



SCHOOL & COLLEGE LEGAL SERVICES
OF CALIFORNIA

Texas Association of School Psychologists
(TASP)

Legal and Ethical Best Practices Regarding Manifestation Determinations

November 5, 2021

Presented by:

Carl D. Corbin,
General Counsel

School & College Legal Services of California
5350 Skylane Boulevard
Santa Rosa, CA 95403

Tel: (707) 524-2690
Fax: (707) 578-0517
santarosa@sclscal.org
www.sclscal.org

Carl D. Corbin General Counsel

ccorbin@sclscal.org

Areas of Expertise

Special Education; Section 504 Issues;
Student/Parent Issues including Student
Discipline; Certificated and Classified
Personnel Issues



Experience

Mr. Corbin has successfully represented districts at various stages of special education litigation, including administrative hearings. He has assisted districts in responding to student and employee complaints before DFEH, EEOC, CDE, and OCR. He has also represented districts with classified and certificated layoffs and other employee related matters.

Mr. Corbin works with districts to avoid litigation through preventive education by presenting workshops, and developing training and prevention materials, including Legal Updates.

Mr. Corbin served on the Office of Administrative Hearings Special Education Advisory Committee for the State of California for the 2008-2009 and 2009-2010 school years. From Spring 2007 through Spring 2012 he was a lecturer at Sonoma State University in either the Department of Educational Leadership or Special Education. He is a past president of the California Council of School Attorneys.

Prior to joining SCLS, Mr. Corbin served in the United States Army for over three years. He has ten years' experience as a Counselor or School Psychologist, is a Licensed Educational Psychologist (Inactive), and a Nationally Certified School Psychologist.

Education

J.D. Berkeley Law (University of California at Berkeley), 2005

Specialist degree in School Psychology, Gallaudet University (Washington D.C.) 1998

Masters in Developmental Psychology, Gallaudet University (Washington D.C.) 1996

School and College Legal Services (SCLS) is a joint powers authority serving school districts, county offices of education, SELPAs, and community colleges in over fifteen counties in Northern California. Our primary focus, as a *preventative law firm*, is helping clients avoid future costly legal problems. We are a collaborative office, working to ensure our clients receive the most legally defensible advice in the most efficient manner possible.



SCHOOL & COLLEGE LEGAL SERVICES
OF CALIFORNIA

5350 Skylane Boulevard ▪ Santa Rosa, CA 95403 ▪ (707) 524-2690

Fax: (707) 578-0517 ▪ www.sclscal.org



SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

Texas Association of School Psychologists (TASP)

Legal and Ethical Best Practices Regarding Manifestation Determinations

November 5, 2021

	Page
1. PowerPoint Presentation.....	1-40
2. <i>Liberty Union High Sch. Dist.</i> (OAH 5-17-17) No. 2017040078	41
3. 34 CFR sections 300.530-537.....	58
4. Sample Texas MD Hearing Officer Decision <i>Student v. Lewisville Ind. Sch. Dist.</i> (2-8-18) No. 092-SE-1217.....	61

These materials have been prepared by School & College Legal Services of California for informational purposes only and are not intended to constitute legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. Persons receiving this information should not act on it without seeking professional counsel. This information is not intended to create and does not constitute an attorney-client relationship between parties.

© 2021 School and College Legal Services of California

All rights reserved. However, SCLS grants permission to any current SCLS client to use, reproduce, and distribute these materials in its entirety for the client's own non-commercial purposes.



SCHOOL & COLLEGE LEGAL SERVICES
OF CALIFORNIA

Legal and Ethical Best Practices Regarding Manifestation Determinations

November 5, 2021

Presented by:
Carl D. Corbin, General Counsel
School & College Legal Services

www.sclscal.org | 1



Learner Objectives

This session will help participants:

1. Learn the legal requirements governing the behavior and discipline needs of special education students.
2. Understand the legal basis governing special education behavior, discipline, and manifestation determination meetings.
3. Develop the skills to complete a legally defensible manifestation determination meeting.

www.sclscal.org | 2



SCHOOL & COLLEGE LEGAL SERVICES
OF CALIFORNIA

Texas!

- Population estimate: 29,145,505
- % Children under age of 18: 25.5%
- Public School K-12 Students: 5,371,586 (2020-2021)
- Median household income: \$61,874 (2019 dollars)
- Land area in square miles: 261,231
- Capital: Austin
- Largest city: Houston (2,304,580)(2020)

<https://www.census.gov/quickfacts/TX>

https://www.texas-demographics.com/cities_by_population

<https://tea.texas.gov/reports-and-data/school-performance/accountability-research/enrollment-trends>

Texas! Fort Sam Houston 1989



Texas! Padre Island 1989



IDEA & Section 504

Special Education/Section 504 Discipline

For the most part, the same rules apply to students who qualify for services under Section 504 of the 1973 Rehabilitation Act (“Section 504”) as apply to students who qualify for services under the Individuals with Disabilities Education Act (“IDEA”). Differences between Section 504 and IDEA will be discussed.

Acronyms

- IDEA – Individuals with Disabilities Education Act
- Section 504 – Section 504 of the Rehabilitation Act of 1973
- FBA – Functional Behavioral Assessment
- BIP – Behavioral Intervention Plan
- IAES – Interim Alternative Educational Setting
- OCR – United States Department of Education, Office for Civil Rights
- CFR – Code of Federal Regulations (In Particular 34 CFR...)
- LEA – Local Educational Agency
- MD – Manifestation Determination
- OSERS – Office of Special Education and Rehabilitative Services
- OSEP – Office of Special Education Programs
- USC – United States Code (In Particular 20 USC...)
- OAH – California Office of Administrative Hearings
- IEP – Individualized Educational Program

Handouts

1. PowerPoint Presentation
2. *Liberty Union High Sch. Dist.* (OAH 5-17-17) No. 2017040078.
3. 34 CFR sections 300.530-537.
4. Sample Texas MD Hearing Officer Decision
 - *Student v. Lewisville Ind. Sch. Dist.* (2-8-18) No. 092-SE-1217.
 - https://tea.texas.gov/sites/default/files/092-SE-1217_Lewisville%20ISD.pdf

Available Upon Request

The below documents are available via the link or upon request:

Questions and Answers on Discipline Procedures (OSERS June 2009):

https://sites.ed.gov/idea/files/08-0101_Discipline_FINAL_June_2009-1.pdf

Dear Colleague: Positive Behavior Interventions and Supports (OSERS Aug. 1, 2016):

<https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf>

Special Education Discipline

- Texas Education Agency guidance
 - <https://tea.texas.gov/academics/special-student-populations/special-education/programs-and-services/state-guidance/discipline-and-school-removals>

Circuit Courts

Geographical Boundaries of U.S. Courts of Appeals
and U.S. District Courts



Special Education Discipline

- Special Education (and 504 students) are also “special” when it comes to discipline.
 - Special education student.
 - Student in process of being assessed for special education.
 - Student whom the Local Educational Agency (“LEA”) had a basis of knowledge the student might be a special education student.
 - 504 students. (34 CFR section 104.35)
 - *Dunkin (MO) R-V Sch. Dist.* (OCR 2009) 52 IDELR 138.

Special Education Discipline

- “In Texas, the IEP team is known as the Admissions, Review, and Dismissal Committee (“ARDC”)...”
- “Additional procedural safeguards are required when a school district seeks to place a student with a disability in a Disciplinary Alternative Education Program (“DAEP”). When such placement is to be for a period exceeding ten school days, the ARDC must make a manifestation determination,...”
- Holding that the district did not violate the IDEA when it placed a middle schooler with ADHD and a specific learning disability in an interim alternative education setting for 60 days after he photographed a schoolmate on the toilet when the misconduct was not a manifestation of student’s disability.
 - *C.C. v. Hurst-Eules-Bedford Indep. Sch. Dist.* (N.D. Tex. 2015) 2015 WL 2443835, *aff’d*, 653 F.App’X (5th Cir. 2016) *unpublished*

Functional Behavioral Assessment

The IDEA does not specifically define “FBA”...

- In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, the use of “positive behavioral interventions and supports, and other strategies to address that behavior.” 20 USC section 1414(d)(3)(B)(i); 34 CFR section 300.324(a)(2)(i).
- The purpose of a FBA is to isolate a target behavior (a behavior that interferes with the student’s learning) and to develop a hypothesis regarding the function of the target behavior for the purpose of developing a BIP to address the target behavior through strategies and interventions to result in a positive replacement behavior.
 - *Anaheim City Sch. Dist.* (OAH 6-14-10) 2010010357.

Functional Behavioral Assessment

Requirements of a FBA:

- If an FBA is used to evaluate an individual child to assist in determining the nature and extent of special education and related services that the child needs, the FBA is considered an evaluation under federal law.
 - *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007).
- Consequently, an FBA must meet the IDEA's legal requirements for an assessment, such as the requirement that assessment tools and strategies provide relevant information that directly assists in determining the educational needs of the child. 34 CFR section 300.304(c)(7).

When is an FBA Required?

- Student changed topics quickly, walked away, mumbled, picked his nails, licked his hands, touched the wall, and plugged his nose.
 - The district assessed student's behaviors based on observations and interviews and four standardized assessment tools: the BRIEF, the BASC-II, the BASC-Self Report, and the GARS-3.
 - There was no evidence that the behaviors impeded student's learning or that of others "even minimally."
 - The ALJ found that it was appropriate for the district to conclude that his behaviors were not severe enough to warrant an FBA.
- "A district is not required to use a functional behavior assessment to evaluate every behavioral issue. The district may, for example, conclude that behavior that 'does not seriously interfere with instruction' is not severe enough to warrant a functional behavior analysis."

San Marino USD (OAH Oct. 2017) OAH No. 2017040077.

When is an FBA Required?

- Student demonstrated that his behaviors impeded his learning and that of others. His off-task behaviors of excessive talking, walking around the classroom, blurting out answers, and fidgeting with a pencil, resulted from his ADHD and were heightened when he did not take his medication.
- Student's teachers implemented classroom accommodations to address the behaviors, and his annual IEP added goals to address homework completion, organization, following directions, remaining on-task, and completion of in-class assignments.
- The ALJ found that the evidence showed that the district had already identified the student's target behaviors, developed accommodations to address those behaviors, and developed goals to track progress on those behaviors.
 - Interestingly, the student's expert witness did not recommend an FBA and instead found that observing his classroom performance revealed more information than a formal assessment in the area of behavior.
 - The ALJ noted that the student did not present evidence that an FBA would have either: (1) Identified additional target behaviors; or (2) Suggested different goals to address the already identified behaviors.
 - The student also did not require a formal BIP, as the district used positive behavioral interventions, supports and other strategies to address Student's behaviors impeding learning, during all relevant time periods.

Capistrano Unified School District, et al. (OAH July 2017) No. 2017020910.

When is an FBA Required?

- Daily behavior logs showed an increase in inappropriate and aggressive behaviors, which showed that the interventions being provided to the student were ineffective. Without an FBA, the district did not have enough information to curb the student's problem behaviors.
 - The district's program specialist testified that the behaviors had reduced; however, the daily behavior logs contradicted that opinion.
 - The student was frequently removed from the classroom due to disruptive behaviors. Student seldom followed instructions, frequently did not respond to prompting, often sat or lay on the floor, and refused to cooperate with anyone for extended periods of time. It was also common for Student to pinch and hit his teacher and other students.
- The failure to conduct an FBA resulted in the development of inadequate behavior goals, which did not teach positive replacement behaviors or guidance to the teacher tasked with remediating the behaviors.
- *Los Alamitos Unified School District (OAH Aug. 2015) No. 2015050300.*

What about a BIP?

- “However, neither Congress, the U.S. Department of Education, nor any statute or regulation has created substantive requirements for a behavior plan as contemplated by the IDEA. (*Alex R. v. Forrestville Valley Community Unit Sch. Dist. #221* (7th Cir. 2004) 375 F.3d 603, 615.) The IEP team must consider the use of positive behavioral interventions and supports, and other strategies, but the implementing regulations of the IDEA do not require the team to use any particular method strategy or technique. (71 Fed. Reg. 46,683 (Aug. 14, 2006).)
 - *Mill Valley Elem. Sch. Dist.* (OAH 7-31-15) 2014110046, pgs. 53-54.
 - Also see: *Antioch Sch. Dist.* (OAH 5-9-18) 2017080513.

What about a BIP?

20. However, the resulting **behavior intervention plan was fatally flawed** in that it did not correctly identify **functionally equivalent replacement behaviors, specific target behaviors during stages of escalation through de-escalation, or strategies to reduce the problem behaviors**. Dr. Santos [Parent’s Witness] described the behavior intervention plan as incomplete and determined it could not be implemented as written.

21. Staff did not consistently address Student’s problem behaviors during the earliest stages of escalation. Student moved from having his head on the table, to falling under the table, and laying there for some time. This reinforced problem behaviors, since Student obtained what he sought-avoidance and escape. The stated purpose of the behavior assessment and plan was to identify such strategies to develop consistency between Student’s providers so that problem behaviors would decrease.

22. Temple City’s IEP offer did not offer Student appropriate behavior intervention services, because the behavior plan was incomplete and could not be implemented as written. Accordingly, Temple City denied Student a FAPE.

- *Temple City USD* (OAH 4-7-19) 2018060785/2018070829, pg. 19.

What about a BIP?

- Orcutt created a plan allowing Parent to park directly in front of the school gate. Orcutt provided two aides to help Student transition through the gate. **Orcutt should have assisted Parent at her car when she parked in designated parking spot next to the gate.**
- **However, staff was not required to physically pull Student from the vehicle as Parent requested because it was required to use positive behavior supports.** When a disabled child's behavior impedes the ability to learn, the IEP team shall consider the use of positive behavioral interventions, supports, and strategies to address the behavior. (20 U.S.C. §§ 1414(d)(3)(B)(i); Ed. Code, § 56341.1, subd. (b)(1).) A disabled child's education is more effective when positive behavioral interventions and supports are provided to address the child's learning and behavioral needs. (20 U.S.C. § 1400(c)(5)(F); Ed. Code, § 56520, subd. (a)(3).) **Extricating Student from Parent's vehicle, at her request, is not a positive behavior support, and Orcutt was not required to physically remove Student from Parent's vehicle as a behavioral emergency intervention because he was not a danger to himself or others.**
- Orcutt denied Student a FAPE for failing to offer behavior support to assist Student's transition from Parent's car to the school gate on the days when Parent parked in the reserved spot by the gate, on school property. However, Orcutt was not required to physically remove Student from the car because that is not a positive behavior support. **Orcutt was also not required to follow Parent to her parking lot of choice across the street when Orcutt provided her a designated spot next to the gate on school property.** The IDEA requires transportation of a disabled child only to address his educational needs, not to accommodate a parent's convenience or preference. (Fick v. Sioux Falls School Dist. 49-5 (8th Cir. 2003) 337 F.3d 968, 970.)
 - *Orcutt USD* (OAH 12-4-20) 2019120978/2019101249, pgs. 89-90.

FBA + IDEA 2004

- Congress removed from IDEA 2004 the requirement to conduct a FBA or review and modify an existing BIP within 10 days of a disciplinary removal regardless of whether the behavior was a manifestation of the student's disability.
- But still a really, really, good idea.
- IDEA 2004 still requires FBA or review of BIP if behavior was a manifestation of disability.

Change in Placement

In-School Suspension:

- In-school suspension is not a change in placement for purpose of convening MD if:
 1. The student is afforded the opportunity to continue to appropriately participate in the general curriculum; and
 2. Continue to receive the services specified on the student's IEP; and
 3. Continue to participate with nondisabled students to the extent they would have in their current placement.
 - 71 Fed. Reg. 46,715 (2006).

Change in Placement

Partial school days?

- “Portions of a school day that a child had been suspended may be considered as a removal in regard to determining whether there is a pattern of removals...” 71 Fed. Reg. 46,715 (2006).
- OSEP found “The use of short-term disciplinary measures [administratively shortened day]...implemented repeatedly (emphasis added), could constitute a disciplinary removal.” *Letter to Mason* (OSEP 7-27-2018).
- OCR found “early dismissal” of student from school, even without being formally suspended, counted towards 10 days for determining the need to conduct a manifestation determination for a special education student. *South Bronx Classical Charter Sch.* (OCR 6-7-12) 02-12-1064.

Tip: In the absence of any other federal guidance on this issue, we advise that LEAs “round up” when calculating school days for purpose of “pattern of removals...”

Bus Suspension

- If transportation is included on a student’s IEP then a bus suspension is treated like a suspension under 34 C.F.R. 300.530 unless alternative transportation is provided.
 - *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46715 (August 14, 2006)
- See EC 48915.5, which requires alternative transportation to be provided in case of bus suspension if the service is on student’s IEP.
- OSEP opined in *Letter to Sarzynski* (6-21-12) 112 LRP 35343 that LEA must still convene MD even if parent voluntarily transports the student to/from school when: the student has been suspended for over 10 days (including any bus suspensions) during a school year; the student has been suspended from the bus; and transportation services are provided for in the student’s IEP as a related service.

Change in Placement

A “change in placement” occurs when:

1. The series of removals total more than 10 consecutive school days in a school year; or
2. The student is subjected to a “series of removal that constitutes a pattern.”

Series of removals that constitutes a pattern:

1. Totals more than 10 school days in a school year; and
2. Student’s behavior is substantially similar to student’s behavior in previous incidents that resulted in a series of removals; and
3. Because of additional factors such as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another. (34 C.F.R. 300.536)

4 Types of Removals

1. Short term removals for 10 days or fewer.
2. Short term removals that total more than 10 cumulative days constituting a change in placement.
3. Short term removals that total more than 10 cumulative days that does not constitute a change of placement.*
* Danger Zone – proceed with caution...
4. Long term removals of more than 10 consecutive days.

Type 1

1. Short-term removals for 10 days or fewer
 - Suspension of 10 days or less per school year = student not entitled to any services.
 - General Disciplinary Rules Apply.
 - No Manifestation Determination meeting required.
 - Best practice is to consider FBA+BIP and convene IEP meeting.

Types 2 and 4

2. Short term removals that total more than 10 cumulative days constituting a change in placement.

4. Long term removals of more than 10 consecutive days.

- Students have a right to educational services on 11th Day to enable student to:
 - Participate in general education curriculum, although in another setting (may be interim alternative setting); and
 - To progress towards meeting the student's IEP goals.
- (34 C.F.R. § 300.530(d))
- Receive a FBA+BIP “as appropriate” (should happen).
 - Manifestation Determination must happen within 10 school days of any decision to change the placement of the student.
 - IEP team determines scope of services – parent may disagree = expedited due process hearing. Discuss at MD meeting.

www.sclscal.org | 29

Types 2 and 4 cont.

2. Short term removals that total more than 10 cumulative days constituting a change in placement.

4. Long term removals of more than 10 consecutive days

- The LEA should not have a policy of providing all students with a “standard” service – rather the scope of services should be discussed on individual basis at the MD meeting.
- OAH ALJ ordered a LEA, among other remedies, to provide 4 hours of training to staff focusing on provision of special education services to students suspended pending expulsion when LEA staff testified that the LEA's standard practice was to uniformly provide only “homework packets” to “RSP only” students on suspension pending expulsion hearing.

Fresno Unified Sch. Dist. (OAH 6-22-12) 2012020842.

www.sclscal.org | 30

WARNING Type 3 WARNING

3. Short-term removals of more than 10 cumulative days not constituting a change in placement.

- Students have a right to educational services on 11th Day to enable student to:
 - Participate in general education curriculum, although in another setting (may be interim alternative setting); and
 - To progress towards meeting the student's IEP goals.
(34 C.F.R. § 300.530(d)(4))
- Receive a FBA+BIP "as appropriate" (should happen).
- Manifestation Determination not required but what if...
- IEP team determines scope of services – parent may disagree = expedited due process hearing.
- Services the student receives NOT determined by IEP team, but by "school personnel, in consultation with at least one of the student's teachers."

Manifestation Determination

When:

- Held within 10 school days after decision to impose a removal that constitutes a change in placement. (34 C.F.R. 300.530(e))

Purpose:

- To review the relationship between the student's disability and behavior subject to disciplinary action

Procedures:

- (Federal) LEA, parent and relevant members of IEP team consider evaluation/diagnostic results, observations, information supplied by parents, student's IEP and placement. (34 C.F.R. 300.530(e))
- (State) Used to have separate state procedures, but now aligned with federal standards. (EC 48915.5)

Procedural Safeguards:

- On date decision is made by LEA to make a removal that constitutes a change of placement, parents must be notified and provided with a copy of procedural safeguards. (34 C.F.R. 300.530(h))

Manifestation Determination Meeting

- The modified IEP team* must determine whether the student’s behavior was a manifestation of the student’s disability.
- However, “it is not appropriate to make IEP decisions based on a majority ‘vote.’” Rather, if there is a disagreement, the LEA representative makes a decision and the parent has the right to seek resolution through an expedited due process decision.
- *Letter to Richards* (OSEP 1-7-10) 55 IDELR 107.

Manifestation Determination Meeting

It is undisputed that a general education teacher, like Grisham, is a mandatory member of an IEP team. *See* 34 C.F.R. § 300.321. However, Section 1415(k) “does not name specific individuals who must make a manifestation determination concerning a disabled child.” *Fitzgerald v. Fairfax County Sch. Bd.*, 556 F. Supp. 2d 543, 552-53 (E.D. Va. 2008). Rather, it defines the MDR’s attendees as “the [local education agency], the parent, and *relevant members* of the IEP Team (*as determined by the parent* and the [local education agency].” *See* 20 U.S.C. § 1415(k)(1)(E)(i) (emphasis added); *see* 34 C.F.R. § 300.350(e). **This plain language reveals that “[t]he MDR committee is ... a subset of a disabled child’s IEP team.”** *Fitzgerald*, 556 F. Supp. 2d at 552 (emphasis added). That is, an MDR team could consist of the entire IEP team, or, at the parent’s and local education agency’s discretion, a fraction of the whole IEP team. *See D.C. v. Mount Olive Tp.Bd. of Educ.*, No. CIV. 12-5592 KSH, 2014 WL 1293534, at *28 (D.N.J. Mar. 31, 2014) (“Although the statute requires ‘relevant members of the IEP Team’ to be present at the [MDR] meeting, it gives ‘the parent and the local education agency’ broad discretion to determine relevancy.”).

- *Gloria V. Wimberley Independent Sch. Dist.* (W.D.TX 2021) 2021 WL 770615, pgs. 8-9.

Manifestation Determination Meeting

The two questions to be addressed at a MD:

1. Was the conduct in question caused by, or had a direct and substantial relationship to the student's disability; **OR**
 2. Was the conduct in question the direct result of the LEA's failure to implement the student's IEP.
- 34 CFR section 300.530(e).

Manifestation Determination Meeting

The court does not find, and G.V. does not reveal any authority showing, that the IDEA requires an MDR Team to verbally discuss every one of a student's diagnosed disorders. Instead, the plain language of the statute requires only that the MDR Team assess whether a student's misconduct was a manifestation of a disability. 20 U.S.C § 1415(k)(1)(E) (i). G.V. has not shown by a preponderance of the evidence that the MDR Team erred by neglecting to verbally discuss whether B.V.'s other IDEA recognized disabilities were the direct cause of the underlying conduct. In fact, there is no evidence anywhere in the record, including in the testimony of G.V.'s experts, that B.V.'s other diagnoses caused B.V. to steal the ATV. Accordingly, the MDR Team appropriately assessed the most plausible theory, as agreed on by G.V. and Little, and ultimately rejected it. Thus, the fact that the MDR Team focused on B.V.'s ADHD does not amount to an error under the IDEA.

- *Gloria V. Wimberley Independent Sch. Dist.* (W.D.TX 2021) 2021 WL 770615, pg. 12.

Manifestation Determination Meeting

Additionally, G.V. has not shown by a preponderance of the evidence that the MDR was conducted with a fatal level of **generality**. G.V. is correct that there were discussions during the MDR regarding what a typical student with ADHD would do. *See* R31. However, the crux of the MDR Team's opinion, based on all of the information available to them, was that B.V.'s specific action at issue – stealing an ATV – would at least require some sort of planning for execution. Upon concluding this required planning precludes a finding that the ATV theft was directly related to B.V.'s impulsivity, WISD members of the MDR Team decided the underlying theft was not caused by B.V.'s ADHD.

- *Gloria V. Wimberley Independent Sch. Dist.* (W.D.TX 2021) 2021 WL 770615, pg. 13.

Manifestation Determination cont.

J.H. v. Rose Tree Media Sch. Dist. (E.D.PA. 2018) 2018 WL 4405890, at pg. 1.

On March 1, 2017, J.H. assaulted another student. (*Id.* at 4.) A different student agreed to film J.H. assault the victim and share the video online. (*Id.*) When J.H. approached the victim during lunch to talk, the victim offered J.H. a box of raisins. (*Id.* at 3.) Without provocation, J.H. abruptly grabbed the victim's head and smashed it into his lunch on the cafeteria tabletop. (*Id.*) The victim became upset and struck J.H.'s chest. (*Id.*) J.H., "still standing over the [victim], then wound up like a softball pitcher and delivered a fist punch to the left eye socket on the [victim's] face." (*Id.*) As a result, the victim suffered a broken nose and eye socket, a collapsed nasal cavity, an air pocket behind the left ear, and a concussion. (*Id.* at 4.)

Manifestation Determination cont.

J.H. v. Rose Tree Media Sch. Dist. (E.D.PA. 2018) 2018 WL 4405890, at pg. 1.

On March 7, 2017, the District held an MDR. (*Id.* at 5.) The psychologist, the secondary supervisor of special education, the assistant principal, the counselor, the regular education teacher, the special education teacher, L.H., J.H.’s grandfather, and J.H. attended the MDR. (*Id.*; Manifestation Determination Worksheet at 8.) “To ensure the manifestation determination team had up to date data[,] the psychologist spent three to four hours reading and reviewing records.” (HOD at 16.) The team reviewed the relevant records and collected input from the teaching staff, the psychologist, the mental health counselor, and L.H. (*Id.* at 5.)

Manifestation Determination cont.

J.H. v. Rose Tree Media Sch. Dist. (E.D.PA. 2018) 2018 WL 4405890, at pg. 3.

The hearing officer correctly determined that the District’s MDR was legally sufficient. MDR attendees “shall review all relevant information in the student’s file.” § 1415(k)(1)(E). But each member of the review team need not review the entire file. *See Fitzgerald v. Fairfax Cty. Sch. Bd.*, 556 F. Supp. 2d 543, 559 (E.D. Va. 2008) (“All the statute requires is that, before reaching a manifestation determination, the team must review the information pertinent to that decision.”). Here, at least two members of the MDR team reviewed video footage capturing the incident. (Pls.’ Mot. at 12; Tr. 244:13–25.)

Manifestation Determination cont.

J.H. v. Rose Tree Media Sch. Dist. (E.D.PA. 2018) 2018 WL 4405890, at pg. 4.

Here, the parties agree that J.H.’s disabilities are Attention Hyperactivity Disorder Inattentive Type and a Specific Learning Disability in Written Expression. (HOD at 15.) The MDR team and the hearing officer considered J.H.’s disability-related manifestations such as impulsiveness and low frustration tolerance; “stressors” that Plaintiffs asserted are interconnected with J.H.’s disabilities such as family dynamics and living arrangements; and other factors such as cyberbullying. (HOD 13–16.)

www.sclscal.org | 41

Manifestation Determination cont.

J.H. v. Rose Tree Media Sch. Dist. (E.D.PA. 2018) 2018 WL 4405890, at pg. 4.

It is unapparent to the Court how J.H.’s disability, or its impulsive effects and associated stressors, caused or directly and substantially related to a planned assault on another student. *See Danny K. v. Dep’t of Educ.*, Civ. A. No. 11-00025, 2011 WL 4527387, at *15 (D. Haw. Sept. 27, 2011) (noting that planned activities are less likely manifestations of a student’s ADHD because the disability affects organization or attentiveness).

www.sclscal.org | 42

Manifestation Determination cont.

Danny K. v. Dept. of Educ., State of Hawaii (D.HI. 2011) 2011 WL 4527387, at pg. 1.

- Student is currently sixteen years old and his public home school is Castle High School.
- Student was identified as eligible for special education and related services under the Individuals with Disabilities Education Act (“IDEA”) in March 2010, due to a diagnosis of Attention–Deficit/Hyperactivity Disorder, Predominantly Inattentive Type (“ADHD”).
- In May 2010, however, Student set off a firework/bomb in the boys’ bathroom at Castle, causing extensive damage.

Manifestation Determination cont.

Danny K. v. Dept. of Educ., State of Hawaii (D.HI. 2011) 2011 WL 4527387, at pg. 11.

The officer further noted that school psychologist Leslie Kunimura, who was part of the team, “opined that Student’s conduct in lighting off the bomb was not a manifestation of his diagnosis of ADHD, inattentive type”; and that behavioral health specialist Jackson “testified that Student is able to appreciate the consequences of his actions, even though he has been diagnosed with ADHD, inattentive type, and he is impulsive.” *Id.* The officer agreed that “[t]he facts surrounding the explosion show that Student’s admitted act of lighting the fuse was not an impulsive act which Student could not control.”

Manifestation Determination cont.

Danny K. v. Dept. of Educ., State of Hawaii (D.HI. 2011) 2011 WL 4527387, at pgs. 12-13.

Plaintiffs cite no authority, and the Court has found none, 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. Such a requirement would essentially deputize manifestation determination teams, and in turn, administrative hearings officers and federal courts, as appellate deans of students.

Accordingly, the manifestation determination team did not violate the IDEA in accepting the Defendant's finding that Student set off the firework without independently reviewing the accuracy of that finding.

Manifestation Determination cont.

Danny K. v. Dept. of Educ., State of Hawaii (D.HI. 2011) 2011 WL 4527387, at pg. 15.

In particular, Leslie Kunimura, the school psychologist who explained Student's diagnosis to the manifestation determination team, testified that:

[Student's] conduct was not a manifestation of his diagnosis of the ADHD inattentive type because the act of setting an explosive off at school is a planned activity. It requires sustained attention. It requires follow through with directions. So students with ADHD, inattentive type, they have difficulty organizing tasks and following through with directions because they are easily distracted, and they tend to overlook the details of the task.

Manifestation Determination cont.

Boutelle v. Bd. Of Educ. of Las Cruces Public Schls. (D.NM. 2019) 2019 WL 2061086, at pg. 13.

Plaintiff asserts that the school denied L.B. a FAPE by placing him on long-term suspension after the rock-throwing incident. He suggests that (1) throwing rocks might have been a manifestation of L.B.’s disability, (2) L.B.’s “history of disruptions” in school were manifestations of his disabilities and were wrongfully used as grounds for this suspension, and (3) the school had not provided L.B. an IEP or an evaluation prior to the time it suspended L.B. Pl.’s Mot. 24-26. The Court again disagrees.

www.sclscal.org | 47

Manifestation Determination cont.

Boutelle v. Bd. Of Educ. of Las Cruces Public Schls. (D.NM. 2019) 2019 WL 2061086, at pg. 14.

After reviewing the record and giving “due weight” to the hearing officer’s factual findings, this Court has no reason to disturb the finding that L.B. intentionally threw rocks at other students on April 19, 2017. L.B.’s conduct on that occasion—including striking a student with four rocks and then striking a separate student with a rock right after having asked something like “do you think I can hit him with a rock?”—certainly seems to suggest intentional conduct, rather than some sort of involuntary, complex motor tic, as suggested by Plaintiff.

www.sclscal.org | 48

Manifestation Determination cont.

Boutelle v. Bd. Of Educ. of Las Cruces Public Schls. (D.NM. 2019) 2019 WL 2061086, at pg. 14.

Finally, as the IDEA does not require an IEP or an evaluation before a child is placed on long-term suspension, this Court concludes that the decision to place L.B. on long-term suspension was not improper either because the IEP was issued after the suspension or because there had not been a school-funded evaluation.

Because L.B.'s rock-throwing behavior was intentional and not a manifestation of a disability, the school was permitted to apply the same "relevant disciplinary procedures" it would have applied to any other rock-throwing child without a disability.

Manifestation Determination cont.

Roseville Joint Union High Sch. Dist. (OAH 2013) Case No. 2013080664.

- 17-year-old with primary disability hearing impairment and secondary OHI (for ADHD).
- Student punched assistant principal!
- ALJ found MD procedurally defective because LEA did not consider whether or not bi-polar disorder, recent 5150's, suicidal ideation, etc. caused the behavior.

Manifestation Determination cont.

San Diego Unified School District (OAH 2009) Case No. 2009070224.

- Consider all of the student’s disabilities not just IDEA disability category.
- IEP to review at MD is the IEP mutually agreed upon.
- ADHD impacts “spur-of-the-moment” decisions not “long-term assessing for future consequences.”
- First year M.A. school psychologist (Bylund) opinion prevails against 30 year Ph.D. school psychologist (Prinz), psychiatrist (Mishek), and 30 year psychiatrist (Buccigross).

Manifestation Determination cont.

Riverside Unified Sch. Dist. (OAH 2014) Case No. 2014030785.

- 15-year-old with primary disability OHI (for ADHD).
- Student was provided firecracker at school from friend during the lunch period and friend told him to light it. Student deferred and stated he would light it after school as he did not want to get in trouble with police or hurt anyone. Later, another group of students (including the original “friend”) placed a firecracker in an apple and verbally “goaded” Student into lighting the firecracker. Student walked away in an isolated area (so others would not be hurt) tried to light the firecracker, but it was too wet and/or the firecracker was defective.
- District determined that possession of firecracker was violation of Education Code section 48900(b), determined the possession of the firecracker was not a manifestation of Student’s disability.
- ALJ upheld LEA’s decision finding Student’s actions were deliberate rather than impulsive in nature.

Manifestation Determination cont.

- Yes, **manifestation** of the student’s disability, the student may not be disciplined for that behavior:
 - Conduct a FBA and implement a BIP if one was does not already exist;
 - Or review the BIP and modify if necessary;
 - Except under “special circumstances”, return the student to last mutually agreed upon IEP placement unless a new placement is agreed to by the IEP team.
- No, **not manifestation**, the student can be disciplined as a general education student but must continue FAPE and IEP team not required to develop a BIP (but a really, really good idea).

Manifestation Determination cont. Stipulated Suspended Expulsion Agreement

When a student has engaged in misconduct and a stipulated suspended expulsion agreement is reached by parents there should be a MD meeting prior to the signing of the agreement.

After the stipulated suspended expulsion agreement has been approved by the LEA governing board and the student commits another act of misconduct and the LEA intends to impose the expulsion that had been suspended – another MD meeting must be convened.

William S. Hart Union HSD (OAH 4-18-16) 2016020807.

Upheld by *Jay F v William S Hart Union High School District* (9th Cir. 2019) Unpublished WL 2744844.

***Check state law on this issue!**

Manifestation Determination cont.

While not legally required, really helpful for a school psychologist to conduct a screening/review of records to develop a short report to be considered at a Manifestation Determination IEP meeting. Many OAH hearing decisions reference, with approval, the development of such a report by the school psychologist associated with a Manifestation Determination IEP.

- One to two pages in length is fine, bonus points for a longer report.
- Please note: this report is a record review, discussion/interview with staff and administrators, screening so no assessment plan is required. If any standardized assessments are implemented then written parental consent on an assessment plan **must** be obtained.
- This summary report should be discussed/reviewed at the manifestation determination meeting and be attached to the Manifestation Determination IEP document along with the IEP meeting notes.

Manifestation Determination cont.

Include the following:

Demographic information

- The same as a “regular” assessment report (student’s name, grade, D.O.B., parents, school, etc.)

Student’s Disability

- Provide the student’s disability eligibility category(ies) under the IDEA (SLD, OHI, ED, etc.).
- In addition, to the IDEA disability(ies), also mention other disabilities such as ADHD, Down Syndrome, Bi-Polar Disorder, etc.

Student’s Special Education Services and Supports

- List the student’s special education services and supports.

Description of Misconduct that Resulted in Discipline

- Describe in a paragraph or two the facts surrounding the incident.

Manifestation Determination cont.

Analysis

- Describe in a paragraph your professional opinion, based on the student's individual learning needs (disabilities) and based on the facts of the incident, as to whether the incident was a manifestation of the student's disability.
- Please include after your opinion:
- "However, all final determinations regarding whether _____'s conduct was a manifestation of his/her disability will be determined by _____'s IEP team at his/her forthcoming manifestation determination meeting."
- Conclude the report with a title, signature and date.

Section 504 Discipline

**Manifestation Determination:
May Use IDEA process for Section 504**

See: J.M. v. Liberty Union High Sch. Dist. (N.D.Cal. May 16, 2017) No. 16-CV-05225-LB.

Section 504 – Discipline – Drugs & Alcohol

- ...[LEAs] may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any student ... to the same extent that such disciplinary action is taken against students who are not individuals with disabilities. Furthermore, the due process procedures at section 104.36 of title 34, Code of Federal Regulations (or any corresponding similar regulation or ruling) shall not apply to such disciplinary actions. 705 U.S.C. 705(20)(C)(iv).
- Also See: *Tracy Unified Sch. Dist.* (OCR No. 30, 2004) 43 IDELR 41.
 - “Because the Student was disciplined for drug possession, as explained above, the procedural protections of § 104.36 are not applicable.”
- But, some continue to advise, based on *Letter to Zirkel* (OCR May 15, 1995) and an OCR Staff Memorandum from 1991, that students that only possess illegal drugs and alcohol are still entitled to a Manifestation Determination...

Special Circumstances

Where the student commits any of the following 3 acts, the student may be removed for 45 school days to an IAES even if the student’s behavior was a manifestation of the student’s disability (a MD meeting must still be convened! *William S. Hart Union HSD* (OAH 5-10-16) 2016030901) and even if the parent disagrees (parent has a right to expedited due process upon disagreement). (34 C.F.R. § 300.530(g).)

1. Student carries or possesses a “weapon” to or at school, on school premises, or at school functions;
 - Weapon defined as “weapon, device, instrument, material, or substance, animate or inanimate, that is readily used for, or is capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length.” (18 USC 930(g)(2))
2. Student knowingly possess or uses illegal drugs, or sells or solicits the sale of controlled substances at school, on school premises, or at school functions;
3. Student inflicts “serious bodily injury” while at school, on school premises or at a school function.

Special Circumstances cont.

Fiskars Scissors – weapon for purposes of IDEA? Depends on student’s use of scissors.



Special Circumstances cont.

“Weapon”

Determining whether Fiskars scissors (5 ½ inches from tip to handle) with rounded and blunt edges (“childproof scissors”) held by student (without a prior history of using scissors in a threatening manner) for approximately 30 seconds without brandishing constituted a “weapon” under the IDEA (capable of causing serious bodily injury or death) depended on how the student used the scissors. In this case, the ALJ found the scissors were not a weapon by the eight-year-old student with ED.

California Montessori Project (OAH 2011) No. 2011030849.

Special Circumstances cont.

“Serious Bodily Injury”:

1. Substantial risk of death;
2. Extreme physical pain;
3. Protracted/obvious disfigurement; or
4. Protracted loss or impairment of function of bodily member, organ, or mental faculty. (18 USC 1365(h)(3))

William S. Hart Union HSD (OAH 5-10-16) 2016030901.

ALJ found that 14-year-old with autism and very limited communication skills grabbed head of SLP and slammed on table and held SLP’s hair and shook head for 15 seconds resulted in concussion with associated medical issues over a two month period. Student also bit aide on arm.

Westminster SD (2011) OAH No. 2010110730.

ALJ found that 6-year-old with autism that “head butted” teacher in chest resulting in 3 visits to doctor, pain medicine, and a description that pain was a “10 out of 10” was a “serious bodily injury.”

Tehachapi USD (2006) OAH No. 2006010238.

ALJ found that mild concussion to one student and broken nose to another student did not result in “serious bodily injury.”

Special Circumstances cont.

Los Angeles Unified Sch. Dist. (OAH 2014) Case No. 2014040246.

- 8th grade student with primary disability OHI (ADHD? not specified in decision) brought semi-automatic handgun to school at IEP NPS during the school day.
- Student was arrested and brought to juvenile hall and subsequently released.
- IEP team convened manifestation determination meeting and determined that student’s conduct of bringing a gun to school was a manifestation of student’s disability!
- Student was placed in an IAES for at least 45 school days.
- Following the IAES placement, LEA subsequently took action to expel student because of state and federal laws requiring expulsion for possession of firearm at school.
- LEA argued that OAH lacked jurisdiction to prevent student expulsion due to firearm possession.
- ALJ found that IDEA law precluding change of placement (e.g. expulsion) when student’s misconduct was manifestation of disability applied and, therefore, student could not be expelled and ALJ ordered LEA to reinstate student at IEP NPS.

Expedited Due Process Hearing

- If the parent disagrees with the team’s determination that the student’s behavior was not a manifestation of the student’s disability, then the student “stays put” in the discipline setting and parent files for expedited due process.
- If the student’s behavior was a manifestation of the student’s disability, then the student is not disciplined and “stays put” in the IEP placement and the LEA can file for expedited due process if the student’s placement “is substantially likely to result in injury to the student or others.” (34 CFR 300.532(a))
- Expedited due process hearing must be held within 20 school days as compared to 45 calendar days for “regular” due process hearing.

LEA Expedited Due Process Request

- An LEA may file for an expedited due process hearing (must be heard and decision rendered in 20 school days) regarding whether maintaining the student’s placement is “substantially likely” to result in injury to the student or others. If the LEA prevails at hearing, OAH may order an IAES for no more than 45 school days, although an LEA can seek to renew the order.
- This is an option for an LEA in which a MD was held where there were no special circumstances and the IEP team found the behavior subject to discipline was a manifestation of the student’s disability.
- During the hearing process, the student is maintained in the last mutually agreed upon and implemented placement unless there is mutual agreement to change the student’s placement.

Student Not Yet Identified as Special Education

- A student not identified as special education may assert IDEA protections if the LEA had “knowledge” that the student is disabled before incident occurred.
- “Deemed to have knowledge”:
 - Parent expressed written concern to supervisors/teachers that student needs special education;
 - Parent has requested a special education evaluation; or
 - Teacher or other school personnel expressed “specific concerns” about a “a pattern of behavior” directly to special education director or other supervisory personnel.
 - 34 CFR section 300.534(b).
- LEA deemed not to have knowledge where the LEA had assessed the student and the student did not qualify for services or student was referred for evaluation, but parents refused the evaluation or refused services.
 - See *Ron J. v. McKinney Independent Sch. Dist.* (E.D.TX Oct. 11, 2006) 46 IDELR 222.

Student Not Yet Identified as Special Education cont.

- If a parent requests a special education evaluation at the time of the disciplinary action where the LEA did not have a basis of knowledge the LEA:
 - May stop disciplinary proceedings, but not required.
 - Must complete an “expedited” special education evaluation (not defined).
 - Upon completion of assessment must notice and convene IEP team to:
 - Determine eligibility and if eligible,
 - Establish an IEP and provide services.
- During this time, the student will remain in placement determined by LEA (stay put does not apply).
- If eligible, the LEA must:
 - Proceed with the IEP process and provides services.
 - May continue with the discipline.
- If not eligible:
 - Parent may request a due process hearing regarding eligibility.
 - May continue with the discipline.

Student Not Yet Identified as Special Education cont.

Menifee Union SD (OAH 4-21-20) 2020020214, pg. 7.

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

Student Not Yet Identified as Special Education cont.

Menifee Union SD (OAH 4-21-20) 2020020214, pgs. 14-15.

Menifee argues none of Student's teachers or other personnel expressed "specific concerns" about a "pattern of behavior" demonstrated by Student, "directly to" the Director of Special Education or to other supervisory personnel. This argument is unconvincing. It is undisputed that no one alerted Lisa Hall, the Director of Special Education. But, Orr, Lyman and Westmoreland were supervisory personnel, and the teachers notified them. The logs indicated the concerns were specific, "rather than casual comments regarding the behaviors demonstrated by the child." (71 Fed. Reg. 46727 (Aug. 14, 2006).) The evidence established that teachers provided much more than casual comments. There were numerous, specific, and direct communications from teachers and staff to the administrators sufficient to establish a basis of knowledge that Student might be a child with a disability and possibly eligible for special education.

Student Not Yet Identified as Special Education cont.

Menifee Union SD (OAH 4-21-20) 2020020214, pg. 17.

Menifee argues, correctly, that the "basis of knowledge" criteria is clearly stated and should not be expanded or broadened. The IDEA 2004 reauthorization made several changes to title 20 United States Code section 1415 (k)(5)(A), narrowing the circumstances under which a district is deemed to have knowledge that a child is a child with a disability. Under previous law, a district was deemed to have knowledge that a child is a child with a disability if the behavior or performance of the child demonstrated the need for such services. **This provision was deleted because a teacher could make a stray, isolated comment to another teacher expressing concern about behavior, and that could trigger the protections.** (Sen. Rep. No. 108-185, pp. 45-46, 1st Session (2003).)

Student Not Yet Identified as Special Education cont.

Menifee Union SD (OAH 4-21-20) 2020020214, pg. 17.

Thus Congress, when reauthorizing the IDEA, narrowed the "basis of knowledge" criteria due to the "unintended consequence of providing a shield against the ability of a school to be able to appropriately discipline a student." (See 71 Fed. Reg. 46726-27 (Aug. 14, 2006) [quoting Sen. Rep. No. 108-185, p. 46, 1st Session (2003).]) **The intent of Congress was to ensure that "schools can appropriately discipline students, while maintaining protections for students whom the school had a valid reason to know had a disability."** (Id.) Congress struck this balance by requiring specific facts about patterns and communications before imputing knowledge to a school district. Such facts are amply demonstrated here.

Student Not Yet Identified as Special Education cont.

Hayward USD (OAH 2-7-18) 2017120638.

- 15-year-old 9th grade student who initially qualified under Section 504 for ADHD and then three weeks later cut the back of a peer's hand (requiring 7 stitches to close and paramedics were called to the school). Parent had requested months earlier in previous school year by email that student be assessed for special education. LEA did not complete an IDEA assessment at that time.
- Student stated she accidentally injured peer with a pen and a search for a knife in the classroom was initially not successful, but later police search found two knives in student's undergarment.
- Section 504 MD meeting was convened and it was determined by LEA that student's misconduct was not a manifestation of her disability. Parent requested another IDEA assessment at the Section 504 meeting. The LEA subsequently completed the IDEA assessment (but had not convened IEP meeting as of the hearing date). Student was expelled.

www.sclscal.org | 73

Student Not Yet Identified as Special Education cont.

Hayward USD (OAH 2-7-18) 2017120638. Continued.

9. Despite Hayward's basis of knowledge that Student was a student with a disability at the time of the November 8, 2017 incident, Hayward decided to effectuate a disciplinary change in placement for more than 10 school days. Therefore, the disciplinary protections of a manifestation determination apply to Student. Hayward was required to presume Student was eligible for special education and conduct a timely manifestation determination under the IDEA with regard to Student's conduct on November 8, 2017. Hayward failed to do so. Its legal obligation was not discharged by conducting a Section 504 manifestation determination on November 27, 2017. (Pg. 12).

10. Hayward's contention that it is not required to conduct a manifestation determination review unless it finds that Student is eligible for special education runs counter to the law which expressly affords Student the right to assert any of the disciplinary protections. (Pg. 13).

16. Student's requested remedies of rescinding the expulsion order and reinstating her at her high school placement are denied as premature in this case... Student has not persuaded this tribunal that she is entitled to any remedy other than a manifestation determination under the IDEA. (Pg. 15).

www.sclscal.org | 74

Student Not Yet Identified as Special Education cont.

Anaheim Union High Sch. Dist. v. JE (C.D.Cal. May 21, 2013) 2013 WL 2359651 at pg. 6, affirmed by *Anaheim Union High Sch. Dist. v. JE* (9th Cir 2016) 637 Fed.Appx. 380.

Basis of knowledge established where assistant principal attended a Section 504 meeting at which teachers discussed the student's panic attacks and inability to complete work.

Student Not Yet Identified as Special Education cont.

Fairfield-Suisun USD (OAH 5-25-12) 2012030917.

- OAH ALJ found that LEA was “deemed” to have a “basis of knowledge” when student exhibited “negative patterns of behavior” at a SST meeting including an “alarming lack of empathy, bullying, treating peers badly, lack of affect, playing with fire, and acting in defiance of school authorities.” (Pg. 30).
- The student had been expelled for writing a threatening note to a female student.
- ALJ ordered the student to be reinstated to the same school that he was attending prior to the November 4, 2011, incident.
- ALJ ordered LEA to complete a manifestation determination meeting (even though the 10 school day time period had long lapsed) if the LEA wanted to suspend the student for more than 10 school days or expel the student.
- ALJ also ordered that if the LEA decided not to convene a MD meeting, then all references to the student's expulsion must be purged from the student's records.
- Oddly and of some concern, the ALJ also found that the three criteria in 34 CFR 300.534(b) were not the sole means that a LEA could be deemed to have knowledge. This finding could significantly widen the scope and kind of information that could establish a LEA had a basis of knowledge.

Student Not Yet Identified as Special Education cont.

Anaheim UHSD (OAH 5-9-12) 2012031076.

- OAH ALJ found that LEA was “deemed” to have a “basis of knowledge” when student exhibited aspects of ADHD, lack of focus, disorganization, and anxiety in his classes, which was also discussed at a Section 504 meeting by the student’s teachers and continued for approximately 5 months after the Section 504 meeting to the date of the incident (attempting to buy cannabis at school) thus constituting a “pattern of behavior.”
- ALJ found that the mere fact that a Section 504 meeting was convened for a student does not provide per se notice that a child may be eligible under the IDEA, rather a case-by-case factual analysis must occur.
- Student had been suspended for incident and removed from comprehensive high school to community day school.
- LEA was in the process of assessing student for IDEA eligibility at the time of hearing.
- ALJ ordered LEA to complete manifestation determination meeting (even though the 10 school day time period had long lapsed), but ordered the meeting to occur within 10 calendar days of the OAH decision or 10 calendar days from the date the LEA completes the assessment, whichever occurs last.
- ALJ also ordered student to return to original placement after the student completed “45 days of actual school attendance” at the IAES.
- This decision was upheld: *Anaheim Union High Sch. Dist. v. JE* (C.D.Cal. May 21, 2013) 2013 WL 2359651. www.sclscal.org | 77

Interdistrict Attendance Permit Issues.

- Interdistrict attendance permit can be revoked for Section 504 and Special Education students for behavioral issues; however, prior to revocation a Manifestation Determination meeting was be convened and if the student’s behavior is due to the student’s disability then the district cannot proceed with the revocation.
 - *Torrance Unified Sch. Dist.* (OCR May 28, 2010) 09-091284 55 IDELR 143.
 - **Check state law on this issue!**

School Attendance Review Board Issues.

- SARB ordered change in placement = need to convene MD
- “Student met his burden of proof on Issue One and demonstrated District was obligated to conduct a manifestation determination, as proscribed by section 1415(k)(1)(E). District’s student attendance review board determined that Student, who was eligible for special education, violated the code of student conduct requiring regular attendance and as a result, changed Student’s placement. Section 1415(k), which requires a manifestation determination meeting, applies to any violation of a code of student conduct that could result in change of placement.” (Pg. 2).
- *Rialto Unified Sch. Dist.* (OAH 8-13-14) 2014040978.
- **Check state law on this issue!**

Questions?



Information in this presentation, including but not limited to PowerPoint handouts and presenters’ comments, is summary only and not legal advice. We advise you consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

Carl D. Corbin, General Counsel
ccorbin@sclscal.org

School & College Legal Services of California
5350 Skylane Boulevard
Santa Rosa, CA 95403
(707) 524-2690
www.sclscal.org

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LIBERTY UNION HIGH SCHOOL
DISTRICT.

OAH Case No. 2017040078

EXPEDITED DECISION

Student filed a due process hearing request (complaint) which contained both expedited and non-expedited issues with the Office of Administrative Hearings, State of California, on February 15, 2017, naming the Liberty Union High School District. Administrative Law Judge Charles Marson heard the expedited portion of this matter in Brentwood, California, on May 2 and 3, 2017.

Betsy Brazy, Attorney at Law, represented Student. Mother was present throughout the hearing. Student did not attend.

David R. Mishook, Attorney at Law, represented Liberty. John Saylor, Liberty's Director of Student Services, attended the hearing on its behalf. Dr. Tony Shah, Liberty's Assistant Superintendent, also attended most of the hearing.

On May 3, 2017, the record was closed and the matter was submitted. The parties filed written closing arguments on May 10 and 11, 2017.

ISSUE

Did Liberty wrongfully determine that Student's conduct on January 19, 2017, for which he was suspended and expelled, was:

- a. Not caused by, or have a direct and substantial relationship to, his disabilities;
or

- b. Not a direct result of Liberty's failure to implement his March 2, 2016 individualized education program?¹

SUMMARY OF DECISION

Student contends that Liberty's manifestation determination on February 2, 2017, was incorrect because his assault on another student on January 19, 2017, had a direct and substantial relationship to one of his disabilities, Attention Deficit Hyperactivity Disorder, which leads him to anger, impulsiveness, frustration, and acting out. He also contends that the assault occurred because his behavior intervention plan was not implemented.

Liberty contends that the manifestation determination was correct because Student's assault was premeditated and caused by tensions following personal conflicts between the students involved, not by Student's disabilities, which have not in the past led him to aggressive violence.

This Decision holds that there was no direct or substantial relationship between the assault and Student's ADHD because it was neither impulsive nor foreshadowed by his previous behavior. It also holds that the assault, which occurred outside of class, was not caused by any failure to implement Student's behavior intervention plan, which applied only to his behavior in class with adults.

FACTUAL FINDINGS

Jurisdiction

1. Student is a seventeen-year-old boy who lives with his Mother within Liberty's boundaries and receives special education and related services in the category of specific learning disability because of an auditory processing deficit. He has also been diagnosed as having ADHD. He is bright, social, physically healthy, charismatic and a leader among his peers, but he has trouble paying attention and is frequently oppositional and defiant to adults in class. In the last two school years his previously good grades have declined, and, due to frequent absences, tardies and cutting classes, he has been failing most of his courses.

2. In January 2017, Student was in general education classes in the eleventh grade at Liberty's Heritage High School. On January 19, 2017, he engaged in a physical

¹ The issue has been slightly reworded for clarity. The ALJ has authority to rephrase 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; *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090; but see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 852 F.3d 840, 847, fn. 2 [dictum].)

fight with another student for which he was suspended, recommended for expulsion, and moved to an alternative educational setting. At a manifestation determination meeting on February 2, 2017, Liberty decided that his conduct on January 19 was not caused by, and did not have a direct and substantial relationship to his disabilities, nor was it a direct result of Liberty's failure to implement his IEP. On April 12, 2017, Liberty's school board expelled Student but suspended his expulsion on various conditions.

The Fight on January 19, 2017

3. The fight had its origins in a previous incident. On or about January 10, 2017, student Jane Doe (a pseudonym) went to Student's home, accosted Student's younger sister about her interest in Doe's boyfriend John Roe (also a pseudonym), and started an argument, and perhaps a physical fight. Student defended his sister and either hit Doe in the head or slapped her in the process. Student then called Roe and asked whether the two had "a problem," but Roe told him they did not. Later in the week Student heard a rumor Roe was talking about wanting to fight him, so he called Roe again to ask if the rumor was true, and Roe said "No."

4. About midday on January 19, 2017, Student was walking across an open area of the campus in front of the Principal's office, carrying a backpack and wearing headphones. He was suffering from sinus problems, had been excused from class, and was on his way to see the school nurse. Roe approached Student from behind and tapped him on the shoulder. Student turned around, and insults were exchanged. According to Student, Roe put a protective mouthpiece in his mouth to prepare for a fight, but started gagging on it and fell to the ground. According to a Liberty staff member who later interviewed Roe, Roe said he fell because he was ill from anxiety about the impending fight. In any event, there was no evidence that either student hit the other at that time.

5. Alerted by his secretary, Principal Larry Oshodi looked out the window, saw Student in an aggressive posture, and went out to investigate. He saw student Roe on the ground several feet from Student, in distress. Mr. Oshodi took Student into his office, where Student slammed his backpack down angrily. Mr. Oshodi told Student to stay in his office and went back outside to deal with Roe, making sure the door to his office was closed.

6. Mr. Oshodi's secretary had called campus security, and a security officer arrived in a golf cart. Mr. Oshodi and the officer helped student Roe into the golf cart as two other security officers arrived. But Student, who was looking through the window of the principal's office, perceived that Roe was insulting him again with facial expressions, gestures or words. Student emerged angrily from the principal's office and strode aggressively toward Roe, cursing, making threats, ignoring orders to stop, saying "[D]on't disrespect me like that again," and appearing intent on attacking Roe. Student Roe responded in kind, stepped off the golf cart, and swung the first punch. A melee ensued during which Student and student Roe hit each other while the four adults tried to separate them. At some point Student's hoodie was pulled down over his face and he could not see, but he kept swinging wildly and in the process inadvertently hit a security guard several

times in the head. Student received several blows from student Roe, but kept fighting so vigorously that it took the four adults two to four minutes to separate the boys. As he was taken into an office, Student yelled: “This isn’t over.”

7. About an hour later, Mr. Oshodi asked Student to explain the incident. Student declined, but did say something like “He’s not going to do that to me.” Mr. Oshodi tried to calm him down, but Student said “I’m going to do what I’m going to do,” and walked off.

The Suspension and Investigation

8. Liberty suspended Student on the day of the assault and issued a suspension notice that charged him with two violations of the Education Code: “Caused/attempted/threatened physical injury to another person”. (§ 48900, subd. (a)(1)); and “Assault or battery, as defined by Sections 240 and 242 of the Penal Code upon any school employee” (§ 48915, subd. (a)(1)(E).) Assistant Principal Heather Harper began an investigation.² Ms. Harper knew Student well, having counseled him several times after behavioral incidents in class.

9. Ms. Harper gathered statements from the participants in the fight and witnesses to it.³ Student would not talk to her immediately, but furnished a written statement in a day or two. School psychologist Anthony Meehlis brought together the witness accounts, Student’s IEPs, his disciplinary and other records, and statements from his teachers in a written report that was distributed to those who attended the manifestation determination meeting.

The Manifestation Determination

10. On February 2, 2017, Liberty held a manifestation determination meeting attended by several Liberty staff and by Mother, Student, and Student’s attorney. The team considered both the Education Code charges in the suspension notice. The recording of the meeting shows that the team extensively discussed whether there was anything in Student’s

² Ms. Harper has a master’s degree in education and single subject and administrative credentials. She has taught in three other school districts. Ms. Harper came to Liberty in 2009 to teach biology, and was promoted to Assistant Principal. She has extensive experience in special education and has received a number of recognitions and awards.

³ These statements were introduced in evidence. They were hearsay but explained and supplemented Mr. Oshodi’s direct testimony. (See Cal. Code Regs., tit. 5, § 3082, subd. (b).)

previous records to suggest that his disabilities, including ADHD,⁴ had caused conduct similar to his conduct on January 19th. Student's attorney argued that his behavior on January 19th was a consequence of lack of impulse control, foreshadowed by previous incidents, and also perhaps failure to understand instructions. She also argued that Liberty had failed to implement the behavior intervention plan in Student's IEP. Student spoke up briefly four times, but said nothing about the cause of the fight.

11. The Liberty members of the manifestation determination team unanimously decided that Student's disabilities did not have a direct or substantial relationship to his conduct on January 19th, and therefore that his conduct was not a manifestation of his disabilities. They also found that Student's behavior on January 19th was not caused by any failure to implement the behavior intervention plan in his IEP. They memorialized these decisions in a written finding given to Mother the same day. After the meeting, expulsion proceedings were continued, and Student was transferred to a different school.

12. Two weeks after the manifestation determination meeting, Liberty amended the suspension notice to eliminate the charge of striking a school employee, because Ms. Harper had decided at the end of her investigation (but before the manifestation determination meeting) that Student struck the employee only inadvertently. Liberty did not explain at hearing why it waited until well after the manifestation determination to eliminate the second charge.

13. Student's triennial review was due in March 2017. On February 6, 2017, Liberty offered to finish the triennial assessments "and reconvene the manifestation determination to consider the result and any potential contribution of any new findings to student's behaviors" if Student would waive the timelines for the upcoming expulsion process to allow time for that reconsideration. Student declined to waive the timeline and declined the offer.

Student's Previous Behaviors as Predictors

14. Student's school records and the testimony at hearing both show that Student has long had difficulties paying attention and controlling his tendency to argue with adults in class. In high school he has frequently interrupted classes by blurting out inappropriate remarks, interrupting others, socializing with other students, and arguing with adults. His most consistent difficulty has been his oppositional attitude. He has refused to follow instructions, challenged policies, and attempted to rally other students against teachers (particularly in their policy of forbidding use of cell phones in class). He responds negatively to any criticism in front of his peers and frequently escalates his verbal behavior

⁴ Liberty knew Student had an outside diagnosis of ADHD, but had nothing in its files explaining the potential impact of that condition on Student's education or behavior. Student's representatives did not furnish any such information at the meeting. However, the parties appear to agree that for the purpose of this hearing ADHD ought to be considered as one of Student's disabilities, so the plural "disabilities" is used here.

when that occurs, although he does not threaten or engage in violence. The consensus among his teachers and case manager is that he does this to impress his peers and bring attention to himself.

15. Student's arguments in class have frequently been accompanied by frustration and anger, and it takes him several minutes to calm down after such an argument. In May 2016 a behavior intervention plan was added to his IEP that emphasizes allowing Student to leave the class briefly when having trouble refraining from arguments, and counseling him in private rather than reprimanding him in front of his peers. The plan set up a "break card" system in which Student could show a card and leave class briefly, and seek counseling if he desired. The plan was directed entirely to in-class verbal behavior and arguments with adults. It does not contain any provision concerning Student's conduct out of class or with peers. The plan has sometimes been successful and sometimes not.

16. Student's records and Mother's testimony support the conclusion that he has difficulty controlling his verbal impulses in class and is quick to anger. He is sometimes slow to understand instructions. He is frequently off task. However, nothing in his previous behavior indicates any tendency toward physical assault. In two and a half years in high school, Student's disciplinary history shows only two incidents arguably involving violence. In the first, his disciplinary log states that he was suspended for three days in November 2015 for a "fight" before school. Mother testified that the fight was between two students who were late for school, and that Student did not start it. Other than that, there was no evidence from which any conclusion about the November 2015 incident can be drawn. Student was also disciplined once for throwing some pencils at a peer during a class. There was no evidence that either event was related to Student's disabilities; Mother's view that Student did not start the fight suggests that the fight had other causes. These events do not constitute a pattern of assaultive violence that would have illustrated the effects of Student's disabilities or made his conduct on January 19 foreseeable.

Specific Learning Disorder / Auditory Processing Delay

17. Student's attorney argued at the manifestation determination meeting that it was possible that Student did not hear the principal's order to remain in his office, to return to his office, or to cease hitting student Roe, or was slow to process these orders, due to his auditory processing disorder. However, there was no evidence at hearing that this was the case, and Student no longer pursues that argument.

Attention Deficit Hyperactivity Disorder

18. Student's only witnesses at hearing were Mother, several Liberty staff members, and Dr. Jaime Garcia, a well-qualified pediatrician who has monitored Student's

ADHD medication Vyvanse, since 2012.⁵ Dr. Garcia sees Student every month for that purpose, or every other month if Student has not had recent problems with the dosage or the medicine.

19. Dr. Garcia confirmed that Student has ADHD/ADD, which implies inattentiveness, distractibility, and impulsivity. He takes Vyvanse primarily for his attentiveness to his academics and to curb any of the impulsivity he might have as a result of his ADHD. The goals of administering it are to balance his brain biochemistry, bring his concentration closer to the norm for his age group, and help him control his impulsivity. The medicine succeeds in those goals, but not always.

20. On January 18, 2017, the day before the fight, Dr. Garcia saw Student for medication monitoring. He also treated Student for sinus infection and coughing that affected him that day. Dr. Garcia testified that his treatment of those conditions would not lessen the effect of Vyvanse; generally sinus infection, coughing, and treatment for those conditions might cause sluggishness or lethargy instead.

21. Dr. Garcia did not address Student's conduct on January 19th. He was not asked for, and did not state, an opinion on the possible relationship of Student's ADHD to the disciplinary incident. Nothing in his testimony suggested he was aware of the incident.

22. Dr. James Bylund, a well-qualified and experienced school psychologist,⁶ testified about the effect of ADHD on Student's behavior generally. Dr. Bylund conducted a psychoeducational assessment of Student in February 2017, about a month after the fight, as part of Liberty's preparation for Student's triennial review in March. He met with Student on two different days and administered to him a wide variety of standardized tests and other measures such as rating scales. He was unable to observe Student in class because Student was suspended, but he reviewed Student's health and developmental history and his educational records, interviewed Parents, collected information from teachers, and reviewed previous assessments. He also reviewed Student's academic and disciplinary records.

⁵ Dr. Garcia is a 1993 graduate of the University of Southern California Medical School. He spent three years as a general pediatric intern and resident at Children's Hospital in Oakland, and was invited back for a fourth year to be its chief pediatric resident. Dr. Garcia has extensive experience treating children who have ADHD.

⁶ Dr. Bylund has a doctorate in educational psychology from Alliant International University and is both a credentialed school psychologist and a state-licensed psychologist. He owns and directs Bylund Neuro-Educational Services, which provides evaluation and consultation to parents and school districts about psychological disorders in children. Dr. Bylund has taught widely and published numerous papers in his field. He also has experience as a program specialist and special education administrator. Dr. Bylund has conducted many assessments of students who are or may be disabled.

23. From his assessment, Dr. Bylund concluded that Student may no longer qualify for special education due to an auditory processing disorder, but does qualify in the category of other health impaired due to his ADHD. He also concluded that Student's oppositional and defiant behaviors in class function as a way of bringing attention to himself and obtaining positive reinforcement from his peers.

24. Dr. Bylund established that Student displays both the inattentive and attentive forms of ADHD. The former leads him to have difficulty attending to details, sustaining attention, appearing not to listen, and completing tasks. The latter leads Student to have difficulty remaining still or seated in class, to interrupt others, and to talk excessively.

25. He explained that Student also displays characteristics that are not core characteristics of ADHD, although many young people with ADHD also display them. These characteristics inhibit Student's emotional regulation and include a short temper, a tendency to argue with authority figures, and a tendency not to comply with something required of him. There may be many variables leading to these characteristics other than ADHD, and many teenage boys are oppositional without having ADHD. Student's ADHD does not define him.

26. Dr. Bylund stressed that a disability such as ADHD would be expected to manifest across environments and over time; there are no six-hour disabilities. If Student's poor impulse control led to physical aggression, Dr. Bylund would expect to see it in his records over time and across settings such as school, home, and the outside community. There would be a consistent pattern of it. Dr. Bylund did not find such a pattern in Student's records. Student did not present any evidence to the contrary.

27. He also observed that Student's typical oppositional behavior is not impulsive, such as the repeated incidences in his records of refusing to take his hat off or surrender his cell phone.

28. Liberty also presented four witnesses who spoke directly to the relationship between Student's conduct on January 19th and his disabilities. Anthony Meehlis is an experienced school psychologist employed by Liberty at Heritage.⁷ He attended the manifestation determination meeting after assembling and writing a report on Student's school history for the meeting. He opined at hearing that there was no relationship between Student's conduct on January 19th and his disabilities. Student did have a record of impulsivity, which is acting without thinking, but his qualifying disability was specific learning disorder occasioned by an auditory processing problem. Anger is not a disability and can occur with or without a disability. The manifestation determination team accepted

⁷ Mr. Meehlis has a master's degree in school psychology. He was a special education teacher from 1996 until he received his school psychology credential in 2002. Mr. Meehlis has worked in that capacity for three school districts and the Los Angeles County Office of Education. He has completed more than 1000 assessments.

that Student had a diagnosis of ADHD but did not think the fight on January 19th was foreshadowed by or consistent with his previous behaviors.

29. Patricia Wright, a teacher with extensive special education experience,⁸ has been Student's teacher in his tutorial support class, which is akin to a resource room. She is also Student's case manager. Her experience with Student has led her to conclude that his behavioral difficulties occur in the classroom and involve confrontations with adults. For example, last September he was disciplined for disobedience for refusing to surrender his cell phone to a teacher. The behavior support plan was added to his IEP in March 2016 was intended to address his behavior in class with adults. Ms. Wright has counseled Student privately after incidents in which he left the classroom in anger or frustration, as the plan permits, and went outside briefly to cool down. That usually takes him about five minutes, or sometimes longer. In Ms. Wright's experiences after the behavior plan was adopted, its application was usually successful in calming student and allowing him to return to class.

30. Ms. Wright testified that in her extensive experience with children who are impulsive, they make a quick uncalculated decision to hurt somebody and afterward are unable to explain what they did or should have done. Student's confrontations in the classroom are not impulsive; they are progressive. She pointed out that his oppositional behavior occurs only in the classrooms of teachers he does not like or respect; in the classes of teachers he likes, that behavior does not occur.

31. Ms. Wright attended the manifestation determination meeting and remembered that the IEP team did not dispute Student's diagnosis of ADHD; instead, its possible effect on Student's conduct was discussed. But she concluded at the meeting that his previous behaviors at school were not in any way predictive of his behavior on January 19th, which was not the sort of behavior addressed by his behavior intervention plan. Ms. Wright concluded at the meeting that Student's behavior on January 19th was not the product of his disabilities.

32. Assistant Principal Harper has been a counselor to Student in his 4-person Small Learning Community, and has counseled him after several classroom incidents. She explained that his behavior intervention plan discourages staff from criticizing him in front of his peers because that usually causes him to escalate. Its overall purposes are to enable him to return to class so he does not miss instruction, and to assist him when he has difficulty with classroom rules. In her experience, Ms. Harper does not view Student as acting impulsively; his oppositional behavior usually involved being instructed to do something he

⁸ Ms. Wright received a master's degree in special education from the University of the Pacific in 1992 and has multi-subject, learning handicapped and special education credentials. She has taught in several school districts and spent 17 years teaching a special day class for the Castro Valley Unified School District. She has also taught at the nonprofit Spectrum Center, where she encountered many children with serious emotional and behavioral difficulties.

does not want to do, like take off his hat or surrender his cell phone. He has not been regularly assaultive on campus and his escalations of verbal conflict have not led to violence.

33. Ms. Harper remembers discussing the possible effect of Student's ADHD on his behavior on January 19th at the manifestation determination meeting. She concluded from the discussion that there was no direct relationship between that behavior and his ADHD.

34. John Saylor, Liberty's Director of Special Services,⁹ chaired the manifestation determination meeting. He confirmed at hearing that the team discussed the possible effect of Student's ADHD on his behavior, and also discussed whether his behavior had been previously seen at school or in other places. Like the other Liberty members of the team, he did not see any connection between Student's disabilities and previous behaviors and his conduct on January 19th.

35. The testimony of Dr. Bylund, Mr. Meehlis, Ms. Wright, Ms. Harper, and Mr. Saylor was convincing. Each knew the details of Student's disabilities and his conduct, testified with clarity, testified consistently with contemporary records, and was not undermined by cross-examination. Collectively their testimony was credible and is given substantial weight here.

36. Mother was the only witness at hearing who saw a connection between Student's ADHD and his disabilities. She testified that he suffers from sensory overload, has a diminished ability to regulate his behavior, and gets upset quickly. He would regard a tap on the shoulder more like a punch.

37. Mother testified she disagreed with the manifestation determination because Student has "an impulse issue and an auditory issue" and that the principal did not give him appropriate time to calm himself down before he reacted quickly to the boy on the ground. She believes that Student's behavior implementation plan was not properly followed on January 19th because district personnel were aware of his past impulse and behavior issues and that day "it could have been approached differently." Mother's information about the incident came entirely from Student. No other witness supported her views.

Student's Perspective

38. In his written statement submitted a day or two after the fight, Student attributed the event to the animosity between student Roe and himself. He accidentally hit the campus security guard and freely apologized for that, but he did not express any remorse for hitting Roe, or for the incident itself. Nor did he mention anything about the possible effect of his disabilities on the event.

⁹ Mr. Saylor has a master's degree in psychology and pupil personnel services and administrative credentials. He is also credentialed as a school psychologist, and worked in that capacity for Liberty from 2000 to 2005, when he was promoted to his present position.

39. Student attended the manifestation determination meeting and for the most part listened quietly while the others discussed whether he could have heard instructions to stay in the principal's office and stop fighting, and whether impulsiveness related to his ADHD had played a role in the events. He spoke up briefly four times about his dislike of the card system that was part of his behavior plan, his tardies, and his accommodations. His only mention of the fight was a single statement about being four feet away from Roe and not sitting down. He said nothing about the effect of his disabilities on his conduct, did not claim he could not hear instructions, and did not claim he acted on impulse.

CONCLUSIONS OF LAW

Introduction: Legal Framework for Student Discipline under the IDEA¹⁰

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.)(2006).¹¹ The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. Title 20 United States Code section 1415(k) and title 34 Code of Federal Regulations, part 300.530 et seq., govern the discipline of special education students. (Ed. Code, § 48915.5.) A student receiving special education services may be suspended or expelled from school as provided by federal law. (Ed. Code, § 48915.5, subd. (a).) If a special education student violates a code of student conduct, the local educational agency may remove the student from his or her educational placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities.) (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1) .) A local educational agency is required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed. (34 C.F.R. § 300.530(d)(3).) If a special education student violates a code of conduct and the local educational agency changes the educational placement of the student for more than 10 days the local educational agency must meet the requirements of section 1415(k).

¹⁰ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹¹ All references to the Federal Regulations are to the 2006 version unless otherwise specified.

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

4. The party requesting a due process hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii).)

Issue: Was Liberty's Manifestation Determination Correct?

RELATIONSHIP OF STUDENT'S CONDUCT TO HIS DISABILITIES

5. Student contends that his fight with John Roe on January 19, 2017, was caused by or directly related to his ADHD. Liberty contends that his conduct was unrelated to his disability because he had no history of such outbreaks; his conduct was not impulsive; and that the sustained nature of the act, in the context of his ongoing dispute with John Roe, was different in kind from the sort of impulsiveness or anger to which ADHD can contribute.

6. A student's conduct is a manifestation of his disability: (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) if the conduct in question was the direct result of the local education agency's failure to implement his IEP. (34 C.F.R. § 300.530(e)(i) & (ii).) In *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470, 1480, fn. 8, affd. sub nom. *Honig v. Doe* (1988) 484 U.S. 305 [98 L.Ed.2d 686], the Ninth Circuit held that "conduct that is a manifestation of the child's handicap" occurs "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. . . ."

7. The evidence did not show that Student's conduct was caused by, or had a direct and substantial relationship to, his disabilities. Mother was the only witness who connected the two, and her testimony, though motivated by love and concern, did not clearly demonstrate a relationship between Student's conduct and his ADHD. Mother testified there was such a relationship because Liberty knew Student had "an impulse issue and an auditory issue." Impulsiveness is not a disability; it is only one characteristic that appears sometimes in some children who have ADHD. Student's specific learning disability does stem from his auditory processing deficit, but there was no evidence his difficulty with auditory processing had anything to do with his conduct. He was alone in the principal's office when he decided to leave it and attack John Doe.

8. For the several reasons that follow, the evidence at hearing independently supported the conclusion that Student's conduct on January 19th was not caused by, nor did

it have a direct and substantial relationship to, either his auditory processing deficit or his ADHD.

9. Student's behavior on January 19th was not impulsive. It is possible to speculate that his decision to leave the principal's office and attack John Roe was impulsive, though there was no evidence that it was. To the contrary, the evidence showed he left the office because he thought Roe "disrespected" him. In any event, it is not accurate to characterize Student's next actions as impulsive, which Mr. Meehlis defined at hearing as acting without thinking. Student had ample time to think about his conduct as he charged toward student Roe issuing curses and threats, ignored the orders of all adults to cease, and fought Roe so hard that it took two to four minutes for the four adults present to separate the boys. Even an hour later he was still angry and impliedly threatened further action against Roe. These actions show sustained rage rather than impulsive conduct.

10. Liberty presented substantial credible evidence, in the form of the opinions of Mr. Meehlis, Ms. Wright, Ms. Harper, and Mr. Saylor, that Student's conduct on January 19, 2017, was not related to his disabilities. Except for Mother's testimony, Student presented no evidence to contradict their opinions. Dr. Garcia, the only professional who testified for Student, did not address the question presented here.

11. There is a clear, specific, and persuasive explanation for Student's conduct that is unrelated to his disabilities. The confrontation between the two boys had been building for a week. Student was subject to serious provocation by Roe, who sought him out, came up behind him, tapped him on the shoulder, insulted him, threatened a fight, and put a protective mouthpiece in his mouth. These facts do not justify Student's subsequent conduct, but they do explain its origins.

12. Student's previous behavior does not show a pattern of assaultive conduct. Though Student has had ADHD for years, it had not driven him to assault anyone before January 19th. Dr. Bylund was convincing in establishing that, if Student's ADHD led to assaultive behavior, a pattern of such behavior would appear in previous years and across settings. The evidence showed no such pattern existed. Student presented no evidence about the "fight" in November 2015 except the bare entry in Student's disciplinary log and Mother's testimony that two boys fought at the start of school but Student did not start it. This is insufficient to show that the incident was serious or that it had anything to do with his disabilities. That and a pencil-throwing incident, throughout two and a half years of high school, do not make up the sort of pattern of violence that Dr. Bylund persuasively testified would appear if ADHD impelled Student to assaultive behavior. And Student's verbal outbursts of argumentative anger in class appear only in some classes in which he does not like the teacher, not in all of them, which strongly suggests that it is not disability-driven.

13. Student, in his closing brief, is not persuasive in equating his reported impulsiveness in class (interrupting, blurting out inappropriate remarks, and the like) with his conduct on January 19th; none of those earlier events involved sustained rage or violence. In arguing that his conduct on January 19th was predicted by his past behavior, Student fails

entirely to distinguish between violent and nonviolent conduct, or between the sort of anger that leads to an argument and the sort of anger that leads to an assault. Thus Student's claims that his conduct on January 19th was part of a pattern of impulsiveness and anger, and was so "predictable" that Liberty should have known to put a guard with him in the principal's office and put him somewhere without a window, are without support in the record.

14. There was no evidence that Student himself believes there was any connection between his conduct and his disabilities. His hostile statements soon after the fight ("He's not going to do that to me" and "I'm going to do what I'm going to do") displayed a personal animosity toward student Roe, not an impulsive, disability-related reaction. His written explanation of the incident also supported the conclusion that it occurred because of his hostile relationship with Roe, not because he had a sudden impulse or failed to hear anything. Student is 17 years old, intelligent and articulate. He could have claimed to the manifestation determination team that his disabilities caused his conduct, but he chose not to do so.

15. Student argues that his conduct on January 19th was self-defense; that the manifestation determination team should have found it was self-defense; and that such a finding "would nullify both conduct charges and cancel the manifestation determination review." No evidence supported that conclusion. Assistant Principal Harper established that Students are disciplined even when they engage in self-defense; it is regarded as part of "mutual combat" under the code of student conduct. The fact that Roe swung the first punch did not relieve Student of his own violations. A finding of self-defense, even if appropriate, would not have relieved Student of charges of violating the code of student conduct.

16. In addition, it is inaccurate to characterize Student's course of conduct on January 19th as self-defense. Roe's original challenge went no further than a tap on the shoulder; then Roe for some reason fell to the ground sick. Principal Oshodi successfully had separated the two boys, and he and a security guard had helped Roe to get up and get on the golf cart. That portion of the incident was over, although the effects of the argument and the insults were not. It was Student who re-opened hostilities by charging out of the principal's office cursing and threatening Roe, with the obvious intent of attacking him. The fact that Roe got off the cart and swung the first punch is minor in comparison to Student's instigation of the confrontation, and when that first punch was thrown Student did not retreat; he kept trying to attack Roe for two to four minutes. This went far beyond defending himself from one punch. The incident was a single event from Roe's shoulder-tapping to the end, and certainly Student was provoked. Nonetheless, the portion of the event that actually led to combat was instigated by Student.

17. Student faults the manifestation determination team for relying on assessments from Student's fifth and eighth grades rather than conducting a new assessment before the manifestation determination meeting. However, the team's obligation was to review the information that existed, not to create new information. (20 U.S.C. §1415(k)(1)(E); 34 C.F.R. § 300.530(e).) As Mr. Meehlis pointed out, a manifestation determination review must occur within 10 days of a decision to change the student's placement, which leaves

insufficient time for assessment. Liberty did offer to re-open the manifestation determination after the triennial assessments, but Student declined. And Student does not identify anything a new assessment might have shown that would likely have changed the outcome of the manifestation determination.

18. The record does not show why Liberty did not amend the suspension notice earlier in order to drop the charge of assaulting an employee before the manifestation determination, which would have been the better practice. Student argues, however, that if Liberty had done so the result would have been different. No evidence supports that conclusion. Ms. Harper testified that she and the team would have come to the same conclusion in the absence of the second charge because their decision was based on the same course of conduct, whether there were two charges or only one. This testimony was persuasive; Student's underlying behavior was the same whether his wild blows while blinded by the hoodie struck John Roe or someone else. Student did not prove that Liberty's tardiness in amending the suspension notice had any effect on the outcome of the manifestation determination, and on this record it is quite unlikely that it did.

19. Student argues, without evidentiary support, that if the manifestation determination meeting had proceeded without the charge of assaulting an employee, he would have been suspended for five days as Roe was, rather than expelled. This is only speculation, and it incorrectly assumes that the two boys were equally culpable; the evidence showed they were not. Roe's original tap-on-the-shoulder challenge was not accompanied by violence and came to nothing. The fight by the golf cart was instigated and maintained by Student and led to serious violence and injury. That speculation also disregards the prospect that there may have been other reasons for the level of discipline selected for Roe, which the confidentiality of Roe's records would have prohibited Liberty from mentioning.

20. For the reasons above, the manifestation determination was correct. Student's conduct on January 19, 2017, was not caused by, and did not have a direct and substantial relationship to, Student's disabilities. It was sustained and mostly premeditated rather than impulsive, and was the product of student Roe's animosity toward him and his response.

IMPLEMENTATION OF BEHAVIOR PLAN

21. Student argues that his conduct was also the consequence of Liberty's failure to implement the behavior intervention plan in his March 2, 2016 IEP. Mother testified that the incident could have been avoided if only Mr. Oshodi had allowed Student time to cool off.

22. A student's violation of a code of student conduct may also be a manifestation of his disability if the conduct was the direct result of the local education agency's failure to implement his IEP. (34 C.F.R. § 300.530(e)(1)(ii).)

23. Student argues that “[t]here was no data to show whether the IEP’s behavior plan was implement correctly.” This disregards the fact that the burden of proof was on Student to show that it was not.

24. Student also argues that there were several flaws in the behavior plan: that it was insufficiently detailed; that it was over-reliant on Student to develop his own strategies for self-control; and that it should have required teaching him more and different coping skills. These arguments are premature; they are pertinent to the non-expedited hearing, not this expedited hearing. The only issue here is whether the behavior plan, as written, was in fact implemented, not whether it could have been a better plan.

25. Student’s argument that the behavior plan should have been distributed widely to administrators and campus security is unpersuasive. The plan solely addressed Student’s conduct in class with adults. It contained no provision about his interaction with peers, and no provision for any contingency outside of class. Student’s closing brief does not identify any particular provision of the plan that should have been applied, and on the face of the plan there was no such provision.

26. The plan did generally employ the strategy of removing Student from a tense situation and letting him cool off, and Mr. Oshodi was aware that such a strategy was being used with Student. His act in removing Student from the situation and putting him in his office with instructions to remain there was entirely consistent with the general strategy of the behavior plan. The fact that the strategy was ineffective on this occasion does not mean that the plan was not followed. Student’s rage was so pronounced that it was extremely unlikely anything Mr. Oshodi could have done short of physical restraint would have been effective, and Student produced no evidence that he would have done anything differently if a different strategy had been used.

27. Student did not prove that his conduct on January 19, 2017, was related to any failure to implement his IEP.

ORDER

1. The manifestation determination of February 2, 2017, that Student’s conduct on January 19, 2017, was not a manifestation of his disabilities is affirmed.

2. All relief sought by Student from the expedited hearing is denied.

PREVAILING PARTY

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

RIGHT TO APPEAL

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

DATED: May 17, 2017

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings

reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.

(Authority: 20 U.S.C. 1415(m))

§§ 300.521–300.529 [Reserved]

Discipline Procedures

§ 300.530 Authority of school personnel.

(a) *Case-by-case determination.* School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

(b) *General.* (1) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536).

(2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

(c) *Additional authority.* For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

(d) *Services.* (1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must—

(i) Continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting,

and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.

(3) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

(4) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under § 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

(5) If the removal is a change of placement under § 300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section.

(e) *Manifestation determination.* (1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must 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 to determine—

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

(f) *Determination that behavior was a manifestation.* If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must—

(1) Either—

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

(g) *Special circumstances.* School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child—

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

(h) *Notification.* On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in § 300.504.

(i) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Controlled substance* means a drug or other substance identified under schedules I, II, III, IV, or V in section

202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(2) *Illegal drug* means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(3) *Serious bodily injury* has the meaning given the term “serious bodily injury” under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

(4) *Weapon* has the meaning given the term “dangerous weapon” under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

(Authority: 20 U.S.C. 1415(k)(1) and (7))

§ 300.531 Determination of setting.

The child’s IEP Team determines the interim alternative educational setting for services under § 300.530(c), (d)(5), and (g).

(Authority: 20 U.S.C. 1415(k)(2))

§ 300.532 Appeal.

(a) *General.* The parent of a child with a disability who disagrees with any decision regarding placement under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to §§ 300.507 and 300.508(a) and (b).

(b) *Authority of hearing officer.* (1) A hearing officer under § 300.511 hears, and makes a determination regarding an appeal under paragraph (a) of this section.

(2) In making the determination under paragraph (b)(1) of this section, the hearing officer may—

(i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of § 300.530 or that the child’s behavior was a manifestation of the child’s disability; or

(ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

(3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may

be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

(c) *Expedited due process hearing.* (1) Whenever a hearing is requested under paragraph (a) of this section, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of §§ 300.507 and 300.508(a) through (c) and §§ 300.510 through 300.514, except as provided in paragraph (c)(2) through (4) of this section.

(2) The SEA or LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing.

(3) Unless the parents and LEA agree in writing to waive the resolution meeting described in paragraph (c)(3)(i) of this section, or agree to use the mediation process described in § 300.506—

(i) A resolution meeting must occur within seven days of receiving notice of the due process complaint; and

(ii) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.

(4) A State may establish different State-imposed procedural rules for expedited due process hearings conducted under this section than it has established for other due process hearings, but, except for the timelines as modified in paragraph (c)(3) of this section, the State must ensure that the requirements in §§ 300.510 through 300.514 are met.

(5) The decisions on expedited due process hearings are appealable consistent with § 300.514.

(Authority:

20 U.S.C. 1415(k)(3) and (4)(B), 1415(f)(1)(A))

§ 300.533 Placement during appeals.

When an appeal under § 300.532 has been made by either the parent or the LEA, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in § 300.530(c) or (g), whichever occurs first, unless the parent and the SEA or LEA agree otherwise.

(Authority: 20 U.S.C. 1415(k)(4)(A))

§ 300.534 Protections for children not determined eligible for special education and related services.

(a) *General.* A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(b) *Basis of knowledge.* A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred—

(1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or

(3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

(c) *Exception.* A public agency would not be deemed to have knowledge under paragraph (b) of this section if—

(1) The parent of the child—

(i) Has not allowed an evaluation of the child pursuant to §§ 300.300 through 300.311; or

(ii) Has refused services under this part; or

(2) The child has been evaluated in accordance with §§ 300.300 through 300.311 and determined to not be a child with a disability under this part.

(d) *Conditions that apply if no basis of knowledge.* (1) If a public agency does not have knowledge that a child is a child with a disability (in accordance with paragraphs (b) and (c) of this section) prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors consistent with paragraph (d)(2) of this section.

(2)(i) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under

§ 300.530, the evaluation must be conducted in an expedited manner.

(ii) Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.

(iii) If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency must provide special education and related services in accordance with this part, including the requirements of §§ 300.530 through 300.536 and section 612(a)(1)(A) of the Act.

(Authority: 20 U.S.C. 1415(k)(5))

§ 300.535 Referral to and action by law enforcement and judicial authorities.

(a) *Rule of construction.* Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(b) *Transmittal of records.* (1) An agency reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(2) An agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

(Authority: 20 U.S.C. 1415(k)(6))

§ 300.536 Change of placement because of disciplinary removals.

(a) For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, a change of placement occurs if—

(1) The removal is for more than 10 consecutive school days; or

(2) The child has been subjected to a series of removals that constitute a pattern—

(i) Because the series of removals total more than 10 school days in a school year;

(ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and

(iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

(b)(1) The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.

(2) This determination is subject to review through due process and judicial proceedings.

(Authority: 20 U.S.C. 1415(k))

§ 300.537 State enforcement mechanisms.

Notwithstanding §§ 300.506(b)(7) and 300.510(d)(2), which provide for judicial enforcement of a written agreement reached as a result of mediation or a resolution meeting, there is nothing in this part that would prevent the SEA from using other mechanisms to seek enforcement of that agreement, provided that use of those mechanisms is not mandatory and does not delay or deny a party the right to seek enforcement of the written agreement in a State court of competent jurisdiction or in a district court of the United States.

(Authority: 20 U.S.C. 1415(e)(2)(F), 1415(f)(1)(B))

§§ 300.538–300.599 [Reserved]

Subpart F—Monitoring, Enforcement, Confidentiality, and Program Information

Monitoring, Technical Assistance, and Enforcement

§ 300.600 State monitoring and enforcement.

(a) The State must monitor the implementation of this part, enforce this part in accordance with § 300.604(a)(1) and (a)(3), (b)(2)(i) and (b)(2)(v), and (c)(2), and annually report on performance under this part.

(b) The primary focus of the State's monitoring activities must be on—

(1) Improving educational results and functional outcomes for all children with disabilities; and

(2) Ensuring that public agencies meet the program requirements under Part B of the Act, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.

(c) As a part of its responsibilities under paragraph (a) of this section, the State must use quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the priority areas identified in paragraph (d) of this section, and the indicators established

by the Secretary for the State performance plans.

(d) The State must monitor the LEAs located in the State, using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in those areas:

(1) Provision of FAPE in the least restrictive environment.

(2) State exercise of general supervision, including child find, effective monitoring, the use of resolution meetings, mediation, and a system of transition services as defined in § 300.43 and in 20 U.S.C. 1437(a)(9).

(3) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification.

(Approved by the Office of Management and Budget under control number 1820-0624)

(Authority: 20 U.S.C. 1416(a))

§ 300.601 State performance plans and data collection.

(a) *General.* Not later than December 3, 2005, each State must have in place a performance plan that evaluates the State's efforts to implement the requirements and purposes of Part B of the Act, and describes how the State will improve such implementation.

(1) Each State must submit the State's performance plan to the Secretary for approval in accordance with the approval process described in section 616(c) of the Act.

(2) Each State must review its State performance plan at least once every six years, and submit any amendments to the Secretary.

(3) As part of the State performance plan, each State must establish measurable and rigorous targets for the indicators established by the Secretary under the priority areas described in § 300.600(d).

(b) *Data collection.* (1) Each State must collect valid and reliable information as needed to report annually to the Secretary on the indicators established by the Secretary for the State performance plans.

(2) If the Secretary permits States to collect data on specific indicators through State monitoring or sampling, and the State collects the data through State monitoring or sampling, the State must collect data on those indicators for each LEA at least once during the period of the State performance plan.

(3) Nothing in Part B of the Act shall be construed to authorize the development of a nationwide database of personally identifiable information

DOCKET NO. 092-SE-1217
(Consolidated with Docket No. 089-SE-1217)

STUDENT	§	BEFORE A SPECIAL EDUCATION
b/n/f PARENT	§	
	§	
v.	§	HEARING OFFICER FOR THE
	§	
LEWISVILLE INDEPENDENT	§	
SCHOOL DISTRICT	§	STATE OF TEXAS

DECISION OF HEARING OFFICER

Petitioner, STUDENT (“Student”), by next friend, PARENT, Petitioner’s mother (“Parent”) and formerly named STUDENT, filed two complaints requesting expedited impartial due process hearings pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). The complaints were received by the Texas Education Agency on December 12, 2017 and December 18. The Respondent is Lewisville Independent School District, (“District”). The complaints were consolidated on January 3, 2018.

On January 26, 2018, the parties convened for the due process hearing. Parent appeared *pro se* on behalf of Petitioner. Student and Student’s father, *** (“Father”) were present. Nona Matthews, attorney, appeared on behalf of District. Elizabeth Knox, attorney, was present. Dr. ***, Executive Director of Special Education for District was present. Observing by agreement of the parties were Ray Green, Sandy Lowe, Kimberly Kovach and Delia Mims, hearing officers.

Issues for Hearing

The issues brought forth by Petitioner in its Request for Special Education Due Process Hearing and Required Notice are as follows:

1. Whether District failed to hold a manifestation determination review (“MDR”) within the required time frame under the IDEA;
2. Whether a December ***, 2017 discipline letter failed to contain Procedural Safeguards or a date for a MDR meeting;
3. Whether, following a ***, 2017 incident, District’s decision on December ***, 2017 to send Student to disciplinary school for 20 days constituted a change of placement;
4. Whether District’s communications with Student’s father interfered with Student’s right to a free, appropriate public education (“FAPE”) and was in violation of a court order giving Parent all decision making authority;

5. Whether prior to the *** incident, District violated its Child Find duties by its failure to evaluate Student;
6. Whether District failed to implement or revise Student’s §504 behavior intervention plan (“BIP”) and/or failed to develop a BIP when it determined eligibility for special education services under the IDEA; and
7. Whether District’s placement of Student in the *** (“****”) in lieu of the disciplinary alternative education program (“DAEP”) constituted a change of placement.

Requested Relief

Petitioner requested the following relief:

1. An order directing District to train administration in the IDEA rules and regulations including implementation of Student’s individualized education program (“IEP”);
2. An order directing District to resume Student’s prior placement at ***; and
3. An order directing District to remove the disciplinary incident from Student’s records.

Findings of Fact

Based on the documentary evidence and testimony of witnesses before this hearing officer, the following are findings of fact in the instant action. Citations to Petitioner’s Exhibits and Respondent’s Exhibits are designated with a notation of “P” or “R” respectively, followed by the exhibit number, and page number as appropriate and available. Citations to the transcript are designated with a notation of “T” followed by the page number.

1. Student is a *** grade child who resides with Father within the geographical boundaries of District. Student’s mother ***. District is responsible for the provision of special education and related services to those within its boundaries who are eligible for such services. P34;
2. Student attended *** (“****”) ***. Student began *** grade at *** and was dropped from enrollment ***, 2014 (***) grade) due to non-attendance. R2:3, 4;
3. In the fall, 2015 Student enrolled in District as a *** grader due to ***. The enrollment form did not indicate that Student had received §504, special education, ***, or *** services. Student had been attending ***. By the 2016 spring semester, Student had completed the necessary requirements to begin *** grade and ***. Student’s reading and comprehension was at ***. R1:1; R3; T 57-63; 319
4. During the 2015-2016 school year, Student had *** disciplinary offenses. R13
5. On February ***, 2016, District learned that Student had received services in *** either under §504 or the IDEA. District requested information from Father because it had nothing from

Student's previous school regarding services. Father was unsure whether Student was in special education or §504. R6:1-2; T 62-63

6. Student passed all spring semester classes except ***. Student *** during the 2016 summer school. With the exception of ***, Student's grade averages ranged from ***. Student passed the Texas state required *** tests for *** during the 2015/2016 school year. R37:1-6
7. On July ***, 2016, for the first time, District received Student's *** IEP. Student had qualified in *** for special education services as *** and other health impairment ("OHI"). Necessary information was not included. On July ***, District notified Father regarding the need for additional information. R8:2,3; R9:4; R11:2
8. On August ***, 2016, District contacted *** and requested additional information regarding Student's eligibilities. Records were transmitted to District the following day. The IEP was for the year of September ***, 2014-September ***, 2015 (*** grade year). The IEP did not require a BIP. The records included a neuropsychological evaluation dated April 2009 and an October, 2009 Reevaluation Summary Report. The *** IEP team determined that it needed additional information to determine whether other disabilities existed. R9:7; R10:1-29; R11:2, 6; T 768, 4-75; 232-233
9. Parent filed a due process hearing request on July 29, 2016. District provided a copy of the Procedural Safeguards on August 1, 2016. R9:1-2
10. On August ***, 2016, after receiving an email from Parent indicating that she ***, District requested ***. R9:14
11. Following Parent's request for due process hearing, District offered to conduct a full and individualized evaluation ("FIE") during a resolution meeting on August 25, 2016. District emailed a Notice and Consent for a Full and Individualized Evaluation along with a copy of the Notice of Procedural Safeguards. District wanted to evaluate in the areas of OHI, Autism, emotional disturbance ("ED"), and learning disability ("LD"). Parent did not provide consent to evaluate. R12:1-25; T 234-235, 379-380
12. Student withdrew from District September ***, 2016. Student enrolled in *** in *** (***) for Student's *** grade year. R15:1
13. In response to Student's behavior at parent's home, Student was ***. Student was diagnosed with ADHD, *** (***) and ***. *** attempted to obtain consent for assessment to determine special education eligibility in *** on September ***, 2016. Parent did not give consent. R16:4-8; R18:2

14. On February ***, 2017, Petitioner's physician diagnosed Student with ADHD and ***. Another physician diagnosed Student with ADD, *** and ***. R16:1, 3
15. On March ***, 2017, Student transferred from *** to ***, both in ***. R20:1
16. On March ***, 2017, *** §504 team determined that Student was eligible for §504 services. The impairments were ADHD, ***, ***, Autism Spectrum Disorder, ***, and ***. Accommodations were put in place. The documentation indicated that Student had a health care plan. P32; R17:1-8
17. At Parent request, *** conducted a psycho-educational evaluation to determine whether Student met the *** standards for ***. Student did not meet the standards and was found ineligible for special education services. Parent disagreed with the committee's determination. R18; R19
18. While at ***, Parent requested a Functional Behavior Assessment ("FBA"). The FBA was completed on May ***, 2017. The FBA reported that Student had *** office referrals for a variety of reasons at ***. Since transferring to ***, Student had received no referrals. The report found that Student engaged in non-compliance in order to avoid non-preferred activities and to obtain access to preferred items. The report recommended a BIP. R20
19. Student enrolled in District for the 2017-2018 school year (*** grade). On August ***, Parent emailed that Student would be ***. Parent informed District that ***. Parent told District that Student was on a §504 service plan on August ***, 2017. On the same date, Parent emailed the §504 Plan. Parent did not send a health plan. P1; P32; R25:1; R26:2
20. On August ***, 2017, District requested Student's records from ***. District received the records September ***, 2017. P6; R26:1
21. On the first day of school, ***. Student ***. On September ***, Student received ***. R36:2
22. After the ***, the Assistant Principal called Parent to learn more about Student. District's diagnostician was in the office during the phone call. The Assistant Principal discussed special education with Parent and suggested that perhaps a special education referral should be made. After a contentious conversation, Parent did not want to pursue special education. T 420-424
23. On September ***, 2017, pending District's §504 meeting, Student's teachers were given a list of the §504 accommodations that were in Student's schedule of services from Student's prior school. The *** that District had access to. In lieu of ***, teachers were encouraged to have Student use *** unless they had an alternative program already set up for students. P6; R27:1
24. Notice of the September ***, 2017 §504 committee meeting was sent September ***. Parent participated by phone, but hung up before introductions concluded. The meeting was rescheduled for October ***, 2017. Parent participated by telephone. Father was present at the meeting. The plan included numerous accommodations that included ***. The committee did not develop a

- BIP. Parent requested an evaluation for special education services including a homebound assessment. District recommended a referral for a full individual evaluation (“FIE”) to include homebound and psychological assessments. District provided Procedural Safeguards. Parent consented to the evaluations. P 5; R29; R30:1; T 22
25. Beginning September ***, 2017, Parent began to take issue with District’s statutory compliance in the implementation of Student’s §504 plan. P7; P8; P9; P10
 26. Beginning October ***, 2017, Student was ***. Student returned on or about December ***. During that time, District provided instruction through the ***. ***. P34; R33:21; T 97-101
 27. A physician completed and OHI evaluation report and diagnosed Student with *** and moderate ADHD, combine type. The doctor did not recommend homebound instruction. He recommended rest periods during the school day. R31
 28. District provided Procedural Safeguards on November ***, 2017. R24:3
 29. The initial FIE for OHI was reported November ***, 2017 and concluded that Student met requirements to be identified as a child with OHI. The report recommended access to *** classroom for *** instruction and/or ***. It recommended that the admission, review and dismissal (“ARD”) committee consider an assessment for emotional disturbance (“ED”) and a referral for special education counseling. P34; R32; T 237
 30. The initial ARD committee meeting was held November ***, 2017. Procedural Safeguards were given Parent on October ***. The committee accepted eligibility of OHI for ADHD and ***. Behavior and study skills goals were developed. Student was to return to school December ***. Student would attend school for *** and complete ***. District members recommended *** support for *** minutes per week. Due to Student’s absences, District had been unable to conduct a psychological evaluation at that time. The committee members expressed their wish to complete the rest of the evaluation areas: psychological, including Autism, and counseling. Parent did not consent to more evaluation. The committee completed Student’s *** and reviewed Student’s Present Levels of Academic Achievement and Functional Performance (“PLAAFP”). The committee developed a goal for work completion. At Parent request, the group added a goal for ***. The committee did not determine a need for a BIP. The meeting ended in non-consensus and a reconvened ARD was scheduled for December ***. P34; R33:1-13, 21; T 238-242, 447, 449
 31. At the reconvened ARD meeting, Parent requested increased minutes of *** support to *** minutes per day, a total of *** minutes per week. The committee agreed. Parent and Father did not agree to further evaluation at that time. The committee ended in agreement. P16; P34; P35; R33:19, 22; T 23, 244

32. The IEP included the following accommodations: preferential seating, ***, ***; reminders to task; ***; breaks and water access as needed; extended time to make up work; ***; use of computer; access to technology; access to book when done; ensure clarity of instruction and expectations; extra time for tests; retake tests and quizzes for grades less than 70%; ***; *** and encourage/praise; verbal. P 35; R33:15
33. At the time of the ARD meeting, Student had received *** discipline referrals. P 34; R33:5
34. On November ***, 2017, while Student was absent ***, it was reported that Student ***. District emailed Parent and Father on December ***, 2017 and described the incident. District waited until Student had returned to school to complete its investigation and to allow Student's return to class to be smooth. P20; R24:9; T 425
35. On December ***, the Assistant Principal emailed Parent and Father of the incident and the need to address the violation of the student code of conduct. R24:9
36. On December ***, District interviewed Student ***. R36:3
37. On December ***, 2017, the Assistant Principal emailed Parent and Father that the diagnostician would send an official invitation for the MDR ARD. He also sent a letter informing Parent and Father of Student's assignment to the disciplinary alternative education center ("DAEP") for 20 days. He made no reference to the Procedural Safeguards in the body of the letter. District emailed new Procedural Safeguards to Parent on same day. P22; R24:10-12
38. Parent filed a Level One appeal of the disciplinary decision. P24
39. Parent filed the first request for expedited due process hearing on December 12, 2017.
40. . On December ***, 2017, District sent notice of an ARD meeting scheduled for December *** to conduct a MDR review and consider disciplinary assignment of Student. A copy of the December 2017 Explanation of Procedural Safeguards was included. P 36; R34:29
41. On December ***, 2017, District's Assistant Principal emailed Parent and Father of a change in Student's discipline from DAEP to ***. In the first week after the holiday break, the Assistant Principal walked Student to *** classroom. P26; P28; T 432
42. Parent filed the second request for expedited due process hearing on December 18, 2017.
43. At the December *** MDR meeting, Parent participated by phone. Father and Student were in attendance. The committee reviewed information from Parent, evaluations, teacher observations, classroom based assessments and observations, Student's placement, and discipline records, and a May ***, 2017 FBA. The committee reviewed Student's ***. *** was currently being provided at the time of the MDR. P36; R34:3-4, 12

44. The committee conducted a FBA and developed a BIP for Student. Two behaviors were discussed: ***. The BIP addressed both behaviors. P36; R34:4-7
45. The ARD committee determined that Student's actions were not a manifestation of OHI by reason of ADHD. ***. The committee could not determine if the behavior was a manifest of *** due to lack of information and its inability to complete a psychological evaluation. Parent was not in agreement with further evaluation. Prior written notice was given December ***, 2017. P36; R34:8
46. The ARD committee discussed discipline and determined that Student's needs could not be met in the DAEP setting. District recommended the *** setting as Student's interim educational alternative setting. District clarified the supports of the *** environment. It reviewed Student's absences from ***. Also, ***. The committee determined that Student's behavior was not a failure to implement the IEP since the behavior occurred prior to determination of eligibility for special education services. Parent did not choose to indicate agreement with the BIP at that time. She was in disagreement with the discipline assignment to *** for *** days. Father was in disagreement, as well. The MDR form did not check whether the behavior was or was not a manifestation of Student's disability. Deliberations stated that District members agreed that Student's behavior was not a manifestation of ADHD. P36; R34:7-10
47. On January ***, 2018, District sent its Notice of Proposal or Refusal to Provide Services to Parent and Father. It continued to propose further evaluation, including a psychological to consider possible ED, Autism, and ***. It proposed the *** setting rather than DAEP in order to meet Student's educational needs and implement Student's IEP, among others. R35:2
48. Eight school days passed from the date of District's decision to change Student's placement for violation of a code of student conduct to the date of the MDR. R38:1
49. ***. ***. R37:9; T 92

Discussion

A petitioner who challenges the school district's eligibility determination or offer of services under the IDEA bears the burden to prove that the child has been denied a FAPE. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U. S. 528 (2005).

The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508(b), unless the other party agrees otherwise. 34 C. F. R. § 300.511(d). No agreement was made; thus, only those issues raised in the consolidated requests are considered in this decision.

Issues

#1 Did District fail to hold a manifestation determination review (“MDR”) within the required time frame under the IDEA?

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child’s IEP Team (as determined by the parent and the LEA) must 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 to determine —

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or

(ii) If the conduct in question was the direct result of the LEA’s failure to implement the IEP. 34 C. F. R. §300.530(e).

The decision to change Student’s placement because of a violation of a code of student conduct was made December ***, 2017. The MDR meeting was held December ***. District held the MDR less than 10 school days from the disciplinary decision. Petitioner failed to prevail on this issue.

#2: Did District’s December *, 2017 discipline letter fail to contain Procedural Safeguards or a date for a MDR meeting?**

On the date on which a school decides to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the Procedural Safeguards notice. 34 C. F. R. §300.530 (h). District sent Parent notice of its decision to change Student’s placement on December ***, 2017. Although it is unclear if Procedural Safeguards were included with the notice, the evidence is clear that Procedural Safeguards were sent to Parent on the same day. Petitioner failed to prevail on this issue.

The IDEA does not require that a date for a MDR meeting be included in the notification of a decision to change placement of a child with a disability because of a violation of a code of student conduct. On December ***, 2017, District sent notice of the December *** ARD meeting to conduct a MDR review and consider disciplinary assignment of Student. Petitioner failed to prevail on this issue.

#3 Following a *, 2017 incident, did District’s decision on December ***, 2017 to send Student to disciplinary school for 20 days constitute a change of placement?**

For purposes of removals of a child with a disability from the child’s current educational placement under §§ 300.530 through 300.535, a change of placement occurs if the removal is for more than 10 consecutive school days or the child has been subjected to a series of removal that constitute a

pattern as described in the IDEA. 34 C. F. R. §300.536. District's decision to send Student to DAEP for 20 days constituted a change of placement; however, District had authority to implement up to 10 days of that assignment pending the timely MDR analysis. The MDR meeting occurred within 10 school days of the decision to change Student's placement for violation of the student code of conduct. 34 C. F. R. §530 (e). Petitioner failed to prevail on this issue.

#4 Did District's communications with Student's father interfere with Student's right to a free, appropriate public education ("FAPE") and did such communications *?**

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide a free and appropriate public education (FAPE). The educational program must be meaningful, and reasonably calculated to produce progress as opposed to *de minimis* advancement. 20 U.S.C. § 1412(a)(1); *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982).

The Fifth Circuit further defined a FAPE by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the child's assessment and performance; 2) Is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by the key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d at 253 (5th Cir. 1997).

The authority of a hearing officer under the IDEA is limited to determinations relating to the identification, evaluation or educational placement of a child with a disability or the provision of FAPE to the child. Such authority does not extend to a determination regarding ***. Any allegation in that regard is DISMISSED.

Father began making inquiries about Student's transfer to District in the fall, 2015. He sent emails throughout that school year regarding Student's progress and behavior. He requested make up work when Student was absent. Student withdrew in September, 2016 and returned to ***. Student had not been determined eligible for special education services during the 2015-2016 school year.

Father enrolled Student in District again in the fall, 2017, having provided the necessary information for enrollment. Student was determined eligible for special education services December ***, 2017. Throughout that time, District communicated with both Parent and Father regarding Student's education.

Petitioner argued that District circumvented Parent and communicated directly with Father who then forwarded the communications to Parent. Parent reasons that such inferred delay caused a denial of

FAPE for Student. Of the four factors for determining FAPE, Parent's argument may relate to the third factor that asks if the services provided in a coordinated and collaborative manner by the key stakeholders. Parent's evidence is insufficient to make such a finding. Prior to Student's eligibility for special education services, when District was notified of Parent's role in Student's life, it copied emails to Parent and Father. The Assistant Principal called Parent regarding Student. Parent was included via telephone at the §504 meetings. Parent attended the ARD meetings via telephone. Parent failed to carry the burden of proving that communications with Father interfered with Student's right to FAPE.

#5 Prior to the * incident, did District violate its Child Find duties by its failure to evaluate Student?**

Public school districts must comply with the IDEA procedures for identifying children with disabilities who need special education, and delivering appropriate services as necessary to provide a FAPE. This is referred to as Child Find. 34 C.F.R. §300.111; *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 189 (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). Child Find is an affirmative duty of a school district that is triggered at the time a district has reason to believe that a student has a disability and suspects that special education services may be needed to address that disability. *Davonne B. v. Houston I.S.D.*, No. 327-SE-596 (Texas H.O. Dec'n, May 2, 1997). IDEA requires more than a diagnosis of a disability; it requires that a child exhibits symptoms of a qualifying disability *and* exhibits them to such a degree that they interfere with the child's ability to benefit from the general education setting. *Student v. Lake Travis Indep. Sch. Dist.*, No. A-07-CA-152-SS (W.D. Tex. Filed Aug. 10, 2007); *Alvin Indep. Sch. Dist. v. Student*, 46 IDELR 221(5th Cir. 2007).

In August 2016, District proposed conducting a FIE for possible OHI, Autism, ED, and Learning Disability. Parent refused to give consent for the evaluations. In April 2017, while Student attended ***, the IEP team considered Student for *** eligibility classification of *** and determined that Student did not meet eligibility for special education services. Student re-enrolled in District in August 2017 with a §504 plan. The Assistant Principal discussed possible special education evaluation with Parent who did not want to pursue special education. District developed its §504 plan and Student progressed under the plan. Following Student's ***, the §504 committee initiated a referral for a special education evaluation to include a psychological evaluation including Autism, OHI and ***. Parent gave consent. Due to Student's absence from school until December ***, District was able only to consider the disability of OHI. District wanted to start services as soon as possible and summarized the existing information in a report dated November ***, 2017. The ARD committee met and found Student eligible for special

education services as a child with OHI due to ADHD and ***, but recommended additional evaluation. Parent did not consent to the additional evaluation.

Petitioner believes that District’s psychologist recommended a review of existing evaluation data (“REED”) for Student on September ***, 2017. The email from the psychologist stated that she recommended REEDs going forward unless additional concerns were express by teachers. Petitioner failed to produce supporting evidence to explain what, if any, actions District took as a result of that September email or why Student was included in the email. Student had not been determined eligible for special education services at that time. Petitioner also argued that a single emailed letter from one of Student’s teachers was sufficient to cause District to suspect that Student was a child with a disability in need of special education services. On October ***, 2017, Student’s *** teacher emailed Parent and Father that Student had ***, but that Student was “***”.

Promptly after District learned of Student’s ***, it began the referral process for special education evaluation. Petitioner’s evidence is not persuasive that District had reason to suspect Student had a disability and was in need of special education services until Student’s ***. Until that time, and at the time of hearing, Student was successful academically. Further, Student’s discipline referrals were no more than *** since the beginning of the school year. Teacher testimony indicated that Student is motivated, inquisitive, expects good academic performance of ***self, and interacts with Student’s peers. Petitioner failed to prevail on this issue.

#6 Did District fail to implement or revise Student’s §504 behavior intervention plan (“BIP”) and/or fail to develop a BIP when it determined eligibility for special education services under the IDEA?

Petitioner devoted a significant amount of time at hearing in regard to Student’s §504 plan and the allegations that District failed to implement or revise the §504 BIP. This hearing officer lacks jurisdiction to consider District’s actions regarding Student’s §504 plan; thus any allegation concerning Student’s §504 program is DISMISSED.

The remaining question at issue is whether District failed to develop a BIP when it determined eligibility for special education services under the IDEA. The ARD committee considered Student’s behavior needs and determined that positive behavioral interventions, strategies and supports were necessary. The committee developed goals to address Student’s needs for timely completion of assignments and for compliance with directives. Student’s program also included time in the *** classroom for *** or ***. At Parent request, the committee increased Student’s time in the *** classroom.

The IDEA requires development of a BIP when a child's conduct is determined to be a manifestation of the child's disability. At the December ***, 2017 MDR meeting, the ARD committee determined that the behavior was not a manifestation of ADHD. Despite that, the committee conducted a FBA and developed a BIP. 34 C. F. R. §300.530 (f). Petitioner failed to show that the ARD committee was required or should have developed a BIP when Student was determined eligible for special education services under the IDEA. Petitioner failed to carry the burden of proof on this issue.

#7 Did District's placement of Student in the * in lieu of the DAEP constitute a change of placement?**

As previously discussed, District had authority to implement up to 10 days of that assignment pending the MDR analysis that occurred within 10 school days of the decision to change Student's placement because of a violation of a code of student conduct. 34 C. F. R. §530 (3). Within the 10 days, the Assistant Principal changed the disciplinary setting to the *** classroom. He was within his authority to make the disciplinary change. 34 C. F. R. §300.530 (b).

Conclusions of Law

1. The Student is eligible for a free appropriate public education under the provisions of IDEA, 20 U.S.C. §1400, et seq., 34 CFR §300.301 and 19 T.A.C. §89.1011.
2. The Lewisville Independent School District is responsible for properly identifying, evaluating, and serving the student under the provisions of IDEA, 20 U.S.C. §§1412 and 1414; 34 CFR §300.301, and 19 T.A.C. §89.1011.
3. Petitioners failed to carry the burden of proof to establish a violation of IDEA or a denial of FAPE. *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

Orders

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that all relief requested by Petitioner is DENIED and that all claims of Petitioner are DISMISSED with prejudice.

SIGNED on February 8, 2018.

BRENDA RUDD
Special Education Hearing Officer
For the State of Texas

NOTICE TO THE PARTIES

The decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States. A civil action brought in state or federal court must be initiated not more than 90 days after the date the hearing officer issued Student's or her written decision in the due process hearing. 20 U.S.C. §§1415(i)(2) and (3)(A) and 1415(l).