

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ROSEVILLE JOINT UNION HIGH
SCHOOL DISTRICT.

OAH CASE NO. 2013080664

EXPEDITED DECISION

Administrative Law Judge (ALJ) Theresa Ravandi, from the Office of Administrative Hearings (OAH), State of California, heard this expedited matter in Roseville, California, on September 17 through 19, 2013, and September 23, 2013.

Attorney Daniel R. Shaw appeared on behalf of Parents and Student (Student). Student's Mother was present each day of hearing. Student testified on the third day of hearing but otherwise was not present. Attorney Diane Foos observed the first day of hearing and Lindsey Mehler, a paralegal, attended on the last day.

Attorney Heather M. Edwards appeared on behalf of the Roseville Joint Union High School District (District). District's Director of Special Education Craig Garabedian was present each day as the District's representative. Law Clerk Kyle Raney observed the first day of hearing.

Student filed his Request for Due Process Hearing (complaint) with expedited and non-expedited issues on August 19, 2013.¹ The evidentiary portion of the expedited hearing was closed on September 23, 2013. The ALJ allowed counsel, at their request, to present oral closing arguments telephonically on September 24, 2013, and ordered them to submit a list of case authorities they intended to rely upon during their oral closing arguments by

¹ The scheduling of the expedited hearing to commence on September 17, 2013, complied with the mandate that it be held within 20 school days of the filing of the expedited due process hearing request. According to the District's 2013-2014 school year calendar which is in evidence, school was not in session on September 2, 2013, the Labor Day holiday, and therefore is not counted when calculating the timeline.

12:00 p.m. on September 24, 2013. The ALJ recorded the closing arguments and both parties timely submitted their respective list of case authorities.²

ISSUES³

Issue One: Was Student's May 2, 2013 disciplinary conduct caused by, or did it have a direct and substantial relationship to, his attention deficit hyperactivity disorder (ADHD) and impulse control disorder?⁴

Issue Two: Did the District commit a procedural violation by not considering all relevant information in connection with the manifestation determination (MD) review process?

CONTENTIONS OF THE PARTIES

Student contends that in addition to his primary, qualifying disability of hard of hearing, he also has the following disabilities which the District was aware of and failed to consider during the MD review process: ADHD combined type, impulse control disorder, and bipolar disorder. It is Student's position that his act of striking the assistant principal was impulsive and caused by, or had a direct and substantial relationship to, his ADHD and his impulse control disorder. Additionally, Student maintains that the District failed to consider all relevant information during the MD review, including details of the disciplinary conduct, Parental input, health information, the entire 2012 triennial assessment, his complete operative individualized education program (IEP), definitions of ADHD and impulsivity, teacher observations, his bipolar diagnosis, and a letter from Heritage Oaks Hospital. It is Student's position that the District's failure to consider all relevant information resulted in a procedurally invalid meeting which deprived him of educational benefit and significantly impeded Parent's ability to participate in the process.

² To maintain a clear record, Student's list of authorities has been marked for identification as exhibit S-45, and the District's list of authorities is marked for identification as exhibit D-54.

³ At the start of the hearing, Student moved to slightly re-word Issue Two. The District had no objection and Student's motion was granted. The issues have been further modified for clarity. No substantive changes were made.

⁴ Although Student alleges he also has bipolar disorder, Student did not litigate that his conduct was a manifestation of his bipolar condition. Rather, Student contends under Issue Two that the District failed to consider this disability.

The District contends that it considered all relevant, available information, including Student's alleged ADHD and impulse control disorders and conducted a procedurally compliant MD review. The District asserts that based upon Student's file including the November 2012 triennial assessment, it was not aware of any disabilities other than his hearing impairment and processing deficits, but even so, the MD review team considered Student's possible ADHD and related symptoms. The District maintains that even if Student did have impulse control deficits, his disciplinary conduct was not an impulsive act, and therefore was not a manifestation of his ADHD. The District contends that Parent did not provide it with information on Student's bipolar diagnosis, and even if she had, the team was not required to consider it as this diagnosis was not made until after the disciplinary conduct.

FACTUAL FINDINGS

Jurisdiction and Background

1. Student is a 17-year-old male who resides with his Parents within the District's boundaries. He attended Roseville High School (RHS), a District school, for his sophomore and junior years, starting with the 2011- 2012 school year until his suspension on May 2, 2013. Sports are an important motivator for Student, and he played on the high school football team. He is described as social and liked by his peers.

2. Student has a long history of academic struggles and behavioral issues dating back to kindergarten. Beginning in February 2009, Student first received services and supports as a seventh grader from the Roseville City School District under a Section 504 plan.⁵ Student's 504 plan identified his disabilities as attention deficit disorder (ADD) and moderate bilateral hearing loss.⁶ Student had difficulty focusing, working independently, keeping organized, and was easily distracted.

Eligibility for Special Education

3. Student originally qualified for special education during eighth grade on or about December 11, 2009, under the primary category of hard of hearing, and the secondary

⁵ A 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to students with physical or mental impairments that substantially limit a major life activity such as learning.

⁶ Witnesses and documents at times interchanged the labels ADD and ADHD when identifying Student's disability. As established through Student's expert, Dr. Randall Ball, since 1987 all such diagnoses fall under the label ADHD, and are then subcategorized into three types, i.e. predominantly inattentive, or hyperactive/impulsive, or combined type.

category of other health impaired (OHI), due to ADHD.⁷ Since his initial eligibility, Student has attended general education classes and received specialized academic instruction through a resource specialist program (RSP), hard of hearing services as needed, and accommodations, modifications and supports. At Student's November 28, 2012 triennial IEP team meeting, the District removed his secondary eligibility category of OHI.

4. Student was diagnosed with moderate bilateral hearing loss when he was in the third grade. According to an August 2012 Placer County Office of Education (PCOE) audiology evaluation, Student's hearing loss affects his ability to hear soft, high pitch sounds. Based upon the audiology evaluation and her own assessment of Student in August 2012, Gwenyth Sharwood, a PCOE teacher for the deaf and hard of hearing, determined that Student is able to understand 76 percent of spoken utterances without the assistance of hearing aids or lip reading support. Student infrequently wears his hearing aids and testified at the hearing without them. He reported that he was able to hear the questions posed, and answered each question without hesitation or a request that it be repeated.

5. Robin Fennel, a licensed clinical social worker (LCSW) and Student's treating psychotherapist with the Kaiser Permanente Medical Group (Kaiser), first diagnosed Student with ADHD combined type in 2006 when he was 10 years old.⁸ This means Student exhibits all three symptoms of the disorder including inattention, hyperactivity, and impulsivity. In 2009, Student's treating psychiatrist at Kaiser prescribed medication to target ADHD symptoms, but Student had an adverse reaction to the medication and ceased taking it shortly thereafter. In January 2010, Ms. Fennel additionally diagnosed Student with impulse control disorder, which she testified highlighted the significance of Student's impulsivity.

Student's Disciplinary Conduct of May 2, 2013

6. A full understanding of the nature of the disciplinary event is required in order to make an informed decision regarding its relationship to any of Student's disabilities. A detailed account of Student's conduct on May 2, 2013, is presented below. From all accounts, during the MD review team meeting, school psychologist Shelly Harris simply read a brief summary of the incident which contained few details.

7. May 2, 2013, began as a typical school day for Student, although his campus was engaged in the California State Standardized Testing and Reporting (STAR) process. He was tardy to his first period class and forgot his lunch. He called Parent who assured him

⁷ The District could not locate Student's initial IEP, although subsequent IEP's list his special education entry date as December 11, 2009.

⁸ Ms. Fennel obtained her LCSW license in 1990. She received a master's in social work in 1987 at California State University, Sacramento.

she would bring it to the office and text him when it arrived. Student was using his girlfriend's phone that morning and saw text messages concerning a male dance instructor. He testified that he was "mad," felt his relationship was in jeopardy, and needed to talk with his girlfriend right away. Student was given a pass to leave class and go to the office to retrieve his lunch. Once in the hall, he saw his girlfriend and a verbal argument ensued. In Student's words, the two were "yelling at each other." Teacher Ron Grove was the first to arrive and he instructed Student to return to his class. Student refused and told him, "No."

8. Student confronted his girlfriend about the text messages and a heated argument ensued with each accusing the other of cheating. Teachers intervened and the girlfriend returned to her class while Student sat on a bench with a male friend. Student remained visibly upset and crying so athletic director Jaime Bunch called his assistant football coach Daniel Garcia to sit with Student and attempt to talk with him.

9. Mr. Garcia has worked at RHS for the past 19 years as assistant varsity football coach, and as a campus monitor for the past 16 years. He first met Student in June of 2012. Mr. Garcia presented as a concerned and involved coach who cares about Student. He demonstrated good recall about the incident and his testimony was consistent with his written statement which he prepared two days after the incident.⁹ During questioning, Mr. Garcia was open and non-defensive as to his hands-on involvement with Student. Other witnesses and documentary evidence corroborated his account.

10. At approximately 10:00 a.m., Mr. Garcia received the call for assistance. He responded and found Student very upset and crying. He sat next to Student and spoke with him. Student started to calm down. Jon Coleman, assistant principal, called Mr. Garcia on the radio to see if he needed assistance. Mr. Garcia declined as the situation was under control. Shortly thereafter, Student's girlfriend entered the hall and Student escalated. He became agitated and wanted to speak with her. Mr. Garcia instructed Student that he could not speak with her and needed to return to class. Student refused to listen and told Mr. Garcia, "No." Student's male friend encouraged him to stay away from his girlfriend but he would not listen to the friend either. Student went to his girlfriend and repeatedly told her, "I need to talk to you." She responded, "No. Stay away from me." Student grabbed her arm but let her go when Mr. Garcia told him that he could not touch her. Student remained agitated, continued to repeat that he needed to talk to his girlfriend, and refused to listen to staff as they attempted to calm him and keep him away from his girlfriend.

11. Student's girlfriend tried to get away by walking down the hall towards the administration office. When it was clear that Student would not listen and began to pursue her, Mr. Garcia called Mr. Coleman for assistance. School officials followed Student as he followed his girlfriend, informing him that he could not talk with her, and directing him to stop. Student acknowledged that he was "probably" told to stop more than one time.

⁹ Mr. Garcia initially handwrote his statement. His wife typed it for him on May 27, 2013, which accounts for the discrepancy in the date of the report.

12. Mr. Coleman has spent more than 20 years in the field of public education and this is his ninth year as assistant principal at RHS.¹⁰ He knew Student prior to the incident and felt they had a good rapport. He provided detailed testimony consistent with his written statement which he prepared the day of the incident. Mr. Coleman arrived on scene from the administration building as Student pursued his girlfriend at a brisk pace towards administration. He observed Student to be agitated, in “obvious distress and openly crying.” When he arrived, he stood in front of Student to allow Student’s girlfriend to move farther away, and instructed him to stop many times. Student did not recall saying anything, although District witnesses established that Student continued to repeat that he needed to talk to his girlfriend *now*. There was no question that Student heard school officials direct him to stop pursuit and inform him that he could not talk with her. Mr. Garcia encouraged Mr. Coleman to call the police, and Mr. Coleman did so once Student darted around him.

13. Neither Mr. Coleman nor Coach Garcia had seen Student in such an emotional, uncontrollable state. Mr. Coleman described him as inconsolable and sobbing. Mr. Coleman’s training has consisted of dealing with mental health crises and assessing suicide risk. He testified that Student appeared to have mental health issues at the time of the incident and that he presented a safety risk. Mr. Coleman described Student’s relationship with his girlfriend as stormy and that the two argued fairly regularly, which he has personally witnessed approximately three to four times. Both Mr. Garcia and Mr. Coleman have had to intervene and stop arguments between the two. Prior to the date of the incident, Student was generally compliant with Mr. Coleman’s directives.

The Physical Contact

14. Mr. Coleman called 911 on his cell phone and reported that Student was belligerent, refusing to comply with instructions, and he requested officer assistance. He kept the call open as they pursued Student as he pursued his girlfriend up the stairs to the office. Student continued to cry and yelled repeatedly, “Please, let me talk to you!” As the girl approached the office door, Mr. Coleman slid past Student, held the door to allow her to enter, and then blocked the doorway to prevent Student from following. Mr. Coleman stood in the doorway, raised his hands with elbows bent at his side and both palms facing Student as a visual command and verbally instructed him, “Stop, stop, stop!” Student was loud and insistent that he needed to talk to his girlfriend. He testified that he knew it was Mr. Coleman, the assistant principal, blocking him.

¹⁰ Mr. Coleman obtained a master’s in education administration in 2003. He holds an administrative services and a single subject teaching credential, is certified in cross-cultural language acquisition and development (CLAD), and has an emergency medical technician (EMT) certification. Mr. Coleman has been trained in crises response, mental health intervention, and working with difficult students. His prior employment includes teaching for 14 years and serving as a vice principal for one year.

15. Overall, the above description was generally agreed to by all eyewitness accounts. From this point forward there are some inconsistencies between witness accounts and written statements. District witnesses contend that Mr. Coleman did not place hands on Student. It is Student's perception that Mr. Coleman grabbed his shoulders. The weight of the evidence supports a finding that Mr. Coleman did not touch Student.

16. The next discrepancy is as to the number of times Student hit Mr. Coleman. Both of Student's experts established that the number of hits was not a determining factor as to whether the act was impulsive. Student described that he threw his arms up and out to break free from Mr. Coleman's hold and then punched him one time in the chest near his left shoulder. Although each eyewitness recollected events from their individual perspective, the District established that Student physically pushed against Mr. Coleman in an attempt to gain entry and when prevented, he threw at least one and up to three punches. Mr. Coleman testified that he was pushed and received a combination of blows. Mr. Garcia, who was standing behind the taller and larger Student, recalled him throwing a right and a left punch.

17. Eyewitness Judi Daniels, an assistant principal at RHS, saw the incident, which she described as "shocking", from inside the office looking out. She had never before seen a Student punch an assistant principal, even though she has seen assistant principals frequently step into the middle of a fray to calm the situation.¹¹ Student was attempting to get in and she heard Mr. Coleman tell him, "No, you can't go to her" and advise him he needed to calm down. Immediately thereafter, Student punched him. She described Student as flailing around with his shoulders moving from side to side and attempting to push his way into the office, but she did not see any other punches land. Student was angry, distraught and determined to get in. His jaw was clenched; he was exclaiming although she could not recall his words; and afterwards he was crying as his male friend led him away.

18. After Student punched Mr. Coleman, Mr. Garcia restrained Student from behind by wrapping his arms around him. He announced it was "Garcia," turned Student around, told him to calm down, and led him out to the stairs with the help of Student's friend. Student did not struggle and continued to cry. Only a few seconds passed from the time his girlfriend entered the office until the time Student hit Mr. Coleman. The length of time from when Mr. Garcia first received the call for assistance until the time Student struck the assistant principal spanned a period of approximately 15 to 20 minutes. Mr. Garcia was present when Officer Miller from the Roseville Police Department arrived and handcuffed Student, explaining that he needed to ensure his own safety. Student was cited for battery on a school employee and released to his Parent.

19. When Student left the office, Mr. Coleman interviewed the girlfriend and asked her to write a statement. She shared that Student was upset about her text messages

¹¹ Ms. Daniels has been a teacher for 23 years. She started working for the District in approximately 1996 and this is her third year as an assistant principal. She holds a teaching credential in English and an administrative services credential.

involving another male and reported that Student “gets very mad very quickly about everything.”¹² He recorded this in his written statement. Mr. Coleman obtained statements from other staff members and students, but did not ask Student for his statement.

The Aftermath

20. The District initially suspended Student for five days for violating Education Code section 48900, subdivision (a)(1), caused or attempted to cause physical injury to another; section 48900, subdivision (a)(2), willfully used force or violence; section 48900, subdivision (k), disrupted school activities or otherwise willfully defied the valid authority of school officials; and section 48915, subdivision (a)(1)(e), assault or battery on a school employee.¹³ Mr. Coleman informed Student in the presence of Officer Miller of his suspension and that he would be recommended for expulsion. Student remained distraught and engaged in self-injurious behavior by smacking his head backwards against the wall with force. Sometime later, at Student’s request, he was allowed to apologize to Mr. Coleman, and the two shook hands. Parent was present during this exchange and recalled that Mr. Coleman told Student he was concerned about him and wanted to know how he was doing afterwards.

21. Parent testified at hearing and presented as a sincere witness, who took her responsibility of testifying seriously. On the drive home, Parent called Student’s therapist Ms. Fennel as he was still crying, and she felt he needed to be seen immediately. Ms. Fennel spoke with Student on the phone and scheduled an appointment for the next morning.

22. That afternoon as Mr. Coleman was writing his statement, he was interrupted due to a second emergency situation involving Student. A female student reported that Student texted her that he had consumed a quantity of medication and was trying to kill himself. Mr. Coleman again called 911, this time to dispatch police to Student’s home, and requested that the female student try to contact Student to ascertain his condition.

23. Student testified that upon arriving home, he remained sad and upset. He contacted a friend and told the friend he was going to overdose on medication and kill himself. The police called Parent to inform her of Student’s reported suicide attempt. She checked on Student, confronted him and searched his room. He was enraged, cussed at her, and told her to get out of his room and mind her own business. When emergency personnel

¹² The girlfriend’s statement to Mr. Coleman is hearsay and cannot by itself support a factual finding. (Cal. Code of Regs., tit. 5, § 3082, subd. (b).) However, the statement supports other direct evidence of Student’s arguments with his girlfriend and his own statement that he was “mad.”

¹³ Witnesses and documents referenced the former version of the Education Code, section 48915, subdivision (a)(5). Legislation enacted January 2013, restructured subdivision (a).

arrived, Student used profanity and told them to get out of his room. Despite his protestations that he did not take any pills, police placed Student on a 5150 hold and paramedics took him to Kaiser on a stretcher by ambulance.¹⁴ He was transferred the next day to Heritage Oaks Psychiatric Hospital and admitted for five days. On May 7, 2013, Heritage Oaks discharged Student with a diagnosis of bipolar disorder with psychotic features and provided him a psychotropic medication regimen. Student agreed to try the prescribed medication and believes this is helping him with his anger issues.

24. Jeff Clark, a credentialed school psychologist and Student's special services coordinator went to check on him at Heritage Oaks on May 7, 2013, the date of his discharge.¹⁵ He has worked in education since the year 2000. He was aware of Student's suicide attempt/ideation and acknowledged during his testimony that this was the second time Student displayed suicidal ideation since the start of the 2012-2013 school year. Although Mr. Clark did not recall the details of his conversation with Parent at the hospital, Parent credibly established that she informed him of Student's diagnosis of bipolar disorder and that he was taking prescribed medication for this condition.

Manifestation Determination Review Meeting, May 9, 2013

25. While students with disabilities are subject to disciplinary measures such as suspension or expulsion by a school district, federal law prohibits expelling a special education student for conduct determined to be a manifestation of his disability. When a special education student is suspended for disciplinary reasons for more than 10 days, the suspension constitutes a change of placement. If the school district decides to change the educational placement of a student with a disability, either by an expulsion or suspension in excess of 10 days, because of a violation of law or code of conduct, the parents and relevant school district members of the student's IEP team must meet and review all relevant information in the student's file, teacher observations, and relevant information from the Parent. The review team must determine whether the student's conduct was a manifestation of his disability.

26. In making the manifestation determination, the team must determine: (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the

¹⁴ Under the Welfare and Institutions Code, section 5150, police and other designated professionals, may, upon probable cause, place an individual who as a result of a mental disorder is a danger to himself or others, or who is gravely disabled, in an approved health care facility for treatment and evaluation for up to 72 hours.

¹⁵ Mr. Clark received a master's degree in counseling from California State University, Sacramento in 2005 and a certification of program completion in school psychology. That same year he obtained a pupil personnel services credential. Prior to working with the District, he was a substitute teacher as well as counseling intern and school psychologist intern.

student's disability; and/or (2) if the conduct in question was the direct result of the local education agency's (LEA) failure to implement the IEP.¹⁶ If the answer to either question is yes, then the student's conduct is deemed a manifestation of his disability and the district may not remove him from his current placement without an order from an ALJ. If the answer to both questions is no, then the district may change the student's placement in the same manner, and for the same duration, that it could change the placement of a student not receiving special education services.

27. On May 2, 2013, the District initially suspended Student from school for five school days, and recommended Student's expulsion, which triggered the District's obligation to hold a MD review team meeting within 10 school days thereafter, to review the disciplinary conduct and determine if it was a manifestation of Student's disability. By letter dated May 7, 2013, the District extended Student's suspension until the governing board makes a final determination regarding Student's expulsion. Student's initial expulsion hearing was continued at Parent's request and had not been conducted at the time of the due process hearing.

28. The District timely convened Student's MD review team meeting on May 9, 2013. The following relevant members of Student's IEP team were in attendance: Parent, Student, Ms. Davis, Mr. Clark, school psychologist Angela Sanchez, resource teacher Karen Lane, algebra teacher Miguel Quinonez, biology teacher Erin Granucci, and administrator Matt Pipitone. District witnesses were familiar with the role of the MD review team and the questions to be answered, but evinced less familiarity with their duty to consider all of Student's suspected disabilities.

29. Ms. Davis was in charge of the MD review meeting. She did not testify at hearing. According to Parent, Ms. Davis explained that the purpose of the MD review meeting was to decide if Student's qualifying disability, as listed on his IEP, was directly related to his conduct. Parent's testimony was convincing, corroborated by the MD report findings and the testimony of Mr. Clark, and is highly credited. According to the MD review report, the District only considered Student's qualifying disability of hard of hearing when answering the first question as to whether his conduct was caused by, or had a direct and substantial relationship to, his disability. Mr. Clark additionally testified that Student, at the time of the MD review meeting, had no disabilities other than his hearing loss. It was Mr. Clark's opinion and testimony that the MD review team is only required to consider Student's qualifying disability as listed on his IEP.¹⁷

¹⁶ The question of whether the District failed to implement Student's IEP is not at issue in this proceeding.

¹⁷ On June 3, 2013, Ann Vollaro, program specialist for the Placer County Special Education Local Plan Area (SELPA), emailed Mr. Clark the following, "[Parent] called me about [Student's] pending expulsion. ... She is concerned that [Student's] attention deficit and his diagnosis of an "impulse disorder" were not considered in his MD hearing. Your perspective?" To which Mr. Clark replied, "The manifestation team reviewed the assessment

30. Although the District is not required to ensure that an eyewitness to the incident attend the MD review, the team must be sufficiently informed of the event in order to answer the manifestation questions. Student was the only witness present and the team did not invite him to describe what happened on May 2, 2013. The team did not review any witness statements. Rather, Ms. Davis read a brief summary of the event which provides no details of Student's emotional state. The team did not discuss the conduct any further.

31. Ms. Sanchez reviewed relevant portions of her November 2012 psycho-educational report with the team, and the team reviewed Student's operative IEP in terms of eligibility, accommodations and services.¹⁸ Three of Student's teachers participated in the MD review team and all had input in answering the two required questions. Although Student contends that the MD review team did not consider teacher input, he failed to prove that any teacher had relevant input that was not considered.

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

Hard of Hearing

32. The MD review team determined that Student's behavior was unrelated to his qualifying disability of hearing impairment. Ms. Davis asked Student if he could hear the directives of school officials, and he confirmed he could. Student's acknowledgement that his hearing loss did not prevent him from hearing staff directives was perhaps the best evidence available to the team. The evidence showed that Student has processing deficits which could have slowed his reaction to staff directives. However, the District established that his conduct was not related to a processing deficit given that numerous staff directed him multiple times, over time. The evidence supports the MD review team's determination that Student's act of striking the assistant principal was not caused by, nor did it have a direct and substantial relationship to his hearing loss. Student did not contend otherwise.

33. To the extent Student contended that the MD review meeting was procedurally deficient in that neither an audiologist nor teacher for the deaf or hard of hearing was present,

which was current (was just done in October 2012) and the only handicapping condition listed in the IEP and report was Hard of Hearing." Additionally, Student established that Mr. Clark told Parent during a telephone conversation in June 2013 that the team was only required to consider the disability noted in Student's IEP.

¹⁸ Ms. Sanchez is a credentialed school psychologist and licensed educational psychologist and has worked in this capacity for 10 years. She estimated that she has conducted approximately 600 special education assessments. She received her bachelor's degree in psychology from Brigham Young University and a master's in counseling from California State University, Hayward, and holds a pupil personnel services credential.

Student did not prove that a hearing specialist was a required relevant member of Student's IEP team. Mr. Garabedian persuasively testified that a hearing specialist would be required to attend Student's MD review if the team members needed information that they did not have regarding Student's hearing loss and how it impacted his functioning or required an explanation of audiology information they could not understand.¹⁹ Arguably, the absence of a hearing specialist may have constituted a procedural violation if a team member requested the presence of such a specialist and if Student contended that his hearing loss was substantially related to the disciplinary conduct. Neither is true in this case.

34. Upon concluding that it had appropriately implemented Student's IEP, the District determined that Student could be disciplined pursuant to discipline procedures applied as to non-disabled students. It recommended that Student be placed in an interim alternative educational setting at his home pending resolution of the disciplinary sanctions. Student's case manager was to collect school work weekly, review for appropriateness of instruction, send appropriate assignments home to Student and receive the completed assignments back, and be available for consultation with Student. Student disagreed with these findings on the grounds that the District failed to consider all of Student's disabilities, and all relevant information, and filed this appeal of the manifestation determination.

*Student's ADHD and Impulse Control Disorder*²⁰

35. Student contends that in focusing solely on his qualifying disability, the District committed a procedural violation by failing to adequately consider his ADHD and impulse control disorders during the MD review, and substantively should have determined that his conduct was impulsive and a manifestation of these disabilities. The District asserts that the MD review team did address Student's ADHD and related symptoms, but that testing data and educational records, including teacher observations, revealed that Student did not struggle with impulsivity, and even if he did, the conduct in question was not impulsive.

36. After the MD review determined that Student's conduct was not a manifestation of his hearing loss, Parent asked the team to consider Student's ADHD and impulsivity. The MD review report does not answer the question of whether Student's

¹⁹ Mr. Garabedian has served as the District's special education director since 2007. Prior to this he was a school psychologist for approximately 13 years, six of these with the District. He has maintained a private practice as a licensed educational psychologist since 1998. He obtained a master's in school psychology from San Francisco State University and holds a post graduate certificate in clinical neuropsychology, pupil personnel services credentials in school psychology and in school counseling and an administrative services credential. Mr. Garabedian has assessed approximately 1,000 students for special education, including students with hearing loss, bipolar disorder, and hundreds of students with ADHD.

²⁰ Both diagnoses are characterized by impulsivity, and this is the only symptom at issue.

conduct was a manifestation of his ADHD or impulse control disorder. The evidence showed the District members of the MD review team determined, based upon his triennial testing, that Student did not struggle with impulsivity and his conduct was not impulsive. Although it is unclear whether the MD review team officially answered the question of whether Student's conduct was a manifestation of his ADHD and impulse control deficits, this issue was fully litigated at hearing and will be determined on the merits herein.²¹

37. Student established he has a known disability of ADHD which the MD review team was required to consider. In summary, Student's educational records are replete with information regarding his ADHD, such that the District was required to determine whether his conduct was a manifestation of this disability. From 2009 until August 2012, Student's secondary eligibility was identified as OHI due to ADHD. Although the District removed Student's OHI eligibility in November 2012, Student's experts established that ADHD is not a condition that simply goes away over time. Although hyperactivity may decrease in the teenage years, inattention and impulsivity remain. According to Student's operative IEP from November 2012, he requires numerous accommodations due to his weaknesses in attention. Although the District may not have received an official diagnosis from Student's treating professionals, Student demonstrated that the District was aware he was being seen professionally, that Kaiser completed an assessment in August of 2012, and that Parent signed releases for the exchange of information when requested by the District. Parent informed the District of her concern with Student's ADHD and specifically requested that his triennial assessment focus on this disability. Further, teachers reported that Student struggled with a lack of focus and organization; Ms. Sanchez personally observed his off task behaviors; and testing results from Student's November 2012 triennial evaluation showed he displayed symptoms of both inattention and impulsivity consistent with ADHD.

38. Based upon teacher reports and his discipline record, Student tried to establish that he had a tendency to act impulsively due to his ADHD and impulse control disorder, and the District tried to prove otherwise.²² Resolution of Student's two issues does not depend

²¹ It is unlikely the District determined whether Student's conduct was a manifestation of a disability which it decided he did not have.

²² Student's disciplinary record documents monthly offenses from September 2011 through his suspension in May 2013. Without evidence of the actual underlying incidents, Student's reported behaviors, including cheating on a test, multiple tardies, unauthorized cell phone use, not following directions, truancies, defiance, use of profanity, nonsuit for P.E., and a fight with a teammate, are equally likely to be consistent with impulsivity as with teenage rebellion. Ms. Lane, who has worked with Student in her academic lab class for two years, testified that she has not known him to act impulsively, and described him as unmotivated and distracted by his cell phone. Student countered with the testimony of Dr. Ball who explained that teenagers with ADHD are often described as unmotivated, and identified Student's distraction with his cell phone to be a classic example of an impulsive behavior.

upon a determination of whether Student's ADHD caused him to act impulsively. Critical to a determination of Issue One, is whether Student's conduct on May 2, 2013, was impulsive. Even if Student's ADHD and impulse control disorder caused him to act impulsively at times, Student failed to show by a preponderance of the evidence that his disciplinary conduct was impulsive.

39. Student spent some time exploring underlying test data from the triennial assessment. He attempted to discredit the District's method of reporting scores, and confronted District witnesses with the questionable validity of reported behavior rating scales in support of his contention that the MD review team failed to consider specific testing results that implicated symptoms of impulsivity.²³ While the testing results are certainly relevant information, there is no need to determine the impact of the team's failure to consider this information or other relevant information, given the substantive determination in this Decision that Student's conduct was not impulsive, and therefore not a manifestation of his ADHD or impulse control disorder.

Was Student's Conduct Impulsive?

40. Student presented two expert witnesses to establish that his conduct was an impulsive act and a manifestation of his ADHD. As discussed below, Student's experts were not persuasive in this regard, and the evidence showed that his conduct was not impulsive.

Student's Expert, Robin Fennel

41. Ms. Fennel was recognized as an expert in adolescent mental health diagnoses. She has over 13 years of experience in providing treatment to children and families, and is authorized to diagnose mental health disorders listed in the Diagnostic and Statistical Manual of Mental Disorders, now in its Fifth Edition (DSM-V). She typically sees close to 1200 children each year in her practice.

42. Ms. Fennel first met Student in November of 2004 and focused on his presenting diagnosis of oppositional defiant disorder. She removed his prior diagnosis of depression as he did not display any signs of this. In 2006, after meeting with Student four times, administering the Conner's rating scales and obtaining a family history, she diagnosed Student with ADHD, combined type. She continues to treat Student, although has met with him infrequently, approximately 10 times for one hour over the past nine years, six times since January 2006. She has never seen him at school and has not interviewed any of his teachers or reviewed any educational records.

²³ Student identified significant concerns with the District's reporting of results from the Conner's-3 Rating Scales which are designed to assess ADHD and are completed by Parent, Student and teachers. Some of the teachers failed to answer multiple questions associated with particular indexes, resulting in a profile of questionable validity.

43. Ms. Fennel described impulsivity as a difficulty in delaying responses, acting without thinking of the consequences, and repeating the same mistake. In January of 2010, she diagnosed Student with impulse control disorder which she described as a failure to resist an impulse that may be harmful to self or others. Although she readily described Student as impulsive, she provided no examples of impulsive acts she directly observed or which were reported to her. Ms. Fennel testified that she adds a diagnosis of impulse control disorder when impulsivity is of heightened concern in the ADHD presentation. Again, there was no evidence of how she concluded that Student's impulsivity was a heightened concern and Ms. Fennel provided no behavioral examples.

44. Although Ms. Fennel demonstrated a good understanding of Student's disciplinary conduct, she readily conceded that it would be difficult for her to know if his conduct was related to his impulsivity. She testified that she could not form an opinion as to whether or not his act of striking the assistant principal was caused by his impulsivity as she was not privy to Student's emotional state or what Student said or felt, and did not witness the event or hear eyewitness accounts.

Student's Expert, Dr. Randall Ball

45. Student hired Dr. Randall Ball to review his relevant school records and to render an opinion as to whether his disciplinary conduct was caused by or had a direct and substantial relationship to his ADHD.²⁴ Since 1978 Dr. Ball has evaluated between 500-600 students in the school setting. He has conducted independent educational evaluations and provides consultation to various school districts as well as trainings in the areas of ADHD evaluation, diagnoses pursuant to the DSM-V, and special education eligibility. Dr. Ball was recognized as an expert in the area of educational psychology.

46. It is Dr. Ball's opinion that Student's conduct was an impulsive reaction in the heat of the moment. He considered it a behavioral manifestation of Student's lack of impulse control, as students with ADHD have trouble with executive functioning and emotional self-

²⁴ Dr. Ball earned a master's degree in education with a major in counseling and emphasis in developmental psychology from California State Polytechnic University at San Louis Obispo in 1977. He obtained a doctorate of education in counseling and educational psychology from the University of San Francisco in 1988. Dr. Ball holds a license as a marriage and family therapist since 1988 and is a board certified behavior analyst. He has been in private practice since 1990 wherein he evaluates children and adults with psychological and developmental disabilities. He previously worked in the public school systems for approximately 13 years as a counselor for the county office of education in the early infant intervention program, and as a behavioral analyst with Tri-County Regional Center for over 10 years.

regulation. Student was in a heightened emotional state which added to his impulsivity by reducing his ability to control his impulses.

47. In Dr. Ball's opinion, Student's conduct had a direct and substantial relationship to his ADHD. He was emotionally upset, in a novel and thus stressful situation wherein he was less likely to show good control, and reacted to stimuli without forethought, planning or consideration of consequences. He considered the situational antecedents "novel" in that the records did not indicate any similar occurrences. Dr. Ball did not persuasively account for the fact that the situational antecedent of Student having heated arguments with his girlfriend, and needing to be separated and instructed to return to class by both Mr. Coleman and Mr. Garcia, has happened with some regularity.

48. When asked on cross-examination if he could entertain a situation wherein a student with impulsivity may hit a staff member and it would not be associated with his disability, Dr. Ball offered the following scenario: if a student was in a familiar, structured setting where he knew the rules, a stimulus occurs and he acts with reflection and intent to produce certain consequences. Student's conduct in question involved this very scenario. Student was at school, a structured setting where he knew the rules; he learned of a concerning text message; Student and his girlfriend have a stormy relationship and began to yell at each other which has happened previously; staff intervened as they have previously; Student was advised of the rules, many times, and informed by staff and a friend that he must stop his pursuit; Mr. Coleman eventually blocked his entry to reach his girlfriend; and Student acted with intent to enter the office by striking Mr. Coleman. Dr. Ball's testimony, at most, supports a conclusion that Student's misconduct had an attenuated relationship to his ADHD symptoms. Dr. Ball conceded that heightened emotionality can result in an act of aggression that has no relation to a student's ADHD. Dr. Ball has never met Student, did not interview Parent and has not spoken with any teacher. Therefore, he did not have a sufficient factual basis to support his opinion that it was "not in [Student's] nature" to assault the assistant principal to gain access to his girlfriend.

Determination that Student's Conduct was not Impulsive

49. District witnesses were more persuasive in their testimony that Student's conduct was not impulsive, but rather demonstrated intent. The situation leading up to the incident of aggression is important to consider as this was a chain of events, spanning time and place, and included a period wherein Student was able to calm himself. The entire event spanned a period in excess of 20 minutes. Student's conduct must be analyzed in the context of his discovery of information which threatened his relationship and spawned his intent to confront his girlfriend.

50. Student was angry and upset, failed to comply with multiple directives from several officials to "stop," continued down the hallway, purposefully evaded Mr. Coleman in an attempt to catch up to his girlfriend, and then attempted to gain access to her by physical means. Student heard and saw Mr. Coleman as they proceeded to the office and recognized him as an adult in a position of authority. Student demonstrated purpose when he

intentionally evaded Mr. Coleman and disregarded his directions. There were many opportunities and multiple reminders from trusted sources, including his coach and friend for him to stop what he was doing as the situation progressed. Once it was clear that that Student lost his opportunity to engage his girlfriend, he acted with intent to gain access by pushing and then punching Mr. Coleman. He needed to talk to his girlfriend and no one was going to stop him. Student's conduct was not impulsive and he did not prove that his ADHD or impulse control disorder prevented him from exercising judgment.

51. Further, Student displayed aggression during the incident and remained angry for a prolonged period of time afterwards. Mr. Clark remained with Student on and off for one-two hours. During this time, Student displayed a high level of anger and upset such that Mr. Clark was concerned Student would hit someone else. This is consistent with both Mr. Coleman's observation of Student banging his head against the wall while he was with Officer Miller, and Parent's description of Student's continuing anger at home when he yelled at her and law enforcement to get out of his room. Nothing in the diagnostic criteria for ADHD states that aggression is a component of this disorder. Student's expression of remorse by apologizing to Mr. Coleman does not establish that he acted on impulse. Rather, his continuing anger weighs against his conduct being the result of impulsivity.

52. Student's conduct may have involved some impulsivity, but at its core was a plan to engage his girlfriend, and his conduct showed intent, even if that intent was formed in the moment. Student made a choice to engage his girlfriend and consciously disregarded the instructions of staff, advisements of a trusted coach and pleas of his friend. His choice evinced poor judgment and resulted in a progression of events that involved a series of decisions. Student did not establish that his conduct was caused by, or had a direct and substantial relationship to, his ADHD or impulse control disorder.

Bipolar Disorder and History of Emotional Dysregulation

53. Student contends that the District was aware of his hospitalization and discharge diagnosis of bipolar disorder and failed to consider whether his conduct was a manifestation of this disability. The District alleges that it was not aware of his bipolar diagnosis at the time of the MD review and, therefore, did not fail to consider a known or suspected disability. Further, even if the District was aware, Student's diagnosis of bipolar disorder was "new" information which arose subsequent to the disciplinary conduct such that the District was not required to consider whether Student's conduct was related to this new disability.

54. Ms. Fennel's description of bipolar was not disputed. Bipolar disorder consists of wide mood swings with depressive and hypomanic episodes. Depression is characterized by sleep and appetite disturbances, low energy, feelings of helplessness and hopelessness, fatigue, apathy and suicidal ideation. Hypomania is characterized by periods

of grandiosity, decreased need for sleep, excessive talking, intrusive thoughts, pleasure seeking, distractibility and psychomotor agitation.²⁵

55. Heritage Oaks diagnosed Student with “Bipolar I, mixed with psychotic features” during his five day hospitalization between May 3 through 7, 2013. Ms. Fennel confirmed this diagnosis on August 12, 2013. It was her understanding that a diagnosis of bipolar disorder indicates that the patient’s diagnostic symptoms have presented for a length of time. She explained that bipolar disorder is not a common diagnosis in children and adolescents as many symptoms are similar to typical teenage behavior. Clinicians tend to wait until youth are at least 17-years of age, and other conditions have been ruled out before making this diagnosis and placing this label on an adolescent. Ms. Fennel highlighted the significance of Student’s decision to consent to psychotropic medication for his bipolar disorder, as he has never embraced his long standing diagnosis of ADHD, and has been resistant to try medication.

56. Possible bipolar disorder was not an area of concern at the time of the November 2012 triennial assessment, and Ms. Sanchez did not administer a full social-emotional assessment as this was not an identified area of need.²⁶ Ms. Sanchez recalled Parent mentioning a recent diagnosis of bipolar disorder at the end of the MD review meeting, although she had no knowledge of Student’s bipolar diagnosis prior to the meeting.

57. Parent credibly testified that at her request, Student’s treating psychiatrist at Heritage Oaks, Dr. Hazel, wrote a letter for the MD review meeting, with information on Student’s emotional condition. In the letter, he explains Student’s condition as follows: “Though serious, the clinical history of the months leading up to his admission here are [sic] consistent with Bipolar disorder, and he has started treatment to target the symptoms that led to his admission.”

58. Parent submitted Dr. Hazel’s letter to Mr. Clark at the MD review meeting. He made a copy of it and placed it in Student’s file. At hearing, Mr. Clark did not recall if Parent provided him this letter at the MD review meeting. He then qualified his answer by stating, “It may have happened,” and added that the letter was familiar to him. Ms. Lane remembered hearing that Parent presented a letter after the meeting ended. Parent’s testimony that she provided the MD team with Dr. Hazel’s letter was credible. Parent was a forthright witness who directly answered all questions posed and whose testimony, in most important regards, was validated by the testimony of other witnesses or documentary evidence.

²⁵ Grandiosity is characterized by an inflated ego or one’s belief that he is supreme.

²⁶ The assessment plan signed by Parent on October 31, 2012 had the evaluation area of social/emotional pre-checked. Ms. Sanchez only administered a brief self-report measure in the area of self-concept, the Piers-Harris 2.

59. Notwithstanding whether Mr. Clark recalled receiving the letter at the MD review meeting, he personally visited Student at Heritage Oaks hospital on May 7, 2013, and learned from Parent about Student's bipolar diagnosis and that Student was taking medication for the disorder. This was highly relevant information. The District should not have ignored this information provided to one of its team members, and had a duty to consider it regardless of whether Parent mentioned Student's hospitalization or diagnosis. Further, the weight of the evidence established that the District had knowledge of Student's emotional dysregulation issues dating back to August of 2012, and therefore a duty to consider if his conduct was a manifestation of this suspected disability.

60. Mr. Garabedian testified that the MD review team was only required to consider relevant information that was available at the time of the disciplinary conduct on May 2, 2013. His testimony was not persuasive. The District seems to be relying on a version of the "snapshot" rule which states, in summary, that an IEP is to be judged by information known to the team at the time of its development.²⁷ IEP team decisions can often be improved upon and so this prevents judging an IEP offer with the benefit of hindsight. Here, however, the MD review process is a look back in time, a retrospective to determine whether conduct that has already occurred is a manifestation of a Student's disability. The danger of hindsight is not applicable in this situation. The District's attempt to arbitrarily designate the date and time of the conduct as the cut-off point as to what information is deemed relevant is not persuasive in this situation.

61. Just as the District believes it is important to consider the chain of events leading up to the act resulting in Student's recommendation for expulsion, it is equally important to consider the chain of events that followed the act, up to and including the moment Parent provided the District with Dr. Hazel's letter.²⁸ Ms. Daniels testified with great insight that she was sure she had seen students with emotional issues before, although she was probably not always aware at the time. The District does not always have a full understanding of a student's disability at the time of his disciplinary conduct. The District may receive more pieces to the puzzle by the time of the MD review team meeting, and the law mandates that all relevant information be considered during the MD review team meeting, including District observations and Parental input.

²⁷ *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.

²⁸ Student was diagnosed with cannabis dependency in August 2013. Mr. Garabedian testified that use of cannabis can adversely affect Student's behavior and that withdrawal symptoms include irritability, anger and interpersonal aggression. Nothing in this Decision prevents the parties from considering this additional diagnosis and whether it has any relationship to Student's disciplinary conduct apart from his bipolar diagnosis.

History of Emotional Dysregulation at School

62. Prior to the diagnosis by Heritage Oaks, there were two noteworthy instances of emotional dysregulation at school, in addition to the incident on May 2, 2013, leading to Student's hospitalization.²⁹ In August 2012, Mr. Clark received a report that Student shared suicidal ideation with the junior varsity football coach's daughter. At the time, Student downplayed his ideation, and Mr. Clark assessed him to be at no immediate risk but informed Parent of the situation.³⁰ Parent told Mr. Clark that Student was not following her rules and had been upset recently. She informed him that she would schedule an appointment for Student with his therapist.

63. The next indication of Student's emotional struggles arose in April of 2013. Parent informed the District that Student had run away from home in April after he broke curfew and came home smelling of marijuana. Mr. Clark was aware that Student was living with a relative around this time. Student was also exhibiting difficulties at school.

64. On April 12, 2013, Mr. Clark and Ms. Granucci called Parent and informed her that Student's behavior had deteriorated for the past several weeks, his attendance was poor, and he was not as compliant, frequently late and defiant. Mr. Clark described Student as spiraling out of control and that they needed to do something. Ms. Granucci described Student as angry and checked out for a three week period in which he rarely attended class, slept through class and was rude to staff and peers. Student's emotionality escalated culminating in a tantrum in front of the class when directed to stop talking with his girlfriend in the hallway. Parent discussed her difficulties controlling Student's behavior, shared that he was staying with a relative and requested help from the District. Mr. Clark encouraged her to report Student as a runaway, and recommended that Student return to the home. After this call, Student's attendance improved and he exhibited a positive change in attitude.

65. The incident on May 2, 2013, detailed above, was the next instance of emotional dysregulation. Several District witnesses as well as Parent reported that they had never seen Student so emotionally distraught, for so long, and crying uncontrollably. Mr. Coleman agreed that Student appeared to have mental health issues. After punching Mr. Coleman, his excessive emotionality continued and escalated. Mr. Coleman saw Student throw his head back against the wall while still with the police. When Student arrived home he texted a friend that he was going to overdose on medication and kill himself, cursed at Parent and law enforcement, was placed on an involuntary psychiatric hold, and then hospitalized in a psychiatric facility for five days.

²⁹ This Decision does not determine that these were the only instances of emotional dysregulation; these were simply the instances identified at hearing.

³⁰ Mr. Clark received specialized training in crises response, intervention and suicide assessment through a multi-day training conducted by "ASSIST." He could not recall what the acronym stood for.

66. The MD review team did not discuss any aspect of bipolar disorder, whether Student had such a disability, and whether his conduct was a manifestation of this condition. Additionally, the team did not consider Student's current and past suicidal ideation, additional periods of emotional and behavioral dysregulation, Mr. Coleman's second 911 call, Student's 5150 hold or his hospitalization. All of this is relevant information to be considered in determining whether Student's conduct was a manifestation of his disability. It cannot be determined on this record what the result would have been if the team had properly considered Student's bipolar diagnosis and history of emotional dysregulation.

67. In making the manifestation determination, the team, which includes Parent, was required to consider whether Student's conduct was a manifestation of his bipolar disability. Failing to consider all relevant information in answering the first prong of the MD inquiry deprived Student of the complete consideration required under the IDEA prior to changing his educational placement, and also deprived Parent of her right to participate in the MD review process. For the above reasons, Student must be immediately reinstated at RHS. If the District wishes to continue with the expulsion process, the District needs to convene another MD review team meeting.

LEGAL CONCLUSIONS

Burden of Proof

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

Change of Placement

2. The Individuals with Disabilities Education Act (IDEA) provides states with federal funds to help educate children with disabilities if the state provides every qualified child with a FAPE that meets the federal statutory requirements. Congress enacted the IDEA "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs. . . ." (20 U.S.C. §§ 1400(c), 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.)

3. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to him. (Cal. Code Regs., tit. 5, § 3042, subd. (a).) If a special education student violates a code of student conduct, school personnel may remove the student from his educational placement without providing services for a period not to exceed 10 days per school year, provided typical peers are not provided services during disciplinary removal. (20 U.S.C. §

1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3)(2006).³¹ A “change of placement” is a fundamental change in, or elimination of, a basic element of a student’s educational program. The removal of a special education student from his placement for more than 10 consecutive school days constitutes a change of placement. (34 C.F.R. § 300.536(a)(i).)

Manifestation Determination

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

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

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

³¹ All subsequent references to the Code of Federal Regulations are to the 2006 version.

7. The Ninth Circuit in *Doe v. Maher, supra*, 793 F.2d 1470, 1480, discussed the meaning of various phrases describing “conduct that is a manifestation of the child’s handicap.” The court explained: “As we use them, these phrases are terms intended to mean the same thing. They refer to conduct that is caused by, or has a direct and substantial relationship to, the child’s handicap. Put another way, a handicapped child’s conduct is covered by this definition only if the handicap significantly impairs the child’s behavioral controls. [I]t does not embrace conduct that bears only an attenuated relationship to the child’s handicap.” The court went on to say: “If the child’s misbehavior is properly determined *not* to be a manifestation of his handicap, the handicapped child can be expelled. [Citations] ...When a child’s misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. ...To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not so.” (*Id.* at 1482.)

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

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

10. The IDEA provides that, when dealing with a student with a disability who has violated a code of conduct, school personnel are expressly permitted to consider, “any unique circumstances on a case-by-case basis” in determining whether a change of placement order would be appropriate. (20 U.S.C. § 1415(k)(1)(A).) The law provides for a “broad and flexible” determination of whether a student’s conduct is a manifestation of his disability, “including such factors as the inter-related and individual challenges associated with many disabilities.” (71 Fed. Reg. 46720 (Aug. 14, 2006).) “The Conferees intended to assure that the manifestation determination is done carefully and thoroughly with consideration of any rare or extraordinary circumstances presented.” (*Ibid.*)

11. The parent of a student with a disability, who disagrees with either a district's decision to change the student's educational placement as a disciplinary measure or the manifestation determination, may appeal by requesting a due process hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532 (a) & (c).)³² An expedited hearing shall be held within 20 school days of the date the hearing is requested and a decision or "determination" shall be made by the hearing officer within 10 school days after the hearing. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532 (c)(2).) In appropriate circumstances, the ALJ hearing the dispute may order a change in placement of the student, and may return the student to the placement from which he was removed. (20 U.S.C. § 1415(k)(3)(B)(ii); 34 C.F.R. § 300.532(b)(2)(i).)

Procedural Requirements

12. In *Board of Education v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690], the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA, which provide a range of safeguards to ensure parental participation. (*Id.* at pp. 205-06.) The procedures ensuring meaningful parent participation are particularly significant. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 891.) However, not every failure to strictly comply with the procedures for disciplining students with disabilities will result in an invalid determination. (*Danny K. ex rel. Luana K. v. Department of Educ., Hawai'i* (D.Hawai'i 2011 Civ. No. 11-00025 ACK-KSC) 2011 WL 4527387, * 15 (*Danny K.*) [even if a district violated procedures by failing to ensure that each MD review team member considered a particular assessment, student must show he was denied a FAPE.]) A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) There must be a showing that but for the violation, the MD review team may have reached a different conclusion. (*Danny K.*, *supra* 2011 WL 4527387, *15; *Fitzgerald v. Fairfax County Sch. Bd.* (E.D. Va. 2008) 556 F.Supp.2d 543, 549 [MD review did not violate the IDEA where there was no showing that the outcome may have been different if the team reviewed additional information]; *Farrin v. Maine Sch. Admin. Dist. No. 59*, (D.Me 2001) 165 F.Supp.2d 37, 51-52 [delay in holding the MD review and the team's failure to consider relevant test data was harmless].)

³² The district may also request a hearing in specified circumstances.

Determination of the Issues

Issue One: Was Student's May 2, 2013 disciplinary conduct caused by, or did it have a direct and substantial relationship to his disability of ADHD and impulse control disorder?

13. As discussed in Factual Findings 3-5 and 25-37, and Legal Conclusions 1-10, the evidence established that the MD review team was required to consider Student's ADHD and impulsivity and determine whether his conduct was caused by, or had a direct and substantial relationship to his impulsivity. The District erred in focusing on Student's qualifying disability, and failed to make a final determination of whether Student's conduct was a manifestation of his ADHD and impulse control disorder. Rather, the District members of the MD review team determined that Student did not have impulsivity issues and that the conduct was not impulsive. As set forth in Factual Findings 6-23, 25-26, and 36-52, and Legal Conclusions 6-10, the evidence did not support Student's claim that his conduct was a manifestation of his ADHD or related impulse control disorder. Student's actions demonstrated intent and were not impulsive. While his conduct demonstrated poor judgment, Student did not demonstrate that his poor judgment was a manifestation of his ADHD as opposed to a manifestation of his adolescence, anger or heightened emotionality, or any other non-disability related rationale for engaging in such behavior. Therefore, Student did not meet his burden to establish that his conduct was caused by, or had a direct and substantial relationship to, his ADHD and impulse control disorder.

Issue Two: Did the District commit a procedural violation by not considering all relevant information in connection with the MD review process?

14. As set forth in Factual Findings 2, 5, 19-26, 51, and 53-67, and Legal Conclusions 1-5 and 8-12, the District failed to consider all relevant information in determining that Student's conduct was not a manifestation of his disabilities, including Student's recent bipolar diagnosis, current and past suicidal ideation, additional periods of emotional and behavioral dysregulation, Mr. Coleman's second 911 call, Student's 5150 hold or his hospitalization. The District was aware of Student's bipolar diagnosis and failed to consider this diagnosis and incidents of emotional dysregulation. The District did not determine whether Student's conduct was a manifestation of his disability in this regard, prior to changing his educational placement to home instruction. The District's failure to consider this relevant information deprived Student and Parent of the complete consideration required under the IDEA.

Remedy

15. As set forth in Factual Findings 53-67 and Legal Conclusions 4, 5 and 10-12, the District did not consider Student's bipolar disorder or emotional dysregulation, and did not answer the question of whether his conduct was a manifestation of this additional disability. Therefore the District's MD is invalid. Student's suspension is set aside and he is to be immediately reinstated at RHS. If the District seeks to pursue disciplinary action, it must convene a MD review meeting within 10 school days of this Decision to determine

whether Student's conduct was a manifestation of his bipolar disorder and related emotional dysregulation.

ORDER

Student's request for relief from the District's May 9, 2013, manifestation determination is granted in part. Student's conduct on May 2, 2013, which led to Student's suspension pending expulsion, was not impulsive and therefore was not a manifestation of his ADHD or impulse control deficits. However, the District failed to consider all relevant information and failed to determine whether his conduct was a manifestation of his bipolar disorder.

1. Student's suspension is set aside.
2. Student is to be reinstated at Roseville High School as of the date of this Decision, and allowed full participation as a member of the football team, as existed prior to his suspension, as well as other athletic and extracurricular programs.
3. Within 10 school days of this Order, the District shall convene a MD review team meeting if it decides to expel Student for the May 2, 2013 incident to determine whether Student's conduct is a manifestation of his bipolar disorder.³³

PREVAILING PARTY

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

³³ This Order does not intend to prevent the parties from mutually agreeing to a later date to ensure the presence of those qualified to discuss Student's recent diagnosis and those aware of his emotional state at the time of the incident.

NOTICE OF APPEAL RIGHTS

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

Dated: October 4, 2013

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings