

**THE MANIFESTATION DETERMINATION
AND MEDICAL/MENTAL HEALTH CONDITIONS**

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I. INTRODUCTION

Perhaps the most difficult challenges for educators in the area of special education are understanding and correctly implementing compliant procedures in the area of discipline. One particular piece of the discipline puzzle is that of making the manifestation determination. This presentation will examine the provisions of the law related to the manifestation determination requirement and will examine judicial/administrative decisions regarding the validity of manifestation determinations, particularly with respect to students who have been diagnosed with mental health conditions.

II. APPLICABLE LEGAL PROVISIONS

The IDEA is not the only statute to consider when examining the manifestation determination requirement. In fact, the manifestation determination requirement did not appear in the IDEA until the Act was amended in 1997. However, the Office for Civil Rights (OCR) required that manifestation determinations be made in the context of discipline for many years prior to that time and pursuant to Section 504.

A. The IDEA

The manifestation determination requirements under the IDEA were significantly amended in 2004 and further clarified in the IDEA regulations in 2006. In order to properly highlight the significance of the changes made to the manifestation determination standard by the amendments, it is important to review the previous version (pre-2004 Amendments) and compare it to the current version.

1. The previous version of the manifestation standard

Prior to the 2004 IDEA Amendments and 2006 regulations, relevant provisions of the law related to the manifestation determination were as follows:

(former) 34 C.F.R. § 300.523 Manifestation determination review

(a) *General.* If an action is contemplated regarding behavior described in [sections dealing with change of placement for disciplinary reasons] or involving removal that constitutes a change of placement...for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the LEA that applies to all children—

(1) Not later than the date on which the decision to take that action is made, the parents must be notified of that decision and provided the procedural safeguards notice...; and

(2) Immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review must be conducted of the relationship between the child’s disability and the behavior subject to the disciplinary action.

(b) *Individuals to carry out review.* A review...must be conducted by the IEP team and other qualified personnel in a meeting.

(c) *Conduct of review.* In carrying out a review..., the IEP team and other qualified personnel may determine that the behavior of the child was not a manifestation of the child’s disability only if the IEP team and other qualified personnel—

(1) First consider, in terms of the behavior subject to disciplinary action, all relevant information, including—

(i) Evaluation and diagnostic results, including the results or other relevant information supplied by the parents of the child;

(ii) Observations of the child;

(iii) The child’s IEP and placement; and

(2) Then determines that—

(i) In relationship to the behavior subject to disciplinary action, the child’s IEP 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 of the behavior 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.

(d) *Decision.* If the IEP team and other qualified personnel determine that any of the standards in paragraph (c)(2) of this section were not met, the behavior must be considered a manifestation of the child’s disability.

(e) *Meeting.* The review...may be conducted at the same IEP meeting that is convened under § 300.520(b).

(f) *Deficiencies in IEP or placement.* If...a public agency identifies deficiencies in the child's IEP or placement or in their implementation, it must take immediate steps to remedy those deficiencies.

2. The current version of the manifestation standard

(current) 34 C.F.R. § 300.530(e)

Manifestation determination.

(1) 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, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

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

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

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

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

In commentary issued with the final 2006 IDEA regulations, the U.S. Department of education noted that "the purpose of the change in the law is to simplify the discipline process and discipline children with disabilities when discipline is appropriate and justified....Because fewer factors need to be considered during each manifestation determination review, the time required to conduct such reviews will likely be reduced, and some minimal savings may be realized. Because it will be less burdensome for school personnel to conduct manifestation determinations, it is reasonable to expect an overall increase in the number of these reviews as school personnel take advantage of the streamlined process to pursue disciplinary actions against those children with disabilities who commit serious violations of student codes of conduct." 71 Fed. Reg. 46,748-46,749 (2006).

3. What difference does the manifestation determination make under IDEA?

a. Where conduct *was* a manifestation

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

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

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

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

34 C.F.R. § 300.530(f).

b. Where conduct *was not* a manifestation

If it is determined that the behavior that gave rise to the violation of the school code *was not* a manifestation of the disability, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except that the student must continue to receive educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the IEP and receive, as appropriate, an FBA and BIP designed to address the behavior violation so that it does not recur.

34 C.F.R. § 300.530(c) and (d).

4. Who makes the manifestation determination?

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

B. Section 504

1. The requirement for manifestation determinations

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

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

2. What difference does the manifestation determination make under 504?

a. Where conduct was a manifestation

The presumption under Section 504 is that a student cannot be deprived of services based upon behavior caused by the student’s disability (because that would seem to be discrimination on the basis of disability). Thus, OCR presumes that the student’s placement cannot be changed through the use of disciplinary removals where the student’s behavior was a manifestation of disability. Rather, the Team should determine whether the student’s current educational program is appropriate and revise it if necessary. *See Tulsa (OK) Pub. Schs.*, 46 IDELR 49 (OCR 2005) [district complied with all of 504’s requirements with respect to discipline and placement decisions when it conducted an MD hearing prior to the student’s expulsion, convened a team of knowledgeable persons familiar with the student, agreed to admit the student, and develop a BIP for him. In addition, the district conducted a reevaluation of the student and changed his disability category from ED to LD]. However, the 504 regulations do not contain provisions requiring functional behavior assessments and behavioral intervention plans.

b. Where conduct was not a manifestation

It is also the presumption that where it is found that the student’s behavior was not a manifestation of disability, disciplinary consequences can be applied as if the student is not disabled and if a non-disabled student would receive the same consequences under the same

circumstances. See *Gates-Chili (NY) Cent. Sch. Dist.*, 50 IDELR 51 (OCR 2007); *Knox Co. (TN) Sch. Dist.*, 26 IDELR 762 (OCR 1997). Unlike IDEA, however, Section 504’s regulations do not provide for the continuation of services for a suspended or expelled student who is disabled only under Section 504. *OSEP Memorandum 95-16*, 22 IDELR 531 (OSEP 1995). Though a parent can challenge a disciplinary removal/manifestation determination by initiating a 504 impartial due process hearing, OCR has acknowledged that there is no “stay-put” provision under Section 504. *Letter to Zirkel*, 22 IDELR 667 (OCR 1995).

3. Who makes the manifestation determination?

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

III. WHAT ROLE DO MEDICAL/MENTAL HEALTH DIAGNOSES PLAY?

Probably more often than not, a student with a disability who commits a serious violation of the code of conduct has a condition under the Diagnostic and Statistical Manual of Mental Disorders (now DSM-5) that has been diagnosed by a physician and/or psychologist. While a student may have such a diagnosis, the diagnosis does not necessarily equate to a disability under the IDEA or Section 504. Rather, educators are required to use the definitions of disability under IDEA and Section 504 when making educational decisions, including manifestation determinations. Since these medical and mental health conditions are not necessarily “disabilities” under IDEA or Section 504, what role do they play in the manifestation determination review? Do you only address the disability for which the student is identified and refuse to consider any DSM-5 diagnoses that a parent brings to the school’s attention? Do other factors play a role, such as the intentional nature of the behavior at issue?

IV. GUIDANCE THROUGH COURT AND AGENCY DECISIONS

There are some interesting decisions regarding manifestation challenges as set forth below that may provide some guidance and support for decision-making in the disciplinary context, specifically with respect to manifestation determinations.

A. Relevant Court Decisions

Anaheim Union High Sch. Dist. v. J.E., 61 IDELR 107 (C.D. Cal. 2013). District had notice of student’s likely status as a child with a disability when the Section 504 Team met to discuss the student’s ADHD and anxiety diagnoses, panic attacks, inability to complete work, failing grades, inability to remain in class and hospitalization for attempted suicide. Thus, the district had an obligation to conduct a manifestation determination before placing him in an alternative school for disciplinary purposes. A school district is deemed to have knowledge of a student’s disability before the misconduct occurred where a teacher or other staff member “expresses concern about

a pattern of behavior” to the special education director or other district supervisor. This does not require teachers to suggest a special education evaluation. Rather, the high school AP’s attendance at the 504 meeting triggered the knowledge that the student was likely covered by IDEA. Thus, the hearing officer’s decision requiring a manifestation determination is upheld.

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

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

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

Ron J. v. McKinney Indep. Sch. Dist., 46 IDELR 222 (E.D. Texas 2006). A federal magistrate judge recommended that a District Court dismiss a suit against a Texas district that expelled a sixth-grader without first conducting a manifestation determination. Although the student’s parents claimed that the district violated the student’s rights under Section 504 and the IDEA, U.S. Magistrate Judge Don D. Bush concluded that the parents waived the student’s statutory rights by voluntarily withdrawing the student from his school and refusing to consent to the evaluation the district needed to conduct a manifestation determination. Magistrate Bush acknowledged that the district may have failed to adhere to the IDEA’s procedural requirements,

but explained that procedural errors do not automatically constitute a denial of FAPE. Instead, courts must consider whether the alleged procedural error resulted in a loss of educational opportunity or seriously infringed on the parents' right to participate in the IEP process. By removing their son from the school and refusing to consent to an evaluation, the magistrate explained, the parents waived their right to claim that the district violated the IDEA and Section 504 by failing to consider whether the student's attempt to start a fire in a school bathroom was a manifestation of his ADHD.

B. Relevant Hearing Officer Decisions

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

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

Seattle Sch. Dist., 60 IDELR 266 (SEA Wash. 2012). Where the district did not consider the impact of all of the other disabilities a student with ADHD had when it decided to expel him for bringing a homemade explosive device to school, it must reconsider its disciplinary decision that the conduct was not a manifestation. In making a manifestation determination, districts must review all relevant information in a student's file. A district may violate the IDEA when its manifestation determination only considers the disability upon which a student's special education eligibility is based. Here, the student's special education eligibility was based on his ADHD, but by the time his MD review took place, he had also been diagnosed with disruptive behavior disorder and anxiety disorder. Although the disruptive behavior disorder was referenced in the student's most recent evaluation and at least one MD team member was aware of his anxiety disorder, the team did not take into account either disorder in reaching its manifestation decision. On this basis, the parent has satisfied his burden of showing the district failed to conduct a proper manifestation review. However, there is insufficient evidence to determine whether the child's conduct was in fact a manifestation of his disability. Although the student had a history of bringing inappropriate items to school—acts believed to be related to his disability when done impulsively—the team had reason to think that the conduct in this case was premeditated. They believed that the student may have made the device some time ago and brought it to school with the intent to ignite it. Because of the conflicting possibilities, the matter is remanded to the student's MD team to make a new determination by at least considering the student's additional disabilities.

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

In re: Student with a Disability, 61 IDELR 56 (SEA Va. 2012). A grade schooler's habit of checking for the presence of adults before engaging in behaviors such as upending desks, destroying classroom property and physically assaulting staff members and classmates reflects that his maladaptive behaviors were unrelated to his intellectual disability or his emotional disturbance. Thus, the student's 13-month expulsion was appropriate and the district's proposal to place the student in an alternative day school is upheld. The parents' claim that the student did not understand the difference between right and wrong is rejected. As the MD team had observed, the student typically looked behind him to check whether school personnel were

watching before engaging in violent or disruptive behaviors. Additional evidence showed that the student's misbehavior was targeted to obtain certain goals. For example, the student would take the teacher's keys to further his plan to "escape" to the computer lab, and the student often made comments such as "ha ha" or "you can't catch me" at the start of a behavioral incident. "His own commentary on his behavior shows that he is aware of his actions" and the student will not benefit from his education until he learns appropriate behavior. The highly structured alternative school has small classes, uses positive behavioral interventions and supports, and has staff members trained in crisis management. Thus, the parents' request for home instruction is denied.

In re: Student with a Disability, 112 LRP 49628 (SEA Wis. 2012). Deaf student's conduct of buying and selling look-alike drugs was not a manifestation of his disability and the district's determination is upheld. While there was concern that he may also have ADD and an evaluation was never performed, the IEP team found at the MDR that the student's behavior was not related to his disability and recommended expulsion. The student argued that the bullying and involvement with drugs was impulsive behavior that was related to his hearing loss and ADD, and his expert psychologist testified that the student's hearing impairment, along with ADD, could cause the student to act impulsively. However, the district presented the testimony of the student's special and general education teachers, who agreed that the student had not previously exhibited impulsive behavior and attributed his involvement with bullying and drugs to poor decision-making on his part. Both teachers had spent substantial time with the student, and the special education teacher had taught the student for the last four years. Conversely, the expert psychologist, who testified on behalf of the student, examined the student for the first time less than one month prior to the due process hearing. Thus, the teachers were in a better position to assess the student's alleged inclination toward impulsive behavior. Finally, in rejecting the student's position, the actual conduct was not impulsive in nature, because the buying and drug selling took place over an extended period of time.

Center Unif. Sch. Dist., 112 LRP 12038 (SEA Cal. 2012). Where high schooler with ADHD had a night to sleep on her decision to smoke marijuana at school the next day, she was not acting spontaneously when she followed through on her plans. Thus, the district properly determined that the student's conduct was not a manifestation of her ADHD before expelling her. The student accepted the marijuana as a present for her birthday and planned to smoke it with a friend the following morning. Once in the school bathroom the next day, she texted a third student to bring rolling papers, and the three students smoked the marijuana. The parent's argument that the student's decision was triggered by her impulsivity is rejected, as the student's ADHD symptoms primarily manifested as lack of sustained attention and organization. There was no evidence that she engaged in impulsivity to any significant degree at school, and the evidence indicated that she behaved well in class, other than speaking out of turn. Further, there was no evidence that she was acting impulsively on the day in question. "The student did not spontaneously accept a marijuana cigarette from someone and smoke it." Rather, she accepted one the previous day. Nor was there any evidence that the student could not say "no" to the student who provided it. "At best, Student's initial decision to accept the marijuana may have been impulsive and that impulsiveness may have had an attenuated relationship to her disability." Her involvement in planning the incident and subsequent participation, despite having a night to reflect, demonstrated that her actions were deliberate, not impulsive.

Dist. of Columbia Schs., 59 IDELR 88 (SEA D.C. 2012). A surveillance tape supports the district's decision to expel a student with ADHD for setting off firecrackers in his school cafeteria. Based on the evidence the MD team considered, the disciplinary action meted out was appropriate and the child was not entitled to the compensatory services his grandmother sought on his behalf. After deciding expulsion was in order, the district timely convened an MD review to determine whether the student's actions were caused by his disability. As the district pointed out, the team reviewed the student's IEP, his most recent psychological evaluation, statements the child and school personnel made, input from the grandmother, and a surveillance videotape that contained the whole incident. The videotape provided the most comprehensive and credible account of what happened, and was the best indicator that the district's decision was accurate. The school's special education coordinator who attended the MD review and saw the tape explained that the video revealed that the student's behavior leading up to the incident was not impulsive, rash or lacking in forethought. Rather, the tape showed him strategically waiting until no adults were nearby before he lit the firecrackers. The information the MD team relied on, i.e., review of the surveillance tape, etc., provided for a comprehensive analysis of the incident and made the decision-making process reliable. Therefore, there was no evidence that the MD decision was erroneous.

Los Angeles Unified Sch. Dist., 111 LRP 60703 (SEA CA 2011). Where 15-year old student with ADHD sold a prescription drug to another student, it was not the result of impulsivity caused by his disability. The student had previously engaged in conduct in school thought to be manifestations of his disability, including fights with other students, class disruptions, yelling inappropriate comments in class, insulting staff and peers and bullying. When the district learned of the student's sale of the prescription drug to another student, which violated the school code, it initiated a pre-expulsion meeting in which it made a manifestation determination. The district considered expert opinion, the IEP, teacher observations, the relevant portions of the student's records and information from the parents. Based on the circumstances surrounding the misconduct, the district determined that the student's misconduct was not a manifestation of his student's SLD. Importantly, the student initially planned the details of the sale with another student, went home, and brought the drug back the next day to complete the sale. This conduct, the district determined, was the result of premeditation rather than impulsivity caused by the student's ADHD. Due in part to the contrast between the student's misconduct deemed to be manifestations of his disability and the conduct at issue in this instance, the district's contention that the drug sale was premeditated and deliberate rather than a result of impulsiveness triggered by ADHD is upheld.

Poway Unified Sch. Dist., 55 IDELR 153 (SEA Cal. 2010). While the student may have exhibited poor judgment when he set off a dry-ice bomb at school, there was no link between the conduct and his ADHD. The student's actions leading up to the incident involved a series of thoughtful steps and demonstrated that he did not act impulsively. Clearly, the student made the device by placing dry ice in a bottle and adding water to it, placing it in a stall and waited for it to explode. When it exploded, it injured a teacher. "Even if a disability causes impulsive behavior, it is not an impulsive behavior if it takes place over the course of hours or days and involves a series of decisions." The evidence showed that the student researched how to obtain dry ice, got it, chose a place to construct the bomb, constructed it and selected a place to hide and

explode it. In addition, the student “mulled over” the steps for doing this for a long period of time.

Westford Pub. Schs., 55 IDELR 152 (SEA Mass. 2010). There is no evidence that the student’s plan to shoot a list of students he developed was caused by, or directly and substantially related to his social anxiety or selective mutism. While the student had a behavior plan that addressed his tendency to withdraw and become aggressive when anxious, there was no evidence that the student was upset or anxious when he developed the list of 75 students that he planned to shoot and wrote “I am bored” on the back of it 50 times. Teachers testified that they had never seen the student’s behavior escalate when he was bored.

Medford Pub. Schs., 55 IDELR 47 (SEA Mass. 2010). No evidence supported the parent’s position that the 17-year-old student with ADHD and LD violated school rules based upon his disabilities. Student’s counselor and teachers agreed that there was no direct or substantial relationship and that the student was able to conform his behavior when he wanted to, that he enjoyed the drama of misbehavior, and that he planned his conduct to achieve maximum effect.

Hermitage Sch. Dist., 110 LRP 26513 (SEA Pa. 2010). Because student’s assistance of two friends to engage in misconduct spanned nearly 20 minutes, it was not the result of impulsivity or related to his ADHD. The student served as a lookout for his peers in order to show affiliation or friendship and videotape surveillance of the school hallways established that the activity occurred in several locations. This conduct did not relate to the student’s impulsivity, poor social awareness, temper, or lack of focus in the classroom. “The fact that Student, like most if not all adolescents, undoubtedly places a priority on maintaining peer relationships simply does not lead to the conclusion that his actions...bear a direct and substantial relationship to his disability.”

Inland Lakes Pub. Schs., 110 LRP 20187 (SEA Mich. 2010). Where student with emotional disability, LD and ADHD reportedly forgot that he had razor blades in his pocket, his conduct was not related to his disability where the incident was not connected to his disabilities. The MD review team correctly concluded that the student’s memory lapse and conduct were unrelated to his disabilities and the evidence established that the student was no more prone to absentmindedness than any other student. Further, his IEP did not address memory lapses and his actions subsequent to realizing that he had the blades when he tried to hide them showed that he reached a logical conclusion that his only way out of the situation was to conceal the contraband.

C. Relevant OCR/OSEP Decisions

Letter to Sarzynski, 59 IDELR 141 (OSEP 2012). Just because a parent decides to drive her child to school during a bus suspension, a district cannot bypass a MD review. If a student receives transportation as a related service and the district provides no alternative transportation, a bus suspension is a removal that triggers an MD review if it constitutes a change of placement. *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009). The removal is a change of placement for purposes of triggering an MD review if it continues for more than 10 school days or is part of a pattern of exclusions of

more than 10 days. In that case, the MD team must convene within 10 days of the suspension decision to determine whether the conduct is a manifestation of the child's disability. In addition, when a district evaluates whether a bus suspension is part of a pattern of removals, it must consider prior instances in which the student was suspended from instruction. Similarly, in assessing whether an instructional suspension is part of a pattern, the district must factor in prior bus suspensions.

Johnston Co. (NC) Public Schs., 56 IDELR 205 (OCR 2011). School district violated Section 504 when it conducted an MD review after it suspended a high schooler with an ED and ADHD. Under Section 504, a reevaluation, including an MD review in the case of a disciplinary exclusion, must occur prior to a significant change of placement. Here, on Feb. 5, 2010, the district imposed a 10-day suspension to take effect the same day. The district had suspended the student two times earlier in the year. On that date, the principal also informed the student's probation officer about the suspension, with the result being incarceration of the student. The district subsequently conducted an MD review and found the student's conduct that led to the suspension was a manifestation of his disabilities. The parent claimed the district violated Section 504 by imposing the suspension prior to the MD review and that it intentionally discriminated against the student when it contacted his probation officer. Section 504 requires districts to reevaluate a student before a significant change in placement, not after. 34 CFR 104.35. In the case of a disciplinary exclusion of more than 10 days or a pattern of exclusions exceeding 10 days, that reevaluation must include an MD review. Here, the district violated 504 by waiting until after it imposed the suspension. As to the claim that the principal's communication with the probation officer was discriminatory, the only evidence was the parent's assertion that she believed the principal called the officer because he did not want the student to return to school. However, in light of the principal's statements to the contrary, those assertions were insufficient to establish that the district knowingly took adverse action against the student.

St. Charles (MO) R-VI Sch. Dist., 55 IDELR 175 (OCR 2010). District violated Section 504 by failing to consider whether a hearing impaired sixth-grader's threat of a school massacre was linked to a possible emotional disturbance. The student's psychiatric hospitalization and bizarre statements to a school counselor should have tipped off the MD review team that she might have an ED, as well as a hearing impairment. The 12-year-old informed the counselor that she had been raped, was having negative thoughts and was cutting herself. A few days later, she told the counselor she was picturing a Columbine-type massacre and that she had made a list of people to kill, which included the counselor. The district took steps to have the student hospitalized in a mental health center for four days. It then held an MD review meeting, found the threat was unrelated to her hearing impairment, and expelled her for 180 days. Noting that the district knew about her emotional difficulties, even before the student's conversation with the counselor that triggered the expulsion, the MD review team was required to consider whether the student's conduct was a manifestation of those difficulties. The district's review "should have included an evaluation of all potential disabling conditions, not just her hearing impairment." The district also violated Section 504 by failing to draw upon a variety of information sources. Specifically, it neglected to consider teacher input, the student's prior disciplinary records or her psychiatric hospitalization. The district is to conduct an appropriate MD review, but if it finds a link to ED, it can still expel her if it is determined that she poses a direct threat to students or staff members.

Corona-Norco (CA) Unified School District, 48 IDELR 138 (OCR 2006). The fact that a teenager received 17 disciplinary interventions for behavioral offenses during his first four months in a new high school was not enough to trigger the district's obligation to evaluate for special education services. The district met with the student's parent one month into the school year to discuss his behavioral and academic difficulties, but neither the parent nor district representatives suggested at the meeting that the student might be eligible for special education and related services. Only after the student was expelled for carrying a weapon on school property did the parent notify the district that her son had ADHD and bipolar disorder. The district had no obligation to divert from its general disciplinary policies during the expulsion proceedings. "Because the student was not disabled or believed to be disabled at the time that he was disciplined, the district did not have a duty to determine whether his misbehavior was caused by a manifestation of his disability."

Portsmouth (VA) Public Schools, 48 IDELR 229 (OCR 2006). While the district suspended a student for a total of 12 days over a five-month period, the district did not need to hold an MD hearing before his third suspension. The three suspensions were too brief and too far apart to constitute a pattern of removals under the IDEA, and a district has no obligation to conduct a manifestation determination unless the student's disciplinary removals constitute a significant change in placement. Although the student could establish a significant change in placement by establishing a pattern of exclusion, he could not show a pattern, since each individual suspension lasted five days or less—less than half of the time it would take for a single suspension to amount to a change in placement. Moreover, the suspensions occurred in December 2005, April 2006 and May 2006. While all of the suspensions stemmed from fights with classmates, the similarity in misconduct did not in itself establish a pattern. "We find that there is insufficient evidence that the [district's] suspension of the student on May 23, 2006, either on its own or together with the previous suspensions, constituted a significant change in placement." Thus, there was no need for the district to hold an MD hearing.