THE ADMINISTRATOR'S PLAYBOOK: SPECIAL EDUCATION DISCIPLINE AND MANIFESTATION DETERMINATIONS— WHEN, WHY, WHAT, WHO & HOW?

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I. INTRODUCTION

Understanding and implementing compliant playbook of procedures in the area of discipline of students with disabilities is a challenge for school administrators. One particularly challenging piece of the discipline puzzle is that of making appropriate manifestation determinations—sometimes referred to as "Manifestation Determination Reviews" or "MDRs." This session will first examine the provisions of federal law related to the MDR and important judicial/administrative decisions regarding the validity of manifestation determinations. In addition, I will provide a practical summary of key questions and factors for MDR Team consideration to assist in making manifestation determinations more defensible.

II. MOST RECENT DISCIPLINE GUIDANCE ISSUED BY THE US DEPARTMENT OF EDUCATION

Before we get started, it is important that on July 19, 2022, the U.S. Department of Education (US DOE) issued a set of informal guidance documents on discipline of students under IDEA and Section 504. While the guidance was not all new to those of us who have been in the field for some time, it is important that all school administrators are familiar with it. As with all recent significant guidance documents that US DOE has issued, it was noted that "this significant guidance is nonbinding and does not create or impose new legal requirements." However, the way this guidance is enforced, school districts are not given much of a choice as to whether to follow it.

Below is a brief description of the guidance documents and currently active links for them:

Document #1 – The Secretary's Cover Letter:

There is a cover letter from Secretary Cardona "to our Nation's Educators, School Leaders, Parents, and Students" about the importance of supporting the needs of students with disabilities. Perhaps the statement that caught my attention the most in this cover letter (as well as in the other resource documents) is the following:

> The Department recognizes and appreciates school administrators, teachers, and educational staff across the nation who work to provide a safe, positive, and non-discriminatory education environment for all students, teachers, and other school staff. Schools need not choose between keeping their school community—including students and school staff—safe and complying with the law.

Document #2 – Guidance from U.S. DOE's Office for Civil Rights (OCR):

Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973. This OCR document appears as a 32-page Manual with a 4-page Appendix A (a Glossary of "Key Terms and Acronyms"). To begin, OCR makes it clear that, though it can enforce the rights of IDEA-eligible students pursuant to its authority under Section 504, the guidance document "addresses the rights and responsibilities concerning FAPE under Section 504 that apply to Section 504-only students," and that "FAPE" refers to FAPE under Section 504, "unless otherwise stated." (OCR 2022 Discipline Manual, p. 4). Highlights of this document will be referenced herein as "OCR 2022 Manual").

Documents #3, 4, and 5 – Guidance from U.S. DOE's Office of Special Education and Rehabilitative Services (OSERS) and Office of Special Education Programs (OSEP):

Dear Colleague Letter. This document is a 4-page letter that serves as an introduction to the Guidance issued by U.S. DOE's OSERS and OSEP referenced within the document. The document emphasizes that for years, "data have demonstrated clear disparities in the use of discipline for children with disabilities" and "[d]espite the evidence that using positive, proactive strategies can reduce rates of discipline and improve school climate and student outcomes, there remain notable disparities in the use of school discipline for children with disabilities compared with their nondisabled peers and for children of color with disabilities compared with all other students. The use of exclusionary disciplinary practices places large numbers of children with disabilities at risk for short- and long-term negative outcomes, including lower achievement and increased likelihood of not graduating. Since the Department issued [a Dear Colleague Letter in 2016], disparities in the use of exclusionary discipline, including both short-term and long-term removals, have continued."

Document #4:

Questions and Answers Addressing the Needs of Children with Disabilities and the Individuals with Disabilities Education Act's (IDEA's) Discipline Provisions. This document is a 55-page Q&A document issued by the DOE's Office of Special Education and Rehabilitative Services (OSERS). Like OCR's Discipline Manual, it is extensive and is intended to supersede a Q&A document regarding Discipline that was issued in June 2009. As indicated previously, for those who are well-versed in IDEA's disciplinary provisions, there is nothing really surprising or new here, but some highlights will be referenced herein as "OSERS 2022 Q&A."

Document #5:

Positive, Proactive Approaches to Supporting the Needs of Children with Disabilities: A Guide for Stakeholders. This document is, as its title reveals, a 17-page document issued by OSERS that suggests approaches that are considered "best practices" related to managing difficult behaviors and discipline for students with disabilities.

III. APPLICABLE FEDERAL LEGAL PROVISIONS

The Individuals with Disabilities Education Act (IDEA) is not the only statute to consider when examining the manifestation determination requirement. In fact, the manifestation determination requirement did not appear in IDEA until Congress amended it in 1997. However, the US DOE's Office for Civil Rights (OCR) has required districts to conduct manifestation determinations in the context of disciplining students with disabilities for many years prior to 1997 via Section 504 of the Rehabilitation Act of 1973 (Section 504) and its prohibition of disability-based discrimination. We will discuss the provisions of both laws today.

A. IDEA's Provisions on Manifestation

34 C.F.R. § 300.530(e) (notations and emphasis added)

Manifestation determination.

(1) **[WHEN?]** Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, **[WHO?]** the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) **[WHAT?]** must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

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

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

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

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

34 C.F.R. § 300.536(e)(1)-(3) (notations and emphasis added).

Question:

Do parents dictate who is on the MDR team or the decision the team makes?

As noted in the regulations cited above, the LEA, the parent and relevant members of the child's IEP Team (as determined by the parent and the LEA) make the manifestation determination. In determining who are the "relevant members of the child's IEP Team," parents do not have the right to "veto" a district's choice of team members or the Team's determination that the child's misconduct is unrelated to his disability. *Fitzgerald v. Fairfax Co. Sch. Bd.*, 50 IDELR 165 (E.D. Va. 2008).

Question:

What constitutes a "change of placement" that would trigger the requirement to conduct the MDR under IDEA?

34 C.F.R. § 300.546(a) and (b)

Change of placement because of disciplinary removals.

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

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

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

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

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

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

(b)(1) **[WHO and HOW?]** The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.

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

Question:

What is a "disciplinary removal" day for the 10-day "change of placement" count?

- **In-school suspension (ISS) days?**

In its commentary to the 2006 IDEA regulations, the US DOE reiterated its "long term policy" that an in-school suspension would not be considered a part of the days of suspension toward a change in placement "as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement." 71 Fed. Reg. 46715. This continues to be US DOE's policy as reflected in the OSERS 2022 Q&A, page 11, footnote 20 and Question C-7.

Jefferson Co. Bd. of Educ., 75 IDELR 178 (SEA AL 2019). District did not violate IDEA when it suspended student with an unidentified disability. Here, the student received 3 days of OSS after he threatened to shoot a teacher and 2 additional days after he hit another one. Following each suspension, he was also required to attend a "transitional classroom" for a week, where he could work on social skills and learn replacement behaviors. While in this classroom, the student had access to general education teachers, lunch and PE. Thus, the student was only suspended for 5 days and, even if the "transition class" days were equivalent to ISS, the transition placement was appropriate where it allowed the student to continue to participate in the general curriculum, receive the services required by his IEP and participate in activities with typical peers. Thus, no "change of placement" occurred requiring an MDR.

- **Bus suspension days?**

In the 2006 IDEA regulatory commentary, the U.S. DOE commented that "[w]hether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child's IEP. If the bus transportation were a part of the child's IEP, a bus suspension would be treated as a suspension…unless the public agency provides the bus service in some other way." U.S. DOE went on to note that where the bus transportation is not a part of the child's IEP, it is not a suspension. "In those cases, the child and the child's parent have the same obligations to get the child to and from school as a nondisabled child who has been suspended from the bus. However, public agencies should consider whether behavior on the bus is similar to behavior in the classroom that is addressed in an IEP and whether the child's behavior on the bus should be addressed in the IEP or a behavioral intervention plan for the child." 71 Fed. Reg. 46715. US DOE reiterated this same position in its July guidance. OSERS 2022 Q&A, Question C-8.

Letter to Sarzynski, 59 IDELR 141 (OSEP 2012). Just because a parent decides to drive her child to school during a bus suspension, a district cannot bypass the MDR. If a student receives transportation as a related service and the district provides no alternative transportation, a bus suspension is a removal that triggers an MDR if it constitutes a change of placement.

Conecuh County (AL) Sch. Dist., 35 IDELR 193 (OCR 2001). School district did not violate student's rights under Section 504 when it did not hold a manifestation determination meeting prior to barring student from riding the bus for violating bus rules and yelling obscenities at the bus driver. The district's policy indicated that riding the bus was a "privilege" that could be revoked for failure to adhere to school rules, and the student's IEP did not include transportation as a related aid or service.

- **Half-day suspensions or shortened school days?**

The issue of shortened school days has been specifically addressed for years by US DOE. In 2006 regulatory commentary, US DOE stated that "portions of a school day that a child has been suspended may be considered as a removal in determining whether there is a pattern of removals" that constitutes a change of placement. 71 Fed. Reg. 46715 (2006).

See also, Letter to Mason, 72 IDELR 192 (OSEP 2018). Shortened school days that are imposed repeatedly as a disciplinary measure could count in creating a "pattern" of removals that are a change of placement that would trigger the IDEA's procedural protections, including a manifestation determination. For a student who was subjected to an administratively shortened day to address his behavior and it was done outside the IEP team process, those shortened days may count in determining whether a pattern of removals constituting a change of placement occurred. It is up to a district to determine on a case-by-case basis whether a pattern or removal exists that would trigger a manifestation determination.

More recent guidance on administratively shortened school days was provided by US DOE in the July 2022 Q&A document as follows:

> In the discipline context, administratively shortened school days occur when a child's school day is reduced solely by school personnel, rather than the child's IEP Team or placement team, in response to the child's behavior. In general, the use of informal removals to address a child's behavior, if implemented repeatedly throughout the school year, could constitute a disciplinary removal from the current placement. Therefore, the discipline procedures [in IDEA regulations] would generally apply unless all three of the following factors are met: (1) the child is afforded the opportunity to continue to appropriately participate in the general curriculum; (2) the child continues to receive the services specified on the child's IEP; and (3) the child continues to participate with nondisabled children to the extent they would have in their current placement.

(OSERS 2022 Q&A, Question C-6).

- **Other "informal exclusions"?**

In OCR's 2022 Discipline Manual, OCR adds to the list of what it calls "informal exclusions" that could likely count toward the 10 days (or more) for purposes of determining whether a change of placement has occurred that would trigger the MDR requirement. Specifically, OCR notes that it

"is aware that some schools informally exclude students, or impose unreasonable conditions or limitations on a student's continued school participation, as a result of a student's disability-based behaviors in many ways" and lists examples, such as:

- ❖ Requiring a parent or guardian not to send their child to, or to pick up their child early from, school or a school-sponsored activity, such as a field trip;
- ❖ Placing a student on a shortened school-day schedule without first convening the Section 504 team to determine whether such a schedule is necessary to meet the student's disability-specific needs;
- ❖ Requiring a student to participate in a virtual learning program when other students are receiving in-person instruction;
- ❖ Excluding a student from accessing a virtual learning platform that all other students are using for their instruction;
- ❖ Informing a parent or guardian that the school will formally suspend or expel the student, or refer the student to law enforcement, if the parent or guardian does not: pick up the student from school; agree to transfer the student to another school, which may be an alternative school or part of a residential treatment program; agree to a shortened school day schedule; or agree to the use of restraint or seclusion; and
- ❖ Informing a parent or guardian that the student may not attend school for a specific period of time or indefinitely due to their disability-based behavior unless the parent or guardian is present in the classroom or otherwise helps manage the behavior (e.g., through administering medication to the child).

"Depending on the facts and circumstances, OCR could find that one or more of these practices violate Section 504." (OCR 2022 Manual, p. 23).

- **Filing juvenile petitions or criminal charges?**

Rochester Comm. Schs. v. Papadelis, 55 IDELR 79 (Mich. Ct. App. 2010). While a district must conduct an MD review within 10 days of a decision to change the placement of a high schooler with Tourette syndrome, ADHD and adjustment disorder for disciplinary reasons, the requirement does not apply to this student because he was not removed from school for more than 10 consecutive days. Rather, there was a filing of a petition with the juvenile court which did not constitute a change of educational placement.

34 C.F.R. § 300.530(f)

<u>Question</u>:

What difference does the MDR make under IDEA?

- **Where misconduct *was* a manifestation**

If it is determined that the child's conduct *was* a manifestation of the disability, the IEP Team must—

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

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

iii. Except [in situations involving dangerous weapons, drugs and serious bodily injury], return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

34 C.F.R. § 300.530(c) and (d) (emphasis added)

- **Where conduct *was not* a manifestation**

If it is determined that the behavior that gave rise to the violation of the school code *was not* a manifestation of the disability, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except that the student must 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 IEP and receive, as appropriate, an FBA and BIP designed to address the behavior violation so that it does not recur.

Question:

Can an unidentified student assert the right to an MDR under IDEA?

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

34 C.F.R. § 300.534(a)-(b)

According to IDEA regulations, yes.

IDEA's regulations provide for the ability of unidentified students to assert IDEA's disciplinary protections where there is knowledge on the part of the district that the student was one with a disability before the behavior that precipitated the disciplinary action occurred. Under IDEA, a

district will be deemed to have knowledge that a child is a child with a disability before the behavior that precipitated the disciplinary action occurred where—

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

(ii) the parent requested an evaluation of the student [an initial evaluation under IDEA]; or

(iii) the teacher of the student, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the student, directly to the director of special education of such agency or to other supervisory personnel of the agency.

34 C.F.R. § 300.534(c)

A school district will not be deemed to have knowledge under the above where—

(i) the parent has not allowed an evaluation of the child under IDEA;

(ii) the parent has refused services under IDEA; or

(iii) the child has been evaluated and determined not to be a child with a disability.

34 C.F.R. § 300.534(d)(1)

If the district does not have knowledge of a disability prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors.

Agency Guidance and Case Law Regarding Unidentified General Education Students

D.N. v. School Bd. of Bay Co., 83 IDELR 86 (Fla. 1st DCA 2023). Student's appeal of expulsion by the School Board for his participation in a riot involving more than 50 students in a school courtyard is affirmed, and he was not entitled to be treated as a student with a disability by the Board. At the time of the incident, the 15 year-old ninth grader was not identified as a student with a disability under IDEA; nor had his mother ever asked that he be evaluated for special education services until she was notified of the student's expulsion hearing and obtained assistance from an advocacy group. While the student had a history of 52 disciplinary referrals between 2013 and 2021 for things like fighting, drug use/possession, skipping school, defiance, physical attack, theft, class disruption and inappropriate behavior, IDEA's relevant regulations indicate that a school district is deemed to have knowledge that an unidentified student is a student with a disability if, prior to the incident: 1) the parent requests an IDEA evaluation or services; or 2) school personnel express concerns that student behaviors are caused by a disability. Although numerous school personnel reported this student's behavior problems, "there is no record that any of them viewed the behavior as disability-related or reported them as such to the school's or

district's special education or other supervisory personnel." Thus, the school district's treatment of the student under the rules governing procedures where a district does *not* have knowledge that a student has a disability was appropriate and the district was authorized to impose disciplinary measures authorized for students without disabilities. Where the mother could not prove she ever asked for a disability evaluation or an IEP, and not a single trained educator or school counselor over the years expressed any concern that a disability was causing the student's behavior, the school board could not be expected to "leap to that conclusion on its own."

Letter to Nathan, 73 IDELR 240 (OSEP 2019). When a district is deemed to have knowledge that a student is a student with a disability, an MDR must occur within 10 school days of any decision to change the placement of the student because of a violation of a student code of conduct, even if the student has not yet been found eligible for special education and related services. The district cannot remove the student and wait to conduct the MDR until after an initial evaluation has been completed and eligibility determined. While the MDR team may not have an IEP to review in making the determination, it would still be possible to conduct the determination by reviewing and considering all available information. The team would likely consider the information that served as the district's basis of knowledge that the student may be a child with a disability in the first place, such as concerns expressed by a parent, teacher or other school personnel about a pattern of behavior demonstrated by the student. *See also*, OSERS 2022 Q&A, Question I-7 and I-8.

G.R. v. Colonial Sch. Dist., 74 IDELR 7 (E.D. Pa. 2019). District did not err when it expelled the general education high school student for a year for bringing a knife to school without first conducting a manifestation determination. While a general education student may be entitled to disciplinary protections under IDEA if the district had knowledge that the student had a potential disability, such was not the case here. Here, the district had no reason to believe that the student needed special education services due to a potential disability. None of the student's teachers expressed concerns about his grades or academic performance. Indeed, during the student's high school career, he received good grades, excelled in a vocational program focused on auto repair and achieved "proficient" and "advanced" scores on state standardized assessments. Although the parents alleged that they frequently communicated with the district about the student's academic troubles, those communications occurred while the student attended middle school and addressed the provision of general education interventions there. In addition, records indicate that the parents never requested a special education evaluation or reported to the district that the student might need special education, even though their other two children receive IDEA services. Because there was no reason to suspect that the student had a possible disability, the district was not required to conduct a manifestation determination prior to the expulsion. The hearing officer's decision upholding the expulsion is, therefore, upheld.

A.V. v. Panama-Buena Vista Union Sch. Dist., 71 IDELR 107 (E.D. Cal. 2018). The parent's failure to consent to an IDEA evaluation bars the 12 year-old student with ADHD from claiming the protections of the IDEA in a discipline context. While a district generally must conduct a manifestation determination for a student who does not currently receive IDEA services if it has reason to believe the student has a disability at the time of the disciplinary infraction, an exception exists if the district proposes an evaluation and the parent fails to provide consent for it. Here, the district prepared copies of its assessment plan in both English and Spanish and mailed them to the parent's home address on at least four occasions. In addition, district personnel provided the parent

with a Spanish version of the consent form and reviewed the form with her, explaining why the district was asking to conduct an evaluation. Thus, the district met the requirement to make reasonable efforts to obtain the necessary consent from the parent, going the "extra mile, and then some, to do so, all to no avail." While the parent did return the signed consent form in January 2015, the district was not required to conduct an MD before it expelled the student in November 2014.

Anaheim Union High Sch. Dist. v. J.E., 61 IDELR 107 (C.D. Cal. 2013). District had notice of student's likely status as a child with a disability when the Section 504 Team met to discuss the student's ADHD and anxiety diagnoses, panic attacks, inability to complete work, failing grades, inability to remain in class and hospitalization for attempted suicide. Thus, the district had an obligation to conduct a manifestation determination before placing him in an alternative school for disciplinary purposes. A school district is deemed to have knowledge of a student's disability before the misconduct occurred where a teacher or other staff member "expresses concern about a pattern of behavior" to the special education director or other district supervisor. This does not require teachers to suggest a special education evaluation. Rather, the high school AP's attendance at the 504 meeting triggered the knowledge that the student was likely covered by IDEA. Thus, the hearing officer's decision requiring a manifestation determination is upheld.

Jackson v. Northwest Local Sch. Dist., 55 IDELR 104 (S.D. Ohio 2010). School district missed the signs that a third grader with ADHD could be a child with a disability and, therefore, was entitled to an MD review prior to expelling her for threatening behavior. Where the district provided her with RTI interventions for two years with few gains and recommended that the student undergo a mental health evaluation, the district should have suspected that the student had a disability.

B. Section 504's Provisions on Manifestation

There is no reference at all to student discipline, much less the MDR requirement, under Section 504 or its regulations. However, there's been a whole lot of guidance provided by OCR since the 1980's on the topic.

OCR's requirement for MDRs

The term "manifestation determination" does not appear anywhere in Section 504 or its educational regulations. However, OCR has interpreted Section 504 to require an MDR as an "evaluation" in connection with disciplinary actions that constitute a "significant change in placement" pursuant to 34 C.F.R. §104.35 (504's regulatory "evaluation" requirements). *See, e.g., Dunkin (MO) R-V Sch. Dist.*, 52 IDELR 138 (OCR 2009) [34 C.F.R. § 104.35 requires a manifestation determination prior to a suspension of more than 10 days]; *South Harrison Co. (MO) R-II Sch. Dist.*, 51 IDELR 110 (OCR 2008) [fact that 7th grader received services under Section 504, not the IDEA, did not relieve district of the duty to conduct the manifestation review]; *Kalamazoo (MI) Pub. Sch. Dist.*, 50 IDELR 80 (OCR 2007) [district should have conducted a manifestation determination review for a student with ADHD who was suspended for 22 days over a period of seven months].

As it is under IDEA, it has been OCR's long-standing position that a disciplinary change of placement occurs if a student with a disability is suspended or expelled for more than 10 consecutive school days. *Dunkin, supra; OCR Staff Memorandum*, 16 IDELR 491 (OCR 1989). In addition, OCR made it clear long ago that its position was also that the duty to conduct a manifestation determination may also be triggered by a series of suspensions that constitute a pattern of removals that cumulate to more than 10 school days in a school year because that pattern might constitute a "change of placement." *OCR Staff Memorandum*, 307 IDELR 05 (OCR 1988).

OCR's historical position that an evaluation in the form of a manifestation determination must occur before a "significant change of placement" is made has been reiterated for many years and is restated once again with more specific information in its July 22 Guidance throughout. In fact, OCR considers an MDR to be part of the "FAPE requirements" applicable to the discipline of "504-only" students with disabilities. OCR 2022 Manual, pp. 13-24.

Question:

Who conducts this MDR "evaluation" under Section 504?

OCR has said for a long time that the MDR evaluation must be made by "persons knowledgeable about the student and the meaning of the evaluation data." This may be the same group that makes placement determinations under Section 504. *Quincy (WA) Sch. Dist. No. 144-101,* 52 IDELR 170 (OCR 2009); *OCR Memorandum*, 16 IDELR 491 (OCR 1989). OCR has also indicated that a manifestation determination team *should* include a parent. *Mobile Co. (AL) Sch. Dist.*, 353 IDELR 378 (OCR 1989).

In its most recent guidance, it reiterates this position. OCR also adds that "[i]f a single person, such as a principal who is in charge of the school's general disciplinary process for all students, alone determined whether a student's behavior was based on the student's disability, such a unilateral decision would not comply with Section 504." OCR 2022 Manual, p. 17. In other words, the MDR should be done by what schools typically refer to as the student's "504 team."

Question:

So, when does OCR require an MDR for the 504-only student?

In its 2022 guidance, OCR makes it clear that an "evaluation" in the form of a manifestation determination is required before the eleventh school day of a disciplinary removal for a 504-only student. OCR 2022 Manual, p. 16.

Question:

What is a 504 team required to do in conducting the MDR for the 504-only student and what difference does the answer to the MDR question make?

In its guidance, OCR sets out the following two-step process for making the manifestation determination:

STEP ONE: At the first step, the Section 504 team determines whether the behavior in question was "caused by or has a direct and substantial relationship to the student's disability." The guidance goes on to describe the kind of relevant information from a variety of sources that must be reviewed during the MDR and notes that the 504 team must ensure that such information is documented and carefully considered in conducting the MDR evaluation. OCR 2022 Manual pp. 16-17.

According to OCR, the information to be reviewed and documented during this MDR/"504 evaluation" could include, for example:

- any previous evaluations of the student with respect to disability-based behavior;
- the student's Section 504 plan (including any behavioral supports the student needs), any updates to the plan, and information about whether the current Section 504 plan is being implemented with fidelity;
- psychological or medical evaluation data related to the behavior at issue;
- relevant information provided by the student's parents or guardians;
- academic records;
- relevant discipline records, including information on whether previous disciplinary actions led to changes in behavior, and incident reports, including any involving SROs or other law enforcement officials, consistent with applicable Federal or State privacy protections; and
- relevant teacher notes, observations, and data collected about the behavior.

OCR also notes that "[t]o be useful in determining whether the behavior is based on the student's disability, these materials should be relevant to the behavior at issue and recent enough to provide the Section 504 team an accurate understanding of the student's current behavior." OCR 2022 Manual, pp. 16-17.

STEP TWO: The school's next step depends on whether the behavior for which the school proposed discipline is determined to be based on disability.

- **Where student's behavior *is* based on disability**

In its 2022 guidance, OCR states that "after a review of the information obtained," if the 504 team determines that the behavior is disability-based, "the school is prohibited from carrying out any discipline that would exclude the student on the basis of disability. Under this circumstance, the

discipline would deny the student equal educational opportunity by excluding the student based on disability, in violation of Section 504." OCR 2022 Manual, p. 18.

OCR goes on to note that a finding that the behavior was disability-based may be—

> one reason to believe that the student's placement may be inappropriate and that the student may need additional or different services, such as behavioral supports, or may need a change in educational to ensure FAPE. Accordingly, the Section 504 team must continue the evaluation to determine if the student's current placement is appropriate. The Section 504 team may determine that an additional assessment, which may include a behavioral assessment, is necessary, in which case the Section 504 team should consider using the information obtained to develop and implement a BIP.

OCR 2022 Manual, p. 18.

Importantly, OCR notes that while further discipline could not be carried out, the 504 team could change the student's placement. "In determining the appropriate placement for the student with a disability, the impact of the student's disability-based behavior on other students is a relevant factor." OCR 2022 Manual, p. 19. OCR goes on to note that:

> [w]here a student's disability-based behavior significantly impairs the education of others or otherwise threatens the safety of the student or others, the Section 504 team's placement determination could result in a change to the student's services, supports, or educational setting to more effectively address the behavior and attempt to prevent it from recurring.

OCR 2022 Manual, p. 19. OCR goes on for several pages talking about this topic. *See* OCR 2022 Manual, pp. 19-21.

- **Where student's behavior *is not* based on disability**

OCR has long held and reiterates in its 2022 guidance that where the Section 504 team finds that the student's behavior was not based on disability, "Section 504 permits the school to discipline the student as it proposed as long as it does so in the same manner that it disciplines similarly situated students without disabilities...." OCR goes on to note that under these circumstances, "the discipline would not violate Section 504 because the student is not being excluded on the basis of any disability-related behavior and is being treated in the same manner as a student without a disability for substantially the same behavior." OCR 2022 Manual, p. 21.

Case Law Regarding Discipline of a "504-only" Student

While OCR has its 2022 guidance now, school districts have typically borrowed the discipline language of IDEA and applied it in "504-only" situations. At least two courts have upheld this application:

J.M. v. Liberty Union High Sch. Dist., 70 IDELR 4 (N.D. Cal. 2017). District's expulsion of a high school student with ADHD and 504 services is upheld and the student's discrimination suit is dismissed. Under 504, a district must evaluate a student prior to imposing a significant change of placement, including disciplinary removals. When the student here was involved in a "threatening confrontation" with a classmate, the district convened a team and concluded that the student's misconduct did not have "a direct or substantial relationship" to his disability. The student's claim that the district should have assessed whether his conduct merely "bore a relationship" to his ADHD is rejected where 504 does not include guidelines for making manifestation determinations but does provide that a district's compliance with the procedural safeguards of the IDEA is one means of meeting Section 504's evaluation requirement. Here, the evidence showed that the district appropriately followed its evaluation procedures, which mirrored the procedural safeguards outlined in the IDEA regulations.

Doe v. Osseo Area Sch. Dist., 71 IDELR 35 (D. Minn. 2017). District did not discriminate when it made its decision as to whether the student's ADHD, PTSD and Major Depressive Disorder caused him to write racist graffiti on the inside of a stall door and on a toilet paper dispenser in the boys' bathroom. The parents' argument that the manifestation determination should have considered whether there was any connection to his disabilities since it was made under Section 504 is rejected. Section 504 does not establish specific requirements for making manifestation determinations. Rather, 504 regulations require a district to adopt and implement a system of procedural safeguards that can be satisfied by using the same procedural safeguards that would apply in cases with IDEA-eligible students, which is what the district here chose to do. Where the IDEA requires a team to consider whether the student's misconduct was caused by or had a substantial relationship to his disability, the parents' lesser standard is rejected. The parents do not cite any Section 504 student discipline cases that use the standard that they argue the school district should have applied. In addition, OCR applies a causation standard as well; thus, the parents could not show that the district should have applied a lesser standard in its review of the student's conduct.

IV. MDR CHALLENGES UNDER IDEA: GUIDANCE THROUGH SOME COURT AND AGENCY DECISIONS

There are some interesting decisions regarding manifestation challenges as set forth below that may provide some guidance and support for decision-making in the disciplinary context, specifically with respect to conducting defensible MDRs. Most of the reported court and agency decisions regarding MDRs consist of parent challenges made to the school district's manifestation determination based upon the causation/disability question. There is very little case law that is focused upon the argument that the district's failure to implement the student's IEP caused the violation of the student code of conduct.

A. Some Relevant Decisions: Whether the Violation of the Student Code of Conduct was Caused by or Had a Direct and Substantial Relationship to Disability

Court Decisions:

Sampson Co. Bd. of Educ. v. Torres, 717 F.Supp.3d 474, 124 LRP 8435 (E.D.N.C. 2024). ALJ's decision to vacate the student's long-term suspension is given great deference and is upheld. The ALJ's findings are entitled to deference that district violated IDEA when it suspended the 12 year-old male student with selective mutism, ADHD, and ODD for sexually assaulting a female schoolmate after she told him to "get away." The student's grabbing or "poking" the buttocks and breast of a female student was a manifestation of the student's disabilities. Specifically, the school's MDR team violated IDEA's procedural requirements when it failed to consider all relevant information when making the manifestation determination. The student, who did not speak in the school setting, had a documented school history of touching others to communicate with them or to get their attention. While the school conducted an FBA and developed a BIP, the MDR team did not consider any of that information contained in them. Rather, the MDR team's report actually indicated that the student did not have a BIP. The district's decision to classify the conduct as a "sexual assault" is also questioned, given the district's knowledge of his behavioral history. These procedural violations resulted in the loss of educational opportunity to the student and in light of all relevant information, the student's conduct was a manifestation of his disabilities. Not only does the student's selective mutism impede his communication at school, but his ADHD leads him to act impulsively. Further, the fact that the incident occurred during a transition time waiting for the bus when these behaviors were more likely to manifest suggests that the district failed to implement the student's BIP, where it is indicated that transition time is problematic for the student.

Kristina C. v. Klein Indep. Sch. Dist., 124 LRP 3961 (S.D. Tex. 2024). District's summary judgment motion is granted, and the hearing officer's decision is upheld that the student's bringing a clay cutter to school was not a manifestation of his disabilities (though the hearing officer's decision that the clay cutter is a weapon is questioned). Therefore, the district's placement of the gifted seventh grader with Autism, ADHD, and "vulnerability to emotional disturbances" in an alternative disciplinary program was not a violation of IDEA. While the record reflects that the student has difficulty interacting with others and responding to peer conflict in the moment, there is no evidence in his education file or in his recent behavior that would connect his disabilities to a premeditated decision to bring a clay cutter to school in self-defense. Rather, the record shows that in past stressful situations at school, the student would "shut down and begin exhibiting signs of frustration, such as grunting, clenching teeth and/or fists, and crying." There is no prior record showing that the student had possessed or displayed a sharp object that could be used as a weapon at school with the stated intent to use it to "defend himself" by physical force, and this behavior is different than the signs of disabilities that the student has previously exhibited. Thus, the hearing officer was correct in determining by a preponderance of the evidence that the acts involving the cutter were not a manifestation of disability. In addition, the court agrees with the parent that it is unlikely that the clay cutter falls into the definition of "weapon" under IDEA as an instrument capable of "causing death or serious bodily injury." However, since the school promptly and properly determined that the behavior was not a

manifestation, whether the clay cutter is a weapon under IDEA does not change the outcome of this case.

C.D. v. Atascadero Unif. Sch. Dist., 83 IDELR 80 (C.D. Cal. 2023), *aff'd*, 124 LRP 11529 (9th Cir. 2024) (unpublished). ALJ's decision that the student's physical aggression toward his teacher was not a manifestation of his disability is upheld. Although the parent attributes the student's behavior to poor impulse control and communication difficulties due to his disabilities, the ALJ's decision that the behavior was not a manifestation of his ADHD, intellectual disability, or speech and language impairment is correct. Here and based upon detailed documentation kept by involved staff about what happened before, during, and after the incident, it appears that the student's behavior of physical aggression was a choice. For example, the district's school psychologist testified that the student's conduct did not arise as a result of his ADHD or cognitive functioning and that the aggressive incidents for which the student was disciplined were separated by a period of time that gave the student sufficient "time to make a choice about what behavior he wanted to do." In fact, school staff accompanying the student for a distance from a construction site next to the administrator's office and then into the office area noted that the student could have engaged in aggression at any point in time during that distance but did not. Rather, the student waited until a preferred staff member left before engaging in the aggressive behavior toward his teacher. The court also notes that witness testimony and documentation showed that the student used functional communication to achieve his goal of being able to stay in the unsafe construction area and this is evidence of the student's cognitive understanding, as well as his receptive and expressive processing of what was going on. For example, in response to a request that he move away from the construction site, the student communicated that he was refusing to comply and that he felt he was safe. The student also put on his glasses to demonstrate that he was aware that flying debris could hurt his eyes. Further, in response to his teacher's statements that it looked like something was bothering him, he used functional language to communicate that he was not upset, that he was refusing to leave the construction area, and that he felt he was safe. Given the student's repeated use of functional language during the entire incident, it is more likely than not that the student engaged in deliberate planning in response to not being allowed to remain near the construction site. This conclusion is again further supported by the fact that he waited until preferred staff was not present before he became physically aggressive toward his teacher. As the ALJ noted, this is evidence that the student "knew what he was doing and how to differentiate between preferred and non-preferred staff." Thus, the court agrees with the ALJ in concluding that the student's aggression toward the teacher was not impulsive, and that the student processed the situation and understood it.

Lemus v. District of Columbia International Charter Sch., 83 IDELR 18 (D.D.C. 2023). District's motion for summary judgment is granted and the hearing officer's decision in its favor is upheld where the parent of a student with TBI and a diagnosis of PTSD did not show that the district made an improper manifestation determination when expelling him for threatening to shoot his math teacher. First, the parent did not show that the district failed to implement the student's IEP or BIP. Second, with respect to the MDR team's decision that it was the student's relationship with gangs and not his TBI that caused him to threaten to shoot his math teacher after she reported the student's use of gang gestures during class, the parent did not show that the decision was incorrect. IDEA mandates that MDR teams review all relevant information in the student's file, including the IEP, any teacher observations, and any relevant information provided by the parents. "Relevant

information" is information that is pertinent to whether the conduct is directly and substantially related to a disability. Here, the team reviewed the student's evaluations and diagnostic results, information from the student's mother, observations of the student, and other information. The parent's claim that the team was required to consider the student's PTSD is rejected where PTSD is not a recognized disability under IDEA. Accordingly, the team was not required to consider it. In addition, the hearing officer was correct in finding that the student's threat was not the product of his disability but instead was based upon his association with gang members. In a footnote rejecting another parent argument, the court also noted that "[f]urthermore, the IDEA requires that the MDR Team, whose actions the Hearing Officer reviewed, focus only on Orlin's documented disability under the IDEA, as the MDR Team must determine if Orlin's conduct was a manifestation of that disability."].

Gloria V. v. Wimberley Indep. Sch. Dist., 78 IDELR 96 (W.D. Tex. 2021), *aff'd*, 80 IDELR 181 (5th Cir. 2022) (unpublished). Court adopts Magistrate Judge's report and recommendation supporting district's decision to move the student from the High School to an alternative placement where the district believed that his continued presence at the High School would be disruptive. The Magistrate found that the district made an appropriate determination that the SLD/OHI 17-year-old's felony theft of an all-terrain vehicle (belonging to another student at the High School) off campus and during summer break was not a manifestation of his ADHD. Based upon all relevant information available to the team, the crux of the team's decision was that the student's stealing of the ATV would "at least require some sort of planning for execution." In addition, the team's determination that the theft was not caused by the student's disability was made after discussing, for well over two hours, the student's past behaviors and diagnoses, including his impulsivity attributed to ADHD. The Magistrate also noted that the team considered the type of item stolen as important and that the team's decision might have differed had the student stolen a cookie rather than an ATV. Judgment in favor of the district is granted.

Jay F. v. William S. Hart Union High Sch. Dist., 74 IDELR 188 (9th Cir. 2019) (unpublished). Where there was extensive documentation that the student engaged in disability-related threats for many years, the district court's decision that the behavior at issue was a manifestation of the ED student's disability is affirmed. The district relied too heavily upon the school psychologist's opinion that the student's threat to retaliate against two classmates was not a manifestation of his disability. In January of 2015, the ED student threatened retaliation against two classmates who had reported a substance abuse violation on his part. At the MDR, the school psychologist opined that the threats were not consistent with the manner in which the student's ED typically manifested itself, which was through depression or inappropriate feelings. On that basis, the team found that the conduct was not a manifestation and placed the student on disciplinary probation after he signed an agreement suspending his expulsion. Several months later, the student violated the agreement when he decapitated a lizard in front of other students and the district sought to reimpose the expulsion. The district court did not clearly err when it found the January incident was a manifestation of the student's ED, given the student's history of threatening behavior stemming from the ED. Indeed, the ALJ found that the district failed to thoroughly and carefully analyze whether the psychologist's determination could be reconciled with the student's extensive history, which was documented in school records. Thus, the district court's order that the student's expulsion and suspended expulsion agreement be expunged from the record is affirmed, as well as its award of dialectical behavioral therapy and attorneys' fees.

M.V. v. Conroe Indep. Sch. Dist., 75 IDELR 134 (S.D. Tex. 2019). School district did not err when finding that the 10th-grader's misconduct of purchasing online and bringing two stun guns to school was not a manifestation of his ADHD. While this student's ADHD resulted in his acting impulsively as reflected by evaluation reports, discipline records, school records and teacher comments considered by the team, the misconduct reflected at school included making inappropriate comments and blurting out in class, putting a jump rope around another student's neck and fighting with others. However, the parties agreed that the student's decision to purchase the stun guns and bring them to school was premeditated. The parent's assertion that the MDR was predetermined based upon the fact that a district employee produced a document before the meeting began that noted that the student's misconduct was not a manifestation is rejected, where the employee explained that the document was merely a draft intended to guide the team's discussion. The team's discussion of the evidence and efforts to solicit the father's input at the meeting demonstrated that the decision was not predetermined.

Boutelle v. Board of Educ. of Las Cruces Pub. Schs., 74 IDELR 130 (D. N.M. 2019). Hearing officer's decision that the school district did not violate IDEA when it placed the middle schooler with ED and ADHD on long-term suspension is upheld. Based upon an investigation into the incident, which included interviews with witnesses, collecting statements and completing a police report, the principal correctly concluded that the student had intentionally thrown rocks at two other students and injured them. Parent's assertion that the student's behavior was a manifestation of his Tourette syndrome is rejected, where the student struck a student with four rocks and then hit a second student with a rock. Before hitting the second student, the student asked a peer something like, "Do you think I can hit him with a rock?" This certainly suggests intentional conduct rather than involuntary based upon a complex motor tic as suggested by the parent. Thus, the school team did not err when it found that the student's rock throwing behaviors were not a manifestation of disability.

J.H. v. Rose Tree Media Sch. Dist., 72 IDELR 265 (E.D. Pa. 2018). Hearing officer's decision upholding the district's determination that the 15-year-old student's conduct was not a manifestation of his ADHD and SLD is upheld. Video recordings showed the student approaching another student in the cafeteria, pushing his face into his food and punching him in the face. In conducting an MDR, the team cannot focus on traits typically associated with the student's disability; rather, it must consider how the disability impacts the student specifically. Here, the team considered the student's impulsivity and low tolerance for frustration, as well as factors such as family dynamics and reports of cyberbullying against the student. None of the evidence connects the student's disability to violence and, at most, it suggests that the student exhibits verbal aggression due to his disability-related frustration. In addition, the district's deletion of certain video footage did not impede the MDR team's review of the incident where two videos by the student's friends captured the assault in its entirety. The fact that several of the student's friends captured the entire six-second incident on video also indicated that he planned the attack against his fellow student.

Bristol Township Sch. Dist. v. Z.B., 67 IDELR 9 (E.D. Pa. 2016). Determination that teenager's ADHD did not play any role in the alleged physical assault of a teacher is inappropriate and the hearing officer's order of compensatory education for one day for each day after 10 days the student was removed is affirmed. The manifestation team did not discuss whether the student's

alleged misconduct had a direct and substantial relationship to his disability. In fact, the special education supervisor testified that the team looked at it "more from a global picture," and did not look at what occurred during the specific incident. According to the supervisor, the team only considered whether ADHD generally has a connection to aggressive behavior. In addition, the team's failure to consider the student's horseplay in the school hallway and refusal to follow teacher's direction, both of which came before the alleged assault, made the manifestation decision deficient. Further, the supervisor's decision to complete the MDR report prior to the team's discussion was ill-advised, even though she gave team members an opportunity to object to it, which was not an appropriate substitute for meaningful discussion.

Z.H. v. Lewisville Indep. Sch. Dist., 65 IDELR 147 (E.D. Tex. 2015). The district's determination that the student's creation of a list of schoolmates he wanted to shoot was not a manifestation of his disability is upheld. While the district had evaluated the student for Asperger's the previous school year at his parents' request, the school psychologist determined that no further assessment was necessary based upon the student's extremely sociable nature and good sense of humor. The MDR team did discuss a PDD-NOS diagnosis by the student's pediatrician issued five days after the discovery of the shooting list and offered to complete an autism evaluation, but the parents would not consent to it. After the school psychologist explained why further autism testing had not been done the previous year, the team limited its review to the student's ADHD and depression. While the student's ADHD caused him to act impulsively, the shooting list was developed over several days and was not the result of his ADHD. In addition, the parents could not identify any evidence in the record linking the creation of the list to the student's depression. Thus, the district's determination that the behavior was not a manifestation of disability is upheld.

Danny K. v. Dept. of Educ., 57 IDELR 185 (D. Haw. 2011). The MDR team properly determined that the student's detonation of an explosive device in a school bathroom was not triggered by his ADHD. The team made a proper determination, and it was not required to examine whether the student falsely confessed. The school psychologist concluded that setting off the bomb was a planned activity that required following directions and attention to detail, which are tasks that are difficult for students with ADHD-inattentive type, who are easily distracted. In addition, the team determined that the student was capable of understanding and controlling his misconduct, which was supported by the testimony of a behavioral health specialist. The parent's assertion that the student took the blame for the incident in order to collect money from "the real" perpetrators is rejected. Further, it was not the court's or the MD review team's role to determine whether the student falsely confessed. "Instead, the manifestation team was required by the IDEA to determine whether the actions leading to Student's potential suspension—as determined by [district's] investigation—were a manifestation of an eligible disability." In addition, the conduct for purposes of the MD review was the explosion, not the confession. Importantly, the vice principal's investigation supported his determination that the student was the perpetrator, and when he asked the teen why he told his mother he did it for the money, the student said, "I just told my mom that, so she'll get off my case."

SEA Hearing Officer/ALJ Decisions

Peabody Pub. Schs., 123 LRP 537 (SEA Pa. 2023). District's MDR was not appropriate and the district is to return the 8th grader with SLD and OHI due to ADHD to his prior middle school

placement because the teachers who know him best and the principal who knew details of the off-campus assault and felony charge against the student were not at the meeting. Rather, the team relied upon the school psychologist whose conclusions about that the student's conduct seemed sustained, planned and lacked ADHD-associated impulsivity were speculative and inconsistent with the student's history of disability-related impulsive behaviors. What is difficult to discern is whether the student's pattern of impulsive, and sometimes disruptive, behavior gave rise to the alleged conduct; without knowing specifically what took place, any conclusions in this regard are speculative. The record contains no information about the relationship (if any) between the student and the peer at issue or about what, if anything, took place between the two students prior to the incident. While the psychologist testified that by allegedly following the peer, the student demonstrated planning and a lack of ADHD-associated impulsivity, without information as to what preceded the incident, as to whether the student actually did follow the second child as alleged, or what he was doing as he did so, "I find that Dr. Hynick's conclusion is somewhat speculative." While it is certainly possible that the alleged actions demonstrated planning and forethought, these actions could also be found to stem from continuation of impulsive behavior similar to the student's repeatedly hitting his computer on his desk and tapping his pen in his class as observed in April 2022, as well as in his persisting in disruptive behavior after repeated requests by his teachers (or Aunt) to stop. Without information about the surrounding circumstances around the felony charge, it is impossible to reach a conclusion.

Sarasota Co. Sch. Bd., 123 LRP 16699 (SEA Fla. 2023). District did not violate IDEA when it moved the student with SLD and a language impairment to an IAES for more than 10 school days. The student was involved in a group attack of another student off campus and after school, and the MDR team found that the conduct was not a manifestation of the student's disability. Although the student had some history of hitting or shoving others, those incidents were impulsive, as described in the student's BIP. The group attack, however, was a premeditated, coordinated attack unlike any other physical aggression the student exhibited at school. Specifically, the student, along with 12 other students, lined up outside the school's gate—"seemingly lying in wait"—and attacked the victim after he passed them. The student even took a video of the attack and pushed, kicked and stomped the victim, as did others in the group.

Norwalk Bd. of Educ., 122 LRP 20922 (SEA Conn. 2022). District conducted an appropriate MDR finding the eighth grade student's threatening Snapchat post depicting a gun was not a manifestation of his OHI due to ADHD. Premeditation and actions which require multiple steps are "strong indicators" that an action is not a manifestation of ADHD. Here, the student's conduct was not impulsive. Rather, it involved a lengthy process of surfing the web, selecting an image, captioning the post, discussing it with a friend, downloading the image, and posting it to the group. In addition, the district followed appropriate procedures in conducting the MDR by examining the incident very specifically, considering all relevant information. In fact, the parent agreed with the decision until the parent found out that it supported expulsion.

Hamilton Township Bd. of Educ., 122 LRP 13710 (SEA N.J. 2022). MDR team's decision that the ED teenager's hitting of a classmate was not a manifestation of her disability is upheld. Here, the 17 year-old went to the library where her classmate often went, and cell phone videos showed her approaching the classmate and striking her. The ED student later texted a friend stating that she started the fight because the classmate had made negative comments about her deceased

brother six days previously. The parent's argument that the student's conduct was the result of her impulsivity related to ED is rejected where days passed between the time the teen heard the offensive comment and the time she initiated the fight. While the parent argues that the student's behavior was not premeditated, she and the student both contend that the actions were in response to unkind remarks made six days earlier. In addition, just before the first punch was thrown, the student told another that she intended to engage in the fight. Finally, the student engaged in further deliberate conduct when she re-posted a video of the fight on social media, particularly given that she waited a day before doing so. Thus, the district was free to subject the student to its regular discipline process.

Katy Indep. Sch. Dist., 122 LRP 20430 (SEA Tex. 2022). Where the student with ADHD never had a problem with impulsivity, the MDR decision that his undisclosed behaviors over a two-day period were not a manifestation of his disability is upheld. Here, the parent did not show that the student's ADHD manifested itself as impulsivity or disregard for consequences. Where courts and hearing officers are to look for a close connection between the way the student's disability has presented itself in the past and the behavior at issue, it is found that the student's disability has historically been evident by failing to pay attention, complete work, and stay organized. In addition, the conduct was not actually impulsive because it took place over two days and required multiple steps.

Suwannee Co. Sch. Bd., 121 LRP 28620 (SEA FL 2021). School district is correct in its position that the student's fight with another student was not a manifestation of his "mental impairment" for which he had a 504 Plan. Here, the student was expelled after a fight in the cafeteria with another student once the district determined the behavior was not a manifestation of the student's disability or the result of the failure to implement the student's Plan. Interpreting 504 consistently with IDEA, 504 limits the district's ability to remove a student with a disability for more than 10 school days without first conducting an MDR. While the student has a history of excessive discipline issues and referrals, the team based its decision on the fact that the student knew of the anticipated conflict with the other student, made a willful choice as opposed to an impulsive one, instigated the fight, walked across the cafeteria to engage the other student without invitation, prompting or provocation, had time and warning to deescalate and disengage, but continued to fight. All of these behaviors were not characteristic of past behaviors. Although the student has struggled with self-regulation and peer conflict and the student's disability therefore contributed to some degree, the student was the aggressor in this situation, and there was no evidence that the behavior was a manifestation of his disability.

Bradford Co. Sch. Bd., 119 LRP 37683 (SEA FL 2019). Parent's due process complaint challenging the district's MDR and long-term suspension is dismissed where student recorded a video of a fight in the school's bathroom and subsequently posted it on social media. During the MDR, the district found no medical information, records or other evidence that linked the student's risky and impulsive conduct to his disability. In addition, the parent failed to present any evidence that the district failed to follow appropriate IDEA procedures during the MDR.

School X Pub. Charter Sch., 119 LRP 22172 (SEA DC 2019). Team's overreliance on student's characterization of his behavior and its failure to closely review the documentation it collected led to an incorrect determination that the student's conduct was not a manifestation of his disability.

After the ED student with disruptive mood dysregulation disorder threatened and helped tackle a classmate and take his shoes, the Team found no manifestation and recommended expulsion. Instead of relying on a psychiatric evaluation and the student's description of behavior as "horseplay," the Team should have focused on all documents it had compiled, which described the student as relating poorly to others and regularly displaying negative and disruptive behavior. In addition, the school's eligibility report described the student as having "poor impulse control" and making "poor decisions at times." The behavior at issue should have been considered either the product of a poor decision, the product of poor impulse control, or both.

Pinellas Co. Sch. Bd., 73 IDELR 30 (SEA FL 2018). Based upon evidence that the high schooler's emotional disturbance primarily manifested itself as off-task behavior, the MDR team's decision that the student's conduct of removing a razor blade from a pencil sharpener and cutting two classmates with it was not a manifestation of his ED is upheld. While the MDR team failed to include its rationale for its decision in the MDR paperwork, team members testified at the hearing that their decision was based upon the student's lack of discipline referrals during high school and the fact that the behavior at issue occurred over a span of three class periods. While the student engaged in behavioral issues years earlier, the student had no referrals in high school and the primary effect of the student's ED was that he had trouble staying on task with respect to academics. Though one teacher testified that the student would distract other students by playing with school equipment on limited occasions, this is insufficient to support a causal connection to the incident in question. Because the incident transpired over the course of multiple classes, the team also correctly concluded that the conduct was not the result of impulsivity.

Orange Co. Sch. Bd., 118 LRP 36395 (SEA FL 2018). District must immediately return the student with an undisclosed disability to a traditional, non-alternative school placement and conduct an FBA and implement a BIP because of its failure to consider all relevant information when conducting the MDR. After the student made a verbal threat in November 2017, the MDR team convened. On the day of the MDR, the parents informed the team that they had emailed the student's evaluation, as well as a letter for the team to consider, but the team did not consider it. The MDR team should have reviewed all documentation that the parents brought to the MDR as the IDEA requires. The district's argument that the MDR was limited to all information collected before the incident is rejected. In addition, the student's behavioral history, emails sent to his teacher and the verbal threat in November 2017 indicate that the threat he made had a direct and substantial relationship to the disability and was, therefore, a manifestation.

Henry Co. Sch. Dist., 73 IDELR 86 (SEA GA 2018). District's determination that the behavior was not a manifestation of disability is upheld where middle schooler with an emotional disorder, ASD and ODD was involved in an incident of physical aggression and suspended to an alternative placement. Here, the MDR team properly convened, provided notice and determined that the student's behavior related to his ODD, not to his ASD or emotional disturbance. The team reviewed a video recording of the incident, finding that the student appeared calm and in control of his actions when he made the choice to engage in the physical aggression. Even though the incident involved unwanted physical contact and aggression and the IEP indicated that the student struggled with aggression, elopement, work refusal and following directions, the evidence showed the student's deliberate choice to engage in the conduct was consistent with ODD, not ASD or EBD.

Liberty 53 Sch. Dist., 117 LRP 26090 (SEA MO 2017). Where evidence indicates that student's ADHD symptoms are limited to anxiety about doing schoolwork (not impulsivity), his decision to bring a sock full of coins to fight a peer was not a manifestation of his disability. In addition, the student admitted that he planned to bring the sock to school. The MDR team properly considered all available evaluations and relevant information in making its determination.

Upper Darby Sch. Dist., 117 LRP 48405 (SEA PA 2017). District's manifestation determination that bringing a knife to school was not a manifestation of his ADHD is upheld. Here, the student brought a knife to school and lost it and then tried to find it, but it was turned in by a classmate to school administrators. It was recommended that the student be placed in an alternative school, but the parents disagreed. Here, the school psychologist indicated that ADHD is defined as an impairment of a child's executive functions, such as impairment of impulse control or "impulsive" behavior that is instantaneous or "in the moment." Evidence of intention to do something or knowledge of doing it, like bringing a knife to school, is not an impulsive action. In addition, the psychologist's opinion that the student's efforts to find a knife, bring it to school and possess it at school showed that the student's behaviors were not impulsive and did not implicate any of the other executive functions supports the determination. The parents did not present any other evidence that would contradict the psychologist's definitions, opinions and conclusions; thus, the district's decision is upheld. Finally, the student stated that he brought the knife to school in order to feel safe. This shows that the cause of the behavior was a need for a feeling of security, not the operation of an impulse.

Ocean Township Bd. of Educ., 68 IDELR 147 (SEA N.J. 2016). Where a ninth grader with ADHD prepared to light a fire in the classroom with five aerosol cans of body spray and wrapping a pencil in paper before igniting it, the district's determination that this was not a manifestation of the student's disability is upheld and IAES placement is appropriate. After the incident involving use of the spray and a lighter to burn items before stomping the flames out, the student was charged with starting a fire and possession of a dangerous weapon on school grounds. The MDR team determined that this conduct was not a manifestation of his ADHD which caused him to lose focus, not to be impulsive. The parents presented no evidence to refute the testimony of the district's assistant superintendent, who is a licensed psychologist who concluded that the student's ADHD was predominantly the inattentive type. In addition, the accommodation in the student's IEP that required the teacher to keep him within close proximity was designed to ensure that the student stayed on task, not to prevent him from endangering safety. Thus, the fire-starting behavior did not have a direct and substantial relationship to the student's ADHD; nor did it occur because of a failure to implement his IEP.

In re: Student with a Disability, 115 LRP 6203 (SEA Va. 2014). The district's determination that the student's skipping classes, being loud and disruptive in class and refusing to finish assignments was not a manifestation of his ADHD and Asperger's Syndrome is upheld. Despite the use of interventions listed in the student's BIP, his behavior continued to deteriorate, culminating in an alleged assault of an assistant principal. Because the child ceased his 25-minute tirade upon being told that the police would be called, the team determined that he had control over his behavior and made a deliberate choice to disobey the AP. Thus, his suspension for one year is upheld.

High Tech Middle North Co., 114 LRP 53441 (SEA Ca. 2014). Given that the student with ADHD-inattentive type displayed a knife and then concealed his conduct, it was reasonable for the district team to determine that the conduct was not a manifestation of his disability. If the student genuinely took the knife to school by mistake, it is unlikely that he would have taken it out, opened it and displayed it to another student. In addition, it was reasonable to conclude that the student would have explained his mistake to school staff after he was caught, which he did not do. In addition, the knife was made of heavy metal and had a substantial blade, which makes it reasonable for school staff to doubt that the student would have been unaware of it in his pocket.

Lakeshore Sch. Dist., 114 LRP 4249 (SEA Mich. 2014). Team correctly determined that ED football player's conduct was not a manifestation of the student's disability and that the behavior was a deliberate choice, not a sudden uncontrolled response to teasing. Clearly, the student was in complete control of himself and understood the consequences of his behavior but still chose to hit the other student after an incident of "mutual teasing" when the other student made a negative comment about the ED student's mother at lunch. Lunch ended, and the player went to his 4th period class and made a mental note of the location of the other student's class. When the bell rang, the player abruptly walked down the hall to the other student's class, waited for him and then began punching him in the head. In addition, the football player told the responding police officer that he would have "gotten" the victim at school, his house, or at a store and that something was going to happen to him for talking about his mother.

Southington Bd. of Educ., 113 LRP 42841 (SEA Conn. 2013). Argument that 18-year-old's ADHD caused him to store 200 anabolic steroid pills in his backpack and take them to school is rejected. In April 2013, when the AP found two packages of 100 pills each in the student's backpack, the parent later explained that the student had, without their knowledge, been buying the pills on the internet and taking them daily until January 2012. Where the evidence was that the student struggled to a small degree with organization, impulsivity, forgetfulness and inattentiveness, there was no evidence that this impacted his behavioral controls in such a way as to cause him to put steroids in his backpack and fail to remove them for a period of over four months. Nor was there any other evidence specifically linking his ADHD to the incident in question. Importantly, the student's conduct when he obtained the pills was marked by deliberation, organization and attention to detail. He had to find a source for the steroids online, identify a way to pay for them, obtain the money and convert it to a form accepted by the distributor. Thus, the presence of the pills in the backpack was the result of a plan, not a lapse in memory or impulsivity.

In re: Student with a Disability, 62 IDELR 217 (SEA Kan. 2013). Hiding marijuana and contraband in a backpack was not a manifestation of 15 year-old epileptic student's disability. According to the testimony of the student's parents, she was diagnosed with epilepsy at 22 months old and subsequently received a diagnosis of mood disorder, depression, anxiety and PTSD. Relying on a report from the student's doctor, the parents argued that her epilepsy impacted her "executive decision making," but there was not objective evidence to support this. Text messages from the child's phone indicated that she was interested in purchasing marijuana from the first day she started school, which showed that her course of action appeared to be "thought out and planned." In addition, she concealed her illegal activity during the investigation and hid the contraband in her backpack.

New Haven Unif. Sch. Dist., 113 LRP 28568 (SEA Cal. 2013). The violent actions of a student with SLD and ADHD were not a manifestation of her disability and her expulsion was appropriate. After a fight, the student was angry and upset and failed to stop walking away when directed by principal. She purposefully tried to evade him several times, and then attempted to break free of his grasp by kicking and punching him, which mandated an automatic expulsion for battery against a school employee. The MDR team concluded that the student's actions were not a manifestation of her disability, and at the hearing, the school's psychologist and several of her teachers testified that her impulsivity had not previously manifested in physical aggression. The testimony of a private psychologist who stated that the student's behaviors were a manifestation of her disability is rejected in favor of the testimony of the district personnel who had acquired knowledge and understanding of the way the student's ADHD manifested itself based upon their long-term observations of her. The evidence established that the student's conduct was not caused by nor did it have a direct and substantial relationship to her ADHD. In addition, the private psychologist did not include the teacher's rating scales in her analysis and relied solely on the parent and student self-reporting.

Lebanon Spec. Sch. Dist., 113 LRP 16893 (SEA Tenn. 2013). District was correct in determining that student's assaultive and destructive behavior was not a manifestation of his emotional disturbance or OHI. The student's special education teacher testified that he gave the student homework at the parent's request, although homework was not required and tended to negatively impact the student and his behaviors often flared when he was confronted with difficult work. One morning, he came to school upset that he had not completed his homework, and he banged his head on his desk, occasionally looking up to see if anyone was paying attention, according to the teacher. He then began throwing desks, chairs and electronic equipment, allegedly targeting the teacher's personal property. When an education specialist approached, the student reportedly wheeled around, looked her in the eyes and punched her chest. In determining that there was no manifestation, staff members relied in part on their experience that the student was capable of controlling his actions up until the point he reached full crisis mode, which did not occur until he was restrained following the assault. The parent failed to present any evidence to contradict the MD team's conclusion, calling just one witness—the education specialist that the student had punched—who testified that the student's destruction of property and assaultive behavior was not a manifestation of his disability. Other witnesses with extensive experience working with the student testified that his behavior was under his control until he was restrained, at which time he was in full crisis mode and could not control his behavior.

Seattle Sch. Dist., 60 IDELR 266 (SEA Wash. 2012). Where the district did not consider the impact of all of the other disabilities a student with ADHD had when it decided to expel him for bringing a homemade explosive device to school, it must reconsider its disciplinary decision that the conduct was not a manifestation. In making a manifestation determination, districts must review all relevant information in a student's file. A district may violate the IDEA when its manifestation determination only considers the disability upon which a student's special education eligibility is based. Here, the student's special education eligibility was based on his ADHD, but by the time his MD review took place, he had also been diagnosed with disruptive behavior disorder and anxiety disorder. Although the disruptive behavior disorder was referenced in the student's most recent evaluation and at least one MD team member was aware of his anxiety disorder, the team did not take into account either disorder in reaching its manifestation decision.

On this basis, the parent has satisfied his burden of showing the district failed to conduct a proper manifestation review. However, there is insufficient evidence to determine whether the child's conduct was in fact a manifestation of his disability. Although the student had a history of bringing inappropriate items to school—acts believed to be related to his disability when done impulsively—the team had reason to think that the conduct in this case was premeditated. They believed that the student may have made the device some time ago and brought it to school with the intent to ignite it. Because of the conflicting possibilities, the matter is remanded to the student's MD team to make a new determination by at least considering the student's additional disabilities.

Brazos Indep. Sch. Dist., 60 IDELR 149 (SEA Tex. 2012). Regardless of whether the student's misconduct (not described) on school grounds a new manifestation of his emotional disturbance was, the district did not err in changing his placement to an alternative program. The district's MD review properly considered only those behavioral problems discussed in the student's IEP and BIP. The IDEA provisions governing MD reviews look at the district's knowledge "before the behaviors that precipitated the disciplinary action occurred." As such, the MD team was not required to consider all types of behavior that an individual with an emotional disturbance might exhibit. Rather, the team's job was to determine whether the misconduct in question was the same type of behavior addressed in the student's BIP, which identified his difficulties as a need to exert control, a distrust of adults and a resistance to attempts to redirect him during instruction. The BIP further noted that the student had problems with disruptive behavior and verbal and physical aggression. Because the incident that triggered the MD review was a type of misbehavior not addressed in the student's BIP, there was no fault with the decision that his misconduct was unrelated to his disability. However, the incident put the district on notice of a possible need to expand his IEP and the district needs to reevaluate the student and consider whether any changes to his program are necessary.

In re: Student with a Disability, 61 IDELR 56 (SEA Va. 2012). A grade schooler's habit of checking for the presence of adults before engaging in behaviors such as upending desks, destroying classroom property and physically assaulting staff members and classmates reflects that his maladaptive behaviors were unrelated to his intellectual disability or his emotional disturbance. Thus, the student's 13-month expulsion was appropriate and the district's proposal to place the student in an alternative day school is upheld. The parents' claim that the student did not understand the difference between right and wrong is rejected. As the MD team had observed, the student typically looked behind him to check whether school personnel were watching before engaging in violent or disruptive behaviors. Additional evidence showed that the student's misbehavior was targeted to obtain certain goals. For example, the student would take the teacher's keys to further his plan to "escape" to the computer lab, and the student often made comments such as "ha ha" or "you can't catch me" at the start of a behavioral incident. "His own commentary on his behavior shows that he is aware of his actions" and the student will not benefit from his education until he learns appropriate behavior. The highly structured alternative school has small classes, uses positive behavioral interventions and supports, and has staff members trained in crisis management. Thus, the parents' request for home instruction is denied.

Center Unif. Sch. Dist., 112 LRP 12038 (SEA Cal. 2012). Where high schooler with ADHD had a night to sleep on her decision to smoke marijuana at school the next day, she was not acting

spontaneously when she followed through on her plans. Thus, the district properly determined that the student's conduct was not a manifestation of her ADHD before expelling her. The student accepted the marijuana as a present for her birthday and planned to smoke it with a friend the following morning. Once in the school bathroom the next day, she texted a third student to bring rolling papers, and the three students smoked the marijuana. The parent's argument that the student's decision was triggered by her impulsivity is rejected, as the student's ADHD symptoms primarily manifested as lack of sustained attention and organization. There was no evidence that she engaged in impulsivity to any significant degree at school, and the evidence indicated that she behaved well in class, other than speaking out of turn. Further, there was no evidence that she was acting impulsively on the day in question. "The student did not spontaneously accept a marijuana cigarette from someone and smoke it." Rather, she accepted one the previous day. Nor was there any evidence that the student could not say "no" to the student who provided it. "At best, Student's initial decision to accept the marijuana may have been impulsive and that impulsiveness may have had an attenuated relationship to her disability." Her involvement in planning the incident and subsequent participation, despite having a night to reflect, demonstrated that her actions were deliberate, not impulsive.

B. Some Relevant Decisions: Whether the Conduct Was the Direct Result of the District's Failure to Implement the IEP

Henry Co. Sch. Dist., 120 LRP 22074 (SEA GA 2020). While the school team determined that the ED student's disability did not cause him to push and kick another student repeatedly in the hallway while transitioning to his special education pull-out class, it was undisputed that the student's BIP and safety plan were not implemented at the time of the misconduct. The BIP and safety plan included in the student's IEP were put in place to address his noncompliance and safety during transitions between classes and called for adult supervision and monitoring during the transitions. Here, the student was not monitored when the incident occurred because a paraprofessional was unavailable, even though the student was normally escorted by a teacher. Clearly the student's misbehavior was a direct result of the school's failure to implement his IEP and the district must return the student to the placement from which he was removed.

Fremont Co. Sch. Dist. #25, 71 IDELR 224 (SEA WY 2017). District denied FAPE when it found student's behaviors were not a manifestation of his OHI. When the student made a threat to beat up and kill a staff member, a team was convened to conduct a manifestation determination and a recommendation for expulsion was made. The decision is overruled where previous assessments of the student overlooked appropriate qualifying disabilities and critical staff were not trained to implement and monitor implementation of the student's BIP to better ensure effectiveness and prompt refinement of unwanted behaviors. Thus, the district is ordered to return the student to his current placement because the behavior was a manifestation.

V. A SUMMARY OF KEY QUESTIONS TO CONSIDER AND DOCUMENT WHEN CONDUCTING MANIFESTATION DETERMINATION REVIEWS AND SOME ADDITIONAL REMINDERS

A. Key Questions for the MDR Team to Consider

Based upon a review of all relevant information available (including, but not limited to, the student's IEP, teacher observations, all information that the parents provide to the team, disciplinary records, district and/or private evaluation reports, etc.), consider the answers to the following questions when deciding whether the violation of the student code of conduct was or was not a manifestation of the student's disability:

- At the time of the misconduct, was the district implementing all of the provisions of the student's IEP, including any behavior plan? If not, was the violation of the student code of conduct the direct result of the district's failure to implement?

- What, if any, specific misconduct or behavioral challenges served as the basis for finding that the student was a student with a disability under IDEA/504 or supported any DSM-5-TR diagnoses made? [If further information is needed from a private practitioner, strongly consider requesting parent consent for release of any information the team may need to properly conduct its MDR].

- What are the "hallmarks" of the student's problematic behavior, if any? (e.g., anger, frustration, impulsivity, agitation, etc.)? Did the incident occur without the presence of these usual "hallmarks?"

- What, if any, specific behaviors/difficulties are addressed as part of the student's disability in the student's IEP, 504 documentation or BIP? Is the specific misconduct in question the same type of specific behavior addressed as part of the student's disability in the student's IEP, 504 documentation or BIP in place at the time of the misconduct?

- Prior to the misconduct, did the student engage in research, preparation, planning or forethought?

- Did the misconduct involve a series of steps that were carried out by the student or was the misconduct impulsive, rash or a momentary lapse in judgment? If the misconduct involved a series of steps, did they span over a period of time (class periods, hours, days, months, etc.) or were they immediate or the result of a sudden uncontrolled response?

- Did the student check for the attention of or presence/absence of adults before or after the misconduct in question?

- Did the misconduct require following directions, organization and/or attention to detail? Are those areas in which the student's disability specifically manifests itself?

- How has the student's disability specifically manifested itself previously? In ways like the misconduct at issue (aggression, violence, etc.)?

- Was the misconduct specifically targeted or focused on one person or his/her property/things or did the misconduct target or focus on no one/nothing specific?

- Was the student capable of or did the student actually demonstrate an understanding that the misconduct was wrong? For example, did the student try to hide it or behave in some way at the time of or after the misconduct to indicate that he/she knew it was wrong or that he/she could get in trouble for the misconduct? (apology, admission/confession, etc.)

- Was the student capable of controlling his/her misconduct/misbehavior? Prior to the misconduct, had the student shown difficulty with self-regulation; temper; controlling behavior in the past?

- During the misconduct, was the student capable of ceasing or did he/she cease the misconduct "on cue?"

- Were there any relevant events/statements made by the student or others before, during or after the incident for the team to consider?

- Did the student take any medication for his/her disability that might have had as a side effect the same behavior as the misconduct at issue (aggression; violence, etc.)?

- Did the student fail to take medication for his/her disability prior to the misconduct and could that relate to the occurrence of the misconduct at issue?

- If outside evaluative information is to be considered, how much time did the outside evaluator spend with the student? What specific assessments were administered and are the results consistent with school data and information about the student? What were the sources of the outside evaluator's information?

B. <u>Additional Reminders for MDR Teams</u>

- Make sure that the members of the MDR team are familiar with the student and how the student's disability usually manifests itself, including teachers, other service providers and a school psychologist or other evaluator. Also have staff members and others present who have knowledge of the details of the incident at hand—before, during, and after.

- Be careful in drafting the MDR paperwork before the team meeting. If draft paperwork is prepared, be sure to explain that it is in draft form for discussion purposes only and for the team to consider when conducting the MDR together with the parent(s).

- During the meeting, document all rationale and bases for the determination made, including all documents and other relevant information considered by the team.

- Consider the impact of ALL of the student's disabilities about which the district has knowledge, not only the disability upon which the student's special education eligibility or 504 disability are based.

- If additional information, including independent evaluative information, is provided by the parent/student at the manifestation determination meeting, the team should consider it and consider whether that information is consistent with anything seen in the school setting prior to the misconduct. Do not ignore that information just because it was obtained after the misconduct occurred if it is provided prior to or at the time of the MDR meeting.