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Manifestation Determinations Under the New Individuals With Disabilities Education Act

An Update

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This article provides an update of a previous analysis of the case law concerning manifestation determinations culminating in the revised pertinent provisions of the Individuals with Disabilities Education Act (IDEA) 2004. Specifically, the update consists of a synthesis of the legislative history, Office of Special Education Programs interpretations, and published hearing and review officer and court decisions that provide legal guidance as to the application of the manifestation provisions of IDEA 2004 and its 2006 regulations. The results reveal that thus far (a) the hearing and review officer and court decisions applying the new, causality criteria have continued at a higher but still modest rate (i.e., frequency per year) as the case law under the prior criteria; (b) the conduct in question remained focused primarily on drugs and, in various forms, violence; (c) specific learning disability and other health impairment (attention-deficit/hyperactivity disorder) continued to predominate as the disabilities at issue, but the *Diagnostic and Statistical Manual of Mental Disorders* diagnosis of oppositional defiant disorder became more frequent than in the prior case law; (d) the only new notable decisional factor was burden of proof; (e) the outcomes of the new case law has, with an unexpected but limited reduction, continued to predominate in favor of determinations that the child's disciplined conduct was not a manifestation of the child's disability; and (f) procedural issues have played a limited role in terms of reversing such district manifestation determinations.

Keywords: *law; special education; discipline*

The special safeguards and standards under the Individuals With Disabilities Education Act, or IDEA, for disciplinary "removals," or suspensions and expulsions, are complicated and controversial. The manifestation-determination, or M-D, requirement plays a pivotal role in this special framework (Zirkel, 2003), which represents a compromise between the competing interests of "zero reject" for students with disabilities and "zero tolerance" for safety-threatening behavior (Zirkel, 2007, p. 445). The 1997 amendments of the IDEA codified the framework, and the 2004 amendments of the IDEA adjusted it toward the zero-tolerance direction, particularly in the specifications for the M-D requirement. "The obvious goal of the statutory change [in 2004]," according to Weber (2006), "is to diminish the number of cases in which the school district must find that the behavior was a manifestation of the disability" (p. 36).

Previous articles in the professional literature do not extend to the Office of Special Education Programs (OSEP) and case law interpretations of the adjusted M-D provisions. For example, Osborne and Russo (2005) canvassed the then-proposed IDEA regulations for IDEA 2004 specific to M-D and a sample of the pertinent case law under the previous versions of the IDEA. More recently, Arnberger and Shoop (2006) synthesized eight published hearing and review officer decisions in M-D cases from 2005; however, all of them had arisen under IDEA 1997, and M-D was only indirectly at issue in five of them. The most comprehensive previous article (Zirkel, 2006b) traced the application of the M-D criteria in the published case law under IDEA 1997 and the subsequent adjustments in the M-D provisions in IDEA 2004 and its 2006 regulations.

The predecessor article (Zirkel, 2006b)—noting that the special education literature has tended to provide best practice, but often without clear differentiation from the legal requirements, for M-Ds—filled various gaps. First, it provided a tabular analysis of the hearing and review officer and the court decisions prior to IDEA 2004, finding

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that the outcome of 74% of the 53 cases, which averaged 2 per year, was a "no" answer to the M-D. Second, within the prior case law, the article traced the primary, causal criterion in the new IDEA to the Ninth Circuit's foundational decision in *Doe v. Maher* (1986), which formulated the standard as "conduct that is caused by, or has a direct and substantial relationship to, the child's [disability]" (p. 1480 n.8) and which added this clarifying guidance:

> [The child's] conduct is covered by this definition only if the [disability] significantly impairs the child's behavioral controls. . . . It does not embrace conduct that bears only an attenuated relationship to the child's [disability]. An example of such attenuated conduct would be a case where a child's physical [disability] results in his loss of self-esteem, and the child consciously misbehaves to gain the attention, or win the approval of his peers. (p. 1480 n.8)

Third, the predecessor piece provided the echoing guidance from the legislative history from the conference committee that resolved the differences between the House and Senate versions of IDEA 2004:

> The Conferees intend that in order to determine that the conduct in question was a manifestation of the child's disability, the local educational agency, the parent and the relevant members of the IEP team must determine the conduct in question be the direct result . . . not an attenuated association, such as low self-esteem, to the child's disability. (H.R. Conf. Rep. No. 108-779, 2004, pp. 224–225)

The conferees also clarified that the manifestation be careful and thorough, including any extraordinary circumstances, as follows:

> The manifestation determination will analyze the child's behavior as demonstrated across settings and across time when determining whether the conduct in question is a direct result of the disability. (H.R. Conf. Rep., 2004, p. 225).

Finally, the earlier article's immediate predecessor (Zirkel, 2006c) is the source of the template for a practical M-D form—replicated herein as Figure 1—to be customized at the local district level. The central part of the form consists of the two new causality criteria—one general to the disability–conduct relationship and the alternative specific to lack of individualized education program (IEP) implementation.

This update adds (a) the OSEP interpretations that may be integrated in or serve as a supplement to the M-D form and (b) the applications of the new M-D provisions that show the frequency and outcomes of the case law to date.

OSEP Interpretations

The U.S. Department of Education's OSEP provided additional guidance in successive sources. First, in its interpretive comments accompanying the originally proposed version of the 2006 regulations, the department acknowledged the zero-tolerance emphasis on "a school environment that is safer, more orderly, and more conducive to learning" (U.S. Department of Education, 2005, p. 35,823) in providing this prediction:

> It is reasonable to expect an overall increase in the number of [M-D] reviews as school personnel take advantage of the streamlined process to pursue disciplinary actions against those students with disabilities who commit serious violations of student codes of conduct. Even more importantly, the changes in the law would make it less difficult for review team members to conclude that the behavior in question is not a manifestation of the child's disability, enabling school personnel to apply disciplinary sanctions in more cases involving children with disabilities. (p. 35,823)

Next, in its commentary accompanying the final version of the IDEA regulations, the department clarified that (a) the two new causality-based criteria supplant, not supplement, the previous criteria concerning the appropriateness of the IEP and the disability effects in terms of control and consequences (U.S. Department of Education, 2006, pp. 46,719–46,720); (b) the revised criteria are "broad and flexible, and would include such inter-related and individual challenges associated with many disabilities" (p. 46,720); (c) the M-D provisions represent a "simplified, common sense . . . process" intended for a case-by-case application (p. 46,720); and (d) the "concept of burden of proof" is not applicable to the school-level M-D, rather resting on the party filing for a due process hearing to challenge it (pp. 46,723–46,724).

New Case Law

Inasmuch as several states have not yet made available all of their hearing and review officer decisions on the Internet, even for the most recent years, the source was—as in the previous pertinent studies—the specialized publication the Individuals With Disabilities Education Law Reports (IDELR) and the major electronic databases, Westlaw and Lexis. The two-step method for the search was (a) to use both the IDELR topical index, which classifies M-D cases under "discipline—relationship between misconduct and disability," and the two electronic databases,

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Figure 1
Manifestation determination checklist

Child's Name: ______________________________ Date: ________

Disciplinary Behavior (i.e., "conduct in question"):

____

PERSONS PRESENT:

Relevant members of the IEP team including:

___ the parent

___ the local educational agency representative

___ others determined by the parent and the local education agency:

____

____

____

SOURCES OF DATA:

All relevant information in the student's file, including:

___ relevant information from the parents

___ teacher observations of the child

___ the child's IEP

___ other: ____

CRITERIA:

1. Was the disciplinary behavior caused by, or did it have a direct and substantial relationship to, the child's disability? YES NO

2. Was the disciplinary behavior a direct result of the local educational agency's failure to implement the IEP? YES NO

If the answer to either of these two questions is YES, then the determination is that the disciplinary behavior is a manifestation of the child's disability. On the other hand, if the answer to both is NO, then it is not a manifestation of the child's disability.

Source: Zirkel (2006c).

with the search term being *manifestation determination*, for the period 2005 to present and (b) to examine each of the resulting hearing and review officer and court decisions to determine whether it specifically addressed the application of the new IDEA criteria and procedures. The major exclusions were M-D cases (a) decided under § 504 (e.g., *Centennial School District v. Phil L.*, 2008); (b) based on technical grounds, such as whether the parent lacked standing to file suit for a particular remedy (e.g., *L.K. v. North Carolina State Board of Education*, 2008) or had exhausted the IDEA administrative procedures (e.g., *R.T. v. Southeastern York County School District*, 2007); or (c) addressing closely related but distinguishable issues, such as the hearing officer's remedial authority (e.g., *District of Columbia v. Doe*, 2008).

The results are in Table 1, which covers all of the published hearing and review officer and court decisions that apply the new M-D provisions of IDEA 2004. The first column of the table provides the abbreviated name of the decision; the full citation is provided in the reference list. The court decision listed in bold is because of its weightier legal level than hearing or review officer decisions. The second column lists the jurisdiction, with the official abbreviations of the court (e.g., "E.D. Va." signifying the

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Table 1
Manifestation Determination Case Law Under the Individuals With Disabilities Education Act (IDEA) 2004

Case Name	Jurisdiction, Date	Disability	Conduct	Crit. 1	Crit. 2	Outcome	Comment
Okemos	Mich. SEA 3/6/06	SLD + OHI (AD/HD)	Drugs	No		NO	• District staff > parents' expert • Legislative history (attenuation) • Not impulsive
Muskegon	Mich. SEA 5/18/06	SLD	Fight	No		NO	• Burden of proof (on parents) • Deliberate action
Baltimore County	Md. SEA 5/25/06	ED	Drugs	No	(No)	NO	• Burden of proof on parents • ED not automatic but > *DSM* diagnosis (bipolar disorder) • District staff > parents' expert
Madison City	Ala. SEA 11/3/06	SLD	Weapon	No		NO	• Lack of prior incidents • Procedural compliance + FBA effort
MaST	Pa. SEA 12/26/06	SLD + AD/HD	Weapon	No	No	NO	• Burden of proof—open question • Deliberate action • Unweighty *DSM* diagnoses
Philadelphia	Pa. SEA 1/10/07	ED (including ODD)	Trespass + theft	Yes		YES	• Procedural violations • *Doe v. Maher* + "but for" analogy • Previous pattern-need for attention
Swansea	Mass. SEA 4/4/07	SLD + AD/HD + ODD	Assault	Yes		YES	• Assistant principal compounded causation • Parent expert > district staff
Fulton County	Ga. SEA 7/11/07	OHI (AD/HD + ODD)	Threat	Yes?		YES?	• IEP provisions → relevance of ODD • Remand for new M-D
Lancaster	Cal. SEA 8/28/07	SLD	Drugs	No		NO	• Knowledgeable school psychologist • Legislative history (across times or settings)
South Lyon	Mich. SEA 4/11/08	ED + OHI (AD/HD+)	Drugs?	Yes		YES	• Distinguishable conduct • Impulsivity + bad judgment • Reliance on pre-IDEA 2004 cases
Fitzgerald	**E.D. Va. 5/23/08**	ED (including AD/HD, ODD, OCD)	Weapon	No		NO	• Procedural compliance • Bad decision > impulsivity • School psychologist's testimony
Manteca	Cal. SEA 6/27/08	TBI	Assault	Yes		YES	• Parent's psychiatric expert testified that PTSD (because of sexual assault) and depression (irritability) caused the student to kick sexually harassing boy in the groin
In re Student with a Disability	Va. SEA 8/13/08	ED	Assault	No		NO	• Burden of proof on parents
Elk Grove	Cal. SEA 1/14/09	AD/HD+	Threat	No		NO	• School psychologist's testimony

Note: SLD = specific learning disability; OHI = other health impairment; AD/HD = attention-deficit/hyperactivity disorder; ED = emotional disturbance; *DSM* = *Diagnostic and Statistical Manual of Mental Disorders*; FBA = functional behavioral assessment; ODD = oppositional defiante disorder; IEP = individualized education program; M-D = manifestation-determination; OCD = obsessive-compulsive disorder; TBI = traumatic brain injury; PTSD = posttraumatic stress disorder.

federal district court in eastern Virginia) and with "SEA" designating hearing or review officer decisions. The second column also provides the date of the decision because the table sequences the cases in chronological order; earlier rulings at lower levels are not included, and subsequent rulings on other grounds are included only in the reference-list citations. The third column specifies the child's IDEA disability classification according to the following abbreviations: ED = emotional disturbance, OHI = other health impairment, SLD = specific learning disability, and TBI = traumatic brain injury. In addition, because of their prevalence in the cases, the *Diagnostic*

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and Statistical Manual of Mental Disorders (*DSM-IV*; American Psychiatric Association, 1994) classifications of attention-deficit/hyperactivity disorder (AD/HD), obsessive-compulsive disorder (OCD), and oppositional defiante disorder (ODD) are also included. Parentheses indicate cited diagnoses for the IDEA disability classification. The "conduct" column broadly categorizes the conduct that triggered the disciplinary change in placement, such as drugs or fighting. The columns designated "crit. 1" and "crit. 2" list the case outcomes for the two respective causal criteria in IDEA 2004, the first concerning the disability–conduct connection and the second concerning the alternate and narrower implementation criterion. In each case, the district's answers for both criteria had been no, thus causing the parental challenge and the ultimate impartial decisions. Here, the entries are the hearing and review officer's or judge's decision of yes or no, with parentheticals for inferred answers and blanks for cases where the decision did not at all address the criterion. The "outcome" column designates the hearing and review officer's or court's ultimate overall decision as to manifestation determination—"YES" or "NO." Again parenthetical entries indicate information inferred from rather than explicit in the published opinion. In each case, the parent was challenging the team's determination of a negative M-D; thus, a "YES" represents an overruling of the district's position. Finally, the "comments" column summarizes notable contributing factors (previous incidents) or sources (e.g., legislative history) noted in the legal conclusions of the decision.

An examination of Table 1 reveals that the frequency of the decisions thus far has been approximately four per year and that approximately 65% of the outcomes have been a NO answer to the M-D. The partial outcome of the Fulton County case (2007) accounted for the approximated 65% outcome ratio for the 14 decisions; the hearing officer reversed the district's determination but remanded the matter back to the M-D team to redo the process rather than dictating a YES answer. The jurisdictions of the 14 cases tended to scatter throughout the country. Moreover, the leading disability classification was SLD, with close seconds being AD/HD, which the IDEA regulations expressly include under OHI, and ODD, which the IDEA regulations do not explicitly mention. The leading categories of conduct subject to the M-D are related to violence and drugs. Finally, the hearing and review officer analyses have been rather cursory, but—as revealed in the comments section of the table—the most frequent factors in the rationale of the decisions were burden of proof, the relative evidentiary weight of district witnesses and parent experts (usually in the district's favor), and the impulsive versus deliberate nature of the student's action.

The only court decision thus far—*Fitzgerald v. Fairfax County School Board* (2008)—merits special attention because of its officially published status in terms of legal precedent and its comprehensive analysis that extended beyond the application of the required criteria to the interpretation of the required procedures. On the procedural side, this district court decision in Virginia broadly interpreted the statutory membership requirement for the M-D team—"[other] relevant members of the IEP Team as determined by the parents and the local education agency"—in light of the legislative history and OSEP interpretations. First, the court interpreted this language as meaning that each side has its independent right for invitation rather than an effective veto, which would be the result of the alternative of interpreting the language as requiring mutual agreement. Second, the court similarly rejected the parents' contention that such invitees must have personal familiarity with the child and must have served previously on the child's IEP team, concluding instead that Congress's streamlining purpose required only that the invitees fit within the broad statutory requirements for IEP team membership. Third, the court disagreed with the parents' alternative veto claim that the M-D requires a consensus of the participants, ruling instead that the IDEA requires only parental involvement in the M-D process, with their ultimate right being to file for an impartial hearing to challenge the procedures and outcome. In this case, the next parental procedural claim concerned the IDEA requirement that the M-D team "review all relevant information in the student's file." Disagreeing with the parents' contention that this language required each member to review every piece of information in the student's file before the M-D meeting, the court upheld the hearing officer's conclusion that the defendant–district's procedure in this case, which was that one or more members reviewed the file before the meeting and that the team discussed the child's disability, his IEP, and his teachers' anecdotal reports at the meeting, sufficed in terms of the IDEA's harmless-error standard for procedural matters. The parents' final procedural claim targeted the informal consultation among district representatives without the parents prior to the M-D meeting. Based on judicial precedents concerning IEP teams generally, the court concluded that the IDEA required that the local education agency (LEA) representatives have an open—not a blank—mind and that in this case the parents failed to prove predetermination, that is, that the LEA members came to the meeting with a closed prejudgment.

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As for the substantive side of the M-D in this case, the court agreed with the hearing officer that this high school senior's code of conduct violation, which was possession of a weapon (here, paintball guns that he and four other boys used to shoot at the school's exterior), was not a manifestation of his disability, which was ED, with various diagnoses including AD/HD, ODD, and OCD. First, the court rejected the parents' reliance on the statements in the student's IEP and in the teachers' anecdotal reports that his disability included impulsivity and his tendency to be drawn into inappropriate behaviors by his peers; the evidence was preponderant that the entire episode took several hours and that he played a leadership role in its planning and execution. Similarly, the court found much more persuasive the school psychologist's individualized information than the one-sided written reports from the parents' experts submitted subsequent to the M-D meeting. Finally, the court rejected the parents' reliance on hearing and review officer rulings, primarily the *Philadelphia* (2007) decision, concluding that they were distinguishably based in significant part on prejudicial procedural violations.

Discussion

The higher frequency of the case law concerning M-Ds under IDEA 2004 than under the previous versions of the IDEA is not surprising, but the decreased predominance of upheld "no" answers is not in line with the aforementioned OSEP prediction of "less difficulty," which in turn was based on the streamlining of the procedures and stringency of the criteria in the new IDEA. However, the relatively limited period for and, thus, much smaller sample of M-D cases and the unknown results of settled and unpublished cases under the new IDEA warrant caution in such comparisons (e.g., D'Angelo, Lutz, & Zirkel, 2004). With the same circumspection, the continued prevalence of the disability classification of SLD in M-D cases is not unexpected; students with SLD have consistently accounted for half of all special education enrollments nationally during the past decade (Zirkel, 2006a). However, the majority of decisions upholding M-Ds of "no" specifically for students with ED does not square with the common conception. The increasing proportion of M-D cases where AD/HD or ODD is an additional diagnosis is at least a potentially complicating factor, but the effect has varied widely. For example, in *Fitzgerald v. Fairfax County School Board* (2008), the court found that the evidence discounted the role of AD/HD, concluding, "[The student] simply made a bad decision; he must now live with the consequences" (p. 562).

Procedural issues were not significant in most of the new cases, attributable in part to the streamlining effect of the new IDEA M-D provisions. An additional contributing factor, which the *Fitzgerald* case amply exemplified, is the tendency toward judicial deference to school districts in the disciplinary context. Practitioners may also be surprised that the M-D case law tends to rely on their testimony more than that of parent experts, especially where they show more familiarity with the individual characteristics and behavior of the child.

Because of its relative prevalence in the decisions (as noted in the comments column of Table 1), the single procedural factor that merits discussion is the concept of burden of proof. More specifically, this term refers to burden of persuasion, that is, which party—the parent or the district—loses when the M-D is a close call. As the *MaST* (2006) decision observed, the use of burden of persuasion in M-D cases is subject to question. Although the conception that IDEA 2004 places the burden of proof in a M-D on the parent is not uncommon in the professional literature (e.g., Arnberger & Shoop, 2006) and even extends to the House of Representatives Committee on Education and the Workforce (2005) guide, neither the IDEA legislation nor the IDEA regulations expressly address the burden of proof. In a case concerning the appropriateness of an IEP, the Supreme Court interpreted the silence in IDEA as importing the general rule that the burden of proof is on the moving party, that is, the party challenging the IEP at an impartial hearing (*Schaffer v. Weast*, 2005). However, the Court was careful to limit its ruling to the IEP issue, and subsequent lower court case law has not determined whether it extends to the M-D issue. Moreover, as the OSEP commentary accompanying the 2006 regulations clarified, the concept of burden of proof does not apply in any event at the M-D meeting as compared to subsequent adjudicative proceedings.

The case law sample is relatively limited to date. The guidance in *Doe v. Maher* (1986), the legislative history of IDEA 2004, and the OSEP interpretations that accompanied and followed the issuance of the 2006 IDEA regulations largely remain as untapped valuable resources for both the party participants in M-D meetings and any resulting IDEA adjudicative proceedings.

In any event, whether district personnel ultimately opt for the child-protective approach advocated in the best-practice literature of the special education, they need to start with legal literacy as to not only the procedures (Yurman, Zirkel, & Dullum, 2007) but also the substance (Zirkel, 2006b, 2006c) of M-Ds under the IDEA. The legal lessons appear to include the following:

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- Make sure to follow the M-D procedures specified in the IDEA regulations, including those summarized in Figure 1 along with the prescribed time lines, notifications, and the overall obligation to provide an opportunity for meaningful parental participation
- Check to see whether the state special education regulations or local district policy adds any relevant requirements
- Bear in mind the possible pertinence of the legislative history, the OSEP commentary, and the published case law to date concerning M-Ds under IDEA 2004
- Avoid stereotypes about particular disabilities, such as ED, in favor of an individualized determination based on the child's particular need-based profile in the IEP and other available information sources
- Consider carefully, without either ignoring or overdoing, the possible relevance and significance of impulsivity
- Focus on the two express causality-based criteria without relying on burden of proof
- Consider the appropriateness of the IEP as a significant but separate issue
- Give due weight to experts, without overdeferring to outside specialists who are not familiar with the child and without underestimating the expertise of district personnel

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