Understanding Special Education Manifestation Determinations:

The State of the Law as a Guide for Practice Today

And Considerations for Future Change

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Introduction

Alternative dispute resolution is widely utilized in many areas. Often, parties voluntarily agree to submit their disputes to resolution, via alternative methods, such as mediation and arbitration, in place of litigation. At times, courts mandate that alternative methods of dispute resolution be attempted to resolve disputes, before bringing disputes to court for resolution via litigation. For example, this method, requiring alternative dispute resolution before utilizing the courts, has become common in parts of the country in resolving divorces and accompanying matters. This note will focus on an area where alternative dispute resolution is built in to the process by federal law and regulations; i.e., to resolve issues and conflicts that arise with regard to preserving the rights of special education students in our nation's public schools when they come into conflict with policies intended to maintain a safe learning environment for all students who attend.

There is a tension in the law between policies intended to preserve the rights of special education students in public schools and policies intended to maintain a safe learning environment for all students who attend. This paper will examine how the law has sought to protect the rights of special education students while having to reconcile these rights with school policies designed to maintain safety. This paper will also discuss procedures that must be followed and policy implications of the current procedures. How the process moves from a rather informal one, that is mandated to take place within school districts, ultimately to state and federal courts will be examined. Most cases are resolved and end in the earliest stage of the process, when the process is most informal. Procedures that are mandated as well as criteria that must be used, within this process, will be examined. Changes in the law that are needed and that should be made will also be discussed.

Congress passed the Education for All Handicapped Children Act (EHA)[1] in 1970 and amended it substantially in 1975, as the Education for All Handicapped Children Act[2]. This landmark bill, for the first time, set in motion national standards for special education and the right to an education on the part of special education students. The bill has been reauthorized several times. In 1990, its name was changed to the Individuals with Disabilities Education Act (IDEA). The most recent reauthorization was in 2004 (IDEA 2004). These bills form the statutory basis in federal law for the issues that will be discussed in this paper.

Case law based upon the EHA eventually led to and contributed to the enactment of revised statutes, which in turn led to later case law which further refined the law and the procedural requirements in this area. To place the law in this area into its proper perspective, this paper first will trace the development of the law through examination of the early case law. Relevant statutes will also be examined. Having derived the concepts, principles and required practices from the statutes and case law, this paper will examine implications for practice from recent case law, draw policy implications and make recommendations.

The United States Supreme Court, in *Honig v. Doe*[3] explained that the EHA was passed after Congress found that school systems had excluded one out of every eight children from class. The Court explained that,

> in drafting the law, Congress was largely guided by . . . *Mills* v. *Board of Education of District of Columbia* . . . and *PARC*. . . both of which involved the exclusion of hard-to-handle disabled students. *Mills* in particular demonstrated the extent to which schools used disciplinary measures to bar children from the classroom. There, school officials had labeled four of the seven minor plaintiffs "behavioral problems," and had excluded them from classes without providing

[1] 84 Stat. 175.
[2] 89 Stat. 773.
[3] 484 U.S. 305 (1988).

> any alternative education to them or any notice to their parents. . . . After finding that this practice was not limited to the named plaintiffs but affected in one way or another an estimated class of 12,000 to 18,000 disabled students, . . . the District Court enjoined future exclusions, suspensions, or expulsions "on grounds of discipline." [4]

Education traditionally has been seen as an area in which the states, rather than the federal government, play the leading roles. In New Jersey, for example, the State Constitution requires that "the Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State. . . "[5]. Through the IDEA, Congress has instituted federal control over special education by mandating special education procedures. It has done so by requiring that any state that wishes to receive federal funds under IDEA must have rules, regulations and polices that conform to this act.[6]

After 1970, when the EHA was first passed, early court decisions clarified the parameters of special education students' right to an education, as this right intersected with the desire of school officials to maintain a safe school environment. With the passage of the 1997 revision of the IDEA, formal procedures, termed Manifestation Determination Review, were put into place for handling the possibility of suspension from school for serious misbehavior by special education students. These procedures were revised in the 2004 reauthorization.

Overview of Process – From School Based and Informal to Litigation in the Courts

The issue is what is to be done when a special education student displays disruptive behavior in a school setting. Federal and state rules allow public schools to suspend students for displaying disruptive behavior but the problem arises when special

[4] *Id*. at 324 (Citations within block quote omitted for clarity.)
[5] N.J. CONST. Art. VIII 4 § 1.
[6] 20 U.S.C. § 1407.

education students, in a manifestation of their disabilities, display disruptive behavior. As will be shown below, the law does not allow punishing special education students for manifesting their disabilities. The disruptive behavior can, at times, be a manifestation of the disability. Federal law and regulations, as will be shown below, have set forth a process for examining the student's behavior in order to determine if the behavior is in fact a manifestation of the disability or not.

The first step in the process in the least formal. This is also the step at which most controversies in this area are resolved, as consensus is reached in most cases, so that the appeal process, which takes one towards and ultimately into formal litigation, is in most cases not needed. The law requires that a team consisting of "the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and local educational agency)" make the determination.[7] The process is one in which the parties together examine and analyze the student's behavior as it relates to the student's disabilities. However, the nature of the proceeding is such that it can become adversarial since the result of the determination of whether the student's behavior was a manifestation of disability is whether the student will be suspended from participation in the regular public school program. Parents can and often do choose to participate in such proceedings without the benefit of counsel; however, at times, parents do bring counsel to assist and advocate on their behalf, at these problem solving and dispute resolution meetings.[8] This entire note discusses the legal aspects that pertain to the decisions made at these relatively informal conflict resolution/problem solving meetings. The process envisions that this informal problem solving/conflict resolution meeting will resolve the

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[7] 20 U.S.C.S. § 1415 (k) (1)(E).
[8] *See* pages 10 – 17, *infra*, for more details on how this process is to be carried out.

issues at this level, not necessitating resort to formal litigation. By and large, the process has been working and in most cases, matters are in fact resolved at this level.

This informal problem solving/conflict resolution process is not always successful, however, in resolving conflict between the student and parents on one side and the school district on the other. If conflict is left unresolved, the process then allows for appeal to an expedited impartial hearing.[9] The legal considerations discussed in this paper also pertain to this appeal process.

Parties may appeal the results of the impartial hearing to the state educational agency.[10] Finally, if the matter is not resolved at that level, the law allows appeal, as a civil action, to "any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy."[11]

Early Cases that Established the Rights of Special Education Students When Facing Potential Expulsion from School for Disruptive Behavior

An early case dealing with the nexus between the rights of disabled students and suspension for disruptive behavior in a school was *Stuart v. Nappi*.[12] A student placed in a special education class was suspended from school for the remainder of the school year following her involvement in a school-wide disturbance. She sought, and ultimately was granted, a preliminary injunction against the school board, preventing this suspension from being put into effect. The court held that she had made a persuasive showing and demonstrated that she might suffer irreparable injury if the suspension were put into effect. The court also held that she had demonstrated probable success on the merits of

[9] 20 U.S.C.S. § 1415 (k) (3) (A).
[10] 20 U.S.C.S. § 1415 (g) (1).
[11] 20 U.S.C.S. § 1415 (i) (2) (A).
[12] 443 F. Supp. 1235 (D. Conn. 1978).

her claim, under the Education of the Handicapped Act[13], as she contended that there was a causal connection between her academic program and her anti-social behavior. The court reasoned, "In the instant case, judicial intervention in Danbury High School's disciplinary procedures is congressionally mandated. The Handicapped Act vests jurisdiction in federal district courts over all claims of noncompliance with the Act's procedural safeguards, regardless of the amount in controversy. *See* 20 U.S.C. § 1415(e)(4)."[14] The court further explained that the federal special education regulations and the school's disciplinary procedures were actually intertwined and were not distinct. The area of school disciplinary procedures is one traditionally reserved to the discretion of local school officials. Nevertheless, the court therefore ordered the proposed disciplinary plan not to be put into effect:

> Defendants' principle objection to the issuance of a preliminary injunction is that the procedures for securing a special education are distinct from disciplinary procedures and therefore one process should not interfere with the other. This contention is based on a non sequitur. The inference that the special education and disciplinary procedures cannot conflict, does not follow from the premise that these are separate processes. Defendants are really asking the Court to refuse to resolve an obvious conflict between these procedures. This Court will not oblige them.[15]

The court therefore ordered the Danbury Board of Education to have its Planning and Placement Team review the student's special education program and the court preliminarily enjoined the school district from proceeding with a hearing to expel the student. If any changes were to be made in the student's special education program, they were to be made through the regular special education processes and not through an expulsion. The court thus resolved the conflict between the school district's disciplinary procedures and the protections inherent in federally based rights of special education

[13] 20 U.S.C. § 1401.
[14] *Id.* at 1244.
[15] *Id*.

students by giving the procedures in special education, that emerge from the rights of special education students, greater weight.[16]

One year later, another federal court ruled that the Education of the Handicapped Act does not prohibit all expulsions of disruptive handicapped individuals in *Doe v. Koger.*[17] The court's opinion explained that the EHA would not permit expulsion based on disruptive behavior due to a child's handicap but would permit it if it were due to another reason. The court also reasoned that "before a disruptive handicapped child can be expelled, it must be determined whether the handicap is the cause o the child's propensity to disrupt." A disruptive handicapped child can be expelled only if "properly placed." [18]

The need to inquire into the relationship between a student's disruptive behavior and the student's handicapping condition was set forth in *S-1 v. Turlington*[19] In this case, a school district suspended a number of mentally retarded students from school for alleged misconduct. One of them requested a hearing, at which the school's superintendent determined that the misconduct could not have been a manifestation of the student's disability, since the student was not classified as emotionally disturbed. The court held that the defendants did not sufficiently inquire into whether the behavior bore a relationship to the handicapping condition.

In *Turlington,* the court set forth the statutory bases for not permitting the expulsion of a student for displaying a handicapping condition. It is based on section 504 of the Rehabilitation Act of 1973 and the EHA. The court explained as follows:

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[16] *Id.*
[17] 480 F. Supp. 225 (N.D. Ind. 1979)(need pincite).
[18] *Id.* at 229.
[19] 635 F.2d 342 (5th Cir. 1981).

> Section 504 of The Rehabilitation Act of 1973 . . . provides . . .
> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . .
>
> Under 29 U.S.C. § 706(7)(B), a handicapped individual is defined as "any person who . . . has a physical or mental impairment which substantially limits one or more of such person's major life activities ..."
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> Under the EHA, 20 U.S.C. § 1412, . . . a state receiving financial assistance under this Act is required to provide all handicapped children a free and appropriate education in the least restrictive environment. The definition of handicapped children under the EHA is similar to the definition under section 504.

The court explained that, under EHA and § 504 of the Rehabilitation Act of 1973, determining whether a child is handicapped, would be related to whether the child may be expelled; i.e., a student could not be expelled merely for manifesting behavior reflective of the disability. As the court put it:

> The children in this suit are clearly handicapped within the meaning of both section 504 and the EHA. The parties agree that a handicapped student may not be expelled for misconduct which results from the handicap itself. It follows that an expulsion must be accompanied by a determination as to whether the handicapped student's misconduct bears a relationship to his handicap. From a practical standpoint, this is the only logical approach.[20]

In *Kaelin v. Grubbs*[21], the court, citing *Turlington*, in a case dealing with "mentally handicapped" students, noted that expulsion must be accompanied by a determination of whether a handicapped student's misconduct was related to and was a "manifestation" of the handicapping condition. The court noted that the relevant statutes

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[20] *Id*. at 346.
[21] 682 F.2d 595, 599-600 (6th Cir. 1982).

did not provide any guidance on this issue but that reasoning of *Stuart v. Nappi*, and of *Sherry v. New York State Education Department* and *Doe v. Koger*[22] provided support for student expulsion being seen as a change in placement within the Handicapped Children's Act (EHA).

The "stay-put" provision of the EHA requires a child whose placement is under review to remain in the educational placement in effect at that time, until the review is completed. The relationship of the "stay-put" provision of the EHA and the suspension of special education students was discussed by the United States Supreme Court in the landmark case of *Honig v. Doe.*[23] The Court ruled that a thirty-day suspension from school would violate this provision but a suspension of less than ten days would not. With regard to disruptive handicapped students, whose behavior was believed to constitute a dangerous situation, the Court explained, "Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny officials their former right to 'self-help,' and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts."[24]

The Court explained that Congress attacked exclusionary practices in a number of ways. It included children with emotional disturbance in the definition of the "handicapped." It mandated inclusion of parents in the decision making process with regard to special education student placements. It barred the changing of student placements, over parent objections, until all proceedings had been completed. The Court noted that an emergency exception for dangerous students was absent from the statutes

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[22]480 F. Supp. 225 (N.D. Ind. 1979).
[23] 484 U.S. 305 (1988).
[24] *Id*. at 323, 324.

and that this was an omission in the statute that was intentional. As the Court put it, "we are therefore not at liberty to engraft onto the statute an exception Congress chose not to create."[25] The Court recommended that schools utilize for disruptive students procedures such as time-outs and detentions. School officials could even use, if necessary, temporary suspensions of up to ten days. During that ten day period, if needed, school officials could access the assistance of the courts, which under
§ 1415(e)(2) could grant greater relief for a school.

Substantial Relationship of Misbehavior to the Disability

What is meant by a "manifestation" of a disability that a student's behavior must exhibit to invoke the statute's protections of disabled students? This was addressed in *Doe v. Maher*.[26] In *Maher*, the court explained that other expressions, such as "conduct that arises from the handicap," "conduct that is caused by the handicap" and "handicap-related misconduct" have been utilized. The Maher court explained that what these various expressions mean is the same; i.e., they "refer to conduct that is caused by, or has a direct and substantial relationship to, the child's handicap. Put another way, a handicapped child's conduct is covered by the definition only if the handicap significantly impairs the child's behavioral controls."[27]

The court went on to explain that the definition does not include situations where there is only an "attenuated relationship" between the behavior and the disability.[28] The court gave the example of a child whose physical handicap affected self-esteem and the child misbehaved to win the attention or approval of peers.[29] The court explained that

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[25] *Id.* at 325.
[26] 793 F.2d 1470 (9th Cir. 1986).
[27] *Id.* at 1480.
[28] *Id.*
[29] *Id.*

while "such a scenario may be common among handicapped children, it is less common" but also present among students who are not disabled but suffer from low self-esteem.[30]

When a student's misbehavior is not a manifestation of a disability, a school is not precluded from removing a student from the educational program.[31] In *Virginia v. Riley*, the court, sitting en banc, found in favor of Virginia, because the "plain language of the IDEA does not, even implicitly, condition the receipt of IDEA funding on the continued provision of educational services to disabled students who are expelled . . . due to serious misconduct wholly unrelated to their disabilities."[32] The Seventh Circuit, agreed with the Fourth Circuit's reasoning in Virginia.[33]

Similarly, in *Hayes v. Unified School Dist*.[34], the court reasoned that where a student is suspended for disability related behavior and the suspension is for a limited duration within the school building, the suspension is not a change of placement. Thus, in Hayes, the school district did not run afoul of IDEA and related court rulings. Id.

In *Hacienda La Pente Unified Sch. Dist v. Honig*[35], the court emphasized that there was no "dangerousness" exception to the "stay-put" provision. School districts must, therefore, provide an educational program for special education students even if they exhibit serious misconduct. The court explained that "the broad language used by the Supreme Court leaves the unmistakable impression that all disabled students, whether

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[30] *Id.*
[31] *See Virginia v. Riley,* 106 F.3d 559 (4th Cir. 1997). (where "the Department [of Education] threatened to withhold the State of Virginia's entire IDEA grant for fiscal years 1994 and 1995, unless" the state changed its practice of denying free public school education to children whose misconduct was unrelated to their disability.)
[32] *Id.* at 561.
[33] *See Doe v. Board of Education*, 115 F.3d 1273, 1278 (7th Cir. 1997) (court found school did not violate IDEA when it did not provide alternative services to an expelled student.)
[34] 669 F. Supp. 1519 (D. Kan. 1987), at 1524.
[35] 976 F.2d 487, 493 (9th Cir. 1992).

or not possessing 'previously identified exceptional needs,' are entitled to the procedural protections afforded under the IDEA."[36]

Additional Relevant Cases – Before the Latest Revision of IDEA

In *Moubry v. Indep. Sch.Dist. No. 696 (ELY)*[37] the court held that the Americans with Disabilities Act (ADA) claim was "cognizable as an IDEA claim," demonstrating the relationship between an IDEA claim and an ADA claim and the importance of exhausting administrative remedies before seeking relief from the courts.
The court dismissed the IDEA claim because the student had not exhausted available administrative remedies before commencing suit.[38]

The Seventh Circuit, in *Doe v. Bd. of Ed. of Oak Park and River Forest High Sch. Dist. 200*[39], held that a school did not deny a student an education under the IDEA when it expelled him for bringing a pipe and a small amount of marijuana to school. The school expelled the student following a determination by the district's Multidisciplinary Conference that the student's misconduct was not related to the student's learning disability.

Manifestation Determination Procedures Now Required by Statute

The requirement and procedures to determine if a student's behavior is a manifestation of disability were first incorporated into statute in the 1997 revision of the IDEA. These procedures were revised in 2004. Thus, court decisions subsequent to 1997 took account of manifestation determination procedures now spelled out in statute, whereas prior to the 1997 revision the procedures were derived from the judicial decisions and interpretations.

[36] *Id.* at 494.
[37] 951 F. Supp. 867, 874 (D. Minn. 1996).
[38] *Id.*
[39] 115 F.3d 1273 (7th Cir. 1997).

In the 1997 revision of the IDEA, the criteria for finding that a behavior was not a manifestation of the student's disability were as follows[40]:

> (i) In relationship to the behavior subject to disciplinary action, the child's IEP [Individual Educational Program] and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;
> (ii) The child's disability did not impair the ability of the child to understand the impact and consequences subject to disciplinary action; and
> (iii) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

Parts (ii) and (iii) adopted *Doe v. Maher*'s reasoning that behavior could not be viewed as related to a student's disability, unless the disability "significantly impairs the child's behavioral controls."[41] In addition, the 1997 version of the IDEA added the third requirement of part (i) that the need for the IEP and placement be appropriate.

The 2004 revision of the IDEA made certain significant changes from the 1997 IDEA regarding the determination of whether a student's behavior is a manifestation of disability. The 2004 IDEA revision decreased the number of individuals who must participate in the conference to determine if there is a manifestation and also cut back the amount and nature of the data that the conference needs to consider. These changes make it more likely that a given behavior will not be found to be a manifestation of the disability.

Under the current 2004 revision of IDEA, the criteria that determine if the behavior was a manifestation of the disability have been modified. The group making the determination must consider: "(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

[40] 34 C.F.R. § 300.523 (1997).
[41] *Id.* at 1480.

question was the direct result of the LEA's [Local Educational Agency's] failure to implement the IEP."[42] The 2004 revision eliminates the deeming of a child's behavior as a manifestation of the student's disability based on the failure to fully provide special education services, the child's lack of understanding of the impact and consequences of his or her behavior due to his or her disability, or the child's lack of behavioral control due to his or her disability. A direct and substantial relationship between the disability and the conduct are now required for the behavior to be considered a manifestation of the disability. With regard to the IEP, it is no longer sufficient to deem the student's behavior as a manifestation if not all of the details of the IEP were implemented. Instead, to deem the behavior a manifestation of the disability based on lack of implementation of the IEP, the conduct be a direct result from the lack of IEP implementation . In addition, the failure must be traceable to a failure by the local educational agency.

Under the 1997 law, the conduct was deemed to be a manifestation of the disability if the IEP placement or special education services were believed to be inappropriate. Under the 2004 revision such deeming only occurs if the local educational agency had a prior "basis of knowledge" that the IEP placement or special education services were inappropriate. The statute defines "basis of knowledge" as that *before* the behavior that precipitated the disciplinary action, one of the following occurred:

> (i) the parent of the child has 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 of the child has requested an evaluation of the child …
> (iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior

[42] Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46540 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300.530(e)).

> demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.[43]

The statute also specifies exceptions to these rules; i.e., that the local educational agency "shall not be deemed to have knowledge that a child is a child with a disability if the parent of the child has not allowed an evaluation of the child . . . or has refused services under this part . . . or the child has been evaluated and it was determined that the child was not a child with a disability under this part."[44] Under the new rules, therefore, even if the child is in need of services, if the LEA had no basis of knowledge of this need, then the child's behavior would not be deemed to be a manifestation of his disability. Also, the law does not require such deeming if the parent previously did not cooperate with the provision of special education services or the professionals evaluated and determined that special education services were not needed.

Although the changes from the 1997 version of the IDEA to the 2004 version seem to weaken the parents and students claims on the school district, the change from the 1997 law is not as great as it might seem. The parent could refer the child for evaluation even while the disciplinary action is being contemplated. While doing so would not result in a deeming of the behavior as a manifestation, as would have been the case under rule i of the 1997 rules, nevertheless, the new statute states that in such a situation, the "evaluation shall be conducted in an expedited manner." The statute also specifies "pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities."[45]

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[43] 20 U.S.C. § 1415, (k), (5), (B).
[44] *Id*. at (k)(5)(C).
[45] *Id*. at (k)(5) (D) (ii).

IDEA of 2004 changes what data must be reviewed in making the determination of whether behavior is a manifestation of the disability. In the 1997 IDEA, the reviewing team was to consider "all relevant information."[46] Under the 1997 statute, the review to make this determination had to be carried out "by the IEP team and other qualified personnel in a meeting."[47] The determination regarding whether the behavior was a manifestation of the child's disability had to be done by considering "all relevant information, including":

> (i) Evaluation and diagnostic results, including the results of other relevant information supplied by the parents of the child;
> (ii) Observations of the child; and
> (iii)The child's IEP and placement[48]

Under IDEA 2004, the determination of whether the behavior was a manifestation of a disability is do be done "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, [by] the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) . . . ."[49] The parent is now a mandated member of the team and the parent now has a say, along with the IEP Team, regarding who else participates in the decision-making group. Regarding what data are to be utilized in making the decision, the team members, "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 . . . ." *Id.* The new procedures do not require the use of "evaluation and diagnostic results," as was the case with the 1997 IDEA. Therefore,

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[46] 20 U.S.C. § 1415(k)(4)(c); 34 C.F.R. § 300.523(c).
[47] 64 FR 12406 § 300.523 (b).
[48] *Id*. at (c).
[49] 71 FR 46540 § 300.530 (5) (e).

if such results are not available, it would appear from the change in the wording that they need not be carried out; rather, the team can make its determination with the information at hand in the student's file, such that it is.

Functional Behavioral Assessments and Behavioral Intervention Plans

A matter closely related to the manifestation determination is the requirement for the functional behavioral assessment. A functional behavioral assessment (FBA) is an assessment in which assorted data is gathered to determine the function of particular behavior for an individual. In a functional behavioral assessment, as described by Crimmins and Woolf, the purpose of the assessment is to

> identify the underlying purpose of the behavior for the individual. In behavioral terms, teams are attempting to identify how the behavior is reinforced and what stimuli control its occurrence. Determining how the behavior is reinforced is based on assessing both typical consequences for the challenging behavior and existing contingencies for more acceptable behaviors in the same situation. Determining controlling stimuli requires the identification of antecedent and setting events that appear to trigger the behavior.[50]

On the basis of understanding of the function of behavior for an individual, a behavioral intervention plan is then developed that seeks to change the individual's behavior by addressing the function of the inappropriate behavior; i.e., it seeks to satisfy the same function that the undesirable behavior (that we wish to see eliminated) had. It does so through teaching of different behaviors and manipulating the setting events, antecedents and consequences of the behavior which is problematic and of the behaviors which are sought to be introduced to replace the problematic behaviors.[51]

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[50] DANIEL B. CRIMMINS & SARA B. WOOLF, POSITIVE STRATEGIES – TRAINING TEAMS IN POSITIVE BEHAVIOR SUPPORT 3-1 (Westchester Institute for Human Development 1997).

[51] This explanation of the FBA and behavior intervention plans is by the author, who is an experienced school psychologist who has utilized this approach to assessment and intervention and has trained others to do so.

The 1997 IDEA required that when a disabled student is being removed from his educational program, "if the LEA did not conduct a functional behavioral assessment and implement a behavioral intervention plan for the child before the behavior that resulted in the removal . . . , the agency shall convene an IEP meeting to develop an assessment plan."[52] This provision of IDEA of 1997 required this additional task be carried out and its results considered; thus, concurrent with the requirement to conduct a manifestation determination, the Functional Behavioral Assessment (FBA) needed to be worked on as well; typically, by the same people, i.e., the school psychologist and other personnel typically involved on IEP teams in schools.

In the IDEA of 2004, there is a change with regard to the FBA requirement. With regard to suspensions from school, the new IDEA requires that "school personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement . . . is appropriate for a child with a disability who violates a code of conduct."[53] With regard to the functional behavioral assessment and behavioral intervention plan, the regulations now state that the student is to "receive, *as appropriate* [emphasis added], a functional behavioral assessment, and behavioral intervention services…."[54] Thus, whereas, the FBA was previously required whenever suspending a disabled student, whether the student's behavior was found to be a manifestation of the disability or not, now an FBA may be used "as appropriate." Now the statute states that the IEP Team shall conduct the FBA and implement a behavioral intervention plan (or modify, as necessary, the behavioral intervention plan that already exists) "if the local educational agency, the parent, and relevant members of the IEP Team make the

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[52] 64 FR 12406 § 300.520(b)(1)(i).
[53] 71 FR 46540 § 300.530(a).
[54] *Id.* at § 300.530(d)(1)(ii).

determination that the conduct was a manifestation of the disability. . . ."[55] This implies that the FBA would not be needed if the determination made was that the misconduct was not a manifestation of the disability.

Serious Bodily Injury, Weapons and Illegal Drugs

The 1997 IDEA and even more so the 2004 IDEA have provided exceptions, wherein students may be removed from their schools for a lengthy period, even if the behavior is a manifestation of the disability.

Previously, under the 1997 IDEA, disabled students could be removed from their educational environments for up to forty-five days if the child brought a weapon to school or to a school function or if the child brought illegal drugs to school or sold or solicited the sale of any controlled substance, either at school or at a school function.[56] IDEA 2004 has added a third category, if the child inflicts serious bodily injury to another person at school.[57]

Recent Cases

Recent court cases have further delineated the rules governing manifestation determinations. As the cases that follow will show, decisions have clarified the law with regard to change of a student's placement following a manifestation determination, the relationship of manifestation determinations to functional behavioral assessments, what is the result if a manifestation determination is conducted after the student's program has been changed (rather than before a change of program), and what happens if the student is classified as disabled following the occurrence of the disruptive behavior.

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[55] 20 U.S.C.S. § 1515 (k) (F).
[56] 20 U.S.C. § 1415(k)(1)(G)(i)(ii).
[57] 20 U.S.C. § 1415(k)(1)(G)(iii).

Students in special education are to "stay-put," i.e., remain in their current program (under 20 U.S.C. § 1415(j)) while disciplinary proceedings are pending. One interesting case involved a student who was transferred from one school to another, after a Manifestation Determination Review committee found his behavior was not a manifestation of his disability and his IEP was appropriate.[58] The parents of the child challenged this conclusion, including by bringing an evaluation conducted by an outside psychologist.[59] The case went was heard by a Due Process Officer, who ruled against the parents.[60] The student was moved to a similar program in another elementary school.[61] The next year, the change in elementary school resulted in the student going to a different junior high school, since particular elementary schools feed students to particular junior high schools.[62] The parents challenged this as they maintained that the student was moved while they had not yet exhausted their appeal process.[63] Thus, they maintained, the "stay-put" provision was violated.[64] The district court and then the Court of Appeals affirmed that this was not a violation of the "stay-put" provision since the educational environment had not changed, only the location had changed.[65] The court held that educational environment referred to type of educational placement and not to a specific location.[66]

Another recent case was one where no manifestation determination was conducted by the school, nor were an FBA and behavioral intervention plan developed, for a student who exhibited serious disciplinary violations and had his school program

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[58] *A.W. ex rel.. Wilson v. Fairfax County School Board,* 372 F.3d 674, 674 (4th Cir. 2004).
[59] *Id*. at 677.
[60] *Id*.
[61] *Id*.
[62] *Id*. at 676.
[63] *Id.* at 678.
[64] *Id*.
[65] *Id.* at 683 – 684.
[66] *Id*. at 685.

changed.[67] While the court found that the lack of manifestation determination was not a violation of IDEA because the school system personnel were not the ones who changed the student's program, they were found to have violated IDEA for not having developed the FBA and behavior intervention plan, to address the student's challenging behaviors.[68] Thus, the summary motion was denied by the court.[69]

A recent case shows that without an FBA conducted by the time of the manifestation determination conference, the validity of the manifestation determination itself can become suspect. In *Coleman v. Newburgh Enlarged City Sch. Dis.*[70] a manifestation determination conference was held, and a determination was made. The Committee on Special Education (CSE) of the school district "recommended that a functional behavioral assessment be" conducted following the Manifestation Hearing. [71]The court explained:

> [T]he CSE recommended performance of an assessment casts doubt on the conclusion at the Manifestation Hearing that the altercation with N.H. was not a manifestation of the Plaintiff's disability. At the very least, the CSE's determination at the Manifestation Hearing should be subject to greater scrutiny in the absence of such an assessment. . . . This Court finds that the Defendant's determination following the Manifestation Hearing is insufficiently supported by the evidence in the record.[72]

A student may not be suspended from school without a hearing and a disabled student must not be suspended without a manifestation determination hearing and without the conclusion of such a hearing. In *Waln v. Todd County School District*[73]*,* a student was given a long-term suspension and was denied a hearing related to this. As this was a

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[67] *Larson v. C.L.*, 2004 U.S. Dist. LEXIS 3322, at *26.
[68] *Id*. at *32.
[69] *Id*. at *60.
[70] 319 F. Supp. 2d 446 (S.D.N.Y. 2004).
[71] *Id*. at 454.
[72] *Id*.
[73] 388 F. Supp. 2d 994 (D.S.D. 2005).

disabled student, a manifestation determination was necessary; one was begun but it was not completed to the point of reaching a conclusion.[74] The court referred to this violation by the school district as the "coup de gras" and characterized what occurred as being a process of "guilty until proven innocent."[75] Accordingly, the plaintiff obtained summary judgment as to liability by the school district.[76] Clearly, violation of the manifestation determination requirements can have serious consequences.

However, if a parent places a child into an educational program independently of the school district, the school district cannot then be held liable for not having conducted a manifestation determination review.[77] This was a case where the school district put the parents in contact with someone who assisted the parents in obtaining this educational placement.[78] The school district's role was merely to give the parents information about an option that they might choose but the school district did not actually make the placement.[79] However, this court did find that the school district violated the IDEA by failing to provide a functional behavioral assessment and a behavioral intervention plan for the student; these were required because the student's behavioral difficulties were the focus of the student's IEPs.[80] The court concluded that the student's IEPs were in violation because they "were not reasonably calculated to enable him to receive a meaningful educational benefit." *Id.* at 40.

In *Doe v. Todd County School District,* 2006 U.S. Dist. LEXIS 77770 (D.S.D 2006), a student was put on long-term suspension. In the midst of this suspension, the manifestation determination was conducted, at which time it was decided that the

[74] *Id*. at 999.
[75] *Id*. at 1007.
[76] *Id*.
[77] *Larson, supra* note 63 at 25-26.
[78] *Id*. at 5.
[79] *Larson, supra* note 63 at 24-26.
[80] *Larson, supra* note 63at 31.

behavior was not a manifestation of the disability.[81] The School District did not stay the suspension pending the manifestation determination. The court said, "[t]his is backwards."[82] The court concluded that "the plaintiff was deprived of [the] right to education without due process of law."[83] Accordingly, [partial] summary judgment was granted on behalf of the plaintiff student.[84]

It is important to remember that the fact that a student is not yet classified as disabled does not necessarily exempt the school district from the requirements of IDEA, with regard to conducting a manifestation determination. In *K.W. v Washington Township Board of Education*[85], a student was barred from her high school graduation. She was suspended and given this punishment prior to having been classified as disabled. However, shortly after the fight that led to these consequences, she was classified as emotionally disturbed. As the administrative law judge (ALJ) reasoned, "had she been classified before the fight she would have been entitled to a manifestation determination which could have affected the course of events thereafter. Her need for special services most likely did not arise right after the second fight. . . . The District's actions are well-intentioned, but its actions . . . are arbitrary, capricious and unreasonable."[86] The ALJ therefore ordered that this student be allowed to attend her graduation.

Policy Implications

It would appear from an examination of the provisions of the IDEA relating to manifestation determination, that Congress was attempting to balance the need for safety and discipline in schools with the rights of the disabled to obtain a free and appropriate

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[81] *Id*. at 7.
[82] *Id*. at 38.
[83] *Id*. at 50.
[84] *Id*. at 51.
[85] Decision on Emergent Relief, OAL (New Jersey) Dkt. No. EDS4020-06, May, 2006.
[86] *Id*. at 3.

education, as required under IDEA for all special education students. Turnball, et al., however, argue against the view that there is a need to strike a balance between the right to safety and discipline, on the one hand, and the rights of the disabled, on the other. "[The] view that school safety concerns must be balanced against the rights of children with disabilities . . . creates a false dichotomy." They argue that the IDEA "provides for personnel development, instructional resources, and innovative interventions and strategies that can aid schools in implementing school-wide safety plans that will help to deal not only with behavioral problems among children with disabilities, but with those that occur throughout the school." They further argue that strategies emphasizing such approaches and functional behavioral assessments, behavior intervention plans and approaches using "positive behavioral supports" will reduce the behavioral problems so that there will not necessarily be safety concerns balanced against the rights of special education students, but instead, the safety concerns will be diminished for all.[87]

However, there is no denying that with a policy that says that if a student's behavior is found to be a manifestation of a disability, the student will not be removed from the school while if the student's behavior was not a manifestation of a disability, then the student would likely have been removed, the following is the result: regular education students, in the interest of safety, are being removed, while special education students manifesting their disabilities are not being removed. Clearly, this does reflect a balancing of the rights of special education students versus the safety concerns of schools.

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[87] H. Rutherford Turnbull III, Brennan L. Wilcox, Ann P. Turnbull, Wayne Sailor and Donna Wickham, *Special Education: IDEA, Positive Behavior Supports and School Safety*, 30 J.L. & Educ. 445, 496-497 (2001).

In fact, the dichotomy in treatment of the disabled versus other students, with regard to the same disruptive behavior, has been criticized. Pitts argues that the problem with this dichotomy in treatment is that while a referred child gets protection from suspension and removal from school programs, other children who should have been referred but were not, get no such protections. "When child protection social workers are overburdened and underpaid, they cannot even identify all of the children who are entitled to help." Pitts writes of "undiagnosed and untreated disabilities."[88]

Pitts adds, quoting from a U.S. Supreme Court Decision, *In re. Gault*[89], the "Supreme Court has said that 'neither the Fourteenth Amendment nor the Bill of Rights is for adults alone . . . [under] our constitution, the condition of being a boy [or girl] does not justify a kangaroo court.'" Pitts adds that "kangaroo court" proceedings occur "in courts every day for children. They are treated as objects of the proceedings rather than participants with the right to be heard through counsel. . . children are routinely denied this right."[90]

If students in the schools at large, rather than only special education children, are awarded greater procedural protections, as is recommend by Pitts, this would have implications for school governance and utilization of funds by school districts. School districts would clearly have to apply greater attention and resources towards litigation than they do at present. As a public policy matter, it does not appear that the public or the courts are prepared to place such a burden upon schools, whose budgets and efforts are already strained by the many responsibilities that they already face.

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[88] Lewis Pitts, Fighting for Children's Rights: Lesson from the Civil Rights Movement, 16 J. Law & Pub. Pol'y 337, 2005, at 342-343.
[89] 387 U.S. 1, 13 (1967).
[90] *Id.* at 344-345.

The 1997 IDEA, as described above, deemed student behavior as being a manifestation of the disability when:

a. the IEP is not appropriate or when the IEP services were not provided

b. the child's disability impaired the ability of the child to understand the impact and consequences of the behavior or

c. the disability did impair the ability of the child to control his/her behavior .

However, under the 2004 IDEA, student behavior is not deemed to be a manifestation of disability based on these three criteria. Instead, behavior is considered a manifestation of disability only when the behavior had a direct and substantial relationship to the disability and was a direct result of the LEA's failure to implement the IEP. Further, under the 2004 IDEA, for conduct to be deemed a manifestation of the disability, the LEA would have to have been put on notice in advance of the behavior through referral by the parent or school personnel. Such prior notice was not required for this deeming to take effect under the 1997 IDEA.

These changes add strength to the argument of Pitts. It seems that children whose rights to special education have not been asserted in advance (as no one advocated for them at that time), now become ineligible for the protections of IDEA when their behavior, which may well be caused by a previously unidentified disability, becomes a cause of concern to school officials.

An aspect of the 2004 IDEA's approach to the manifestation determination, as opposed to the approach of the 1997 IDEA, that has come under criticism, pertains to a the elimination in the new IDEA of the need to revise the IEP when behavior is found to be a manifestation of a disability. As explained by Blackwood,

> If the team determines that the behavior was a manifestation of the disability, the child returns to the placement from which s/he was removed. In the past, the

> team was charged with remedying any deficiencies in the IEP or placement, conducting a functional behavioral assessment (unless one had already been done) and developing (or revising) a behavioral intervention plan. . . .under the new rules, the first step is omitted, and the team is charged with conducting a functional behavioral assessment and then modifying any behavioral intervention plan.[91]

Blackwood refers to this change as "disturbing." She explains, "The assumption seems to be that any violation of a school conduct rule can be corrected by a behavior intervention plan. Yet, if the behavior is caused by or directly related to the child's disability, the IEP services, rather than a purely behavioral response, may be the key to addressing that behavior."[92]

Conclusions

What began as procedures derived from the EHA and court opinions following the EHA have evolved into regulations in the 1997 IDEA and now, in a new form, in IDEA of 2004. Court holdings have continued to shape how manifestation determinations are to be carried out and who is to make these determinations. Functional behavioral assessments, which first appeared as a requirement in the 1997 IDEA, now appear to be so related to the manifestation determination process that conducting the process without the benefit of a prior functional behavioral assessment may invalidate it.

It is apparent that the IDEA of 2004 has made it easier to remove special education students from their school programs, as a result of their misconduct. Undoubtedly, many school officials concerned about the effects on schools of a student who misbehaves and disrupts, are and will be pleased by this change. For the student who has had an unidentified disability, however, this change may bode poorly with

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[91] Eileen M. Blackwood, *Special Focus: Special Education: Will the "Improvements" Decrease Protections for Parents and Students?* 32 Ver. B. J. & L. Dig. 52, 56 (2006).
[92] *Id.*

regard to developing a program to meet that student's needs, rather than punishing and excluding the child for behavior resulting from his or her disability. *K.W. v. Washington Township Board of Education*[93], an administrative law decision in New Jersey, stands for the proposition that even if not originally identified, if there is truly an underlying disability, it behooves school officials to address the disability rather than punish the students without treatment. Striking the balance between addressing the needs of the disabled and not going so far that schools are disrupted is a challenge that local educational agencies will continue to face.

Finally, what the case-law has also shown is that school districts cannot simply ignore statutes and case-law with regard to manifestation determinations or approach this area in an imprecise manner. Not following proper procedures will result in losses at hearings and in court by local educational agencies, with financial penalties. Thus, it is important that school psychologists, school administrators and other school officials become conversant in this area. There may well be ever greater need for assistance from the legal profession as matters will continue to arise, challenging the application of statute and case-law to specific students' situations, in this area where psychology, education and the law intersect.

Balancing the needs of disabled students with the need to maintain order in schools is important and the results of any approach, including that of the 2004 IDEA, will need to be monitored. Further adjusting of the rules and regulations may very well be needed down the road. Having orderly schools, to insure an environment conducive to learning, is certainly something all parents and citizens desire. However, making schools orderly must not be done at the cost of returning disabled students to where they once

[93] *Supra* note 81.

were; excluded from their rightful place, as individuals entitled to equal protection under the law, as part of the diverse mosaic, that are the public schools of America.