

DISABLED ... OR JUST TROUBLED?
**MANAGING EMOTIONAL DISORDERS
IN THE SCHOOL ENVIRONMENT**

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I. INTRODUCTION

This presentation was developed to address one of the most difficult – and least understood – issues in the field of special education today. Public schools are increasingly confronted with students who exhibit behavior problems that disrupt the learning environment for themselves, other students and staff. Parents of these students often claim that the source of their child’s misbehavior is a “disability” that is the explanation, or even the excuse, for the student’s actions. School staff remain frustrated with what they see as weak parenting and a societal toleration for bad behavior and a lack of respect for teachers.

There are two avenues for parents and educators seeking to classify a student as “disabled” due to behavior problems. The first choice is usually via the IDEA, under the categories of “ED” (“emotional disturbance”) or “OHI” (“other health impaired”). It

should be difficult to become labeled “emotionally disturbed” pursuant to the IDEA, due to the restrictiveness of the federal eligibility criteria. In fact, according to the most recent statistics published by the U.S. Department of Education, approximately 8 percent of all special education students are identified as “emotionally disturbed” pursuant to the IDEA. The second eligibility option is via Section 504 of the Rehabilitation Act of 1973, where no specific diagnostic criteria are required. Rather, a student may qualify for Section 504 protections if she has a mental “impairment” that substantially limits a major life activity, such as learning.

It is the presenter’s opinion that far too many students are determined to be eligible under both the IDEA and Section 504, and that eligibility for many of these students is the result of uncontrollable behavior at school and at home. It is time for school attorneys and educators to take an analytical look at the purpose of these laws, the application of the eligibility criteria for each law, and the factors important to courts and administrative law judges in reviewing eligibility determinations.

II. EMOTIONALLY DISTURBED VS. SOCIALLY MALADJUSTED: A CLINICAL ANALYSIS

A. IDEA

One of the difficulties in this area lies in determining the distinction between an “emotional disturbance” and a “social maladjustment.” The IDEA does not define “social maladjustment,” but students with this condition are clearly and specifically excluded from coverage under the Act. 34 CFR 300.7(c)(4). In fact, students with “social maladjustment” have been excluded from coverage in the ED category since the inception of the Act in 1975. Likewise, the *Diagnostic and Statistical Manual*, 4th Edition

(Text Revision) (“DSM-IV-TR”), does not contain a precise definition of the term “social maladjustment.” Rather, state education agencies and courts have been left to interpret the meaning of the statutory exclusion for “social maladjustment.” Over the past 32 years, numerous advocacy groups have in vain lobbied Congress to include a definition of “social maladjustment” in the law. So the issue remains a viable one that courts and school agencies have continued to struggle with in addressing student misbehavior. It is the presenter’s opinion that “social maladjustment” means any type of willful behavior that is within the student’s control and that is not related to an emotional disturbance or a mental impairment.

There is significant confusion in the field as to whether every diagnosis made pursuant to DSM-IV-TR criteria constitutes an educational disability or a mental impairment. From the presenter’s perspective, Congress clearly did not intend for every type of medical diagnosis to equal an educational disability. For example, the DSM-IV-TR contains diagnostic criteria for several types of sexual dysfunction, drug abuse/addiction, and even caffeine intoxication disorder. The Americans with Disabilities Act specifically excludes drug abuse/addiction from the list of disabilities. Likewise, several courts have refused to recognize conditions like oppositional defiant disorder or conduct disorder as educational disabilities.

The difficulty for attorneys, educators, advocates and parents is in pinpointing the cause of a child’s misbehavior at school. Specifically, is the misbehavior caused by a condition that is beyond the child’s control? Or is the misbehavior a manifestation of the child’s willful choice to disregard school rules? To compound matters, it is rare that a child will be diagnosed with ODD alone. More often, a student carries more than one

diagnostic label – e.g., ODD, ADHD and LD. IEP teams and courts continue to grapple with how to separate the characteristics of these categories in determining the causality of a child’s misbehavior at school, or the impact on the child’s academic performance in the classroom.

B. Section 504

If a student does not meet the ED eligibility criteria under the IDEA, or does not require special education and related services under any category, many school officials and parents will “default” to a Section 504 plan. I believe that this is an improper action in most cases. According to the Office for Civil Rights, it *is* possible for a student with behavior problems to be deemed eligible under Section 504 if the student is diagnosed with a “mental impairment” that results in a “substantial limitation” of the student’s ability to learn. *Irvine (CA) Unified Sch. Dist.*, 353 IDELR 192 (OCR 1989). Additionally, the denial of a student’s eligibility as ED due to “social maladjustment” under the IDEA does not preclude eligibility under Section 504. *Id.* The threshold question therefore is whether “social maladjustment” is a “mental impairment.” My research reveals no simple answer to this question. In fact, the term “social maladjustment” is not addressed in the DSM-IV-TR. It is the presenter’s opinion that “social maladjustment” is not a “mental impairment” and, therefore, cannot result in eligibility under either Section 504 or the IDEA.¹

The main argument against “social maladjustment” being defined as an “impairment” under Section 504 is simply that there is no such diagnostic label or category in the mental health field. The DSM-IV-TR, used by psychiatrists and psychologists to diagnose mental impairments, does not contain such a condition.

¹ Of course, a student may be socially maladjusted and have an educational disability in addition.

The next question is whether an “impairment” under Section 504 is the equivalent of a “mental disorder” per the DSM-IV-TR? The DSM defines a “mental disorder” as “a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress ... or disability ... or with a significantly increased risk of suffering death, pain disability, or an important loss of freedom ... a manifestation of a behavioral, psychological, or biological dysfunction in the individual. Neither deviant behavior ... nor conflicts that are primarily between the individual and society are mental disorders. ... DSM-IV-TR, pages xxx-xxxii. I would argue that, according to this definition, oppositional defiant disorder and conduct disorder would not be considered “mental disorders.” However, I am certain that many experts would disagree with me. So, in the interest of fairness, let’s assume that ODD and Conduct Disorder ARE “mental disorders.” Even so, a medically diagnosed “mental disorder” is not automatically an “educational disability” under Section 504. The key issue is whether these disorders cause a “substantial limitation” in a student’s ability to attend school and to learn. I would argue that a child whose ODD or Conduct Disorder is severe enough to cause a “substantial limitation” in the ability to learn should be eligible under some disability category under the IDEA.

Recent rulings by the U.S. Supreme Court are instructive on the issue of what types of conditions are legally considered to be “impairments” in disability law. In *Sutton v. United Air Lines, Inc.*, 30 IDELR 681 (U.S. 1999), the Court held that a medically diagnosed condition, disease, or impairment is NOT a “disability” within the meaning of the ADA or Section 504 if the affected person can alleviate the symptoms by taking a medication or using a prescribed device. Therefore, a student with severe asthma is not

suffering from an “impairment” which qualifies him for eligibility under Section 504 if that student can completely alleviate the symptoms by using an inhaler. *Garcia v. Northside Independent Sch. Dist.*, 47 IDELR 6 (W.D. Tex. 2007). See also, *Smith v. Tangipahoa Parish Sch. Dist.*, 46 IDELR 282 (E.D. La. 2006); and *Kropp v. Maine Sch. Admin. Union #44*, 47 IDELR 131 (D. Me. 2007). It can be argued, therefore, that a student who is diagnosed with any condition, disease, or impairment listed in the DSM-IV-TR, and whose symptoms are alleviated by the use of medication or therapy, is not “disabled” within the meaning of the law.

There is also much confusion in the field as to the meaning and application of the “record of” and “regarded as” prongs of the eligibility definition in Section 504. According to OCR, a student’s past impairment cannot be used as a basis for present eligibility under Section 504. *OCR Senior Staff Memorandum*, 19 IDELR 894 (OCR 1992). Further, OCR states that eligibility cannot be based merely on a physician’s statement or opinion, or the parent’s opinion. *Id.* The aforementioned document states, “The opinion of the doctor or the mother is a piece of information to be considered in that decision.” *Id.* Thus, a physician’s letter or report concluding that a student has several diagnosed conditions and is taking several types of medication does not determine Section 504 eligibility. Only a student who is suffering a “substantial” impairment of a “major life activity” that is not being controlled with medication or a device can be eligible for Section 504 protections.

C. Social Maladjustment

So, what IS social maladjustment? Many experts in the mental health and education field define social maladjustment as behaviors that are willful, deliberate,

planned, or otherwise within the control of the student. Researchers from the University of Oregon studying this issue have concluded, “Most concerned researchers, practitioners, writers, and agencies who have made serious attempts to tackle this question have concluded that [social maladjustment] can be operationalized as a pattern of engagement in purposive antisocial, destructive and delinquent behavior. *Deconstructing a Definition: Social Maladjustment Versus Emotional Disturbance and Moving the EBD Field Forward*, Merrell and Walker, *Psychology in the Schools*, Vol. 41(8), 2004. There is no evidence that Congress intended to extend the protections of the IDEA and Section 504 to students whose misbehaviors are willful, deliberate, planned, and within the child’s control. Rather, the addition of the “social maladjustment” exclusion in the IDEA indicates that Congress was concerned that the law would be misused to protect these children. *Supra*, Merrill and Walker.

D. Oppositional Defiant Disorder

I believe that one diagnostic parallel to the term “social maladjustment” in the IDEA is “oppositional defiant disorder,” as defined below:

“A recurrent pattern of negativistic, defiant, disobedient, and hostile behavior toward authority figures. ... Expressed by persistent stubbornness, resistance to directions, and unwillingness to compromise, give in, or negotiate with adults or peers. Defiance may also include deliberate or persistent testing of limits, usually by ignoring orders, arguing, and failing to accept blame for misdeeds. Hostility ... is shown by deliberately annoying others or by verbal aggression. ... Usually individuals with this disorder do not regard themselves as oppositional or defiant, but justify their behavior as a response to unreasonable demands or circumstances.” DSM-IV-TR, p. 100.

The diagnostic criteria for ODD (313.81) are as follows:

A. A pattern of negativistic, hostile, and defiant behavior lasting at least six months, during which four (or more) of the following are present:

1. Often loses temper.
2. Often argues with adults.
3. Often actively defies or refuses to cooperate with adults' request or rules.
4. Often deliberately annoys people.
5. Is often touchy or easily annoyed by others.
6. Is often angry and resentful.
7. Is often spiteful or vindictive.

Note: Consider a criterion met only if the behavior occurs more frequently than is typically observed in individuals of comparable age and developmental level.

B. The disturbance in behavior causes clinically significant impairment in social, academic or occupational functioning.

C. The behaviors do not occur exclusively during the course of a psychotic or mood disorder.

D. Criteria are not met for conduct disorder, and if the individual is 18 years or older, criteria are not met for antisocial personality disorder.

DSM-IV-TR, p. 102.

E. Conduct Disorder

Another diagnostic parallel to the IDEA's definition of "social maladjustment" is "conduct disorder," as defined in the DSM-IV-TR:

A repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated. These behaviors fall into four main groupings: aggressive conduct that causes or threatens physical harm to other people or animals, nonaggressive conduct that causes property loss or damage, deceitfulness or theft, and serious violations of rules. ... Although opposition defiant disorder includes some of the features observed in conduct disorder (e.g., disobedience and opposition to authority figures), it does not include the persistent pattern of the more serious forms of behavior in which

either the basic rights of others or age-appropriate societal norms or rules are violated.” DSM-IV-TR, pages 94 and 98.

The diagnostic criteria for conduct disorder are:

A repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated, as manifested by the presence of three (or more) of the following criteria in the past 12 months, with at least one criterion present in the past 6 months.

Aggression to people and animals

1. Often bullies, threatens or intimidates others.
2. Often initiates physical fights.
3. Has used a weapon that can cause serious physical harm to others (e.g., a bat, brick, broken bottle, knife, gun).
4. Has been physically cruel to people.
5. Has been physically cruel to animals.
6. Has stolen while confronting a victim (e.g., mugging, purse snatching, extortion, armed robbery).
7. Has forced someone into sexual activity.

Destruction of property

8. Has deliberately engaged in fire setting with the intention of causing serious damage.
9. Has deliberately destroyed others’ property (other than by fire setting).

Deceitfulness or theft

10. Has broken into someone else’s house, building or car.
11. Often lies to obtain goods or favors or to avoid obligations (i.e. “cons” others).
12. Has stolen items of nontrivial value without confronting a victim (e.g., shoplifting, but without breaking and entering, forgery).

Serious violations of rules

13. Often stays out at night despite parental prohibitions, beginning before age 13 years.
14. Has run away from home overnight at least twice while living in parental or parental surrogate home (or once without returning for a lengthy period).
15. Is often truant from school, beginning before age 13 years.

F. Attention Deficit Disorder, With or Without Hyperactivity (ADD OR ADHD)

What about the rising numbers of children being diagnosed with attention deficit disorder or ADHD (ADD with hyperactivity)? Congress clearly intended for ADD and ADHD to be included in the category of “Other Health Impaired” when such disorders resulted in the need for special education and related services. The difficulty with ADD and ADHD is when the student is brought before her IEP team for a “manifestation determination” following a disciplinary infraction. For example, when a student with ADHD is in trouble for fighting at school, is the act of fighting caused by, or substantially related to, the disorder? Is there any scientific literature linking ADD or ADHD to aggressive actions? What behaviors are legitimately linked to the “impulsivity” that is a feature of ADD/ADHD? We will see that a growing number of courts are holding that acts of physical aggression are not related to ADD or ADHD.

1. What is “impulsivity” as it relates to ADD or ADHD?

According to the DSM-IV-TR:

Impulsivity manifests itself as impatience, difficulty in delaying responses, blurting out answers before questions have been completed, difficulty awaiting one’s turn, and frequently interrupting or intruding on others to the point of causing difficulties in social, academic or occupational settings. Others may complain that they cannot get a word in edgewise. Individuals with this disorder

typically make comments out of turn, fail to listen to directions, initiate conversations at inappropriate times, interrupt others excessively, intrude on others, grab objects from others, touch things they are not supposed to touch, and clown around. Impulsivity may lead to accidents and to engagement in potentially dangerous activities without consideration of possible consequences.” DSM-IV-TR, p. 86.

2. Diagnostic criteria for ADD/ADHD:

A. Either (1) or (2):

(1) Six (or more) of the following symptoms of inattention have persisted for at least 6 months to a degree that is maladaptive and inconsistent with developmental level:

Inattention:

- a. Often fails to give close attention to details or makes careless mistakes in schoolwork, work or other activities;
- b. Often has difficulty sustaining attention in tasks or play activities;
- c. Often does not seem to listen when spoken to directly;
- d. Often does not follow through on instructions and fails to finish schoolwork, chores, or duties in the workplace (not due to oppositional behavior or failure to understand instructions);
- e. Often has difficulty organizing tasks and activities;
- f. Often avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort ;
- g. Often loses things necessary for tasks or activities (such as toys, school assignments, pencils, books or tools);

- h. Is often easily distracted by extraneous stimuli;
- i. Is often forgetful in daily activities.

(2). Six (or more) of the following symptoms of hyperactivity-impulsivity have persisted for at least 6 months to a degree that is maladaptive and inconsistent with developmental level:

Hyperactivity:

- a. Often fidgets with hands or feet or squirms in seat;
- b. Often leaves seat in classroom or in other situations in which remaining seated is expected;
- c. Often runs about or climbs excessively in situations in which it is inappropriate;
- d. Often has difficulty playing or engaging in leisure activities quietly;
- e. Is often “on the go” or often acts as if “driven by a motor”;
- f. Often talks excessively.

Impulsivity:

- a. Often blurts out answers before questions have been completed;
 - b. Often has difficulty awaiting turn;
 - c. Often interrupts or intrudes on others (e.g., butts into conversations or games).
- B. Some hyperactive-impulsive or inattentive symptoms that caused impairment were present before age 7 years.
- C. Some impairment from the symptoms is present in two or more settings (e.g., at school and at home).

We will see from a review of recent court opinions that there continues to be a significant level of confusion about the manifestations of ADD and ADHD in the school setting. However, more courts are refusing to blame ADD or ADHD for a child's physical aggression or threat of aggression at school.

III. WHAT ARE THE COURTS SAYING ABOUT EMOTIONAL DISTURBANCE?

A. *R.B. v. Napa Valley Unified Sch. District*, 48 IDELR 60 (9th Cir. 2007). A 16-year-old girl with a history of prenatal exposure to drugs and a lengthy history of psychiatric treatment did not qualify as "emotionally disturbed" pursuant to the IDEA. The student did not meet any of the five criteria for ED eligibility, and had made significant progress in behavior.

B. *Mr. and Mrs. C. v. Bedford Central Sch. District*, 47 IDELR 95 (S.D.N.Y. 2007). The parents of a high school student with a history of sexual abuse and behavioral problems were not entitled to reimbursement for a unilateral private placement. The student did not qualify as "ED" pursuant to the IDEA, and his drug use was the result of social maladjustment rather than an emotional impairment.

C. *Mr. & Mrs. I vs. Maine Sch. Admin. District*, 45 IDELR 4 (D. Me. 2006). The District Court denied the parents' request for reimbursement for their tuition costs for their 12-year-old daughter with Asperger disorder because they failed to demonstrate the appropriateness of their chosen placement, but ordered the district to convene an IEP meeting and develop an appropriate IEP for her. Although a magistrate judge found that the sixth-grade girl made excellent academic progress throughout her public school tenure, the court held that the judge's finding was based on a limited notion of "educational performance." In finding that the student met the IDEA's eligibility requirements, the court explained that academic progress also included communication and social skills. Because the student's Asperger disorder adversely affected her ability to communicate and relate socially, she was entitled to special education services. Although the girl excelled academically, met the school's standards for learning, communicated skillfully in writing and orally, participated thoughtfully in class, obeyed rules even when she did not agree with them, was not rude or a disciplinary problem, and maintained some close friends, she was also described by her teachers as isolated and inflexible. She also self-mutilated during school time. Although the IHO attributed a subsequent mental health crisis that included a suicide attempt to a short-term problem, a neuropsychiatrist testified that the student's condition was permanent. The district initially agreed to provide accommodations under a Section 504 plan, but the parents rejected its plan after the

district failed to provide the first of the required services. Thereafter, when the parents attempted to reenroll the student in the district, the district maintained that the student was not eligible for services. The District Court also determined that the parents exhausted their administrative remedies with respect to Section 504 and were not required to bring those claims before the IHO in the IDEA hearing. But, their Section 504 claims failed because the parents did not meet their burden to show the district's offered accommodations were deficient.

D. *West Windsor-Plainsboro Regional Sch. Dist. v. J.S.*, 44 IDELR 159 (D.N.J. 2005). A high school student with emotional disturbance was offered FAPE by her district, a federal District Court decided. It called into question the amount of deference the ALJ gave to the parents' experts and found that the parents had decided to place their daughter in a residential setting before the district proposed a placement. The court noted that the district's rationale for proposing an out-of-district day placement instead of residential placement for the student was based on the fact that the student performed well academically, appeared to be socially ready to return to a regular school setting, and a day placement was the less restrictive option. The court found the parents had visited and decided upon their chosen residential placement prior to reenrolling their daughter in the district. The court determined the district offered the student an appropriate placement that was calculated to address her individual needs. It reversed the ALJ's decision granting the parents reimbursement for their tuition costs, room, board and attorney's fees.

E. *Massey v. D.C.*, 44 IDELR 163 (D.D.C. 2005). A federal District Court granted a request by parents of a "troubled teenager" to require her district to place her in the private school of their choosing. The court accepted jurisdiction over the matter despite the fact that the parents had not exhausted their administrative remedies, finding that pursuing the administrative process with the district would be futile or inadequate. The district's continuing violation of its obligation to abide by procedural requirements evidenced its "blatant disregard" of IDEA statutory requirements. Because the parents showed the district's offered placements were inappropriate for their daughter, and since the district offered no support for its proposed placements nor explanations for its procedural failures, the court ordered the district to place the 14-year-old in the parents' private high school choice.

F. *R.B. v. Napa Valley Unified Sch. Dist.*, 43 IDELR 188 (N.D. Cal. 2005). Although the fifth-grader was diagnosed with ADHD, PTSD, intermittent explosive disorder and depression, the court ruled that the district's Section 504 plan for the student that included a behavioral support plan was appropriate. The court concluded that the student's emotional issues and ADHD did not adversely affect her academic performance because she consistently achieved above-average grades and scores. Therefore, the student was ineligible for special education services under the IDEA. The student's mother had the student independently assessed and, on the recommendation of the psychologist, placed the student in a residential treatment center for emotionally disturbed adolescents. She claimed the public school had repeatedly failed to address her daughter's emotional and behavioral needs. She also

asserted her daughter's above-average academic performance was not reflective of her high intelligence and, therefore, was not evidence that she was not qualified for special education services under the IDEA. The school's assessment revealed the student did not have a serious emotional disturbance or other health impairment as defined under the IDEA, or that her disability affected her educational performance.

G. *Forest Grove Sch. Dist. v. T.A.*, 43 IDELR 189 (D. Or. 2005). The court reversed an IHO's decision ordering the district to pay the tuition costs of a high school senior's placement in a private residential program. The parents failed to request special education services from the district, or put the district on notice, as required by the IDEA, that they wanted special education services for their son and intended to assess him for a private placement. Nor had the district previously provided special education services to the student. The student exhibited behavior and attentiveness problems throughout high school. After his grades fell from middle school, the parents and school administrators met often to discuss his progress and his needs. Although the parents worked with the student frequently at home to help him complete assignments, both parents and district administrators agreed that the student did not require special education services. At the beginning of his senior year, his parents withdrew him from high school and notified the school that he would be attending a community college. He was assessed privately and found to have combined ADD, depression, learning disabilities, and substance abuse issues. The assessment recommended he attend a private residential school to address those issues. After enrolling him, the parents requested a due process hearing from the district. The district evaluated the student and determined that the student did not require special education services. The court concluded that "the need for special education services was not so obvious in this case that the general exercise of equity would override the statutory requirement for tuition reimbursement." The student's academic performance was similar to many other students at Forest Grove, it noted. And it determined the real reason the parents enrolled him in the residential school was in order to address his drug use.

H. *People v. Gustavo S.*, 41 IDELR 153 (Cal. Ct. App. 2004). The juvenile court failed to consider or determine whether a minor needed special education when it placed him in a group home. In an unpublished opinion, the state appellate court explained the juvenile court should have suspected the minor had exceptional needs based on a psychological evaluation indicating he might be borderline mentally retarded, had severe depression, and exhibited ADHD-like symptoms. The juvenile court had the obligation under the version of the state's court rule then in effect to consider the educational needs of the child when declaring him a ward of the court. It was required to make a preliminary assessment whether the minor might have special education needs and, if appropriate, order an evaluation to determine if such needs actually existed. The court refused to conclude the minor waived such duty by failing to object to the juvenile court's omission, noting that the obligation of the court under the former rule could not be waived. According to the reviewing court, the duty under the former rule "did not involve the court's discretionary sentencing choices." It

ordered the juvenile court to determine whether an evaluation was needed and to forward its findings to the institution where the minor was committed.

I. *C.J. v. Indian River County Sch. Bd.*, 41 IDELR 120 (11th Cir. 2004). The student, diagnosed with bipolar disorder and ODD, was ineligible for special education services because she did not “require special education or related services to benefit from her education or to enable her access to the general curriculum.” The 11th Circuit concluded, in an unpublished decision, that because the student had a “strong academic record” and “successfully progressed from grade to grade,” her behaviors did not interfere with her ability to learn. While the court recognized that a student with good academic performance “could have behavioral problems that rise to a level where they interfered with her learning process or educational performance,” this student’s behavioral problems did not. The district evaluated the student in seventh grade following a recommendation for expulsion. It determined that her behavioral problems were insufficient for special education services. Before the district made an expulsion decision, her parents withdrew her and provided home schooling. But because the student’s behavior continued to deteriorate at home, she was involuntarily committed to a psychiatric hospital, where she was diagnosed with bipolar disorder and ODD. The student began eighth grade at a district school, where neither her performance nor her behavior was problematic. Her parents sought another eligibility determination, which the district denied. Her parents withdrew her from the district, placed her in an out-of-state residential program, and sought due process. The court also determined the student’s due process rights weren’t violated by the district’s refusal to reevaluate her special education eligibility seven months after its initial determination. The court concluded a review of the initial evaluation and consultation with the student’s current teachers “provided a rational basis” for denying the reevaluation.

J. *In re: Angela M.*, 40 IDELR 15 (Cal. Ct. App. 2003). The state appeals court, in an unpublished decision, ordered a juvenile court to determine whether a teenager should be evaluated for special education before committing her to a juvenile facility. It pointed out that both the IDEA and state statutes provided for special education to qualified children. And court rules required the juvenile court to implement FAPE by considering whether a child had special educational needs, before committing the child to a juvenile facility. The juvenile court ordered the child committed to a juvenile facility after she violated her probation. A court-appointed psychologist recommended the teenager undergo an IEP assessment, concluding that her drug abuse may be a means to self-medicate possible bipolar disorder or ADHD. Despite being on notice, the juvenile court failed to address the child’s special education needs.

K. *Lincoln County Sch. Dist. v. A.A.*, 39 IDELR 185 (D. Or. 2003). The district sought reversal of an administrative decision that it failed to timely evaluate the student in compliance with the IDEA, and awarding tuition reimbursement to the parents for the unilateral placement of their son in a substance abuse program and then residential facility. The court rejected most of the district’s arguments and

upheld the majority of the IHO's findings and conclusions. The 16-year-old student had a history of anorexia nervosa of which the district was aware. It provided Section 504 services, but did not evaluate the student at that time as required by Section 504. Nor did it inform the parents about IDEA services, procedures or IEPs. "Had [it] conducted an evaluation, ... "it would more likely than not have ascertained [the student's] status as a child with [an IDEA qualifying] disability," the court noted. The student's condition worsened during the school year and a counselor overheard him tell other students he "thought it would be more humane to kill his parents with a gun, rather than a machete." Upon inquiry about alternative placements and services, the district informed the parents that nothing was available at that time and still did not evaluate the student. Eventually, the parents moved their son into a substance abuse program and then to a residential facility. The court concluded the district's argument that the parents failed to provide it with information suggesting a disability was without merit, since the district "failed to follow child find and evaluation procedures by which [it] would have obtained such information."

L. *Adam J. v. Keller Ind. Sch. Dist.*, 39 IDELR 1 (5th Cir. 2003). Although the 5th Circuit acknowledged the student continued to exhibit severe behavioral problems, it upheld the District Court's conclusion that his IEP was reasonably calculated to enable him to achieve educational benefit. The student's behavior difficulties appeared to improve somewhat after he returned from an IAES and began working with the personal aide. The parents also contended the district failed to provide their son with an IEP that considered his unique needs, claiming that his special education classes were not sufficiently challenging given his status as a gifted student. But they were unable to refute the lower court's finding that the student made progress while attending the district's high school. Finally, the 5th Circuit concluded that even if the student's 2000 IEP was procedurally deficient in some respects, there was no indication that any such defects resulted in a loss of educational opportunity or infringed upon the parents' opportunity to participate in the IEP process. The student's mother attended every meeting and the parents frequently submitted supplemental statements expressing their concerns and frustrations.

M. *S.C. v. Deptford Twnshp Bd. of Education*, 38 IDELR 212 (D.N.J. 2003). Because the child's maladaptive behaviors were increasing and he was regressing academically in his day program, his parents asked the district to place him in a residential setting with appropriate behavioral controls. The district believed a residential placement was not necessary for primary educational purposes. The court disagreed, finding the student demonstrated potential for academic advancement, but only with full-time behavior modifications. His behavioral problems in his current setting negatively impacted, and in some cases precluded, his ability to participate in activities that were well within his mental and physical capabilities. Testimony indicated that without a residential placement the child would be "totally uncontrollable in two or three years." The New Jersey ED, as well as the state Department of Developmental Disabilities, sought dismissal from the case on 11th Amendment immunity grounds. The court granted dismissal to the DDD because it did not receive IDEA funding, but it stated its decision did not alter the ED's

obligation to the student. It said that as long as the child received FAPE, it did not matter “which agency is footing the district’s bill.”

N. *N.L. v. Knox County Schools*, 38 IDELR 62 (6th Cir. 2003). The 6th Circuit found no harm to the parent resulted from the discussion between the various district experts concerning the child’s assessment report. Although the parent was not present when those discussions took place, she took an active role in the IEP meeting, at which the final determination of eligibility was made. The parent argued that the contacts between school officials and the assessment team’s report were a premature determination of eligibility. The court acknowledged that the IDEA’s regulations prohibit districts from forcing a completed IEP upon the parents. However, it added that evaluators may prepare reports and come to the meeting with opinions regarding the best course of action for the child, “as long as they are willing to listen to the parents and the parents have the opportunity to make objections and suggestions.” The district also acted appropriately when it relied upon the evaluations and findings of the IEP team to conclude the student was not eligible for Section 504 services, the 6th Circuit ruled. It returned the case to the lower court for a decision on the merits of the ineligibility determinations under both the IDEA and Section 504.

O. *S.W. v. Holbrook Public Schools*, 37 IDELR 216 (D. Mass. 2002). At the time the district expelled the student, it appeared to know she had failed all of her classes the previous year and took medication at home for her ADD. The parents’ complaint also suggested their child’s teachers might have discussed their opinions about whether she demonstrated a need for special education services. Drawing all inference in the parents’ favor, the court ruled they adequately alleged a violation of the child’s stay-put rights. Accordingly, they were allowed to challenge the expulsion decision by demonstrating the district had knowledge of the student’s possible disability at the time it decided to discipline her for allegedly furnishing drugs to another student. The district argued its evaluation team had already determined the student did not have an LD, but that conclusion was the subject of an appeal in a pending separate proceeding. Since the no-disability determination was not final, the student’s stay-put rights were not necessarily extinguished, the court stated. The district also contended the student’s recent admission to school made the parents’ claim moot because there was no longer a need for an injunction returning her to class. The court disagreed, noting it was not yet clear whether the parents might be entitled to some other form of relief for any stay-put violation. The court dismissed the parents’ claims for violations of the Rehabilitation Act and constitutional due process.

P. *Katherine S. v. Umbach*, 36 IDELR 63 (M.D. Ala. 2002). The court concluded that the student’s emotional and behavioral problems did not rise to the level of requiring special education. It noted that the fact the student was unsuccessful in a home school setting after leaving the district did not mean that she could not have accessed and benefited from general education, especially given evidence regarding her conflicts with her family. The court also observed the student did not receive special education at her private school, yet was able to make academic progress and graduate successfully. The parent’s Section 1983 due process and equal protection claims

against school administrators stemming from the student's rape failed because of qualified immunity provisions. The officials were acting within their discretionary authority at all relevant times and there was no evidence they violated any law.

Q. *Austin Ind. Sch. Dist. v. Robert M.*, 35 IDELR 182 (W.D. Tex. 2001). The district's gifted curriculum made FAPE available to the student, offering a program reasonably calculated to confer an educational benefit. The court concluded the responsibility for the student's lack of success in the program could not be attributed to the district, commenting that "schools are not required to force or motivate students to take advantage of the education they offer - this is the parents' role." It added that the case represented an example of a circumstance in which blame for failures is placed on the most convenient, rather than the most deserving, party. The court vacated an impartial hearing officer's reimbursement award, stating that it could not fathom how the IHO's finding of fact supported her conclusions of law.

R. *Maricus W. v. Lanett City Bd. of Education*, 34 IDELR 233 (M.D. Ala. 2001). An impartial hearing officer correctly concluded that a high school student did not meet Alabama's criteria as a student with ED, the court determined. Accordingly, the district did not have to provide the special education services requested by the student's foster parent. Only two of the five teachers who completed a calibrated survey concluded the student exhibited ED characteristics. Several other teachers noted that the student often acted appropriately. State law afforded the IHO with discretion in weighing the probative value of all evidence presented at the DP hearing. After the district transferred the student to an alternative school for 45 days based on a series of disciplinary referrals, the foster parent asked that the student be tested for special education services under the criteria for ED. The district concluded the student was not eligible and an impartial hearing officer upheld that finding. The foster parent appealed the IHO's decision. The court ruled the IHO correctly determined that the student did not meet the state's criteria for ED eligibility. Only two of the five teachers who completed a calibrated survey concluded the student exhibited ED characteristics. Several other teachers noted that the student often acted appropriately. State law afforded the IHO with discretion in weighing the probative value of all evidence presented at the DP hearing, the court observed. It concluded the IHO did not abuse his discretion in determining the evidence presented by the foster parent lacked credibility.

S. *J.D. v. Pawlett Sch. Dist.*, 33 IDELR 34 (2d Cir. 2000). The 2d Circuit denied a gifted student's bid for special education services under the IDEA and state law, because despite an emotional/behavioral disability his exceptional academic performance showed that he did not need such services. The student performed above the mean in various subjects, and an IQ test placed him in the top 2 percent of his age group. The parents could not point to at least two performance measures that indicated an adverse effect. Similarly, the parents were not entitled to tuition reimbursement even though the student was entitled to Section 504 accommodations. The IEP proposed by the district addressed the major recommendations of the student's psychologist, and offered individual counseling and peer relationship skills

training. The parents of a gifted student with emotional/behavioral disability sought reimbursement for the student's private school tuition and costs. The parents unilaterally placed the student in private school, after the district offered the student a program that they found unsatisfactory. The district prevailed at due process, and the District Court also ruled in the district's favor. The parents appealed. The 2nd U.S. Circuit Court of Appeals, examining the issue for the first time in the circuit, concluded that the boy's disability, though undisputed, did not have an adverse effect on his educational performance. The student performed above the mean in math and other basic subjects, and an IQ test placed him in the top 2 percent of his age group. His teachers also characterized his academic ability as outstanding. Since the parents could not point to at least two performance measures that indicated an adverse effect, the student was not eligible for services under the IDEA. Similarly, the parents were not entitled to tuition reimbursement under Section 504, based on their unilateral placement in a private school, even though the student was entitled to Section 504 accommodations. The IEP proposed by the district addressed the major recommendations of the student's psychologist, and offered individual counseling and peer relationship skills training. While the court sympathized with the parents' desire to provide the student with the best possible education, the district was not required to maximize the student's potential. The district's accommodations were reasonable and permitted "the same access to the benefits of a public education as all other students."

T. *Johnson v. Metro Davidson County Sch. System*, 33 IDELR 59 (M.D. Tenn. 2000). The District Court allowed the parents of an 18-year-old student with emotional disturbance to offer more evidence at trial. The 6th Circuit applied "a fairly liberal standard for the admittance of evidence." The court chose to admit evidence regarding the student's alleged disability, including her medical and educational records, for the purpose of determining whether she was eligible under the IDEA at the time of the due process hearing. The evidence showed the student was eligible as emotionally disturbed. Other specialists' concerns also tended to support that finding. The court observed that the parents were also entitled to tuition reimbursement. The school district gave no indication that it was willing or able to provide the student with services. However, equity dictated that the parents were entitled to reimbursement only from the time that the district had the opportunity to evaluate the student. The parents of an 18-year-old student with emotional disturbance sought to admit additional evidence and tuition reimbursement for the student's private school education. The student had a history of behavioral problems and had been expelled from two private schools. It was while the student was attending the second of those schools that the parents requested special education services from the district. After evaluating the student, the district found the student ineligible for special education services, and an administrative law judge found in favor of the district. The parents then initiated an action in District Court. The court noted that the 6th U.S. Circuit Court of Appeals applies "a fairly liberal standard for the admittance of evidence to the extent that it sheds light on the reasonableness of the original decision, but not if the evidence brings up new issues." The court chose to admit evidence regarding the student's alleged disability, including her medical and educational records, for the purpose of determining whether she was eligible for services under the IDEA at the

time of the due process hearing. The evidence, especially the testimony of one physician, showed the student was eligible as emotionally disturbed. While other specialists did not directly arrive at the same conclusion, their concerns also tended to support that finding. The parents were also entitled to tuition reimbursement because the student's private school education provided her with small class sizes, a structured environment, and individual attention. Equity dictated that the parents were entitled to reimbursement only from the time that the district had the opportunity to evaluate the student.

U. Babb v. Knox County Schools, 18 IDELR 1030, 965 F.2d 104 (6th Cir. 1992). Special education costs arising out of a psychiatric hospitalization are not excludable medical expenses, and are reimbursable to the parents, if the hospitalization is determined to be an appropriate educational placement. Accordingly, the court of appeals reversed the district court's decision to deny reimbursement for any portion of the psychiatric hospitalization of a student who should have been identified as seriously emotionally disturbed prior to his expulsion from school, and remanded the case for further proceedings on the issue of the actual expenses to be reimbursed. The parents of a teenager who had exhibited academic difficulties and behavioral problems at school since the age of four appealed a district court ruling that they were not entitled to reimbursement for the student's psychiatric hospitalization. The parents unilaterally hospitalized their son prior to his expulsion from school. A hearing officer initially held that the parents were not entitled to reimbursement because they had failed to present sufficient proof of the educational portion of their out-of-pocket expenditures. The district court affirmed the administrative decision on the grounds that the parents failed to exhaust their administrative remedies on the issue of whether the student was entitled to special education services under the IDEA, and that the parents had placed the student at the psychiatric hospital for primarily medical reasons. The court of appeals found the evidence to be convincing that the student was seriously emotionally disturbed and entitled to FAPE at the time of his hospitalization. Consequently, the school district violated the procedural requirements of the IDEA by failing to identify the student as SED and by failing to develop and implement an appropriate program for the student. Moreover, in comparing the student's unilateral placement at the psychiatric hospital to the prospect of his expulsion, the hospitalization constituted an appropriate placement, despite its restrictive setting. Finally, in light of two prior cases regarding similar reimbursement issues, the court of appeals reiterated that special education costs arising out of a psychiatric hospitalization are not excludable medical expenses, and are reimbursable to the parents, if the hospitalization is determined to be an appropriate educational placement. Accordingly, the district court's decision was reversed, and the case was remanded for further proceedings on the issue of the actual expenses to be reimbursed to the parents.

V. P.J. v. Eagle-Union Comm. Sch. Corp., 31 IDELR 108 (7th Cir. 1999). The suit alleged that the school failed to identify a student as having a serious emotional disturbance requiring special education and related services under the IDEA and state regulations. Beginning in eighth grade, after his transfer from a private school, school

officials repeatedly asked the student's mother for permission to evaluate him for special education services based on his poor performance and interactivity problems with other students. However, she declined to consent based on concerns over confidentiality and being negatively labeled that would impair his chances of re-admission to private school. Though she also would not share his medical records with the school, she informed officials that his pediatric neurologist concluded that he was not learning disabled. As a result, the school implemented a general education intervention plan for him as a student experiencing educational difficulties, but not yet eligible for special education services. In high school, where he continued to perform poorly, the parent again rebuffed efforts by school staff to evaluate the student as someone who might be eligible for special education services. After he was repeatedly tardy to a math class because he played basketball during his lunch period, school officials withdrew him from the class. His mother then claimed he had a disability, gave her consent for an evaluation, and said she would provide the school with his medical records. She subsequently refused to sign the evaluation consent form or to provide the medical records. The parent then filed for due process alleging that the school failed to identify the student as someone in need of services and that it violated the IDEA and Rehabilitation Act by withdrawing him from class and dropping him from the basketball team.

A hearing officer found in favor of the school, concluding that it had made every effort to assist the student and obtain his parents' permission to evaluate him. After the state board of special education appeals affirmed the decision, the student filed suit in federal District Court and the parties filed cross-motions for summary judgment. The District Court entered judgment in favor of the school. The District Court's conclusion that the evidence supported the hearing officer's and board of appeals' decision that the school had not failed to identify the student as in need of special education services was not clearly erroneous. The record offered support for his improved performance, his own neurologist's diagnosis that he was not learning disabled, and his parent's failure to accept extra services offered by the school. Nor did state regulation require the school to proceed in evaluating the student without parental consent. The school was not required to seek authority to evaluate him based on the parents' opposition to such an evaluation. The school did not deny the student due process rights under the IDEA by withdrawing him from a class and cutting him from the basketball team. The Circuit Court concurred that there was sufficient evidence to show that the district took both actions based on nondiscriminatory reasons.

W. Sylvie M. v. Dripping Springs Ind. Sch. Dist., 31 IDELR 28 (W.D. Tex. 1999). The District Court denied the parents' request for reimbursement for the student's placement at a private residential special education school in Maine. The student was diagnosed as learning disabled in sixth grade when she began receiving special education services. She was later diagnosed with ADD and classified as seriously emotionally disturbed. Using a four-factor analysis derived from the IDEA's federal implementing regulations, the Court concluded the IEPs in effect at the time the student was removed from school were reasonably calculated to provide her with a

meaningful educational benefit and FAPE. Further, the private residential school was not the LRE. The program was individualized on the basis of her assessment and performance; it was administered in the LRE; the services were provided in a coordinated and collaborative manner by the school and her parents; and both positive academic and nonacademic benefits were demonstrated by her placement in the district's school. Despite failing grades in some classes in the district school, her achievement tests stayed at grade level or higher except for math. There was evidence that the academic standards at the private school were somewhat lower and class hours were fewer. Also, there was no homework required at the private school. All that a school is required to do is ensure that its students are receiving educational benefit and no more is required. The parent alleged that the district should pay for the student's placement at a private residential special education school in Maine. The district contended that it offered the student FAPE under the IDEA and should not be obligated to pay for the parent's unilateral transfer and placement. The student was diagnosed as learning disabled in sixth grade when she began receiving special education services. She was later diagnosed with ADD and classified as seriously emotionally disturbed. In preparation for the due process hearing, the student was evaluated and, except for a learning disability in math, was found to be at or above grade level in every subject with a high IQ. The psychologists agreed that her primary need was for counseling. The hearing officer found that the district's IEP was inadequate because it failed to recognize or consider her emotional disturbance. However, the hearing officer further found the private placement was not the LRE and therefore inappropriate.

The parent argued that the student's far higher grades in the private placement showed that it was the correct and appropriate setting. The District Court concluded the IEPs in effect at the time the student was removed from school were reasonably calculated to provide her with a meaningful educational benefit. Further, the private residential school was not the LRE. The district's program was individualized on the basis of her assessment and performance; it was administered in the LRE; the services were provided in a coordinated and collaborative manner by the school and her parents; and both positive academic and nonacademic benefits were demonstrated by her placement in the district's school. Despite failing grades in some classes in the district school, her achievement tests stayed at grade level or higher except for math. There was evidence that the academic standards at the private school were somewhat lower and class hours were less. Also, there was no homework required at the private school. The district had available multiple settings which were less restrictive than the private school. The residential treatment was for personal, not educational needs. All that a school is required to do is ensure that its students are receiving educational benefit and no more is required. As such, the student's IEP provided FAPE in the LRE and the Court entered judgment in favor of the district.

X. *Hoffman v. East Troy Comm. Sch. Dist.*, 29 IDELR 1074 (E.D. Wis. 1999). The parents of a high school student filed a request for a due process hearing alleging that the student should have been evaluated for special education and identified as being eligible for special education. The parents sought reimbursement for the costs of a

private residential program they unilaterally placed the student in. The hearing officer found for the parents on all counts. On appeal, a review officer reversed, finding that the student's behavior, falling asleep in class and poor classroom performance, was insufficient to indicate to the district that he had an emotional disturbance. Even though the review officer recognized that the teachers at the student's school had inadequate training in ED and insufficient information about special education, she still found that his behavior was not suspicious enough to cause a reasonably prudent person to suspect that the student required a special education evaluation. Since there was insufficient evidence to support a finding that the student was disabled, the review officer determined that he was not eligible for special education. Therefore, the parents were not entitled to reimbursement for the costs of the private program. The parents appealed to court. Both parties filed motions for summary judgment.

The court upheld the review officer's decision, agreeing with the conclusion that the district had no reason to evaluate the student. The student's behavior was not serious enough to warrant a referral for special education, and the district took other steps to address the student's behavior. After a discussion with the guidance counselor, the student's grades improved, and he passed all but one of his classes. The district was unaware of the student's out-of-school misconduct, and the parents did not provide the district with any information regarding the student's private therapy. The district took various measures to address the student's problems without referring him to special education, which was a legitimate or even the preferred, course of action under the circumstances. In examining the other alleged procedural violations, the court determined the parents were never told about the special education referral and evaluation procedures. Although this resulted in a procedural error, the error did not result in the denial of a FAPE, because the parents only requested the evaluation after they unilaterally placed the student. The request was based on the parents' desire to obtain reimbursement for the costs of the unilateral placement. The court reversed the review officer's determination that the failure to complete the evaluation resulted in a procedural violation. The district attempted to complete the evaluation, but was unsuccessful, through no fault of its own. Once the student voluntarily withdrew from the private school upon reaching the age of majority, the district's obligation to evaluate him ended. Based on these findings, the court concluded the parents were not entitled to reimbursement for the costs of the unilateral placement. The district's motion for summary judgment was granted.

Y. Seattle Sch. Dist. No. 1 v. B.S., 24 IDELR 68 (9th Cir. 1996). At due process, an administrative law judge concluded a school district denied a FAPE to a student with various emotional and behavioral disabilities including an attachment disorder, an oppositional defiant disorder, a conduct disorder, and a histrionic personality, and ordered the district to reimburse the student's parent for the costs of an independent educational evaluation and to pay for the student's placement at a residential children's home. The school district appealed to a federal district court, which affirmed the ALJ's decision and awarded the parent attorney's fees and costs. The school district appealed to a circuit court, alleging its evaluation and proposed placement in a day class were appropriate. The circuit court concluded the district's

evaluation was inappropriate in that the evaluation team did not include anyone who was familiar with the student's disorders, and failed to consider the recommendations of several of the student's doctors that a residential placement was appropriate. Since the parent did not concur with the district's evaluation and the district did not demonstrate its evaluation was appropriate, the court concluded the parent was entitled to reimbursement for the IEE she had arranged. In examining whether the district's proposed day placement was appropriate, the court determined the student was not receiving an educational benefit from her placement in the district, as she was regressing. Nor was she experiencing nonacademic benefits in that placement — she had been expelled by the district and was seriously disrupting the class. The court credited the testimony of the student's medical experts that a residential placement was the most appropriate placement. Additionally, the court noted that during the course of the proceedings, the student had started the proposed residential placement and was making progress. In rejecting the district's argument that it should not have to pay for the student's residential program because the program was of a "medical" nature, the court stated that the program was an accredited educational institution. Since the district's proposed placement was inappropriate and the residential program was appropriate, the court affirmed the district court's decision requiring the district to pay for the student's nonmedical costs at the residential placement. The circuit court also upheld the district court's award of attorney's fees since the district did not provide any evidence that the award was invalid. Thus, the district court's decision was affirmed in its entirety.

Z. *Bloomfield Bd. of Education v. S.C.*, 44 IDELR 128 (D.N.J. 2005). A 13-year-old student with a history of threatening other students and verbally and physically attacking others was denied FAPE by his district, a court decided. Despite the student's continuing deterioration in behavior, the district offered only an alternative day school for placement. At a subsequent due process hearing, four psychologists testified that the student required residential placement that included long-term psychiatric care and intensive individual and group psychotherapy. The court agreed with the administrative law judge that residential placement was necessary and appropriate for educational purposes. The district's attempt to join the state as a party in an effort to require it to pay some of the placement costs failed. The court, citing a recent 3d Circuit decision, held that districts have no private right of action under the IDEA against states. Although the court found in favor of the parent on the issue of liability for the costs associated with the placement, it denied her request for sanctions against the district. Because "extraordinarily difficult problems" arise in determining how to manage "a person as psychologically damaged" as the student, the court said the district "cannot be faulted for advancing its position."

AA. *A.W. v. Fairfax County Sch. Bd.*, 41 IDELR 119 (4th Cir. 2004). The district did not violate a gifted student's stay-put by transferring him to a gifted program in a nearby school, where he continued to receive one-hour weekly special education. The student had another student place a threatening note in a student's computer file in order to scare the targeted student from school. The district conducted a manifestation determination review and concluded his emotional disability did not affect his

misconduct. The court rejected his parents' argument that "educational placement" under the IDEA's stay-put provision required the student stay in his originally assigned classroom. It stated that: "To the extent that a new setting replicates the educational program contemplated by the student's original assignment and is consistent with the principles of 'mainstreaming' and affording access to FAPE, the goal of protecting the student's 'educational' placement' served by the 'stay-put' provision appears to be met." In contrast, the court explained where a location change "results in a dilution of the quality of a student's education or a departure of the student's LRE-compliant setting, a change in 'educational placement' occurs." It also concluded the MDR conclusion was appropriate. While the student's ADHD was a factor relevant to the student's emotional disability, the ADHD did not figure into the threatening letter. He was aware and anticipated the consequences of sending the message as evidenced by his enlisting another student to actually place the message. The student's conduct "indicated forethought and investigation, as he had to figure out a way to gain access to his target's personal folder."

IV. WHAT ARE THE COURTS SAYING ABOUT ADD, ADHD AND SOCIAL MALADJUSTMENT?

A. *Babb v. Hamilton County Bd. of Education*, 42 IDELR 9 (Tenn. Ct. App. 2004). The state appeals court ruled the district properly followed the IDEA's stay-put provision over its own zero-tolerance policy when, pending the outcome of his manifestation determination review, it placed the second-grade student with a specific-learning disability and suspected ADHD back in the classroom of the teacher he assaulted. Until the conclusion of the manifestation determination review, the student was to remain in his current educational placement. The student struck his teacher in the face and immediately received a 10-day suspension. At the same time, the district immediately began preparations to expel him in accordance with its zero-tolerance policy. However, the district first conducted a manifestation determination review because, though the student had a history of socially aggressive behavior and was suspected of having ADHD, he had inconsistent test results and had not been officially diagnosed with a disability. At the meeting the team closed his SLD case and noted he did not meet the standards for any disability, but also reopened his case for the suspected ADHD disability. No determination was made at that time. Following the 10-day suspension, the student returned to the same classroom with the same teacher he had assaulted. That same day, he hit his teacher again and also hit the classroom aide. The teacher brought suit against the district and alleged it acted negligently when, following the first assault, it re-placed the student in her classroom. The district defended on grounds it took action in conformity with the IDEA's stay-put provision. The court agreed with the district. It found the district's decision to re-place the student in the teacher's classroom was required under stay-put. Though the team closed his case with regard to SLD, the manifestation determination review was pending due to the team's suspicions the student had ADHD. During the time the manifestation determination review was being conducted, the district was obligated to keep the student in his then current educational placement.

B. *Mars Area Sch. Dist. v. Laurie L.*, 39 IDELR 96 (Pa. Commw. Ct. 2003). The district appealed the review panel's decision that it had to reevaluate the 15-year-old student, whom it had previously identified as other health impaired due to ADHD and ODD, and then determined was socially maladjusted and was not OHI or ED. Because the evidence overwhelmingly supported the district's conclusion, including evidence that his behavior and actions had a specific purpose and goal, the review panel erroneously reversed the IHO's decision upholding the district's classification. The appeals panel also exceeded its authority by ordering the district to evaluate the student for OHI eligibility, on grounds the mother's original request for DP only raised the issue of whether the district had to reevaluate her son to assess whether he had ED. Because the mother did not meet the burden of proving her son was ED, there was no need for an additional evaluation, as the district had recently finished a very thorough battery of tests and assessments. Despite the district's conclusion that the student was ineligible for special education and the IHO's ruling, the student continued to receive services. Due to his escalating poor behavior and increased suspensions, the district placed him in a private facility.

C. *Edwin K. v. Jackson*, 37 IDELR 63 (N.D. Ill. 2002). The court found that "EBD" (emotional/behavioral disability) was the student's primary disability, disagreeing with the parents' claim the district should have attributed their son's behavioral problems to his ADHD. It also ruled the alternative school placement was proper. Several teachers testified the student exhibited passive/aggressive behavior, including defiance and disrespect for authority without a demonstration of physical aggressiveness. Evidence indicated the alternative school could address that type of behavior. A representative from the school indicated the student could be transitioned to another program focusing on his LD once the behavioral issues were addressed. Procedural flaws alleged by the parents, including lack of a BIP, inadequate IEP goals and an improper transition program, did not result in a denial of FAPE, the court determined. However, it ordered the district to include in its IEP the recommendations of the parents' independent evaluator, following an administrative finding that the district failed to identify the specific LDs identified by the IEE. The court awarded the parents reimbursement for their IEE, ordered the district to pay for the student's auditory processing testing, and granted the student eight months of compensatory social work services.

D. *J.S. v. Shoreline Sch. Dist.*, 37 IDELR 253 (W.D. Wash. 2002). Denying reimbursement for a unilateral residential placement, the court determined that, despite previous FAPE denials, the student was receiving FAPE at the time his parents removed him from school near the end of eighth grade. During that year, the district fully evaluated the student in all areas of his suspected disability. Although the parents claimed their son should have been tested for ODD, all observable symptoms in the classroom were logically explained by the ADHD diagnosis and accompanying evaluation. The district also developed an appropriate IEP, which addressed the importance of finishing assignments and provided the student with the necessary organizational tools to do so. Additionally, it committed no procedural violations that would have denied the student FAPE. Under state law, the student was

no longer a resident of the district when his parents enrolled him in the out-of-state residential facility, and, therefore, the district's obligations under the IDEA terminated, including its duty to develop and maintain an IEP.

E. *Colvin v. Lowndes County Sch. Dist.*, 32 IDELR 32 (N.D. Miss. 2000). A U.S. District Court found that a district failed to evaluate a 12-year-old student diagnosed with ADD. While the parents did not show that the student had a disability and was subject to the stay-put provision, evidence established that they asked the district to evaluate the student. The parents stated that the student was diagnosed with ADD and was taking Ritalin. Teachers commented on his inability to concentrate and his poor academic performance. The district knew or should have known that the student had a suspected disability. The court accordingly ordered the district to evaluate the student if and when he was reinstated. The parents of a 12-year-old student with suspected ADD/ADHD claimed that the district violated the stay-put provision and the student's due process rights when it expelled him for possession of a Swiss-army knife. The student was not receiving special education when school officials charged him with possession of the knife on school grounds. Prior to the incident, the parents asked the district to evaluate the student for disability but it never did. The student admitted possession of the knife and turned it over to his teacher without incident. At the disciplinary hearing, the hearing officer found that the student had no serious prior disciplinary infractions and recommended a suspended one-year expulsion, with the student missing only one day of school. The district elected to enforce its zero-tolerance policy and imposed the full one-year expulsion. A U.S. District Court found that the district violated the IDEA and the student's due process rights. While the parents did not show that the student had a disability and was protected by the stay-put provision, the evidence established that they asked the district to evaluate the student. The parents stated on the student's enrollment application that he was diagnosed with ADD and was taking Ritalin. Teachers commented on his inability to concentrate and his poor academic performance. Therefore, the district knew or should have known that the student had a suspected disability. The court, accordingly, ordered the district to evaluate the student if and when he was reinstated. The district also failed to consider the specific circumstances of the case before it expelled the student. The district blindly applied its zero-tolerance policy without reviewing the facts of the case. The court remanded the case to the district for reconsideration of the appropriate penalty under the proper legal standard.

F. *Springer v. Fairfax County Sch. Bd.*, 27 IDELR 367 (4th Cir. 1998). The parents of a student who failed the 11th grade unilaterally placed him at a private school and requested the district fund the student's placement. According to the parents, the student qualified for special education due to a serious emotional disturbance. The district concluded the student did not have a SED and refused to fund the private placement. At due process, a level I hearing officer agreed with the parents, and granted the request for reimbursement. On appeal by the district, a level II hearing officer reversed. A district court upheld the level II decision and the parents appealed to circuit court. The circuit court agreed with the district court, finding the student did not meet the eligibility criteria for SED. The student's misbehavior, which included

truancy, drug use and theft, was not consistent with SED, it was consistent with his diagnosed social maladjustment. A diagnosis of social maladjustment alone does not qualify a student as SED. The circuit court noted that none of the psychologists who evaluated the student concluded he was SED, not even the parents' expert. The student maintained satisfactory relationships with teachers and peers, and did not manifest "pervasive" unhappiness or depression. Further, the student's educational difficulties were the result of his misbehavior, not a SED. Accordingly, the student was not eligible for special education and the district was not required to reimburse the parents for the costs of the unilateral private placement. The parents' objection to the district court's refusal to admit the testimony of a certain expert witness was rejected by the circuit court. There was no evidence this witness was unable to testify at the administrative proceedings, and the witness was not going to furnish new evidence. The district court decision was upheld.

V. MANIFESTATION DETERMINATIONS AND THE CAUSAL CONNECTION?

A. *Lancaster Elementary Sch. Dist.*, 49 IDELR 53 (SEA CA 2007). An administrative law judge rejected a parent's argument that frustration with schoolwork led her son to bring marijuana and tobacco to school. The ALJ agreed with the IEP team's determination that the possession of illegal drugs was not caused by, or related to, the boy's learning disability.

B. *Fulton County Sch. Dist.*, 49 IDELR 30 (SEA GA 2007). A school district improperly limited the scope of the manifestation determination by refusing to consider the effects of a student's oppositional defiant disorder on his threat to kill a teacher. The student's IEP listed his behavior as the main area of concern, and recorded "ODD" as the basis for his classification as "other health impaired."

C. *Traverse City Area Pub. Schs.*, 106 LRP 791 (SEA MI 2005). A ninth-grade student, who wrote several classmates' names on the bathroom wall stating that they would all die three days later, did not write the death threat as a result of his disabilities: OHI and learning disability. An IHO found that the district's manifestation determination review was appropriate and correctly determined that the student's actions were not a manifestation of his disability. Although his parent argued that the student's action was borne out of impulse, there was sufficient testimony by district personnel to show that the student planned the writing of the list by deciding to get a pass to the bathroom during class and included his own name on the list to deflect suspicion from him. And, he indicated he knew what the consequences of the action would be because he stated he could be suspended or even have charges filed against him.

D. *Selma City Bd. of Educ.*, 44 IDELR 105 (SEA AL 2005). A 12-year-old with ED, who had a behavioral intervention plan included in his IEP, was able to control his actions when he fought with a student after school. Therefore, the manifestation determination review that found the student's behavior was not a manifestation of his

disability was correct. His parent did not show that the student's disability affected his ability to distinguish right from wrong, nor did she show that his disability impaired his ability to restrain himself. The student acknowledged that his behavior was inappropriate, and he actively chose whom to fight with and whom to refrain from fighting with. Also, the student had not engaged in any fights since being placed in the alternative school. The IHO decided the district's determination was correct and its alternative school placement was appropriate as discipline.

E. *Miami-Dade County Sch. Dist.*, 44 IDELR 492 (SEA FL 2005). A sixth-grader with specific learning disabilities who responded in a defiant and disruptive manner when directed to stop passionately kissing a girl in the parking lot and to stop attempting to start a fight with a girl outside the school cafeteria, was appropriately suspended and placed in an alternative setting. The IHO determined that the district properly held a manifestation hearing and determined that the student's behavior was not a manifestation of his disability. And it was interfering with his ability to access his education. The alternative placement the district decided upon after due consideration was a smaller school with three administrators, smaller classes, more counseling resources and a better behavior management program.

F. *Tuscaloosa City Bd. of Educ.*, 44 IDELR 81 (SEA AL 2005). The student's act of starting a fire in his classroom was not a manifestation of his disability, the IHO ruled. The IHO determined that the district complied with the IDEA when, following the fire, it held a manifestation determination meeting. The student sprayed air freshener on an open cigarette lighter flame and created a fire in the classroom. During the manifestation determination hearing, the IEP committee determined that his IEP placement was appropriate, as was his special education aids and services. The committee also found that the behavior intervention strategies that were provided to him were consistent with his IEP and placement. Thus, the IHO determined that the committee appropriately reached the conclusion that his disability did not impair his ability to understand the impact and consequences of his behavior.

G. *Sacramento City Sch. Dist.*, 44 IDELR 101 (SEA CA 2005). A middle school student was improperly disciplined for behavior that may have been related to his ADHD, OCR found. The eighth-grader's teachers noted he had difficulty focusing, was very talkative and often off task. The parents disagreed with each other about whether the student had ADHD, but the district noted that the disorder was suspected. A clinical psychologist submitted a report to the district that the student had mild-to-moderate ADHD, but should be reevaluated. And, although the principal requested the counselor to set up a meeting to develop a Section 504 plan for the student, neither followed through. The student was suspended for pushing a teacher and was not allowed to attend a field trip. Thereafter, a Section 504 meeting was held, but because the team did not agree to its provisions, a plan was not developed. And, although the officer presiding over the student's discipline reviews took no further action after learning the student was in the 504 process, the district placed him on a behavior contract regardless. Because of failing several subjects, the student was not allowed to graduate with his class and was recommended for summer school, but was

removed after violating his behavior contract. At the beginning of his ninth-grade year, a 504 team met and, after learning that an evaluation confirmed his ADHD, recommended he be promoted to high school and placed on a 504 plan. OCR found the district should have suspected the student had a disability and evaluated him prior to disciplining him. The district agreed to determine whether it should remove the disciplinary actions from the student's record, train its staff on the requirements of Section 504, and determine whether compensatory educational services would be appropriate for the student.

VI. WHAT ARE THE EFFECTS OF THE 2004 REAUTHORIZATION OF THE IDEA ON DISCIPLINE FOR STUDENTS WITH EMOTIONAL DISTURBANCE OR SOCIAL MALADJUSTMENT?

A. *Letter to James*, 44 IDELR 256 (OSEP 2005). OSEP explained that IDEA 2004 provides districts more flexibility in disciplinary situations. Although many of their options are the same as under the previous version of the law, IDEA 2004 has expanded upon them. A district may remove a student with a disability for violating the code of student conduct to an appropriate interim alternative educational setting for no more than 10 school days at a time. But if the student has a weapon or drugs at school or at a school-sponsored function, the district may remove him to an alternative setting for up to 45 days without a due process hearing or manifestation determination review. New to IDEA 2004 is the additional 45-day removal authority in circumstances where a student has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the SEA or LEA. Further, if the district believes that maintaining a student in his current placement will result in injury to himself or others, it may request an expedited due process hearing to remove the student to an alternative setting for up to 45 days. After the 45 days are over, in either of the above circumstances, the district may make repeated requests for the hearing officer to maintain the student in the alternative setting. And at any time, the district may request a court order to remove the student from school or place him in another setting if his remaining in his current placement is substantially likely to result in injury to himself or others.

B. Discipline Rules Contained in IDEA 2004:

1. Authority of school personnel – School personnel may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, *for not more than 10 school days* (to the extent such alternatives are applied to children without disabilities). 20 USC 1415(k)(1)(B).

Note: The proposed regulations clarify that the 10 school days is either “10 consecutive school days” or “for additional removals of not more

than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement).” 34 CFR 300.530.

2. Case-by-case determination – School personnel may consider any unique circumstances on a case-by-case basis when disciplining a child with a disability. 20 USC 1415(k)(1)(A).

3. Additional authority – If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be either: (1) directly and substantially related to the child’s disability; or (2) a result of the school district’s failure to implement the IEP, *the relevant disciplinary procedures for nondisabled students may be applied to the child with a disability in the same manner and for the same duration as would be applied to a nondisabled child.*

Exception: The child with a disability who is removed for disciplinary reasons for more than 10 school days must be provided a “free appropriate public education” (although FAPE may be provided in an “interim alternative educational setting as determined by the IEP Team). 20 USC 1415(k)(1)(C); (k)(1)(H)(2).

4. Continuation of FAPE – A child with a disability who is removed from his/her educational setting for disciplinary reasons for more than 10 school days (or who is removed for 45 school days for weapons, drugs, or serious bodily injury) must continue to receive the services in his/her IEP and access to the general education curriculum. Such student must also receive, as appropriate, a *functional behavioral assessment* and *behavior intervention services and modifications* that are designed to address the behavior violation so that it does not recur. 20 USC 1415(k)(1)(D).

Note: The proposed regulations clarify that educational services must begin “after a child with a disability has been removed from his or her current placement for 10 school days in the same school year....” 300.530.

5. Manifestation determination – *Within 10 school days of any decision to change a child’s educational placement for disciplinary reasons for more than 10 school days*, the school district, the parent, and the relevant members of the IEP team shall review all relevant information in the student’s file, the IEP, any teacher observations, and other relevant information provided by the parent to determine:

- a. if the conduct in question was *caused by*, or had a *direct and substantial relationship to, the child's disability*; or
- b. if the conduct in question was the *direct result of the school district's failure to implement the IEP*.

If either (a) or (b) is applicable, the conduct shall be determined to be a manifestation of the child's disability. 20 USC 1415(k)(1)(E).

6. Determination that behavior was a manifestation – If the child's conduct was a manifestation of the disability, the IEP shall:

- a. Conduct a *functional behavior assessment*, and implement a *behavior intervention plan* (if no FBA had been done prior to the conduct);
- b. If a BIP had been developed prior to the conduct, *review and modify the existing BIP* as necessary to address the behavior; and
- c. *Return the child to his/her previous placement*, unless the school district and parents agree to a change of placement as part of the modification of the behavior plan. 20 USC 1415(k)(1)(F).

7. 45-day removal – School personnel may remove a child with a disability to an interim alternative educational setting (determined by the IEP team) for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child:

- a. Carries or possess a *weapon* at school, on school premises, or to or at a school function under the jurisdiction of the school district;
- b. Knowingly possesses or uses *illegal drugs*, or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function under the jurisdiction of the school district.
- c. Has inflicted *serious bodily injury* upon another person while at school, on school premises, or at a school function under the jurisdiction of the school district. 20 USC 1415(k)(1)(G); (k)(1)(H)(2).

Note: A “serious bodily injury” means “a serious risk of death; protracted loss or enjoyment of a bodily organ, member, or mental faculty; extreme physical pain.”

8. Notification of rights - On the day of a decision to take disciplinary action against a child with a disability, the school district must provide notification to the parents of all applicable procedural rights. 20 USC 1415(k)(1)(H).

9. Appeal – The parent of a child with a disability who disagrees with any decision regarding placement or manifestation, or a school district that believes that maintaining the current placement of a child is substantially likely to result in injury to the child or to others, may request a hearing. 20 USC 1415(k)(3)(A). The hearing officer may return the child to his/her previous placement, or order that the child be placed in an interim alternative educational setting for not more than 45 school days (if the hearing officer determines that maintaining the current placement is substantially likely to result in injury to the child or others). 20 USC 1415(k)(3)(B)(ii).

10. Placement during appeals – When an appeal is requested (above), ***the child shall remain in the interim alternative educational setting pending a final decision, or until the expiration of the time period for removal as ordered by school personnel, whichever occurs first***, unless the school district and the parents agree otherwise. The State shall arrange for an expedited hearing to occur ***within 20 school days*** of being requested, and shall result in a determination ***within 10 school days*** after the hearing. 20 USC 1415(k)(4).

11. Protections for children not yet eligible for services – ***Removes*** “behavior or performance demonstrates a need for services.” ***Adds*** “A local educational agency shall not be deemed to have knowledge that the child is a child with a disability ***if the parent of the child has not allowed an evaluation of the child ... or has refused services ...*** or the child has been evaluated and it was determined that the child was not a child with a disability ...” 20 USC 1415(k)(5)(C).