Lingering Questions about Identification, Team Participation and the Manifestation Determination

A Seminar Presented to the New Hampshire Association of Special Education Administrators

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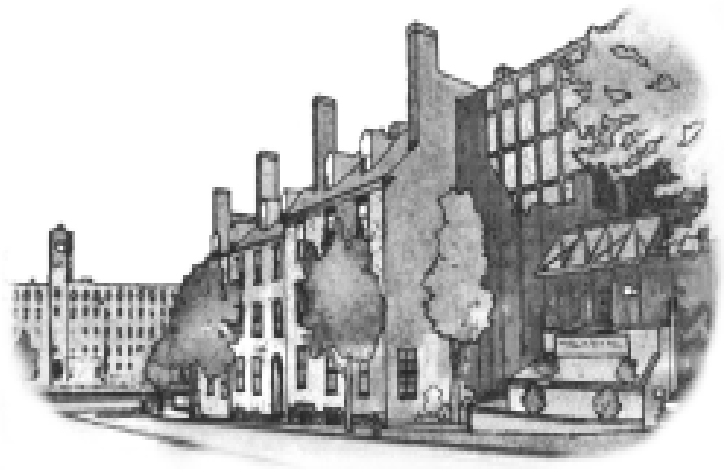

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with an understanding of certain aspects of the Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400 *et. seq*. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. Overview

The purpose of this material is to provide school officials with a deeper understanding of identification, focusing on response to intervention, the rules regarding Team participation, and the new manifestation determination.

II. Identification and Response to Intervention (RTI)

A. The Legal Requirements

When determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures. 20 U.S.C. § 1414(b)(6)(B).

Scientifically based research is defined in the No Child Left Behind Act as "research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs, and includes research that:

1. Employs systematic, empirical methods that draw on observation or experiment;

2. Involves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn;

3. Relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators;

4. Is evaluated using experimental or quasi-experimental designs;

5. Ensures that experimental studies are presented in sufficient detail and clarity to allow for replication, and;

6. Has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.

20 U.S.C. § 7707(b)(37).

The regulations require that States adopt criteria for determining whether a child has a specific learning disability. 34 C.F.R. § 300.307(a). The criteria adopted by the State "(1) Must not require the use of a severe discrepancy between intellectual ability

and achievement for determining whether a child has a specific learning disability . . . (2) Must permit the use of a process based on the child's response to scientific, research-based intervention; and (3) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability." 34 C.F.R. § 300.307(a)(1)-(3).

The Office of Special Education and Rehabilitative Services (OSERS) has opined that "RTI is only one component of the process to identify children in need of special education and related services. Determining why a child has not responded to research-based interventions requires a comprehensive evaluation." 71 Federal Register, No. 156, 46647 (Aug. 14, 2006).

While States must permit the use of a process that is based on a child's response to intervention, districts are not required to utilize that process. See 20 U.S.C. § 1414(b)(6)(B); 34 C.F.R. § 300.307(a). However, some level of research-based instruction must be provided, because the group that determines that a student has a specific learning disability must ensure that the child's underachievement "is not due to a lack of appropriate instruction in reading or math." 34 C.F.R. § 300.309(b). To do that:

> the group must consider, as part of the evaluation, . . .
>
> 1. Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and
>
> 2. Data-based documentation of repeated assessments of achievements at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.

34 C.F.R. § 300.309(b)(1)-(2). Thus, even if the discrepancy model is used, educators must still collect RTI data.

Key Point: even if the discrepancy model is used, the group making the eligibility determination must utilize some research-based interventions. Thus, it is important to ensure that your regular educators are familiar with various types of research-based interventions and are able to implement them in the general education setting.

It is important to keep in mind that "[e]vidence of appropriate instruction, including instruction delivered in an RTI model, is not a substitute for a complete assessment of all of the areas of suspected need." 71 Federal Register, No. 156, 46656 (Aug. 14, 2006).

In addition, screening by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services. 34 C.F.R. § 300.302.

Practice Pointer: When making an eligibility determination for any child, including those with specific learning disabilities, "the evaluation . . . must include a variety of assessment tools and strategies and cannot rely on any single procedure as the sole criterion for determining eligibility for special education and related services." 71 Federal Register No. 156, 46646 (Aug. 14, 2006).

B. What is Response to Intervention?

RTI is a process that provides students with high quality ("researched-based") instruction in the general education setting. This process will generally be done prior to the evaluation process. General educators will be primarily responsible for implementing the RTI and monitoring the student's progress. In addition to implementing RTI and monitoring progress, the general educator should collect data regarding the researched-based interventions that were used and the student's response to those interventions. If a special education referral is made, this data will later be shared with the group that is making the eligibility determination.

RTI is intended to aid in the identification of children with learning disabilities, by distinguishing between children who have specific learning disabilities and children who may be having difficulty learning, but "whose learning difficulties could be resolved with more specific, scientifically based, general education interventions." Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS) at 2, January 2007.

OSERS has opined that districts must "select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE." 71 Federal Register, No. 156, 46665 (Aug. 14, 2006) (emphasis added).

General educators collect RTI data for an "appropriate period of time" prior to making a special education referral. 34 C.F.R. § 300.309(c)(1) ("public agency must promptly request parental consent to evaluate a child [if the] child has not made adequate progress after an appropriate period of time"). OSERS refused to define "appropriate period of time," noting that

> [m]odels based on RTI typically evaluate the child's response to instruction prior to the onset of the [evaluation] period, and generally do not require as long a time to complete an evaluation because of the amount of data already collected on

the child's achievement, including observation data. RTI models provide the data the group must consider on the child's progress when provided with appropriate instruction by qualified professionals as part of the evaluation.

71 Federal Register, No. 156, 46658 (Aug. 14, 2006). As a general rule, the special education referral should be made when the general educator, after collecting data evidencing a child's response to various interventions, believes that the child may have a disability.

The Oregon Department of Education has set forth "Six Critical Components of an RTI Model." See http://www.ode.state.or.us/initiatives/idea/sixcomponents-RTI.pdf (accessed March 13, 2007). These components are:

1. Universal Screening. This screening process is administered to all students, three times per year, beginning in mid-kindergarten. It is used to pinpoint early academic difficulties.

2. Measure Problem Areas. Use assessment results to aid in determining:

    a. Whether a problem represents a student's skill or performance issue;

    b. Whether the problem is occurring in measurable and observable terms

    c. The factors that are associated with the occurrence of the problem.

3. Establish Baseline Data. Use curriculum-based measurements to help identify the performance of each student on a specific skill measure. Review previous benchmark data when analyzing the student's data. Students who are not performing at the average level within the classroom should be identified for intervention.

4. Write an Accountability Plan. The accountability, or intervention, plan should include:

    a. a description of the specific intervention;

    b. the duration, schedule and setting of the intervention;

    c. the persons responsible for the implementation of the intervention;

d. a description of the skill measurement and recording techniques; and,

e. a progress monitoring schedule.

5. Monitor Progress. Student progress in various areas (academics, behavior, social) should be frequently monitored over extended time periods. In addition, various types of data collection methods should be utilized.

6. Compare pre-intervention data to post-intervention data. This will assist in determining whether the instruction has been effective.

See http://www.ode.state.or.us/initiatives/idea/sixcomponents-RTI.pdf (accessed March 13, 2007). The Oregon Department of Education recommends implementing this plan for all students, before the student is referred for special education. Id.

Virginia has also implemented a RTI model that begins prior to the special education referral. See Addendum to Local Policies and Procedures 2007, available at http://www.doe.virginia.gov/VDOE/sess/spedannualplan/AddendumtoP-P.pdf (accessed Mar. 13, 2007). In Virginia, a child may be deemed eligible for special education and related services as a result of a specific learning disability if "

> . . . [t]he child does not make sufficient progress to meet age or VDOE-approved grade-level standards in one or more of the above eight areas [oral expression; listening comprehension; written expression; basic reading skills; reading fluency skills; reading comprehension; mathematics calculation; and, mathematics problem solving] when using a process based on the child's response to intervention . . .

Id. Parents must be notified about the services that will be provided as part of the RTI process, the nature and amount of data that will be collected, and informed about their right to request a special education evaluation. Id.

Practice Pointer: General educators should begin collecting RTI data on all children, at early stage and at frequent intervals. This data will provide a base-line that can be used to determine whether a specific child requires more intensive interventions, and ultimately, whether that child should be referred for a special education evaluation.

Practice Pointer: It is important to keep parents informed about their child's response to the interventions that have been used.

III. Team Participation

A. Team Members

The IEP team is a group of individuals composed of:

1. The parents of a child with a disability;

2. Not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

3. Not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;

4. A representative of the local educational agency who –

   - is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

   - is knowledgeable about the general education curriculum; and

   - is knowledgeable about the availability of resources of the local educational agency

5. An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

6. <u>At the discretion of the parent or the agency</u>, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

7. <u>Whenever appropriate</u>, the child with a disability.

20 U.S.C. § 1414(d)(1)(B) (emphasis added).

There is no requirement that <u>more</u> than one regular education teacher attend Team meetings. Thus, as long as one regular education teacher (of the child) is present at the meeting, the public agency is not required to obtain parental consent before excusing other regular education teachers. This also applies when more than one special education teacher or provider is in attendance at the meeting.

"Special education teacher" and "special education provider" were left undefined in the regulations. However, OSERS opined that "the special education teacher or provider who is a member of the child's IEP team should be the person who is, or will be, responsible for implementing the IEP." Id.

The decision regarding whether to invite a special education teacher, or special education provider of the child is also left to the public agency. OSERS has opined that "[t]he special education provider may substitute when there is no special education teacher. However, . . . there may be other appropriate circumstances when a special education provider could substitute for a special education teacher." 71 Federal Register No. 156, 46670 (Aug. 14, 2006).

Practice pointer: The public agency determines which of its personnel will fill the roles of the required IEP Team participants at the team meeting.

Practice pointer: If the district wishes to invite individuals from other agencies who are not representing the child, it must obtain parental consent before the individual participates in the meeting.

B. Attendance at Team Meetings

Team members are not required to attend meetings, in whole or in part, if the parent and the LEA agree that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. 20 U.S.C. § 1414(d)(1)(C)(i) (emphasis added); see also 34 C.F.R. § 300.321(e)(1). **The agreement must be in writing.** 20 U.S.C. § 1414(d)(1)(C)(iii) (emphasis added).

Team members may be excused from attending a meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if: (1) the parent and the LEA consent to the excusal; and (2) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. 20 U.S.C. § 1414(d)(1)(C)(ii) (emphasis added); see also 34 C.F.R. § 300.321(e)(2). **The parent must consent to the excusal in writing.** Id. at § 1414(d)(1)(C)(iii) (emphasis added).

The attendance requirement and excusal provisions apply only to the required members of the IEP Team. That is, those members listed supra in Part III, A, 2-5. See 34 C.F.R. §300.321(e).

Unless the parents have consented or agreed to their excusal from the meeting, at least one regular education teacher and special education teacher or provider of the child **must** be present at Team meetings. A District's failure to include those individuals in team meetings may be an insurmountable procedural violation, resulting in a finding that the District denied FAPE. See e.g. New York City Department of

Education, 45 IDELR 236 (N.Y. State Ed. Agency, Nov. 16, 2005); Board of Education of the Arlington Central School District, 45 IDELR 73 (N.Y. State Ed. Agency, July 5, 2005).

In New York City Department of Education, the parents filed a request for due process, seeking reimbursement for the tuition costs associated with their unilateral private placement. 45 IDELR 236 (N.Y. State Ed. Agency, Nov. 16, 2005). Parents alleged, among other things, that the district failed to ensure that the appropriate team members were present at the annual review meeting. Specifically, they alleged that the District's failure to include a regular education teacher and its failure to include a special education teacher of the child significantly impeded their participation and denied their daughter a FAPE.

The State Review Officer agreed that the Team was improperly constituted, and held that the improperly constituted team significantly impeded the parent's "participation in the creation and formulation of the IEP because [the district] had no appropriate special education teacher of the student present at the [Team] meeting with whom [parents] could review and discuss an appropriate special education program for the student for that school year." It is important to note that although a special education teacher was present at the meeting, the special educator "was not the student's current special education teacher, a special education teacher who would or might have implemented the student's IEP, or an appropriate related services provider who was currently providing services or would or might have implemented the student's IEP." Instead, the special educator was "not an active teacher but was assigned to the [Team] for the purpose of being its special education teacher member." In addition, in this particular case, the district was recommending placement in "self-contained special education classes." Thus, "[t]he lack of an appropriate special education teacher . . . deprived the student and her parent of the perspective and input of a special education teacher familiar with the self-contained special education class and program recommended as appropriate for the student's needs."

Similarly, in Board of Education of the Arlington Central School District, the parents received reimbursement for the costs associated with their unilateral private placement because "the absence of the regular education teacher [at a June 18, 2004 team meeting] impeded the development of an appropriate IEP, denied educational benefit to the student, and therefore, denied the student a FAPE for the 2004-05 school year." 45 IDELR 73 (N.Y. State Ed. Agency, July 5, 2005). The district had invited a math teacher to the meeting; the teacher attended the meeting for a short period of time, and the district could not demonstrate that the math teacher "participated in the development, review and revision of the student's IEP, including assisting in: 1) determining appropriate positive behavioral interventions and strategies for the student; and 2) determining supplementary aids and services, program modifications and supports for school personnel that would be provided for the student."

Practice Pointer: If an individual cannot attend a Team Meeting, the first inquiry should be whether that person is a required Team participant. If so, then the excusal provisions must be followed; if the parents do not agree or consent to the excusal, then that member must attend the meeting. If the individual seeking to be excused is not a required member of the Team, then they can be excused from attendance without parental consent or agreement.

Practice Pointer: If more than one regular education teacher has been invited to the meeting, it is not necessary to obtain written consent or agreement prior to excusing those teachers from the meeting, provided that "not less than one" regular education teacher remains at the meeting. This would apply to special education teachers and providers as well. If the district has designated one regular education teacher as the individual who will participate on a specific IEP Team and that teacher is properly excused from the meeting, then it is not necessary for the public agency to invite another regular education teacher to the meeting.

OSERS has opined that Section 300.321(e) is "intended to provide additional flexibility to parents in scheduling IEP Team meetings and to avoid delays in holding an IEP Team meeting when an IEP Team member cannot attend due to a scheduling conflict." See 71 Federal Register, No. 156, 46673 (Aug. 14, 2006). Accordingly, the public agency was given "wide latitude" when determining the content of the written agreement. Id. However, when written consent is required, as it is when a Team member's area of the curriculum is being modified or discussed, the parent must be fully informed in his or her native language, or other mode of communication, and must understand that the granting of consent is voluntary and may be revoked at any time. See 34 C.F.R. § 300.9. Thus, the written consent must "provide the parent with appropriate and sufficient information to ensure that the parent fully understands that the parent is consenting to excuse an IEP Team member from attending an IEP Team meeting in which the member's area of the curriculum or related services is being changed or discussed and that if the parent does not consent the IEP Team meeting must be held with that IEP Team member in attendance." 71 Federal Register No. 156, 46674 (Aug. 14, 2006).

The IEP team must meet at least once per year to review the child's IEP and determine whether the annual goals are being achieved. 20 U.S.C. § 1414(d)(4)(A)(i). After the annual IEP meeting, the parent and LEA may agree not to convene a meeting for the purpose of making changes to the child's IEP, but instead, may develop a written document to amend or modify the child's current IEP. 20 U.S.C. § 1414(d)(3)(D). The IDEIA and the regulations are silent with regard to which individuals must participate in making changes to the IEP in writing.

Practice Pointer: The IDEIA and the regulations permit the parent and the LEA to agree to amend the IEP in writing rather than at a meeting. The statute is silent with regard to changing placement. Therefore, Districts should convene a Team meeting if the child's placement is going to be changed.

Practice Pointer: If a parent and the LEA have agreed to amend the IEP in writing, rather than by convening a meeting, the individuals who are required members of the Team should participate in making changes to the IEP.

IV. Discipline

A. Placement in an Alternate Educational Setting

School personnel may consider any "unique circumstances" on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct. 20 U.S.C. § 1415(k)(1)(A); 34 C.F.R. 300.530(a). The student may be removed to "an appropriate interim alternative educational setting, another setting, or [be] suspen[ded], for not more than 10 school days (to the extent such alternatives are applied to children without disabilities)." 20 U.S.C. § 1415(k)(1)(B). The district may also make "additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change in placement . . .)." 34 C.F.R. § 300.530(a)(1).

"Unique circumstances" were not defined in the regulations, but OSERS has opined that they include the child's disciplinary history, the child's ability to understand consequences, whether the child has expressed remorse, and the supports that were provided to the child prior to the violation. 71 Federal Register, No. 156, 46714 (Aug. 14, 2006).

A "change in placement" occurs if:

1. The removal is for more than 10 consecutive school days; or,

2. The child has been subjected to a series of removals that constitute a pattern

    a. Because the series of removals total more than 10 school days in a school year;

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

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

34 C.F.R § 300.536(a). The LEA determines on a case-by-case basis whether a pattern of removals constitutes a change in placement. Id. at § 300.536(b).

OSERS has opined that this provision provides "public agencies the flexibility to implement discipline policies as they deem necessary to create safe classrooms and schools for teachers and children as long as those policies are fair and equitable for all children and protect the rights of children with disabilities." 71 Federal Register, No. 156, 46728 (Aug. 14, 2006).

The Office of Civil Rights has identified the following factors to be used when determining whether a series of suspensions has resulted in a significant change in placement:

- the length of each suspension;
- the proximity of the suspensions to one another; and
- the total amount of time the child is excluded from school.

See e.g. Ponca City (OK) Sch. Dist., 20 IDELR 816 (July 1993).

However, as the following opinions demonstrate, the change in placement determination is not based on a specific number of cumulative days.

In Ralph C. Mahar Regional School District (MA), the parents filed a complaint with OCR, asserting that the District had discriminated against their son in violation of Section 504. 45 IDELR 103 (OCR 2004). The student had received one-day suspensions on November 2, November 19, and November 30, 2004, and was sent home for disciplinary reasons on October 26. On December 6, he received a ten-day suspension, which he began serving on December 7. At a manifestation meeting on December 14, the team concluded that the behavior was a manifestation of the student's disability. On November 15, the District convened a team meeting to propose a 45-day diagnostic evaluation and placement in a therapeutic setting. By December 1, the parents had not formally responded to the District's proposal, and the District filed a request for an emergency hearing regarding placement and evaluation. On December 2, the parent responded to the District's proposal, agreeing with the placement but disagreeing with the length of the placement. During a December 16 pre-hearing conference, the parents and the district agreed to an eight-week diagnostic placement. The student began attending the school on December 21.

OCR determined that the fourteen days that the Student was suspended amounted to a significant change in placement, which triggered the District's obligation to hold a manifestation meeting. OCR found that the District complied with its obligation to convene a manifestation meeting by holding a meeting on December 14, the 6th day of the 10-day suspension, and the 10th day the Student was excluded from school during the school year. OCR also found that the student's new placement began within 10 days after the last suspension began, and within the 10-day 'cooling down period'

described in Honig v. Doe, 485 U.S. 305 (1988); therefore, OCR concluded that the District did not discriminate against the student by excluding him from school during the period of December 15 through December 17. However, the District was required to inform parents, orally and in writing, of their child's right to return to school after there has been a determination that the misconduct was a manifestation of the child's disability. The District was also required to amend the student's educational records to reflect that he was not suspended as of December 14.

Similarly, in Santa Barbara (CA) School District, parents filed a complaint which alleged that the District discriminated against their child by denying him a FAPE. 43 IDELR 172 (2004). The parents alleged that the District made significant changes in the Student's placement without evaluating the Student and without conducting a manifestation meeting. Between October 2003 and January 2004, the student was transferred to three different schools and suspended six times (for a total of 23 days). OCR found that this constituted a significant change in placement, which triggered the District's obligation to evaluate the Student to determine if the misconduct was a manifestation of the Student's disability and to review the Student's placement.

In contrast, in Ponca City (OK) School District, three students with disabilities were given a series of suspensions which were shorter than ten (10) days individually, but in their aggregate, totaled more than ten days. Parents complained, asserting that the suspensions constituted a significant change in placement and the District failed to conduct an evaluation. The first student was suspended three times during the school year, for a total of 12 days. The second student received two suspensions in a three-month period, for a total of 11 days. The third student received four suspensions during the school year, for a total of 23 days suspended. OCR found that given the length of the suspensions, and their proximity to one another, the suspensions did not constitute a pattern of exclusions that amounted to a change in placement. Therefore, the District complied with Section 504.

If the school personnel seek to order a change in placement that would exceed 10 days, they must convene a manifestation meeting. 20 U.S.C. § 1415(k)(1)(C). If it is determined that the behavior that gave rise to the violation of the code of conduct is not a manifestation of the student's disability then "the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except that school officials must continue to provide educational services "so as to enable the child to continue to participate in the general education curriculum . . . and to progress toward meeting the goals set out in the child's IEP." Id. at § 1414(k)(1)(D)(i)-(ii). The educational services may be provided in an interim alternative educational setting. Id. at § 1414(k)(1)(C). The interim educational setting shall be determined by the IEP team. Id. at § 1415(k)(2). In addition, the child must also receive a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavioral violation so that it does not recur. 34 C.F.R. § 300.530(d)(1)(ii).

The LEA does not need to provide services to students who are removed from their current placements for 10 school days or less, unless the LEA provides services to children without disabilities who are similarly removed. 34 C.F.R. § 300.530(d)(3).

B. The Manifestation Determination

If the district intends to remove a child from school for more than 10 school days because of a violation of the code of conduct, it must convene a manifestation meeting. 20 U.S.C. § 1415(k)(E)(i). The meeting must be convened within ten (10) school days of the decision to change the child's placement. Id. The child's parent and relevant members of the IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the IEP, teacher observations, and any relevant information provided by the parents to determine whether the conduct in question:

1. was caused by, or had a direct and substantial relationship to, the child's disability; or

2. was the direct result of the LEA's failure to implement the IEP.

If either of the above circumstances applies, then the conduct shall be determined to be a manifestation of the child's disability. 20 U.S.C. § 1415(k)(1)(E)(i)-(ii).

If the behavior is a manifestation of the child's disability, the IEP team must conduct a functional behavioral assessment, and implement a behavioral intervention plan for the child. 20 U.S.C. § 1415(k)(1)(F). If a behavioral intervention plan had already been developed, then the team must review the plan and modify it, as necessary, to address the behavior. Id. In either case, unless special circumstances apply, the child must be returned to the placement from which she was removed, unless the parent and LEA agree to a change in placement as part of the modification of the behavior plan. Id.

Several recent decisions have discussed the manifestation determination standard. In MAST Community Charter School, the Pennsylvania State Education Agency rejected the parents challenge to the manifestation determination. 47 IDELR 23 (Pa. state Ed. Agency Dec. 26, 2006. The student had been identified as eligible for special education and related services while in was in fourth grade and had made significant academic and behavioral progress during the period of fourth through ninth grade. During that time, the student had been taking medication to assist in controlling his impulsive behavior. At the end of his ninth grade year, the student's parents took him off of the medication.

In October 2006 (tenth grade), the student was suspended for ten days after he took a three-inch folded hunting knife to school. The student informed school officials

that he carried the knife to protect himself when he walked in his neighborhood. The district convened a manifestation meeting, which was initially postponed at the request of his parents, who had obtained an emergency evaluation. At the student's manifestation meeting, the team reviewed his records, IEP, and the evaluation, and determined that the weapons violation was not a manifestation of the student's disability. Therefore, the team recommended placement in a 45-day interim alternative setting.

The parents disagreed with this decision and requested a due process hearing. The SEA agreed with the team, noting that since there was no dispute that the district had been implementing the IEP, the behavior would be a manifestation only if the disability caused, or had a substantial relationship to, the conduct in question. The SEA held that the student's deliberate decision to bring the knife to school on a regular basis, was not caused by, or substantially related to, his disability which was largely due to impulsive behaviors. Accordingly, the student could be disciplined in the same manner as children without disabilities.

Similarly, in Baltimore County Public Schools, the student, a sixteen year old with psychiatric and behavioral disorders, was suspended for using illegal drugs prior to going to school. 46 IDELR 179 (Md. State Ed. Agency May 25, 2006). On the day he was suspended, the student had taken psychiatric medication, which he had not taken for three-weeks. After taking the medication, the student became drowsy and lethargic. The student's instructional assistant noticed that the student had his head on his desk, and after asking the student to come to his desk, told him "You are high as a kite." The student replied "No shit, you're just noticing?"

The instructional assistant brought the student to the nurse, who believed that the student's drowsiness and slower reactions were caused by his psychiatric medication. The student was sent back to class; when the behavior continued, his teacher sent him back to the nurse's office and the assistant principal ordered the nurse to conduct an impairment assessment. Following the assessment, the nurse determined that he was impaired; the student subsequently told the nurse that he had smoked a joint before school. He was suspended and sent home; the district later recommended that he be expelled because of his use of illegal drugs.

The District convened a manifestation meeting and determined that the student's behavior was not a manifestation of his disability. His parents appealed that decision, arguing that the student's therapist had opined that his conduct was substantially related to, or caused by, his disability. The SEA rejected that argument, noting that the opinion that the "student has a major psychiatric disability which has had a significant impact on his psychological, social and academic development" was not the equivalent of an opinion that the student's "specific behavior was caused by, or had a direct and substantial relationship to student's disability."

In contrast, in Philadelphia City School District, the SEA held that the district erred when it determined that the student's behavior was a not manifestation of his disability. 47 IDELR 56 (Pa State Ed Agency Jan. 10, 2007). During the 2005-06 school year the student, who had been identified as eligible for services since 1998, engaged in serious threatening behavior. This behavior resulted in the student's placement being changed to a private school for students with emotional disabilities. During the first part of the 2006-07 school year, the student broke into the private school on several occasions, to use the school computers to download pornography. Eventually, the student stole the school's computer server and related equipment. He was caught after he offered to sell the stolen items to other students. He was suspended for three days, and the school officials recommended transferring the student to a remedial disciplinary setting.

A manifestation meeting was convened, it was determined that the student's behavior was not a manifestation of his disability, and the parents were given notice that the district was recommending placement in a remedial disciplinary setting. The parents disagreed with this decision and requested due process.

The SEA reversed the hearing officer's decision, holding that the student's conduct had a direct and substantial relationship to his disability. The SEA believed that it was "more likely than not" that the student's ED, which was marked by inappropriate behaviors, attention-seeking and ODD, caused or was substantially related to his repeated break-ins, which culminated in theft of items. Because the behavior was a manifestation of the student's disability, the district could not change his placement without parental consent.

C. Special Circumstances

Students may be removed to interim alternative educational settings for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability if the child:

1. Carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

2. Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of the State or local educational agency; or

3. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the State or local educational agency.

20 U.S.C. § 1415(k)(1)(G). The interim educational setting shall be determined by the IEP team. Id. at § 1415(k)(2).

Weapon is defined as "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length." 20 U.S.C. § 1415(k)(7)(A).

Controlled substances that are "legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used" are expressly excluded from the definition of "illegal drug." 20 U.S.C. § 1415(k)(7)(B).

Serious bodily injury means "bodily injury which involves

- A substantial risk of death;
- extreme physical pain;
- protracted and obvious disfigurement; or
- protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

20 U.S.C. § 1415(k)(7)(D).

It is important to note that nothing in the IDEIA "shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability." 20 U.S.C. § 1415(k)(6)(A).

D. Notice Requirement

"Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards . . ." 20 U.S.C. § 1415(k)(1)(H).

E. Appeals

Parents who disagree with the placement decision or the manifestation determination may request a due process hearing. If the LEA believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others it may request a hearing. 20 U.S.C. § 1415(k)(3)(A). The hearing officer may order that the child be returned to the placement from which he was removed or, if the hearing officer determines that maintaining the current placement is substantially likely to result in injury, she may order that the child's placement be changed to an appropriate interim alternative educational setting for not more than 45 school days. Id. at § 1415(k)(3)(B)(ii).

F. Protection for Children Not Yet Eligible for Special Education and Related Services

A child who has violated the code of student conduct and who has not yet been determined to be eligible for special education and related services may assert the protections provided by the IDEIA if the LEA had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. 20 U.S.C. § 1415(k)(5)(A).

The LEA will be deemed to have knowledge when:

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

2. the parent of the child has requested an evaluation of the child; or

3. the teacher of the child, or other personnel of the LEA, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of the agency or to other supervisory personnel of the agency.

20 U.S.C. § 1415(k)(5)(B)(i)-(iii).

The LEA will not be deemed to have knowledge that the child is a child with a disability if the parent has not allowed the child to be evaluated or has refused services, or if the child was evaluated and it was determined that the child was not a child with a disability. 20 U.S.C. § 1415(k)(5)(C). If the LEA does not have knowledge then the child may be disciplined in the same manner as all other children without disabilities who engage in comparable behavior. Id. at § 1415(k)(5)(D)(i). However, if the parent requests an evaluation during the period in which the child is subject to disciplinary measures, the district must conduct an expedited evaluation. If the child is determined to be a child with a disability, then the district must provide special education and related services. Id. at § 1415(k)(5)(D)(ii). Pending the evaluation results, the child shall remain in the educational placement determined by the school authorities. Id.