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# MANIFESTATION DETERMINATIONS UNDER THE IDEA: THE LATEST CASE LAW

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The central protection for disciplinary changes in placement under the Individuals with Disabilities Education Act (IDEA, 2014) is the requirement for a manifestation determination. School psychologists often play a key role in this team-based determination based on their specialized expertise and school-based experience.

The purpose of this article is to provide an updated empirical analysis of the most recent three years of hearings and review officer and court decisions specific to manifestation determinations. Like the predecessor analysis (Zirkel, 2016), the frequency and outcome tabulation differentiated the rulings within each case into two typical dimensions of legal issues—“procedural,” referring to such issues as

*who, how, and when, and “substantive,” referring to the ultimate *whether* or *what*.*

The legal framework consists of specific provisions in the successive IDEA amendments in 1997 and 2004 that refined the concept of manifestation determinations initially developed by case law during the prior period. These provisions established both procedural and substantive requirements that applied to a disciplinary change in placement, which generally is a removal for more than ten consecutive school days or a functionally equivalent period of cumulative days within a school year.

### **1997 Amendments**

Procedurally, IDEA 1997 required (a) the full individualized education program (IEP) team to (b) review evaluation and diagnostic results, observations of the child, the IEP and placement, parent input, and other relevant information within (c) 10 days of the decision for a disciplinary change in placement. Substantively, IDEA specified the standard for the team’s decision as a multi-factor test. The specified factors, or criteria, were whether, in relationship to the conduct in question, (a) the IEP and placement were appropriate and implemented, (b) the disability impaired the child’s ability to understand the consequences of the conduct, and (c) the disability impaired the child’s ability to control this behavior.

### **2004 Amendments**

The 2004 amendments of the IDEA revised the manifestation determination requirement in two significant ways. On the procedural side, IDEA 2004 reduced the minimum for *who* must conduct the manifestation determination from all the members of the IEP team to a school district representative, the parent, and other relevant IEP

team members “as determined by the parent and the [district]” and, less significantly and clearly, changed the scope of required information sources to “all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents” (IDEA, 2014, §1415[k][1][E][i]). On the substantive side, IDEA 2004 narrowed the focus to the following two more stringent alternatives (referred to herein as criterion #1 and criterion #2):

1. Whether the conduct “was caused by, or had a direct and substantial relationship to,” the student’s disability.
2. Whether the conduct was the direct result of the school district’s failure to implement the IEP (IDEA, 2014, §1415[k][1][E][i]).

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

### **Previous Research**

#### **Prior to 2004 Amendments**

The published research concerning the related case law was limited for the period prior to the 1997 amendments. The leading example was Zirkel’s (2006) brief tabular analysis of the manifestation determination cases published in the only national case law reporter series that includes hearing and review officer decisions, LRP Publications’ *Individuals with Disabilities*

Education Law Report (IDELR). He found 16 IDELR-published decisions between 1980 and 1997, including three at the judicial level, specifically addressing manifestation determinations. The majority (63%) of these decisions were in favor of the defendant district's determination of a lack of the requisite conduct-disability connection. The most frequently identified disability classification was specific learning disability (SLD), and the most common categories of conduct were drugs/alcohol or some form of violence.

The case law analyses were more numerous for the period between the 1997 and 2004 amendments. However, most of these analyses had limitations in case coverage or selection, largely attributable to being only incidentally empirical (e.g., Katsiyannis & Maag, 2001; Osborne & Russo's, 2005). In partial contrast, Zilz (2006) identified 99 "cases" between 1994 and 2003 (p. 200). However, his selection indiscriminately extended to 38 Office for Civil Rights letters of findings under Section 504, and his analysis failed to differentiate between those IDEA decisions arising before and after the 1997 amendments and between the procedural and substantive rulings.

Zirkel's aforementioned (2006) analysis extended to a separate canvassing of cases under IDEA 1997. However, although much more clear and comprehensive within its selection criteria, it was limited to rulings with respect to the new codified substantive criteria. Within this scope, he found 37 IDELR-published decisions, including three at the court level. The pronounced majority (78%) of these decisions were in favor of districts' determination of "no" manifestation. The most frequently identified disability classification was other health impairment (OHI), often based on a diagnosis of attention deficit disorder (ADD), and

the most common conduct was actual or threatened violence.

## After the 2004 Amendments

In the major systematic analysis of case law decided under IDEA 2004, Zirkel (2016) extended the scope to procedural as well as substantive rulings specific to manifestation determinations and to decisions only available electronically (i.e., those with "LRP" rather than "IDELR" citations, in SpecialEdConnection®). For the period ending on December 31, 2014, he found 86 relevant decisions, with only five (6%) being at the judicial level and with 20 (23%) including both procedural and substantive rulings.

Subcategorizing the procedural rulings into four groups, he found the following frequency distribution for the 38 cases with procedural rulings: information sources - 21; team membership - 15; timing - 4; and miscellaneous/other - 26 (with the most frequent being parental participation - 4, notice - 4, and additional diagnoses - 4). The adjudication was often a two-step analysis—(a) whether the district violated a procedural requirement, and, if so, (b) whether the violation(s) resulted in educational harm. The outcomes distribution for these 38 cases on a best-for-parent basis across the procedural rulings was 45% for districts and 55% for parents, with the most successful challenges being based on the failure to either consider additional diagnoses or provide sufficient parental participation. However, the remedial relief was generally limited, such as sending the case back for re-doing with correction(s) of the procedural violation(s), although these cases presented the potential for recovery of attorneys' fees.

For the 68 cases with substantive rulings, all addressed criterion #1 (i.e., causal relationship with child's disability), and 18 additionally but only



secondarily addressed criterion #2 (i.e., causal relationship with IEP non-implementation). The most frequently identified IDEA classifications were OHI (n=23), SLD (n=23), and emotional disturbance (ED, n=13), with ADD being the underlying diagnosis in 68% of the cases with substantive rulings. The most common conduct in question was actual or threatened violence. The outcomes distribution for these 68 cases, again on a best-for-parent basis across both substantive criteria, was 75% for districts and 25% for parents. The analyses for the substantive rulings were generally rather cursory, but the predominant decisional factors included the following, usually on a district-deferential basis and each stated here first in the direction of an adjudicative ruling in favor of the school district's "no" manifestation determination: (a) whether the behavior at issue was premeditated or impulsive, where impulsivity is symptomatic of the child's disability, (b) whether the behavior at issue was specific to the child's disability or stereotypic of the disability without customization to the

individual child, and (c) whether the expert witness was the school psychologist or a private practitioner.

### **Search/Selection Method**

The purpose of this analysis is to examine the most recent three years (January 1, 2015 to December 31, 2017) of case law to determine the current pattern in relation to the previous frequency and outcomes trend under the IDEA 2004 procedural and substantive requirements for manifestation determinations.

Consistent with the predecessor analysis (Zirkel, 2016), the primary database was LRP's electronic database, SpecialEdConnection®, with a supplemental judicial search in Westlaw. The selection criteria also were the same, resulting in exclusions for the following marginal or otherwise related categories: (a) manifestation cases resolved on threshold adjudicative issues, such as exhaustion (e.g., *Molina v. Board of Education*,

2015); (b) manifestation determination cases based on Section 504 (e.g., *Doe v. Osseo Area School District*, 2017); (c) cases concerning the prerequisite of a disciplinary change in placement (e.g., *Jay F. v. William S. Hart Union High School District*, 2017; *Pocono Mountain School District*, 2016); (d) cases concerning whether the student qualified for “deemed to know” coverage (e.g., *Artichoker v. Todd County School District*, 2016; *Chippewa Local School District*, 2017); (e) cases concerning related requirements, such as interim alternate education settings (e.g., *Edmonds School District*, 2016) and FBAs-BIPs (e.g., *District of Columbia Public Schools*, 2016; *N.G. v. Tehachapi Unified School District*, 2017); and (f) complaint investigation decisions by state education agencies (e.g., *Mobridge Pollock School District*, 2016) or the Office for Civil Rights (e.g., *Noah Webster Basic School*, 2015). Similarly, consistent with the prior analysis, the respective subcategories for the relevant rulings within the selected cases were the abovementioned two substantive criteria and the following procedural subcategories: (a) team (e.g., district representative and parent), (b) information sources (e.g., relevant information from the parents); (c) timing (within 10 days); and (d) other (e.g., notices).

### Specific Findings

The total number of pertinent cases for the three-year period was 46, which included only three court decisions. Moreover, nine of the cases contained both procedural and substantive rulings.

Slightly less than half of the cases (n=21) contained procedural rulings, averaging approximately 1.5 per case within the constituent categories. The frequency distribution of the 33 procedural rulings was as follows: team members - 6; information sources - 8; timing - 3; and other -

14 (especially notice violations - 8). The outcomes distribution of the 21 cases, on a best-for-parent basis across procedural rulings, was 43% for districts and 57% for parents. Although widely dispersed and often subject to a two-step harmless-error analysis, the most common reasons for district losses were failure to provide timely notices, insufficient parental participation, and lack of complete information and thorough consideration. The remedies in the majority of the district losses extended to expungement, reinstatement, functional behavior assessment-behavior intervention plan (FBA-BIP), and/or compensatory education.

The only court decision in the procedural category upheld the hearing officer’s ruling in favor of the parent in light of two types of procedural violations. The first type was the lack of meaningful discussion based on (a) the meeting chair’s filling out the manifestation determination form with “no” answers to the two criteria before the meeting and using those conclusion as the framework for the discussion, and (b) the conduct in question and the child’s ADD-based disability classification on a global rather than a specific basis. The second type was the lack of timeliness in the notice to the parents and the scheduling of the hearing. The court also upheld the hearing officer’s respective remedies of a new, corrected manifestation determination meeting and compensatory education for each day of removal beyond the ten-day period specified in the IDEA. Additionally, the court ordered the district to pay the attorneys’ fees of the parents because they were the prevailing party (*Bristol Township School District v. Z.B.*, 2016).

For the 34 cases that contained substantive rulings, all addressed criterion #1, and 10 also addressed criterion #2, although usually on a secondary basis. The most common IDEA

classifications were OHI (n=20) and ED (n=9), often in combination and/or based on ADD. The conduct at issue in the overwhelming majority of the cases was actual or threatened violence. The adjudicative analysis was often rather cursory, without the nuances of new causal language or citation to the applicable legislative history, regulatory commentary, or court decisions. The overall outcomes ratio for these 34 cases was 35% for districts and 65% for parents, although more than half of the decisions for parents were from one jurisdiction, the District of Columbia. The most frequent decisional factors included the school psychologist's testimony, credibility of other witnesses, the role of impulsivity, and the legal concepts of judicial deference and burden of proof. Finally, the remedial orders were often limited, but in some cases included compensatory education and/or a FBA-BIP.

The only two court decisions with substantive rulings illustrated the rather perfunctory and diverse analyses. In *Z.H. v. Lewisville Independent School District* (2016), a federal district court in Texas reversed the hearing officer's ruling that a sixth grader's preparation of a "shooting list" of classmates as part of his English journal, was not a manifestation of his disabilities, which were ED (based on depression) and OHI (based on ADD). Noting that the expert opinion of the school psychologist was based on her preparation of the most recent evaluation and her classroom observations of the student, the court summarily relied on judicial deference to school authorities and the parents' failure to fulfill their burden of proof by rebutting this presumption.

Conversely, in *Maple Heights City School District v. A.C.* (2016), a federal district court in Ohio upheld the hearing officer's ruling that a fourteen year old's possession of marijuana and, four months later, theft of an iPod were each a

manifestation of her ED. Rejecting the case law from other jurisdictions that supported judicial deference to school authorities, this court followed Sixth Circuit precedent that called for deferring to hearing officers, particularly their determinations of the credibility and cogency of the witnesses. In this case, each side's primary witness was a private consultant, and the hearing officer found the parents' expert to be more credible largely because her assessment of the student was more thorough. For example, it included not only classroom observation and records review but also—unlike the basis for the district's expert—testing of the student and interviews with the parents, teachers, and the student. The court awarded compensatory education for the days of removal beyond the initial ten-day suspension.

## Interpretation and Recommendations

### Overall Cases

The overall frequency of the cases, which averaged 15 per year for this limited period, fit with the gradually upward trajectory of manifestation determination litigation traced in previous research (e.g., Zirkel, 2006, 2010, 2016). Tempering this growth, the cases continued to be predominantly at the hearing and review officer level. Indeed, for this most recent period, the three court decisions were at the lowest level of the federal judiciary and not officially published, thus having limited precedential weight. Moreover, the analyses, whether at the hearing/review officer or court level, continued to be cursory, not reflecting the disciplined depth and nuances valued in legal scholarship and related professions, including school psychology. One of the reasons may be that the IDEA regulations (2015) require due process hearings concerning manifestation determinations to be expedited, thus having a



*“...the analyses, whether at the hearing/review officer or court level, continued to be cursory, not reflecting the disciplined depth and nuances valued in legal scholarship and related professions, including school psychology”*

tighter timeline for issuance of the decision (§ 300.532[c]). Another may be the issue in some of these cases is incidental to one or more larger claims, such as whether the IEP was appropriate, thus providing only secondary or tertiary attention to the manifestation determination issue. Regardless of the reasons, the result is a body of case law that is not particularly helpful in terms of specific, weighty, and relatively reliable guidance.

### **Procedural Dimension**

For the procedural rulings, the distribution and outcomes also aligned with those of the previous manifestation determination case law analyses. The emphases on information sources and team membership for this three-year period, along with the more particular focus on parental participation and timely notices, represented a direct extension of the distributional trend for the previous nine-year period (Zirkel, 2016). Similarly, the outcomes ratio was almost identical to that for the previous post-IDEA 2004 period, but the remedies appeared to gather

some strength, particularly in terms of compensatory education. Yet, despite the ratio at least slightly favoring parents, the two-step harmless-error approach for procedural violations was notably less rigorous than the compliance orientation associated with the IDEA's alternate decisional dispute resolution mechanism, complaint procedures investigations (e.g., Zirkel, 2017).

### **Substantive Dimension**

However, the major departure from the previous pattern of manifestation determination case law was for the outcomes ratio of the substantive rulings. Although the identified conduct and disabilities reflect an increased predominance of actual or threatened violence and ADD, respectively, the change from a ratio approximating 3:1 in favor of districts to almost 2:1 in favor of parents for substantive manifestation determination rulings is unexpected in light of not only the predominant pro-district pattern of IDEA litigation (e.g., Karanxha & Zirkel, 2014) but also the aforementioned directional change in the substantive manifestation determination criteria from IDEA 1997 to IDEA 2004. Nevertheless, the tempering limitations for this seemingly significant difference in the outcomes ratio of the substantive rulings include not only the relatively short period of this most recent analysis but also the predominance of parent-favorable substantive rulings from the District of Columbia. This particular jurisdiction is historically much less-district friendly than other jurisdictions in IDEA cases (e.g., Zirkel & D'Angelo, 2002), and its law puts the burden of proof on the district and contains the substantive criteria of both IDEA 1999 and IDEA 2004 (e.g., *District of Columbia*, 2017). In any event, the adjudications to date do not reflect any increase at all in the recognition of the shift in the IDEA 2004 to a direct, causal connection.

### **Recommendations**

Suggestions for further research include not only extensions to a longer period but also to more complete sampling of hearing and review officer decisions. Given the representativeness issue of IDELR-published hearing administrative decisions (e.g., D'Angelo, Lutz, & Zirkel, 2004), follow-up analyses should randomly sample the relatively complete records of decisions that state education agencies maintain per the IDEA regulations' (2015) requirement for public availability (§ 300.513[d][2]). Moreover, the professional literature lacks quantitative and qualitative research concerning the knowledge, attitudes, and practices of school personnel, including school psychologists, specific to manifestation determinations.

The recommendations for practitioners include balanced consideration of proactive procedures, in light of (a) the limited guidance of the adjudicative decisions to date and the costs of adjudication; (b) the educational philosophy of the district; (c) the values of the local community; (d) the particular conduct at issue, such as weapons violations or other perceived clear and present dangers; and (e) the efficacy of the school psychologist in mediating these varying interests in a child-centered, outcomes-oriented direction. Particular priorities for proactive procedures for manifestation determinations include special efforts to arrange and document the following:

- timely notices
- meaningful parental participation
- complete information sources

On the overlapping substantive side, priorities for proactive practice include thorough discussions that avoid (a) predetermination, (b) overemphasis of the causal nature of the criteria, (c) reliance on

stereotypical assumptions rather than individualistic specificity, and (d) knee-jerk zero-tolerance-type reactions to any form of actual or threatened violence. Conversely, particular preparation is warranted with regard to (a) the individualized assessment and contribution of ADD and ED and (b) the possible need and procedures for a formal threat assessment protocol.

For all of these procedural and substantive aspects of manifestation determinations, school psychologists can and should play a leading role in maintaining respectful professionalism, mediating opposing perspectives, and exceeding legal requirements with prudent proactivity. Whether specific to this specialized issue or much more encompassing issues of eligibility and FAPE, school psychologists are a key source of objective information about legal requirements and professional recommendations.

Finally, however, the case law generally accords priority weighting to the expert opinion of school psychologists based on the combination of the professional specialization and their direct experience with the child. Given this adjudicative tendency, school psychologists should keep their potential role as witnesses in mind during the deliberation and documentation at the manifestation determination meeting. Maintaining the ethical and evidence-based practice of the profession provides latitude for the school psychologist to contribute to manifestation determinations that minimize the frequency of, and losses at, litigation and that effectively balance the interests of the school and the student.

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