SCLS SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

Washington State Association of School Psychologists

An In-Depth Discussion Around the Manifestation Determination

August 21, 2017

Presented by:

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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 Education Psychologist (Inactive), and a Nationally Certified School Psychologist.

Education

J.D. Boalt Hall (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.

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An In-Depth Discussion Around the Manifestation Determination

August 18, 2017

SCLS SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

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August 21, 2017

Presented by:
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Learner Objectives

This session will help participants:

1. With the skills to identify the legal requirements governing the behavior and discipline needs of special education students;
2. With the legal citations governing special education behavior, discipline, and manifestation determination meetings, and
3. With the skills to complete a legally defensible manifestation determination meeting.

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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

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Handouts

1. 34 CFR sections 300.530-537.
2. *Questions and Answers on Discipline Procedures* (OSERS June 2009): http://idea.ed.gov/explore/view/p/,root,dynamic,QaCorner,7,
3. *Dear Colleague: Positive Behavior Interventions and Supports* (OSERS Aug. 1, 2016): http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf
4. *New Haven Unified Sch. Dist.* (OAH 5-20-13) No. 2013031128.
5. *Liberty Union High Sch. Dist.* (OAH 5-17-17) No. 2017040078.
6. *J.M. v. Liberty Union High Sch. Dist.* (N.D.Cal. May 16, 2017) No. 16-CV-05225-LB

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Agenda

- Students Who Receive MD Protection
- FBA
- "Change in Placement"
- Requirements Of MD
  - Suggestions For Summary Document/Report To Be Reviewed At MD
- Special Circumstances
  - IAES
- Expedited Due Process Hearing
  - Parent
  - LEA
- Student Not Yet Identified As Being in Special Education

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Special Education Discipline

Special Education (and Section 504 students) are also "special" when it comes to discipline are receive various due process rights (including a MD):

- Special education student.
- Student in process of being assessed for special education.
- Student whom the LEA had a basis of knowledge the student might be a special education student.
- Section 504 students. (34 CFR section 104.35)
  - *Dunkin (MO) R-V Sch. Dist.* (OCR 2009) 52 IDELR 138.

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Functional Behavioral Assessment

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.

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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.

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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).

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Functional Behavioral Assessment

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.

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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 CFR section 300.536

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Change in Placement

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.

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Change in Placement

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 MD meeting required.
  - See *Avila v. Spokane Sch. Dist. #81* (E.D.Wa. Nov. 3, 2014) 114 LRP 47881.
- Best practice is to consider FBA+BIP and IEP meeting.

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Change in Placement

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 CFR section 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.

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Change in Placement

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

- 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.

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Change in Placement

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 CFR section 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."

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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).
- Check state law on this issue!

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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).
- 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…"

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Change in Placement

Suspension from the bus:

- If transportation is included on a student's IEP then a bus suspension is treated like a suspension under 34 CFR 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)
- 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.

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Manifestation Determination Meeting

When:

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

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 CFR section 300.530(h).

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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.

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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).

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Manifestation Determination Meeting

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 [involuntary 72-hour hospitalization for suicidal/homicidal ideation], suicidal ideation, etc. caused the behavior.

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).

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Manifestation Determination Meeting

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 lit 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 California 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.

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Manifestation Determination Meeting

- 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).

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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.

*Check state law on this issue!

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Manifestation Determination Report

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.

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Manifestation Determination Meeting

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.

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Manifestation Determination Meeting

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.

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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 CFR section 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 section 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.

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Special Circumstances

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

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Special Circumstances

"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.

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Special Circumstances

"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."

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Special Circumstances

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.

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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 section 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.

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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.

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CA LEA Expedited Due Process Request

- *Capistrano USD* (OAH 2-3-16) 2015120782 - LEA prevail IAES general education to NPS
  - Granted LEA's request to move 5 y/o initial assessment from kindergarten general education to NPS.
- *San Leandro USD* (OAH 12-16-13) 2013100168 - *LEA prevail IAES SDC to CE*
  - Granted LEA's request to move student from SDC to Counseling Enriched ("CE") program.
- *Rialto USD* (OAH 2013) No. 2013090966.
  - Granted LEA's request to move student from SDC to NPS.
- *Grossmont USD* (OAH 2011) No. 2011020431.
  - Granted LEA's request to move student to small alternative high school.
- *Saddleback Valley USD* (OAH 2009) No. 2008110184.
  - Denied LEA's request to move student from general education to SDC-ED IAES.
- *Fort Bragg USD* (OAH 2008) No.2008100507.
  - Granted LEA's request to move student from SDC to residential placement.
- *Long Beach USD* (OAH 2008) No. 2008030017.
  - Granted LEA's request to move student from SDC-ED to Non-Public School ("NPS").
- *Fullerton Joint Union HSD* (OAH 2007) No. 2007040584.
  - Granted LEA's request to move student from SDC to more restrictive SDC.
- *Lancaster Elem. SD* (OAH 2006) No. 2006030771.
  - Granted LEA's request to move student from general education (2nd grade) to SDC
  - Also, of note, prior to the OAH decision the LEA obtained temporary injunctive relief through a California Superior Court that restrained the student from attending the general education program and ordered the student to the SDC, which the student refused to attend.

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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.

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Student Not Yet Identified as Special Education

- 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.

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Student Not Yet Identified as Special Education

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.

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Student Not Yet Identified as Special Education

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 section 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.

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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 must 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.

SCLS

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.

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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 §A300.530(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

Questions and Answers
On Discipline Procedures

Revised June 2009

Regulations for Part B of the Individuals with Disabilities Education Act (IDEA) were published in the Federal Register on August 14, 2006, and became effective on October 13, 2006. Additional regulations were published on December 1, 2008, and became effective on December 31, 2008. Since publication of the regulations, the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education (Department) has received requests for clarification of some of these regulations. This is one of a series of question and answer (Q&A) documents prepared by OSERS to address some of the most important issues raised by requests for clarification on a variety of high-interest topics. Each Q&A document will be updated to add new questions and answers as important issues arise or to amend existing questions and answers as needed.

OSERS issues this Q&A document to provide guidance on discipline policies enacted for school-age students to personnel in State educational agencies (SEAs) and local educational agencies (LEAs), and families. This Q&A document represents the Department's current thinking on this topic. It does not create or confer any rights for or on any person. This guidance does not impose any requirements beyond those required under applicable law and regulations.

This Q&A document supersedes the Department's guidance, entitled *Questions and Answers on Discipline Procedures*, issued January 2007.

The 2004 amendments to section 615(k) of the IDEA were intended to address the needs expressed by school administrators and teachers for flexibility in order to balance school safety issues with the need to ensure that schools respond appropriately to a child's behavior that was caused by, or directly and substantially related to, the child's disability. The reauthorized IDEA and its implementing regulations include provisions that address important disciplinary issues such as: the consideration of unique circumstances when determining the appropriateness of a disciplinary change in placement; expanded authority for removal of a child from his or her current placement for not more than 45 school days for inflicting a serious bodily injury at school or at a school function; the determination on a case-by-case basis as to whether a pattern of removals constitutes a change of placement; and revised standards and procedures related to the manifestation determination.

Generally, the questions, and corresponding answers, presented in this Q&A document required interpretation of the IDEA and its implementing regulations and the answers are not simply a restatement of the statutory or regulatory requirements. The responses presented in this document generally are informal guidance representing the interpretation of the Department of the applicable statutory or regulatory requirements in the context of the specific facts presented and are not legally binding. The Q&As in this document are not intended to be a replacement for careful study of the IDEA and its implementing regulations. The IDEA, its implementing

regulations, and other important documents related to the IDEA and the regulations are found at http://idea.ed.gov.

If you are interested in commenting on this guidance, please email your comments to OSERSguidancecomments@ed.gov and include Discipline in the subject of your email or write us at the following address: Patricia Guard, U.S. Department of Education, Potomac Center Plaza, 550 12th Street, SW, room 4108, Washington, DC 20202.

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determines that a series of removals constitutes a change of placement?

F-4. Does a school need to conduct a manifestation determination when there is a violation under 34 CFR §300.530(g), which refers to a removal for weapons, drugs, or serious bodily injury?

F-5. What disciplinary procedures would apply in the case of a child who has been referred for a special education evaluation and is removed for a disciplinary infraction prior to determination of eligibility?

F-6. Is there a conflict between 34 CFR §300.530(c), allowing school personnel, under certain circumstances, to apply the relevant disciplinary procedures to a child with a disability in the same manner and for the same duration as would be applied to children without disabilities, and the provision, at 34 CFR §300.532 (b)(2), that the hearing officer may order a change in placement 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?

Authority: The requirements for discipline are found in the regulations at 34 CFR §§300.530 – 300.536.

A. Safeguards

Question A-1: When the parent(s) of a child and the school personnel are in agreement about the child's change of placement after the child has violated a code of student conduct, is it considered to be a removal under the discipline provisions?

Answer: No, if the parent(s) of a child and the school district agree to a specific change in the current educational placement of the child.

Question A-2: When a parent consents to the initial provision of some, but not all, of the proposed special education and related services, do the discipline provisions apply if the child violates the school's code of student conduct?

Answer: Yes. When a parent consents to the initial provision of some, but not all, of the proposed special education and related services listed in a child's initial individualized education program (IEP), the child has been determined eligible for services and is entitled to all the protections of the IDEA.

Question A-3: Do the discipline provisions apply if the child violates the school's code of student conduct after a parent revokes consent for special education and related services under §300.300(b)?

Answer: No. Under §§ 300.9 and 300.300, parents are permitted to unilaterally withdraw their children from further receipt of special education and related services by revoking their consent for the continued provision of special education and related services to their children. When a parent revokes consent for special education and related services under §300.300(b), the parent has refused services as described in §300.534(c)(1)(ii); therefore, the public agency is not deemed to have knowledge that the child is a child with a disability and the child will be subject to the same disciplinary procedures and timelines applicable to general education students and not entitled to IDEA's discipline protections. It is expected that parents will take into account the possible consequences under the discipline procedures before revoking consent for the provision of special education and related services. 73 Federal Register 73012-73013.

Question A-4: In order to receive the protections for disciplinary purposes in 34 CFR §300.534, parents who are concerned that their child may need special education and related services must first **express their concerns in writing**. How are parents informed of this requirement?

Answer: Neither the IDEA nor the regulations specifically address this issue. However, in its child find policies and procedures, a State may choose to include ways to provide information to the public regarding IDEA's protections for disciplinary purposes when a parent has expressed in writing to school personnel concerns regarding the child's need for special education and related services. Examples of ways to provide such information include making the information available on the State's Web site, the LEA's Web site, or in the State's Procedural Safeguards Notice or the school's student handbook.

Question A-5: Under 34 CFR §300.534(b), a public agency is deemed to have knowledge that a child is a child with a disability if a parent expressed in writing a concern that his or her child needs special education and related services. What happens if a parent is unable to express this concern in writing?

Answer: The requirement that a parent express his or her concern in writing is taken directly from the IDEA. However, there is nothing in the IDEA or the regulations that would prevent a parent from requesting assistance to communicate his or her concerns in writing. The Department funds Parent Training and Information Centers (PTIs) and Community Parent Resource Centers (CPRCs) to assist parents of students with disabilities. Information about the PTIs and CPRCs is found at http://www.taalliance.org/.

Question A-6: If a removal is for 10 consecutive school days or less and occurs after a student has been removed for 10 school days in that same school year, and the public agency determines, under 34 CFR §300.530(d)(4), that the removal **does not constitute a change of placement,** must the agency provide written notice to the parent?

Answer: No. Under Part B, a public agency's determination that a short-term removal **does not constitute a change of placement** is not a proposal or refusal to initiate a change of placement for purposes of determining services under 34 CFR §300.530(d)(4). Therefore, the agency is not required to provide written notice to the parent.

Question A-7: If a teacher or other school personnel has specific concerns that a child may need special education and related services due to a child's pattern of behavior, must such concerns be submitted in writing to school officials in order for the public agency to be deemed to have knowledge that the child is a child with a disability?

Answer: No. Under 34 CFR §300.534(b)(3), teachers or other local educational agency (LEA) personnel are not required to submit **a written statement** expressing specific concerns about a pattern of behavior demonstrated by the child in order for the public agency to be deemed to have knowledge that the child is a child with a disability. Although a written statement is not necessary, the teacher of the child or other LEA personnel must express their specific concerns directly to the special education director or other supervisory personnel within the agency. In addition, State child find policies and procedures may provide guidelines regarding how teachers and other LEA personnel should communicate their specific concerns regarding a child's pattern of behavior. If the State's or LEA's child find or referral procedures do not specify how such communication should occur, the State or LEA is encouraged to change its guidelines to provide a method for communicating direct expressions of specific concerns regarding a child's pattern of behavior. 71 Federal Register 46727.

B. Definitions

Question B-1: What options are available for school personnel when a student with a disability commits a serious crime, such as rape, at school or at a school function?

Answer: Under most State and local laws, school personnel must report certain crimes that occur on school grounds to the appropriate authorities. The IDEA regulations, under 34 CFR §300.535(a), do not prohibit the school or public agency from reporting crimes committed by students with disabilities. In addition, where such crimes constitute a violation of the school's code of student conduct, school authorities may use the relevant discipline provisions related to short-term and long-term removals, including seeking a hearing to remove the student to an interim alternative educational placement if maintaining the current placement is substantially likely to result in injury to the child or others. To the extent that such criminal acts also result in an injury that meets the definition of "serious bodily injury," the removal provisions of 34 CFR §300.530(g) would apply. The definition referenced in 34 CFR §300.530(i)(3) currently reads:

> As defined at 18 U.S.C. 1365(h)(3), the term serious bodily injury means bodily injury that involves—
> 1. A substantial risk of death;
> 2. Extreme physical pain;
> 3. Protracted and obvious disfigurement; or
> 4. Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Certain Federal cases have held that rape met this definition of serious bodily injury because the victim suffered protracted impairment of mental faculties.

The current definition of the term "serious bodily injury" in 18 U.S.C. 1365(h)(3) can be found on the U.S. House of Representatives Web site at http://uscode.house.gov/download/pls/18C65.txt.

Question B-2: What is the definition of "unique circumstances" as used in 34 CFR §300.530(a), which states that "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?"

Answer: The Department believes that "unique circumstances" are best determined at the local level by school personnel who know the individual child and are familiar with the facts and circumstances regarding a child's behavior. "Factors such as a child's disciplinary history, ability to understand consequences, expression of remorse, and supports provided … prior to the violation of a school code [of student conduct] could be unique circumstances considered by school personnel when determining whether a disciplinary change in placement is appropriate for a child with a disability." 71 Federal Register 46714.

Question B-3: May a public agency apply its own definition of "serious bodily injury?"

Answer: No. As specifically set out in the IDEA, the term "serious bodily injury" is defined at 18 U.S.C. 1365(h)(3) and cannot be altered by States or local school boards. The definition and a link to the current U.S. Code is included in the answer to question B-1, and also in the *Analysis of Comments and Changes* that accompanied the regulations published on August 14, 2006, and became effective on October 13, 2006. 71 Federal Register 46723.

C. Interim Alternative Educational Setting (IAES)

Question C-1: What constitutes an appropriate IAES?

Answer: What constitutes an appropriate IAES will depend on the circumstances of each individual case. An IAES must be selected 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. 71 Federal Register 46722.

Question C-2: May a public agency offer "home instruction" as the sole IAES option?

Answer: No. For removals under 34 CFR §300.530(c), (d)(5), and (g), the child's IEP Team determines the appropriate IAES (34 CFR §300.531). Section 615(k)(1)(D) of the IDEA and 34 CFR §300.530(d) are clear that an appropriate IAES must be selected "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." Therefore, it would be inappropriate for a public agency to limit an IEP Team to only one option when determining the appropriate IAES. As noted in the *Analysis of Comments and Changes* accompanying the regulations published on August 14, 2006, and became effective on October 13, 2006, at 71 Federal Register 46722:

> Whether a child's home would be an appropriate interim alternative educational setting under §300.530 would depend on the particular circumstances of an individual case such as the length of the removal, the extent to which the child previously has been removed from his or her regular placement, and the child's individual needs and educational goals. In general, though, because removals under §§300.530(g) and 300.532 will be for periods of time up to 45 days, care must be taken to ensure that if home instruction is provided for a child removed under §300.530, the services that are provided will satisfy the requirements for services for a removal under §300.530(d) and section 615(k)(1)(D) of the Act.

Where the removal is for a longer period, such as a 45-day removal under 34 CFR §300.530(g), special care should be taken to ensure that the services required under 34 CFR §300.530(d) can be properly provided if the IEP Team determines that a child's home is the appropriate IAES.

Question C-3: Do all services in the child's IEP need to be provided in the IAES for a removal under 34 CFR §300.530(c) or (g)?

Answer: It depends on the needs of the child. The LEA is not required to provide all services in the child's IEP when a child has been removed to an IAES. In general, the child's IEP Team will make an individualized decision for each child with a disability regarding the type and intensity of services to be provided in the IAES. 34 CFR §300.530(d)(1) clarifies that a child with a disability who is removed from his or her current placement for disciplinary reasons under 34 CFR §300.530(c) or (g) must continue to receive educational services as provided in 34 CFR §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 his or her IEP goals. For removals that constitute a change of placement, the child's IEP Team determines the appropriate services under 34 CFR §300.530(d)(1). See 34 CFR §300.530(d)(5). If a student whose placement has been changed under 34 CFR §300.530(c) or (g) is not progressing toward meeting the IEP goals, then it would be appropriate for the IEP Team to review and revise the determination of services and/or the IAES.

D. Hearings

Question D-1: Must a hearing officer make a sufficiency determination under 34 CFR §300.508(d) for an expedited due process complaint? In other words, does the hearing officer need to determine if the complaint meets the content standards listed in section 615(b)(7)(A) of the IDEA and 34 CFR §300.508(b)?

Answer: No. The sufficiency provision does not apply to expedited due process complaints. See 34 CFR §300.532(a). As noted in the *Analysis of Comments and Changes* accompanying the regulations published on August 14, 2006, and became effective on October 13, 2006 at 71 Federal Register 46725:

> In light of the shortened timelines for conducting an expedited due process hearing under §300.532(c), it is not practical to apply to the expedited due process hearing the sufficiency provision in §300.508(d), which requires that the due process complaint must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not include all the necessary content of a complaint as required in §300.508(b).

E. Functional Behavior Assessments (FBAs) and Behavioral Intervention Plans (BIPs)

Question E-1: Was the requirement for a "positive behavioral intervention plan" removed from the discipline regulations?

Answer: No. Under 34 CFR §300.324(a)(2)(i), the use of positive behavioral interventions and supports must be considered in the case of a child whose behavior impedes his or her learning or that of others. The requirement in 34 CFR §300.530(f) that a child with a disability receive, as appropriate, an FBA and a BIP and modifications designed to address the child's behavior now only applies to students whose behavior is a manifestation of their disability as determined by the LEA, the parent, and the relevant members of the child's IEP Team under 34 CFR §300.530(e). However, FBAs and BIPs must also be used proactively, if the IEP Team determines that they would be appropriate for the child. The regulations in 34 CFR §300.530(d) require that school districts provide FBAs and behavior intervention services (and modifications) "as appropriate" to students when the student's disciplinary change in placement would exceed 10 consecutive school days and the student's behavior was not a manifestation of his or her disability. See 34 CFR §300.530(c) and (d). Please see question E-2 in this section for more information about the use and development of FBAs and BIPs.

Question E-2: Under what circumstances must an IEP Team use FBAs and BIPs?

Answer: As noted above, pursuant to 34 CFR §300.530(f), FBAs and BIPs are required when the LEA, the parent, and the relevant members of the child's IEP Team determine that a student's conduct was a manifestation of his or her disability under 34 CFR §300.530(e). If a child's misconduct has been found to have a direct and substantial relationship to his or her disability, the IEP Team will need to conduct an FBA of the child, unless one has already been conducted. Similarly, the IEP Team must write a BIP for this child, unless one already exists. If a BIP already exists, then the IEP Team will need to review the plan and modify it, as necessary, to address the behavior.

An FBA focuses on identifying the function or purpose behind a child's behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP Team in developing a BIP that will reduce or eliminate the misbehavior.

For a child with a disability whose behavior impedes his or her learning or that of others, and for whom the IEP Team has decided that a BIP is appropriate, or for a child with a disability whose violation of the code of student conduct is a manifestation of the child's disability, the IEP Team must include a BIP in the child's IEP to address the behavioral needs of the child.

Question E-3: How can an IEP address behavior?

Answer: When a child's behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior (34 CFR §300.324(a)(2)(i)). Additionally, the Team may address the behavior through annual goals in the IEP (34 CFR §300.320(a)(2)(i)). The child's IEP may include modifications in his or her program, support for his or her teachers, and any related services necessary to achieve those behavioral goals (34 CFR §300.320(a)(4)). If the child needs a BIP to improve learning and socialization, the BIP can be included in the IEP and aligned with the goals in the IEP.

Question E-4: Is consent required to do an FBA for a child?

Answer: Yes. An FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability. The FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP. As with other individualized evaluation procedures, and consistent with 34 CFR §300.300(a) and (c), parental consent is required for an FBA to be conducted as part of the initial evaluation or a reevaluation.

Question E-5: If a parent disagrees with the results of an FBA, may the parent obtain an independent educational evaluation (IEE) at public expense?

Answer: Yes. The parent of a child with a disability has the right to request an IEE of the child, under 34 CFR §300.502, if the parent disagrees with an evaluation obtained by the public agency. However, the parent's right to an IEE at public expense is subject to certain conditions, including the LEA's option to request a due process hearing to show that its evaluation is appropriate. *See* 34 CFR §300.502(b)(2) through (b)(5). The

Department has clarified previously that an FBA that was not identified as an initial evaluation, was not included as part of the required triennial reevaluation, or was not done in response to a disciplinary removal, would nonetheless be considered a reevaluation or part of a reevaluation under Part B because it was an individualized evaluation conducted in order to develop an appropriate IEP for the child. Therefore, a parent who disagrees with an FBA that is conducted in order to develop an appropriate IEP also is entitled to request an IEE. Subject to the conditions in 34 CFR §300.502(b)(2) through (b)(5), the IEE of the child will be at public expense.

F. Manifestation Determinations

Question F-1: What occurs if there is no agreement on whether a child's behavior was or was not a manifestation of his or her disability?

Answer: If the parents of a child with a disability, the LEA, and the relevant members of the child's IEP Team cannot reach consensus or agreement on whether the child's behavior was or was not a manifestation of the disability, the public agency must make the determination and provide the parent with prior written notice pursuant to 34 CFR §300.503. The parent of the child with a disability has the right to exercise his or her procedural safeguards by requesting mediation and/or a due process hearing to resolve a disagreement about the manifestation determination. 34 CFR §300.506 and §300.532(a). A parent also has the right to file a State complaint alleging a violation of Part B related to the manifestation determination. See 34 CFR §300.153.

Question F-2: What recourse does a parent have if he or she disagrees with the determination that his or her child's behavior was not a manifestation of the child's disability?

Answer: The regulations, in 34 CFR §300.532(a), provide that the parent of a child with a disability who disagrees with the manifestation determination under 34 CFR §300.530(e) may appeal the decision by requesting a hearing. A parent also has the right to file a State complaint alleging a denial of a free appropriate public education and to request voluntary mediation under 34 CFR §300.506.

Question F-3: Is the IEP Team required to hold a manifestation determination each time that a student is removed for more than 10 consecutive school days or each time that the public agency determines that a series of removals constitutes a change of placement?

Answer: Yes. 34 CFR §300.530(e) requires that "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 must conduct a manifestation determination (emphasis added). Under 34 CFR §300.536, a change of placement occurs if the removal is for more than 10 consecutive school days, or if the public agency determines, on a case-by-case basis, that a pattern of removals constitutes a change of placement because the series

of removals total more than 10 school days in a school year; the child's behavior is substantially similar to the behavior that resulted in the previous removals; and 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.

Question F-4: Does a school need to conduct a manifestation determination when there is a violation under 34 CFR §300.530(g), which refers to a removal for weapons, drugs, or serious bodily injury?

Answer: Yes. 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 conduct the manifestation determination. 34 CFR §300.530(e). However, when the removal is for weapons, drugs, or serious bodily injury under §300.530(g), the child may remain in an IAES, as determined by the child's IEP Team, for not more than 45 school days, regardless of whether the violation was a manifestation of his or her disability. This type of removal can occur if the child: carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the State educational agency (SEA) or LEA; 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 the SEA or LEA; or has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the SEA or LEA.

Question F-5: What disciplinary procedures would apply in the case of a child who has been referred for a special education evaluation and is removed for a disciplinary infraction prior to determination of eligibility?

Answer: If a child engages in behavior that violates the code of student conduct prior to a determination of his or her eligibility for special education and related services and the public agency is deemed to have knowledge of the child's disability, the child is entitled to all of the IDEA protections afforded to a child with a disability, unless a specific exception applies. In general, once the student is properly referred for an evaluation under Part B of the IDEA, the public agency would be deemed to have knowledge that the child is a child with a disability for purposes of the IDEA's disciplinary provisions. However, under 34 CFR §300.534(c), the LEA is considered not to have knowledge that a child is a child with a disability if the parent has not allowed the evaluation of the child under Part B of the IDEA, the parent has refused services, or if the child is evaluated and

determined not to be a child with a disability under Part B of the IDEA. In these instances, the child would be subject to the same disciplinary measures applicable to children without disabilities.

Question F-6: Is there a conflict between 34 CFR §300.530(c), allowing school personnel, under certain circumstances, to apply the relevant disciplinary procedures to a child with a disability in the same manner and for the same duration as would be applied to children without disabilities, and the provision, in 34 CFR §300.532(b)(2), that the hearing officer may order a change in placement 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?

Answer: No, there is no conflict between the two provisions. In addition to the specific authority set out in 34 CFR §300.532, a hearing officer also has the authority to uphold a disciplinary change of placement made by school personnel under 34 CFR §300.530(c). Where the parent brings a due process hearing to challenge a disciplinary change of placement made by school personnel under 34 CFR §300.530(c) and the hearing officer concludes that the disciplinary requirements of Part B have been met, the hearing officer would properly uphold the disciplinary change of placement. If the hearing officer concludes that the child's behavior was a manifestation of the child's disability, but also determines that returning the child to the prior placement is substantially likely to result in injury to the child or to others, then the hearing officer, under 34 CFR §300.532(b)(2), may change the placement to an appropriate IAES for not more than 45 school days.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

August 1, 2016

Dear Colleague:

The U.S. Department of Education (Department) is committed to ensuring that all children with disabilities have meaningful access to a State's challenging academic content standards that prepare them for college and careers. Consistent with these goals, the Individuals with Disabilities Education Act (IDEA) entitles each eligible child with a disability to a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet the child's unique needs.[1] 20 U.S.C. §§1412(a)(1) and 1400(d)(1)(A). Under the IDEA, the primary vehicle for providing FAPE is through an appropriately developed individualized education program (IEP) that is based on the individual needs of the child. 34 CFR §§300.17 and 300.320-300.324. In the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider – and, when necessary to provide FAPE, include in the IEP – the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 CFR §§300.324(a)(2)(i) and (b)(2); and 300.320(a)(4).

The Department has determined that this letter is significant guidance under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). See www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf. Significant guidance is non-binding and does not create or impose new legal requirements. The Department is issuing this letter to provide LEAs and other responsible public agencies with information to assist them in meeting their obligations under the IDEA and its implementing regulations.

If you are interested in commenting on this letter, please email us your comment at iepgoals@ed.gov or contact Lisa Pagano at 202-245-7413 or Lisa.Pagano@ed.gov. For further information about the Department's guidance processes, please visit www2.ed.gov/policy/gen/guid/significant-guidance.html.

Recent data on short-term disciplinary removals from the current placement strongly suggest that many children with disabilities may not be receiving appropriate behavioral interventions and

[1]While this letter focuses on requirements under the IDEA relating to FAPE in the least restrictive environment, students with disabilities also have rights under two civil rights laws that prohibit discrimination on the basis of disability—Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act (Title II). The Office for Civil Rights (OCR) in the U.S. Department of Education enforces Section 504 in public elementary and secondary schools. Also, in this context, OCR shares in the enforcement of Title II with the U.S. Department of Justice. More information about these laws is available at: www.ed.gov/ocr and www.ada.gov.

supports, and other strategies, in their IEPs.[2] During the 2013-2014 school year, 10 percent of all children with disabilities, ages 3 through 21, were subject to a disciplinary removal of 10 school days or less, with children of color with disabilities facing higher rates of removal.[3] For instance, nineteen percent of black children with disabilities, ages 3 through 21, were subject to a removal of 10 school days or less within a single school year.[4] In light of research about the detrimental impacts of disciplinary removals,[5] including short-term disciplinary removals, the Department is issuing this guidance to clarify that schools, charter schools, and educational programs in juvenile correctional facilities must provide appropriate behavioral supports to children with disabilities who require such supports in order to receive FAPE and placement in the least restrictive environment (LRE). As a practical matter, providing appropriate behavioral supports helps to ensure that children with disabilities are best able to access and benefit from instruction.

The IDEA authorizes school personnel to implement a short-term disciplinary removal from the current placement, such as an out-of-school suspension, for a child with a disability who violates a code of student conduct. 34 CFR §300.530(b)(1). The Department strongly supports child and school safety, and this letter is not intended to limit the appropriate use of disciplinary removals that are necessary to protect children. Rather, the letter is a part of the Department's broader work to encourage school environments that are safe, supportive, and conducive to teaching and learning, where educators actively prevent the need for short-term disciplinary removals by effectively supporting and responding to behavior.[6,7] In keeping with this goal, this letter serves to remind school personnel that the authority to implement disciplinary removals does not negate their obligation to consider the implications of the child's behavioral needs, and the effects of the use of suspensions (and other short-term removals) when ensuring the provision of FAPE.[8]

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[2] For purposes of this letter, we use "behavioral supports" to generally refer to behavioral interventions and supports, and other strategies to address behavior.

[3] U.S. Department of Education, EDFacts Data Warehouse (EDW), OMB #1875-0240: "IDEA Part B Discipline Collection," 2014.

[4] Id.

[5] Council of State Governments Justice Center and the Public Policy Research Institute. (2011). Breaking schools' rules: a statewide study of how school discipline relates to students' success and juvenile justice involvement. Available at https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf

[6] "The Act and the regulations recognize that school officials need some reasonable degree of flexibility when disciplining children with disabilities who violate a code of student conduct. Interrupting a child's participation in education for up to 10 school days over the course of a school year, when necessary and appropriate to the circumstances, does not impose an unreasonable limitation on a child with a disability's right to FAPE." 71 Fed. Reg. 46717 (Aug. 14, 2006).

[7] More about the Department's work is available at www.ed.gov/rethinkdiscipline

[8] This letter does not address the obligations of school personnel following a disciplinary change in placement, including obligations to provide behavioral supports. This letter is intended to supplement the June 2009 Questions and Answers on Discipline Procedures (as revised) from OSERS, which provided guidance on discipline policies for school-age children to personnel in State educational agencies (SEAs) and local educational agencies (LEAs), and parents. Further, as the obligations of school personnel covered in this letter also apply to school personnel serving children with disabilities in juvenile correctional facilities, this letter is also intended to supplement the December 5,

Additionally, this letter provides alternatives to disciplinary removal which schools can apply instead of exclusionary disciplinary measures.

We are issuing this guidance to clarify that the failure to consider and provide for needed behavioral supports through the IEP process is likely to result in a child not receiving a meaningful educational benefit or FAPE. In addition, a failure to make behavioral supports available throughout a continuum of placements, including in a regular education setting, could result in an inappropriately restrictive placement and constitute a denial of placement in the LRE. While such determinations are necessarily individualized, this guidance is intended to focus attention on the need to consider and include evidence-based behavioral supports in IEPs that, when done with fidelity, often serve as effective alternatives to unnecessary disciplinary removals, increase participation in instruction, and may prevent the need for more restrictive placements.

This letter is organized into five areas:

- IDEA's procedural requirements regarding evaluations, eligibility determinations, IEPs, and behavioral supports;
- IDEA's IEP content requirements related to behavioral supports;
- Circumstances that may indicate potential denials of FAPE or of placement in the LRE;
- Implications for short-term disciplinary removals and other exclusionary disciplinary measures;[9]
- Conclusion, including additional information for parents and stakeholders.

I. IDEA Procedural Requirements Regarding Evaluations, Eligibility, IEPs, and Behavioral Supports

The IDEA and its implementing regulations require IEP Teams to follow certain procedures to ensure that IEPs meet the needs, including the behavioral needs, of children with disabilities. See 20 U.S.C. §1414(d) and 34 CFR §§300.320-300.324. Those needs are generally identified during the initial evaluation or reevaluation, which must, among other matters, use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, and assess the child in all areas related to the suspected disability,

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2014 OSERS Dear Colleague Letter on the Individuals with Disabilities Education Act requirements that apply to the education of students with disabilities in correctional facilities. The June 2009 guidance can be found at http://idea.ed.gov/object/fileDownload/model/QaCorner/field/PdfFile/primary_key/7 and the December 5, 2014 letter can be found at http://www2.ed.gov/policy/gen/guid/correctional-education/index.html

[9] For purposes of this document, we use "exclusionary disciplinary measures" as a descriptive term to discuss the range of actions that school personnel implement – in response to a child's misbehavior or violation of a code of student conduct – where the child is removed and excluded from their classroom, from school grounds, or school activities either formally (e.g., suspension) or informally (e.g., asking the parent to keep the student at home for a day or more). Additional information regarding exclusionary disciplinary measures may be found in Section IV of this document.

including, if appropriate, social and emotional status. 34 CFR §§300.304(b) and 300.304(c)(4); see also 34 CFR §§300.304-300.311. Further, the evaluation must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical and developmental factors. 34 CFR §300.304(b)(3). Parents, classroom teachers, and other service providers will also have formal and informal information about an eligible child's current functional (e.g., behavioral) performance for the IEP Team's consideration. 34 CFR §§300.321 and 300.324. Once the IEP is developed, IEP Teams must: (1) review the child's IEP periodically, but not less than annually, to determine whether the child's annual goals are being achieved (34 CFR §300.324(b)(1)(i)), and (2) revise the IEP, as appropriate, to address any lack of expected progress towards the annual goals in the child's IEP and in the general education curriculum, the child's anticipated needs, or other matters. 34 CFR §300.324(b)(1)(ii).

There are a number of special factors that IEP Teams must consider in developing, reviewing, or revising a child's IEP. The IDEA specifically requires IEP Teams to consider the use of positive behavioral interventions and supports, and other strategies, to address behavior for any child with a disability whose behavior impedes his or her learning or that of others. 20 U.S.C. §1414(d)(3)(B)(i). This requirement applies to all IEP Teams, regardless of the child's specific disability, and to the development, review, and revision of IEPs (34 CFR §300.324(a)(2) and (b)(2)). Incidents of child misbehavior and classroom disruptions, as well as violations of a code of student conduct, may indicate that the child's IEP needs to include appropriate behavioral supports. This is especially true when a pattern of misbehavior is apparent or can be reasonably anticipated based on the child's present levels of performance and needs. To the extent a child's behavior including its impact and consequences (e.g., violations of a code of student conduct, classroom disruptions, disciplinary removals, and other exclusionary disciplinary measures) impede the child's learning or that of others, the IEP Team must consider when, whether, and what aspects of the child's IEP related to behavior need to be addressed or revised to ensure FAPE. If the child already has behavioral supports, upon repeated incidents of child misbehavior or classroom disruption, the IEP team should meet to consider whether the child's behavioral supports should be changed.

In general, IEP Team meetings provide parents (who are required members of the team) critical opportunities to participate in the decision-making process, raise questions and concerns regarding their child's behavior, and provide input on the types of behavioral supports their children may need to facilitate their child's involvement and progress in the general education curriculum. 34 CFR §§300.320(a), 300.321(a)(1), and 300.324(a)(1)(ii). Parents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a reasonable request from a parent for an IEP Team meeting.[10] See 20 U.S.C.

[10] Assistance to States for the Education of Children with Disabilities and Early Intervention Programs for Infants and Toddlers with Disabilities, Final Rule, 64 Fed. Reg. 12406, 12581 (Mar. 12, 1999) explains, in response to public comment, that "A[regulatory] provision is not necessary to clarify that public agencies will honor 'reasonable' requests

§1414(d)(4)(A)(i)(III) and 34 CFR §300.324(b)(1)(ii)(C). We believe it would be appropriate for a parent to request an IEP Team meeting following disciplinary removals or changes in the child's behavior that impede the child's learning or that of others, as these likely indicate that the IEP, as written or implemented, may not be properly addressing the child's behavioral needs.[11] Whenever appropriate, the child with a disability should also be present during IEP Team meetings. 34 CFR §300.321(a)(7).

When an IEP Has Already Been Developed for a School Year

In instances where a child with a disability is subject to a disciplinary removal after the IEP for that school year has been developed and the parents and the relevant school officials agree that the IEP needs to be revised to address the behavior, but circumstances prevent the IEP Team from convening prior to the child's return to school, the IDEA regulations permit the parent and public agency to agree not to convene an IEP Team meeting and instead to develop a written document to amend or modify the current IEP. 34 CFR §300.324(a)(4)(i). This option could be used to provide the child with the necessary behavioral supports upon the child's return to school. However, if changes are made to the child's IEP in this manner, the agency must ensure that the IEP Team is informed of those changes. 34 CFR §300.324(a)(4)(ii).

II. IDEA's IEP Content Requirements Related to Behavioral Supports

Research shows that school-wide, small group, and individual behavioral supports that use proactive and preventative approaches, address the underlying cause of behavior, and reinforce positive behaviors are associated with increases in academic engagement, academic achievement, and fewer suspensions and dropouts.[12] In short, children are more likely to achieve when they are directly taught predictable and contextually relevant school and classroom routines and expectations, acknowledged clearly and consistently for displaying positive

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by parents for a meeting to review their child's IEP. Public agencies are required under the statute and these final regulations to be responsive to parental requests for such reviews."

[11] T.K., S.K., individually and on behalf of L.K. v. New York City Department of Education, Brief of the United States as Amicus Curiae Supporting Appellees (2015). Available at https://www.justice.gov/sites/default/files/crt/legacy/2015/03/16/tknycdoebrief.pdf

[12] Christle, C. A., Jolivette, K., & Nelson, C. M. (2005). Breaking the school to prison pipeline: identifying school risk and protective factors for youth delinquency. Exceptionality, 13(2), 69-88. See also Crone, D. A., & Hawken, L. S. (2010). Responding to problem behavior in schools: the behavior education program. Guilford Press. See also Liaupsin, C. J., Umbreit, J., Ferro, J. B., Urso, A., & Upreti, G. (2006). Improving academic engagement through systematic, function-based intervention. Education and Treatment of Children, 29, 573-591. See also Luiselli, J. K., Putnam, R. F., Handler, M. W., & Feinberg, A. B. (2005). Whole-school positive behaviour support: effects on child discipline problems and academic performance. Educational Psychology, 25(2-3), 183-198. See also Putnam, R., Horner, R. H., & Algozzine, R. (2006). Academic achievement and the implementation of school-wide behavior support. Positive Behavioral Interventions and Supports Newsletter, 3(1), 1-6.

academic and social behavior, consistently prompted and corrected when behavior does not meet expectations, and treated by others with respect.[13]

However, when a child with a disability experiences behavioral challenges, including those that result in suspensions or other exclusionary disciplinary measures, appropriate behavioral supports may be necessary to ensure that the child receives FAPE. In the same way that an IEP Team would consider a child's language and communication needs, and include appropriate assistive technology devices or services in the child's IEP (34 CFR §300.324(a)(2)(iv) and (v)) to ensure that the child receives a meaningful educational benefit, so too must the IEP Team consider and, when determined necessary for ensuring FAPE, include or revise behavioral supports in the IEP of a child with a disability exhibiting behavior that impedes his or her learning or that of others. 34 CFR §§300.320(a)(4) and 300.324(a)(2)(i).

Therefore, as part of the development, review and, as appropriate, revision of the IEP, IEP Teams should determine whether behavioral supports should be provided in any of three areas: (1) special education and related services, (2) supplementary aids and services, and (3) program modifications or supports for school personnel. 34 CFR §300.320(a)(4).

IEPs should contain behavioral supports supported by evidence—IDEA specifically requires that both special education and related services and supplementary aids and services be based on peer-reviewed research to the extent practicable. 34 CFR §300.320(a)(4). As a matter of best practice, we strongly encourage schools to consider how the implementation of behavioral supports within the IEP could be facilitated through a school-wide, multi-tiered behavioral framework, described at greater length below.

Special Education and Related Services

Behavioral supports provided as part of a child's special education and related services may be necessary to ensure that the child's IEP is designed to enable the child to advance appropriately toward attaining the annual goals specified in the IEP, to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities. 34 CFR §§300.320(a)(4)(i) and (ii). Interventions and supports that could assist a child with a disability to benefit from special education may include instruction and reinforcement of school expectations, violence prevention programs, anger management groups, counseling for mental health issues, life skills training, or social skills instruction. Please see the end of this section for additional tools and resources to assist with the implementation of behavioral supports.

[13] Algozzine, B., Wang, C., & Violette, A. S. (2011). Reexamining the relationship between academic achievement and social behavior. Journal of Positive Behavioral Interventions, 13, 3-16. See also McIntosh, K., Chard, D. J., Boland, J. B., & Horner, R. H. (2006). Demonstration of combined efforts in school-wide academic and behavioral systems and incidence of reading and behavior challenges in early elementary grades. Journal of Positive Behavioral Interventions, 8, 146-154.

Supplementary Aids and Services

Public agencies must comply with the requirement to make available a continuum of alternative placements as required under 34 CFR §§300.114-300.116, which includes the provision of supplementary aids and services (e.g. behavioral supports) throughout the continuum. Under 34 CFR §300.42, supplementary aids and services are defined to include aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with 34 CFR §§300.114-300.116.

Appropriate supplementary aids and services could include those behavioral supports necessary to enable a child with a disability to be educated in regular classes or the setting determined to be the child's appropriate placement in the LRE. Such behavioral supports might include meetings with a behavioral coach, social skills instruction, counselor, or other approaches. In general, placement teams may not place a child with a disability in special classes, separate schooling, or other restrictive settings outside of the regular educational environment solely due to the child's behavior when behavioral supports through the provision of supplementary aids and services could be provided for that child that would be effective in addressing his or her behavior in the regular education setting.[14] 34 CFR §§300.114-300.116. Children with disabilities may only be removed from the regular educational environment when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.114(a)(2)(ii).

Program Modifications or Supports for School Personnel

In addition to the behavioral supports that may be provided directly to children with disabilities, program modifications or supports for school personnel, provided on behalf of the child, may also be necessary to support the child's involvement and progress in the general education curriculum, advancement towards attaining the annual goals specified in the IEP, and participation in extracurricular and other nonacademic activities. 34 CFR §§300.320(a)(4)(i) and (ii). School personnel may need training, coaching, and tools to appropriately address the behavioral needs of a particular child. Supports for school personnel may be designed, as appropriate, to better implement effective instructional and behavior management strategies and specific behavioral interventions that are included in the child's IEP.

[14] We refer to the "placement team," rather than the IEP Team, as IDEA's implementing regulations specify that placement decisions must be made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 CFR §300.116(a)(1).

Implementation of a Multi-Tiered Behavioral Framework

Research shows that implementing evidence-based, multi-tiered behavioral frameworks can help improve overall school climate, school safety, and academic achievement for all children, including children with disabilities.[15] In general, behavioral supports are most effectively organized within a multi-tiered behavioral framework that provides instruction and clear behavioral expectations for all children, targeted intervention for small groups not experiencing success, and individualized supports and services for those needing the most intensive support. In recent years, the Department has disseminated a number of tools and resources to assist schools in the creation of safe and supportive school climates conducive to learning, including the implementation of effective alternatives to disciplinary removal. These resources include:

- *Supporting and Responding to Behavior: Evidence-based Classroom Strategies for Teachers*, a document summarizing evidence-based, proactive, and responsive classroom behavior support and intervention strategies for teachers.[16]

- *Positive Behavioral Intervention and Supports: Implementation Blueprint and Self-Assessment,* a guide to develop local capacity for sustainable, culturally and contextually relevant, and high-fidelity implementation of multi-tiered practices and systems of support.[17]

- *2014 School Discipline Guidance Package*, including guidance on how public elementary and secondary schools can meet their legal obligations to administer discipline without discriminating on the basis of race, color or national origin and a set of guiding principles to assist communities in improving school climate and school discipline.[18]

These and other resources can be found at www.ed.gov/rethinkdiscipline and http://ccrs.osepideasthatwork.org.

III. Circumstances that May Indicate Potential Denials of FAPE or of Placement in the LRE

It is incumbent upon IEP Teams to implement IDEA's procedural and substantive requirements to ensure that children with disabilities receive the behavioral supports they need to enable them to advance appropriately toward attaining the annual goals specified in their IEPs and to be

[15] Bradshaw, C., Koth, C.W., Thornton, L.A., & Leaf, P.J., (2009). Altering school climate through school-wide positive behavioral interventions and supports: findings from a group-randomized effectiveness trial. Prevention Science 10(2), 100-115.

[16] Available at https://www.osepideasthatwork.org/evidencebasedclassroomstrategies/

[17] Available at http://www.pbis.org/blueprint/implementation-blueprint

[18] Available at http://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html#guidance

involved in and make progress in the general education curriculum.
20 U.S.C. §§1414(d)(1)(A)(i)(IV); 1414(d)(3)(B)(i) and 1414(d)(3)(C). A failure to implement these procedural requirements or provide needed behavioral supports to a child with a disability could result in the child not receiving a meaningful educational benefit, and therefore constitute a denial of FAPE and/or a denial of placement in the LRE (i.e., an unduly restrictive placement).

A determination of whether there is a denial of FAPE is a fact-based determination, to be made on a case-by-case basis. Factors to consider include: whether the public agency has failed to follow the procedures IDEA requires when developing, reviewing, or revising the child's IEP, or has failed to consider and/or provide a child with a disability with necessary behavioral supports when the child's behavior impedes his or her learning or that of others; or whether the child's IEP is reasonably calculated to provide a meaningful educational benefit in the absence of behavioral supports.

Circumstances that may indicate either a procedural or substantive failure in the development, review, or revision of the IEP include, but are not limited to, the following[19]:

- The IEP Team did not consider the inclusion of positive behavioral interventions and supports in response to behavior that impeded the child's learning or that of others;
- School officials failed to schedule an IEP Team meeting to review the IEP to address behavioral concerns after a reasonable parental request;
- The IEP Team failed to discuss the parent's concerns about the child's behavior, and its effects on the child's learning, during an IEP Team meeting;
- There are no behavioral supports in the child's IEP, even when the IEP Team determines they are necessary for the child;
- The behavioral supports in the IEP are inappropriate for the child (e.g., the frequency, scope or duration of the behavioral supports is insufficient to prevent behaviors that impede the learning of the child or others; or consistent application of the child's behavioral supports has not accomplished positive changes in behavior, but instead has resulted in behavior that continues to impede, or further impedes, learning for the child or others);
- The behavioral supports in the child's IEP are appropriate, but are not being implemented or not being properly implemented (e.g., teachers are not trained in classroom

[19] Under 34 CFR §300.513(a), a hearing officer's determination of whether a child received FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies: (1) impeded the child's right to FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or (3) caused a deprivation of educational benefit. 34 CFR §300.513(a)(2)(i)–(iii). Although best viewed as a procedural requirement, a failure to follow 34 CFR §300.324(a)(2)(i) could result in a substantive denial of FAPE if any of the circumstances in 34 CFR §§300.513(a)(2)(i)–(iii) are present. As this is a fact-based determination, Section III provides examples of facts and circumstances that may indicate that a procedural failure has resulted in a denial of FAPE.

management responses or de-escalation techniques or those techniques are not being consistently implemented); or
- School personnel have implemented behavioral supports not included in the IEP that are not appropriate for the child.

Circumstances that may indicate that the child's IEP is not reasonably calculated to provide a meaningful educational benefit include, but are not limited to, the following:

- The child is displaying a pattern of behaviors that impede his or her learning or that of others and is not receiving any behavioral supports;
- The child experiences a series of disciplinary removals from the current placement of 10 days or fewer (which do not constitute a disciplinary change in placement) for separate incidents of misconduct that impede the child's learning or that of others, and the need for behavioral supports is not considered or addressed by the IEP Team;[20] or
- The child experiences a lack of expected progress toward the annual goals that is related to his or her disciplinary removals or the lack of behavioral supports, and the child's IEP is neither reviewed nor revised.

A determination of whether there is a denial of placement in the LRE is also a fact-based determination. Factors to consider include whether the child's IEP is designed to enable the child to be educated and participate with nondisabled children in extracurricular and other nonacademic activities in the absence of behavioral supports. Circumstances that may indicate that the child's placement in the LRE may not be appropriate include, but are not limited to, a scenario in which a continuum of placements that provides behavioral supports is not made available (e.g., behavioral supports not provided in the regular educational setting), and, as a result, the IEP inappropriately calls for the child to be placed in special classes, separate schooling, or another restrictive placement outside the regular educational environment (e.g., home instruction, home tutoring program, or online learning program).

IV. Implications for Short-Term Disciplinary Removals and Other Exclusionary Disciplinary Measures

Schools should note that recent research demonstrates that disciplinary measures such as short-term removals from the current placement (e.g., suspension), or other exclusionary disciplinary measures that significantly impede the implementation of the IEP, generally do not help to

[20] Under 34 CFR §300.536 a series of disciplinary removals that constitute a pattern is a change in placement. A pattern of removals is a series of removals that total more than 10 school days within a school year, for behavior that is substantially similar to the child's behavior in previous incidents that led to removals, with consideration for additional factors such 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.

reduce or eliminate reoccurrence of the misbehavior. In fact, there is a growing awareness that school suspensions produce unintended and undesirable results. Longitudinal studies, for example, have found that suspension from school does not deter misbehavior. These studies found a high rate of repeat offending in out-of-school suspension, ranging from 35% to 42%.[21] Research also shows that suspension from school is associated with significant adverse consequences for the children suspended.[22] Suspensions from school are consistently associated with lower academic performance.[23] As a suspended child's education is interrupted, he or she is more likely to fall behind, to become disengaged from school, and to drop out.[24]

Removals from the current placement generally do not address the needs of a child with a disability for positive behavioral interventions and supports. Accordingly, we remind States, LEAs, and IEP Teams that while 34 CFR §300.530 explicitly permits school personnel to implement short-term disciplinary removals from the current placement, such removals may indicate a need to review and revise the child's IEP to address his or her behavioral needs. In addition, exclusionary disciplinary measures that do not constitute a removal from the current placement may also indicate the need to review and revise the child's IEP.

Authority of School Personnel under 34 CFR §300.530

Under IDEA and its implementing regulations, school personnel have the authority to 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 up to 10 consecutive school days in a school year, to the extent those alternatives are applied to children without disabilities, and for additional removals of up to 10 school days in the same school year for separate incidents of misconduct, provided that the additional removals do not constitute a change of placement. 34 CFR §§300.530(b) and 300.536.[25]

While the IDEA and its implementing regulations recognize that school officials need some reasonable degree of flexibility when disciplining children with disabilities who violate a code of student conduct and that school safety is paramount, the Department cautions that the use of short-term disciplinary removals from the current placement may indicate that a child's IEP, or

[21] Skiba, R.J., Shure, L.A., Middelberg, L.V., & Baker, T.L. (2012). Reforming school discipline and reducing disproportionality in suspension and expulsion. In Jimerson, S.R., Nickerson, A.B., Mayer, M.J., & Furlong, M.J. (Eds.) Handbook of School Violence and School Safety, 2nd Ed. New York: Routledge.

[22] Lee, T., Cornell, D., Gregory, A., & Xitao, F. (2011). High suspension schools and dropout rates for black and white students. Education & Treatment Of Children, 34(2), 167-192. See also Brooks, K., Schiraldi, V., & Zeidenberg, J. (2000). School house hype: two years later. Washington, DC: Justice Policy Institute / Covington, KY: Children's Law Center. See also Civil Rights Project. (2000). Opportunities suspended: the devastating consequences of zero tolerance and school discipline policies. Cambridge, MA.

[23] Id.

[24] Id.

[25] Disciplinary removals of more than 10 consecutive school days or a series of removals that cumulate to more than 10 school days in a school year that constitute a pattern are considered a change in placement. 34 CFR §300.536.

the implementation of the IEP, does not appropriately address his or her behavioral needs. This, in turn, may result in the child not receiving a meaningful educational benefit, which could constitute a denial of FAPE. As noted above, these determinations are highly factual, and would be made on a case-by-case basis. We are concerned, however, that some SEAs and LEAs may have erroneously interpreted the IDEA to provide school personnel with the broad authority to implement short-term removals without restriction and without regard to whether the child's IEP is properly addressing his or her behavioral needs. It has come to the Department's attention that there are a number of legal memos and technical assistance documents which have erroneously characterized the 10-day period as "free days."[26]

This characterization may discourage school personnel from considering whether behavioral supports are needed to address or improve patterns of behavior that impede learning before, during, or after short-term disciplinary removals are implemented. The Department reminds SEAs and LEAs that, under IDEA, IEP Teams have an obligation to develop appropriate IEPs based on the individual needs of each child. Teachers must also be fully informed about their specific responsibilities related to implementation of the child's IEP, including the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP. 34 CFR §300.323(d). Further, IDEA requires States and LEAs to ensure that all personnel necessary to carry out the purposes of Part B of IDEA are appropriately and adequately prepared and trained. 34 CFR §§300.156 and 300.207. This responsibility would include appropriately training teachers and other school personnel to provide required behavioral supports to children with disabilities. Therefore, a failure to provide appropriate behavioral supports (because they are not offered or because teachers and other staff are not adequately trained to implement such supports) that results in the child not receiving a meaningful educational benefit may constitute a denial of FAPE.

Use of Exclusionary Disciplinary Measures

Schools should take care when implementing exclusionary disciplinary measures that significantly interfere with a child's instruction and participation in other school activities. In some schools, staff are properly trained to implement and document measures such as the use of study carrels, time outs, and restrictions in privileges, in a manner consistent with a child's right to FAPE.[27] However, in other schools, staff may not be properly trained in the appropriate use of

[26] National Council on Disability. (2015). Breaking the school-to-prison pipeline for students with disabilities. Available at https://www.ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf. This report highlights an excerpt from a legal pamphlet designed for school districts: "Schools have free use of up to 10 school days of short-term removals per school year without IDEA implications. The days can be used in any combination, quickly or slowly, although caution would warrant using the 10 'free' days judiciously over the school year, and avoiding multiple suspension days if at all possible."

[27] The Department has previously stated that the use of measures such as study carrels, time outs, or other restrictions in privileges is permissible so long as such measures are not inconsistent with a student's IEP (OSEP Memorandum to Chief State School Officers, Questions and Answers on Disciplining Students with Disabilities, April 1995).

these measures; consequently, their improper use of these measures could rise to the level of a disciplinary removal. These exclusionary disciplinary measures also could include:

- A pattern of office referrals, extended time excluded from instruction (e.g., time out), or extended restrictions in privileges;
- Repeatedly sending children out of school on "administrative leave" or a "day off" or other method of sending the child home from school;
- Repeatedly sending children out of school with a condition for return, such as a risk assessment or psychological evaluation; or
- Regularly requiring children to leave the school early and miss instructional time (e.g., via shortened school days).[28]

In general, the Department does not consider the use of exclusionary disciplinary measures to be disciplinary removals from the current placement for purposes of 34 CFR §300.530, so long as children with disabilities are afforded the opportunity to continue to be involved in and make progress in the general education curriculum, receive the instruction and services specified on their IEPs, and participate with nondisabled children to the extent they would have in their current placement.[29] It is likely that the exclusionary disciplinary measures listed above, if implemented repeatedly, would constitute a disciplinary removal from the current placement. For example, when school personnel regularly require a child with a disability to leave school early and miss instructional time due to their behavior, it is likely that the child's opportunity to be involved in and make progress in the general education curriculum has been significantly impeded; in such circumstances, sending the child home early would constitute a disciplinary removal from the current placement. To the extent that schools implement exclusionary disciplinary measures in a manner tantamount to a suspension – or other removal from the

[28] We have deliberately omitted from this list of examples any reference to referrals to law enforcement authorities due to our recommendation to schools, described in the Department's *Guiding Principles: A Resource Guide for Improving School Climate and Discipline*, that school resource officers not be involved in routine disciplinary matters. The Guiding Principles can be found at www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf

[29] The Department would apply the same analysis to the use of exclusionary discipline measures that apply to in-school suspensions, for purposes of 34 CFR §300.530. In the Preamble to the August 14, 2006 final Part B regulations, the Department explained: "It has been the Department's long term policy that an in-school suspension would not be considered a part of the days of suspension addressed in 34 CFR §300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. This continues to be our policy." The explanation concludes by indicating that whether an in-school suspension would constitute a day of suspension would depend on the unique facts and circumstances of each case. 71 Fed. Reg. 46715 (Aug. 14, 2006).

child's current placement – they are required to fulfill their statutory obligation to report such removals,[30] and act within the authority of school personnel provided under 34 CFR §300.530.

Further, as we noted earlier, the use of exclusionary disciplinary measures may indicate that a child's IEP, or the implementation of the IEP, does not appropriately address his or her behavioral needs. To ensure that each child receives a meaningful educational benefit, IEP Teams must consider the need for positive behavioral interventions and supports for children with disabilities whose behavior impedes their learning or that of others, and, when determined necessary to ensure FAPE, include or revise needed behavioral supports in the child's IEP. Such behavioral supports also may include supports for school personnel, so that teaching staff are trained in best uses of such behavioral supports.

V. Conclusion

Children with disabilities are at a greater risk of disciplinary removals that significantly interrupt their learning, often unnecessarily. These risks are increased for children of color with disabilities. In many cases, we have reason to believe these removals are due to minor instances of misbehavior that are unrelated to issues of child or school safety, and can and should be addressed through supports and guidance.[31]

When behavioral supports are not provided and, as a result, a child with a disability is repeatedly removed from his or her current placement through suspensions for behavior that impedes his or her learning or that of others, a number of options are available to assist parents in challenging the appropriateness of their child's IEP. First, as noted earlier, parents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a reasonable parental request for an IEP Team meeting. Parents may be particularly interested in making such a request following changes in the child's behavior that result in disciplinary removals. Further, parents, individuals, and organizations may also pursue child-specific or systemic remedies through the State complaint procedures outlined below.

[30] IDEA mandates that States provide data each year to the Secretary of Education and the public on the use of long-term suspensions and expulsions (20 U.S.C. §1418(a)(1)(A)(v)(III)) and on the incidence and duration of disciplinary actions, including suspensions of one day or more, by race, ethnicity, limited English proficiency status, gender, and disability category (20 U.S.C. §1418(a)(1)(D)). Further, States are required to collect and examine data to determine whether significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to the incidence, duration, and type of disciplinary actions, including suspension and expulsions (34 CFR §300.646(d)(1)(C)), and whether significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities among LEAs in the State or compared to the rates for nondisabled children within LEAs (34 CFR §300.170).

[31] Skiba, R. J., Chung, C. G., Trachok, M., Baker, T., Sheya, A., Hughes, R. L. (2014). Parsing disciplinary disproportionality: Contributions of infraction, student, and school characteristics to out-of-school suspension and expulsion. American Educational Research Journal, 51, 640-670.

When conditions persist and a denial of FAPE is suspected, a parent or a public agency may file a due process complaint to request a due process hearing on any matter relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child. 34 CFR §300.507(a). If the dispute cannot be resolved through the resolution process, the parent or public agency must have an opportunity for an impartial due process hearing. 34 CFR §§300.511(a), 300.512, 300.513 and 300.515.

A second important method for resolving disputes available under IDEA is the mediation process described in 34 CFR §300.506. The mediation process, which must be voluntary, offers a less formal opportunity for parents and public agencies to resolve disputes about any matter, including disciplinary removals, under 34 CFR part 300, including matters arising prior to the filing of a due process complaint. 34 CFR §300.506(a).

Lastly, States are also required to establish and implement their own State complaint procedures, separate from their due process procedures, for resolving any complaint that meets the requirements of 34 CFR §300.153. 34 CFR §300.151(a)(1). Any organization or individual, including one from another State, may file a signed written State complaint alleging that a public agency has violated a requirement of either Part B of the Act or the Part B regulations.

Additional information regarding dispute resolution is available at:

- Questions and Answers on IDEA Part B Dispute Resolution Procedures, revised July 2013 (OSEP Memo 13-08) (http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf); and
- Dear Colleague Letter on a public agency's Use of Due Process Procedures After a Parent Has Filed a State Complaint, April 2015 (https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/dcl04152015disputeresolution2q2015.pdf)

The Office of Special Education and Rehabilitative Services (OSERS) is committed to ensuring that children with disabilities have access to learning environments that are safe, supportive, and conducive to learning. In such learning environments, educators have the skills and tools to prevent disciplinary incidents before they happen, use effective behavioral supports, teach behavioral expectations, and implement other behavioral management strategies. In many schools, effective behavioral supports have been implemented within a multi-tiered behavioral framework to organize school efforts to support children with disabilities and their peers. In this way, schools facilitate the provision of FAPE by providing children with disabilities with the behavioral supports they need to prevent, or bring an end to, disciplinary approaches that may unduly interfere with instruction and the implementation of IEPs. Further, this focus on prevention helps to ensure that educators receive the training, coaching, and other supports they

need to help children with disabilities, and their peers, to focus on learning and succeed in school.

To better develop and implement appropriate IEPs for children whose behavior impedes the child's learning or that of others, and to ensure that behavioral supports are available throughout the continuum of placements, including in the regular education setting, OSERS has enclosed with this letter two technical assistance documents that we first released in November 2015 as part of the 40th Anniversary of IDEA:

1) Supporting and Responding to Behavior: Evidence-Based Classroom Strategies for Teachers:
   https://www.osepideasthatwork.org/evidencebasedclassroomstrategies

2) Positive Behavioral Interventions and Supports: Implementation Blueprint and Self-Assessment:
   http://www.pbis.org/blueprint/implementation-blueprint

These two documents provide additional information on evidenced-based classroom strategies to support and respond to behavior and on organizing practices in an integrated manner in a multi-tiered system of support.

If you have any questions or comments, please contact the Office of Special Education Programs Education Program Specialist, Lisa Pagano at 202-245-7413 or Lisa.Pagano@ed.gov.

Thank you for your support and your continued interested in improving education access and opportunity for children with disabilities.

Sincerely,

/s/	/s/
Sue Swenson	Ruth E. Ryder
Acting Assistant Secretary	Acting Director
Special Education and Rehabilitative Services	Office of Special Education Programs

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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

EXPEDITED DECISION

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

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

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

Student's Expedited Request for Due Process Hearing was filed on March 28, 2013.[2] At the conclusion of the hearing, the parties were given until 12:00 p.m. on May 13, 2013, to

[1] Logan High School has over 4,000 students, each of whom are randomly assigned to a particular "house" which is staffed by a house principal, two vice principals and other support personnel. Student was assigned to House Three and Mr. Camacho was her house principal.

[2] The scheduling of the expedited hearing to commence on April 25, 2013, complied with the mandate that an expedited hearing occur within 20 school days of the filing of the expedited due process request. School was not in session March 29, 2013, a furlough day,

file any closing briefs. Both parties timely submitted their respective closing briefs and the record was closed on May 13, 2013.[3]

ISSUES[4]

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

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

CONTENTIONS OF THE PARTIES

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

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and April 1 through 5, 2013, Spring Break; therefore, these days are not counted toward the timeline.

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

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

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

FACTUAL FINDINGS

Background and Jurisdiction

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

2. The District originally qualified Student for special education in April of 2008 under the category of SLD due to a severe discrepancy between her ability and academic achievement in reading, along with visual and attention processing deficits. Since her initial eligibility, Student has attended general education classes and received support through the resource specialist program (RSP).

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

Student's Operative IEP

Previous 2011 IEP and BSP

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

5. Student transferred into the District from the Elk Grove Unified School District at the start of the 2012-2013 school year. Her prior IEP from Elk Grove, dated October 21, 2011, included academic, transition, and work completion goals, placement in general education with RSP support, academic accommodations, and a BSP with a behavior goal that called for Student to attend school regularly, be on time to each class, arrive with materials and books, and socialize at appropriate times. At hearing, the parties introduced extensive testimony regarding Student's 2011 BSP, what efforts the District took to obtain the complete written BSP, what purpose it served, and whether the District implemented the BSP. This testimony was irrelevant to a determination of the issues for two reasons: (1) the District had no legal obligation to implement Student's prior IEP upon her transfer into the

District at the start of the 2012-2013 school year; and (2) the District offered Student a new IEP dated September 24, 2012, to which Parent provided written consent. As discussed below, Student's operative IEP at the time of her disciplinary conduct was the September 2012 IEP.

September 24, 2012 IEP and Behavior Goal

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

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

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

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

8. Ms. Jaffe-Bird's testimony established that by the time of the September 2012 IEP team meeting, Student's primary challenge was her difficulty accepting responsibility for her inappropriate classroom behaviors. She proposed that the team adopt a behavior goal to encourage Student to accept consequences without talking back and being disrespectful.[8] Ms. Jaffe-Bird persuasively testified that the development of a behavioral goal, the lowest level of intervention, would meet Student's needs since she was not demonstrating more serious behaviors indicating a need for higher level of intervention, such as a BSP. Documentary evidence, including Student's Profile and Visit Log which detailed behavior incidents, and other witness testimony corroborated Ms. Jaffe-Bird's testimony that Student had not exhibited any disciplinary behavior at the time of the September 2012 IEP.

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

Student's Disciplinary Conduct of October 26, 2012

10. The evidence established that on October 26, 2012, Student engaged in a mutual fight on campus outside the girls' locker room in the "60's hallway" with another female student (Girl 1) immediately prior to the start of first period. Student established that a second student (Girl 2) jumped into the fray attacking Student from behind. Annette Blanford, a physical education (P.E.) teacher at Logan, arrived and observed that Girl 1 had obviously been in a fight and took her to House Office Two. She witnessed no fighting at

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

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

[10] Student challenges the "removal" of the BSP and asserts that the District committed procedural violations. However, the issue of whether the District violated Student's rights to a FAPE in the development of the September 2012 IEP is not an issue in this case. The issue relevant to the determination of this matter is whether the September 2012 IEP was the operative IEP in place when the behavior incident, that is the subject of this hearing, occurred.

that time and did not recall seeing Student. Ms. Blanford informed Abhijit Brar, House Two principal, of the fight, and he responded to the 60's hallway where he encountered Student yelling and upset.

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

12. At hearing, Mr. Brar provided clear, credible testimony as to his hands-on involvement with Student.[11] His testimony established the following account. Mr. Brar first observed Student walking away from a crowd of students near the girls' locker room, and yelling in the 60's hallway. He instructed her to stop and informed her that she needed to come with him. He was yelling loud enough for Student to hear over the noise of the crowded hall which had between 20-50 students nearby. When she failed to comply, he again yelled, "Don't walk away. Stop!" After 30-45 seconds, Student turned and started to walk towards him. He again instructed her to stop and told her he needed to speak with her. He was dressed in a suit and tie and carrying his walkie-talkie. He and Student had never met. Student then tried to evade him several times by moving from side-to-side in the 15 to 20 foot wide hallway. He again instructed her to stop but she did not comply. As she was about to walk past him, he reached out to the side and grabbed her upper arm. Student immediately turned to face him and kicked him. She struggled to break free and punched him in the chest. He then held both her arms around her stomach in what he called a "bear hug" to prevent her from further assaulting him. Christopher Perry, a campus security technician (CST), arrived to assist Mr. Brar in escorting Student to the office. Student dropped her weight to the floor; Mr. Brar let go of her; and she vomited. She was breathing heavy and crying, so he attempted to calm her. The incident was over quickly. No more than five minutes elapsed from the time he got involved at 8:15 a.m. until he placed Student in a hold.

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

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

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

15. Student testified that as soon as she stood up from the fight, the first thing she recalled was someone grabbing her from behind with both arms around her stomach; she was scared and kicked backwards without turning around. This version is at odds with her statement to Student's expert Rebecca Branstetter, Ph.D., that she tried to get around Mr. Brar.[12] Student's perception and recall of the incident are affected by her sense that she was under attack and her own description to Parent of "blacking out" until being restrained by Mr. Brar. Dr. Branstetter's opinion, discussed below, was that Student's conduct resulted from impaired self-regulation. She based her opinion on Student's self-report that she was "going crazy" and "enraged" and did not know it was the principal. Student's expert did not account for Student's report that she tried to get past the principal which undermines her conclusion that Student's conduct was caused by her ADHD.[13]

16. Mr. Camacho completed an investigation which included interviewing Student, Mr. Brar, CST Perry, and two other students including Girl 1, at Student's request.[14]

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[12] Dr. Branstetter was qualified at hearing as an expert in ADHD and manifestation determination assessments. She obtained her master's degree in education with an emphasis in school psychology in 2000 from the University of California at Berkeley along with a Ph.D. in 2004. She obtained her school psychologist credential in 2001, is a licensed educational psychologist and received her California state license in 2009. She worked as a school psychologist for San Francisco Unified School District from 2001-2007 and for Oakland Unified School District from 2007-2011. She has operated a private practice counseling service since 2007.

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

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

He wrote an expulsion report and prepared the expulsion documents. His report of how the event unfolded is consistent in most respects with Principal Brar's account.[15]

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

Original Manifestation Determination Meeting, October 30, 2012

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

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

[15] One difference is that Mr. Camacho reports that Student punched Mr. Brar two times. Logan school psychologist Michael Piette also recalled Mr. Brar telling him that Student hit him twice. Mr. Brar testified at hearing as to one punch. Student testified that she could have quickly hit him two times. Whether she punched the principal once or twice is not critical to resolution of the two issues for hearing.

January 2013 Settlement Agreement[16]

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

21. The stated purpose of the February 2013 manifestation determination review was *solely* to address Student's disability of ADHD. However, the evidence showed that the February 2013 manifestation determination review incorporated the prior findings from the October 2012 manifestation meeting, namely, that Student's conduct was not a result of her SLD or of the District's failure to implement her IEP. Therefore, Student is entitled to challenge both prongs of the February 2013 manifestation determination review.[17]

February 19, 2013 Manifestation Determination Review

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

23. At the February 2013 manifestation determination meeting, Mr. Piette reviewed his report with the team. In preparation for his report, he conducted a review of records and interviewed Mr. Brar, Mr. Camacho and Ms. Jaffe-Bird. He credibly established

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

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

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

that current testing of Student was not required to conduct a manifestation determination review as he did not require this additional data to reach a determination, and he had access to her 2011 triennial assessment. His testimony persuasively established that the big picture of how Student functions at school as provided by a record review is more telling than testing scores from self-reported rating scales, and he credibly countered Student's expert's reliance on such scores.

24. Student hired Dr. Branstetter to conduct a current behavior assessment to determine her *present* functioning and to render an opinion as to whether her disabilities *impacted* her behavior in October of 2012.[19] In addition to a record review and interview of Parent and Student, Dr. Branstetter administered rating scales to Parents and Student from the Behavior Assessment Scales for Children, 2nd Edition (BASC-2), and the Delis Rating of Executive Functioning (DREF).[20] Data from these rating scales was not highly credited in that it provided, in Dr. Branstetter's words, a current "snapshot" of Student's functioning and the scales could have yielded very different results if administered at the time of the incident. Additionally, the data was based upon self-report of Parents and Student and did not include teacher rating scales. Although Dr. Branstetter testified that teacher rating scales were not indicated as they would be based upon retrospective data since Student had not attended school for five months, the evidence established that she gave Parent the teacher rating scales to give to Student's teachers. Parent did not receive the completed scales back from the teachers.[21] Mr. Piette's testimony persuasively established that teachers are a critical source of information on Student's functioning in the school setting, and the BASC-2 includes parent, student and teacher rating forms so that information can be gathered across environments from different perspectives.

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

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

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

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

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

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

27. The evidence established that ADHD is characterized by inattention, impulsivity and hyperactivity, as identified in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM- IV). Physical aggression is not a characteristic of the disorder. One criterion for ADHD is that it occurs across environments and situations. Student was diagnosed at age six with ADHD-combined type, meaning her disability manifests with a combination of all three characteristics. Parent's testimony and her October 30, 2012 letter to the original manifestation determination IEP team, established that she is familiar with ADHD and how it specifically impacts her daughter.[22]

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

29. The undisputed evidence is that Student's ADHD manifests as class disruption through talking in class, blurting things out, being disorganized, not getting her work in on time, and not having her planner and materials ready to go. Student has no history of

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

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

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

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

physical aggression.[26] Most recently, she received three referrals in her English class for throwing an item in class, insubordination and defiance, and class disruption.

30. Mr. Piette credibly established the overriding importance of history and record review in determining whether conduct is a manifestation of Student's ADHD. His testified persuasively that students with ADHD typically have a pattern in which their impulsivity manifests over time. Here, Student has a history of impulse control in the class setting which manifests in very specific, non-aggressive ways which supports the conclusion that Student's conduct was not a manifestation of her ADHD. Parent agreed that Student has no history of any prior fights, but contended that Student could not have a pattern of hitting or kicking as she had never before felt attacked.[27] Ms. Jaffe-Bird persuasively testified that based upon her direct work with Student and her experience of working with students with ADHD over her 20 year career, she did not see Student's ADHD taking her to the point of kicking and hitting the principal.

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

32. District witnesses credibly established that Student's in-class behaviors went beyond impulsivity when she argued back and refused to comply with class procedures when prompted and redirected. The evidence showed Student exhibited a pattern of willful disrespect for authority unrelated to her ADHD. Ms. Kappler has instructed at least 95 students with ADHD over her 13 years of teaching in the District.[28] In her experience,

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

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

[28] Ms. Kappler received her bachelor's degree in general and special education from Northern Arizona University and a master's degree in education from California State University, East Bay. She holds an educational specialist and administrative credentials.

students with ADHD are not more likely than students without ADHD to engage in fights or to talk back when re-directed. She testified persuasively that talking back and arguing is a common teenage behavior and is more a reflection of Student's personality than a manifestation of her ADHD. The District established that Student's arguing and class defiance, although intrinsically related to her disruptive socialization which is a manifestation of her ADHD, are not caused by nor substantially related to her ADHD. By extension, Student's assault on the principal, which has no relation to her class socialization, also has little to no relation to her ADHD.

Was Student's Conduct Impulsive?

Intent to Fight as Demonstrated by Attire

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

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

35. Student contended that she had no intention of fighting the morning of October 26, 2012; the District contended that Student went to school planning on a fight. Student established that she and Parent strategized a plan to avoid a fight, which included Student

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She taught a special day class and resource class for 13 years in the District, and served as a program specialist in Newark for four years prior to her current position.

[29]Although Student's statement to Ms. Jaffe-Bird is an out-of-court hearsay statement, Student is a party to this action. The statement is therefore an admission of a party or a statement against her own interest, both of which are exceptions to hearsay. (Evid. Code §§ 1200, 1220, 1230; *In Re Ricky B.* (1978) 82 Cal.App.3d 106, 112.)

eating lunch in the office and Parent picking her up immediately after school. Parent testified she was certain Student did not go to school planning to fight as they had their plan of avoidance, and Student was terrified of fighting. Dr. Branstetter testified to her opinion that Student "absolutely" did not want to fight on October 26, 2012. Her opinion was not persuasive as it was based on Parent and Student self-reported data in March of 2013, that Student had elevated levels of anxiety and concerns with personal safety. Student's own statements to Ms. Jaffe-Bird indicated that she wanted to continue with the fight and not let it end as it did. Although the District did not prove that Student planned to fight that morning, the evidence showed that Student came to school prepared for the likelihood of a fight.

Executive Functioning Deficits as a Component of ADHD

36. Both Student's expert and Mr. Piette demonstrated their knowledge about ADHD and executive functioning which they agreed is a component of ADHD. The evidence established that executive functioning includes planning and organization, working memory, and emotional control. An individual with ADHD typically has some degree of impairment in executive functioning of which impulse control is a factor. Dr. Branstetter did not persuasively establish that a core feature of Student's ADHD is executive functioning deficits which impede her ability to self-regulate her behavior and emotions, such that her conduct was a manifestation of her disability.

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

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

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

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

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

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

41. Student's contention that she was operating under an overwhelming level of distress the week of the incident, which exacerbated her ability to regulate her emotions and control impulses the morning of the altercation, serves to undermine her claim that her conduct was caused by her ADHD.[31] The evidence established that Student was able to cope

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

with each stressful situation, Monday through Thursday, without exhibiting inappropriate responses, despite her disability.

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

Implementation of Student's Operative IEP

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

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

Implementation of Behavior Goal

45. As Special Education Director, Ms. Kappler is responsible for program oversight and compliance. Her testimony as well as Mr. Piette's credibly established that a BSP is not needed to implement a behavior goal so much as communication with the case manager who drafted and supports the goal. Student's IEP specifies that the lowest level of behavior intervention, a behavior goal, will effectively address Student's behavior challenges. Ms. Kappler credibly established that Student's teachers knew how to and did implement Student's behavior goal. Mr. Camacho persuasively testified that the IEP team discussed Student's behavior goal and understood that the object was to have Student take responsibility and not argue back. He was persuasive in his testimony that students frequently answer back to teachers, and teachers are experienced and equipped to respond effectively to modify such behavior.

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

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

47. The September 2012 IEP called for Student to meet with Ms. Jaffe-Bird weekly and the District established this was being implemented, often on a daily basis. Ms. Jaffe-Bird's testimony persuasively demonstrated that she worked one-on-one with Student on her behavior goal by helping her to understand acceptable classroom behavior, set short-term academic and behavior goals, organize her binder, ask for help, request accommodations, and develop life skills. Additionally, her study skills curriculum helped support and implement Student's behavior goal through group lesson plans which addressed what students can do if they feel angry such as take a break, step-out, or ask to see a counselor.

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

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

LEGAL CONCLUSIONS

Burden of Proof

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

Obligations to a Transfer Student and Determination of Operative IEP

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

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

Change of Placement

4. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to her. (Cal. Code Regs., tit. 5, § 3042, subd. (a).) If a special education student violates a code of student conduct, school personnel may remove the student from her educational placement without providing services for a period not to exceed 10 days per school year, provided

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

typical children are not provided services during disciplinary removal. (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3).) A "change of placement" is a fundamental change in, or elimination of, a basic element of a pupil's educational program. The removal of a special education student from her placement for more than 10 consecutive school days constitutes a change of placement. (34 C.F.R. § 300.536(a)(i).)

Manifestation Determination

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

6. Within 10 school days of any decision to change the educational placement of a student with a disability because of a violation of law or code of conduct, the local educational agency (LEA), the parent, and relevant members of the student's IEP team shall review all relevant information in the student's file, "including the child's IEP, any teacher observations, and any relevant information provided by the parents." (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).) If the review team determines that (1) the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or (2) the conduct was the direct result of the LEA's failure to implement the student's IEP, the student's conduct "shall be determined to be a manifestation of the child's disability." (20 U.S.C. § 1415(k)(1)(E)(ii); 34 C.F.R. § 300.530(e)(1) & (2); 71 Fed.Reg. 46720 (Aug. 14, 2006).) The revised manifestation provisions "provide a simplified, common sense manifestation determination process that could be used by school personnel." (71 Fed. Reg. 46720 (August 14, 2006).)

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

8. The Ninth Circuit in *Doe v. Maher, supra,* 793 F.2d 1470, 1480, discussed the meaning of various phrases describing "conduct that is a manifestation of the child's handicap." The court explained: "As we use them, these phrases are terms intended to mean

the same thing. They refer to conduct that is caused by, or has a direct and substantial relationship to, the child's handicap. Put another way, a handicapped child's conduct is covered by this definition only if the handicap significantly impairs the child's behavioral controls. [I]t does not embrace conduct that bears only an attenuated relationship to the child's handicap." The court went on to say: "If the child's misbehavior is properly determined *not* to be a manifestation of his handicap, the handicapped child can be expelled. [Citations] ...When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him [or her] from the rules, including those regarding expulsion, applicable to other children. ...To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not so." (*Id.* at 1482.)

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

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

11. The parent of a student with a disability, who disagrees with either a district's decision to change the student's educational placement as a disciplinary measure or the manifestation determination, may appeal by requesting a due process hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532 (a) & (c).)[35] An expedited hearing shall be held within 20 school days of the date the hearing is requested and a decision or "determination" shall be made by the hearing officer within 10 school days after the hearing. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532 (c)(2).) In appropriate circumstances, the ALJ hearing the dispute may order a change in placement of the student, and may return the student to the placement from which she was removed. (20 U.S.C. §1415(k)(3)(B)(ii); 34 C.F.R. § 300.532(b)(2)(i).)

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

Issue One: Was Student's October 26, 2012 physical altercation with a school principal caused by, or did it have a direct and substantial relationship to, her disability of ADHD?

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

Issue Two: *Was Student's October 26, 2012 disciplinary conduct the direct result of the District's failure to implement Student's IEP?*

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

ORDER

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

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

PREVAILING PARTY

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

NOTICE OF APPEAL RIGHTS

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

Dated: May 20, 2013

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings

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 becuase 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' 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. Byland 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 afterword 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 IDEA[10]

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

J.M., **Plaintiff,**

v.

LIBERTY UNION **HIGH SCHOOL DISTRICT, Defendant.**

Case No. 16-cv-05225-LB.

United States District Court, N.D. California, San Francisco Division.

May 16, 2017.

J. M., Plaintiff, represented by Eileen Elizabeth Matteucci, Eileen Matteucci Attorney at Law.

Liberty Union High School District, Defendant, represented by Katherine A. Alberts, Leone & Alberts, a Professional Corporation & Seth L. Gordon, Leone & Alberts, APC.

ORDER GRANTING THE DEFENDANT'S MOTION TO DISMISS

Re: ECF No. 34

LAUREL BEELER, Magistrate Judge.

INTRODUCTION

This case concerns the expulsion of **J.M.**, a minor and former student at **Liberty Union** High School District.[1] **J.M.**, who has ADHD, had "a verbal altercation with another student while playing an on-line video game" and, the next day, was "involved in a threatening confrontation with that same student on school grounds."[2] **J.M.** challenges here the District's determination that his altercation-related conduct was not a manifestation of his ADHD and asserts two substantive claims: (1) discrimination under section 504 of the Rehabilitation Act, *see* 29 U.S.C. § 794; and (2) retaliation under section 504 of the Rehabilitation Act, *see id.*[3] He also seeks judicial review of the District's administrative hearing and determination.[4] The District moves to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6).

The court can decide the matter without oral argument and so it vacated the hearing previously set for May 11, 2017. The court grants the motion and dismisses the complaint but grants leave to amend.

STATEMENT

1. The District Develops a Section 504 Plan for J.M.

J.M. is sixteen years old and has Attention Deficit Hyperactivity Disorder ("ADHD").[5] While in middle school (outside of the defendant's district), **J.M.** was provided with a section 504 Plan — a plan consisting of the "accommodations, supplementary aids, supports[,] and services" necessary to provide him with a free appropriate public education.[6] In 2014, when **J.M.** enrolled in the District's high school, the District "evaluated him and again found him eligible for a 504 Plan" because of his ADHD.[7]

The District's 504 Plan for **J.M.** "described the impact of [his] disability on his education," which was "limited to his poor attention and distractibility in the classroom, poor organization skills[,] and frequent failure to complete and turn in assignments and homework."[8] Under the Plan, **J.M.** received "class notes, preferential classroom seating, [and] enrollment in a tutorial support class."[9] The Plan also contained "similar provisions focusing solely on his timely production and completion of his academic work."[10]

2. J.M. Is Involved in an Altercation; the District Conducts a Manifestation Determination; and J.M. Requests an Administrative Hearing

One night in January 2016, **J.M.** had "a verbal altercation with another student while playing an on-line video game."[11] The next day, he was "involved in a threatening confrontation with that same student on school grounds."[12] "**J.M.** was immediately suspended and [the District] moved to expel him."[13]

The District then completed a "comprehensive psycho-educational assessment of **J.M.**"[14] The District's assessor considered whether **J.M.**'s conduct in the altercation "was caused by or had a direct and substantial relationship" to his ADHD.[15] The assessor found that it was not, and therefore his "conduct was not a manifestation" of his disability.[16] The assessor explained: "The conduct in question did not appear to be an act of impulsivity, [it] instead appeared to be an act organization [sic] and planning."[17] **J.M.**'s parents disagreed with the determination.[18]

To challenge the District's determination, **J.M.**'s parents requested a section 504 administrative hearing under the District's policies.[19] In that process, his parents obtained a copy of the District assessor's test protocols used in conducting **J.M.**'s assessment.[20] Those protocols revealed certain facts — including (among other things) **J.M.**'s "clinically significant" inability to independently generate ideas, responses, or problem-solving strategies; an inability to anticipate future events; a "severe" inability to consider the consequences of his own acts; and an "elevated" difficulty providing an appropriate emotional response — that **J.M.** asserts the assessor failed to consider.[21] The assessor instead "discussed only one symptom of ADHD — difficulty with organization and planning of tasks — and even then . . . failed to make a factual finding."[22]

J.M. submitted the above facts for the administrative hearing, which was held in May 2016.[23] At the hearing (and in his briefs), **J.M.** challenged the District's "failure to take any reasonable steps to locate [his] prior psycho-educational assessment from the prior school year."[24] He asserted that such failure violated his "procedural right to a manifestation determination based upon all relevant and necessary records and information."[25] But, following an evidentiary hearing, the hearing officer "upheld the D[istrict]'s determination that **J.M.**'s conduct was neither caused by nor had a direct and substantial relationship to **J.M.**'s disability and therefore was not a manifestation of his disability."[26] The hearing officer did not address or make any factual findings regarding **J.M.**'s procedural challenge.[27]

3. J.M. Sues the District

After the administrative hearing, **J.M.** sued the District.[28] In the initial complaint, **J.M.** sought judicial review of the hearing officer's decision under section 504 of the Rehabilitation Act.[29] The District moved to dismiss the complaint for lack of subject-matter jurisdiction.[30] **J.M.** did not dispute that this court lacked jurisdiction but requested leave to amend to "present the facts in a manner that will support a substantive claim of discrimination under Section 504 . . . and establish subject matter jurisdiction."[31] The court granted **J.M.** leave to amend the complaint.[32]

J.M. did so and asserts two substantive Section 504 claims — one for discrimination and one for retaliation — and reasserts his request for review of the hearing officer's findings.[33] The District moves to dismiss the First Amended Complaint ("FAC") under Rule 12(b)(6).[34]

RULE 12(B)(6) LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed because of a "failure to state a claim upon which relief can be granted." A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside Healthcare Sys.,* 534 F.3d 1116, 1121 (9th Cir. 2008); *Navarro v. Block,* 250 F.3d 729, 732 (9th Cir. 2001).

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief" to give the defendant "fair notice" of what the claims are and the grounds upon which they rest. *See* Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007). A complaint does not need detailed factual allegations, but "a plaintiff's obligation to provide the `grounds' of his `entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the

elements of a cause of action will not do. Factual allegations must be enough to raise a claim for relief above the speculative level . . . ." *Twombly,* 550 U.S. at 555 (internal citations omitted).

To survive a motion to dismiss, a complaint must contain sufficient factual allegations, accepted as true, "`to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Twombly,* 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a `probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly,* 550 U.S. at 556). "Where a complaint pleads facts that are `merely consistent with' a defendant's liability, it `stops short of the line between possibility and plausibility of `entitlement to relief.'" *Id.* (quoting *Twombly,* 550 U.S. at 557).

If a court dismisses a complaint, it should give leave to amend unless the "the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss and Liehe, Inc. v. Northern California Collection Serv. Inc.,* 911 F.2d 242, 247 (9th Cir. 1990).

ANALYSIS

1. Section 504 Discrimination Claim

Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). "Section 504 applies to all public schools that receive federal financial assistance." *Mark H. v. Lemahieu,* 513 F.3d 922, 929 (9th Cir. 2008).

To state a claim under section 504, a plaintiff must show: "(1) she is a qualified individual with a disability; (2) she was denied `a reasonable accommodation that [she] needs in order to enjoy meaningful access to the benefits of public services;' and (3) the program providing the benefit receives federal financial assistance." *A.G. v. Paradise Valley Unified Sch. Dist. No. 69,* 815 F.3d 1195, 1204 (9th Cir. 2016) (quoting *Mark H. v. Hamamoto,* 620 F.3d 1090, 1097 (9th Cir. 2010)); *see also Duvall v. Cnty. of Kitsap,* 260 F.3d 1124, 1135 (9th Cir. 2001). The plaintiff can satisfy the second prong "by showing that the program denied her meaningful access to public education . . . by violating a regulation that implements section 504's prohibitions." *A.G.,* 815 F.3d at 1204 (citing *Lemahieu,* 513 F.3d at 938-39). When asserting an implementing-regulation-based claim, the plaintiff must allege "precisely which § 504 regulations are at stake and why," or, "in what regard" the regulation was violated. *Lemahieu,* 513 F.3d at 925.

In the public-school context, section 504's implementing regulations require "schools to `provide a free appropriate public education to each qualified handicapped person.'" *A.G.,* 815 F.3d at 1203 (quoting 34 C.F.R. § 104.33(a)). That free appropriate public education ("FAPE") requires "regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of [34 C.F.R.] §§ 104.34, 104.35, and 104.36." 34 C.F.R. § 104.33(b)(1); *see also A.G.,* 815 F.3d at 1203.

1.1 Private Right of Action

J.M. asserts two implementing-regulation violations, both based in 34 C.F.R. § 104.36.

Whether a plaintiff can bring a claim under a specific implementing regulation depends on whether the regulation asserted "come[s] within the § 504 implied right of action." *Lemahieu,* 513 F.3d at 935; *see H. v. Mill Valley School Dist.,* No. 15-cv-05751-HSG, 2016 WL 3162174, at *4 (N.D. Cal. June 7, 2016). "For purposes of determining whether a particular regulation is ever enforceable through the implied right of action contained in a statute, the pertinent question is simply whether the regulation falls within the scope of the statute's prohibition." *Lemahieu,* 513 F.3d at 938. "[T]o be enforceable through the § 504 implied private right of action, regulations must be tightly enough linked to § 504 that they `authoritatively construe' that statutory section, rather than impose new obligations." *Id.* at 939 (quoting *Alexander v. Sandoval,* 532 U.S. 275, 284 (2001)). Section 504's "reasonable accommodation" and "meaningful access" requirements are relevant "when evaluating whether

regulations `come within § 504's substantive scope.'" *P.P. v. Compton Unified Sch. Dist.,* 135 F. Supp. 3d 1098, 1118 (C.D. Cal. 2015) (quoting *Lemahieu,* 513 F.3d at 938).

In *P.P. v. Compton Unified School District,* the court found that 34 C.F.R. § 104.36, "as invoked in [that] case, is `a variety of meaningful access regulation,' such that it is encompassed within § 504's implied right of action." 135 F. Supp. 3d at 1119. There, the plaintiffs alleged that the school district failed to "established procedures regarding notice," which "resulted in negative consequences for class members who were entitled to the protection of procedural safeguards, including suspension, involuntary transfer, and expulsion." *Id.* (internal quotations omitted). Distinguishing cases that involved "no underlying discrimination claim" (and instead involved only claims for violation of section 104.36's procedural provisions), the alleged consequences of the district's failure were "related to Plaintiffs' general theory of disability-based deprivation." *Id.* (distinguishing *Power ex. rel. Power v. Sch. Bd. of City of Virginia Beach,* 276 F. Supp. 2d 515, 519 (E.D. Va. 2003)). And so the plaintiffs could sue under § 104.36.

Here, as in *P.P.,* the court construes the complaint to invoke § 104.36 as "a variety of meaningful access regulation." The gravamen of **J.M.**'s complaint is that the District did not apply the correct standard (or provide a review process) to evaluate his documented ADHD-related symptoms before expelling him. As such (and liberally construed) the claim is not one attacking only section 104.36's procedural requirements, but one that involves a related, underlying discrimination claim.

1.2 Violation of the "Manifestation Determination" Regulations

J.M. asserts that the District violated section 504 and implementing regulation 34 C.F.R. § 104.36 by applying the incorrect "legal standing in making a manifestation determination."[35] He alleges that "the correct legal standard is not whether the student's behavior was caused by or had a direct and substantial relationship to his disability, the standard used by the D[istrict], but simply whether the behavior bears a relationship to the disability."[36]

34 C.F.R. § 104.36 requires public schools to establish a system of procedural safeguards "with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services." That system must include "notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure." *Id.* Compliance with the procedural safeguards of [the Individuals with Disabilities in Education Act ("IDEA")] is one means of meeting this requirement." *Id.*

The IDEA, designed "to ensure that all children with disabilities have available to them a free appropriate public education," *see Lamahieu,* 513 F.3d at 928 (quoting 20 U.S.C. § 1400(d)(1)(A)), provides for a manifestation-determination process. *See* 20 U.S.C. § 1415(k)(E); 34 C.F.R. 300.530(e). That process requires, before changing a child's placement, that the local educational agency, the parents, and the child's individualized-education-program ("IEP") team members "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 local educational agency's failure to implement the IEP.

20 U.S.C. § 1415(k)(E)(i); 34 C.F.R. 300.530(e)(1). If the group determines that either of those two conditions is applicable to the child, "the conduct shall be determined to be a manifestation of the child's disability." 20 U.S.C. § 1415(k)(E)(ii); 34 C.F.R. 300.530(e)(2).

Here, the District's section 504 "Notice of Parent/Guardian Rights and Procedural Safeguards" contains a section titled "Discipline."[37] The manifestation-determination procedures therein incorporate and mirror the above IDEA process and standard.[38] For example, if the team determines that (1) "the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability," or (2) "the conduct in question was the direct result of [the] District's failure to implement the student's current Section 504 Service Plan," then "the alleged misconduct shall be determined to be a manifestation of the student's disability."[39] **J.M.** concedes as much in his opposition.[40]

But **J.M.** asserts that "[b]y making a manifestation determination that failed to include the findings required by" 34 C.F.R. § 300.523(c)(2)(ii) and (iii), which "requires more specific findings," the District violated § 104.36 and thus gives rise to his claim for discrimination.[41]

There are two problems. First, the regulation that **J.M.** points to (§ 300.523(c)) appears to be an old, repealed IDEA regulation. *See* 34 C.F.R.§ 300.530 (effective Oct. 13, 2006); *id.* § 300.523 (effective to Oct. 12, 2006). It is not clear how the District's failure to comply with that section could constitute a violation of § 104.36. The District's policy instead mirrors the IDEA's current process and standard. Second, in any event, § 104.36 says only that "[c]ompliance with the procedural safeguards of [IDEA] is *one* means of meeting this requirement"— *i.e.,* IDEA compliance is sufficient, but not necessary. *See* *Lemahieu,* 513 F.3d at 933. So **J.M.**'s assertion that the District did not comply with an (old) IDEA regulation is not alone sufficient to state a claim.

Because **J.M.**'s manifestation-determination claim is based solely on the District's failure to apply the correct legal standard (and not, for example, its failure to properly apply it), the court's analysis stops here. The court does not reach the issue of whether the District properly applied the legal standard or whether it's failure to do so constituted "intentional discrimination." The court dismisses the claim without prejudice.

1.3 Violation of the "Review Procedure" Regulations

J.M. asserts that the District violated § 104.36 by failing "to provide [him] with a clear and understandable `review procedure.'"[42]

The District's Section 504 "Notice of Parent/Guardian Rights and Procedural Safeguards" provides "procedural safeguards" involving a three-step process.[43] Under those procedures, if a parent or guardian disagrees with the "decisions regarding the identification, evaluation, or educational placement" of his or her child, the parent or guardian may initiate one of two processes.[44]

First, at "level one," the parent or guardian may submit a written disagreement and request for a meeting with the "District Section 504 Administrator/Director of Special Services."[45] (The parent or guardian may skip level one altogether.[46]) Second, at "level two," "[i]f the disagreement is not resolved," the parent or guardian may request a due-process hearing to "be presided over and decided by an impartial hearing officer."[47] The District's section 504 Notice contains approximately a page and a half of procedures discribing the level two due-process hearing.[48] Finally, the Notice states, "[e]ither party may seek review of the hearing officer's decision by timely filing with a court of competent jurisdiction."[49] The District points out that the "court of competent jurisdiction" in this case would be the California superior court.[50] *See* Cal. Civ. P. Code § 1094.5; *Leone v. Medical Bd.,* 22 Cal. 4th 660, 663 (2000) ("The superior court has original jurisdiction of these administrative mandate proceedings.").

It is this last level of "review" that **J.M.** appears to take issue with. The court does not now decide whether California Civil Procedure Code section 1094.5 provides the proper avenue for review. **J.M.** does not plausibly plead a theory (factual or legal) about (1) how the District's review procedure was unclear and thus discriminatory, or (2) why the final, judicial level of review "cannot be considered to have `provided' a review procedure to claimants, as required by the regulation."[51] The court therefore dismisses **J.M.**'s "review procedure" claim without prejudice.

2. Section 504 Retaliation Claim

J.M. asserts a section 504 retaliation claim based on the District's failure to send his personal file to his new school in response to his parents' "advocacy."[52]

To state a claim for retaliation under section 504, a plaintiff must show: (1) involvement in a protected activity, (2) an adverse action, and (3) a causal link between the two. *See Henry v. Napa Valley Unified,* No. 16-cv-04021-MEJ, 2016 U.S. Dist. LEXIS 170152, at *12 (N.D. Cal. Dec. 8, 2016) (citing *Kitchen v. Lodi Unified Sch. Dist.,* 2014 WL 5817320, at *4 (E.D. Cal. Nov. 5, 2014)); *see also* *Weixel v. Bd. of Educ. of City of New York,* 287 F.3d 138, 148 (2d Cir. 2002).

Here, **J.M.** alleges that while "awaiting hearing and still on suspension," his parents withdrew him from his District school and enrolled him in a private school.[53] Since his enrollment, **J.M.**'s parents and his new school requested "numerous times" that the District send his educational file to the new school.[54] But, to date, the District "has refused to comply with these requests

and has failed to identify any reason for that refusal."[55] In fact, the District "has not communicated with [his] parents at all regarding their request for transmittal of [his] file."[56] And so **J.M.** alleges that the District's actions "are retaliatory against **J.M.** for his parents' advocacy on behalf of their son and their pursuit of claims against the D[istrict] under Section 504."[57]

The District says it concedes (for the current motion) that **J.M.**'s parents "engaged in protected activity by advocating on behalf of their son."[58] But the District later argues, in connection with its "causal connection" challenge, that **J.M.** "does not specifically identify the activity that his parents engaged in that the District allegedly retaliated against."[59] Indeed, the court thinks, it is necessary to first identify the alleged "protected activity."

And it is because **J.M.** fails to adequately identify that activity that the claim as pled fails. He asserts that the District withheld his file in retaliation for his parents' "advocacy." But the term "advocacy" is ambiguous in the context of the complaint. Does **J.M.** allege that the District withheld his file because of his parents' advocacy during his manifestation determination? Because they challenged the result of that determination? Because they enrolled him in a private school? Because they filed this lawsuit? The FAC is not clear: it could be one such instance of advocacy; it could all.

The clarity is important because the FAC must contain enough facts to state a plausible claim and provide sufficient notice of that claim for the District to respond. It is also important because it affects at least two elements of the claim — (1) whether his parents were in fact engaged in "protected activity" and (2) whether there was a causal connection between that activity and the District's alleged retaliation. For example, regarding causation, the time between the activity and retaliation may be illuminating, and that analysis may change depending on what the alleged "activity" is here. *See, e.g.,* *Alex G. ex rel. Dr. Steven G. v. Bd. of Trs. of Davis Joint Unified Sch. Dist.,* 387 F. Supp. 2d 1119, 1129 (E.D. Cal. 2005) ("Courts have generally held that causation can be inferred from timing alone where the adverse action follows closely on the heels of the protected activity") (citing *Clark Cnty. Sch. Dist. v. Breeden,* 532 U.S. 268, 273-74 (2001) (stating "that the temporal proximity must be `very close'")).

The court therefore dismisses the claim without prejudice.

3. Claim for Review of the Hearing Officer's Decision

J.M.'s third claim requests judicial review of the hearing officer's findings.[60] The District previously moved to dismiss this claim (it was the sole claim in **J.M.**'s original complaint) for lack of subject-matter jurisdiction.[61] **J.M.** did not dispute that this court lacks subject-matter jurisdiction to hear an appeal from the hearing officer's administrative proceeding.[62] The court therefore dismissed the complaint but allowed **J.M.** to amend his complaint.[63]

J.M.'s new administrative-review claim is nearly identical but hooks it to the above, substantive section 504 claims and asks the court to exercise "supplemental jurisdiction over this claim as a state claim."[64]

The court dismisses the claim. To the extent **J.M.** can raise this as a state-law claim under the court's supplemental jurisdiction, the court declines to exercise such jurisdiction at this time. Although courts may exercise supplemental jurisdiction over state law claims "that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy," 28 U.S.C. § 1367(a), a court may decline to exercise supplemental jurisdiction where it "has dismissed all claims over which it has original jurisdiction," *id.* § 1367(c)(3). Indeed, unless "considerations of judicial economy, convenience[,] and fairness to litigants" weigh in favor of exercising supplemental jurisdiction, "a federal court should hesitate to exercise jurisdiction over state claims." *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726 (1966); *see also* *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 (1988) ("[A] federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims."), *superseded on other grounds by statute as recognized in* *Fent v. Okla. Water Res. Bd.,* 235 F.3d 553, 557 (10th Cir. 2000).

Here, **J.M.** asserts federal-question jurisdiction based on his substantive section 504 claims. But the court dismisses those claims, and, although the court grants leave to amend, it is not clear that they will support supplemental jurisdiction. The court accordingly declines to exercise supplemental jurisdiction over **J.M.**'s "state-law claim" for review of the hearing officer's decision and dismisses that claim without prejudice. If he amends this claim (for the second time), he should carefully delineate this court's jurisdiction.

CONCLUSTION

The court grants the District's motion to dismiss. **J.M.** may amend his complaint within 14 days from the date of this order.

IT IS SO ORDERED.

[1] *See* First Amended Compl. — ECF No. 33. Record citations refer to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] *See id.* ¶¶ 4, 12.

[3] *Id.* ¶¶ 24-30.

[4] *Id.* ¶¶ 31-39.

[5] *Id.* ¶ 4.

[6] *Id.* ¶¶ 7, 10.

[7] *Id.* ¶ 10.

[8] *Id.* ¶ 11.

[9] *Id.*

[10] *Id.*

[11] *Id.* ¶ 12.

[12] *Id.*

[13] *Id.*

[14] *Id.* ¶ 13.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* ¶ 14.

[20] *Id.* ¶¶ 15-16.

[21] *Id.* ¶¶ 16-17.

[22] *Id.* ¶ 17.

[23] *Id.* ¶ 18.

[24] *Id.* ¶ 21.

[25] *Id.*

[26] *Id.* ¶ 18.

[27] *Id.* ¶ 22.

[28] *See* Compl. — ECF No. 1.

[29] *See generally id.*

[30] *See* ECF No. 24.

[31] ECF No. 26 at 3-4.

[32] Order — ECF No. 30.

[33] First Amended Compl. — ECF No. 33.

[34] Motion to Dismiss — ECF No. 34; Opposition — ECF No. 35; Reply — ECF No. 37.

[35] FAC ¶ 25.

[36] *Id.* ¶ 32.

[37] Request for Judicial Notice — ECF No. 25, Ex. B at 23. The court considers this document — referenced in the complaint — under the incorporation-by-reference doctrine. *See Knievel v. ESPN,* 393 F.3d 1068, 1076 (9th Cir. 2005).

[38] *Id.*

[39] *Id.*

[40] Opposition at 5.

[41] *Id.*

[42] FAC ¶ 26.

[43] *See* Request for Judicial Notice — ECF No. 25, Ex. B at 24-25.

[44] *Id.*

[45] *Id.* at 24.

[46] *Id.*

[47] *Id.*

[48] *See id.* at 24-25.

[49] *Id.* at 25.

[50] Motion at 11-12; Reply at 5-6.

[51] Opposition at 6.

[52] FAC ¶¶ 28-30.

[53] *Id.* ¶ 29.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] Motion at 13.

[59] *Id.* at 14.

[60] FAC ¶¶ 31-39; Prayer ¶ 2.

[61] *See* Compl. — ECF No. 1; ECF No. 24.

[62] *See* ECF No. 26.

[63] Order — ECF No. 30.

[64] FAC ¶ 39.