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 Student-Centered Manifestation Determination Reviews

Introduction

According to the Office of Civil Rights Data Collection, during the 2020-2021 school year Students with disabilities were overrepresented in discipline outcomes when compared to their total student enrollment in public schools. While these students represented only 17% of total K-12 student enrollment, they represented 24% of students who received one or more in-school suspensions, 29% of those who received one or more out-of-school suspensions, and 21% of those who received expulsions. *Office of Civil Rights, 2020-2021 Civil Rights Data Collection.*¹ These students, however, have protection under the IDEA and Section 504 when a school district finds that they should be removed from their school setting via a manifestation determination review.

A manifestation determination review (“MDR”) is a right afforded to students with disabilities in order to ensure that their disabilities are taken into consideration before a school removal equating to more than ten school days. An MDR can be a very contentious process for parents and the school staff. By reframing the process to focus on the student at each juncture the team can ensure they are meeting the student’s needs throughout the process.

Legal Framework for Manifestation Determination Reviews

A manifestation determination review is an evaluation of a child’s misconduct to determine whether that conduct is a manifestation of the child’s disability and must be held when a local education agency (“LEA”), such as a school district, proposes disciplinary measures that result in a change in placement for a child with a disability. *See* 34 C.F.R. §300.530(e). Students who are eligible for an IEP are automatically protected under the MDR regulations.

Under Section 504, unlike the IDEA, a student with a qualifying disability that substantially limits a major life activity has protection under Section 504 even if they do not have a 504 Plan. *See Dear Colleague Letter*, 58 IDELR 9 (OCR 2012). Students who merely have a record of an impairment are protected by Section 504’s general non-discrimination provisions. Therefore, while MDRs are not part of the regulatory framework of Section 504, OCR has interpreted Section 504 as requiring an MDR in connection with disciplinary actions that constitute a significant change in placement. *See Dunkin (MO) R-V Sch. Dist.*, 52 IDELR 138 (OCR 2009). Under Section

¹ According to the report, Students with disabilities eligible under IDEA represented 14% of total K-12 student enrollment but accounted for 18% of students who received one or more in-school suspensions, 24% of students who received one or more out-of-school suspensions, and 17% of students who received expulsions. While students served under Section 504 represented 3% of total K-12 student enrollment but represented 6% of students who received one or more in-school suspensions, 5% of students who received one or more out-of-school suspensions, and 4% of students who received expulsions. *Office of Civil Rights, 2020-2021 Civil Rights Data Collection.*

504 a school district must “conduct an evaluation . . . of any person who . . . needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person . . . and any subsequent significant change in placement.” 34 CFR §104.35(a).

Students who are not yet eligible for an IEP may also be entitled to an MDR if the LEA knew or should have known the child was a student with a disability before the behavioral incident occurred regardless of a diagnosis or eligibility determination. A public agency must be deemed to have knowledge that a child is a child with a disability if *before* the behavior that precipitated the disciplinary action occurred: (1) The parent of the child 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 requested an evaluation of the child; or (3) The teacher of the child, or other personnel of the school district, 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. *See* 34 CFR §300.534(b).

On the other hand, a district is deemed *not* to have knowledge that a child is a child with a disability if: 1) the parent has not permitted the child to be evaluated or has refused services; or 2) the child has been evaluated and determined to not be a child with a disability. 34 CFR 300.534(c). *See also A.V. v. Panama-Buena Vista Union Sch. Dist.*, 71 IDELR 107 (E.D. Cal. 2018). An LEA should ensure that they are documenting requests to parents to evaluate a student and parents’ refusal to consent to evaluation if that is the case. A conversation between a teacher and a parent encouraging them to request assessments, however, would likely not be considered a refusal by parents to evaluate and rather when taken into consideration with other factors could be used to find the LEA had knowledge of the disability and ignored it.

The MDR analysis must be performed within 10 school days of “any decision to change the placement of a child with a disability because of a violation of a code of student conduct.” 34 CFR §300.530(e). A change in placement occurs when: (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. *See* 34 CFR §300.536. A “pattern” occurs when (1) the series of removals totals more than 10 school days in a school year; (2) because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; or (3) 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. *See* 34 CFR §300.536. A “change in placement” includes suspensions totaling 10 school days, expulsion, or removal to an Interim Alternative Educational Setting (IAES).

Under the IDEA, a student’s conduct must be found to be a manifestation of the child's disability if:

1. The conduct in question was caused by or had a direct and substantial relationship to the child's disability; or
2. The conduct in question was the direct result of the district's failure to implement the IEP.

See 34 CFR §300.530(e)(1).

Under Section 504 if the MDR team determines that the student's misconduct was a manifestation of his disability, the team must assess whether the student's current educational placement is appropriate, and if necessary, change the student's placement to a setting that meets his or her educational and behavioral needs. *See Knox County (TN) Sch. Dist.*, 26 IDELR 762 (OCR 1997)

Counting Days

There is often conflict surrounding when an MDR is actually triggered. The law is clear that an MDR is triggered when a student is being referred for a school removal of more than ten days or when they are removed for ten days over the course of the school year – including suspensions, expulsions, and a removal to an interim alternative educational setting. In cases where there is a pending expulsion or suspension of more than ten days, it is fairly clear that an MDR is necessary. But disputes can arise when a student is being suspended for a day or two over the course of the school year as to when an MDR should happen.

The U.S. Department of Education has stated that “portions of a school day that a child has been suspended may be considered a removal in determining whether there is a pattern of removals.” 71 Fed. Reg. 46,715 (2006). However, there is no guidance as to how to calculate a partial day, that is whether it is to be “rounded up” to a full day or counted as a half day or less.

In one administrative decision, a shortened school day that was not a formal suspension required an MDR, according to the Ohio Department of Education. In *Millennium Community School*, the Ohio ED stated that cutting a student's school day in half to resolve his afternoon behavioral incidents triggered an MDR. The student had already been suspended for 10 days. In concluding that the shortened school days counted as additional removals, the state ED emphasized that the decision to reduce the student's schedule was not made in the context of an IEP team meeting. *Millennium Community School*, 116 LRP 11957 (SEA OH 2016). *See also School Dist. of the City of Flint*, 66 IDELR 197 (SEA MI 2015) (finding that removals of a student who was sent home repeatedly for behavioral reasons but were not formally recorded as suspensions should have been counted toward determining whether an MDR was required).

Informal removals are not defined in the IDEA or its regulations, but it is generally when school personnel take action that excludes the child for part or all of the school day, or even an indefinite period of time. OSEP considers these exclusions “informal” because the school removes the student from a class or school without invoking disciplinary procedures. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSEP 2022). OSEP has noted, however, that informal removals are subject to IDEA's requirements to the same extent as disciplinary removals by school personnel using the school's disciplinary procedures. Informal removals include administratively shortened school days when a child's school day is reduced by school personnel outside of the IEP team and placement process, in response to the child's behavior. *Id.* In short, the continued use of these “informal” removals to address a student's behaviors may constitute a disciplinary removal from the current placement. Parents should keep logs of each informal removal in order to ensure that

there is a record of days the student has been removed over the course of the school year and to determine when an MDR is necessary.

In-school suspensions (ISS) don't need to be counted as removal days for purposes of triggering an MDR if the district affords the student the opportunity to continue to: 1) appropriately participate in the general education curriculum; 2) receive the services specified on the child's IEP; and 3) participate with nondisabled children to the same extent. *See Dear Colleague Letter*, 68 IDELR 76 (OSEP/OSERS 2016); and 71 Fed. Reg. 46,715 (2006). In *District of Columbia Public Schools*, for example, a high school student's time in ISS did not constitute a removal under the IDEA and therefore, the independent hearing officer (“IHO”) determined that the district need not conduct an MDR. The student, who was eligible for special education and related services under the eligibility category of OHI and often truant, had received 20 days of ISS. The parent filed a complaint alleging, in part, that the district was required to perform an MDR and had failed to do so. The IHO reasoned, however, that because the student was provided make-up work for the one period per day he missed, and he did not miss any special education services while on ISS, he was not “removed” under the IDEA and therefore an MDR was not required. *See District of Columbia Pub. Schs.*, 113 LRP 32357 (SEA DC 06/21/13). If the LEA takes steps to ensure that the student is provided with supports and services during an ISS, then an MDR is not necessary.

In *Rutherford County (TN) Schools*, the student was subjected to six in-school and six out-of-school suspensions during a single school year and Parent believed that the District should have held an MDR. The District stated that on the days when the Student was in ISS, it was the Special Education Director’s responsibility to make sure the Student continued to receive all accommodations and services required in his IEP. The District noted that the Student received all services and accommodations each day he attended school, including during his ISS. Parent was unable to provide any information to rebut the District's contentions with respect to the implementation of the Student's IEP during the times that he was in ISS. Because the district continued to implement his IEP while he served his suspensions in school, OCR found that those six days did not count toward the 10-day limit. *Rutherford County (TN) Schs.*, 62 IDELR 271 (OCR 2013). This case illustrates that it is important for parents to gather information regarding the ISS when making an argument that the student has been “removed” from school. On the other hand, a LEA should be documenting what programming and services are being provided during an ISS and provide that information to parents to prevent any misunderstanding down the line.

Conducting A Manifestation Determination Review

The first step in conducting an MDR is gathering the team. The MDR should include school district personnel, the parent or parents, and relevant members of the IEP team (as determined by the parents or the district). 34 CFR §300.530(e). Parents have the right, therefore, to invite additional participants to the MDR meeting. Parents, therefore, can invite an advocate or attorney, outside providers, such as a therapist or psychiatrist, to participate in an MDR. On the other hand, the LEA can also invite relevant team members even if they have not been part of an IEP team in the past. For example, if the incident that led to the school removal was in a general education class, but that particular teacher had not been previously involved in an IEP meeting, either the parents or the LEA could determine that that teacher was a relevant MDR meeting participant. Parents do not have the right to veto a district's choice of team members. *See Fitzgerald v. Fairfax*

County Sch. Bd., 50 IDELR 165 (E.D. Va. 2008). Under Section 504, the MDR team must include people knowledgeable about the student, the meaning of the evaluation data, and the placement options. *OCR Staff Memorandum* 16 IDELR 491 (OCR 1989); 34 CFR §104.3(c). For some parents, this might be the first time that a district-level administrator or someone who does not regularly interact with their child is attending an IEP meeting, which can be intimidating. In order to ensure parents are meaningful participants in the process each team member should be sure to introduce themselves at the meeting and explain their role.

There is no legal guidance for whether or not the student in question should or can attend the MDR but given that parents have the right to invite additional participants, arguably the student could fall under that category. If we are attempting to center the student in the discussion then allowing the student to share their perspective, explain their behavior, and offer insights into how their disability affects them could be valuable to the team's discussion.

The LEA and the parents can also invite outside providers to the meeting. If the student sees a therapist, social worker, or other provider outside of school, parents can invite them to support the family by attending the MDR either in person or by phone. Parents should make sure to tell them about the incident that led to the student's suspension or classroom removal, share documents, and talk about whether they believe the incident was related to the student's disability. If this outside provider cannot attend the MDR, they could provide a letter of support that can be reviewed by the MDR team. The letter should explain how and for how long the provider has known the student; what type of services they provide to the student outside of school; list documents they reviewed before writing the letter, if any; a description of other similar incidents they know about; and state whether they believe this was a manifestation of the student's disability, and explain why.

The MDR must involve a review of "all the relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents." 34 C.F.R. 300.530(e). It is important that the entire team have information about the student's behavior at the MDR. Parents should share information from any outside providers ahead of the meeting, so everyone has a chance to review, if possible. The LEA should also provide any documentation ahead of time and if not forthcoming, parents should request student records ahead of the MDR. If we focus back on the goal of the MDR being to serve the student, then we want to make sure that all information is provided in a way that everyone can access it. An attempt to withhold information until the MDR is not conducive to the team being able to come to a well-reasoned decision. Regardless, however, even if the information is not shared until the MDR, the team should take that information into consideration.

Documents that the team should be familiar with or review prior to the manifestation determination and take into consideration should include:

- The most recent IEP or 504 Plan
- Evaluations done for the IEP or 504 that relate to the behavior being discussed
- Information about the incident that led to the suspension or classroom removal
- Documents that show the student's behavior or discipline in school, such as evaluations, progress reports, classroom observations, prior suspension documents,
- Functional Behavioral Assessments (FBAs), and Behavior Intervention Plans (BIPs)

- Any MDR meeting notes/worksheets from earlier incidents.
- Reports and letters from the child's providers, such as therapists, counselors, and doctors

The MDR team then needs to determine if there is a connection between the behavior that led to the incident and the “disability-related behaviors” or if the removal happened because the school was not implementing the IEP or BIP. This is where the connection between the student's past behaviors and the current incident is made. The team should consider information in the student's records about how the student behaves, what leads to problem behaviors, what the student needs to help prevent and manage the behavior, how the behavior keeps the student from learning, and how the behaviors are related to his or her disability. If the student sees a therapist or any outside providers, parents should be encouraged to share information from those providers and/or LEA staff can request a release to speak to them or gather documentation. For example, a private therapist may be able to provide some input or background about the child's diagnosis or support what parents share about behaviors outside of the school setting. A service provider may be able to comment on how the student behaves around peers, in a structured setting or when asked to complete a task.

It is also important that team members be familiar with the student's disability and not just their eligibility. At the MDR the team needs to take into consideration all of a student's disabilities not just the disability that was used to qualify the student. If the student is eligible under one category but has more diagnoses, make sure the team is aware of that at the start of the meeting. The team should research and review behavioral manifestations associated with the child's disability from reputable sources (e.g., DSM-V, disability specific organizations, treating therapists). For example, if the student's disability is Prader-Willi Syndrome (“PWS”), which the team may be less familiar with than other disabilities, the student may be eligible under OHI, but they are going to exhibit much different behaviors than a student with ADHD who is also eligible under OHI. Prader-Willi Syndrome is characterized by a range of behavioral challenges, including hyperphagia (excessive eating), emotional dysregulation leading to temper outbursts, and obsessive-compulsive behaviors. Individuals with PWS may also exhibit rigidity, anxiety, and difficulties with social cognition. Therefore, if a student with this disability steals food from the school cafeteria there is a direct link to their disability, but the team would need to be familiar with the disability to make that determination.

Once the team is aware of the behaviors associated with the disability, the team should review the behavior in question from the school reports to see if it falls into one of these categories. If the team does not have access to a list of possible behavioral manifestations, the team members can discuss behaviors they have seen in students with the same disability and provide information about other behaviors seen in the student in question in order to ensure the team has some context when making the determination. For example, if the behavior at issue is that a student with ADHD left the classroom after repeatedly being told not to do so and get back to work, it would be relevant for the MDR team consider the parent's input that at home the student can ask for break in between tasks or that directions need to be repeated. This information can help the team determine that the student's behaviors can be addressed with some simple accommodations and are likely related to his disability.

Each member of the team is going to come to the MDR with their own agenda of what they want to accomplish at the meeting, but the team should be focused on the student. If the removal in question is a multi-day suspension or even an expulsion, the parents are likely going to be concerned about how the student will be educated in the event the removal moves forward. As the parents they will likely have insight into the student's disability and behaviors that part or even all of the team may not be aware of prior to the MDR. The team needs to make sure that parents are provided with the opportunity to provide the team with all information during the meeting.

An MDR can be very intense for LEA staff especially if there was a serious incident that may have occurred in their classroom or under their supervision but the team needs to ensure that even under those circumstances that while staff can share their emotions and frustration, it is still important to make sure the MDR is thorough and not jump to a determination. For example, if a student's behavior appears to have no direct causal connection to their disability but the LEA had not yet implemented a 1:1 behavior aide provided for in the student's IEP, the removal cannot continue due to the LEA's failure to implement the IEP, as arguably if the behavior aide was present the student would have not exhibited the behavior. While a teacher may be upset that a student is exhibiting behaviors in their class that led to the referral for removal, the staff needs to be aware that a removal will not happen under those circumstances as the IEP was not implemented. What the team may want to consider, however, as part of a MDR, is that if the behavior is happening in a certain setting what can be done in that setting beyond implementing the IEP to address the issue. For example, if the student's program is a general education placement with aide support, the team can consider moving the student to another general education classroom as that is not a change in placement but it may be beneficial to the student as it may remove an antecedent (e.g., another student, classroom environment) and therefore allow the student to be more successful.

If the student is participating in the MDR process, the team should consider involving them in analyzing their behavior, identifying strategies for improvement, and taking ownership of the steps to take in the future to prevent behaviors whether they are a manifestation of their disability or not. The team should focus on collaborative solutions moving forward in order to develop a plan that addresses both the disciplinary concerns as well as the student's ongoing needs.

When the decision making actually begins, the team may want to consider polling each member of the team for their opinion in order to get everyone's input regarding whether the behavior was directly related to the disability. The school team needs to ensure that not just one person is making the decision and that input from parents and each MDR team member is taken into consideration. This also provides a chance for those who may disagree with the final determination to have their input heard and taken into consideration when the team is making any changes to ensure a FAPE is being provided.

When there is evidence of a direct causal connection between the child's conduct infraction and disability this should result in a finding that the child's misconduct was a manifestation of her disability. *See District of Columbia Pub. Schs.*, 114 LRP 3336 (SEA DC 12/19/13) (Student's emotional disturbance caused her to be impulsive and combative, which triggered her to elope from class and start a fire on campus.). In some cases, actions resulting from a child's low self-esteem or bad judgment generally are deemed to be unrelated to the child's disability. *See*

Fitzgerald v. Fairfax County Sch. Bd., 50 IDELR 165 (E.D. Va. 2008) (concluding that an 11th grader's anxiety issues were unrelated to his decision to conduct a weekend paintball raid on his school); and *Martin County Sch. Bd.*, 121 LRP 28614 (SEA FL 04/29/21) (finding that posting a bomb threat online was unrelated to the student's disability).

The team can use information about a student's actions before, during, and after a conduct code violation to determine whether his disabilities played a role in his behavior. That is why districts should encourage staff to take detailed notes about the circumstances leading up to the infraction. *See, e.g., C.D. v. Atascadero Unified Sch. Dist.*, 83 IDELR 80(C.D. Cal. 2023), *aff'd*, 74 IDELR 188 (9th Cir. 2019, *unpublished*) (A California district's detailed records of a 16-year-old boy's conversations with school staff shortly before he pushed a teacher into a wall helped to demonstrate the appropriateness of its MDR.).

If the team is reviewing whether or not the behavior occurred because the school district failed to implement an IEP or the student's BIP, the team should review the IEP and the BIP in order to determine what services the LEA should have been providing. If the school keeps records or logs of services delivered, those documents should be reviewed to ensure that services are being implemented. The team should also discuss whether all services are being implemented and how often. The team should be prepared to provide details about frequency, days of the week, how the service is provided (group, pull-out), etc., in order to determine if the team is implementing the IEP. For example, the LEA may not have been providing an agreed-to aide due to staff shortages for a period of time for a student whose IEP requires it to address ongoing behaviors. While this can happen on occasion, the failure to implement the IEP or BIP, thus not meeting the student's needs, means that the team cannot remove the child from the current educational setting under an MDR.

There are certain special circumstances where the school district may remove a student to an IAES for not more than 45 school days *even if* the behavior was determined to be a manifestation of the child's disability. The team can remove the child if the child:

- Carries a weapon to or possesses a weapon at school, on school premises, or to a school function;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;³ or
- Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function.⁴

See 34 CFR §300.530(g).

² The term "weapon" means a "dangerous weapon" which means "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 2½ inches in length." 18 USC §930(g)(2).

³ The law notes that an "illegal drug" does *not* include a controlled substance that is legally possessed or used under the supervision of a licensed health care professional. 34 C.F.R. §300.530(i)(2).

⁴ "Serious bodily injury" means bodily injury that "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." 18 U.S.C. §1365(h)(3).

After the Manifestation Determination Review

If the team decides that the Student's behavior *was* a manifestation of his or her disability the student has the right to return to school immediately. At that point, the LEA must conduct a Functional Behavioral Assessment ("FBA") to identify what might be causing the problem behavior and draft a Behavior Intervention Plan ("BIP") to provide the student with supports in school to address the behavior. If the student already had a BIP that the school was not following or that was not effective, it must be properly followed or amended to address the behavior. *See* 34 CFR §300.530. While the team makes this determination, there can often be a team member that disagrees with this decision not based on the analysis but rather that he or she thinks it is unfair that the student is not receiving a consequence for their actions. These concerns, however, are not a legal justification to remove a student from their current educational setting.

If the team decides that the student's behavior *was not* a manifestation of his or her disability the student's suspension or classroom removal will continue until the end of the suspension or removal period. During the student's removal, he or she must be given appropriate special education services. This means that the student must get services that allow him or her to make progress toward his or her IEP goals in a general education curriculum. *See* 34 C.F.R. §300.530(d)(1); *see also Metropolitan Sch. Dist. of Decatur Twp.*, 76 IDELR 227 (SEA IN 2020) (finding that an Indiana district failed to provide services to a student with an undisclosed disability during a 10-day out-of-school suspension pending expulsion); and *Malvern Sch. Dist.*, 124 LRP 22110 (SEA AR 06/02/24) (finding that an Arkansas district denied an eighth-grader FAPE by failing to implement her IEP during a disciplinary removal).

Even if the behavior is found to not be a manifestation, the team should seriously consider conducting an FBA and create a BIP to provide support for the student's behaviors moving forward. The goal of an MDR that is centering the student is not to have one side "win" the meeting. Even if the behavior was not a manifestation of the student's disability, the team should continue to consider and adjust the student's program in order to provide a FAPE.

Functional Behavior Assessments

A functional behavior assessment ("FBA") is a systematic process used to understand the reasons behind a student's challenging behaviors. The aim of an FBA is to identify the purpose or function of the behavior so that interventions can be developed to address the student's underlying needs and promote or teach more positive behaviors. The IDEA does not define an FBA or explain what steps are required to complete one.⁵ Instead, FBA requirements are left to state law or local policy.

⁵ Historically OSERS has taken the position that an FBA is an evaluation for purposes of the IDEA meaning an FBA required parental consent and was subject to the IEE requirements. In *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, however, the Office of Special Education and Rehabilitative Services indicated it is reconsidering its position that an FBA is an evaluation or reevaluation under the IDEA following the Second Circuit's decision in *D.S. v. Turnbull Board of Education* that an FBA is not an evaluation or reevaluation under the IDEA that triggers a parent's right to request an IEE at public expense. *See Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline*

Generally, an FBA should define the problem or target behavior; include data about antecedents and consequences of the behavior; and include a hypothesis about the function of the behavior. This information will guide the team in writing a BIP. Because there are no requirements in federal law and many state laws are vague it is going to vary on a case-by-case basis whether an FBA is appropriate. *See C.P. v. Krum Indep. Sch. Dist.*, 114 LRP 41006 (E.D. Tex. 09/17/14) (holding that the FBA was appropriate because it identified the problem behaviors, noted past interventions, identified antecedents of the behavior, and suggested strategies to assist the child in controlling the behavior).

The IDEA also does not list requirements for who is qualified to conduct an FBA and again this left to each state, or school district, to determine who can conduct the assessments. The Office of Special Education and Rehabilitative Services has stated that there is no requirement that a board-certified behavior analyst, or any other specific individual, conduct an FBA unless state law requires it. *Letter to Janssen*, 51 IDELR 253 (OSERS 2008). Although the IDEA does not state who may conduct FBAs, districts must ensure that those who do conduct them are adequately trained. *See also H.D. v. Central Bucks Sch. Dist.*, 59 IDELR 275 (E.D. Pa. 2012) (finding that an FBA was appropriate, in part, because the FBA was conducted by a qualified, board-certified associate behavioral analyst).

In Los Angeles Unified School District, for example, the only requirement to conduct an FBA is a mandatory two-day in-person training. The District requires that each school site has at least one full-time certificated staff member trained to conduct FBAs. The trained full-time school site certificated staff member “may be a special education teacher, a general education teacher, a site administrator, or any other certificated support staff member who works with students with [IEPs].”⁶ In short, any certificated staff member who takes the two-day training is deemed qualified to conduct an FBA. The range could, therefore, include a brand-new general education teacher or a school psychologist with 20 years of experience. This disparity in education and experience could lead to wildly different FBAs for a student.

Despite no requirements being included in the IDEA for who is qualified to conduct an FBA, hearing officers frequently rely in part upon whether the assessor was qualified when determining if an FBA was appropriate. In *H.D. v. Central Bucks School District*, the court held that the FBA was appropriate because it was conducted by a qualified, board certified associate behavioral analyst, used various methods of collecting relevant data, identified the child's most significant concerning behaviors, identified the triggers and consequences of those behaviors, and provided instruction on how to create an educational program and behavior plan to address the behaviors. *H.D. v. Central Bucks School District*, 59 IDELR 275 (E.D. Pa. 2012).

In another matter, the IHO found that the lengths to which a board-certified behavior analyst went to collect information about the escalating behaviors of a child with autism helped a

Provisions, 81 IDELR 138 (OSERS 2022); *see also D.S. v. Trumbull Board of Education*, 975 F.3d 152 (2d Cir. 2020)

⁶ Los Angeles Unified School District, *Functional Behavior Training*, available at [https://www.lausd.org/Page/12031#:~:text=The%20Functional%20Behavior%20Assessment%20\(FBA,staff%20trained%20to%20conduct%20FBAs.](https://www.lausd.org/Page/12031#:~:text=The%20Functional%20Behavior%20Assessment%20(FBA,staff%20trained%20to%20conduct%20FBAs.)

district avoid paying for an IEE. The IHO found that the BCBA's data collection helped her identify what was triggering the child's increasingly frequent and intense behaviors and make recommendations for revising the IEP and therefore found that the FBA was appropriate. *Redding Bd. of Educ.*, 73 IDELR 132 (SEA CT 2018).

Conduct Behaviors and Trauma

As we center the student in the MDR process, we also need to consider the unique needs of the child as we move into the steps that are taken after the MDR. A growing number of students are experiencing some form of trauma and the practices being implemented by the LEA following an MDR should take that into consideration. More than two-thirds of children in the United States report having experienced at least one traumatic event by the age of 16 years old. *Traumatic Events and Posttraumatic Stress in Childhood*, Copeland, W.E., et. al., *Archives of General Psychiatry*, 64(5):577-84 (2007). According to the Substance Abuse and Mental Health Services Administration, "individual trauma results from an event, series of event or set of circumstances experienced by an individual physically or emotionally harmful or life-threatening with lasting adverse effects on the individual's functioning and mental, physical, social emotional or spiritual well-being." *SAMHSA's Concept of Trauma and Guidance for Trauma-Informed Approach*, July 2014.

Adverse childhood experiences, or ACEs, are potentially traumatic events that occur in childhood. ACEs can include sexual abuse, physical abuse, emotional abuse, neglect, dating violence, witnessing crimes, rape, custodial interference, or an active shooter on a school campus. In a study by the National Child Traumatic Stress Network early life trauma exposure was associated with complex trauma symptoms. Children's traumatizing experiences can compromise all areas of childhood development including cognitive processing, ability to manage behaviors, affect tolerance, spiritual and moral development, and the ability to trust self and others. Repeated traumatizing experiences can have a neurodevelopmental, physiological, social, and behavioral impact on children. Children who experience trauma develop "survivor behaviors" meant to help the child survive extreme psychological stress in a hostile environment. These behaviors could include fighting, running away or eloping, substance abuse, spacing out in class, self-injurious behaviors or eating disorders. If present, these behaviors are likely to manifest in the school setting. *See Trauma Informed Approaches to Classroom Management*, Brenda Ingram, EdD, LCSW, Director of Clinical Services, Peace Over Violence.

The LEA needs to take into consideration that a child who has experienced ACEs and is now exhibiting behaviors related to that trauma may need specific interventions in the classroom setting, likely via a behavior intervention plan, to address those behaviors.

Behavior Intervention Plans

Once the target behavior or behaviors are identified via an FBA and the hypothesis developed, a positive behavior intervention plan ("BIP") can be prepared to address the target behavior with strategies and interventions, if necessary. A BIP is also not defined in the IDEA and its implementing regulations but is generally understood to mean a component of a child's IEP designed to address behaviors that interfere with the child's learning or that of others and behaviors

that are inconsistent with school expectations. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSERS 2022). The BIP should outline the targeted behaviors that inhibit the child from accessing learning, the behaviors that are expected, positive behavioral interventions, strategies and supports to address the targeted behaviors, and the positive and negative consequences for identified behaviors. *Id.*

The only time a BIP is *required* under the IDEA is following an MDR when the behavior was found to be a manifestation of a child's disability. In all other circumstances, it is up to an IEP team to determine if it is appropriate for each student on a case-by-case basis in order to provide a FAPE. For instance, if a MDR team determines that a student's conduct is *not* a manifestation of a disability, the LEA is not required to conduct an FBA or develop a BIP. However, a failure to develop a BIP, to develop an appropriate BIP, or to properly or inconsistently implement a BIP can all be violations of a child's right to a FAPE. *See, e.g., Herron Charter (the Sch.)*, 81 IDELR 176(SEA 2022) (while an MDR team found that a student's involvement in a fight was not a manifestation of his disability, his charter school was still required to determine whether an FBA and/or BIP was needed to address his behavior.).

While the IDEA is silent on the specific contents of BIPs, many courts and hearing officers require that a BIP be written with sufficient specificity and address the student's behaviors and possible consequences with consideration of the student's individual needs. *See C.F. v. New York City Dep't of Educ.*, 62 IDELR 281 (2d Cir. 2014) (finding that the lack of an FBA led to the development of an inappropriate BIP and caused the district to offer an inappropriate placement). The IDEA does not require an IEP to detail specific behavioral goals, but an IEP team must consider positive behavioral interventions and supports if behavior impedes a student's learning.

When developing a BIP, the team should be individualizing that BIP for the student. The description of behavior should be specific, rather than lump behaviors under broad categories. It should also mention the triggers and functions of the behavior, if known. *See, e.g., Paris Sch. Dist. v. A.H.*, 69 IDELR 243 (W.D. Ark. 2017) (concluding that the BIP's description of the behaviors as "noncompliance," as well as its failure to identify the reasons for the behaviors, rendered the BIP deficient). A BIP that can be individualized for a student versus a form with check boxes that does not allow for a team to add in descriptors, specific triggers, or interventions, for example, is more likely to meet the needs of a student.

When developing a BIP for a trauma-impacted student, the IEP team should take into consideration interventions and strategies that take into account their unique experiences. Interventions that are beneficial to trauma-impacted students include teaching stress management and relaxation skills. Adults should be calm and quiet when working with students. Teachers and staff should teach and model self-calming techniques, and positive self-talk with students. *See Trauma Informed Approaches to Classroom Management*, Brenda Ingram, EdD, LCSW, Director of Clinical Services, Peace Over Violence. These types of techniques may require some additional training for staff working with the student or putting in place staff that are already trained in order to avoid a lapse in being able to implement the BIP appropriately.

The classroom itself can also be set up to support students who have been impacted by trauma. A predictable environment and routine with clear expectations for behavior will decrease

the change that a student is overwhelmed during the school day. The IEP team should consider providing a quiet, safe place in the classroom for students to go when they are overwhelmed that is not seen as a punishment but rather a space to decompress or calm down. Incorporating sensory materials, music, exercise and stretching into the daily schedule for the class can help support any students who have experienced trauma. *See Trauma Informed Approaches to Classroom Management*, Brenda Ingram, EdD, LCSW, Director of Clinical Services, Peace Over Violence.

The team can include a number of behavioral strategies and interventions within the BIP for trauma-impacted students including:

- Utilizing active listening with students
- Teaching and modeling empathy
- Use of specific praise with students
- 10:1 ratio of positive to negative comments
- Actively ignoring negative behavior
- Provide clear and consistent expectations
- Reward systems instead of punishments
- Collaborative problem-solving
- Teaching student to identify and label emotions and feelings
- Use a “thermometer” to rate emotion intensity
- Identifying and teaching coping skills to help decrease emotional intensity
- Connecting students to friends, peers, or supportive adults
- Involving parents/caregivers in the educational process
- Helping student identify safe people and places
- Teaching student how to ask for help until someone responds via role play

See Trauma Informed Approaches to Classroom Management, Brenda Ingram, EdD, LCSW, Director of Clinical Services, Peace Over Violence

Expedited Due Process

Parents do not have the right to veto the MDR team's determination that the child's misconduct is unrelated to his disability. *See Fitzgerald v. Fairfax County Sch. Bd.*, 50 IDELR 165 (E.D. Va. 2008). However, if parents or guardians disagree with the findings of the MDR, they can appeal a manifestation determination by filing a due process complaint on behalf of the student. The hearing must take place within 20 school days of the date the complaint was filed and the hearing officer or ALJ must make a determination within 10 school days of the hearing. *See* 34 CFR §300.532.

According to OSEP, when a parent files a due process complaint to challenge an MDR, the hearing must occur on an expedited basis. Even if the parent and district agree to extend the shortened timelines, the IDEA does not permit a hearing officer to make an exception to the expedited hearing requirement. *Letter to Snyder*, 67 IDELR 96 (OSEP 2015). *But see Molina v. Board of Educ. of Los Lunas Schs.*, 67 IDELR 18 (D.N.M. 2015) (holding that the parents exhausted their administrative remedies under the IDEA by following the IDEA's standard due process procedures instead of pursuing an expedited hearing when they challenged an MDR). Therefore, if there is a disagreement with the determination, both parties need to be ready to move

forward quickly. The information gathered by parents, the MDR team, and any outside providers would be relevant evidence and the MDR team members will likely be called to provide witness testimony regarding the student's misconduct, the history of the student as well as the MDR proceedings.

Conclusion

Manifestation determination reviews are a procedural right afforded to students with disabilities in order to ensure that school districts do not use discipline procedures to unilaterally remove students from schools, including general education settings. The MDR team has to review all relevant information and make a determination about whether the student's behavior is a manifestation of his or her disability or if the behavior was due to a failure of the district to implement student's IEP/BIP. While the decision at the MDR is left primarily to the school district team members, the MDR does allow for parents to provide the district with further information and an opportunity to determine if further supports are necessary for a student who is exhibiting behaviors in the school setting. Team members that are focused on creating a student-centered MDR should ensure that the MDR team is provided with as much information as possible about a student and that the team undertakes a careful and thorough review of that information when making a determination.

Appendix A: Manifestation Determination Reviews Under IDEA and Section 504

Topic	IDEA	Section 504
Statutory provision requiring MDRs before disciplinary removals	Districts must perform MDR “within 10 days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.” 34 CFR §300.530(e)	Districts must “conduct an evaluation . . . of any person who . . . needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person . . . and any subsequent significant change in placement.” 34 CFR §104.35(a)
Defining "change in placement"	<p>A change in placement occurs when:</p> <ol style="list-style-type: none"> 1. A student is removed for more than 10 consecutive school days; or 2. A student is subjected to a series of removals that constitutes a pattern because: <ol style="list-style-type: none"> 1) the removals total more than 10 school days in a school year; 2) the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in removal; and 3) additional factors such as length of each removal and the proximity of the removals to each other. <p>34 CFR §300.536(a)</p>	<p>A change in placement occurs when:</p> <ol style="list-style-type: none"> 1. A student is suspended or expelled for more than 10 consecutive school days; or 2. A student is subjected to a series of suspension that are each 10 days or fewer in duration that creates a pattern of exclusion. <p><i>OCR Staff Memorandum</i>, 16 IDELR 491 (OCR 1989); and <i>Dunkin (MO) R-V Sch. Dist.</i>, 52 IDELR 138 (OCR 2009).</p>
Purpose of MDR	<p>MDRs are conducted to determine whether:</p> <ol style="list-style-type: none"> 1. A student's misconduct was caused by, or had a direct and substantial relationship to, the child's disability; or 	<p>MDRs are conducted to determine whether the student's misconduct was caused by or related to his physical or mental impairment.</p> <p><i>Dunkin (MO) R-V Sch. Dist.</i>, 52 IDELR 138 (OCR 2009).</p>

	<p>2. The misconduct in question was the direct result of the district's failure to implement the IEP.</p> <p>34 CFR §300.530(e)(1)</p>	
MDR team members	<p>The MDR team must include the district, the parent, and relevant members of the IEP team (as determined by the parent and the district).</p> <p>34 CFR §300.530(e)</p>	<p>The MDR team must include people knowledgeable about the student, the meaning of the evaluation data, and the placement options. This may be the same group that makes placement decisions.</p> <p><i>OCR Staff Memorandum, 16 IDELR 491 (OCR 1989). See 34 CFR §104.35 (c).</i></p>
Data to review during MDR	<p>The MDR team must review of “all the relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents.” 34 CFR §300.530(e). However, that list of relevant information is not exhaustive.</p> <p>71 Fed. Reg. 46,719 (2006).</p>	<p>The MDR team must consider a broad range of data that competent professionals would require and relevant information that is recent enough to afford an understanding of the student's behavior, such as a psychological evaluation.</p> <p><i>OCR Staff Memorandum, 16 IDELR 491 (OCR 1989).</i></p>
Behavior is manifestation of disability	<p>If the MDR team determines that the student's conduct was a manifestation of the student's disability, the IEP team must return the student to the placement from which he was removed and:</p> <ol style="list-style-type: none"> 1. Conduct a functional behavioral assessment and implement a BIP for the student; or 2. If a BIP is already in place, review the BIP and modify it as necessary to address the behavior. 	<p>If the MDR team determines that the student's misconduct was a manifestation of his disability, the team must assess whether the student's current educational placement is appropriate, and if necessary, change the student's placement to a setting that meets his educational and behavioral needs.</p> <p><i>Knox County (TN) Sch. Dist., 26 IDELR 762 (OCR 1997).</i></p>

	34 CFR §300.530(f)	
Behavior is NOT a manifestation of disability	<p>If the MDR team determines that the student's misconduct was not related to his disability, then the student is subject to the same disciplinary sanctions as a student without a disability.</p> <p>However, the student must:</p> <ol style="list-style-type: none"> 1. Continue to receive educational services that enable the him to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the IEP; and 2. Receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications that address the behaviors that led to the disciplinary incident. <p>34 CFR §300.530(d)(i)</p>	<p>If the MDR team determines that the student's misconduct was not related to his disability, then the district may elect to impose whatever suspension, expulsion, or other disciplinary penalty it would impose on a nondisabled student under the same circumstances.</p> <p><i>See, e.g., Gates-Chili (NY) Cent. Sch. Dist., 50 IDELR 51 (OCR 2007); and Youngstown (OH) City Sch. Dist., 114 LRP 29317 (OCR 02/26/14).</i></p>

Appendix B: Table of “You Be the Judge” Cases

Case Name and Citation	Outcome
<i>Lancaster Elem. Sch. Dist.</i> , 49 IDELR 53 (SEA CA 2007)	The ALJ found that the team's manifestation determination analyzed Student's behavior across settings and across times when it determined the conduct in question, bringing marijuana and tobacco to school, was not caused by or a direct result of his disability, SLD, and was not a direct result of the LEA's failure to implement his IEP. The evidence established that the manifestation determination reached at the MDR was correct. Thus, the normal school disciplinary procedures should be used to address the incident, the same as applied to non-disabled students.
<i>Manteca Unified Sch. Dist.</i> , 50 IDELR 298 (SEA CA 2008)	Student's expert witness a psychiatrist who had been treating her for the PTSD and depression concluded that the conduct of kicking a child in the groin very likely had a direct and substantial relationship to her PTSD and depression due to the sexual assault because he was sexually harassing her before she kicked him and her PTSD was caused by a sexual assault. The judge found that Student's expert witness testimony established that Student's conduct of kicking a boy in the groin had a direct and substantial relationship to her disability, specifically, her PTSD and depression. As such, her conduct was a manifestation of her disability.
<i>District of Columbia Pub. Schs.</i> , 114 LRP 3336 (SEA DC 12/19/13)	After reviewing the evidence, the IHO found that the student's conduct was a manifestation of her suspected ED and that the district failed to justify its eligibility and MDR determinations. An expert witness, the IHO noted, concluded that the student's ED caused her to be impulsive and combative, which triggered her to elope from class and start a fire on school grounds. During the initial IEP meeting, the IHO observed, the parents informed the IEP team that the student had a history of engaging in arson behavior and requested that a psychiatric examination be conducted. The district, in contrast, failed to provide any evidence that contradicted the expert testimony, the student's behavioral history, and other evidence of the student's ED manifestations provided by the parents. Reversing the district's MDR determination, the IHO ordered the district to return the student to school and develop an appropriate BIP.

Appendix C: Student Centered Manifestation Determination Reviews Slides