. Ms. Kappler has instructed at least 95 students with ADHD over her 13 years of teaching in the District.[28] In her experience, students with ADHD are not more likely than students without ADHD to engage in fights or to talk back when re-directed. She testified persuasively that talking back and arguing is a common teenage behavior and is more a reflection of Student's personality than a manifestation of her ADHD. The District established that

[28] Ms. Kappler received her bachelor's degree in general and special education from Northern Arizona University and a master's degree in education from California State University, East Bay. She holds an educational specialist and administrative credentials. She taught a special day class and resource class for 13 years in the District, and served as a program specialist in Newark for four years prior to her current position.

Student's arguing and class defiance, although intrinsically related to her disruptive socialization which is a manifestation of her ADHD, are not caused by nor substantially related to her ADHD. By extension, Student's assault on the principal, which has no relation to her class socialization, also has little to no relation to her ADHD.

Was Student's Conduct Impulsive?

INTENT TO FIGHT AS DEMONSTRATED BY ATTIRE

33. The evidence established that Student came to school on the morning of October 26, 2012, casually dressed in sweats and Ugg boots with no make-up, no jewelry and her hair not styled. According to Ms. Jaffe-Bird who sees Student daily, Student normally dresses up with short shorts and low tops, her hair and makeup done, and wearing jewelry. She had never seen Student dress so casual and shortly after the incident, she questioned her about her appearance. Student shared that she came to school prepared to fight Girl 1.[29] Mr. Camacho's testimony corroborated that of Ms. Jaffe-Bird's. He knew that Student usually dressed up for school, although at times she had been instructed to dress more modestly and to cover up. She did not appear to be dressed for her P.E. class according to Mr. Camacho. Mr. Camacho credibly established that Student told him that she needed to take care of business that morning, knew there would be a fight and that it was a continuation of a fight from the night prior.

[29]Although Student's statement to Ms. Jaffe-Bird is an out-of-court hearsay statement,

Student is a party to this action. The statement is therefore an admission of a party or a statement against her own interest, both of which are exceptions to hearsay. (Evid. Code §§ 1200, 1220, 1230; *In Re Ricky B.* (1978) 82 Cal.App.3d 106, 112.)

34. The evidence showed that on the evening of October 25, 2012, Student and her friends were at McDonald's when Girl 1 approached and told her to come outside to fight. When Student replied that she would not fight, Girl 1 slapped her in the face. Student persuasively testified that she then "lost it" and a McDonald's employee grabbed Student to keep her from fighting. Girl 1 kicked Student in the face while the employee restrained Student.

35. Student contended that she had no intention of fighting the morning of October 26, 2012; the District contended that Student went to school planning on a fight. Student established that she and Parent strategized a plan to avoid a fight, which included Student eating lunch in the office and Parent picking her up immediately after school. Parent testified she was certain Student did not go to school planning to fight as they had their plan of avoidance, and Student was terrified of fighting. Dr. Branstetter testified to her opinion that Student "absolutely" did not want to fight on October 26, 2012. Her opinion was not persuasive as it was based on Parent and Student self-reported data in March of 2013, that Student had elevated levels of anxiety and concerns with personal safety. Student's own statements to Ms. Jaffe-Bird indicated that she wanted to continue with the fight and not let it end as it did. Although the District did not prove that Student planned to fight that morning, the evidence showed that Student came to school prepared for the likelihood of a fight.

Executive Functioning Deficits as a Component of ADHD

36. Both Student's expert and Mr. Piette demonstrated their knowledge about ADHD and executive functioning which they agreed is a component of ADHD. The evidence established that executive functioning includes planning and organization, working memory, and emotional control. An individual with ADHD typically has some degree of impairment in executive functioning of which impulse control is a factor. Dr. Branstetter did not persuasively establish that a core feature of Student's ADHD is

executive functioning deficits which impede her ability to self-regulate her behavior and emotions, such that her conduct was a manifestation of her disability.

