Manifestation Determinations, Suspension/Expulsion

by
Jose L. Martín, Attorney at Law
RICHARDS LINDSAY & MARTIN, L.L.P.
13091 Pond Springs Road, Suite 300
Austin, Texas 78729
(512) 918-0051
jose@rlmedlaw.com

BASIC METHOD

1. Learn to identify a short-term disciplinary removal under IDEA.

A short-term removal occurs when a campus administrator removes a child from his normal setting for less than 10 consecutive school days for disciplinary purposes. The most common example is a suspension to the home. In-school suspension (ISS) should be considered a short-term removal, unless the "smart ISS" criteria discussed below is met, in which case the removal days might not "count."

2. Learn to identify a long-term disciplinary removal under IDEA.

A long-term removal is one of over 10 consecutive school days, usually in the form of a removal to a disciplinary alternative education program (AEP) or expulsion.

3. Do not mix up the rules for long-term and short-term removals.

It's easy to get confused if you try to learn and apply the separate rules for long and short-term removals as simultaneous concepts. Rather, learn and apply these rules as two separate sets of rules. This eliminates a lot of mixed-up IDEA discipline questions, such as "is it 10 cumulative or 10 consecutive days?" There are really two sets of 10-day rules, but trying to learn them simultaneously frequently causes confusion.

4. For short-term removals, apply "free days" analysis, and don't push your luck after reaching 10 total removal days in a school year.

At the start of the school year, imagine the school is given 10 "free" removal days for each IDEA student. These days are "free" under IDEA because they can be used without an IEP team meeting, without a functional behavioral assessment (FBA), without a manifestation determination, without educational services, and basically, without worrying about any IDEA procedure or safeguard. They can be imposed as they would in the case of a nondisabled student who commits the same offenses.

But, after the "free" days are used up with short-term removals, they will "cost" you in compliance with IDEA procedures and additional requirements. For any short-term removal after the 10th, educational services must be provided to the student. And, the IEP team should, by that point, probably conduct an FBA and develop a BIP (behavior intervention plan), or revise an existing BIP. Moreover, at a certain point, accumulations of too many short-term removals will become a "pattern of exclusion" (in Department of Education lingo), which consists of an overall long-term removal that requires compliance with the long-term removal IDEA rules discussed below. Additionally, even the most rule-conscientious campuses are subject, after too many removals, to a finding that the excessive short-term removals are in fact a sign that the IEP is simply not working. These situations can thus evolve from pure discipline matters into actual denial-of-FAPE claims. Generally, it's good advice for schools to limit forays into the over-10-total-school-days danger zone. Obviously, the higher the number of short-term removals after the 10-day total is reached, the more precarious the legal position.

5. Before short-term removals add up to 10 total school days, have an IEP team meeting to address behavior.

The best preventive measure in IDEA disciplinary matters is to convene an IEP team meeting *before* short-term removals add up to 10 total days. The IEP team can decide to conduct an FBA, develop a BIP, add counseling, evaluate the student further, vary other IEP services, change the student's placement, or make other adjustments to the student's

program. The idea is to take action before a disciplinary issue becomes a problem. Hearing Officers tend to have little patience for schools that take no measures prior to removing the child a total of 10 days, but then seek to defend significant removals after the 10-day mark is reached.

6. For long-term removals, proceed to manifestation determination as soon as you can, and before the removal reaches 10 consecutive school days.

As soon as possible after the campus initiates a long-term disciplinary removal, a manifestation determination review must be conducted (preferably by the full IEP team in an IEP team meeting). The long-term removal will generally consist of a removal to an alternative setting, a long-term suspension (since in some states the term "expulsion" is not used), or an expulsion (really a long-term suspension). The manifestation determination must definitely take place before the long-term removal reaches its 11th consecutive day. The right to a manifestation determination in instances of threat of long-term removal is *the* primordial safeguard of the IDEA disciplinary procedures. It is a doctrine that was first espoused in court cases starting in the late-70's, later adopted by the Department of Education as policy in the 80's, and finally codified into IDEA and its regulations in the late 90's.

The manifestation determination essentially decides whether the student can be subjected to long-term removal or not. If the IEP team properly determines that the behavior in question is not related to disability, then the student can be subjected to regular disciplinary procedures and regular removals, as in the case of a similarly-situated nondisabled student. If the IEP team determines that the behavior is related to disability, then a long-removal cannot take place. Thus, the quality of the manifestation determination is crucial to a long-term removal. IEP team members are well-advised to prepare and pre-staff for manifestation determinations. In cases of emotionally disturbed or behavior-disordered students, it's also wise to consult with the evaluating psychologist about the determination before the meeting.

ADDITIONAL IMPORTANT MUST-KNOWS

- **For drugs, weapons, or serious bodily injury offenses, proceed to manifestation determination, but a 45-calendar-day removal to an alternative discipline setting is available even if behavior is linked to disability.**

In 1997, Congress decided that even if a drug or weapon offense is related to a special education student's disability, the school can nevertheless remove the student to an alternative setting for a maximum of 45 calendar days. If, however, a student's drug or weapon offense is *not* related to disability, they may be subjected to the school's regular disciplinary procedures, including very long-term removal or expulsion. Schools should not consider this an "automatic" removal, since a manifestation determination is nevertheless necessary, and the IEP team must also plan for serving the student in the disciplinary placement. In the 2004 IDEA reauthorization, Congress decided to add an offense to this list—serious bodily injury, which is reserved for the very most serious of assault offenses. In addition, in 2004 the Congress changed the 45-day period to one of 45 *school* days. Thus, the provision is not a 45-school-day limit to removal for these offenses, unless the behavior were found to be related to disability. If the behavior is not related, regular disciplinary procedures and sanctions would apply, including, for example an expulsion of longer than a year for a gun possession.

- **Under §504, in cases of drug offenses, the §504 committee should first determine whether the student is a "current user" of drugs.**

Students eligible under §504 lose the right to a manifestation determination and due process hearing if they violate drug or alcohol rules and are determined to be "current users." *See* 29 U.S.C. §706(8)(B)(iv). Thus, if there is evidence that the student is a current drug or alcohol user, the §504 committee can skip the manifestation determination, and the student is subject to the regular disciplinary process that would take place in the case of a drug or alcohol offense by a nondisabled student. If the committee does not believe that the student is a current user, it must proceed to make the manifestation determination. OCR has determined that mere possession is not itself evidence of current use of drugs or alcohol. *See, e.g.*, 17 EHLR 609, 611 (OCR 1991). This is the main difference between the rules of discipline for §504 students and those for IDEA-eligible students.

> *How to determine whether student is a "user"*—In many cases, the very nature of the offense will indicate current use, as in the case of the student being found under the influence of drugs or actually using drugs at school or at a school event. In other situations, the nature of the possession offense will indicate current use (e.g., student is found with a small amount of marihuana and a pipe or rolling

papers). If the committee is in doubt, it may be advisable to conduct a manifestation determination.

- **Report criminal behavior to law enforcement if you would do so for a non-disabled student's behavior under your policies, but make sure you have implemented the BIP.**

  IDEA makes clear that schools may report criminal offenses committed by special education students at school. But, school administrators must ensure that resort to law enforcement occurs in a non-discriminatory fashion, for nondisabled and disabled students alike. In addition, staff must ensure that the student's BIP, if any, is fully implemented before the police are called, if at all possible. Reports to law enforcement cannot be undertaken *instead* of complying with the requirements of a BIP or IEP. Moreover, administrators would be well-advised to get information from law enforcement authorities about what type of conduct constitutes criminal conduct.

- **Explore development of a "smart ISS" option on your campus to help minimize suspensions to home.**

  The commentary to the final regulations states that in-school suspension (ISS) would not be considered true removal days as long as the child is given the opportunity to continue to appropriately progress in their curriculum, continue to receive their IEP services, and continue to participate with nondisabled children to the extent they would have in their usual placement. By this guidance, the feds are obviously providing an incentive for schools to use in-school forms of suspension rather than out-of-school suspensions, which come without services and might not motivate positive behavioral change.

  The higher the degree of continuity of educational services at the ISS facility, the better your chance of successfully arguing that these are not true removal days. The more "traditional" your in-school suspension program (i.e. supervision-only while students allegedly work independently, or minimal services), the more likely a hearing officer will find that removals to your in-school suspension program in fact constitute disciplinary removals that "count" toward the 10-day marker. To assess ISS removals, Hearing Officers focus on whether students are receiving all their regular and sp. ed. work, whether regular teachers are monitoring and dropping by periodically, whether sp. ed. instruction is provided (for students with resource and content mastery on their IEP), whether related

services and modifications continue to be implemented, and, ultimately, whether the student made progress while at ISS.

- **The IEP team must address the plan to provide the student a FAPE during any long-term disciplinary removal.**

  Although students whose behaviors are not a manifestation of their disabilities may be removed to disciplinary settings or expelled on a long-term basis, these students must receive a FAPE during their removals. While the IDEA does not require exact replication of their educational programs in the disciplinary setting, the main components of the IEP must be respected, although changes may be necessary in light of the different nature of the disciplinary setting. The "modified" FAPE requirement would include all needed related services, including potentially new ones to address the behavior that led to the removal so that it does not recur. Thus, the IEP team has two fundamental functions in serious disciplinary actions—(1) conduct the manifestation determination review, and (2) plan for services that will provide a FAPE in the disciplinary settings. Providing "cookie-cutter" services, or dropping key related services, can put schools at risk of legal challenges to the services provided during the removals, even if the removal itself was lawful.

MANIFESTATION DETERMINATIONS

The 2004 Reform of the Manifestation Determination Standard

In 2004, the Congress undertook several revisions and reforms to the rules of discipline of students with disabilities. Part of the reforms touched on the requirement for manifestation determinations or manifestation determination reviews (MDs) prior to long-term disciplinary removals of IDEA-eligible students. As seen below, the requirement itself remains, but Congress revised and simplifies the standard under which schools determine whether a behavior is related to disability. Although an apparently subtle change, the new formulation is in fact a significant departure from the prior manifestation determination inquiry.

The revised statutory language—Congress tightened the language and structure of the manifestation determination standard, in essence "raising the bar" of the standard required to show that a behavior is a manifestation of disability. If a school decides to change a student's placement due to a disciplinary offense, "the local educational agency, the parent, and relevant members of the IEP team (as determined by the parent and the local educational

agency), shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

> **if the conduct in question was *caused by, or had a direct and substantial relationship to*, the child's disability; or**
>
> **if the conduct in question was the *direct result* of the local educational agency's failure to implement the IEP."** 20 U.S.C. §615(k)(1)(E)(i).

Legislative Background—The Conference Committee to IDEA 2004 stated that its intention in reforming the provision was that schools determine whether "the conduct in question was caused by, or has a direct and substantial relationship to, the child's disability, and is not an attenuated association, such as low self-esteem, to the child's disability." *Conference Committee Report*, at 225. The commentary to the regulations cites and quotes this significant guidance. *See* 71 Fed. Reg. 46,720.

A desire to simplify MDRs—The USDOE also reads the reformed provision as an attempt to simplify the MDR process. The commentary to the regulation states "the revised manifestation determination provisions in section 615 of the Act provide a simplified, common-sense manifestation determination process that could be used by school personnel." Fed. Reg. 46,720 (August 2006)

Guidance on making the determination under the new standard—The Conference Committee report on IDEA 2004 also provides additional guidance that Congress intended that the manifestation determination "analyze the child's behavior as demonstrated across settings and across time when determining whether the conduct in question is the direct result of the disability." *Committee Report*, at 224. The USDOE commentary to the regulations in fact quotes this very language. *See* Fed. Reg. 46, 720. This suggests that it is appropriate to examine patterns of behavior, the lack thereof, the setting where the behaviors take place or not, in making the determination. Ostensibly, if a behavior is caused by or directly related to disability, one should expect to see it across different settings and times.

Implementation of IEP vs. Appropriateness of IEP—Unlike the 1997 law, the new IDEA manifestation provision does not contain language about whether schools must examine the appropriateness of the child's IEP while undertaking the manifestation determination. This raised questions about whether the omission was intentional and/or meaningful from a substantive standpoint. In response to comments on this point, the USDOE clarified that "the Act no longer requires that the appropriateness of the child's IEP and placement be considered

while making a manifestation determination." Fed. Reg. 46,720. Rather, as part of the manifestation determination, schools must focus on whether there has been a failure of implementation of the IEP that directly resulted in the misbehavior. Id. And, if the manifestation determination decision-makers find that an implementation failure has directly resulted in the behavior, a new subsection requires that the school take "immediate steps" to remedy the deficiencies. 34 C.F.R. §300.530(e)(3); *see also* Fed. Reg. 46,721.

Manifestation Determination Decision-Makers

Decision-making process flexibility—While IDEA '97 required the IEP team and other qualified personnel to conduct the manifestation determination, the new law states that it is to be conducted by the school, the parent, and "relevant members" of the IEP team. §615(k)(1)(E)(i). There is no mention of a meeting requirement to actually undertake the MD, although the law still requires the IEP team to convene to actually determine the interim alternative education setting and the services to be provided during the long term removal. §615(k)(2). Legislatively, the origin of this provision is likely related to other provisions of IDEA 2004 reflecting Congress' concern over the high numbers of IEP team meetings that take qualified staff away from their respective instructional assignments. The final regulation implementing this provision restates the statutory language, and emphasizes that the school and parents mutually determine the relevant members of the IEP team that must make the MD. 34 C.F.R. §300.530(e).

> *Practical considerations*—The flexibility offered by the Congress also means that there can be disputes over determining the "relevant" members of the IEP team. For example, in the case of *Philadelphia City Sch. Dist.*, 47 IDELR 56 (SEA Pennsylvania 2007), an appellate panel overturned a school's MD, in part due to the fact that "the District did not provide the parents with the opportunity to engage in a mutual determination of relevant members of the Student's IEP team." See also, *In re: Student with a Disability*, 107 LRP 63721 (SEA Virginia 2007)(dispute over selection of relevant members, degree of participation). Is it clear how much opportunity must be provided to parents to provide input on members? What if there are disagreements on membership? To what degree must each member participate? To avoid problems and confusion, therefore, schools can choose continue to conduct MDs in proper IEP team meetings. There are substantial questions about making MDs without an IEP team meeting that are likely to be the subject of interesting litigation. Given that these questions may have to be answered by hearing officers and courts, schools may take a "wait and see" approach to this new area of flexibility.

Return to Placement If Behavior Related to Disability

If the manifestation decision-makers determine that a child's behavior was related to their disability, the IEP team is to "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." §615(k)(1)(F)(iii). The new regulations restate this provision at section 300.530(f)(2). They also clarify that in situations of manifestation, IEP teams must conduct a functional behavioral assessment (FBA), if one has not been done already, and implement a behavior intervention plan (BIP). 34 C.F.R. §300.530(f)(1)(i). If a BIP is already a part of the child's IEP, then the IEP team must review the BIP and "modify it, as necessary, to address the behavior." 34 C.F.R. §300.530(f)(1)(ii).

Practice Point 1—When is the MDR Required?

As under prior law, manifestation determinations are required before schools undertake disciplinary changes in placement of IDEA-eligible students.

The point at which the manifestation determination requirement is triggered is unchanged—MDs are still required when a school decides to engage in a disciplinary change in placement of an IDEA student. The most common form of disciplinary change in placement is a removal of more than 10 consecutive school days (usually in the form of a removal to an interim disciplinary setting or expulsion).

The other form of disciplinary change in placement is a "pattern of exclusion" change in placement, where a school engages in a series of short-term removals, each of which is less than 10 consecutive school days in length, but when viewed globally, amount to a disciplinary change in placement. *See* 34 C.F.R. §300.536.

Practice Point 2—How is the new MDR different?

The new manifestation determination questions require a closer logical relationship between behavior and disability to make a finding of manifestation than under the 1997 version of the law.

Under IDEA 1997, for a behavior to be found related to disability, all that was required was for the disability to have impaired the child's ability to understand the impact and consequences of the behavior, or to have impaired the child's ability to control the behavior, to *some* degree. The 2004 Congress

decided that this was too low of a threshold. Under the new law, a behavior is deemed related to disability only if *caused by* the disability, or *directly and substantially* related to the disability.

Similarly, a behavior is deemed related to a school's failure to implement the IEP only if the implementation failure *directly resulted* in the misbehavior. This new formulation does not require consideration of the appropriateness of the IEP, only whether it has been implemented, and if not, whether the failure to implement directly resulted in the misbehavior in question.

Thus, modern MDs require use of updated forms that reflect the new manifestation determination questions. Schools should not use old MD forms that contain the old MD questions, which require a much lower degree of relationship for a finding of manifestation.

Modern MD forms must ask:

1. Was the misbehavior caused by, or directly and substantially related to, the student's disabilities?

2. If the school failed to implement the student's IEP, was the misbehavior the direct result of the school's failure to implement the IEP?

Ideas on MDR Forms—Given the guidance of the Conference Committee, it may also be wise for schools to examine past disciplinary incidents in making a manifestation determination, to determine if there is a pattern of similar behavior across settings and time. Thus, MDR forms might include information on whether a pattern of similar behavior exists in the student's history. In addition, some schools are also including notes in MDR forms that clarify to parents that even if a drug, weapon, or serious bodily injury offense is determined to be a manifestation of disability, the student may be placed in an interim alternative educational setting for up to 45 school days. Also, the revised forms may warn parents of the new "stay-put" formulation in cases of challenges to disciplinary actions. *See attached* Sample MDR Form.

Overall Practical Guidance on Manifestation Determinations

- Schools should prepare for MDs and work on developing a consensus among staff and administrators ahead of the meeting.

- Consult a psychologist and/or attorney if concerns arise.

- Sketch out the members' thinking and rationale behind its decision—Don't just answer the questions on the form.

- The team should be able to explain its thinking clearly and succinctly.

- Sometimes, the best position may be that although the disability may have some relation to the offense, it is not a substantial, direct, or causal relation.

- Make sure the campus comes with "clean hands" to the MD—Has it implemented the BIP? Done the counseling? Provided the basics of positive behavioral supports?

- Review all evidence available involving the offense—sometimes little details tell much about the manifestation issue.

- The increased difficulty of the new MD standard for parents may mean that legal challenges focus instead on the appropriateness of educational services provided in disciplinary settings. Ensure that IEP teams carefully plan the set of services to be provided during long-term disciplinary removals.

Modern Manifestation Determinations in Action

A student and a classmate talked and texted each other about sharing prescription sleep medication before taking pills at school, where they were caught. *San Diego Unified Sch. Dist*., 109 LRP 54649 (SEA California 2009). The parents argued that the offense was an impulsive act related to their son's ADHD. The hearing officer rejected the argument in light of the long-term arrangements of the students over the course of days. On the impulsivity question, also see *In re: Student with a Disability*, 109 LRP 56732 (SEA Virginia 2009)(student who shifted from one disruptive behavior to another over a period of time in class, and after correction, was not acting impulsively).

In *District of Columbia v. Doe*, 51 IDELR 8 (D.D.C. 2008), the problem was that although a hearing officer agreed that a 6th-grader's classroom misbehavior with a substitute teacher was not related to his ADHD, the hearing officer believed that a 45-day removal was excessive and reduced it to an 11-day suspension. The court held that the hearing officer had no authority to alter the school's disciplinary determination, but rather only with respect to the IDEA issue—whether the student's behavior was properly found to be unrelated to his disabilities. Because the offense was a repeated one, which was treated more

seriously under the disciplinary code, the school was allowed to impose a serious sanction.

A California school was derailed in its attempt to discipline a student for his peripheral involvement in the sale of some marihuana seeds. *San Diego Unified Sch. Dist.*, 52 IDELR 301 (SEA California 2009). For several days prior to the sale, the student, a 13-year-old with ADHD, acted as a "middleman," but also skipped his ADHD medication. The hearing officer concluded that the fact that the student was not on medication, coupled with evidence confirming the student's impulsivity when not on medication, should have led the school team to find that the behavior was directly related to the ADHD.

> *Comment*—Curiously, however, the behavior appeared to have been well-planned and thought out over a significant period of time, which normally is inconsistent with a finding that the behavior was impulsive. Moreover, from an educational policy perspective, is it healthy to provide an incentive for a student to discontinue helpful medication, perhaps in preparation for a disciplinary offense?

A Pennsylvania 11th grader with LDs and ADHD brought to school a hunting knife with a folding 3-inch blade, claiming that he needed it for "protection." Students indicated that he had threatened others while exhibiting the knife, and that he had brought it to school on various occasions and while walking to and from school. *MaST Comm. Charter Sch.*, 47 IDELR 23 (SEA Pennsylvania 2006). Before the school conducted the MD, the parent obtained an evaluation from an outpatient psychiatric facility that also diagnosed the student with port-traumatic stress disorder (PTSD), oppositional defiant disorder (ODD), and impulse control disorder (ICD). Nevertheless, the team determined the behavior was not a manifestation, and placed the student in a 45-day alternative education placement for the weapons violation. After a hearing officer found the behavior was related to disability, the school appealed to an appellate panel. The panel overturned the hearing decision, finding that the fact that the student brought the knife to school deliberately and regularly indicated the behavior was not impulsive or ADHD-related. The recent new diagnoses were not given serious weight, as their supporting evidence was "scant," and report was "cryptic" and brief, and the student's school conduct did not support the diagnoses.

> On another point, could not the school have argued that the MD dispute was moot since whether the behavior was related or not it had the authority to remove the student up to 45 school days for either drugs, weapons, or serious bodily injury offenses? That was the position of a New Jersey federal court in the case of *A.P. v. Pemberton Township Bd. of*

Educ., 45 IDELR 244 (D.N.J. 2006). There, the court found that it was immaterial that the school conducted the MD late, since regardless of the result the school could remove the student up to 45 school days for the student's drug offense, and the untimely MD was partly due to the parent's refusal to attend the meeting earlier. See also, *R. S. v. Corpus Christi ISD*, Docket No. 039-SE-1008 (SEA TX 2008)(challenge to MD moot in case of 30-day DAEP removal for controlled substances use/posession).

In a more recent case, however, an Illinois hearing officer overturned a district's decision that a 17-year-old student's Facebook threat to another student was not related to his ADHD, Bipolar Disorder, borderline IQ, and poor executive functioning. *Township High Sch. Dist. 214*, 54 IDELR 107 (SEA Illinois 2010). The school team argued that planning was required for the student to log on to Facebook, enter the text of the threat ("when I come back to school I'm going to look for u and kill you for giving me hell"), and then decide to send the message. The team thus found that the behavior was not related to the student's disabilities and the district proceeded with expulsion. The hearing officer reversed the team, agreeing with the student's treating psychologist that the student's deficits in executive and cognitive functioning meant he really could not have planned the threat. "Student did not engage in a deliberate violation of the school's code of conduct in that he did not fully comprehend the potential consequences of his actions. He did not understand that he could be suspended or expelled, not did he intend to carry out the threat."

Comment—Under the modern IDEA standard for manifestation determination reviews, is it relevant that a student "did not fully comprehend the potential consequences of his actions"? Curiously, the hearing officer neither cites the applicable IDEA standard, nor analyzes how the facts of the case should be applied to the IDEA questions. The inquiry is whether the threat behavior was caused by or directly and substantially related to the disabilities, not the degree to which the student understood the potential consequences of his actions. Thus, the analysis in the case is suspect.

The Georgia case of *Fulton County Sch. Dist.*, 49 IDELR 30 (SEA Georgia 2007), on the other hand, underscores the need to consider the full range of a student's disabilities in making the MD. After a student with ADHD and ODD verbally threatened to kill a teacher, the MD team only considered whether the threat behavior was related to ADHD, and refused to allow the parents to provide information or input on the effect of his ODD, even though the school psychologist noted that all of the child's disabilities had to be considered as part of the MD.

Comment—Aside from the fact that the school acknowledged the student's ODD, there was evidence that the student had engaged in previous verbal threats, which were never carried out. In this case, moreover, the student was eligible under IDEA only as a child with other health impairment (OHI), and not ED. But, unlike in the Pennsylvania case above, this hearing officer did not feel that the school was free to limit the MD only to the ADHD diagnosis simply because the ODD did not rise to the level of IDEA eligibility separately.

A Maryland hearing officer did not rely on a letter written by a student's therapist in the case of a 16-year-old who showed up at school admittedly under the influence of marihuana. *Baltimore County Pub. Schs.*, 46 IDELR 179 (SEA Maryland 2006). Although the student had diagnoses of ADHD, ODD, Dysthymia, Mood Disorder, Bipolar Disorder, and Cannabis abuse, the hearing officer held that the parent failed to prove that behavior was directly related to his emotional disturbance. Although the therapist's letter indicated that the student had major psychiatric disabilities which significantly impact his functioning, "it was a far cry from an opinion that the Student's specific behavior on April 6, 2006 was 'caused by, or had a direct and substantial relationship'" to his disabilities.

A 6th grader with Asperger's who really wanted to go home when he was having a bad day at school pulled on his principal's necktie to escalate the incident. *Scituate Pub. Schs.*, 47 IDELR 113 (SEA Massachusetts 2007). The school decided that the use of the tie constituted a weapon, thus triggering the special offense provisions. First, the hearing officer decided that the tie did not constitute a weapon, since an attacker could not readily cause serious bodily injury if he attacked a person with a tie. Second, the student did not "possess" the tie because he held it only momentarily and did not have control of it. Third, although there was some relation between the combination of disabilities and the offense, it did not rise to the level of a direct or substantial relationship. The student's behavior was "calm, deliberate, voluntary, and calculated."

Comment—The school's argument that the pulling of the tie constituted use of a "weapon" was certainly a stretch, and one that did not withstand much legal scrutiny. The hearing officer also notes that there was no evidence that the student "did not understand the seriousness or consequences of his actions…" Is this not, however, a slip-back to the 1997 MD analysis, which required a review of whether the student's disability impaired their ability to understand the consequences of the behavior?

In another Massachusetts case, a 17-year-old with ADHD and ODD became upset and tried to call his mother on his cell phone so she would pick

him up and take him home. *Swansea Pub. Schs*., 47 IDELR 278 (SEA Massachusetts 2007). Because he was speaking in a highly agitated manner to his mother, a staffperson asked that he go into an office. He escalated, however, throwing his phone down. When the staffperson picked up the phone, he became irate and physically threatening, blocking the staffperson's ability to leave and lunging at her, to the point that he significantly frightened her. Relying significantly on the parent's expert, who testified that the student was unable to self-regulate once escalated, the hearing officer held that "the student was provided no such opportunity to avoid an escalation of the original confrontation with Ms. Ragland, with the result that a spiraling of confrontational, out-of-control behavior occurred."

> *Comment*—School staff that worked with the student testified, however, that in other confrontation situations, the student had demonstrated an ability to de-escalate and avoid extreme behavior. They added that violence and aggressive behavior are not generally associated with ODD and ADHD. The hearing officer, however, discounted their testimony in favor of the parent's expert, although the expert testified purely from a review of records and had not personally evaluated the child. It certainly appears, from the decision, moreover, that the hearing officer questioned the staffperson's handling of the incident. To what degree does such post-hoc inquiry bear into the actual MD questions?

After a 14-year-old boy with LD and ADHD was caught selling pot and trading it for food at school, and it was determined he had done it on several other occasions, the school recommended a disciplinary change in placement. *Okemos Pub. Schs*., 45 IDELR 115 (SEA Michigan 2006). The parents claimed that the behavior was impulsive, and thus directly related to his ADHD. They also claimed the distinction between use and distribution of drugs was merely semantic. The hearing officer found that the spans of time involved in arranging for the various drug transactions gave the student "time to reflect on his actions at each step… In short, rather than being 'spur of the moment' or impulsive, the record evidences the student's conduct was more calculated." Moreover, the parents' expert was surprised on the witness stand to find out that the behavior involved not drug use, but sale and distribution. The hearing officer held that the distinction was not merely semantic, "either practically, behaviorally, or legally."

> *Comment*—The hearing officer cites the case of *Farrin v. Maine Sch. Admin. Dist. No. 59*, 165 F.Supp.2d 37, 35 IDELR 189 (D.Me. 2001) as an example of the proposition that if a behavior involves sufficient time, motor planning, and opportunity for thought, it cannot be considered impulsive and thus related to ADHD. Therefore, when confronted with MDs on ADHD

students' behavior, it is important for MD teams to analyze behavior in terms of time involved and degree of planning required.

A 10th grade student with LDs that was involved in a gang jumped on the back of a staffperson that was trying to break up a gang fight, even though he was not even attending class that day. *Muskegon Pub. Schs*., 45 IDELR 261 (SEA Michigan 2006). The hearing officer admonished the parents, writing that "this matter should never have been the subject of a due process hearing." He found that the parents did not offer any evidence to demonstrate a connection between the assault and the LDs, while noting that "the road to hearing in this matter has been very difficult and expensive." "Learning disabled students and non-disabled students make bad decisions for many reasons. To excuse unacceptable conduct merely because a student has an unrelated disability does a disservice to the student."

SAMPLE MANIFESTATION DETERMINATION REVIEW FORM

THE MANIFESTATION DETERMINATION REVIEW MUST BE CONDUCTED WHEN THE SCHOOL IS CONSIDERING AN ADMINISTRATIVE RECOMMENDATION FOR A DISCIPLINARY CHANGE IN PLACEMENT (E.G., INTERIM DISCIPLINARY ALTERNATIVE EDUCATION PLACEMENT OR EXPULSION OF LONGER THAN 10 CONSECUTIVE SCHOOL DAYS). THE REVIEW MUST BE CONDUCTED IMMEDIATELY AFTER THE RECOMMENDATION, AND NO LATER THAN 10 SCHOOL DAYS AFTER A STUDENT IS ASSIGNED TO A DISCIPLINARY SETTING.

Student's Name _____ DOB _____ Grade _____

School _____ Date of MDR Meeting _____

Student's Disabilities _____
(MDR team members should review current evaluation data in making the determination)

Behavior(s) subject to potential disciplinary action:

_____

_____

_____

The MDR team members, including the parent, have reviewed all relevant information, including evaluation data, information regarding the disciplinary offense, relevant observations, the current IEP and placement, patterns of student behavior across settings and across time, and other relevant information and input provided by staff and/or parents. Based on this review, the MDR team makes the following determinations:

Was the conduct in question caused by, or directly and substantially related to, the student's disabilities?

YES _____ **NO** _____

Summary of team's reasoning:

_____

_____

_____

_____

Parent's opinion, if different than team members'

_____

_____

_____

_____

Was the conduct in question the direct result of the school's failure to implement the student's IEP?

YES _____ **NO** _____

Summary of team's reasoning:

_____
_____
_____
_____

Parent's opinion, if different than team members'

_____
_____
_____
_____

NOTES: IF ANY OF THE TWO QUESTIONS ABOVE ARE ANSWERED "YES," THEN THE BEHAVIOR MUST BE CONSIDERED A MANIFESTATION OF THE DISABILITIES. IN THAT EVENT, THE STUDENT CANNOT BE REMOVED TO AN INTERIM ALTERNATIVE EDUCATION SETTING OR EXPELLED LONGER THAN 10 CONSECUTIVE SCHOOL DAYS.

IN SITUATIONS OF OFFENSES INVOLVING DRUGS/CONTROLLED SUBSTANCES, WEAPONS, OR SERIOUS BODILY INJURY, A STUDENT MAY BE REMOVED FOR UP TO 45 SCHOOL DAYS TO AN INTERIM DISCIPLINARY ALTERNATIVE EDUCATION SETTING EVEN IF THE MDR TEAM DETERMINES THAT THE BEHAVIOR WAS A MANIFESTATION OF DISABILITY. IF THE BEHAVIOR IS FOUND TO NOT BE A MANIFESTATION OF DISABILITY, THEN THE SCHOOL MAY PROCEED WITH REGULAR DISCIPLINARY PROCEDURES AND SANCTIONS APPLICABLE TO NON-DISABLED STUDENTS.

IF A PARENT CHALLENGES A MANIFESTATION DETERMINATION OR DISCIPLINARY PLACEMENT IN AN IDEA DUE PROCESS HEARING, THE STUDENT MUST REMAIN IN THE DISCIPLINARY SETTING PENDING THE DECISION OF THE IDEA HEARING OFFICER OR THE EXPIRATION OF THE DISCIPLINARY PLACEMENT TERM, WHICHEVER COMES FIRST.