Manifestation Determinations Under IDEA 2004: An Updated Legal Analysis

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- **Despite notable revisions in IDEA 2004 for manifestation determinations, the number and the outcomes of the adjudicated cases has remained approximately the same as under IDEA 1997—averaging five decisions per year, mostly at the hearing officer level rather than court level, with about 60% in favor of districts.**
- **In particular, the rulings were in the districts' favor for the substantive issue, which in most cases concerned the causal relationship of the child's disability. This outcome trend appeared to be attributable to traditional deference to school authorities rather than nuanced application of the IDEA's revised criteria. The second causal criterion, which narrowly concerns lack of IEP implementation, was infrequent and almost entirely unsuccessful.**
- **In contrast, the rulings were, on balance, not in favor of the districts in response to the parents' procedural claims, such as those addressing the membership of the team and the sources of information. This outcome trend suggests the need for more careful compliance with the IDEA's specified procedures for manifestation determinations.**

The purpose of this article is to present an updated comprehensive synthesis of the law, starting with the statutory provisions and culminating in the case law specific to the procedural and substantive requirements for manifestation determinations (MDs) under IDEA, as amended in 2004. Procedural requirements include issues such as who must make the determination and when it must be made, whereas the substantive requirements are the criteria for the MD. The following case scenario, based on a federal court decision (*Fitzgerald v. Fairfax County School Board*, 2006), illustrates the central significance of the MD—deciding whether the conduct in question is a manifestation of the student's disability—for disciplinary changes in placement under IDEA 2004.

In grade 8, the school district conducted an evaluation, concluding that Kevin qualified under the classification of emotional disturbance (ED). His subsumed private diagnoses included ADHD, Tourette syndrome, obsessive–compulsive disorder, and generalized anxiety disorder. He successfully moved to grade 11 at his suburban Virginia high school, with IEPs providing for mainstreaming and identifying his behavioral problem of being a follower to peers who instigated him to engage in inappropriate behaviors. On a Saturday midway through the school year, Kevin led four of his friends on an ill-advised episode; he served as the organizer, driver, and problem solver in firing on the high school and nearby school vehicles with paintball guns. Upon discovering Kevin's participation in the incident and hearing his side of the story, school officials decided to suspend him pending expulsion. They promptly scheduled a manifestation determination meeting for the following week, with written notification to his parents that included the purpose of the meeting, the categories of school personnel who would attend, a statement that "additional individuals may attend at the request of the parent or [the district]," and an accompanying procedural safeguards notice. The attendees at the meeting were the school's special education department chair, Kevin's special education teacher, his history teacher, one of the district's school psychologists, the assistant principal who investigated the incident, and Kevin's parents. After the school psychologist summarized the evaluation reports and the IEP provisions, the team reviewed teacher observations, his disciplinary record, and the paintball episode. At the conclusion of the meeting, which lasted about 30–45 minutes, the team concluded, with the parents dissenting, that the incident was not a manifestation of Kevin's disability under the

revised criteria of IDEA 2004. The district moved forward with the expulsion proceedings, and Kevin's parents filed for an expedited due process hearing to challenge the manifestation determination on not only substantive grounds (i.e., what the decision was), but also procedural grounds (i.e., how the decision was made). Their procedural claims focused on (a) the failure to have the team members mutually determined by the parents and the district, (b) the participation of four team members who had never served on Kevin's previous IEP teams, (c) the failure to provide parents with an equal vote in the ultimate determination, (d) the failure of the team members to read Kevin's entire file before the meeting, and (e) the predetermination of the manifestation determination via a meeting of key team members before the meeting, thus significantly impeding the parents' opportunity for meaningful participation. Their substantive claims were that Kevin's disability was marked by both pronounced tendencies to be impulsive and to be induced into inappropriate conduct, thus allegedly qualifying for causal criterion under IDEA 2004.

IDEA 2004 revised the requirements for disciplinary changes in placement of students with disabilities. As the 2006 IDEA regulations clarified, disciplinary changes in placement refer to removals of more than 10 consecutive days or the cumulative equivalent in terms of a "pattern" based on various specified criteria (IDEA regulations, 2013, § 300.536). As Zirkel (2007) observed, the complicated revisions under the 2004 amendments represented a compromise between the competing philosophies of zero tolerance and zero reject. The linchpin of this complicated mechanism, serving as the central component in a diagram of the interlocking provisions (Zirkel, 2008), is the MD. Triggered by a disciplinary change in placement, the MD serves as the pivot point for the regular disciplinary process with a continuing obligation for free appropriate public education (FAPE), a functional behavioral assessment (FBA), and behavior intervention plan (BIP), and—in specified special circumstances—a 45-day interim alternate educational setting. Moreover, challenges to the MD and related components are subject to an expedited due process hearing.

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The backdrop for the synthesis of the case law specific to MD under IDEA consists of two prior stages under the IDEA. The first stage was the development of the MD concept in the case law prior to its first codification in the 1997 amendments to the IDEA. The second stage is comprised of the MD provisions in IDEA 1997 and the case law applying these provisions until their revision in IDEA 2004.

Two-Stage Backdrop

Pre-IDEA 1997

The case law that developed the MD concept in the IDEA context started in the late 1970s based on the convergence of the provisions for FAPE, least restrictive environment, and stay-put, and the overlapping protections of Section 504 (Dagley, McGuire, & Evans, 1994). The lead cases in crystallizing this requirement were the Fifth Circuit Court of Appeals' decision in *S-1 v. Turlington* (1981), which required a team determination of a "causal connection" between the disability and the misconduct (p. 348), and the Ninth Circuit's decision in *Doe v. Maher* (1986), which warned against attenuated and domino-like relationships by referring to "conduct that is caused by, or has a direct and substantial relationship to, the child's [disability]" (p. 1480 n.8). In between these two decisions, the Fourth Circuit provide a more relaxed "caused in some way" approach that upheld a hearing officer's control/consequences logic in connecting the student's specific learning disability (SLD) with his distribution of drugs at school: SLD → loss of self image → need for peer approval → ready "stooge" induced by other students into drug trafficking (*School Board of County of Prince William v. Malone*, 1985, pp. 1216–1217).

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The published research canvassing the case law for this pre-1997 period was notably limited. The leading example was Zirkel's (2010a) brief tabular

analysis of the MD cases published in the only national legal reporter series that includes hearing and review officer decisions, LRP Publications' *Individuals with Disabilities Education Law Report* (IDELR). He found 16 IDELR-published decisions between 1980 and 1997 that addressed the substantive standard for MD, with the majority (63%) in favor of the defendant district's determination of a lack of the requisite conduct-disability connection. The most frequently identified disability was SLD, and the most common categories of conduct were drugs/alcohol or some form of violence.

IDEA 1997 Until IDEA 2004

The 1997 Amendments of the IDEA codified, for the first time, the procedural and substantive requirements for the MD. More specifically, IDEA 1997 procedurally required the full IEP team to review evaluation and diagnostic results, observations of the child, the IEP and placement, parent input, and other relevant information within 10 days of the decision for a disciplinary change in placement. The specified substantive criteria for the MD were whether, in relationship to the conduct in question, (a) the IEP and placement were appropriate and implemented, (b) the disability impaired the child's ability to understand the consequences of the conduct, and (c) the disability impaired the child's ability to control this behavior (e.g., Katsiyannis & Maag, 2001).

Specific to the IDEA 1997 MD provisions, the courts issued only two officially published decisions: *Farrin v. Maine School Administrative District No. 59* (2001) and *AW v. Fairfax County School Board* (2004). In *Farrin*, a federal district court in Maine ruled that the district's procedural violations in the timing/notice and information sources of the MD were respectively "harmless" in this case in terms of the child's FAPE and the parents' participation and the substantive determination (pp. 50–51). Moreover, the *Farrin* court concluded that the child's IEP was appropriate and that the evidence was antithetical to the parents' impulsivity theory in terms of the consequences and control factors for conduct in question—peddling drugs at school. In *AW*, the Fourth Circuit Court of Appeals upheld the district's substantive determination of no manifestation, concluding that the IEP of the child with ED was appropriate in relationship to his ADHD and that, due to the circumstances showing forethought, "his ADHD did not figure into the behavior for which he was to be disciplined"—getting a classmate to place a death threat in the computer file of a student that he disliked (p. 685).

Conversely, another pertinent court decision during this period was of limited precedential weight because it was not selected for official publication. Yet it played an explicit role in *AW*. More specifically, in *Richland School District v. Thomas P.* (1999), a federal district court in Wisconsin upheld a hearing officer's decision to consider the diagnoses of ADHD and dysthymia that arose after the negative MD of a child who had an IEP for SLD and, based on these diagnoses, to reverse the IEP team's decision. The court primarily based its ruling on the IDEA provision that provides the disciplinary protections to so-called "deemed to know" students (i.e., those for whom the district has reason to know may be IDEA-eligible).

The published research was more extensive for this period. However, most of the analyses had limitations in case coverage or selection. More specifically, Katsiyannis and Maag (2001) identified and summarized only four hearing officer decisions under the 1997 amendments, attributable at least in part to the limited period prior to the publication date for their article and to their focus on a proposed alternate model for MD criteria. Similarly, including case law only incidentally, Osborne and Russo's (2005) brief overview was limited to identification of four court decisions—*Farrin*, *AW*, a decision based instead on Section 504, and another subsequently vacated for failure to exhaust the hearing/review officer mechanism in New York under the IDEA.

In partial contrast, Zilz (2006) identified 99 "cases" between 1994 and 2003 (p. 200). However, his selection and analysis were not sufficiently clear. His selection—contrary to the article title being specific to court rulings and the referenced framework being IDEA 1997—largely consisted of hearing officer decisions and indiscriminately extended to 38 Office for Civil Rights (OCR) letters of findings, which are (a) decided under Section 504 rather than under the IDEA, (b) investigative rather than adjudicative, (c) increasingly amounting to voluntary resolution, and (d) often limited to procedural grounds. The analysis failed to distinguish those cases arising before and after the 1997 amendments and, similarly, to provide a systematic differentiation within and between the procedural and substantive rulings.

A more recent tabulation of the MD was relatively clear about and comprehensive within its selection

criteria (Zirkel, 2010a). However, this analysis was specifically limited to adjudications that applied the substantive criteria for MDs under IDEA 1997, not extending to adjudications based on the amendments' procedural requirements. Within this scope, Zirkel (2010a) found 37 IDELR-published decisions for the period between IDEA 1997 and IDEA 2004, with a pronounced majority (78%) in favor of districts' "No" MD determinations. The most frequently identified disability was ADHD, often under the IDEA classification of other health impairment (OHI), and the most common conduct was actual or threatened violence.

IDEA 2004 Framework

Statutory Requirements for the MD Procedures

The IDEA amendments of 2004, which went into effect on July 1, 2005, specified the following procedural requirements (e.g., who, when, and how) for the MD:

- Team: The school district representative, the parent, and other relevant IEP team members "as determined by the parent and the [district]" (IDEA, 2013, §1415(k)(1)(E)(i)).
- Information sources: All relevant information in the student's file, including the IEP, any teacher observations, and "any relevant information provided by the parents" (IDEA, 2013, § 1415(k)(1)(E)(i)).
- Timing: Within 10 days of the decision for the disciplinary change in placement (IDEA, 2013, § 1415(k)(1)(E)(i)).
- Other: Notice to the parents no later than the date of the disciplinary placement of "all procedural safeguards" (IDEA, 2013, § 1415(k)(1)(H)), triggering the prior written notice (IDEA, 2013, §§ 1415(b)(3) and 1415(c)) and procedural safeguards notice (IDEA, 2013, § 1415(d)) requirements.

The changes in comparison to the previous version of the IDEA, per the amendments in 1997, were a reduction in the team requirements and, to a lesser extent, the information sources.

Statutory Requirements for the MD Substantive Criteria

The substantive criteria for MDs in the 1997 amendments focused rather broadly on (a) the appropriateness of the IEP, (b) the disability's impairment of the student's behavioral control, and (c) its impairment of the student's understanding of the consequences. In contrast, the 2004 amendments narrowed the focus to the following two more stringent alternatives (referred to hereafter as criterion #1 and criterion #2):

1. Whether the conduct "was caused by, or had a direct and substantial relationship to," the student's disability.
2. Whether the conduct was the direct result of the school district's failure to implement the IEP (IDEA, 2013, § 1415(k)(1)(E)(i)).

Related Sources for the IDEA 2004 Framework

The legislative history of the new substantive standards expressed the intent of requiring that the MD be conducted "carefully and thoroughly with consideration of any rare or extraordinary circumstances" (H.R. Conf. Report, 2004, pp. 224–225). The same source called for an analysis of the child's behavior "across settings and across time" to determine whether "the conduct in question [is] the direct result … not an attenuated association, such as low esteem, to the child's disability."

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The 2006 IDEA regulations repeated the substantive and procedural requirements for MDs without elaboration except for clarifying that the required parental notification includes the procedural safeguards notice (§ 300.530(h)) and adding an immediate rectification requirement for violations of criterion #2 (§ 300.530(e)(3)). In the following commentary accompanying the proposed regulations, the Department of Education (2005) seemed to suggest an anticipated shift in the frequency and outcomes of MDs:

> It is reasonable to expect an overall increase in the number of [MD] reviews as school personnel take advantage of the streamlined process … 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 (p. 35,823).

In the commentary accompanying the final regulations, the Department of Education (2006) interpreted the substantive standards as "broad and flexible … includ[ing] such factors as the inter-related and individual challenges associated with many disabilities" (p. 46,720).

In a subsequent policy letter, the Department's Office of Special Education Programs (OSEP) clarified that bus suspensions, when the child's IEP provides for transportation, generally count in the calculation of consecutive or cumulative days for the disciplinary change in placement that triggers a MD (Letter to Sarzynski, 2012). In this letter, OSEP appeared to adhere to this interpretation even if the parent voluntarily transported the child in the wake of such a bus suspension, although its use of "generally" for this conclusion may imply an exception.

The published research for this period has been limited, largely due to the date of publication. The first analysis did not provide then current legal guidance. More specifically, Amberger and Shoop (2006) identified eight IDELR-published hearing and review officer decisions from 2005, but all of them arose under IDEA 1997, and MD was at issue only indirectly in the majority of them. More on target but limited to the same substantive scope as his earlier analysis (Zirkel, 2010a), Zirkel (2010b) found 14 decisions for the initial four-year period of IDEA 2004, with approximately 65% being in favor of the school district. Thus, the initial results did not show the expected change in frequency or outcomes to the extent of IDELR-published cases. Moreover, the leading disability classification was SLD, and the leading DSM-type diagnosis was ADHD. The present analysis serves to update and expand this initial examination of the MD case law post-IDEA 2004, extending it beyond the substantive to the procedural rulings and beyond the IDELR to the electronically published cases in LRP Publication's companion source, *Special Ed Connection*®.

Method of Selection and Analysis

Case Selection

The primary source of the decisions was LRP Publications electronic database, *Special Ed Connection*®, based on (a) a Boolean search with the search term "manifestation determination," and (b) a review of the cases in the topical index under its relevant item, "150.025 Discipline: Relationship between Misconduct and Disability." The supplementary steps were to (a) review the citations within the search results, (b) conduct a search based on the names of the leading judicial cases, and (c) perform a Boolean search of court decisions in the Westlaw database. Inasmuch as there were no relevant decisions in 2005 arising after the effective date of July 1, the period of the decision dates was from early 2006 to the end of 2014.

Extending beyond the previous analyses (Zirkel, 2010a, 2010b), the scope of the selection consists of rulings specific to not only the substantive but also the procedural requirements of MDs under IDEA 2004 and extended to decisions that were only available electronically (i.e., those with "LRP" rather than "IDELR" citations, in *Special Ed Connection*®). Conversely, the resulting exclusions were (a) IDEA cases limited to the threshold issue of whether the disciplinary change in placement had occurred (e.g., *Avila v. Spokane School District No. 81*, 2014; *J.F. v. New Haven Unified School District*, 2014; *M.N. v. Rolla Public School District*, 2012); (b) IDEA cases decided solely on adjudicative grounds, such as whether the parents had exhausted the impartial hearing process (e.g., *TC v. Valley Central School District*, 2011) or whether the statute of limitations precluded consideration of the MD issue (e.g., *G.R. v. Dallas School District No. 2*, 2011); (c) cases specific to the issue of whether the child in general education qualified for the "deemed to know" protection of the IDEA (e.g., *Anaheim School District v. J.E.*, 2013; *Jackson v. Northwest Local School District*, 2010); (d) cases under the IDEA's complaint resolution process (e.g., *Warrenton-Hammond School District No. 30*, 2013; *Cherry Creek School District No. 5*, 2011); and (e) cases specific to Section 504 (e.g., *Centennial School District v. Phil L.*, 2008; *N.T. v. Board of School Commissioners,* 2011). Finally, the scope did not extend to related but separable issues, such as rulings specific to FBAs/BIPs or interim alternate educational settings.

Data Analysis

The first step was to separate the procedural from the substantive rulings in the decisions that met the selection criteria. The procedural rulings were those specific to the aforementioned requirements for the team, the information, the timing, and miscellaneous others (e.g., notice). The substantive ruling was the determination of the requisite causal relationship. The next step was to tabulate the procedural rulings on a spreadsheet that listed (a) the citation, with due differentiation of hearing/review officer from court decisions; (b) the procedures at issue, according to the four aforementioned categories; and (c) the procedural ruling outcome (i.e., whether the net result of the procedural categories at issue was in favor of the parent or the school district). The parallel step for the substantive rulings was a spreadsheet tabulation that included (a) the student's IDEA disability and any DSM-type diagnoses, (b) the category of conduct (e.g., violence or drugs), (c) the substantive standard at issue (i.e., criterion #1 and/or criterion #2), and (d) the substantive ruling outcome (i.e., whether it was in favor of the school district or the parent).[1]

Major Findings

For the post-IDEA 2004 period ending on December 31, 2014, this study identified 86 MD decisions, including 20 (23%) that had both procedural and substantive rulings and only five (6%) decisions that were at the court level, as contrasted with the hearing or review officer level. The posture of the case was almost always that (a) the MD decision was "No" (i.e., the conduct was not a manifestation of the disability), and (b) the parent challenged this decision via the IDEA's adjudicatory process, which starts with an impartial hearing. The single exception was a case in which the MD was "Yes" but two months late, thus at the boundary between the selection criteria and the exclusion for the triggering change-in-placement issue (*Broward County School Board*, 2013).

Revealing the overlap among categories, the most frequent adjudicated challenges within information sources was failure to consider additional diagnoses and within team membership was lack of sufficient parental participation, such as an alleged right to consent to additional team members.

One way for conflating rulings to cases as the unit of analysis is to classify each case according to the ruling within it that is most favorable to the plaintiff (e.g., Zirkel & Lyons, 2011). Moving from the rulings to the case as the unit of analysis on this best-for-plaintiff basis, the overall outcomes distribution on a best-for-plaintiff basis was 53 (62%) in favor of the district and 33 (38%) in favor of parent. The following subsections summarize separately the findings for the 38 cases with procedural rulings and the 68 cases with substantive rulings, with the 20 overlapping cases disaggregated into these two groupings.

Procedural Rulings

For the 38 cases with procedural rulings, the average number of the four categories—team, information, timing, and other—that were adjudicated was 1.7 per case. The frequency per category in descending order was as follows:

- Information sources (21)
- Team membership (15)
- Other: Notice and parental participation (8 each)
- Other: Additional diagnoses and timing (4 each)

Revealing the overlap among categories, the most frequent adjudicated challenge within information sources was failure to consider additional diagnoses. Similarly, within team membership, the most frequent challenge was lack of sufficient parental participation, such as an alleged right to consent to additional team members.

The prevailing approach for adjudication of these procedural challenges was to apply a two-part analysis: (a) whether there was a violation successively in terms of the IDEA's procedural requirements and preponderant proof; and, if so, (b) whether the violation was prejudicial in terms of the child's FAPE, the parent's participation, or an incorrect substantive MD determination.

Their outcomes on a case-by-case basis (i.e., across multiple challenges within and among categories) was 17 (45%) in favor of the district and 21 (55%) in favor of the parent. The most frequent, although not at all

[1]Both of the spreadsheet tables, along with case citations and a fuller list of exclusions, are omitted due to space limitations but are available from the author upon request.

uniform, successful challenges concerned (a) failure to consider additional disabilities, which were usually DSM-type diagnoses rather than IDEA classification; and (b) failure, via team membership, IEEs, and/or proper notice, to provide sufficient parental participation. Although parents were successful in slightly more than half of the procedural challenges, the relief that they obtained—in addition to the presumable recovery of attorneys' fees as to the extent of qualifying for prevailing status—was relatively limited. Although the majority of the rulings in favor of the parents resulted in nullification of the MD, the outcome instead in some cases was merely sending the case back for a procedurally revised MD. Moreover, expungement of the MD from the child's record was rare, and none of these cases resulted in an order for compensatory education.

Finally, court decisions accounted for only five (13%) of the 38 cases with procedural rulings, with the most prominent in terms of legal weight being *Fitzgerald v. Fairfax County School Board* (2008), which various subsequent procedural rulings followed or distinguished and which is summarized at the end of this article. The other case that had a notable effect was the aforementioned unpublished court decision in *Richland School District v. Thomas P.* (1999), in terms of the consideration of pending or otherwise subsequent diagnoses.

Substantive Rulings

For the 68 cases with substantive rulings, the most frequent IDEA classifications that were identified as the disability, were as follows: OHI (n=23), SLD (n=23), and ED (n=13). In 12 of these 68 cases, the identified disability was more than one IDEA classification. More pronounced, the identified disability, either alone or as a diagnosis underlying SLD, OHI, or ED, was ADHD in 46 (68%) of the 68 cases with substantive rulings. The most frequent conduct in question was actual or threatened violence, including a notable number of weapons violations. The first substantive criterion for the MD (i.e., causal relationship with the child's disability) was at issue in every one of these cases, whereas the second criterion (i.e., causal relationship with IEP implementation failure) arose in only 18 (26%) of the cases and then only secondary to the first, rather than as the sole, criterion.

The second, implementation-related substantive criterion was successful for the parent in only one case and then incidental to a successful ruling with regard to the first, disability-related criterion. In this case, the hearing officer concluded that the evidence was preponderant that the district had not implemented notable parts of the IEP, and yet, the MD team altogether failed to consider criterion #2 (*Murrieta Valley Unified School District*, 2009).

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Upon adding together the outcomes for criteria #1 and #2, the distribution was of the substantive rulings was 51 (75%) in favor of the district and 17 (25%) in favor of the parent. The analyses were often quite cursory. The citations to previous case law were infrequent and largely limited to pre-IDEA cases, such as the aforementioned *Doe v. Maher* (1986) and *Farrin v. Maine School Administrative Unit No. 59* (2001) decisions; or, less commonly, hearing/review officer decisions or even OCR Section 504 letters of findings. The predominant explicit decision factors that tended to account for the pro-district outcomes trend were as follows:

- Limiting the role of impulsivity, often finding the conduct to be characterized by premeditation or deliberation.
- Assessing expert testimony in terms of familiarity with the child and the specific circumstances, thus usually weighing the MD opinions of district personnel as more persuasive than those of outside specialists.
- Focusing on the specific disability-related characteristics of the individual child, thus tending to undercut the parents' contentions based on the stereotypical behaviors generally associated with the DSM-type label.
- Distinguishing the applicable criteria from the substantive standards under IDEA 1997, thereby

rejecting attenuated relationships as compared with a direct connection.
- Concluding that the parent had the burden of persuasion.

A few other decisional issues that were notable in the explicit rationales for these substantive rulings were more varied in their effect. First, the adjudicators varied widely in their consideration of the phrase in the disability-based criterion #1 that is set off within commas: "or had a direct and substantial relationship to." Many ignored the phrase altogether or appeared to regard it as synonymous with the preceding "caused by" language. One adjudicator specifically reasoned that the commas suggested that the phrase served in apposition, rather than as an alternative to, the causal language (*Philadelphia School District*, 2008). A handful of adjudications omitted the commas in reciting criterion #1 but otherwise without any explicit attention to whether Congress had intended any distinction between its two parts (e.g., *Lewisville Independent School District*, 2011). Finally, a line of hearing officer decisions in Washington state concluded without explanation that the second phrase represents a lower level than the first, causal standard (*Renton School District*, 2011)

The second such issue, which overlaps with the procedural rulings and their aforementioned reliance on *Richland School District v. Thomas P.* (1999) is whether diagnoses issued between the MD team meeting and the due process hearing should be part of the substantive determination. The issue only arose in a minority of the cases, but the answers gravitated toward the polar opposites. A Wisconsin hearing officer answered the question affirmatively on the basis of the *Richland* decision (*Student with a Disability*, 2009). The above-mentioned line of Washington hearing officer cases, starting with *Renton School District* (2011), went a step further, ruling, based on an OCR Section 504 letter of findings, that districts have a duty to reconvene the IEP team to consider new evaluative information that arises during the expulsion period. On the opposite side, a California hearing officer imported the "snapshot" approach that prevails for FAPE cases, concluding that MD teams are accountable only for the information that was reasonably available at the time of their meeting (*High Tech Middle North County*, 2014).

Finally, only two (3%) of these 68 decisions were at the judicial level, as contrasted with the IDEA's hearing or review officer level. Both of them were published decisions of the federal district court in Virginia, and their substantive MD rulings were in favor of the district (*Fitzgerald v. Fairfax County School Board*, 2008; *School Board of City of Norfolk v. Brown*, 2010).

Interpretation of the Findings

The total number of MD rulings for the period under IDEA 2004, when averaged on an annual basis, is only slightly higher than for the period under IDEA 1997 (Zirkel, 2010a) after adjusting for the expansion of the scope to include (a) procedural rulings, which accounted for a net addition of 18 cases that did not also have substantive rulings, and (b) the decisions in *Special Ed Connection*® that were not also in IDELR, which accounted for an additional 24 cases. As a result of this adjustment, the respective rates for the post-1997 and post-2004 periods were 4.5 and 5.0 per year, respectively. Thus, if the aforementioned Department of Education (2005) prediction of more MD reviews is correct at the local level, it is not reflected forcefully in the number of adjudicated MD challenges. This lack of notable upswing may be attributable to the steeper slope for prospective plaintiffs posed by the more stringent substantive standards. However, other intervening factors may be the relatively high ratio of filings to adjudications, largely signaling settlements (Zirkel, 2014), and the unsettled question of the representativeness of the selection of cases published in *Special Ed Connection*® even upon expansion beyond those appearing in IDELR (D'Angelo, Lutz, & Zirkel, 2004).

The overall outcomes distribution of 62% to 38%, when calculated on a best-for-parent approach per previous such analyses, approximates that for MD cases during the previous periods (Zirkel, 2010a, 2010b) and for due process hearings more generally (Zirkel & Skidmore, 2014) with due latitude for differences in sample selection and outcomes calculus. Only four cases (e.g., *School Board of City of Norfolk v. Brown*, 2010) had different outcomes for the procedural and substantive MD claims, showing both the interaction between these two dimensions or avenues. Nevertheless, those cases in which parents raised claims on both the procedural and substantive side presented a moderate outcomes advantage to them in light of the higher success rate on the procedural side.

The higher ratio of favorable outcomes for the procedural, as compared with substantive, claims—

55% v. 25% in favor of parents—was not entirely expected due to the two-step analysis that predominated in these cases and that has yielded less than a 40% success rate for parents in procedural FAPE cases (e.g., Zirkel & Skidmore, 2014). For example, in the case summarized at the opening of this article, the parents faced the successive hurdles for their procedural claim of mutual selection of the team members to show that (a) the IDEA provided them with this right and the district violated it, and (b) the violation was not harmless. The higher than expected success rate for procedural claims of the parents may be attributable to the strategy of relying on more than one procedural challenge per case, the particularly favorable yield of claims based on additional diagnoses, the similarly cross-category commonality with respect to parental participation, the less stringent and narrow focus than the substantive side, and/or the alternate bases for prejudicial effect—not just FAPE but also parental participation or substantive MD. Yet, despite their higher success rate for parents, the procedural claims were only half as frequent as the substantive claims, perhaps suggesting that the plaintiff-parents may have not been aware of this advantageous alternate or additional avenue or, conversely, that they may have been more selective about these claims in light of the prevailing harmless-error approach. Another contributing factor to the lower frequency of the procedural claims may have been the limited relief obtained for the "successful" claims, such as an order merely to redo the MD with procedural rectification. Although such reasons are subject to conjecture, pending more in-depth research, another hypothesis is that districts may have been compliant with the pertinent procedural requirements in the majority of the cases, thus leaving only the substantive determination vulnerable to challenge.

The substantive rulings were similar not only, as discussed above, in terms of frequency, but also in terms of outcome: 78% in favor of districts for the previous period (Zirkel, 2010a) and 75% for this post-IDEA 2004 period. Although daunting for parents, this skew does not square with the Department of Education's (2005) even stronger prediction with regard to significantly lower district difficulty for MDs, except to the extent that parents are only selecting the lower-hanging fruit, or the most questionable of the more frequent substantive determinations of "No."

The low frequency of rulings and almost complete lack of parent-favorable outcomes for the implementation-based criterion #2 were entirely expected in terms of its steep slope. Proving that failure to implement the IEP is not an imposing hurdle, though the level of nonimplementation presumably must be substantial. In any event, finding a causal connection between the requisite lack of implementation and the conduct in question would seem to be almost an insuperable hurdle. Thus, it is not surprising that the regulatory requirement for immediate rectification, which is limited to IDEA 2004's MD criterion #1, rarely comes into play in these adjudications.

The cursory nature of the adjudications did not show a particular sensitivity to the change in substantive standards beyond the district-deferential differentiation between purposeful and impulsive conduct associated with ADHD. Their cursory nature may be due to the mandatory "expedited" nature of the MD hearings under the IDEA in terms of the shorter timeline (§ 1415(k)(4)(B)) and the infrequency of pertinent published court decisions for discussion and application. Nevertheless, the need for more nuanced and careful analysis of criterion #1—with due distinction for OCR letters of findings under Section 504 and for IDEA adjudications under IDEA 1997—would be beneficial in terms of improved predictability and persuasiveness.

On the other hand, the relatively brief substantive analyses are commendable in terms of (a) the deference to the judgments of school personnel to the extent that it is based on familiarity with the specific student and context in addition to expertise, and (b) the corresponding focus on the specific disability characteristics of the individual child rather than those associated with the general DSM-type label. The thorny questions in between these questionable and commendable sides include the scope of the "D" in "MD"—specifically, does "disability" in this context mean the IDEA classification(s) of the child that established eligibility under the IDEA, or does it mean the DSM-type diagnoses that may be subsumed or separate from this eligibility basis? Focusing on the individual profile of the child does not entirely answer this question because a notable part of this profile is beyond the scope of the IDEA's procedural and substantive requirements. Instead, these requirements are based on the strengths and needs associated with

nondisabled students, who are subject to disciplinary changes in placement without these special protections.

The profile of the MD cases in terms of the disability and the conduct was not unexpected in terms of the analyses for the preceding periods (Zirkel, 2010a, 2010b) and the increased recognition of ADHD and safety/security issues in schools and in society more generally. However, the 68% case prevalence of ADHD was higher than its increased incidence, with the likely explanations including its specific characteristic of impulsivity, its more general connection to disciplinary behavior, and the residual carryover from the IDEA 1997 criteria of control and consequences. This proportion also raises the issue of the possible overidentification of ADHD (e.g., Sciutto & Eisenberg, 2007) generally, or at least in these cases; the Centers for Disease Control and Prevention (CDC; 2014) estimated that the incidence of ADHD in school-aged children has moved from 7.8% in 2003 to 11% in 2011, which represents a notable increase but still a wide disparity from the prevalence in the MD case law. More prominent in its effect on the outcome was the increased role of additional diagnoses that often arose secondarily or subsequently to the IDEA classification, which in some cases was ED or SLD rather than OHI.

An overlapping issue, which was not limited to the substantive rulings, merits special attention mention—specifically, the reliance, in a notable number of these adjudications, on the unpublished court decision in *Richland School District v. Thomas P.* (1999). The Department of Education's policy interpretations of the IDEA do not support this reliance. First, they recommend against reconvening the MD team after the 10-day period has expired (Letter to Brune, 2003). Second, to the extent that they permit but not require consideration of one or more unidentified disabilities, their interpretation is open to the question of the extent of the reliance on the 1997 IDEA procedural requirement of "evaluation and diagnostic results" (Letter to Yudien, 2003), which the IDEA 2004 MD provisions did not retain. More importantly, to the notable extent that the *Richland* court relied on the deemed-to-know, or more specifically, "not [yet] to be determined to be eligible" provision of the IDEA, the 2004 amendments resulted in the following two significant and seemingly superseding changes: (a) the addition of the qualifier for the deemed knowledge that its basis arose "before the behavior that precipitated the disciplinary action occurred" and, even more importantly, (b) the elimination of the relevant basis, "the behavior or performance of the child," thereby only leaving the circumscribed alternatives that do not apply to this MD issue (20 U.S.C. § 1415(k)(5)(B)). Moreover, agreeing with the aforementioned minority view among the limited adjudications to date (*High Tech Middle North County*, 2014), the so-called "snapshot" standard that applies in FAPE adjudications to IEP teams (Zirkel, 2011) would also seem to apply, as a matter of reasonableness, to MDs. In any event, reliance or rejection of the *Richland* approach does not resolve the overlapping and previously mentioned question of the specific scope of the "D" in "MD."

Finally, burden of proof, more specifically the issue of who has the burden of persuasion in MD cases at the hearing officer level, merits similar separate attention. The Supreme Court held in *Schaffer v. Weast* (2005) that "the burden of proof in an administrative hearing challenging an IEP is … upon the party seeking relief" (p. 536). Although the *Schaffer* rule was thus limited to FAPE cases, its rationale of applying the usual adjudicative approach in the absence of sufficient evidence of contrary Congressional intent amply supports the consistent approach in these MD cases of putting the burden on the parent as the challenging party. Confirming this conclusion, the Department of Education's (2006) commentary accompanying the final regulations subsequent to IDEA 2004 clarified that the "concept of burden of proof" does not apply at the MD meeting itself, but it is on the moving party upon challenge at a due process hearing (p. 46723). However, the *Schaffer* Court also issued the reminder that "very few cases will be in evidentiary equipoise" (p. 535). Thus, the common reference to the burden being on the parents in these cases is questionable as being superfluous and susceptible to inadvertently influencing the outcome, especially upon not merely identifying but also expressly applying it (e.g., *Rialto Unified School District*, 2014). As an illustration, in *Moses Lake School District* (2012), the hearing officer first established, based on *Schaffer*, that the parent had the burden of proof and then reasoned as follows:

> The evidence of record presented by the Parent and the District in this matter is extremely limited…. Because the Parent has the burden of presenting sufficient evidence to establish the [MD team] erred when it determined the Student's disruptive

> classroom behaviors were not a manifestation of his disabilities, the limited nature of the evidence falls more heavily on the Parent than the District. (p. 148)

A better approach would be to focus, even when the scales are lightly weighted, on the preponderance of the evidence, only resorting to the burden of persuasion when both sides of the scale are in equilibrium.

Practitioner Implications

For special education leaders, the primary lesson at the general level is to separate the law from the lore, thereby obtaining an objectively accurate understanding of the legal requirements for MDs as the baseline for determining the appropriate higher level for local policy and practice, based on professional expertise in best practice and district priorities within limited resources. In contrast, the tendency in the special education literature is to fuse professional norms with legal requirements.

Due differentiation of legal requirements from professional recommendations allows for proper latitude at the local level for professional discretion without false fears of liability and overemphasis on formalism. The frequency and outcomes findings herein pinpoint areas that merit careful choices in terms of risk management and resource allocation.

For the IDEA procedural requirements for MDs, the key is to consider not only the IDEA's specified minimums for the team, information, timing, and other issues such as notice, but also the prevailing two-stage, or harmless-error, test for adjudicative outcomes. Parents have been much more successful for procedural, as compared with substantive, MD challenges. Yet, the resulting relief—other than providing a basis for attorneys' fees—has been largely limited to redoing the MD unless conflated with favorable rulings for other, FAPE-related claims. The particularly vulnerable and yet unpredictable issue for school districts has been how to deal with additional DSM-type diagnoses beyond ADHD, especially when they were subsequent to the MD meeting. It would appear to be worthwhile for district special education leaders to at least review the forms and reinforce the training for MDs in relation to the procedural specifications, with special attention to the requisite information sources and team members. Whether to reconvene the MD team upon any subsequent private diagnoses is more of a case-by-case matter depending on the particular circumstances.

For the IDEA substantive requirements for MDs, the outcome odds are clearly skewed in favor of school districts. The predictable focus is on criterion #1 (i.e., the one focused on the child's disability rather than the one focused on IEP nonimplementation), with lack of consistent interpretations concerning (a) the phrase within commas after the initial causal language and (b) the substantive side of the foregoing additional diagnoses issue. Thus, without being overly strict about legal causality and IDEA classifications, special education leaders should recognize their ample latitude to (a) limit the role of impulsivity as compared with purposeful conduct, (b) rely on the professional opinion of district personnel as long as it is based on familiarity with the specific child and circumstances, (c) focus on the specific disability profile of the child rather than the stereotypical indicia of the disability label, and (d) distinguish the applicable criteria from the substantive standards under IDEA 1997. Finally, when to use the MD meeting as an opportunity to review and revise the IEP to resolve the issue is a matter of parental advocacy (Scavongelli & Spanjaard, 2015) and professional discretion.

Research Recommendations

The overall body of MD case law primarily consists of hearing officer decisions, which do not serve as legal precedents; they are not binding on other hearing officers within or beyond the same state. Yet, in addition to special attention to the few published court decisions, which are likely to have a much more powerful effect, the cumulative pattern of the hearing officer rulings provide reasonably predictive guidance as to the likely adjudicative interpretations in new cases. The overall ratio approximating 60% to 40% in favor of districts provides judicious latitude for districts to proceed with MDs without either undue fear or abuse. It also shows prospective plaintiff-parents of the legal advantages of either bringing multiple claims of MD violations across the procedural and substantive requirement via the impartial hearing process and/or resorting to the alternative of the state complaint resolution process, which tends to be more

stringent in terms of procedural compliance (Zirkel, 2015).

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Yet, these procedural and substantive rulings are only the visible part of the iceberg. The outcomes data do not reveal the prevailing practices and decisions of MD teams or the selective effects of which MD decisions parents challenge via the IDEA adjudicative process and which cases the parties settle. Finally, although the coverage here is far more comprehensive and up-to-date than previous published studies, other sources of selection bias that limit case law analyses include the parties' choices of which cases to appeal from the hearing officer level to the successive judicial levels, and the LRP and Westlaw choices as to which cases to enter in their databases.

In light of these limitations, the recommendations for scholars are also at two overlapping levels. At the more general level, the IDEA literature in the field warrants improvement in the legal quality and collaboration at the author, reviewer, and editing levels of refereed journals. At the specific level, the recommendations for follow-up research include replicating and expanding the analysis to (a) the MD rulings of the state complaint process, (b) the related components of the IDEA process for disciplinary changes in placement, and (c) the corresponding MD requirements and results under Section 504. Advancement of the field of special education and the requisite refinement of its legal framework would also benefit from corresponding qualitative research exploring the psychosocial dynamics of the MD process, including the student–school interactions that led to the disciplinary change in placement and the corresponding interactions that led to adjudication. On a wider level, both quantitative and qualitative research are warranted in terms of the prevailing practices and perceptions for MDs nationally, including the determination of significant demographic factors.

For the sake of a different sort of symmetrical balance, this examination ends by revisiting where it started. The following summary reveals the disposition of the opening case, which is one of the few court decisions concerning MD under IDEA 2004 (*Fitzgerald v. Fairfax County School Board*, 2008). However, as the subsequent published court decision in the same jurisdiction shows, this case is only illustrative but does not apply to all of the varied situations that arise within the scope of this systematic analysis (*School Board of City of Norfolk v. Brown*, 2010).

In Kevin's case the court ruled in the district's favor for each of his parents' five procedural claims. First, for the claim concerning mutual determination of the MD team members, the court concluded that the language "as determined by the parent and the [district]," when viewed in context of the IDEA as a whole, means that each side invites its members without any necessary consent from the other side; thus, the parents did not have the IDEA procedural right that they asserted. Second, for the claim that some of the team members had not served on the previous IEP teams for Kevin, the court similarly concluded that neither the statute nor the case law provides such a procedural requirement; the IDEA mandate for a meeting within 10 days and the accompanying legislative history's emphasis on expedited responses to serious student misconduct run counter to such an interpretation. Third, for the alleged failure to provide parents with an equal vote, the difference between what is optimal and what is required was again fatal to the parents. The court reasoned that parental participation in the MD meeting does not mean parental veto; in the absence of a consensus, the court concluded "the [district] must make a determination, and the parents' only recourse is to appeal that determination [by filing for a due process hearing]" (p. 558). *Fourth, for the information sources, the court ruled that the IDEA does not require all the members to read the student's entire file but rather to review relevant information in the file. Assuming for the sake of argument that a document they did not review, Kevin's IEP for the previous year, was relevant, the court applied the harmless error approach. It did so by observing that evidence was lacking to show that having reviewed it would have resulted in a "Yes" rather than their "No" MD decision. Finally, the court rejected the parents' predetermination claim, concluding that judicial precedents established the requirement that the team members come to the meeting with an open, not a blank, mind and that the evidence was preponderant in this case that the pre-meeting did not constitute prejudgment.*

For the substantive claim, which was based on criterion #1 in IDEA 2004, the court focused on Kevin's individual eligibility profile, as evidenced in his IEP notations and his teachers' observations that he tended to be induced into inappropriate behaviors by his peers. On this basis, the court reasoned, "Even assuming Kevin's disability did cause him to be drawn into inappropriate behaviors at times, the record makes pellucidly clear that far from being drawn into the paintball shooting incident, Kevin played a predominant role in planning and executing it" (p. 562). The court reached its evidentiary conclusion about the balance of the evidence by weighing the school psychologist's opinion as much more persuasive than that of the parent's outside experts.

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