

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

RIVERSIDE UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2014030785

EXPEDITED DECISION

Student filed a request for an expedited due process hearing with the Office of Administrative Hearings, State of California, on March 20, 2014, naming the Riverside Unified School District.

Administrative Law Judge Darrell Lepkowsky heard this matter in Riverside, California, on April 24, 28, 29, and May 1, and 2, 2014.

Wendy M. Housman, Attorney at Law, represented Student. Student advocate Theresa Sester assisted her each day. Attorney Grace Nguyen was also present for Student the first day of hearing. Student's mother was present every day of the hearing. Student testified at the hearing. He was present for part of two hearing days.

Jack B. Clarke, Jr., Attorney at Law, represented Riverside. Tim Walker, Riverside's Executive Director for Pupil Services and Riverside's Special Education Local Plan Area Director, and Erin Vanderwood, Riverside's Program Coordinator, were present on behalf of Riverside each day of hearing.

The parties presented oral closing arguments on May 2, 2014. The matter was submitted at the close of the hearing on that date.

ISSUES¹

1. Did Riverside fail to conduct an appropriate, comprehensive manifestation determination review on March 5, 2014, when it determined that Student's conduct did not have a direct and substantial relationship to his noted disabilities?

2. Did Riverside fail to conduct an appropriate, comprehensive manifestation determination review on March 5, 2014, when it determined that Student's conduct did not have a direct and substantial relationship to Riverside's failure to implement his individualized education program and behavior support plan?

PROCEDURAL ISSUE

After the close of the hearing, the ALJ determined that approximately the last 15 minutes of the hearing had not recorded. At that time, the parties had completed presenting their witnesses and had made their oral closing arguments. The ALJ was in the process of reviewing exhibits and admitting them into evidence, and then made her final remarks closing the hearing. After consultation with the parties concerning the missing recorded hearing time, the ALJ issued an order identifying all exhibits that she had admitted into evidence during the course of the hearing. The order has been marked as ALJ Exhibit 1, so that it is part of the record in this case.

SUMMARY OF DECISION

Riverside suspended Student and has recommended that he be expelled based upon Student possessing a firecracker and then later lighting another one while at his school during the school lunch period. Student contends, and Riverside disagrees, that Riverside's determination that this conduct was not a manifestation of his disability is incorrect. Student contends the facts surrounding the incident demonstrate that he acted impulsively and without concern for the consequences, after other pupils goaded him into the conduct.

¹ The ALJ has rephrased the issues for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

Student initially contended that Riverside improperly failed to consider his diagnosis of Oppositional Defiant Disorder during the manifestation determination review. However, after testimony from his expert, Student stipulated that his Oppositional Defiant Disorder was not an underlying factor in the conduct for which he was disciplined, and therefore withdrew his contentions as to that diagnosis. This Decision therefore does not address issues concerning Student's Oppositional Defiant Disorder in the context of determining whether Student's conduct in question was a manifestation of his disability.

Student contends his conduct directly relates to his diagnosis of Attention Deficit Hyperactivity Disorder. Student also contends that his conduct had a direct and substantial relationship to Riverside's failure to implement parts of his IEP, including his behavior support plan.

This Decision finds that Riverside appropriately found that Student's conduct was not a manifestation of his disability. This Decision also finds that Riverside did not materially fail to implement Student's IEP. Although there were minor failures of implementation, Student did not meet his burden of proof that his conduct was directly and substantially related to the lack of implementation of his IEP. Therefore, Student is not entitled to an order that Riverside's manifestation determination be overturned or that Riverside return him to his original placement at his home high school.

FACTUAL FINDINGS

Jurisdiction and Background

1. Student is a 15-year-old young man who is eligible for special education and related services under the category of "other health impairment" based upon his diagnosis of ADHD. Student and his family live within Riverside's boundaries, where he has attended school since seventh grade.

2. In September and October 2009, when Student was 11 years old, his mother privately contracted with Dr. James Medina² for an assessment of Student. Student's mother was concerned that Student had overactive tendencies, showed a lack of restraint, failed to consider consequences, and was disrespectful to teachers.

3. Dr. Medina administered several standardized tests to Student. The tests included an intelligence assessment, which indicated that Student had a full-scale intelligence quotient of 120, which was in the superior range of intellectual functioning.

4. Through the testing instruments he administered, Dr. Medina determined that Student had combined hyperactive/impulsive ADHD. He also found that Student suffered from Oppositional Defiant Disorder. Because of Dr. Medina's findings, Student's prior school district provided him with an accommodations plan under section 504 of the Rehabilitation Act.

² Dr. Medina is licensed as a clinical psychologist in California. He received his doctorate of philosophy degree in clinical psychology from the California School of Psychology in 1991. Dr. Medina maintains a private practice in which he assesses children and adults and provides direct psychotherapy.

5. Student's family moved into Riverside's boundaries when he was in seventh grade. Dr. Medina did not have any direct contact with Student after that until he re-assessed Student in March 2014, which is discussed below. Dr. Medina had primarily been providing therapy to Student's mother. After Student's family moved, Dr. Medina provided therapy to Student's mother by telephone almost every week. However, until he re-assessed Student, any information Dr. Medina obtained regarding Student and his behavioral issues came from Student's mother.

6. Riverside implemented the 504 plan when Student transferred into the district. Riverside also developed a positive behavior support plan to address Student's inappropriate behaviors at school, which included being defiant, disrespectful, and causing disruptions in class.

7. At the beginning of 2012, Student's mother requested that Riverside assess Student. Student's mother was concerned about his escalating problematic behaviors. She also believed that Student might have a learning disability.

8. School psychologist Sheila Eiden-Assumma administered the psycho-educational portion of the assessment.³ Ms. Eiden-Assumma conducted a full assessment of Student, which included standardized tests. Student acknowledged to Ms. Eiden-Assumma that he had engaged in numerous incidents of behavioral misconduct. He also told her that he could control his behavior when and if he chose to do so. Student indicated that he often would not do class assignments if he did not like the teacher, which was the reason for some of his low grades.

9. Ms. Eiden-Assumma's results were very similar to those obtained by Dr. Medina in 2009. Student's full-scale intelligence quotient again was 120. Ms. Eiden-Assumma also found, as had Dr. Medina, that Student consistently demonstrated moderate to severe problems of inattention, concentration, and distractibility that could have been the cause of some of Student's problems with productivity and work habits, which were negatively affecting his educational performance.⁴

10. At an IEP team meeting held in March 2012, Student's IEP team found him eligible for special education and related services under the category of other health impairment due to Student's ADHD. The team developed an IEP for him, to which Student's mother gave consent.

Student's March 13, 2013 Annual IEP and Behavior Support Plan

11. On March 7, 2013, Dr. Medina wrote a letter to Nicole Roberts, who was Student's special education case carrier and taught Student's special education resource

³ Ms. Eiden-Assumma did not testify at the hearing.

⁴ The test results indicated that Student did not have a learning disability.

class. Dr. Medina explained that Student's ADHD was primarily impulsive in nature rather than inattentive. Dr. Medina opined that Student's inappropriate behavior was best addressed through medication and counseling rather than by punishing Student. Although Dr. Medina stated in his letter that he had treated Student off and on since Student was a pre-teen, in actuality, Dr. Medina's knowledge of Student since Student transferred to Riverside in seventh grade was based only on information provided by Student's mother and not through direct provision of therapy to Student. However, Student's IEP team considered Dr. Medina's letter at Student's subsequent IEP meetings and at his manifestation determination review in March 2014.

12. Student's IEP team met on March 13, 2013, to develop his annual IEP. Student was a freshman in high school at the time.

13. A recurring theme from Student's teachers was his disregard for authority, defiance, and failure to turn-in assignments. However, Student was very articulate. He understood instructions and could follow them if he wanted to. Student had friends, worked well in groups, and had positive peer interactions.

14. Student's mother emphasized to the IEP team that part of Student's disability was his impulsivity. This caused Student to say or do things that were not appropriate. Her other primary concern was for Student to take more responsibility by using his daily planner to track school assignments.

15. The IEP team developed two social and emotional skills goals to address Student's problems with focusing, attention, planning, and behavior.⁵ Goal one addressed Student's need to learn to comply with directions given by his teachers. The IEP team designed goal two to help address Student's difficulties controlling his impulses in social situations. Nicole Roberts was Student's case carrier and special education teacher for both his freshman and sophomore school years. She and Student's general education teachers were responsible for implementing Student's goals, including goal two.

16. The IEP team determined that Student required one school period a day of specialized academic instruction in a resource program classroom, as he had the previous year. Riverside identifies its resource class as Strategies for Success. Ms. Roberts taught this class. Other than the one period of special education, the remainder of Student's educational program was in general education.

17. The team also determined that Student required several accommodations in order to be able to access his education. The IEP therefore provided Student with the following accommodations: copies of his teachers' notes where available; seating near the front of the class; the use of folders as distraction blockers during tests; chunking of lessons;

⁵ The team also developed an academic goal and two vocational goals for Student.

being able to take tests in a separate classroom with supervision; and, extra time to complete assignments.

18. Student had an advocate present at this IEP team meeting. The advocate believed that it was necessary for Student's IEP team to meet at the start of each new school year and at the end of the first semester of school, and that his IEP team meeting should be modeled like a parent/teacher conference to review strategies to address Student's behavior and the implementation of his IEP. Although this request was discussed during the IEP meeting, there is no indication that it was adopted as an accommodation or service to be provided to Student as part of his IEP.

19. The IEP also required that Riverside inform Student's mother of his progress at the same frequency as pupils without disabilities. The IEP required Riverside to provide progress summary reports to Student's mother every trimester.

20. Student's IEP team also developed a behavior support plan for him. The behaviors that impeded Student's ability to learn were his poor impulse control that resulted in Student being disruptive in class and defying authority, which occurred on a daily basis. Student's resistance to class activities and lessons and his choosing to be disruptive triggered his behaviors. Generally, Student's behaviors resulted in attention from his teachers, his receipt of verbal or written warnings, his failure to attend to his lessons, his removal from the classroom to work in an alternate location, and, sometimes, in an on-campus suspension for the remainder of the school day. Student's IEP team surmised that his behaviors were expressions of Student's anger or were means of gaining attention.

21. To prevent Student's behaviors from occurring in the first place, the IEP team determined that Student's teachers would implement the following proactive strategies with Student in class: redirect him with one prompt or with minimal re-direction; have Student seated close to the teacher; provide verbal praise; and, use of a classroom curriculum called Skill Streaming.

22. The behavior support plan provided several reactive strategies for his teachers to use if Student engaged in the inappropriate conduct in spite of the implementation of preventive strategies. These strategies consisted of the following: (1) having the teachers give Student more verbal prompts and remind him of classroom expectations; (2) having the teachers wait for a time before again verbally prompting Student to stop the inappropriate behavior; (3) allowing Student to draw pictures to calm down; (4) allowing Student to step outside the classroom for a few minutes and/or get some water to allow him to calm down; and, (5) having the teachers continue to verbally praise Student for positive behaviors, in addition to again reviewing classroom expectations.

23. If Student continued to engage in the inappropriate behaviors, the behavior support plan directed his teachers to follow the following hierarchy of consequences: (1) verbal redirection; (2) verbal warning; (3) environment change; and (4) detention or referral to the school office.

Amendments to the March 13, 2013 IEP

24. Student continued to engage in disruptive behavior in class. He was also sometimes late to class or missed a class entirely. Student's mother was concerned that Student's inappropriate behavior did not appear to have diminished. She requested an IEP team meeting to discuss the issue. On June 4, 2013, Riverside convened an IEP team meeting based on her request.

25. The IEP team discussed the fact that Student tended to wander around the campus and did not go directly to where he was supposed to go. The team discussed whether it would be appropriate to have a staff member escort Student from one class to another.

26. Student was taking medication for his ADHD, which made him thirsty frequently. He therefore needed access to water. The IEP team agreed that it would be appropriate to permit Student to have a water bottle in class.

27. Student's mother made several requests during this meeting. She requested that Student be provided "water breaks" as an accommodation on his IEP. She requested the school to tell her the "whole story" when Student received discipline. Student's mother also requested that school staff review each incident of inappropriate behavior with Student and discuss better choices he could have made. In the alternative, she requested that staff meet once a week with Student for similar discussions.

28. Based upon the IEP team's discussion, including the input and requests from Student's mother, the IEP team added the following accommodations to Student's IEP and changes to his behavior support plan: (1) Student would be permitted to drink from a water bottle in class; (2) school staff would provide Student with an escort to his first period when he arrived at school, would provide an escort to his sixth period, and would escort Student when he left in the middle of class, such as when he went to the restroom; (3) staff would reduce the opportunities Student had for leaving class; (4) Student would be permitted to take breaks during his Strategies for Success class, such as walking laps, to give him more time for movement; and, (5) school staff would implement a daily grade check report. Student's mother agreed to notify Ms. Roberts if Student did not bring home the daily grade check.

29. The IEP team ultimately did not implement a system for escorting Student to each of his classes. Neither Student's mother nor any of the Riverside IEP team members discussed any necessity for monitoring Student during his lunch period. Before the incident underlying the instant case, Student had never engaged in any inappropriate behavior during his lunch period. Ms. Roberts or her aide initially escorted Student to his first and sixth periods pursuant to the IEP amendments. Ms. Roberts ceased the personal escorts after the start of the 2013-2014 school year in favor of just visually monitoring Student as he moved to the next class because Student was not having difficulties getting to class on time.

30. The IEP team did not agree to the requests by Student's mother to have staff meet weekly with Student to discuss his behaviors, that Student's teacher be directed to provide him with specific breaks to leave class to get water, or that school staff go over every detail of Student's inappropriate behavior with her.

31. The IEP team agreed that all regular disciplinary procedures would apply if Student violated school rules.

32. After the 2013-2014 school year began, Student's mother again requested an IEP team meeting to discuss Student's continuing inappropriate behaviors. Riverside convened a meeting based on her request on September 23, 2013. Student, who generally attended his IEP team meetings, was present at this meeting as well.

33. Student's teachers and other Riverside school administrators discussed Student's continued inappropriate behavior in class. They noted that Student often made inappropriate comments in class, used inappropriate language, and made inappropriate comments on written class assignments. Student continued to display poor impulse control and to engage in attention-seeking behavior.

34. Student told his IEP team that he felt he needed to stop listening to other pupils' requests that he do inappropriate things, and to listen and follow his teachers' instructions.

35. Student's IEP team did not make any changes to his IEP or behavior support plan at this time.

36. Riverside convened another IEP team meeting on November 23, 2013, upon request from Student's mother for an additional meeting to discuss, among other things, Student's behaviors and his behavior support plan.

37. The team reviewed Student's discipline record since school had started in late August 2013. Student had several incidents of truancy, defying authority, and profanity. Student had not engaged in any inappropriate out-of-class behavior as of this meeting.

38. The team, including Student's mother, agreed for Riverside to refer Student to something called the Youth Accountability Team. However, no one at the hearing testified as to what this was, whether the referral was ever made, or if and how Student was impacted by any possible failure to make the referral.

39. Student's IEP team did not make any changes to Student's IEP or behavior support plan.

40. Student's mother had consented to Student's March 13, 2013 IEP, and she consented to all amendments. As will be discussed below, Riverside substantially

implemented Student's March 13, 2013 IEP, including the behavior support plan and all subsequent amendments.

Student's Disciplinary History at Riverside

41. Between the date Student enrolled at Riverside in late 2011, when he was in seventh grade and the date of the incident which was the subject of the manifestation determination review at issue in this case, which occurred on February 28, 2014, Student engaged in 63 acts for which Riverside disciplined him. In the vast majority of the incidents, Student was disruptive in class, defied his teachers' authority, used profanity or made other vulgar comments or noises, was tardy, left class without permission, or, occasionally, did not go to one of his classes.

42. Sixty of the 63 incidents occurred while Student was in class. Only three occurred while Student was not in class. In September 2012, when Student was in eighth grade, he was in a mutual combat fight with another student. In October of that year, he cut some seatbelts on his school bus. Riverside suspended Student for both incidents.

43. In December 2013, a few months before the incident in the instant case, Student threw a raw egg at one of his teachers. The incident occurred at school after classes had ended for the day. Student contends that he threw the egg impulsively because he did not like the teacher. However, the evidence supports Riverside's contention that Student planned his actions. Early on the day in question during her Strategies for Success class, Ms. Roberts overheard Student and some peers talking about an egg. Ms. Roberts approached Student and warned him not to do anything with eggs at school. She told him she did not want to hear that he later did something wrong with eggs. More than four hours later, Student threw the egg at the teacher. Although Student testified at the hearing, he was not questioned about the egg throwing incident or any other acts for which Riverside disciplined him, other than the incident which resulted in the manifestation determination review.

44. The evidence clearly demonstrated that Student rarely engaged in inappropriate behavior outside of the classroom, other than arriving late to class or, very occasionally, skipping one of his classes.

Incident on February 28, 2014

45. On February 14, 2014, Pupil A, who was in Student's second period class, brought about 20 small firecrackers to school. Student saw the firecrackers during second period. Student did not report this to any school staff.

46. During a passing period after second period, Pupil B, an acquaintance of Student, told Student he had obtained some of the firecrackers from Pupil A. Student did not report this to any school staff.

47. Student takes medication for his ADHD. He usually takes one of the medications before lunch at his school's health office. On February 28, 2014, Student went as usual to the health office right before the lunch period and took his medication. By the time Student left the health office, the lunch period had started.

48. Student walked from the health office toward a friend who was in front of classroom 323. The classrooms in the 300 series building on the school campus, which face an open grass area, are numbered 326 through 323, in descending order. As Student approached room 326, an acquaintance of his, Pupil B, approached him, said "Wassup?..." Pupil B had a firecracker in his hand and told Student to light it. Student took the firecracker. However, he told Pupil A that that he would light it after school. He did not want to get in trouble with the police, and did not want to light the firecracker where he would be caught or where anyone would get hurt.

49. Pupil B then told Student "Okay" and said that he would give Student a lighter after school so Student could light the firecracker. Student replied "Okay...." Student then left the area and walked toward the cafeteria with a friend to get his lunch. Student put the unlit firecracker in his backpack and then forgot that it was there.

50. About 10 or 15 minutes later, after getting his lunch, Student walked back alone toward room 323. Pupils A and B were standing with a group of about six other pupils near the benches in front of the classroom. It was raining, and had been raining off and on all day, sometimes moderately, sometimes just drizzling. Pupils A and B, and Pupil A's girlfriend approached Student. All three had lighters. Pupil B had an apple from his lunch. He took a pencil and used it to quickly dig a hole in the apple, and put a firecracker in it. Pupil B told Student that other pupils had already lit firecrackers.

51. Pupil B started challenging Student to light the firecracker. When Student hesitated, the other pupils in the group began goading Student by saying that he was just scared to light it. Student became mad, and took the apple with the firecracker in it from Pupil B. Pupil B then gave Student the lighter.

52. Student walked halfway down a pathway running perpendicular to classroom 323, knelt down, and tried to light the firecracker. He did not walk on the grass because it was raining and there were puddles of water in the grass. There were no other pupils around him on the grass. Due to the rain, the other pupils had remained near the classrooms.

53. The firecracker did not ignite, either because it malfunctioned, or because it was too wet outside for it to ignite. The other pupils questioned Student, as to why the firecracker had not ignited, intimating that it was because he had been scared to light it. Student got mad again and left the apple with the firecracker where he had tried to light it. From the time Student approached Pupils A and B after getting his lunch, to the time he tried to light the firecracker, only moments had elapsed.

54. Since the lunch period was ending, Student then began walking to the locker room to change for his next class, which was physical education. As he was walking toward the locker room, Student heard two or three firecrackers explode. Pupil B then told Student one of the other pupils had put a firecracker in a water bottle and thrown it and that some of the pupils lighting the firecrackers had been caught. Student then proceeded to his gym class.

55. Because of the rain, instead of changing into gym clothes for physical education class, Student and the other pupils were sent to room 323 to sit out the period there.

56. Several of the firecrackers exploded during the lunch period, lit by pupils other than Student. The sound of the explosions could be heard throughout the campus. Megan McGroarty is one of Riverside's vice-principals at Student's high school. She and other school officials, including the school's student resource officer, who is a uniformed police officer, began investigating what was happening. They were very concerned because the exploding sounds were similar to gunshots.

57. There are video cameras placed at various points throughout the school. School staff reviewed video tape recorded during the lunch period. They were able to identify a couple of the pupils who appeared to have set off the firecrackers. They did not identify Student from the videos. They pulled the other pupils from class and questioned them about the incidents. These pupils identified Student and other pupils who had been in possession of the firecrackers and/or lit them.

58. A school staff person went to room 323, took Student out of class, and brought him to a conference room in the school's main office. School officials searched Student's backpack and his jacket. They found the unlit firecracker in Student's backpack. A vice-principal named Leann Iacuone asked Student to write a statement about his involvement with the firecrackers. Student wrote the following statement:

I walk with my friend [R] By room 323 then [B] came up to my (sic) and put his hand out to say wassup then he had a firework in his hand then told me to light it so I took it and told him after school cause I don't wanna get caught then he said okay I'll give you the lighter after school So I said okay. Then later I heard like 2 or 3 go off then I started walking to class (5 period) cause the bell rang then [B] came to me and said 2 people got caught cause they told [] to throw one at someone then X caught them. Then I was like oh okay Then I went to class (sic)

59. Student did not include any discussion of the second time Pupil B had given him a firecracker when Student returned to room 323 after getting his lunch. He did not want to admit to having tried to light the second firecracker. He thought it would get him in more trouble than he would if the school staff just thought he had the unlit firecracker in his backpack.

60. However, school staff was questioning at least two other pupils at the same time Student was in the office and writing his statement. Two pupils wrote statements saying Student had lit a firecracker during lunch period. Student remained in the office for almost three hours. While Student was in the office, Ms. McGroarty and the school resource officer came back three or four times to ask him again if he had lit any of the firecrackers. The first times they returned, Student again denied lighting a firecracker.

61. The last time Ms. McGroarty returned, she had the apple with the firecracker that Student had attempted to light. Student finally admitted to her that he had lit the firecracker but that it had not gone off. Student did not elaborate on the sequence of events leading up to his attempt to light the second firecracker. He did not tell Ms. McGroarty that his attempt had occurred 10 or 15 minutes after Pupil B gave him the first firecracker. He did not tell her that other pupils had goaded him into lighting the firecracker. Student also did not tell her where he had attempted to light the firecracker or that the entire incident with the second firecracker had only taken mere moments.

62. Student testified convincingly at hearing. It was clear that he thought possessing the unlit firecracker was less egregious than having lit the second firecracker. Student also credibly stated although he knew it was wrong to light firecrackers at school, he just had not thought having a firecracker or even lighting one was that big of an offense. He did not think that a student would face expulsion for possessing or lighting firecrackers. He thought the worst discipline facing him for having the firecracker in his backpack was going to be no worse than a suspension.

63. After Student admitted to lighting the second firecracker, Student's mother picked him up from school. Riverside immediately suspended Student for five days. Riverside also recommended expelling Student, based on Education Code, section 48900, subdivision (b), which states that possessing or lighting a dangerous object could be grounds for a pupil's expulsion from school.

64. A Riverside administrator telephoned Student's mother on Monday, March 3, 2014, and verbally informed her that Riverside was going to convene a manifestation determination review meeting for Student on Wednesday, March 5, 2014. Student's mother wanted to postpone the meeting in order to arrange for someone to accompany her to the meeting. Riverside did not agree to postpone the meeting, which Riverside was required to convene 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 pupil conduct.

65. Student's mother testified at the hearing. Although she was a sincere witness, she failed to identify the person she had wanted to accompany her to the manifestation meeting. Prior to the meeting, Student's mother did not ask Riverside's manifestation team to permit her to contact anyone by telephone. She did not make the request during the meeting either.

66. Student's mother also testified that she had wanted Dr. Medina to attend the manifestation review meeting. However, Dr. Medina stated during his testimony that Student's mother never contacted him about either being present at the manifestation meeting in person or by telephone. Dr. Medina testified that had Student's mother contacted him, he would have been able to participate in the meeting by phone.

67. Riverside did not serve Student's mother with written notice of the manifestation meeting until a few hours after the meeting. However, Student's mother attended the meeting based upon verbal notification of the time and place the meeting was scheduled. She participated fully in the manifestation determination review.

68. Riverside convened the manifestation determination review meeting for Student on March 5, 2014. Miranda Taylor, a special education student advisor for Riverside, led the meeting. In addition to Student's mother, the other members of the manifestation determination team were school psychologist Jan Smith, vice-principal Iacuone, Student's case carrier and special education teacher Mrs. Roberts, another vice-principal identified as Mr. Davis, and Emanuela Herrera, one of Student's general education teachers. Student's physical education teacher participated at the end of the meeting. Student's teachers who could not attend prepared statements regarding their observations of Student that were presented to the manifestation team by the Riverside staff members who attended at the meeting.

69. Student was not at the meeting because he was not permitted on school grounds due to his suspension. Student's mother did not request Riverside to permit Student to participate by telephone.

70. The team reviewed the medications Student was taking. They also reviewed Dr. Medina's recommendations made in his March 2013 letter to Ms. Roberts. The team reviewed Student's attendance and discussed Student's difficulties with substitute teachers. The team discussed Student's behaviors in class and in which classes he had the most and least behavioral problems.

71. The manifestation team reviewed Riverside's 2012 assessment of Student. The team spent considerable time discussing Student's behavioral issues and the IEP goals developed to address those issues. The team discussed Student's discipline history, noting that the overwhelming amount of Student's behavioral incidents occurred when he was defiant with his teachers, talked back to them, and made inappropriate verbal and written comments.

72. Although Student contends that Riverside's team members did not discuss Student's impulsivity as it related to his ADHD, the evidence is to the contrary. School psychologist Jan Smith led the discussion regarding Student's impulsivity. The team discussed whether his act of accepting the firecracker from Pupil B was an impulsive act. Ms. Smith reviewed Student's statement with his mother and the rest of the team, focusing on the fact that Student acknowledged that he had taken the firecracker after telling Pupil B

that he would wait until after school ended to light it to avoid being caught. Ms. Smith emphasized that Student's actions were not impulsive. Rather, his actions demonstrated he thought about whether it was prudent to light the firecracker when Pupil B gave it to him, realized that it was not appropriate behavior at school, and decided to wait until after school ended before doing anything with the firecracker.

73. Ms. McGroarty had also spoken with Ms. Iacuone and told her that Student had admitted lighting the second firecracker. Ms. McGroarty was out of town and could not attend the manifestation meeting. Student contends that the manifestation determination review was deficient because Riverside should have provided Ms. McGroarty's notes to the team. However, Ms. McGroarty testified that other than what was in his written statement, the only other information Student provided during the investigation was his admission that he had lit the second firecracker. Student corroborated Ms. McGroarty's testimony. There is no evidence that her notes would have provided more insight to the incident.

74. Student also contends that the manifestation determination review was inadequate because the review team did not review the student resource officer's investigation report. However, the report was not completed at the time of the manifestation meeting. There is no evidence that Student provided any information to the resource officer other than what he told him and Ms. McGroarty the day of the incident.

75. What is apparent from the testimony of Student's mother, Ms. Taylor, and Ms. Roberts, as well as from the recording of the manifestation meeting, is that no one at the time of the meeting had a clear picture of the sequence of events concerning the firecracker incident. Student's mother acknowledged during the hearing that she did not believe she had heard the full story from Student until just before the hearing because it had always been difficult to obtain information from Student. As Riverside stated during its oral closing argument, it was not until Student testified that it became apparent that there was a significant period between when Pupil B gave Student the first firecracker and when Student returned to the same area with his lunch and Pupil B handed him the second firecracker stuck in an apple.⁶

76. Although Student contends that Riverside staff constantly interrupted his mother during the manifestation meeting, the recording of the meeting indicates that to the contrary, Student's mother was given many opportunities to speak and that her input was considered. Riverside staff simply disagreed that Student's actions, based upon what Student had written in statement, were a manifestation of his disability.

77. The Riverside members of the manifestation team concluded that Student's actions in taking possession of one firecracker and then lighting a second one, were not

⁶ Student's due process complaint is very unclear as to the sequence of events concerning Student's possession of the first firecracker and lighting of the second one.

caused by, or had a direct and/or substantial relationship to his ADHD. Student's mother disagreed with the determination.

Implementation of Student's March 13, 2013 IEP and its Amendments

78. The manifestation determination team also discussed in detail whether Student's actions in possessing and then lighting the firecrackers were a direct result of a failure to implement his IEP.

79. After Student's IEP team developed his March 13, 2013 IEP, Ms. Roberts provided each of Student's teachers with a copy of what Riverside calls the "IEP at a Glance," which included all pertinent information from Student's IEP, including his goals and accommodations. She provided a copy of the IEP at a Glance to Student's new teachers after the beginning of the 2013-2014 school year. Ms. Roberts also had frequent discussions with Student's teachers during the school year about the provisions of the IEP, Student's behavior support plan, and his issues in class. There is no evidence that Student's general education teachers did not implement any portion of his IEP.

80. Student contended that Ms. Roberts did not implement his IEP because her aide did not shadow Student in his language arts class and was not consistently checking in with Student throughout the school day. However, although Ms. Roberts indicated at Student's March 13, 2013 annual IEP team meeting that her aide was doing this, Student's IEP did not provide for the shadowing or monitoring. The IEP itself did not include either shadowing or monitoring of Student as special education services or accommodations for him. Therefore, even assuming that the shadowing and monitoring was inconsistent, there was no failure to implement Student's IEP.

81. Ms. Roberts acknowledged that neither she nor her aide was directly escorting Student to his first or sixth periods as required by his IEP. Rather, Ms. Roberts visually followed Student as he went from first to second period and fifth to sixth periods. However, Student provided no evidence of a causal connection between the failure to escort him to first and sixth periods and his actions in possessing one firecracker and lighting another one during lunch period. Student's IEP did not require school staff to monitor him or shadow him during his lunch period. Student provided no evidence to support an inference that the failure to escort him to his first and sixth periods somehow caused him to act inappropriately during lunchtime.

82. Student's IEP required Riverside to send progress reports to Student's mother every trimester. An amendment to Student's IEP required Riverside to send daily reports from all of Student's teachers to Student's mother. Although Ms. Roberts testified that she mailed the trimester progress reports to Student's mother, Student's mother credibly testified she did not receive them. With regard to the daily reports, there is no dispute that Student's mother did not receive them every day.

83. However, Student failed to provide any evidence of a causal connection between the failure of Student's mother to receive the progress reports and Student's inappropriate behavior in possessing one firecracker and lighting another one. Student provided no evidence of how his mother's receipt of the reports would have affected his actions with the firecrackers. Additionally, Student's mother was aware of all of Student's inappropriate behaviors at school and the discipline Riverside meted out to address the behaviors. She was informed of the conduct and discipline when they occurred and Riverside discussed Student's behaviors during his many IEP team meetings. Riverside therefore provided the information contained in the trimester progress reports and in the daily progress reports to Student's mother by other means.

84. Student also contends that Riverside failed to implement goal two of his IEP. This object of the goal was for Student to use strategies to control his impulses in social situations. Although Ms. Roberts acknowledged that she was not specifically working on the goal with Student outside of class, she credibly testified to what the focus of her curriculum was during her Strategies for Success class that addressed goal two.

85. Student's behavior support plan required that his curriculum include a program called Skill Streaming. The curriculum identifies behaviors that each pupil needs to work on inhibiting. The course provides scenarios, which the teacher reviews with the pupils, often by the use of role-playing. They then discuss whether the approaches taken during the role-playing were the best choices or if other approaches would have been more successful. The Skill Streaming curriculum was an on-going lesson in Ms. Roberts's class with Student. When Student acted inappropriately in his classes, Ms. Roberts would use the situations as the start for a discussion during her Skill Streaming lessons. As Ms. Roberts pointed out, with Student, there were always "teachable" moments.

86. Student presented no evidence that Ms. Roberts did not implement the Skill Streaming curriculum with him. The evidence failed to support Student's contention that Riverside failed to implement goal two.

87. Student's manifestation determination team reviewed his IEP during the manifestation meeting. The team spoke with Ms. Roberts and the two general education teachers who were present at the meeting, and reviewed the statements of the teachers who were not able to be present. All teachers indicated that they were implementing Student's IEP and his behavior support plan. The team determined that Student's conduct was not the direct result of a failure to implement his IEP.

Testimony of Dr. Medina

88. As discussed above, Dr. Medina assessed Student in 2009. He re-assessed Student on March 24 and 25, 2014, at the request of Student's mother after Student was involved in the firecracker incident. Student's mother did not ask Dr. Medina to analyze Student's actions with the firecrackers as part of the assessment process. Dr. Medina

therefore did not discuss the incident with Student either during the assessment or at any other time.

89. Since his assessments indicated that Student's ADHD manifested itself primarily as impulsivity, Dr. Medina opined that Student's action in lighting the firecracker was because of Student's inability to control his impulses. Dr. Medina's opinion was based solely on the account of the incident Student's mother had provided to him. The only thing Student's mother told him was that another pupil had given Student a firecracker in a cored-out apple, provoked Student to light it, and the firecracker had not ignited. Dr. Medina opined that although Student may have known after the fact that he had done something wrong, he was not thinking about the fact that it was wrong when he lit the firecracker. The act of lighting the firecracker was not planned and was based on pure impulse.

90. It was clear that Dr. Medina had not been privy to the entire sequence of events concerning Student's interactions with the firecrackers. Dr. Medina did not read Student's written statement about the incident prior to testifying. After being asked to read it during his testimony, Dr. Medina agreed that there was nothing in the written statement that indicated any impulsive behavior on Student's part, at least as it pertained to the events described in the statement.

91. Dr. Medina still believed that when Student lit the second firecracker, it was an impulsive act. Student lit it in the rain after being prodded to do so by his peers, without thinking of the consequences. Dr. Medina admitted that Student apparently could control his impulses sometimes, as Student had refrained from lighting the first firecracker. However, he opined that Student was unable to control his impulses when asked to light the second firecracker because of the goading by other pupils.

92. While Dr. Medina is an experienced psychologist, his opinion as to the impulsivity behind Student's lighting of the second firecracker was weakened by his lack of understanding of the facts of the incident and his lack of direct contact with Student. Dr. Medina did not provide therapy to Student. He never observed Student in class. He did not discuss the firecracker incident with Student and never discussed any of Student's inappropriate behaviors at school with him. All of his knowledge of Student's behaviors was based on second-hand conversations with Student's mother. He also believed that children with ADHD should not be disciplined for any of their inappropriate behaviors, no matter how egregious. His opinion did not take into account the fact that school officials need to maintain the safety of both children and staff on school grounds. All of these factors undermine the persuasiveness of Dr. Medina's opinion that Student's lighting of the second firecracker was directly related to his impulsivity.

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the IDEA*⁷

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 (2006)⁸ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE 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. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) 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. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student filed the request for due process and therefore has the burden of proof as to all allegations.

3. Special education law mandates procedures that a school district must follow when seeking to expel a special education student based on violation of a code of student conduct. 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 local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) 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 to determine –

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

⁷ Unless otherwise indicated, the legal citations in the introduction and in the sections that follow are incorporated by reference into the analysis of each issue decided below.

⁸ All subsequent references to the Code of Federal Regulations are to the 2006 version.

(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)(1)(E)(i).)

4. This procedure is referred to as a manifestation determination review. If the manifestation determination review team decides that either of the two factors listed above applies, then the child's conduct is considered to be a manifestation of his disability. If that is the case, the child's placement cannot be changed unless certain specified circumstances (such as a danger to the child or others) apply. (20 U.S.C. § 1415(k)(1)(F).)

5. If the manifestation determination review does not find one of the two factors listed above applicable, then the school may continue with the student discipline (including expulsion) just as the school would for any pupil without an IEP. (20 U.S.C. § 1415(k)(1)(C).)

6. Prior to 2006, the law regarding manifestation determinations contained different factors to be considered. In particular, the prior version of the law provided that the IEP team could determine that the behavior of the child was not a manifestation of the child's disability only if the IEP Team determined that--

(I) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(Former 20 U.S.C. 1415(k)(4)(C)(ii).)

7. Congress removed the section requiring the manifestation team to determine whether the child's IEP was appropriate in the 2005 amendments to the law. It is no longer a factor to be considered in a manifestation review or an expedited hearing regarding that manifestation review. The only two factors considered are those set forth in the current version of the law and listed in Legal Conclusion 3 above: was the conduct a manifestation of the child's disability and did the school district implement the IEP? Therefore, Student's contentions in his due process complaint, at hearing, and in his oral closing argument that his IEP and behavior support plan failed to offer him a free appropriate public education, were

inadequate to meet his needs, and should have been revised, are irrelevant to the instant expedited proceeding.

Issue One: Was Student's Conduct of Possessing and/or Lighting Firecrackers on February 28, 2014, a Manifestation of his ADHD?

8. All parties agreed that Student's ADHD is expressed in substantial part by Student's lack of control and tendency to be impulsive. Therefore, the primary issue is whether Riverside correctly determined that Student's conduct on February 28, 2014, was not a manifestation of his disability. Student contends that he acted impulsively because of his ADHD, had no control over his actions, and therefore the fact that he lit a firecracker after being prodded into doing so by peers, was caused by his disability. Riverside contends that Student's actions were deliberate and planned, and therefore were not related to the impulsivity caused by his ADHD.

9. In order for conduct to be a manifestation of the child's disability, the conduct must either be caused by, or have a direct and substantial relationship to, the pupil's disability. (20 U.S.C. § 1415(k)(1)(E)(i).) The commentary to the federal regulations notes:

The intent of Congress in developing section [1415(k)(1)(E)] was that, in determining that a child's conduct was a manifestation of his or her disability, it must be determined that "the conduct in question was caused by or had a direct and substantial relationship to, the child's disability, and was not an attenuated association, such as low self-esteem, to the child's disability." (Note 237 – 245 of the Conf. Rpt., p. 225.)

(71 Fed. Reg. 46720 (August 14, 2006); see also *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470, 1480 [discussing a similar example of attenuated association under an older version of the law].)

10. It is clear that the facts described by Student in his written statement regarding his actions on February 28, 2014, were not impulsive. Student was aware that another pupil had brought about 20 firecrackers to school. He did nothing to alert school staff about the situation. Student was aware prior to the lunch period that day that Pupil B had obtained some of the firecrackers, but he still decided to spend his lunch period with Pupil B. When he approached Pupil B for the first time and Pupil B handed Student a firecracker and told him to light it, Student was well aware that it was wrong to light it at school. Although Student may not have thought that he could be expelled for having a firecracker, he knew enough that lighting one could have severe consequences. Student therefore made the deliberate decision to wait until after school was over to have some fun with the firecracker and light it. Student walked away from Pupil B still in possession of the firecracker, but with the intent to wait until after school before doing anything with it. As Dr. Medina readily acknowledged, none of these actions indicates impulsivity on Student's part.

11. Ten or 15 minutes after walking away with the first firecracker to get his lunch, Student deliberately returned to the same group of peers rather than avoid them by going to another section of the school. When he reached the group, Pupil B again gave him a firecracker and told him to light it. Student had the presence of mind to walk away from the group of some eight pupils, go down a concrete pathway, and attempt to light the firecracker far enough away from the group so that no one would get hurt. When viewed in context of the entire series of events, Student's actions were deliberate rather than impulsive in nature as he argues. Student's actions in maintaining possession of the first firecracker with the intent to light it after school and then returning and lighting the second firecracker, were not manifestations of his ADHD.

12. However, even assuming that Student engaged in two separate actions, the first being his walking away in possession of a firecracker, and the second being when he was prodded into lighting the second firecracker 10 or 15 minutes later, Student still has failed to meet his burden of proof in this case. Student requests that Riverside's manifestation determination should be set aside. Student's possession of the first firecracker clearly violated Education Code, section 48900, subdivision (b), which finds possession of an explosive to be grounds for suspension or expulsion. The evidence plainly demonstrated that Student's possession of the first firecracker was not a manifestation of his disability. Therefore, it is unnecessary to determine whether the lighting of the second firecracker was a manifestation of Student's disability because Riverside has grounds for expelling Student based solely on his possession of the first firecracker.

13. Student raised several procedural issues with regard to the manifestation determination review. As stated in Legal Conclusion 2, a party requesting a due process hearing is limited to the issues alleged in the complaint, unless the other party consents. As discussed above, Student acknowledged at hearing that his stated issues were substantive rather than procedural in nature.

14. Student's failure properly to raise procedural issues notwithstanding, the evidence demonstrates that Student was not denied any educational benefit by any alleged procedural deficiencies and his mother was not prevented from participating in the manifestation determination process. Student contends that Riverside should have postponed the manifestation determination review at his mother's request. However, Student's mother failed to identify who she would have brought to the meeting had Riverside postponed it and how that person would have assisted her. She also failed to provide any evidence that Riverside refused to allow that person to participate by telephone.

15. Student also contends that Riverside's failure to postpone the meeting prevented Dr. Medina's participation. However, Student's mother never contacted Dr. Medina to determine his availability. Dr. Medina testified that he would have been available to participate by telephone had Student's mother contacted him.

16. Student contends that Riverside was required to give his mother written notice of the manifestation meeting before the meeting took place. Student cited no authority for

this contention. The notice of manifestation review that Riverside provided to Student's mother after the meeting took place indicates that verbal notice of the meeting is an alternative means of providing notification to parents. In any case, Student failed to demonstrate that his mother was prejudiced by failing to receive written notice of the meeting. A Riverside staff member telephoned Student's mother and gave her the date, time, and location of the meeting. Student's mother attended and participated fully in the manifestation review process.

17. Finally, Student contends that Riverside failed to consider all relevant information concerning Student that might affect the manifestation determination decision. However, the evidence does not support Student's position. Riverside reviewed Student's previous assessment, the letter from Dr. Medina, Student's discipline record, his behaviors in class, observations from Student's teachers, and all information Riverside had concerning the incident with the firecrackers, including Student's written statement. Student did not provide any evidence that information existed at the time of the meeting that Riverside failed to consider or that would have affected its determination that Student's conduct was not a manifestation of his disability.

18. The evidence does not support a finding that Riverside committed any procedural violations that affected the outcome of the manifestation determination review or that prevented Student's mother from actively participating in the process.

Issue Two: Was Student's Conduct in Possessing and/or Lightening the Firecrackers the Direct Result of Riverside's Failure to Implement Student's IEP?

19. Student contends that Riverside failed to implement parts of his IEP, parts of the amendments to his IEP, and parts of his behavior support plan. Riverside asserts that it substantially implemented the IEP.

20. As stated in Legal Conclusion 3, the manifestation determination team is charged with determining if a pupil's conduct was the direct result of the school district's failure to implement the IEP (emphasis added.)

21. Here, Student provided no evidence that his general education teachers were not implementing his IEP, including his goals, or his behavior support plan. Conversely, Riverside provided substantial evidence that its staff was implementing Student's IEP. Ms. Roberts provided each of Student's teachers with a copy of Student's "IEP at a Glance," which included all pertinent information from Student's IEP, including his goals and accommodations. She had frequent discussions with Student's teachers during the school year about the provisions of the IEP, Student's behavior support plan, and his issues in class. There is no evidence that Student's general education teachers did not implement any portion of his IEP.

22. Student contended that Ms. Roberts did not implement his IEP because her aide did not shadow Student in his language arts class and was not consistently checking in

with Student throughout the school day. However, Student's IEP did not require that Riverside staff monitor or shadow Student throughout his school day

23. Ms. Roberts acknowledged that neither she nor her aide was directly escorting Student to his first or sixth periods as required by his IEP. However, Student provided no evidence that his conduct of possessing and lighting firecrackers was the direct result of Riverside's failure to escort him to his first and sixth class periods. Student's IEP did not require Riverside to watch over Student during his lunch period. Therefore, the fact that no staff was monitoring Student at lunch when he took the first firecracker and later lit the second one, was not a failure to implement the IEP or behavior support plan.

24. Although Student's mother failed to receive trimester progress reports, and did not receive every daily progress report required by Student's IEP, Student failed to demonstrate that this failure directly caused his conduct on February 28, 2014. There is no evidence that the failure of Student's mother to receive the progress reports had a causal connection to Student's conduct, or that the conduct would not have occurred had she received the reports.

25. Student also contends that Riverside failed to implement goal two of his IEP because Ms. Roberts acknowledged that she was not specifically working on the goal with Student outside of class. However, Ms. Roberts credibly testified that she specifically integrated the Skill Streaming curriculum into her Strategies for Success class as the primary means of implementing Student's goal two. The curriculum consisted of strategies to teach pupils how to address and respond to situations where they otherwise acted inappropriately. Student failed to provide any evidence that Ms. Roberts did not use Skill Streaming in her class. Student also failed to provide any evidence of other ways that Riverside should have been addressing his goal two, but failed to do. The evidence did not support Student's contention that Riverside failed to implement goal two.

26. In conclusion, Student has failed to meet his burden of proof that his conduct on February 28, 2014, in possessing one firecracker and lighting a second one was a manifestation of his disability, or that his conduct was the direct result of Riverside's failure to implement his IEP.

ORDER

Student's request for relief from Riverside's manifestation determination 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, Riverside prevailed on both issues heard in this expedited proceeding.

RIGHT TO APPEAL THIS DECISION

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

DATED: May 16, 2014

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings