

COMMENTARY

MANIFESTATION DETERMINATIONS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: AN OBJECTIVE EXAMINATION OF THE ADJUDICATIONS SINCE THE 2004 AMENDMENTS*

by

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Currently marking its fiftieth anniversary, the Individuals with Disabilities Education Act (IDEA) is the central federal legislation for special education in P–12 schools.¹ Its primary provisions include identification,² free appropriate public education (FAPE) in the least restrictive environment (LRE),³ individualized education programs (IEPs),⁴ and dispute resolution.⁵ One of the specialized protections of the IDEA is a manifestation determination upon a disciplinary change in placement.⁶

The purpose of the article is to provide a comprehensive overview of the manifestation determination (M-D) requirement of the IDEA, including an empirical analysis of the adjudicative decisions specific to its procedural and substantive criteria since the 2004 amendments of the IDEA and the related 2006 regulations. Part I provides a brief history of the development of the currently applicable requirement. Part II provides a framework for disciplinary changes in placement, with M-D as the focal center. Part III canvasses a representative sampling of the related professional literature specific to M-D case law during

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1. 20 U.S.C. §§ 1400 *et seq.* The legislation originated as the Education of the Handicapped Act in 1975. Its various amendments include the provision for attorneys' fees in 1985, the introduction of its current name and the addition of autism as one of its recognized disability classifications in 1990, and revised protections for disciplinary changes in placement in 1997 and 2004. *See, e.g.,* Mitchell L. Yell et al., *The Individuals with Disabilities Education Act: The Evolution of Special Education Law*, in HANDBOOK OF SPECIAL EDUCATION 105 (James M. Kauffman et al. eds. 2017). The secondary federal legislation, which has a broader scope of coverage, consists of the pair of civil rights acts prohibiting discrimination based on disability—Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA). *See, e.g.,* Perry A. Zirkel, *The Latest Comprehensive Compari-*

son of the IDEA and Section 504/ADA, 416 EDUC. L. REP. 1 (2023).

2. *E.g.*, 20 U.S.C. §§ 1401(3), 1414(b)(4).

3. *E.g., id.* §§ 1401(9), 1412(a)(1), 1412(a)(5).

4. *E.g., id.* §§ 1401(15), 1414(d).

5. *E.g., id.* §§ 1415(f). The other decisional administrative mechanism for dispute resolution under the IDEA is the state complaint process, which is specified in the IDEA regulations. 34 C.F.R. §§ 300.151–300.153. *See, e.g.,* Perry A. Zirkel, *The Two Decisional Dispute Resolution Processes under the IDEA: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169 (2017); *cf.* Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes--Complaint Procedures and Impartial Hearings: An Update*, 369 EDUC. L. REP. 550 (2019) (providing a detailed side-by-side analysis of the similarities and differences between these two decisional administrative avenues under the IDEA).

6. *E.g.*, 20 U.S.C. § 1415(k)(1)(C)–(H) (requiring a team determination of whether the conduct at issue for a removal of more than 10 consecutive school days was a manifestation of the child's disability).

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the recent two decades. Part IV provides the empirical analysis of the pertinent M-D adjudicative decisions. Part V provides an interpretation of the findings for IDEA stakeholders.⁷

I. Development of M-D under the IDEA

The concept of providing protection against substantial disciplinary removals of students with disabilities started in case law as implicit under the original version of the IDEA and, in some cases, the concomitant regulations of Section 504.⁸ For example, in *Stuart v. Nappi*, the federal district court in Connecticut issued a preliminary injunction against expelling a high school student with an IEP as likely in violation of the procedural requirements for changes in placement under the original version of the IDEA.⁹ The following year, citing *Stuart* as well as Section 504 regulations, a federal district court in New York issued a summary judgment for a student with multiple disabilities whom the state school for the blind indefinitely suspended due to her severe self-abusive behaviors, ruling that the pertinent procedural protections do not permit such a removal when, as here, it “becomes a change in [the student’s] educational placement.”¹⁰

In the 1997 amendments of the IDEA, Congress codified the case law by requiring an M-D for a disciplinary change in placement, i.e., for “more than ten school days.”¹¹ The relevant provisions also included an accompanying requirement for functional behavioral assessments (FBAs) and behavior intervention plans (BIPs).¹² The procedural requirements for the M-D included that it be conducted by “the IEP Team and other qualified personnel” and be based on “all relevant information.”¹³ The substantive criteria for the M-D concerned the appropriateness of the IEP, the student’s understanding of the consequences, and the ability to control the behavior at issue.¹⁴ A determination that the behavior was a manifestation precludes the disciplinary change in placement, but permits an “interim

7. In this IDEA context, “stakeholders” is broadly generic, including (a) parents, school personnel, and their respective attorneys/advocates; (b) state education agency personnel, including complaint investigators; (c) policymakers at the federal, state, and local level; (d) university faculty and other researchers or trainers; and, most central to the author, (e) hearing/review officers and federal judges.

8. See, e.g., David L. Dagley, Michelle D. McGuire, & Charles W. Evans, *The Relationship Test in the Discipline of Disabled Students*, 13 EDUC. L. REP. 22 (1994) (tracing the origin of M-D to a cluster of lower court rulings under the original version of the IDEA, often in tandem with Section 504).

9. *Stuart v. Nappi*, 443 F. Supp. 1235, 1240–43 (D. Conn. 1978). Among the considerations identified by the court were that the issue was “a case of first impression.” (*id.* at 1241); “[t]he existence of a causal relationship between plaintiff’s academic program and her anti-social behavior was supported by expert testimony” (*id.*); the stay-put protection allows for alternative measures, such as removals for up to ten consecutive school days (*id.*); and LRE was another basis under the IDEA due to “restricting the availability of alternative placements” (*id.* at 1242).

10. *Sherry v. N.Y. State Educ. Dep’t*, 479 F. Supp. 1328, 1337 (W.D.N.Y. 1979).

11. Pub. L. 105–17, 111 STAT. 37, at 95 (June 4, 1997). These protections expressly extended to students not yet determined to be eligible under the IDEA but in four specified situations for which the school district is “deemed to have knowledge” of eligibility. *Id.* at 97.

12. *Id.* at 94.

13. *Id.* at 95. The specified examples of relevant information were “(I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child; (II) observations of the child; and (III) the child’s IEP and placement.” *Id.* The provisions also provided prompt deadlines for notice to the parents and for the M-D meeting for the purpose of reviewing “the relationship between the child’s disability and the behavior subject to the disciplinary action.” *Id.*

14. *Id.*:

(I) in relationship to the behavior subject to disciplinary action, the child’s IEP and placement were appropriate and the special education services, supplement-

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alternative educational setting” (IAES) for no more than 45 days in narrowly limited “special circumstances.”¹⁵ Finally, the relevant statutory provisions required that, upon challenges to the M-D or other requirements for disciplinary changes in placement, that the due process hearing be expedited.¹⁶ The resulting 1999 regulations added a few enhancements, such as clarifying that, in addition to removals for more than ten consecutive school days, those for cumulative days in a school year also qualify as a disciplinary change in placement if they constitute a pattern.¹⁷

The most recent IDEA amendments, which were in 2004, revised the provisions concerning disciplinary changes in placement in various ways that, on balance, were in the direction of lessening the protections for IDEA-eligible students.¹⁸ The provisions specific to M-D included, on the procedural side, reducing the required core members of the determining team to the district representative and the parents.¹⁹ On the substantive side, the FAPE- and child-oriented criteria were reduced to the following two alternative causal criteria:

- (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or
- (II) if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP.²⁰

tary aids and services, and behavior intervention strategies were provided consistent with the child’s IEP and placement;

(II) the child’s disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child’s disability did not impair the ability of the child to control the behavior subject to disciplinary action.

15. *Id.* at 94–95. The “special circumstances” fit in two separate categories (a) for unilateral change to an IAES – only for cases of weapons or illegal drug violation; and (b) for hearing officer authorization of an IAES – only for circumscribed danger-based circumstances. *Id.* at 94.

16. *Id.* at 96. According to the agency policy interpretation, the expedited timeline is not waivable. Letter to Zirkel, 68 IDELR ¶ 142, <https://sites.ed.gov/idea/idea-files/policy-letter-august-22-2016-to-perry-zirkel/> (OSEP 2016).

17. 64 Fed. Reg. 12406, 12,453 (Mar. 12, 1999). The factors to determine such a pattern include “the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.” *Id.*

18. For a systematic comparison between the previous and current provisions, see Perry A. Zirkel, *Suspensions and Expulsions of Students with Disabilities: The Latest Requirements*, 214 EDUC. L. REP. 445 (2007) (“In general, the overall conclusion seems inescapable that the adjustments are rather subtle but cumulatively represent a further shift, beyond that of IDEA 1997, from “zero reject” toward—but still

notably distinct from—“zero tolerance.”). For an example in the separate threshold step of a disciplinary change in placement, the regulations for IDEA 2004 specified “substantially similar” prior behavioral infractions as an additional determinative factor for cumulative removals in the same year, thus making it more difficult to establish the requisite triggering pattern than under the prior regulations (*supra* note 17 and accompanying text).

19. 20 U.S.C. § 1415(k)(1)(E)(ii). The open-ended additions were for “other relevant members of the IEP team” (*id.*), which represents a more subtle reduction of this residuum of “other qualified personnel” in the corresponding previous provision (*supra* text accompanying note 13). The other procedural provision only slightly streamlined the specified examples of relevant information (*id.*) to “the child’s IEP, any teacher observations, and any relevant information provided by the parents.” 20 U.S.C. § 1415(k)(1)(E)(i). The procedural requirements for timing and notice remained unchanged. *Id.* (within ten days of the decision for the disciplinary change in placement) and *id.* § 1415(k)(1)(H) (prior written notice and procedural safeguards notice).

20. 20 U.S.C. § 1415(k)(1)(E)(i). For the previous criteria, see *supra* note 14. These criteria are largely derived from the Ninth Circuit’s formulation in *Doe v. Maher*, 793 F.2d 1470, 1480 n.8, 33 Educ. L. Rep. 124 (9th Cir. 1986). In affirming *Doe v. Maher* without addressing these criteria, the Supreme Court explained the origin of and approved the more-than-ten-day standard for disciplinary changes in placement. *Honig v. Doe*, 484 U.S. 305, 325 n.8, 43 Educ. L. Rep. 857 (1988).

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Depending on whether the answer to these criteria, when formulated as questions, is a “Yes,” or “No,” the 2004 amendments slightly differentiated the scope of the accompanying FBA-BIP requirement.”²¹ The resulting 2006 regulations added various nuances, including the addition of a district obligation, upon the team’s determination of a “Yes” to the second substantive criterion, to immediately rectify the failure²² and the provision of more detailed specifications for the timeline of the expedited hearing.²³

Additionally, to whatever extent that legislative history is relevant for adjudicative analysis, the conference committee expressed the intent of requiring manifestation determinations to be conducted (a) “carefully and thoroughly with consideration of any rare or extraordinary circumstances,” (b) with consideration of the child’s behavior “across settings and across time,” and (c) requiring the conduct in question to be the direct result, “not an attenuated association, such as low esteem, to the child’s disability.”²⁴

Finally, to the extent that they may be persuasive to adjudicators,²⁵ the relevant agency policy interpretations include:

- it is reasonable to expect an overall increased number and less student-favorable results of M-Ds in light of IDEA 2004’s “streamlined process” and causal criteria.²⁶
- a hearing officer has the discretion to determine whether the conduct at issue violated the district’s student code of conduct²⁷
- a hearing officer does not have the discretion to waive the timeline specifications for an expedited hearing, regardless of whether one or both parties seek an extension²⁸
- the M-D requirement applies to each disciplinary change in placement even if within the same school year²⁹

21. For a “Yes” answer to either or both criteria, IDEA 2004 retained the unqualified FBA-BIP requirement of IDEA 1997. 20 U.S.C. § 1415(k)(1)(F)(i)-(ii). However, for an answer of “No” to both criteria, IDEA 2004 reduced the requirement to an “as appropriate” basis. *Id.* § 1415(k)(1)(D)(ii).

22. 34 C.F.R. § 300.530(e)(3).

23. *Id.* § 300.532(c)(2) (hearing within twenty school days of filing and decision within ten school days of the hearing). For the corresponding version in the 1999 regulations, see 64 Fed. Reg. 12,406, 12,455 (Mar. 12, 1999).

24. H.R. REPORT NO. 108-779, at 224–25 (2004) (Conf. Rep.), <https://www.congress.gov/committee-report/108th-congress/house-report/779/1>. The agency commentary accompanying the 2006 regulations cited this expression of Congressional intent. 71 Fed. Reg. 46,540, 46,720 (Aug. 14, 2006).

25. See, e.g., Perry A. Zirkel, *Preliminary Ruminations on the Effects of the Supreme Court’s Loper Decision in the Special Education Legal Context*, 424 EDUC. L. REP. 727 (2024) (exploring the indirect effects of the Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) on adjudicators’ weighting of agency policy guidance); Perry A. Zirkel, *The Courts’ Use of OSEP Policy Interpretations in*

IDEA Cases, 344 EDUC. L. REP. 671 (2017) (canvassing the application of the courts’ pre-*Loper* test of the persuasiveness of agency policy guidance under the IDEA).

26. 70 Fed. Reg. 35,781, 35,823 (June 21, 2005) (commentary accompanying the proposed regulations for IDEA 2004).

27. Letter to Ramirez, 60 IDELR ¶ 230 (OSEP Dec. 5, 2012), <https://sites.ed.gov/idea/policy-guidance/?selected-topic-area=&selected-year=2012>.

28. Letter to Snyder, 67 IDELR ¶ 96 (OSEP Dec. 13, 2015), <https://sites.ed.gov/idea/policy-guidance/?selected-topic-area=&selected-year=2015>; see also Letter to Nathan, 73 IDELR ¶ 240 (OSEP Jan. 29, 2019), <https://sites.ed.gov/idea/policy-guidance/?selected-topic-area=&selected-year=2019> (concluding that the hearing officer does not have the discretion to postpone the hearing for completion of the evaluation for a “deemed to know” student under 20 U.S.C. § 1415(k)(5), 34 C.F.R. § 300.534(b)).

29. Questions and Answers: Addressing the Needs of Students with Disabilities and IDEA’s Discipline Provisions, 81 IDELR ¶ 38, at item F-7 (OSERS July 19, 2022), <https://sites.ed.gov/idea/policy-guidance/?selected-topic-area=&selected-year=2022>.

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- the IDEA regulation for expedited hearings does not limit hearing officers in M-D cases of denial of FAPE from ordering alternative or additional remedies, such as compensatory education.³⁰

II. Overall Framework for Disciplinary Changes in Placement

Although the focus of this article consists of the above-mentioned procedural and substantive requirements for M-Ds under the 2004 Amendments and the 2006 regulations, the other required steps for disciplinary changes in placement provide an overall context that reveals the centrality of M-Ds as a matter of adjudicative analysis.

On an overall basis, without identifying and analyzing the nuances of the other provisions, such as those specific to FBAs-BIPs and IAES's, the basic requirements amount to a three-step process, with M-D as the hub, for analysis at an expedited due process hearing. The first step is determining whether the challenged "removal" amounts to a disciplinary change in placement. Second, if the answer to this threshold question is "Yes," the central M-D requirement applies.³¹ As the final and resulting step, unless one of the limited "special circumstances" for an IAES applies,³² an answer of "Yes" to either or both of the substantive criteria requires the district to return the student to the original placement (unless the parties agree otherwise), and an answer of "No" permits the district to resort to the procedural process applicable to general education students for lengthy suspensions or expulsions.³³

III. Overview of Legal Literature Relevant to Post-2004 M-Ds

The law-based articles specific to M-Ds after the 2004 IDEA amendments have been limited, particularly regarding the case law. For example, Osborne and Russo's early article was limited to explaining the origin and summarizing the M-D provisions of the 2004 Amendments.³⁴ An article a decade later was limited to practical suggestions for advocates representing students in M-D cases, only incidentally and partially covering two judicial rulings specific to M-Ds after the 2004 IDEA amendments.³⁵

The exception was Claire Raj's rather comprehensive article that included an empirical analysis of the hearing officer decisions published in the Individuals with Disabilities Law Reports (IDELR) and the court decisions published in Westlaw or LEXIS from July 1, 2005

30. Letter to Zirkel, 74 IDELR ¶ 171 (OSEP May 13, 2019), <https://sites.ed.gov/idea/idea-files/policy-letter-may-13-2019-zirkel/>. For the referenced regulatory provision, see *infra* note 33.

31. For the respective procedural and substantive criteria for the M-D requirement, see *supra* notes 19–20 and accompanying text.

32. The 2004 amendments added a third special circumstance for a unilateral IAES (*supra* note 15), which is for infliction of serious bodily injury in the school context. 20 U.S.C. § 1415(k)(1)(G)(iii). Although the M-D is required in all circumstances of disciplinary changes in placement, the special circumstance IAESs are available to school districts "without regard to" whether the M-D is "Yes" or "No." *Id.* § 1415(k)(1)(G).

33. 20 U.S.C. §§ 1415(k)(1)(C), 1415(1)(F). Upon a due process hearing to challenge the district's M-D determination of "No," the 2006 regulations add that the hearing officer "may" order the district to "return the child with a disability to the placement from which the child was removed." 34 C.F.R. § 300.532(b)(2)(ii).

34. Allan G. Osborne & Charles J. Russo, *Making the Manifestation Determination under IDEA 2004*, 203 EDUC. L. REP. 15 (2005).

35. Michele Scavengelli & Marlies Spanjaard, *Succeeding in Manifestation Determination Reviews: A Step-by-Step Approach to Obtaining the Best Result for Your Client*, 10 U. MASS. L. REV. 278 (2015).

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to July 1, 2016.³⁶ Raj identified 134 cases for this eleven-year period, including approximately seventeen at the judicial level.³⁷

The combination of her rather vague description of the cases as “involving [M-Ds] and excluding opinions decided on unrelated issues, such as administrative exhaustion,” and her related characterization of the 134 decisions being exactly split between those based on procedural grounds, such as timing, notice, and members, and those based on substantive grounds, identified as rulings specific to the two M-D questions or criteria,³⁸ suggested that the boundaries for coverage were rulings on the merits specific to the procedural and substantive requirements for M-Ds under IDEA 2004.³⁹ Yet, the data set that she provided revealed marked imprecision of her case selection. For example, twelve of the eighteen court decisions listed in her data set as includable in the analysis were “false positives” in relation to these inferable boundaries.⁴⁰ Conversely, in addition to an express “false negative,”⁴¹ her analysis entirely missed five M-D court rulings on the merits during the specified period.⁴² Moreover, the entries for the five court decisions correctly identified in her data set as includable in the analysis (because they fit within the reasonably inferable boundaries)

36. Claire Raj, *Disability, Discipline, and Illusory Student Rights*, 65 UCLA L. REV. 860 (2018).

37. *Id.* at 882. In the text of her article, she identified the number of judicial decisions as “approximately fourteen” (*id.* at 883) and, more specifically, seventeen (*id.* at 882 n.136); yet, her cited data set lists nineteen at the judicial level, including two that were successive stages in the same case (https://www.uclalawreview.org/wp-content/uploads/securepdfs/2018/05/Raj_Data.pdf [<https://perma.cc/QSV7-VN8J>]). The two that were for the same case were successive rulings in *R.J. v. McKinney Independent School District*, which started with 2005 WL 3576839 (E.D. Tex. Dec. 29, 2005) and also extended further to 2006 WL 3099449 (E.D. Tex. Oct. 30, 2006). The data set mistakenly listed as a separate decision the magistrate’s intervening R&R on October 11, 2011, perhaps due to the variation of the plaintiff’s identification and the mistaken identification of the court in “Ron J. v. McKinney Indep. Sch. Dist., 46 IDELR 222 (E.D. Pa. 2006).” The nineteenth decision was incorrectly denoted as not to be included in the analysis. *See infra* note 41.

38. Raj, *supra* note 36, at 884–85 & n.141.

39. Reinforcing this inference, the article that Raj cited as, in effect, the limited springboard and template for her analysis (*id.* at 882) specifically enumerated the exclusions of rulings limited to (a) Section 504; (b) technical, or adjudicative, grounds; or (c) closely related but distinguishable issues. Perry A. Zirkel, *Manifestation Determinations Under the New Individuals With Disabilities Education Act: An Update*, 31 REMEDIAL & SPECIAL EDUC. 378, 380 (2010).

40. R.T. v. Se. York Cnty. Sch. Dist., 47 IDELR ¶ 129 (M.D. Pa. 2007) (exhaustion); J.F. v. New Haven Unified Sch. Dist., 64 IDELR ¶ 212 (N.D. Cal. 2014)

(mootness); Pelose v. Bishop Grimes Jr./Sr. High Sch., 885 N.Y.S.2d 816, 249 Educ. L. Rep. 362 (App. Div. 2009) (jurisdiction); L.K. v. N.C. State Bd. of Educ., 55 IDELR ¶ 70 (E.D.N.C. 2010) (standing); Avila v. Spokane Sch. Dist., 64 IDELR ¶ 171 (E.D. Wash. 2014); M.N. v. Rolla Sch. Dist. 31, 59 IDELR ¶ 44 (W.D. Mo. 2012); Rochester Cmty. Schs. v. Papadelis, 55 IDELR ¶ 79 (Mich. Ct. App. 2010); A.P. v. Pemberton Twp. Bd. of Educ., 45 IDELR ¶ 244 (D.N.J. May 15, 2006) (prerequisite change in placement in absence of M-D); Anaheim Union High Sch. Dist. v. J.E., 61 IDELR ¶ 107 (C.D. Cal. 213); Jackson v. Nw. Local Sch. Dist., 2010 WL 3474970 (S.D. Ohio Sept. 1, 2010) (deemed to know); District of Columbia v. Doe, 611 F.3d 888, 258 Educ. L. Rep. 993 (D.C. Cir. 2010) (conduct in question); Ron J. v. McKinney Indep. Sch. Dist., 46 IDELR ¶ 222 (E.D. Tex. 2006); R.J. McKinney Indep. Sch. Dist., 45 IDELR ¶ 9 (E.D. Tex. 2005) (Section 504).

41. W.K. v. Harrison Sch. Dist., 59 IDELR ¶ 103, 2012 WL 2681592 (W.D. Ark. July 6, 2012), *aff’d*, 509 F. App’x 565 (8th Cir. 2013) (listed, without the affirmation, as not included, but the decision included a procedural ruling for what it concluded was an M-D meeting).

42. Maple Heights City Sch. Dist. v. A.C., 68 IDELR ¶5, 2016 WL 3475020 (N.D. Ohio June 27, 2016); Z.H. v. Lewisville Indep. Sch. Dist., 65 IDELR ¶ 106, *adopted*, 2015 WL 1384442 (E.D. Mar. 24, Tex. 2015); D.C. v. Mount Olive Twp. Bd. of Educ., 63 IDELR ¶ 78, 2014 WL 1293534 (D.N.J. Mar. 31, 2014); Ne. Indep. Sch. Dist. v. N.B., 2011 WL 13272730 (W.D. Tex. Feb. 25, 2011); Fitzgerald v. Fairfax Cnty. Sch. Bd., 556 F. Supp. 2d 543, 234 Educ. L. Rep. 830 (E.D. Va. 2008). Oddly, Raj’s included the *Fitzgerald* case in her qualitative conclusions, but it is missing from the data sheet that presumably was the basis for her empirical findings.

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reflected imprecision and confusion.⁴³ Finally, for her total of 134 decisions, her reported distribution of 67 procedural and 67 substantive rulings⁴⁴ is clearly questionable in light of the notable proportion of decisions identified with both procedural and substantive rulings in earlier analyses of segments within Raj's post-2004 period.⁴⁵

Within these limitations, Raj's empirical findings included that (a) the outcomes were in the students' favor in 47% of the cases, with the rate distinctly higher for procedural rulings (58%) than for substantive rulings (36%)⁴⁶; (b) the frequent student disabilities were the "soft" IDEA classifications of, in descending order, other health impairment (OHI) based on attention deficit hyperactivity disorder (ADHD), emotional disturbance (ED), and specific learning disability (SLD)⁴⁷; and the most frequent behaviors at issue were threatened or actual violence (40%), drugs (16%), and other disruptive behavior (13%).⁴⁸

Raj's accompanying qualitative findings identified two overlapping themes: (a) the substantive rulings revealed complexity and uncertainty concerning the causal connection between behavior and disability, with the trend being for the adjudicators over-relying on the evidence that the school provides via its own experts and teacher observations⁴⁹; and (b) the substantive and procedural rulings both reveal the elevation of form over substance that,

43. Part of the imprecision was the nonprejudicial incomplete or incorrect citations for three of the five decisions. Specifically, two of them cited years that were clearly wrong, and one of them missed the Eighth Circuit's subsequent affirmation. *W.K. v. Harrison Sch. Dist.*, 509 F. App'x 565 (8th Cir. 2013); *Sch. Bd. of Norfolk v. Brown*, 769 F. Supp. 2d 928, 268 Educ. L. Rep. 197 (E.D. Va. 2010) (cited as July 2, 2005); *Williamson Cnty. Bd. of Educ. v. C.K.*, 2009 WL 499386 (M.D. Tenn. Feb. 27, 2009) (cited as July 1, 2005). More significantly, the imprecision had a direct effect on the findings due to inaccurate entries for all five decisions, because the coding entries were inaccurate for one or both of the substantive criteria. *Sch. Bd. of Norfolk v. Brown*, 769 F. Supp. 2d 928, 168 Educ. L. Rep. 197 (E.D. Va. 2010) (data set entries for criteria 1 and 2 were "N/A," whereas the court ruled that criterion 2 was "No"); *Danny K. v. Dep't of Educ., State of Haw.*, 57 IDELR ¶ 185, 2011 WL 4527387 (D. Haw. Sept. 27, 2011) (data set entries for criteria 1 and 2 were "No," whereas the court did not address criterion 2); *Bristol Twp. Sch. Dist. v. Z.B.*, 67 IDELR ¶ 9, 2016 WL 161600 (E.D. Pa. Jan. 14, 2016) (data set entry was "maybe/remand" for criterion 1, whereas the court only addressed the procedural category M-D); *Z.H. v. Lewisville Indep. Sch. Dist.*, 65 IDELR ¶ 106, *adopted*, 65 IDELR ¶ 147, 2015 WL 1384442 (E.D. Mar. 24, Tex. 2015) (data set entries included "Yes" for criterion 2, but the court only ruled on criterion 1); *Williamson Cnty. Bd. of Educ. v. C.K.*, 52 IDELR ¶ 40, 2009 WL 499386 (M.D. Tenn. Feb. 27, 2009) (data set entries included "No" for criterion 2, but the court only ruled on criterion 1). Perhaps the inaccuracies were due to confusion (a) as to the scope of "procedural" rulings

in contrast or in addition to "substantive" rulings and/or (b) between the hearing officer's and court's M-D rulings.

44. *Supra* note 38 and accompanying text.

45. Perry A. Zirkel, *Manifestation Determinations under IDEA 2004: An Updated Legal Analysis*, 29 J. SPECIAL EDUC. LEADERSHIP 32, 37 (2016) (reporting that 23% of the 86 M-D decisions within the nine-year period of 2006–2014 contained both procedural and substantive rulings); Perry A. Zirkel, *Manifestation Determinations under the IDEA: The Latest Case Law*, 72 SCH. PSYCH. 13, 17 (Winter 2018) (reporting that 20% of the 46 M-D decisions within the three-year period of 2015–2017 contained both procedural and substantive rulings).

46. Raj, *supra* note 36, at 885. It is not at all clear how this outcomes distribution addressed the decisions that addressed both procedural and substantive M-D issues, because the reported equal half of her total decisions in one category or the other did not seem to recognize those that included rulings for both categories.

47. *Id.* at 886–87. Raj described "soft" in this context as referring to "disabilities that are internal and thus difficult to objectively measure." *Id.* at 886. Relative to the overall incidence of these classifications under the IDEA, Raj characterized the rates for OHI (48%) and ED (22%) as disproportionately high and that for SLD (17%) as disproportionately low. *Id.* 887.

48. *Id.* at 888.

49. *Id.* at 890–96.

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based on the sparse, streamlined procedural requirements for M-Ds, “fails to . . . ensure fair outcomes.”⁵⁰

Based on her perceived problems,⁵¹ Raj’s prescribed solutions were to (a) allocate the burden of proof to school districts for M-D cases, (b) lower the substantive disability-misconduct standard for M-Ds; and (c) attain more consistent and objective data collection on student behaviors.⁵²

IV. Empirical Analysis of the M-D Decisions

Purpose

The purpose of this analysis is to provide stakeholders with systematic M-D case law data via a more consistent and complete empirical approach.⁵³ Although the next step after Raj’s contribution, the differences are (a) a longer, updated period of analysis, (b) more clearly defined and carefully implemented procedures, and (c) continuous objectivity extending to the discussion rather than prescriptive advocacy.

Method

Consistent with my earlier analyses,⁵⁴ the scope was limited to hearing/review officer and court decisions that contained substantive or procedural M-D rulings on the merits under IDEA 2004. More specifically, the first step was to assemble a pool of potentially relevant hearing/review officer and court decisions with the alternative search terms of “manifestation determination” or “MDR” in the two primary databases—Westlaw® and SpecialEdConnection®.⁵⁵ Extending to nine more recent years than Raj’s analysis, the period was from July 1, 2005 to June 30, 2025. More explicit and specific than her analysis, the second step was to screen out the many decisions in the pool that did not contain M-D rulings on the merits for either or both of the two substantive criteria or one or more of the above-referenced corresponding procedural requirements.⁵⁶ The principal exclusions were for (a) M-D decisions based on Section 504⁵⁷; (b) M-D decisions from the IDEA’s state complaint

50. *Id.* at 897–98.

51. Raj interpreted the M-D protection against prolonged exclusions as “illusory” due to the identified problems of “failure to account for disability variances” and “insufficient limits [by] . . . not sufficiently account[ing] for scientific uncertainty around disability and behavior[;] . . . fail[ing] to ensure decisions are based on sufficient and objective data[;] . . . lead[ing] to arbitrary results [;] [and] . . . unfairly saddl[ing] parents with the burden of proof.” *Id.* at 898–902.

52. *Id.* at 914–25. The intended target for these respective three policy recommendations appears to be (a) Congress (or the Supreme Court), (b) Congress, and (c) the Department of Education (or Congress).

53. For the meaning of stakeholders in this context, *see supra* note 7.

54. *Supra* note 45.

55. “MDR” is the acronym for manifestation determination review, which was a commonly used term for what is referred to herein as “M-D.” Raj used these same two databases. *Supra* text accompanying note 36. SpecialEdConnection® is the electronic database that includes IDELR and, unlike Westlaw® includes a sampling of hearing and review officer decisions under the IDEA along with other material specific to P–12 students with disabilities.

56. *Supra* notes 19–20 and accompanying text. The data set template subcategories for the M-D procedural requirements were (a) team membership, (b) information sources, (c) timing, and (d) miscellaneous other.

57. *E.g.*, *Doe v. Osseo Area Sch. Dist.*, 296 F. Supp. 3d 1090, 354 Educ. L. Rep. 156 (D. Minn. 2017); *J.M. v. Liberty Union H.S. Dist.*, 70 IDELR ¶ 4, 2017 WL 2118344 (N.D. Cal. May 16, 2017); *Blackstone Valley Reg’l Vocational Tech. Sch.*, 122 LRP 3419 (Mass. SEA 2022); *Suwanee Cnty. Sch. Bd.*, 121 LRP 28620

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process⁵⁸; (c) M-D decisions resolved on adjudicative grounds, including exhaustion,⁵⁹ (d) M-D decisions that were based on the IDEA 1997 rather than IDEA 2004 requirements⁶⁰; and (e) decisions on related but separable issues, such as the pre-M-D step of a disciplinary change in placement,⁶¹ the possible coverage step of “deemed to know,”⁶² or various post-M-D steps.⁶³ In addition, to avoid double-counting, in the five cases that had relevant

- (Fla. SEA 2021); Penn Hills Sch. Dist., 118 LRP 22872 (Pa. SEA 2018); Centennial Sch. Dist. v. Phil L., 559 F. Supp. 2d 634, 235 Educ. L. Rep. 199 (E.D. Pa. 2008); Barnstable Sch. Comm., 111 LRP 48728 (Mass. SEA 2011).
- 58.** *E.g.*, In re Student with a Disability, 125 LRP 27660 (Del. SEA 2025); Hemiston Sch. Dist., 125 LRP 22489 (Or. SEA 2025); Blue Springs R-IV Sch. Dist., 124 LRP 33108 (Mo. SEA 2024); Rio Rancho Pub. Schs., 124 LRP 8372 (N.M. SEA 2023); Pueblo 70 Sch. Dist., 81 IDELR ¶ 58 (Colo. SEA 2022); In re Student with a Disability, 120 LRP 11988 (Wis. SEA 2020); Thompson Sch. Dist. R2-J, 70 IDELR ¶ 168 (Colo. SEA 2017); Cherry Creek Sch. Dist. No. 5, 56 IDELR ¶ 149 (Colo. SEA 2011).
- 59.** *E.g.*, Molina v. Bd. of Educ., 157 F. Supp. 3d 1064, 332 Educ. L. Rep. 795 (D.N.M. 2015); C.L. v. Mars Area Sch. Dist., 65 IDELR ¶ 258, 2015 WL 3968343 (W.D. Pa. June 30, 2015); Gutin v. Washington Twp. Bd. of Educ., 467 F. Supp. 2d 414, 216 Educ. L. Rep. 136 (D.N.J. 2006); Link v. Metro. Nashville Bd. of Pub. Educ., 62 IDELR ¶ 181, 2013 WL 6762393 (Tenn. Ct. App. Dec. 19, 2013) (exhaustion); G.R. v. Dallas Sch. Dist. No. 2, 823 F. Supp. 2d 1120, 278 Educ. L. Rep. 951 (D. Or. 2011) (statute of limitations); Shawano Sch. Dist. v. D.W., 2024 WL 5307843 (E.D. Wis. Dec. 17, 2024); J.H. v. Rose Tree Media Sch. Dist., 72 IDELR ¶ 123, 2018 WL 3033027 (E.D. Pa. June 19, 2018) (additional evidence); J.F. v. New Haven Unified Sch. Dist., 64 IDELR ¶ 212, 2014 WL 6485643 (N.D. Cal. Nov. 19, 2014); L.K. v. N.C. State Bd. of Educ., 56 IDELR ¶ 135, 2011 WL 861154 (E.D.N.C. Mar. 9, 2011); In re Student with a Disability, 114 LRP 25845 (Kan. 2014) (mootness); Y.B. v. Williamson Cnty. Bd. of Educ., 2009 WL 4061311 (Nov. 20, 2009) (attorneys’ fees).
- 60.** Some of these excluded cases were due to their timing relatively soon after July 1, 2005. *E.g.*, Fort Zumwalt R-II Sch. Dist., 106 LRP 55878 (Mo. SEA Sept. 19, 2006); Balt. Cnty. Pub. Schs., 109 LRP 21943 (Md. SEA Aug. 8, 2006); Burton Glen Charter Acad., 106 LRP 57542 (Mich. SEA Apr. 7, 2006); Phila. Sch. Dist., 106 LRP 20070 (Pa. SEA Mar. 1, 2006); Bowling Green R-1 Sch. Dist., 106 LRP 11577 (Mo. SEA Jan. 1, 2006); In re Student with a Disability, 106 LRP 32769 (N.D. SEA Aug. 31, 2005); Prince George’s Cnty. Pub. Schs., 105 LRP 57822 (Md. SEA Aug. 29, 2005); Rockford Sch. Dist. 205, 108 LRP 38054 (Ill. SEA Aug. 22, 2005); Bd. of Educ. of Sauquoit Valley Cent. Sch. Dist., 106 LRP 16578 (N.Y. SEA July 22, 2005). Others were due to reliance on state law provisions that, at the time, retained the 1997 IDEA requirements. *E.g.*, District of Columbia Pub. Schs., 116 LRP 27425 (D.C. SEA 2016); District of Columbia Pub. Schs., 113 LRP 13584 (D.C. SEA 2012); District of Columbia Pub. Schs., 112 LRP 30213 (D.C. SEA 2012); Maple Heights City Sch. Dist., 107 LRP 38499 (Ohio SEA 2007).
- 61.** *E.g.*, Avila v. Spokane Sch. Dist. No. 81, 71 IDELR ¶ 172, 2018 WL 616140 (E.D. Wash. Jan. 29, 2018), *aff’d on other grounds*, 744 F. App’x 506 (9th Cir. 2018); M.N. v. Rolla Pub. Sch. Dist. 31, 59 IDELR ¶ 44, 2012 WL 2049818 (W.D. Mo. June 6, 2012); Rochester Cmty. Schs. v. Papadelis, 55 IDELR ¶ 79 (Mich. Ct. App. 2010); Santa Rosa Cnty. Sch. Bd., 124 LRP 33446 (Fla. SEA 2024); In re Student with a Disability, 121 LRP 29946 (D.C. SEA 2021).
- 62.** *E.g.*, D.N. v. Sch. Bd. of Bay Cnty., 361 So.3d 435 (Fla. Dist. Ct. App. 2023); G.R. v. Colonial Sch. Dist., 74 IDELR ¶ 7, 2019 WL 1128757 (E.D. Pa. Mar. 12, 2019); A.V. v. Panama-Buena Vista Union Sch. Dist., 71 IDELR ¶ 107, 2018 WL 339055 (E.D. Cal. Jan. 9, 2018); Jackson v. Nw. Local Sch. Dist., 55 IDELR ¶ 104, 2010 WL 3452333, *adopted*, 2010 WL 3474970 (S.D. Ohio Sept. 1, 2010); W. Wayne Sch. Dist., 123 LRP 10117 (Pa. SEA 2023); Los Altos Sch. Dist., 117 LRP 45409 (Cal. SEA 2017); Downingtown Area Sch. Dist., 117 LRP 7296 (Pa. SEA 2017); Cleve. Heights-University Heights City Sch. Dist., 69 IDELR ¶ 291 (Ohio SEA 2015).
- 63.** *E.g.*, Olu-Cole v. E.L. Haynes Pub. Charter Sch., 930 F.3d 519 (D.C. Cir. 2019) (post-M-D stay-put); G.D. v. Utica Cmty. Schs., 2023 WL 2719426 (E.D. Mich. Mar. 30, 2023) (unilateral special circumstance); Patrick v. Success Acad. Charter Sch., Inc., 354 F. Supp. 3d 185 (E.D.N.Y. 2018); Edmonds Sch. Dist., 116 LRP 50618 (Wash. SEA 2016) (IAES FAPE); C.C. v. Hurst-Euleess-Bedford Indep. Sch. Dist., 65 IDELR ¶ 195 (N.D. Tex. 2015), *aff’d mem.*, 653 F. App’x 808 (5th Cir. 2016); Hollingsworth v. Hackler, 303 S.W.3d 884, 254 Educ. L. Rep. 456 (Tex. Ct. App. 2009) (FAPE post M-D determination of “No”); Irvine Unified Sch. Dist., 125 LRP 25420 (Cal. SEA 2025); Student with a Disability, 70 IDELR ¶ 54 (Ill. SEA 2017) (danger-based special circumstance).

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decisions at both levels, the court decision superseded and, thus, resulted in the exclusion of the hearing officer decision.⁶⁴

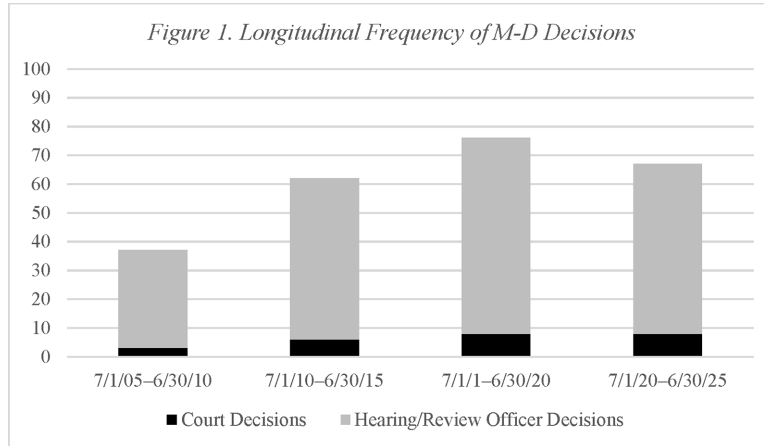
Findings for Frequency

The data collection and selection resulted in 242 decisions for the twenty-year period from mid-2005 to mid-2025.⁶⁵ Only twenty-five (10%) of the decisions were at the court, rather than hearing or review officer, level.⁶⁶ Moreover, fifty-four (22%) of the decisions included a relevant ruling in both the procedural and substantive categories.⁶⁷ As a result, the 242 decisions encompassed 296 rulings, with 108 in the procedural category and 188 in the substantive category.⁶⁸

64. *E.g.*, *Danny K. v. Dep't of Educ., State of Haw.*, 57 IDELR ¶ 185, 2011 WL 4527387 (D. Haw. Sept. 27, 2011), superseding *Dep't of Educ., State of Haw.*, 56 IDELR ¶ 115 (Haw. SEA 2010).
65. The data set, which consists of one table in chronological order for the procedural rulings and a second table in the same order for the substantive rulings. The data set can be found at [https://1.next.westlaw.com/Link/Document/Blob/141f20b1021ff103f1d340123456789ab.pdf?targetType=lawjournal-pdf&originationContext=document&transitionType=DocumentImage&uniqueId=95f72b31-9c95-4ac7-ade4-f5b3d1e3013d&ppcid=d9aa0381a7994166a961ff43d7e11a1f&contextData=\(sc.UserEnteredCitation\)](https://1.next.westlaw.com/Link/Document/Blob/141f20b1021ff103f1d340123456789ab.pdf?targetType=lawjournal-pdf&originationContext=document&transitionType=DocumentImage&uniqueId=95f72b31-9c95-4ac7-ade4-f5b3d1e3013d&ppcid=d9aa0381a7994166a961ff43d7e11a1f&contextData=(sc.UserEnteredCitation)).
66. For the court decisions limited to procedural rulings, *compare* *Leigh Ann H. v. Riesel Indep. Sch. Dist.*, 18 F.4th 788, 397 Educ. L. Rep. 25 (5th Cir. 2021); *N.F. v. Antioch Unified Sch. Dist.*, 78 IDELR ¶ 257, 2021 WL 1746366 (N.D. Cal. Mar. 30, 2021), *aff'd*, 81 IDELR ¶ 7, 2022 WL 1301882 (9th Cir. May 2, 2022); *Gloria V. v. Wimberley Indep. Sch. Dist.*, 2021 WL 770615 (Jan. 5, 2021), *adopted*, 78 IDELR ¶ 96, 2021 WL 769663 (W.D. Tex. 2021), *aff'd mem.*, 80 IDELR ¶ 181, 2022 WL 636406 (5th Cir. Mar. 4, 2022); *W.K. v. Harrison Sch. Dist.*, 59 IDELR ¶ 103, 2012 WL 2681592 (W.D. Ark. July 6, 2012), *aff'd*, 509 F. App'x 565 (8th Cir. 2013); *Boggs v. Bd. of Educ. of Fayette Cnty.*, 2025 WL 1805251 (E.D. Ky. June 30, 2025); *Jordan L. v. E. Stroudsburg Area Sch. Dist.*, 2023 WL 6962707 (E.D. Pa. Oct. 20, 2023); *Dowling v. Limestone Cnty. Bd. of Educ.*, 82 IDELR ¶ 93, 2022 WL 17418644 (N.D. Ala. Dec. 5, 2022); *D.C. v. Mount Olive Twp. Bd. of Educ.*, 63 IDELR ¶ 78, 2014 WL 1293534 (D.N.J. Mar. 31, 2014); *A.P. v. Pemberton Twp. Bd. of Educ.*, 45 IDELR ¶ 244, 2006 WL 1344788 (D.N.J. May 15, 2006) (for district), *with* *Bristol Twp. Sch. Dist. v. Z.B.*, 67 IDELR ¶ 9, 2016 WL 161600 (E.D. Pa. Jan. 14, 2016) (for parents). For the decisions limited to substantive rulings, *compare* *Kristina C. v. Klein Indep. Sch. Dist.*, 2024 WL 420905 (S.D. Tex. Feb. 5, 2024); *Boutelle v. Bd. of Educ. of Las Cruces Pub. Schs.*, 74 IDELR ¶ 130, 2019 WL 2061086 (D.N.M. May 9, 2019); *Z.H. v. Lewisville Indep. Sch. Dist.*, 65 IDELR ¶ 106, *adopted*, 65 IDELR ¶ 147, 2015 WL 1384442 (E.D. Mar. 24, Tex. 2015); *Ne. Indep. Sch. Dist. v. N.B.*, 2011 WL 13272730 (W.D. Tex. Feb. 25, 2011) (for district), *with* *Jay F. v. William S. Hart Union High Sch. Dist.*, 772 F. App'x 578 (9th Cir. 2019); *Maple Heights City Sch. Dist. v. A.C.*, 68 IDELR ¶ 5, 2016 WL 3475020 (N.D. Ohio June 27, 2016); *Williamson Cnty. Bd. of Educ. v. C.K.*, 52 IDELR ¶ 40, 2009 WL 499386 (M.D. Tenn. Feb. 27, 2009) (for parents). For the decisions with both procedural and substantive rulings, *compare* *C.D. v. Atascadero Unified Sch. Dist.*, 2024 WL 1526748 (9th Cir. Apr. 9, 2024); *Lemus v. District of Columbia Int'l Charter Sch.*, 660 F. Supp. 3d 1 (D.D.C. 2023); *M.V. v. Conroe Indep. Sch. Dist.*, 75 IDELR ¶ 134, 2019 WL 193923 (S.D. Tex. Jan. 15, 2019); *J.H. v. Rose Tree Media Sch. Dist.*, 72 IDELR ¶ 265, 2018 WL 4405890 (E.D. Pa. Sept. 17, 2018); *Danny K. v. Dep't of Educ., State of Haw.*, 57 IDELR ¶ 185, 2011 WL 4527387 (D. Haw. Sept. 27, 2011); *Fitzgerald v. Fairfax Cnty. Sch. Bd.*, 556 F. Supp. 2d 543, 234 Educ. L. Rep. 830 (E.D. Va. 2008) (both for district), *with* *Sampson Cnty. Bd. of Educ. v. Torres*, 717 F. Supp. 3d 474, 434 Educ. L. Rep. 884 (E.D.N.C. 2024) (both for parents); *cf.* *Sch. Bd. of Norfolk v. Brown*, 769 F. Supp. 2d 928, 268 Educ. L. Rep. 197 (E.D. Va. 2010) (mixed).
67. The analysis was limited to the rulings specific to the aforementioned procedural and substantive requirements. *Supra* notes 19–20 and accompanying text. Moreover, “rulings” in this context is generic for the decision regardless of the number of procedural subcategories or substantive criteria addressed in the decision. Thus, if a hearing/review officer or court addressed, for example, three procedural subcategories and both substantive criteria, the decision was designated as having one procedural ruling and one substantive ruling.
68. The resulting ratio of rulings to decisions was 295/241, which was an average of 1.2 ruling per decision.

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Figure 1 shows, in the form of a bar chart, the frequencies of the 242 decisions for the successive five-year intervals, with the relatively few by courts represented by the black segments:



Review of Figure 1 reveals an upward trajectory in the frequency for the first three intervals followed by a moderate decline in the most recent interval. The much smaller segments of the court decisions approximately parallel this pattern except for the lack of a decline for the last interval.

For the rulings in the procedural category, the most frequent subcategories were, in descending order, as follows:⁶⁹

- information sources (n=58), with wide variation rather than any principal source(s)
- team membership (n=45), especially lack of parent participation or insufficient opportunity for participation
- notice (n=27), especially for the requisite prior written notice
- timing (n=15), with almost all in relation to the ten-day requirement.

For the rulings in the substantive category, approximately 60% included a diagnosis of ADHD within the disability classification(s) of the child. Similarly, approximately 60% included actual or threatened violence in the identified misconduct.⁷⁰ Moreover, seven decisions were limited to a ruling for criterion 2.⁷¹ Finally, 30% of the 181 remaining rulings, which addressed criterion 1, additionally addressed criterion 2.

69. For the four tabulated categories, *see supra* note 56. Here, the miscellaneous other subcategory is limited to the most frequent item, which was the prior written and procedural safeguards notices. The total for these subcategories clearly exceeds the number of procedural rulings due to several of the decisions addressing more than one subcategory.

70. The approximation is due to the missing or redacted information in some of the decisions and the border-

line determinations for the diagnoses or, more commonly, the misconduct categories. For the specific entries, see the data set. *Supra* note 65.

71. *E.g.*, *Sch. Bd. of Norfolk v. Brown*, 769 F. Supp. 2d 928, 949, 268 Educ. L. Rep. 197 (E.D. Va. 2010) (ruling that the hearing officer erred in concluding that the student's conduct was a direct result of the district's failure to implement the IEP).

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Findings for Outcomes

In accordance with the general propensity for a dichotomous outcomes scale in IDEA case law analyses⁷² and the specific approach in the aforementioned⁷³ line of M-D analyses, the outcome for each procedural or substantive ruling was based on whether the parents were successful for any of their claims addressed within each of these two categories.⁷⁴ Thus, for example, if the hearing/review officer or court addressed both substantive criteria and answered the first criterion as “Yes” and the second as “No,” the outcome entry for the substantive category would be “P” (i.e., in favor of the parents) rather than “SD” (i.e., in favor of the school district. For rulings in the procedural category, the same approach applied across the four subcategories after applying the IDEA-required two-part analysis for procedural FAPE.⁷⁵ Thus, if the adjudicator found, for example, one or more violations of the applicable M-D procedures but that the violations were only “technical,” i.e., harmless to the child and parents, the outcome entry for the procedural category would be “SD.”⁷⁶

Table 1 provides the outcomes distribution for the procedural and substantive rulings.

Table 1: Overall Outcomes for M-D Rulings in Procedural and Substantive Categories

	For the Parents	For the School District
Procedural Rulings (n=108)	44% (n=48)	56% (n=60)
Substantive Rulings (n=188)	37% (n=70)	63% (n=118)
Total Rulings (n=296)	40% (n=118)	60% (n=178)

Table 1 shows that for the overall twenty-year period, the majority of the rulings in each category was in favor of school districts, with the pro-district skew relatively limited for the procedural category and more pronounced for the substantive category.⁷⁷ Overall, the outcomes distribution for the rulings favored the districts on a 60%/40% ratio.

However, upon moving from the ruling to the decision as the unit of analysis, the overall district-favorable ratio moderated slightly based on application of the best-for-plaintiff conflation approach across the procedural and substantive categories. Specifically, the parents’ success rate increased from 40% to 43% due to the net effect of the decisions that contained both procedural and substantive rulings but with mixed outcomes.⁷⁸

72. See, e.g., Perry A. Zirkel & Cathy A. Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISPUTE RESOL. 525, 547–49 (2014) (employing a “prevailing” party outcomes basis); Perry A. Zirkel & Caitlin A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L.J. 323, 344 (2011) (employing a best-for-plaintiff outcomes basis).

73. *Supra* note 45.

74. For the generic meaning of “ruling” in this context and the corresponding conflating approach for frequency, see *supra* note 67.

75. 20 U.S.C. § 1415(f)(3)(E)(ii) (requiring the adjudicator to determine (1) whether the district violated one or more of the applicable procedures of the IDEA and,

if so, (2) whether the violation(s) resulted in substantive harm to the child to the parents’ right to meaningful participation).

76. For a few rulings, the outcome designation was a close, judgment call because the adjudicated determined that the two-part test was in the parents’ favor but did not award a remedy or issued a remedy that arguably but not clearly was attributable to an issue in the case beyond the designated M-D boundaries.

77. For the limited segment of rulings at the court level, the skew was more pronounced in each category—15 (83%) of 18 procedural rulings and 11 (73%) of 15 substantive rulings in favor of the district. See *supra* note 66.

78. Specifically, of the fifty-four decisions that addressed both procedural and substantive M-D issues, thirteen had mixed outcomes, which had the net effect

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Finally, moving from the quantitative to more qualitative basis,⁷⁹ the procedural rulings tended to be rather cursory, with seeming over-emphasis on the burden of persuasion.⁸⁰ Moreover, while following the applicable two-step test,⁸¹ the adjudicators were, with occasional exceptions, notably stingy in providing remedies upon finding procedural violations.⁸²

For the substantive rulings, the similar tendency toward cursory analysis and sparse exercise of the broad equitable authority of IDEA adjudicators were evident. Again with limited exceptions,⁸³ here the cursory adjudicative analysis extended beyond overreliance on burden of persuasion as a general matter. Specific to the application of the substantive criteria, this general but not uniform lack of nuance was evident in deference to district expertise and a one-dimensional over-emphasis on deliberateness v. impulsivity. Similarly, in light of the substantive nature of these rulings, the spare use of equitable authority was particularly notable for compensatory relief.⁸⁴

V. Interpretation of the Findings for Stakeholders' Consideration

The foregoing empirical analysis is not without limitations that warrant caution in interpreting the findings. First, the sample of hearing/review officer decisions is questionable in terms of representativeness.⁸⁵ Second, the decisions at the hearing/officer and court levels represent the proverbial tip of the iceberg, whether referring to the IDEA adjudication process

of increasing the percentage of decisions in which parents prevailed in at least one of the two issue categories. For the limited segment of court decisions, this conflation process resulted in a parental success rate of 23%.

79. For more details, see the final column of in the two tables in the data set. *Supra* note 65.

80. The Supreme Court interpreted the silence in IDEA 2004 as to the burden of proof as putting the burden of persuasion at the due process hearing on the filing party, which in M-D cases is typically the parents. *Schaffer v. Weast*, 546 U.S. 49, 62, 203 Educ. L. Rep. 29 (2005). However, both the majority and the dissent agreed that this decisional basis should only come into play in the rare cases that are in “evidentiary equipoise.” *Id.* at 58 (majority); *see also id.* at 68 (Breyer, J., dissenting).

81. *Supra* note 75.

82. The parsimony was particularly notable at the second step in limiting remedy to declaratory relief or, more often, ordering either a re-do of the M-D or reinstatement of the student to the original placement upon finding that the violation resulted in a denial of FAPE. However, upon closer examination, it was also evident in not granting a remedy, specifically the purely prospective corrective relief authorized in the accompanying statutory provision (20 U.S.C. § 1415(f)(3)(E)(iii)), upon finding a violation at step 1 that did not result in denial of FAPE at step 2.

83. Few decisions, for example, considered whether the phrase “or had a direct and substantial relationship

to” in criterion 1 (*supra* note 20), which is embedded within commas, is intended as alternative or merely in apposition to “caused by.” *Compare* *Student with a Disability*, 59 IDELR ¶ 150 (N.Y. SEA 2012) (applying the relevant language without the commas and without any discussion of their potential significance); *Scituate Pub. Schs.*, 47 IDELR ¶ 113 (Mass. SEA 2007) (treating this phrase as a separate standard without specifically explaining the basis of the interpretation); *Student with a Disability*, 114 LRP 53178 (Pa. SEA 2014) (quoting the language inconsistently for the commas and applying the “relationship” prong without discussing its connection to the “cause” prong), *with Phila. Sch. Dist.*, 47 IDELR ¶ 56 (Pa. SEA 2007) (concluding that the phrase was the opposite alternative to the “caused by” formulation of criterion 1).

84. One hearing officer’s explicit justification was his conclusory interpretation that the regulation applicable to M-Ds limits the remedy to returning the child to the prior placement. *Santa Fe Pub. Schs.*, 124 LRP 11610 (N.M. SEA 2024) (citing 34 C.F.R. § 300.532(b)(2)(i)). The hearing officer did not discuss the basis for interpreting the “may” in this regulatory provision as exclusive rather than illustrative. *Supra* note 33. Similarly, he did not take into consideration agency guidance to the contrary. *Supra* note 30.

85. *See, e.g.*, Anastasia D’Angelo, Gary Lutz & Perry A. Zirkel, *Are Published IDEA Hearing Officer Decisions Representative?*, 14 J. DISABILITY POL’Y STUD. 241 (2004) (finding that the hearing officer decisions under the IDEA available in IDELR database were not

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generally or the segment specific to M-Ds.⁸⁶ Third, although the author's long career has eschewed legal representation of either party, instead focusing on the impartial roles of IDEA review officer and trainer of IDEA hearing officers, he cannot claim complete objectivity. Particularly in the cases at the margin of either the stated selection criteria or the outcomes classification, the required judgment is subject to disagreement among neutral researchers. Moreover, the interpretation of both unsettled issues for and "best practices" of IDEA adjudicators defy uniform judgments among impartial role players.

Within such limitations, the author offers the following interpretations for stakeholder consideration of each of the principal overall findings of the foregoing empirical analysis.⁸⁷ First, the Figure 1 finding of a seeming stabilization of the frequency of M-D decisions after the first, transitional five-year interval after IDEA 2004, in comparison to the more limited overall period under the facially more protective criteria under IDEA 1997,⁸⁸ indirectly supports the abovementioned agency prediction to the extent that the "published" adjudications proportionally parallel the district determinations in M-D cases.⁸⁹

Second, the Table 1 finding that the outcomes of M-D rulings approximated a 60-40 split in favor of school districts, with this pro-district skew more pronounced for the substantive than the procedural category, is less district-favorable than expected in two respects: (1) it is not clearly more district-skewed than under the IDEA despite the agency prediction⁹⁰; and (2)

necessarily representative of the frequency and outcomes of the total population of such decisions). Although the SpecialEdConnection[ae] database subsumed IDELR and extended to additional coverage of IDEA hearing and review officer decisions, with its "LRP" citations, it only includes a limited sample of the decisions posted by the state education agencies, and its collection and selection procedures are based on proprietary commercial concerns for profitability rather than prevailing research norms for representativeness.

86. See, e.g., Perry A. Zirkel & Amanda Machin, *The Special Education Case Law "Iceberg": An Initial Exploration of the Underside*, 41 J.L. & EDUC. 483 (2012). For the hearing officer level, for instance, the ratio of filings to decisions appears to average approximately 15:1. See, e.g., Perry A. Zirkel & Gina L. Gullo, *Trends in Impartial Hearings under the IDEA: A Comparative Analysis*, 376 EDUC. L. REP. 870 (2020) (reporting filings and adjudications for the 2006–2011 and 2012–2017 periods, which need to be adjusted for the "pending" category).

87. The subsidiary findings may also merit consideration depending on the priorities and interests of the particular stakeholders. As an example, the prevalence of ADHD and perceived violence on the two sides of substantive criterion 1 in these M-D cases align with the increased, including over-, identification of ADHD and the ongoing concern with school safety.

88. Figure 1 shows an average of 7.4 decisions per year for the first five-year interval, followed by an average of 13.5 decisions per year for the remaining fifteen years. In contrast, an analysis of the M-D adjudications under IDEA 1997 found an average of 4.1

decisions per year. Perry A. Zirkel, *Manifestation Determinations under the Individuals with Disabilities Education Act*, 19 J. SPECIAL EDUC. LEADERSHIP 3, 8–9 (2006) (identifying thirty-seven M-D decisions within the nine-year period under the M-D provisions in IDEA 1997).

89. *Supra* note 26 and accompanying text. Moreover, for the central part of this period, the trend line of hearing officer decisions more generally under the IDEA was downward. Perry A. Zirkel & Elizabeth Zagata, *CADRE's National Data on the Frequency of Due Process Hearing Decisions: Suggested Adjustments*, 422 EDUC. L. REP. 24, 30, 32 (2024) (demonstrating a downward national trajectory for the ten-year period from 2012 to 2021 after eliminating the outlier jurisdiction of New York, which only accounted for 2% of the M-D decisions in the present analysis).

90. Not only did the agency guidance provide an expectation that the changes in the IDEA 2004 "would make it less difficult" to reach a "No" M-D (*id.*), but also the legislative history of IDEA 2004 reasoned that "under the 1997 law, schools were forced to prove a negative ... based upon a complicated set of factors (S. Rep. No. 1248, at 44 (Nov. 3, 2003)). Yet, the outcome distribution of the adjudications under the multi-factor substantive criteria of IDEA 1997 appear to be more, not less, district-favorable than for the two alternate causal criteria for the substantive rulings of the post-IDEA 2004 period. Compare Zirkel, *supra* note 88, at 7 (reporting an outcomes distribution of 22% for parents and 78% for districts in substantive M-D cases under IDEA 1997), with Table 1 *supra* (finding an outcomes distribution of 37% for parents and 63% for

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despite its single issue, facially uphill provision for parents under IDEA 2004, their success rate for M-D decisions⁹¹ appears to be no worse and perhaps better than for IDEA decisions more generally under the IDEA.⁹²

Finally, the qualitative findings merit careful consideration.⁹³ Overall, the cursory analyses in a majority of the M-D decisions would appear to be attributable in significant part to the required expedited timeline.⁹⁴ For example, the difficulty for parents to have expert witnesses, which is generally a weighty issue based on the general imbalance of resources and the specific non-recovery for prevailing parents,⁹⁵ is all the more acute in a proceeding that averages one-fourth the length of time.⁹⁶

More particularly, the restrictive application of the adjudicators' remedial authority in M-D cases⁹⁷ is clearly questionable in light of the broad, equitable nature of this authority.⁹⁸ In the minority of substantive rulings in the parents' favor, to limit the remedy to declaratory relief or merely an order to return the child to the classroom after an average of sixty days is simply inequitable.⁹⁹ In addition to correction, if not expungement of the record, compensatory relief should be the presumption, not the exception.¹⁰⁰ For procedural violations, with or without a second-step denial of FAPE, the equities warrant a similar presumption of affirmative and creative tailoring in the form of a purely prospective order, such as training of the school staff responsible for the violation or, in cases of lack of parental

districts under IDEA 2004) Other factors would appear to account for this difference, such as the selection of M-D cases filed and reaching decision during the two periods. Moreover, the pre-2004 analysis did not include procedural rulings, thus narrowing the scope of the comparison.

91. *Supra* text accompanying notes 78 (parental success rate of 43% for M-D decisions overall) and 66, 77 (parental success rate of 24% for M-D decisions at the court level).

92. *See, e.g.*, Perry A. Zirkel & Diane M. Holben, *Due Process Hearing Decisions under the IDEA: A Follow-Up Outcomes Analysis with and without New York*, 431 EDUC. L. REP. 394, 398 (2024) (revealing, upon conflation to the best-for-plaintiff approach, the following outcomes distribution of hearing officer decisions without the New York outlier cumulatively for the period 2013–2022: 48% for parents and 52% for districts); Perry A. Zirkel & Zorka Karanxha, *Longitudinal Trends in Special Education Case Law: An Updated Analysis*, 37 J. SPECIAL EDUC. LEADERSHIP 42, 46 (2024) (revealing, upon conflation to the best-for-plaintiff approach, the following approximated outcomes distribution of court decisions for the period 1998–2022: 40% for parents and 60% for districts). More narrowly, the outcomes distribution for M-D decisions approximates that for expedited hearings, which include the aforementioned (*supra* text accompanying notes 31–32) pre- and post-issues. Perry A. Zirkel, *An Analysis of Expedited Due Process Decisions under the IDEA*, 421 EDUC. L. REP. 763, 766 (2024) (finding an outcomes distribution of 39% for parents, 9% mixed, and 52% for districts in represen-

tative sample of expedited hearing decisions from 2013 to 2018).

93. *Supra* notes 79–84 and accompanying text.

94. *Supra* notes 23, 28 and accompanying text.

95. *See, e.g.*, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 303–04 (2006) (holding that prevailing parents are not entitled to recover expert fees under the IDEA).

96. An analysis of a rather complete sample of hearing officer decisions for the period 2013–2018 reported an average length of 50 days for expedited hearing decisions as compared to 200 days for standard, or non-expedited, hearing decisions. Diane M. Holben & Perry A. Zirkel, *Due Process Hearings under the Individuals with Disabilities Education Act: Justice Delayed . . .*, 73 ADMIN. L. REV. 833, 853–54 (2021).

97. *Supra* notes 82, 84 and accompanying text.

98. *See generally* Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: The Latest Update*, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY 505 (2018).

99. The aforementioned fifty-day average for the proceedings (*supra* note 96) is after the requisite ten days for a triggering change in placement (*supra* text accompanying note 11).

100. The rebuttal to this presumption may be if the child received full FAPE during the exclusion, which is often not the case in implementation of the applicable requirement (20 U.S.C. § 1415(k)(1)(D)(i)).

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participation, an outside facilitator.¹⁰¹ Such active exercise of equitable authority for procedural and substantive violations not only provides parents and children with both a symbolic and tangible sense of justice to the parents and their children but also incentivizes districts to fulfill the requirements of the IDEA.¹⁰²

In conclusion, this impartial analysis of M-D case law will hopefully and helpfully inform stakeholders who are policymakers, participants, or researchers in the narrow but significant process that the IDEA requires for disciplinary changes in placement. The stakes are high for not only the parents and child but also the schools and society.

101. Cf. Perry A. Zirkel, *Adjudication under the Individuals with Disabilities Education Act: Explicitly Plentiful Rights But Inequitably Paltry Remedies*, 56 CONN. L. REV. 201 (2023) (proposing more generally affirmative and creative remedial relief for both procedural and substantive district violations in IDEA cases).

102. Part of both the justice for plaintiffs and the incentive for districts is the IDEA attorneys' fees shifting provision, because the requisite material change in the parties' relationship often depends on whether the parents obtained a remedy that caused the

district to take some action it would not have otherwise taken. See, e.g., *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 677–78 (5th Cir. 2018) (ruling that the parent, despite not obtaining the primary requested relief, qualified as the prevailing party based on the hearing officer's prospective order for an IEP); *Jefferson Cnty. Bd. of Educ. v. Bryan M.*, 706 F. App'x 510, 515–16 (11th Cir. 2017) (ruling that, despite mootness, the parents qualified for prevailing party status based on the hearing officer's purely prospective orders, which included remedial training).