37. Mr. Piette defined impulsivity as acting without thinking and without regard for the consequences. Student did not dispute this operational definition. He persuasively testified that Student engaged in a progression of events which were not impulsive in nature. Even though the altercation unfolded quickly, there were opportunities for her to stop what she was doing during the progression. Mr. Piette credibly established that Student can demonstrate a situational impulse such as deciding to strike and kick the principal that has nothing to do with her ADHD impulsivity. Her conduct demonstrated intent even if it did not take a long time to formulate that intent. Rather than attributing her conduct to impulsivity stemming from her ADHD, he credibly testified that it is more likely that Student made a series of quick decisions without planning and therefore, by definition, her actions were not impulsive.

38. Dr. Branstetter testified that Student has difficulty thinking before she acts; that Student did not plan to kick or strike the principal, so by nature it was an impulsive act; and that given the context of the fight with the other girls, Student's fight or flight response and adrenalin rush "hijacked her thinking" and amplified her executive functioning deficits.[30] Dr. Branstetter then concluded, without supporting evidence, that Student's conduct was caused by, or had a direct and substantial relationship to, her ADHD. Dr. Branstetter's testimony was not as persuasive as that of Mr. Piette and District witnesses in that she based her opinion upon Student's account of the incident, failed to

[30] Dr. Branstetter did agree on cross-examination that Student could logically have been acting in self-defense as she perceived she was being attacked. Student's expert did not reconcile a theory of self-defense with her opinion that Student's disability rendered her unable to self-regulate and caused her to act without thinking.

account for discrepancies, relied heavily on the rating scales without accounting for their subjectivity, and did not account for the differences between a causal and/or direct and substantial relationship and a more attenuated association. Dr. Branstetter agreed on cross examination that heightened emotion such as from being in a fight can impair one's judgment and cause her to lose control and lash out without any relationship to her ADHD. She acknowledged that Student could have lashed out as she wanted to return to the fight. Her testimony, that under such a scenario Student's self-regulation deficits would be amplified, supports, at most, a conclusion that Student's misconduct had an attenuated relationship to her ADHD symptoms.

39. Principal Brar has attended approximately 25 manifestation determination reviews over his career. He is familiar with students with ADHD and impulsive acts and has had to break up many fights. Mr. Brar persuasively established that Student was obviously angry and upset, failed to comply with his directives to "stop," purposefully tried to evade him several times, and then attempted to break free of his grasp to go back in the direction of the crowd by kicking and punching him. As further support for his observation that Student willfully attempted to evade him and break free, Student informed Ms. Jaffe-Bird shortly after the incident that she still wanted to fight more once the fight ended, as she needed to represent herself and could not go down this way. Principal Brar's testimony established that while Student's kick was surprising, it was not an impulsive act. He credibly established that from the time she turned and looked at him until the time he grabbed her arm spanned about 30 seconds to a minute. He persuasively testified that she had time to hear him, see him, realize he was an adult in a position of authority, and decided to evade him and disregard his directions. Student did not prove that her conduct was an impulsive act or, that in this instance, her disability prevented her from exercising judgment.

40. Mr. Camacho testified persuasively, based upon his investigation, that the physical altercation with the principal was not an impulsive act. He has received training in manifestation determination reviews, attended seven over his career, and during his testimony demonstrated familiarity with the process. Mr. Camacho credibly established, based upon his investigation and experience, that Student chose to ignore Principal Brar and his directives, purposefully attempted to evade him, and then took steps to try to break free of his grasp to get past him. His conclusion that Student's behavior was not substantially related to her ADHD credibly accounted for how Student's ADHD manifests.

41. Student's contention that she was operating under an overwhelming level of distress the week of the incident, which exacerbated her ability to regulate her emotions and control impulses the morning of the altercation, serves to undermine her claim that her conduct was caused by her ADHD.[31] The evidence established that Student was able to cope with each stressful situation, Monday through Thursday, without exhibiting inappropriate responses, despite her disability.

42. The February 2013 manifestation determination findings that Student's conduct was not caused by, nor had a direct and substantial relationship to, her SLD or her ADHD are supported by the evidence. Student did not prove her claim that her conduct was caused by or substantially related to her ADHD.

[31] Student established that during the week of October 22, 2012, she was presented with a stressful situation each day of the week. She learned upsetting information about her deceased father, was the victim of cyber-bullying, perceived that she was pushed by her English teacher, and was attacked at McDonald's.

Implementation of Student's Operative IEP

43. The District members of the February 2013 manifestation determination team concluded that Student's conduct was not the direct result of the District's failure to implement her IEP. The evidence established that Student's operative IEP was the signed September 24, 2012 IEP which did not carry forward her prior 2011 BSP.[32] Therefore, Student's contention that her conduct was a direct result of the District's failure to implement her BSP is without merit.

44. The evidence established that Ms. Jaffe-Bird provided each of Student's teachers with a revised "IEP at a glance" following the September 2012 IEP team meeting, that the teachers were familiar with Student's IEP, and that Student was receiving services including resource support, accommodations, and a study skills class. Both Ms. Higgerson and Kenneth Pando, Student's English teacher, credibly established their familiarity with and implementation of Student's academic accommodations. The IEP team notes from the September 2012 IEP indicate that Mr. Pando repeated directions and clarified them, checked for understanding, and used graphic organizers. The District established that it implemented Student's September 2012 IEP, including her behavior goal.

IMPLEMENTATION OF BEHAVIOR GOAL

45. As Special Education Director, Ms. Kappler is responsible for program oversight and compliance. Her testimony as well as Mr. Piette's credibly established that a BSP is not needed to implement a behavior goal so much as communication with the case manager who drafted and supports the goal. Student's IEP specifies that the lowest

[32]Student's contentions that Parent did not provide informed consent to the September 2012 IEP are not at issue.

level of behavior intervention, a behavior goal, will effectively address Student's behavior challenges. Ms. Kappler credibly established that Student's teachers knew how to and did implement Student's behavior goal. Mr. Camacho persuasively testified that the IEP team discussed Student's behavior goal and understood that the object was to have Student take responsibility and not argue back. He was persuasive in his testimony that students frequently answer back to teachers, and teachers are experienced and equipped to respond effectively to modify such behavior.

46. Ms. Jaffe-Bird's testimony credibly established that she worked with Student's teachers, specifically Ms. Higgerson and Mr. Pando, on strategies to implement the behavioral goal including positive reinforcement, reminders, pairing Student with a classmate to assist her, and moving her seat. During his testimony, Mr. Pando readily recognized Student's behavior goal and persuasively established that he implemented it by verbally re-directing Student, prompting her to remain on task and reminding her of the rules. He saw it as his role to teach Student personal and social responsibility. Daniel Diaz Romero, Student's algebra teacher, testified persuasively that he was familiar with Student's "IEP at a glance" and her behavior goal which he implemented by correcting her when she was off task, pointing out that her behavior was inappropriate, and verbally reminding her what she needed to do, such as to stop talking. Student was non-compliant at times, which he addressed by having her stand outside. She accepted her consequences without angry outbursts. Likewise, P.E. teacher Elizer Bagaoisan's testimony established that Student did not engage in inappropriate behaviors in his class.

47. The September 2012 IEP called for Student to meet with Ms. Jaffe-Bird weekly and the District established this was being implemented, often on a daily basis. Ms. Jaffe-Bird's testimony persuasively demonstrated that she worked one-on-one with Student on her behavior goal by helping her to understand acceptable classroom

behavior, set short-term academic and behavior goals, organize her binder, ask for help, request accommodations, and develop life skills. Additionally, her study skills curriculum helped support and implement Student's behavior goal through group lesson plans which addressed what students can do if they feel angry such as take a break, step-out, or ask to see a counselor.

48. Student contended, but did not establish, that her behavior goal could not be implemented because the goal simply called for teachers to chart the frequency of her angry outbursts, and that her goal could not be implemented without an action plan such as a BSP.[33] Accordingly, Student's claim that the District failed to implement her IEP, which directly resulted in her disciplinary conduct, fails.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Student, as the party seeking relief, has the burden of proving the essential elements of her claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

OBLIGATIONS TO A TRANSFER STUDENT AND DETERMINATION OF OPERATIVE IEP

2. A school district must have an IEP in place for a student with exceptional needs at the beginning of each school year. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. §

[33] Student's underlying FAPE contentions that she required a BSP, and that the District inappropriately removed her BSP and failed to appropriately assess her and provide sufficient behavior supports, were poorly masqueraded failure to implement claims, and irrelevant to the issues at hearing, as this decision does not determine whether Student was offered or provided a FAPE.

300.323(a) (2006);[34] Ed. Code, § 56344, subd. (c).) When a special education student with an IEP transfers, *during the same academic year*, from one district to another in a different SELPA, the new district must provide the student a FAPE, including special education and related services "comparable" to those described in her previously approved IEP for the first 30 days. (20 U.S.C. § 1414(d)(2)(C)(i)(I); 34 C.F.R., § 300.323(e); Ed. Code, § 56325, subd.(a)(1).)

3. Student contends that her conduct, which subjected her to discipline, was the direct result of the District's failure to implement her IEP. In support of this contention, Student attempted to establish that the District failed to implement her transferring IEP from the Elk Grove Unified School District. She contends that as a transferring Student, she was entitled to the implementation of this IEP. However, Student's contention is misplaced. The issue in this case is whether the District failed to implement Student's operative IEP at the time of the behavior incident and whether that failure directly resulted in Student's behavior. As established in Factual Findings 4-9, Student's operative IEP at the time of the behavior incident subjecting her to discipline, was the September 2012 IEP. Accordingly, this decision need not reach a determination of what Student was entitled to as a transferring student or whether the District implemented Student's existent IEP from her prior school district.

CHANGE OF PLACEMENT

4. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to her. (Cal. Code Regs., tit. 5, § 3042, subd. (a).) If a special education student violates a code of student conduct, school personnel may remove the student from her

[34] All subsequent references to the Code of Federal Regulations are to the 2006 version.

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).) A "change of placement" is a fundamental change in, or elimination of, a basic element of a pupil's educational program. The removal of a special education student from her placement for more than 10 consecutive school days constitutes a change of placement. (34 C.F.R. § 300.536(a)(i).)

MANIFESTATION DETERMINATION

5. When a school district changes the placement of a student receiving special education services for specific conduct in violation of a student code of conduct, the student is entitled to certain procedural protections. The district is required to conduct a review to determine if the conduct that is subject to discipline is a manifestation of the student's disability. This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) Under California Education Code section 48915.5, an individual with exceptional needs may be suspended or expelled from school in accordance with title 20 of the United States Code, section 1415(k). The IDEA prohibits the expulsion of a student with a disability for misbehavior that is a manifestation of the disability. (20 U.S.C. § 1415(k); 34 Code of Fed. Regs. § 300.530, et seq.; *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470.)

6. Within 10 school days of any decision to change the educational placement of a student with a disability because of a violation of law or code of conduct, the local educational agency (LEA), the parent, and relevant members of the student's IEP team shall review all relevant information in the student's file, "including the child's IEP, any teacher observations, and any relevant information provided by the parents." (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).) If the review team determines that (1) the conduct in question was caused by, or had a direct and substantial relationship

to, the student's disability; or (2) the conduct was the direct result of the LEA's failure to implement the student's IEP, the student's conduct "shall be determined to be a manifestation of the child's disability." (20 U.S.C. § 1415(k)(1)(E)(ii); 34 C.F.R. § 300.530(e)(1) & (2); 71 Fed.Reg. 46720 (Aug. 14, 2006).) The revised manifestation provisions "provide a simplified, common sense manifestation determination process that could be used by school personnel." (71 Fed. Reg. 46720 (August 14, 2006).)

7. An attenuated association between the behavior and the student's disability, such as low self-esteem, is not sufficient to establish that the behavior is a manifestation of the disability. (*Doe v. Maher, supra,* 793 F.2d 1470, 1480 ["An example of such attenuated conduct would be a case where a child's physical handicap results in his loss of self-esteem, and the child consciously misbehaves in order to gain the attention, or win the approval, of his peers. Although such a scenario may be common among handicapped children, it is no less common among children suffering from low self-esteem for other, equally tragic reasons."]; 71 Fed. Reg. 46720 (August 14, 2006).)

8. The Ninth Circuit in *Doe v. Maher*, *supra,* 793 F.2d 1470, 1480, discussed the meaning of various phrases describing "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. [I]t does not embrace conduct that bears only an attenuated relationship to the child's handicap." The court went on to say: "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 [or her] 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." (*Id.* at 1482.)

9. If school personnel seek to order a change of placement that would exceed 10 school days, and if it is determined that the behavior that gave rise to the conduct violation was *not* a manifestation of the student's disability, then the district may apply the same disciplinary procedures that are applicable to children without disabilities "in the same manner and for the same duration in which the procedures would be applied to children without disabilities." (20 U.S.C. § 1415(k)(1)(C).) The student must still receive a FAPE, although it may be provided in an interim alternative educational setting. (20 U.S.C. § 1415(k)(1)(D)(i).) In addition, the student shall "receive, as appropriate, a functional behavioral assessment (FBA) and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur." (20 U.S.C. § 1415(k)(1)(D)(ii).)

10. If the review team makes a determination that the student's conduct *was* a manifestation of the student's disability, then the IEP team shall conduct an FBA and implement a behavior intervention plan (BIP) for the student, if the LEA had not already conducted one prior to the behavior at issue; review any existing BIP and modify it, as necessary, to address the behavior; and return the student to the special educational placement from which the student was removed, unless the parent and the LEA agree to a change of placement. (20 U.S.C. § 1415(k)(1)(F).)

11. The parent of a student with a disability, who disagrees with either a district's decision to change the student's educational placement as a disciplinary measure or the manifestation determination, may appeal by requesting a due process

hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532 (a) & (c).)[35] An expedited hearing shall be held within 20 school days of the date the hearing is requested and a decision or "determination" shall be made by the hearing officer within 10 school days after the hearing. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532 (c)(2).) In appropriate circumstances, the ALJ hearing the dispute may order a change in placement of the student, and may return the student to the placement from which she was removed. (20 U.S.C. §1415(k)(3)(B)(ii); 34 C.F.R. § 300.532(b)(2)(i).)

ISSUE ONE: WAS STUDENT'S OCTOBER 26, 2012 PHYSICAL ALTERCATION WITH A SCHOOL PRINCIPAL CAUSED BY, OR DID IT HAVE A DIRECT AND SUBSTANTIAL RELATIONSHIP TO, HER DISABILITY OF ADHD?

12. As set forth in Factual Findings 1-3 and 6-42, and Legal Conclusions 1 and 4-11, the evidence established that Student's conduct was not caused by nor did it have a direct and substantial relationship to her ADHD. The evidence showed that Student's impulsivity did not manifest in physical aggression and there was no evidence of Student exhibiting weakness in coping with stressful situations which impacted her ability to respond appropriately. Furthermore, Student's actions were not impulsive. Student's conduct demonstrated poor judgment, but the evidence did not demonstrate that Student's poor judgment was a manifestation of her ADHD as opposed to a manifestation of her youth, or anger, or heightened emotionality, or any other non-disability related rationale for engaging in such behavior.

[35] The district may also request a hearing in specified circumstances.

ISSUE TWO: WAS STUDENT'S OCTOBER 26, 2012 DISCIPLINARY CONDUCT THE DIRECT RESULT OF THE DISTRICT'S FAILURE TO IMPLEMENT STUDENT'S IEP?

13. As set forth in Factual Findings 1-9, 18-21, and 43-48, and Legal Conclusions 1-6 and 9-11, Student did not sustain her burden of proving that the District failed to implement her IEP. Parent consented to the September 24, 2012 IEP and this was Student's operative IEP. The evidence showed that teachers were aware of her IEP goals and accommodations and implemented these to enable her to obtain educational benefit. Additionally, the IEP included a behavior goal which the evidence showed was capable of being implemented without a BSP and was implemented by Student's case carrier and her teachers. Accordingly, Student did not establish that the District failed to implement her IEP, or that such a failure directly resulted in her conduct on October 26, 2012.[36]

ORDER

Student's request for relief from the District's February 19, 2013, manifestation determination of is denied. Student's conduct on October 26, 2012, which led to Student's suspension pending expulsion, was not caused by, and did not have a direct and substantial relationship to her ADHD. Further, Student's conduct was not a result of the District's failure to implement her IEP. Therefore, the conduct was not a manifestation of Student's disability.

[36] This Decision does not determine whether Student's operative IEP provided a FAPE.

PREVAILING PARTY

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

NOTICE OF APPEAL RIGHTS

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

Dated: May 20, 2013

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings