

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

PARLIER UNIFIED SCHOOL DISTRICT.

OAH Case No. 2016080347

EXPEDITED DECISION

Student filed a request for an expedited due process hearing with the Office of Administrative Hearings on August 4, 2016, naming Parlier Unified School District and the Fresno County Office of Education. On August 22, 2016, Student dismissed Fresno County Office of Education and the matter proceeded against Parlier only.

Administrative Law Judge Cheryl Carlson heard this matter in Parlier, California on August 30, 31 and September 1, 2016.

Alfonso Padron, Parent Advocate, represented Student. Parent Advocates, Elida Padron and Juan Sandoval were also present each day. Student's mother was present every day of the hearing. Student was not present at the hearing.

Karen E. Gilyard, Attorney at Law, represented Parlier Unified School District. Carlos Gonzalez, Attorney at Law, assisted Ms. Gilyard on August 30, 2016. Antonio Aguilar, Director of Student Services for Parlier, was present throughout the hearing.

On September 1, 2016, the record was closed and the matter was submitted for decision. The parties filed closing arguments on September 12, 2016.

ISSUES¹

1. Did Parlier err in determining that Student's behavior was not a manifestation of his disability at the manifestation determination meetings held in May 2016?
2. Did Parlier fail to conduct a functional behavioral assessment analysis pursuant to the manifestation determination meetings in May 2016?
3. Did Parlier change Student's placement during the 2015-2016 school year when Student was suspended more than 10 school days, and did Parlier fail to provide notice of that change in placement?
4. Did Parlier fail to hold a manifestation determination review within 10 school days after the 10th day of suspension to assess whether Student's conduct was a manifestation of his disability?
5. Did Parlier fail to continue to provide educational services after Student's 10th day of suspension?
6. Did Parlier use prohibited disciplinary and emergency interventions?

SUMMARY OF DECISION

This decision holds that Student met his burden of proof that Parlier erred when it determined that Student's behavior was not a manifestation of his disability at the manifestation determination meetings held in May 2016; that when Parlier suspended Student for more than 10 school days during the 2015-2016 school year, Parlier changed Student's placement; and, that Parlier failed to hold a manifestation determination meeting within 10 school days of the change of placement.

This decision also holds that Student did not demonstrate by a preponderance of the evidence that Parlier failed to conduct a functional behavioral assessment pursuant to the manifestation determination meetings; that Parlier failed to provide notice of a change in placement after 10 days of suspension; that Parlier failed to continue to provide educational services after 10 days of suspension; or, that Parlier used inappropriate disciplinary or emergency interventions.

¹ The issues have been reframed 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 Sch. Dist.* (9th Cir.2010) 626 F.3d 431, 442-443.)

FACTUAL FINDINGS

1. Student is an 11 year old male who lives with his family within Parlier's jurisdictional boundaries. He was initially found eligible for special education and related services on September 5, 2013, under the category of other health impairment because of characteristics consistent with ADHD. Student's previous assessments in 2013 established that Student's cognitive abilities fell in the average to below average range.

2. In May 2014, the school individualized education program team members developed and proposed a behavior plan to address Student's work refusals and aggressive behaviors at that time. The May 12, 2014 plan included strategies to provide Student with work breaks when he was frustrated or unwilling to complete assignments; redirection toward alternative activities when frustration was high; and individual counseling with the school psychologist. The plan also proposed using check-in/check-out procedures to monitor and reinforce Student's behavior at school. Parent never agreed to this behavior plan but Student's teachers, administrators and the school psychologist used most of these strategies in response to Student's behavior during the 2015-2016 school year.

3. During the 2015-2016 school year, Student attended the fifth grade. In September 2015, school staff contacted Parent due to Student's behavior and frequent trips to the school nurse. Parent explained that Student did not like his fifth grade teacher and complained about his stomach hurting in order to be sent home. After multiple discussions and meetings to support Student's behavior at school, he was moved into a new fifth grade classroom on October 8, 2015.

Student's February 16, 2016 Annual IEP and Behavior Support Plan

4. At the IEP team meeting on February 16, 2016, the following IEP team members were present: the director of student services, Antonio Aguilar; student's general education teacher, Jackie De La Cruz; the school principal, Courtney Jimenez; the resource specialist, Beatrice Flores; the guided independent specialist, Jessica Coughlin; the school psychologist, Katelyn Kelly; and Mother. The school IEP team members described their continuing concerns about Student's social-emotional and behavioral issues. Student often became frustrated and argumentative during his interactions with his peers, teachers and administrative staff. He became frustrated easily and had difficulty staying on task in his general education and resource services program classrooms. He often focused on other students' problems and tasks instead of doing his own work.

5. At the February 16, 2016 IEP team meeting, the IEP school team members developed two behavioral goals (in addition to his academic goals) to address Student's behavioral problems.² The first goal provided that Student demonstrate on-task observable behaviors by February 16, 2017. This included actively working on assigned tasks with no more than one prompt during a single class session as measured by his teachers'

² For purposes of this expedited decision, only the behavioral goals will be discussed.

observations. The second behavior goal addressed Student's inappropriate language at school. This included responding to his teachers' directions respectfully and using appropriate language in school with 70 percent accuracy as measured by teachers' observations and/or teacher chart.

6. The school IEP team members recommended that Student receive specialized academic instruction in reading and math in a small group setting in the RSP room for two hours, four times per week. Student began the year receiving 90 minutes of RSP daily in the special education setting. The IEP school team members also believed Student required organization and behavioral support in order to access his education. The team recommended that Student receive preferential/assigned seating near the front of the class; short breaks between assignments as needed; cues/prompts/reminders of rules for off-task behavior; choices when Student became frustrated with grade-level work; and, the implementation of a behavior intervention plan.

7. The school IEP team members proposed a behavior intervention plan to address Student's aggressive behaviors that impeded Student's learning such as yelling, swearing, threatening others, arguing, pushing, hitting, putting other students in a headlock and kicking. These defiant behaviors, that impeded learning, occurred when Student failed to follow directives within 20 seconds, refused to complete work, and refused to transition to another classroom. By February 16, 2016, Student had received seven major office discipline referrals and two minor discipline referrals for inappropriate language, disruption, inappropriate physical contact, and defiance. Parlier had suspended Student three times for a total of six days, mostly for acts of physical aggression.

8. The behavioral intervention plan offered Student access to breaks throughout the day to address his frustration levels; redirection towards alternative activities or school environments; counseling with the school psychologist and the check-in/check-out program; positive student-staff interactions to help Student remain calm; and, the use of positive and encouraging language at all times.

9. During the IEP meeting, Parent questioned whether the school was allowed to suspend Student for behavior related to his disability. The school psychologist, Katelyn Kelly told Parent that she did not believe Student's suspension for fighting was related to his disability.³ Ms. Kelly told Parent that two incidents that led to Student's suspensions on October 26, and December 14, 2015, showed planning rather than impulsive behavior related to Student's ADHD. Ms. Kelly also told Parent that Student was not suspended when he made comments, threats or used profanity that reflected his poor impulse control related to his ADHD. The evidence established that during the February 16, 2016 IEP team meeting,

³ Ms. Kelly worked for Parlier as a full time psychologist for six years and as an intern for one year. She received her bachelor of art's degree in psychology, an education specialist degree in school psychology, and her pupil personnel services credential in school psychology from California State University at Fresno.

the school IEP team members believed that Student's suspensions for inappropriate comments, threats and the use of profanity were related to his disability.

10. Parent told the team members that she needed to think about the IEP offer and behavior intervention plan before she signed it. She also told the team to let Student walk away and leave the room if he was really upset because she knew how dangerous he could become. On one occasion at home, Student grabbed a knife during a fight. Parent did not agree to and sign the February 16, 2016 IEP offer until April 13, 2016. At that time Parlier formally implemented the behavior plan.

11. At the meeting, Parent did agree to allow Parlier to refer Student to the Fresno County Department of Behavioral Health. Ms. Kelly completed the referral to behavioral health the same day. However, the department of behavioral health clinician, Marcie Taylor, was unable to initiate services to Student because Parent did not return her phone calls.

Interventions Implemented Before Parent Signed IEP Offer on April 13, 2016

12. After the February 16, 2016 IEP team meeting, Student's teachers, counselors and administrators continued to give Student preferential/assigned seating near the front of the class, short breaks between assignments as needed, cues/prompts/reminders of rules for off-task behavior, and offered choices to Student when he became frustrated with grade-level work. Student had already accessed the school wide check-in/check-out program as part of the Positive Behavior Intervention Supports program that was developed for students who needed more intensive and individualized supports than the general student body. Student started the program in November 2015, and chose the principal, Ms. Jimenez as the staff member he checked in and out with. However, Student's attendance in the check-in/check-out program was inconsistent.

13. Although the check-in/check-out program was intended to be daily, Student only completed 25 check-in/check-out forms in the five months he was part of the program because he refused to check in or out with Ms. Jimenez when he was upset with her, or when he ripped up his form during difficult school days. When Student did complete the forms, he met his goal 70 percent of the time. He earned rewards during the year that included a Raiders' football, multiple kendamas, a lanyard, Fresno State gloves, a pack of pencils, and other items.⁴

14. Student also participated in the Second Step group counseling sessions led by Ms. Kelly with Parent's consent beginning in fall 2015. Second Step groups were held once a week and covered various topics such as identifying emotions in the students and others,

⁴ A kendama is a traditional Japanese toy. The toy has two cups and a spike which fits into the hole in the ball. The principle of the toy is to catch one object with another, where both are joined by a string.

impulse control, calming down strategies, problem solving, and anger management. During group sessions, Student participated well and identified appropriate and inappropriate behaviors within fictional scenarios. Student was eager to answer questions correctly and came up with acceptable solutions to problems.

15. Student had a more difficult time answering questions and discussing the consequences of his own behavior. He became defensive and insisted that he did not care about anyone else or whether his behavior was right or wrong. Student often threatened staff members with lawsuits if they continued to question him or tried to discuss behavioral incidents with him.

16. On March 17, 2016, the resource specialist, Beatriz Flores, sent Parent the triennial assessment plan that included evaluations in the areas of academic achievement, health, intellectual development, social/emotional, and functional behavior. Parent did not sign the assessment plan until April 13, 2016. The evidence did not establish when or if these evaluations were completed.

17. The evidence did establish that during the 2015-2016 school year, the IEP team treated Student's behaviors that led to his suspensions, as if they were related to his disability. Although the formal behavior plan offered to Student during the February 16, 2016 IEP meeting was not signed by Parent until April 13, 2016, Student's teachers, the school psychologist and school administrators offered Student counseling support, conferences, incentives, parent contact and other strategies to improve his behavior as an alternative to suspensions during the school year.

Suspensions During 2015-2016 School Year

18. Parlier suspended Student for a total of 19 days from October 16, 2015 through May 16, 2016. A summary of the conduct follows:

- a. On October 26, 2015, Student was suspended for one day for physical aggression. On this occasion, Student kicked a student repeatedly while in the school bathroom while another student held the student's hands behind his back.
- b. On December 9, 2015, Student was suspended for two days for abusive language and physical aggression. Student had used profanity and disrespectful language towards staff and students. Student defended his actions by stating, "But it's my opinion".
- c. On December 14, 2015, Student was suspended for three days for "possession of a weapon." Student had removed the razor blade from a pencil sharpener and told his teacher, "Look Miss, I'm going to cut someone with this".

- d. On February 22, 2016, Student was suspended for one day for insubordination. Student had refused to attend class, later walked out of class without permission, and made threatening comments towards staff and students. Student stated he would hurt his RSP teacher if he had to return to her class. While Student was in the office regarding this incident, he raised his voice with two sixth grade teachers and stood very near them, “in a threatening manner.” An unidentified person called the police department for help de-escalating the incident. Officer Aguilar from the Parlier Police Department met with Student, Parent and the principal.
- e. On March 14, 2016, Student was suspended for two days for physical aggression. Student pushed a female student and used profanity towards his teacher. A few days later, Student interfered with a school safety drill, broke private property and again used profanity towards his teacher.
- f. On March 17, 2016, Student was suspended for one day for abusive language and physical aggression. On this occasion Student left class without permission, used aggressive and inappropriate language, and displayed physically threatening behavior towards his teacher in front of other students. The notice of suspension stated that Student was suspended on March 18, 2016, and would return on Tuesday, March 29, 2016, after spring break. As of March 18, 2016, Student had accumulated multiple suspensions that added up to 10 school days in the 2015-2016 school year. These suspensions showed a pattern of similar behavior related to Student’s poor impulse control.
- g. On April 13, 2016, Student disobeyed his teacher’s directive during an official lockdown and pushed her outside of the classroom, putting him and the other students and staff members at risk. On April 14, 2016, Student was suspended for three days for physical aggression. This was Student’s 11th day of suspension.
- h. On April 21, 2016, Student was suspended for one day because he defied his teacher and administrators, used profanity and left class without permission. On May 9, 2016, Student was suspended for five days for physical aggression after he pushed his general education teacher with both hands into a cabinet in her classroom. On May 16, 2016, after a manifestation determination IEP meeting, Student’s suspension was extended pending expulsion proceedings against Student.

Manifestation Determination Meetings Attempted Before the 11th School Day of Suspension

MEETING SCHEDULED MARCH 30, 2016

19. On March 21, 2016, the director of student supports, Antonio Aguilar, mailed Parent a letter by certified and regular U.S. mail, and a notice of manifestation determination meeting. Mr. Aguilar scheduled the meeting for Wednesday, March 30, 2016 from 10:30 a.m. to 12:30 p.m. He also enclosed a manifestation determination assessment plan dated March 21, 2016, for an evaluation of Student's social-emotional behavior, a records review, teacher interviews and a manifestation determination.⁵ The evidence established that the manifestation determination meeting scheduled for March 30, 2016, was scheduled before Student had been suspended for more than 10 school days in the school year.

20. Parent did not respond to Mr. Aguilar's letter and did not return any of the assessment forms at that time. She also did not contact any Parlier staff member to confirm whether or not she would be at the meeting. On March 29, 2016, Ms. Kelly spoke with Parent and explained the purpose of the manifestation determination meeting scheduled for the next day. Parent told Ms. Kelly that she was unavailable to attend the meeting and would call Ms. Kelly to reschedule.

21. Despite knowing that Parent was not available for the manifestation determination meeting on March 30, 2016, and the fact that at that time, Student had not been suspended for more than 10 days, the manifestation determination team members assembled on March 30, 2016. Parent did not appear. Parent did telephone Mr. Aguilar to tell him she was not available on either March 30, 2016 or March 31, 2016, because she had a job interview on March 30, 2016. Parent also told Mr. Aguilar that she was available any day the following week in the morning to attend a manifestation determination IEP meeting.

22. The manifestation determination school team members cancelled the March 30, 2016 meeting and decided to reconvene the meeting the following week during the morning of April 4, 2016. Mr. Aguilar mailed parent the IEP team meeting notes dated March 30, 2016, the Parent Rights information form, the Manifestation Determination report prepared by Ms. Kelly dated March 30, 2016, and an invitation for a reconvened manifestation determination IEP meeting for April 4, 2016. The evidence did not establish whether Parlier confirmed with Parent that she could attend this meeting.

MEETING SCHEDULED APRIL 4, 2016

23. Parlier also scheduled the April 4, 2016 manifestation determination meeting prior to Student's 11th day of suspension. Parent did not appear so the team cancelled the meeting. The principal spoke with Parent by phone at some point. Parent told her she had

⁵ Ms. Flores had previously mailed Parent the triennial assessment plan for an evaluation of Student in the areas of academic achievement, health, intellectual development, social-emotional, and a functional behavior assessment on March 17, 2016.

not received notice of the meeting. Whether or not Parent did or did not receive notice of the April 4, 2016 meeting is not relevant to the issues in this case since the manifestation determination meeting was convened before Parlier suspended Student for more than 10 days.

24. Ms. Kelly telephoned Parent on April 6, 2016, to find out when Parent could meet with Ms. Kelly to review and sign the February 16, 2016 IEP offer and attend a manifestation determination meeting. Parent told Ms. Kelly that she was busy and had many meetings so she did not have any days available to meet at that time. Ms. Kelly encouraged Parent to call her when she was available. On April 7, 2016, Ms. Kelly prepared a letter to Parent asking her when she could attend Student's manifestation determination meeting. Parent did not respond to Ms. Kelly's letter. The evidence did not establish whether any communication took place between Parlier and Student between April 7 and May 5, 2016 when the first manifestation determination meeting took place.

Manifestation Determination Meetings After the 11th day of Suspension

MAY 5, 2016 MANIFESTATION DETERMINATION MEETING

25. On April 14, 2016, Parlier suspended Student for three days because of an incident that occurred on April 13, 2016. On that day, Student tried to leave the classroom during an official lockdown to see what was happening. In the process, he pushed a teacher outside the classroom with him. Student's suspension on April 14, 2016, was his 11th day of suspension. A manifestation determination meeting did not take place until May 5, 2016. This meeting took place 15 days after Student's 11th day of suspension on April 14, 2016. The evidence established that Student's behavior on April 13, 2016, was caused by his poor impulse control, and that the team did not specifically discuss this behavior during the May 5, 2016 meeting.

26. The 10th day after Student's 11th day of suspension was April 21, 2016. The evidence did not establish that Parlier had contact with Parent between April 7 and May 5, 2016; however, Parent must have received some notice since she did attend this meeting. No evidence was introduced regarding why the meeting was not held by April 28, 2016, the 10th school day after the April 14, 2016 suspension. On April 21, 2016, Student was suspended for one day because he defied his teacher and administrators, used profanity, and left class without permission. This suspension was also not discussed during the May 5, 2016 manifestation determination meeting.

27. On May 5, 2016, all the manifestation determination team members assembled to discuss whether Student's suspensions through March 17, 2016, were related to his disability. Student also attended part of the meeting. The manifestation determination team members included Parent, Antonio Aguilar, Jackie De La Cruz, Courtney Jimenez, Beatriz Flores and Katelyn Kelly. Also present with Parent's permission, was Marcie Taylor, a clinician with the Fresno County Department of Behavioral Health.

28. During the meeting, the team members filled out a manifestation determination form. The behavior subject to disciplinary action at that time included physical aggression, abusive language, possession of weapons (that is, the razor blade Student removed from a pencil sharpener), and insubordination. The team reviewed relevant information in the Student's file, teacher observations, information provided by the Parent, and the February 16, 2016 IEP offer. The team also reviewed Ms. Kelly's manifestation determination report dated March 30, 2016.⁶ Ms. Kelly's report did not include the suspensions on April 14 and April 21, 2016.

29. Ms. Taylor, the clinician from the Fresno County Department of Behavioral Health, observed Student's behavior during the May 5, 2016 meeting and later prepared a statement describing her observations. Ms. Taylor observed Student's lack of self-control and frustration during the meeting. He ignored directions from the principal, RSP teacher, Parent, school psychologist and general education teacher during the meeting. He engaged in derogatory and demeaning language, referred to female staff as "Stupid bitches." Student used his middle finger toward his general education teacher while she was describing an incident between Student and another staff member. When the teacher told Student she could see his finger, he responded, "So", and continued to make inappropriate remarks. When staff began describing Student's aggressive and physical behaviors, Student told his RSP teacher, "Watch, next time I'm going to hit you, watch next time what I do". He constantly mumbled comments under his breath like, "Stupid, dumb, liars and bitches."

30. On a few occasions, Parent intervened to correct and redirect Student during the manifestation determination meeting, but was unsuccessful in changing Student's behavior. Student told his mother that the teachers were just stupid and did not know anything; that the teachers, "just stick up for each other," or, that the teachers were lying. Any topic of discussion during the meeting triggered Student. When he was given the option to step out of the meeting, Student became more combative with the team members. As the meeting progressed, Parent informed the team, "When you try to block him or stand in front of him, there is no telling what he will do. I'm his mother I know him." Ms. Taylor told Parent that Student should be referred to a higher level of care beyond mental health services.

31. During the May 5, 2016 manifestation determination meeting, the school team members concluded that Student's conduct was not caused by, or had a direct and substantial relationship to the Student's disability because his behavior showed awareness and planning. The team also determined that Student's conduct was not the direct result of Parlier's failure to implement Student's IEP. However, the evidence established that until the manifestation determination meeting on May 5, 2016, Parlier treated Student's conduct as if it was related to his ADHD. The February 16, 2016 school IEP team members developed Student's behavioral goals and accommodations in the IEP offer in response to Student's behavior. The

⁶ Ms. Kelly's assessment of Student in this report was not made pursuant to a signed assessment plan submitted during the hearing. No finding is made here about whether Ms. Kelly's report was appropriate or not.

witnesses testified that the school IEP team members had frequent discussions during the school year about Student's IEP, the behavior intervention plan, and Student's behavioral issues related to his ADHD.

32. Although on May 5, 2016, the team determined Student's conduct was not related to his disability, none of the team members who testified at trial could identify the specific behaviors and suspensions that provided the basis for their determination that Student's conduct was not related to his disability, other than the bathroom incident on October 26, 2016, and the razor blade incident on December 14, 2015. The evidence also established that the team members did not specifically discuss the suspensions that occurred after Student's 10th day of suspension. The team decided Student's conduct was the result of anger and aggression, but did not discuss whether Student's impulsive behavior could result in angry and aggressive behavior.

PARLIER'S DETERMINATION OF STUDENT'S BEHAVIOR

33. Ms. Kelly told the manifestation determination team members that Student's anger, aggressive behaviors, and rude and aggressive comments to her, other teachers and his peers, were not characteristic of ADHD since the most common characteristics of ADHD are inattention, hyperactivity and impulsivity. However, Ms. Kelly acknowledged during her testimony, and in her written reports, that at times Student's misbehavior was caused by his lack of impulse control and inattention. Ms. Kelly also believed that some of Student's behavior was not related to his disability because he understood right from wrong, and knew what the school rules were. She did not explain how Student's understanding of these concepts meant his conduct was not the result of inattention, hyperactivity and impulsivity.

34. Ms. Kelly also told the manifestation determination team members that Student's tendency to make rude, inappropriate comments and to use profanity were not quick, impulsive reactions because the behavior was not provoked. She did not provide the basis for this opinion. Ms. Kelly believed the specific incidents that led to Student's suspensions during the school year, showed some level of planning or foresight which is the opposite of impulsivity. She also did not identify the incidents that showed planning or foresight other than to refer to the bathroom incident on October 26, 2015, and the razor blade incident on December 14, 2015. Ms. Kelly did not address whether she thought Student's behavior on April 13 and April 21, 2016, after Student's 10th day of suspension, was the result of Student's poor impulse control or not.

35. Ms. Kelly concluded at the May 5, 2016 meeting that Student's conduct as of March 17, 2016 was the result of planning and foresight and not impulsive behavior, and that anger and aggression were not characteristic of a Student with ADHD. However, Student's behavior during the incidents that led to Student's suspensions, were not consistent with Ms. Kelly's conclusions. From February 16, 2016 IEP through April 21, 2016, the principal suspended Student for refusing to attend class, walking out of class without permission, making threatening comments; pushing a student, using profanity, interfering with school safety drill, using abusive, aggressive and inappropriate language, displaying physically

threatening behavior toward his teacher, and pushing a teacher outside the class room when he attempted to leave during an official lockdown. The evidence established that these incidents are examples of Student's poor self-control and not the result of planning and foresight.

36. Ms. Kelly was an intelligent, articulate and educated witness; however, her testimony that Student's conduct was not related to his ADHD was not credible or persuasive. Up until May 5, 2016, Parlier treated Student's conduct as if it was caused by his disability, and prepared behavior goals and a behavior intervention plan to address this conduct. In addition, Parlier provided services and accommodations to Student that allowed him to access his education because of his disability.

37. In contrast to Ms. Kelly's testimony, the evidence established that Student's disability resulted in his poor impulse control, frustration with his inability to perform grade level work, learning difficulties, and contributed to his anger and aggression. These characteristics of ADHD contributed to Student's behavior that led Parlier to suspend Student for more than 10 days during the 2015-2016 school year. Therefore, the evidence established that Student's behavior was caused by and had a direct and substantial relationship to Student's disability. The issue as to whether or not Student's conduct was the direct result of Parlier's failure to implement Student's IEP is moot.

AMENDMENTS/ADDENDUMS TO FEBRUARY 16, 2016 IEP OFFER

38. During the May 5, 2016 manifestation determination team meeting, the IEP team members, including Parent, signed an amendment/addendum to the February 16, 2016 IEP, to provide additional academic and behavioral support to Student. The amendment added push in support for one hour, and 45 minutes daily in the general education class. The IEP team also revised the behavior plan to give Student choices regarding his activities in class and consequences for misbehavior. The amendment established that as of May 5, 2016, the school IEP team continued to offer Student a behavioral plan that addressed conduct related to his disability.

MAY 16, 2016 MANIFESTATION DETERMINATION MEETING

39. The IEP team held another manifestation determination meeting on May 16, 2016, to determine whether Student's behavior on May 9, 2016, when he pushed his general education teacher, was a manifestation of his disability. This meeting was held five school days after Student's suspension. On May 9, 2016, Student used both hands to push Ms. De La Cruz against a row of cabinets after she tried to intervene in a confrontation between Student and another child. Student's physical aggression toward Ms. De La Cruz led to his longest suspension and a recommendation for expulsion. Parlier prepared a notice of suspension on May 9, 2016 that stated Student had been suspended for five days until May 16, 2016. The evidence did not establish whether this notice was provided to Parent.

INCIDENT ON MAY 9, 2016

40. Ms. De La Cruz testified about what happened during the incident on May 9, 2016. When Student returned to her class from the RSP classroom that day, he started pacing and chanting at the back of the classroom. Student then walked up to one of the students working on his animal research project at a back table, threw up his hands and puffed out his chest. Student got closer to the other student and bumped the student's chest. He then backed up and said, "Come on then!" The other student took a step forward, turned, looked at Ms. De La Cruz, put his hands up in surrender, and stepped away.

41. Ms. De La Cruz walked a few steps over to the two students. She told Student to stop and calm down. Student stepped up close to the teacher's face and said, "No! You can't fucking make me do shit!" She again told him he needed to calm down and step away. Student told his teacher to move because he was going to, "Beat his fucking ass!" The teacher turned with the intention of telling the other student to move away. As she turned to that student, Student put both of his hands on her chest, pushed her into the cabinets at the back of the room. Ms. De La Cruz hit her back on the handles of the cabinets. She was not seriously injured but felt bruised for a few days after the incident.

42. Another student in Ms. De La Cruz' class saw Student push her and started walking toward Student. He yelled, "Why'd you push Miss!?" Ms. De la Cruz put herself in front of that student, told him to just walk away and that she was okay. She asked another student to go get the teacher from the classroom nearby. Student started yelling at Ms. De La Cruz, "That's what you get! You shouldn't have got in my way! My mom warned you that I'll hurt you if you get in my way." Student continued to yell that it was the teacher's fault for not getting out of his way. Student told her if she got in his way again he would, "Beat your ass too!" Ms. De La Cruz opened the door and told Student to leave. As Student started walking out of the room, he called her a "Fucking bitch."

MANIFESTATION DETERMINATION TEAM FINDINGS

43. The team reviewed relevant information in the Student's file, including his IEP, teacher observations, Student's suspensions through May 9, 2016, and information provided by the Parent. The team also reviewed Ms. Kelly's revised manifestation determination report dated May 16, 2016. This report included the suspensions on April 13, and 21, and May 9, 2016.

44. On the form filled out by the manifestation determination team members during the meeting, the team stated that the behavior subject to disciplinary action was physical aggression against his teacher. The manifestation determination IEP team members concluded that Student's conduct was not caused by, or had a direct and substantial relationship to the Student's disability because "he showed awareness and foresight into his behavior". The team further stated that Student's behavior was not related to his ADHD but "may be related to anger and aggression issues".

45. As described above, Ms. Kelly does not believe anger and aggression are related to ADHD. However, the evidence established that poor impulse control and frustration can lead to anger and aggression. None of the witnesses testified specifically about how Student's act of pushing his teacher on May 9, 2016, showed planning, as opposed to a lack of impulse control. Therefore, the evidence established that Student's behavior on May 9, 2016 was caused by, and did have a direct and substantial relationship to the Student's ADHD.

AMENDMENT/ADDENDUM TO FEBRUARY 16, 2016 IEP OFFER

46. At the May 16, 2016 manifestation determination IEP team meeting, the IEP team members signed an IEP amendment/addendum page that outlined the educational instruction to be provided to Student while he was suspended at home. The team members agreed to change the services set out in the February 16, 2016 IEP so that Student would receive home instruction five hours per week from the general education teacher, five hours of RSP support by the RSP teacher, and 30 minutes of counseling weekly in his home.

Educational Services Provided After 11th Day of Suspension

47. After Student's 11th day of suspension on April 14, 2016, Parlier offered Student one-to-one educational instruction at his home with Melissa Graham, a general education teacher, and Martha Scott, a special education teacher. The teachers were available every day to give Student instruction. Both teachers contacted Parent to schedule Student's instruction after his 11th day of suspension. Parent was not always available because she worked at night so sometimes the instruction took place at the library.⁷

48. Student responded well to Ms. Scott's instruction so she also started providing Student with RSP services at school when Student returned to school after his suspensions. Ms. Scott prepared the following log of her visits with Student at his home during suspensions and at school:

April 19, 2016	One hour of services provided
April 21, 2016	Attempted, no one home
April 22, 2016	One hour of services provided
May 3, 2016	Provided services at school
May 9, 2016	Provided services at school
May 10, 2016	Mother declined services
May 11, 2016	Attempted, no one home
May 12, 2016	Mom was not available when contacted by phone
May 13, 2016	Mom declined services

⁷ Presumably the teachers did not provide instruction at the school library, but the parties did not clarify whether they met at a city or county library in Parlier.

49. Melissa Graham provided educational services to Student at his home beginning May 18, 2016. She attempted to provide instruction to Student for one hour every school day. She went to the home every day but Student was hardly ever at home. On several occasions, Ms. Graham provided instruction at the library. Student was only available for instruction for seven to ten school days between May 18, 2016 and the close of the school year on approximately June 9, 2016. Ms. Graham found Student to be well-behaved for the most part although on her first visit, he told her that if she came back, he would punch her. She gave him breaks and followed the behavior intervention plan. On occasion, Ms. Graham found it difficult to get Student to do any work.

50. Parent testified that Student did not start receiving educational services until after she found a parent advocate. However, Parent did not establish when she retained a parent advocate. She also testified during hearing that the teachers did give Student instruction at the home and at the library.

51. Parent did not produce any written evidence regarding the dates Student received instruction or whether the teachers showed up as scheduled. On the other hand, two teachers credibly testified that they began providing services to Student after the principal suspended him on April 14, 2016, and during subsequent suspensions. Therefore, the evidence established that Parlier did provide educational services to Student after his 11th day of suspension.

Functional Behavior Assessment

52. On June 2, 2016, Ms. Kelly completed Student's functional behavior assessment based on her conclusion that Student's conduct described during the May 5 and May 15, 2016 manifestation determination meetings was not related to his ADHD. Her analysis of Student's behavior was based on interviews with his general education teacher and his resource specialist, Ms. Kelly's observations of Student on April 27 and April 29, 2016, her review of Student's health and discipline records, and Student's previous psychological report from 2013. Ms. Kelly summarized Student's behaviors of concern and the frequency, intensity, and duration of his current behavior.

53. Ms. Kelly concluded in her functional behavior assessment that Student's behavior was impeding his and his peers' learning. She also summarized the Tier II strategies and other interventions that the school staff had implemented and the results of these interventions. She explained that a behavior intervention plan had been developed and offered through the IEP process since May, 2014 but that Parent did not consent to the plan until April 13, 2016. However, the evidence established that Parlier had been implementing the elements of the behavioral intervention plan since the fall 2015.

54. Ms. Kelly established that Student's behaviors had increased to an extreme level and should be addressed as soon as possible by the IEP team. At the time she prepared the report, Student had difficulty being at school for any amount of time without demonstrating severely inappropriate behaviors, such as profuse swearing, threatening staff

and students, intimidating others, and leaving and entering classes without permission. He had pushed his general education teacher with force that led to a suspension and recommendation for expulsion. Ms. Kelly recommended that the IEP team consider a placement in which more individualized attention and support could be given to Student's academic and behavioral needs. She concluded that he might need a more restrictive placement in order for his needs to be met. The evidence established that Ms. Kelly conducted a functional behavior assessment after the May 2016 manifestation determination meetings.

LEGAL CONCLUSIONS

*Introduction – Legal Framework for Student Discipline under the IDEA*⁸

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)⁹ 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 free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for education, 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)(1) and title 34 Code of Federal Regulations, part 300.530, et seq., govern the discipline of special education students. (Ed. Code, § 48915.5.) A student receiving special education services may be suspended or expelled from school as provided by federal law. (20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. §§ 300.530 - 300.537; 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).

⁸ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁹ All references to the Code of Federal Regulations are to the 2006 version.

3. A child with a disability who is removed from the child's current placement when school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, including children with disabilities who have been suspended or expelled from school, although it may be provided in an interim alternative educational setting. The child shall continue to receive educational services 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 shall receive, as appropriate, a functional behavioral assessment, 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), (C)(i), (ii); 20 U.S.C. § 1412(a)(1).)

4. A special education student's educational placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to the student. (Cal. Code Regs., tit. 5, § 3042, subd. (a).) A "change of placement" is a fundamental change in, or elimination of, a basic element of a student's educational program. A change of placement is defined as (a) a removal for more than 10 consecutive school days, or (b) a series of removals that cumulate to more than 10 consecutive school days and constitute a pattern based on listed factors. (34 C.F.R. § 300.536(a).)

5. Parents and local educational agencies may request an expedited due process hearing of claims based upon a disciplinary change of educational placement under title 20 United States Code 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).) The rules for a due process hearing under title 20 United States Code section 1415(k) must be consistent with those of other IDEA hearings. (34 C.F.R. § 300.532(c).)

6. 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).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e); Ed. Code, 56505(l).)

7. 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) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student bears the burden of persuasion.

Issue One: Did Parlier err in determining that Student's behavior was not a manifestation of his disability at the manifestation determination meetings held in May 2016?

8. Student contends that Parlier incorrectly determined that Student's behavior was not a manifestation of his disability at the manifestation determination meetings in May 2016. Student also contends his behavior was caused by Parlier's failure to implement Student's IEP. Parlier contends that Student's actions were deliberate and planned, and therefore, they were not related to the impulsivity associated with ADHD. Parlier also contends that Student's behavior was not caused by a failure to implement Student's IEP since Parlier continually offered Student counseling support, conferences, incentives, parent contact and other strategies to improve his behavior as an alternative to suspensions.

LEGAL AUTHORITY

9. When a local educational agency decides to change a special education student's educational placement for more than 10 days as a result of a violation of a student code of conduct, the local educational agency must convene a meeting with relevant members of the child's individualized education program team to determine whether the child's violation was a manifestation of the child's disability. The meeting is referred to as a manifestation determination review and the result of the meeting is known as a manifestation determination. A student's conduct is a manifestation of the student's disability if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or if the conduct in question was the direct result of the local education agency's failure to implement the IEP. (20 U.S.C. §1415(k)(1)(E); 34 C.F.R. § 300.530(e)(i) & (ii).)

10. If the manifestation review team determines the conduct is not a manifestation of the student's disability, or is not due to the failure to implement student's IEP, then the local educational agency may use normal school disciplinary procedures to address the incident in the same way as the procedures would be applied to non-disabled students. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c); see *Doe v. Maher* (9th Cir, 1986) 793 F.2d 1470, 1482, *affd.*, *sub nom.*, *Honig v. Doe* (1988) 484 U.S. 305 [when a child's misbehavior does not result from his disability no justification exists for exempting him from the rules applicable to other children].)

11. If the manifestation review team determines that the student's conduct was a manifestation of the student's disability; the IEP team shall conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement; in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan. (20 U.S.C. § 1415(k)(1)(F).) If the manifestation review team determines that the student's conduct was a manifestation of

student's disability because the conduct was the direct result of the school district's failure to implement student's IEP, the district must remedy the failure. (34 C.F.R. § 300.530(e)(3).)

ANALYSIS AND CONCLUSIONS

12. The only witness with a professional background in psychology who testified at hearing was the school psychologist, Ms. Kelly. However, her testimony did not establish that Student's behavior was not caused by, nor had a direct and substantial relationship to Student's disability. Her opinion that Student's behavior was not caused by his disability because his behavior showed planning and foresight, is not credible except for the bathroom incident on October 26, 2016, and possibly the razor blade incident on December 14, 2016. Ms. Kelly's opinion about Student's planning and foresight also contradicts her opinion that some of Student's inappropriate and abusive language was due to his poor impulse control.

13. The witnesses testified that the IEP team members had frequent discussions during the school year about Student's IEP, the behavior intervention plan, and Student's behavioral issues as if they were related to his disability. The evidence established that because of his disability, Student was impulsive, became frustrated with his inability to perform grade level work, and had learning difficulties that at times made him angry and aggressive. These characteristics caused the behavior that led the school principal to suspend Student for 19 days during the 2015-2016 academic year.

14. Until May 5, 2016, Parlier treated Student's conduct as if it was caused by his disability. Parlier acknowledged that Student's behavior was related to his disability by addressing his behavioral needs through the IEP process. The IEP team members prepared behavior goals and a behavior intervention plan to address Student's inappropriate behavior. Even without a signed IEP, Parlier continued to provide behavioral support services and accommodations designed to change Student's misbehavior, and to implement strategies to reinforce Student's positive behavior. When these interventions failed, Parlier denied that Student's conduct was, after all, related to his disability in order to expel him.

15. Although on May 5, 2016, the manifestation determination school team determined Student's conduct was not related to his disability because his actions showed planning and foresight, the team members could not identify the specific behaviors and suspensions that provided the basis for this determination, other than the two incidents described above. The team did not establish that any of the other incidents were not caused by Student's lack of impulse control. Although the team decided Student's conduct was the result of anger and aggression, they did not discuss whether or not Student's impulsive behavior could result in angry and aggressive behavior.

16. The evidence also established that the team members did not specifically discuss the suspensions that occurred after Student's 10th day of suspension during the manifestation determination meeting on May 5, 2016. These suspensions were caused by Student's lack of control when he pushed a teacher to get outside during a school lockdown, and when he used profanity and left his class without permission.

17. In contrast to Ms. Kelly's testimony that Student planned the behavior that led to his suspensions, the evidence established that Student's poor impulse control caused his behavior. The conduct that led to Student's suspensions included physical aggression against his teachers and peers, abusive language, frequent extreme profanity, defiance and insubordination. This behavior is consistent with Student's lack of impulse control associated with his ADHD. Therefore, Student's behavior was caused by, and had a direct and substantial relationship to Student's disability.

18. Student established that his conduct was a manifestation of his disability. The issue as to whether or not Student's conduct was the direct result of Parlier's failure to implement Student's IEP is moot.

Issue Two: Did Parlier fail to conduct a functional behavior assessment pursuant to the manifestation determination meetings in May 2016?

19. Student contends that Parlier did not conduct a functional behavior assessment. Parlier contends that the school psychologist began preparing a functional behavior assessment after Student was suspended for more than 10 days, and that the report was completed on June 2, 2016.

LEGAL AUTHORITY

20. A child with a disability who has accumulated more than ten consecutive school days that constitute a pattern and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, shall receive, as appropriate, a functional behavioral assessment, 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).)

ANALYSIS AND CONCLUSIONS

21. Although the manifestation determination team members found that Student's behavior was not caused by his disability, the school psychologist began preparing a functional behavior assessment after Student was suspended for more than 10 days on April 14, 2015. Ms. Kelly completed the assessment on June 2, 2016. Therefore, Student did not meet his burden of proof on this issue.

Issue Three: Did Parlier change Student's placement during the 2015-2016 school year when Student was suspended more than 10 school days and did Parlier fail to provide notice of that change in placement?

22. Student contends that Parlier changed Student's placement during the 2015-2016 school year without providing a notice of a change of placement after he was suspended for more than 10 days. Parlier contends Parent received notices about Student's disciplinary suspension each time Student was suspended after his 11th day of suspension.

23. A “change of placement” is a fundamental change in, or elimination of, a basic element of a pupil’s educational program. A change of placement is defined as (a) a removal for more than 10 consecutive school days, or (b) a series of removals that cumulate to more than 10 consecutive school days and constitute a pattern based on listed factors. (34 C.F.R. § 300.536(a).) Thus, depending on its form and duration, suspension of a pupil receiving special education and related services due to a disability may constitute a change in his or her educational placement. School personnel may remove a child with a disability to an interim alternative educational setting, another setting, or to suspension for not more than 10 school days without triggering the “change of placement” protections of the law. Expulsion or suspension for more than ten days is a change of placement. (*Honig v. Doe* (1988) 484 U.S. 305; 34. C.F.R. § 300.536.)

24. For the purposes of removing a child with a disability from the child's current educational placement, a change of placement occurs if the removal is for more than 10 consecutive school days; or, the child has been subjected to a series of removals that constitute a pattern because the series of removals total more than 10 school days in a school year, the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of 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. The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.

25. Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section. (20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. § 300.530(h).)

ANALYSIS AND CONCLUSION

26. The parties did not dispute that Parlier changed Student’s placement after he was suspended for more than 10 days. The parties also did not dispute that Student’s suspensions amounted to a series of removals that accumulated to more than 10 school days and constituted a pattern of behavior that was substantially similar to his behaviors in previous incidents. However, Student did not introduce any evidence that Parlier did or did not notify Parent of its decision to take disciplinary action at the time the decisions were made.

27. Student called 11 school administrators and teachers to testify at the hearing. However, Student did not ask any of these witnesses whether they or anyone else notified Parent about the decisions to suspend Student after his 11th day of suspension. Student also did not ask Parent this question at the time she testified. Presumably Parent received some notice that Student was suspended since Student did not show up for school during his suspensions. Further, it is more likely than not that the school principal did notify Parent about the suspensions so that Student would not come to school. However, this information was not provided during the hearing.

28. Parlier also did not ask any of the witnesses whether they or anyone else notified Parent about the decisions to suspend Student for each suspension after he was suspended more than 10 days. Parlier could have established that someone notified Parent in order to show Parlier complied with the procedural safeguards, but they did not. However, Parlier did not have the burden of proof on this issue.

29. Student was unrepresented by counsel and might have found it difficult to prove that something did not happen. However, Student was assisted at hearing by three parent advocates. In order to satisfy Student's burden of proof on this issues, Student should have made some attempt to establish when and whether notices were sent to Parent by questioning the school witnesses and Parent about this issue. Student did not do so. Therefore, Student did not meet his burden of proof on this issue.

Issue Four: Did Parlier hold a manifestation determination review within 10 school days after the 10th day of suspension to assess if Student's conduct was a manifestation of his disability?

30. Student contends that Parlier failed to hold a manifestation determination review within 10 school days after the 10th day of suspension to assess whether Student's behavior was a manifestation of his disability. Parlier contends that it attempted to do so but Parent was unavailable until the 15th school day after Student was suspended.

LEGAL AUTHORITY

31. A manifestation determination must be accomplished within 10 school days of the decision to change the student's placement. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).) All relevant information in the student's file, including the IEP, any observations of teachers, and any relevant information from the parents must be reviewed to determine if the conduct was caused by, or had a direct and substantial relationship to the student's disability, or was the direct result of the district's failure to implement the student's IEP. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).)

ANALYSIS AND CONCLUSION

32. The parties do not dispute that the May 5, 2016 manifestation determination meeting was held 15 school days after Student's 11th day of suspension on April 14, 2016. The 10th school day after Student's 11th day of suspension was April 28, 2016. Therefore, Student met his burden of proving that the first manifestation determination meeting after the 11th day of suspension was five days late.

33. The parties also do not dispute that the May 15, 2016 manifestation determination meeting was held 10 school days after Student's suspension on April 21, 2016, and five days after Student's suspension on May 9, 2016. Therefore, Student did not meet

his burden of proving that Parlier failed to hold a manifestation determination IEP meeting within 10 days of these suspensions to assess if Student's conduct was a manifestation of his disability.

34. No evidence was introduced by either party as to why the May 5, 2016 meeting did not take place on April 28, 2016. It is unclear what communication took place between the parties about scheduling a date for the manifestation determination IEP meeting later than the required 10 school days that may have explained why the meeting was held five days late.

35. Although Parlier violated a procedural step under Title 20 United States Code section 1415(k) by holding the meeting five days late, Student did not provide any evidence that the delay was prejudicial. The evidence established that Student was not denied any educational benefit by this procedural deficiency and Parent was not prevented from participating in the manifestation determination process. The evidence also established that Parlier had attempted to schedule two prior manifestation meetings after Student's 10th day of suspension, but Parent did not appear for either of these meetings. Rather than hold a manifestation determination meeting without Parent, Parlier rescheduled these meetings until Parent was able to attend.

36. The Ninth Circuit in the case of *Doug C. v. Hawaii Department of Education* (2013) 720 F.3d 1038, 1044-1045, held that the failure to include the parent at an IEP meeting violated the procedural requirement of IDEA and invalidated the IEP. The court found that the attendance of the parent must take priority over other members' attendance and that the agency cannot exclude a parent from an IEP meeting in order to "prioritize its representatives' schedules," unless the parents refuse to attend. (*Id.* at p. 13.) Parlier previously cancelled manifestation determination IEP meetings when Parent could not attend. If Parlier had to choose between proceeding with the meeting without Parent but meeting the procedural deadline, or including Parent in the meeting and missing the deadline by five days, Parlier made the correct choice by including Parent in the meeting and missing the deadline.

37. Student met his burden of proof on this issue with regard to the May 5, 2016 manifestation determination meeting. Student did not meet his burden of proof that Parlier failed to convene the May 16, 2016 manifestation determination meeting within 10 days of the suspensions on April 21 and May 9, 2016.

*Issue Five: Did Parlier fail to continue to provide educational services after Student's 10th day of suspension?*¹⁰

38. Student contends that Parlier failed to provide educational services after Student's 10th day of suspension and that Student only started receiving educational services when she retained a parent advocate. Parlier contends that Student began receiving educational services after Student's 11th day of suspension.

LEGAL AUTHORITY

39. As set forth above, a child with a disability who is removed from his current placement shall continue to receive educational services so as to enable him 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. (20 U.S.C § 1415(k)(1)(D)(i).) The services may be provided in an interim alternative educational setting. (20 U.S.C § 1415(k)(2); 34 C.F.R. § 300.530(d).)

ANALYSIS AND CONCLUSIONS

40. Parent testified that Student did not start receiving educational services until after she found a parent advocate, Parent did not establish when she retained a parent advocate or when the instruction began. Furthermore, Parent's testimony failed to establish that Student did not receive educational services.

41. Two teachers testified that they began providing instruction to Student after he was suspended from school more than 10 times. One of the RSP teachers kept a log of the instruction that showed she began providing instruction to Student at home on April 19, 2016. This was five days after Student was suspended for the 11th time on April 14, 2016. Therefore Student did not meet his burden of proof that Parlier failed to continue to provide educational services after he was suspended more than 10 times.

Issue Six: Did Parlier use prohibited disciplinary interventions, and did Parlier use prohibited emergency interventions?

42. Student contends that Parlier used prohibited emergency interventions when police officers were called to the school on various occasions to talk to Student. Parlier contends that summoning a police officer to the school on February 22, 2016, to talk to the principal, Student, and his mother, during a behavioral incident, was not a prohibited emergency intervention.

¹⁰ Although Parent framed the issue as requiring services after 10 days of suspension, the statute provides that educational services must be provided after the 11th day of suspension.

LEGAL AUTHORITY

43. As set forth above, a child with a disability who is removed from his current placement shall continue to receive educational services so as to enable him 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. (20 U.S.C § 1415(k)(1)(D)(i).) A child will also receive, as appropriate, a functional behavioral assessment, 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).)

44. Emergency interventions may only be used to control unpredictable, spontaneous behavior that poses clear and present danger of serious physical harm to the individual with exceptional needs, or others, and that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior. Emergency interventions shall not be used as a substitute for the systematic behavioral intervention plan that is designed to change, replace, modify, or eliminate a targeted behavior. No emergency intervention shall be employed for longer than is necessary to contain the behavior. A situation that requires prolonged use of an emergency intervention shall require the staff to seek assistance of the school site administrator or law enforcement agency, as applicable to the situation. Prohibited emergency interventions include: locked seclusion; using an object that simultaneously immobilize all four extremities; an amount of force that exceeds that which is reasonable and necessary under the circumstances; those used in lieu of planned, systematic behavioral interventions. The parent shall be notified within one school day if an emergency intervention is used or serious property damage occurs and complete a behavioral emergency report. (Ed. Code, § 56521.1.)

45. Prohibited interventions for children with special needs include any intervention likely to cause physical pain, including electric shock; the release of noxious, toxic, unpleasant sprays, mists, or substances close to the child's face; that denies adequate sleep, food, water, shelter, bedding, physical comfort, or access to bathroom facilities; that is designed to subject the child to verbal abuse, ridicule, or humiliation. Prohibited interventions also include interventions that can be expected to cause excessive emotional trauma; that employ an object that can simultaneously immobilize all four extremities, including prone containment; that precludes adequate supervision of the individual; and that deprives the individual of one or more of his or her senses. (Ed. Code, § 56521.2(a).)

46. In the case of a child whose behavior impedes the child's learning or that of others, the individualized education program team shall consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior, consistent with Section 1414(d)(3)(B)(i) and (d)(4) of Title 20 of the United States Code and associated federal regulations. (Ed. Code § 56521.2(b).)

ANALYSIS AND CONCLUSION

47. Student did not meet his burden of proof that Parlier used prohibited interventions to address Student's behavior. Although Parent testified that Parlier summoned the police to talk to Student on several occasions, the evidence established that a police officer showed up at the school on only one occasion to de-escalate Student's out-of-control behavior in the principal's office on February 22, 2016.

48. Student did not call any law enforcement personnel or submit any police reports or other law enforcement evidence to establish that Parlier called the police inappropriately to address Student's behaviors. Student also did not meet his burden of proof that one conversation with a police officer while his Parent and the principal were present was an intervention designed to subject Student to verbal abuse, ridicule, or humiliation, or that could be expected to cause Student excessive emotional trauma. Therefore, Student did not meet his burden of proof that Parlier used prohibited disciplinary interventions or emergency interventions with Student.

REMEDIES

1. If the manifestation review team determines that the student's conduct was a manifestation of the student's disability; the IEP team shall conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement. In the situation where a behavioral intervention plan has been developed, the team shall review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior. The team shall return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan. (20 U.S.C. § 1415(k)(1)(F).)

2. An Administrative Law Judge may, on appeal of a manifestation determination proceeding may order a change in placement of a child with a disability by returning a child with a disability to the placement from which the child was removed. (20 U.S.C. § 1415(k)(3)(B).)

3. Student in this case did not ask Parlier to reinstate Student's enrollment at S. Benavidez Elementary School; therefore this remedy will not be ordered. Student's only request was that Parlier's manifestation determinations in May 2015 be reversed. Accordingly, Student is entitled to such an order. In addition, Parlier must conduct a functional behavioral assessment consistent with the finding that Student's conduct was a

manifestation of his disability and review Student's behavioral intervention plan, and modify it, as necessary, to address Student's behavior as provided in Title 20 United States Code section 1415(k)(1)(F).

ORDER

1. Student's request for an order reversing Parlier's manifestation determinations in May 2016 is granted.
2. Parlier shall conduct a functional behavioral assessment consistent with the finding that Student's conduct was a manifestation of his disability.
3. Parlier shall review Student's behavioral intervention plan, and modify it, as necessary, to address Student's behavior.

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, Student prevailed on two of six issues. Parlier prevailed on four of the six issues.

RIGHT TO APPEAL THIS DECISION

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: September 16, 2016

/s/
CHERYL CARLSON
Administrative Law Judge
Office of Administrative Hearings