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Succeeding in Manifestation Determination Reviews: A Step-by-Step Approach for Obtaining the Best Result for Your Client

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ABSTRACT

Manifestation Determination Review (MDR) advocacy is difficult regardless of the role of the advocate — whether the advocate is a parent, an advocate, or an attorney. Because the MDR is conducted as an Individualized Education Program (IEP) Team meeting, if consensus cannot be reached, school personnel make the ultimate decision. Therefore, the advocate's persuasiveness and preparedness at the MDR will be critical in arriving at a consensus. This Article goes beyond the basic legal framework for an MDR and focuses on practical suggestions and approaches to enhance an advocate's efforts on behalf of a child or client. By employing the suggestions outlined in this white paper, we hope that advocates will be able to go into an MDR better prepared, have strategies to possibly avoid such a meeting, increase the number of positive decisions coming out of the MDR, and have a clear direction for next steps regardless of the outcome.

AUTHOR NOTE

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I. INTRODUCTION

The so-called "school-to-prison pipeline" begins with school failure. School failure increases the likelihood of both juvenile and adult incarceration. National research suggests that a child who has been suspended is three times more likely to drop out of school by tenth grade than a student who has never been suspended, and **dropping out triples the likelihood of incarceration later in life**.[1]

Special education students are disproportionately disciplined and excluded from school. In 2012, the U.S. Department of Education Office for Civil Rights revealed that students covered under the Individuals with Disabilities Education Act (IDEA) are twice as likely to receive one or more out-of-school suspensions as their non-disabled peers.[2] In Massachusetts, special education students accounted for thirty-three percent of disciplinary removals but comprised only seventeen percent of the total student population.[3] A recent study of policing practices within schools found that students with behavioral and learning disabilities were disproportionately affected by these practices.[4]

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1 Jen Vorse Wilka, *Dismantling the Cradle to Prison Pipeline: Analyzing Zero Tolerance School Discipline Policies and Identifying Strategic Opportunities for Intervention* (March 22, 2011) (unpublished Masters Program Policy Analysis Exercise, Harvard Kennedy School).

2 U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, THE TRANSFORMED CIVIL RIGHTS DATA COLLECTION (March 12, 2012).

3 *State by State Data on Students with Special Disabilities: Massachusetts*, SPECIALNEEDSDIGEST.COM (Mar. 5, 2014), http://www.specialneedsdigest.com /2014/03/state-by-state-data-on-students-with.html (children with disabilities in MA account for 17.4% of total state student population); *2012-13 Student Discipline Data Report (District) All Offenses – Students with Disabilities*, MASS. DEPT. OF ELEMENTARY AND SECONDARY EDUC. http://profiles.doe.mass .edu/state_report/ssdr.aspx (last visited May 1, 2015) (indicating that 18,495 special needs students were subject to discipline for academic year 2012-13); *2012-13 Student Discipline Data Report (District) All Offenses – All Students*, MASS. DEPT. OF ELEMENTARY AND SECONDARY EDUC. http://profiles.doe.mass .edu/state_report/ssdr.aspx (last visited May 1, 2015) (indicating that 54,453 students in total were subject to discipline for academic year 2012-13). Special needs students comprised 34% of all disciplinary removals for academic year 2012-13.

4 ROBIN L. DAHLBERG, CITIZENS FOR JUVENILE JUSTICE, ARRESTED FUTURES: THE CRIMINALIZATION OF SCHOOL DISCIPLINE IN MASSACHUSETTS'S THREE LARGEST SCHOOL DISTRICTS (Spring 2012), *available at* http://cfjj.org/pdf/ArrestedFutures-CfJJ-ACLU.pdf.

However, the IDEA contains special due process protections for disciplining students suspected of or identified as having a disability.[5] The foundation upon which these protections rest is the Manifestation Determination Review (MDR)—an Individualized Education Program (IEP) Team [6]meeting in which the Team considers the behavior in relation to the student's disability and his or her IEP.[7] If the behavior is found to be a manifestation of the student's disability, the disciplinary action is thwarted and the Team is directed to consider what additional supports the student may need.[8]

Therefore, effective advocacy throughout the MDR process is crucial to prevent the negative collateral consequences of school discipline and to ensure that students with disabilities have the support they need and are not disciplined for behavior that is consistent with their disability.

II. LEGAL FRAMEWORK

Students with a disability are afforded additional rights based on their eligibility under the Individuals with Disabilities Education Act (IDEA), as they may not be disciplined for behavior that is a result of their disability.[9] Before a district can change the placement of a student with special needs, the special education Team is required to conduct an MDR meeting.[10] The Team "must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents" to determine whether the student's behavior, which violated the code of student conduct, was either: (1) "caused by, or had a direct and substantial relationship to, the child's disability" or (2) "the direct result of the Local Education Agency's (LEA) failure to implement the IEP."[11] If the Team answers yes to either of these questions, the Team must perform a functional behavioral assessment or review an existing plan, and "return the child to the placement from where (s)he was

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5 *See* 20 U.S.C. § 1415(k) (2014) and 34 CFR §§ 300.530-300.536 (2014).

6 *See* 20 U.S.C. § 1414(d)(1)(b) (2014).

7 20 U.S.C. § 1415(k)(1)(E) (2014) and 34 CFR §§ 300.530(e)(2014).

8 20 U.S.C. § 1415(k)(1)(F) (2014) and 34 CFR §§ 300.530(f) (2014).

9 Honig v. Doe, 484 U.S. 305 (1988).

10 34 C.F.R. § 300.530 (2014).

11 *Id.*

removed."[12] If the answer to both of these questions is no, the student may be disciplined, but must "continue to receive educational services . . . so as to enable the child to continue to participate in the general education curricular" and must be afforded the opportunity "to progress toward meeting the goals set in the child's IEP."[13]

Additionally, students who have not previously been found eligible for services may have a right to an MDR if the LEA had knowledge of the disability.[14] The LEA is deemed to have knowledge in this context if:

> (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
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> (2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or
>
> (3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.[15]

However, a parent can waive this right if he or she does not permit his or her child to be evaluated or refuses IDEA services.[16] Additionally, an LEA is not considered to have "knowledge" as it applies to the MDR provision if a child was previously evaluated and determined ineligible for IDEA services.[17]

In accordance with the statute, a "change of placement" has occurred when either: (1) the removal exceeds ten consecutive school days; or (2) a series of shorter removals constitutes a pattern: [18]

> (1) Because the series of removals exceeds 10 school days in one school year;
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> (2) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and

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12 *Id.* at § 300.530(f).

13 *Id.* at § 300.530(d)(1)(i).

14 34 C.F.R. § 300.534(a) (2014).

15 *Id.* at § 300.534(b).

16 *Id.* at § 300.534(c)(1)(i)-(ii).

17 *Id.* at § 300.534(c)(2).

18 34 C.F.R. § 300.536(a) (2014).

> (3) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.[19]

The U.S. Department of Education ("The Department") has provided guidance as to whether in-school suspensions constitute removal. An in-school suspension is not considered a removal under the statute if "the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement."[20] The Department further qualifies, however, that "portions of a school day that a child had been suspended may be considered as a removal in regard to determining whether there is a pattern of removals."[21]

Additionally, the Department has clarified that a bus suspension may qualify as a removal "[i]f the bus transportation were a part of the child's IEP . . . because that transportation is necessary for the child to obtain access to the location where services will be delivered."[22]

The Team is statutorily required to "review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents."[23] However, the Department has clarified that the list is "not exhaustive and may include other relevant information in the child's file, such as the information mentioned by the commenters."[24]

As discussed in *Fitzgerald v. Fairfax County School Board*, this language does not require each member to read before the meeting every piece of information in the student's file. All the statute requires is that, before reaching a manifestation determination, the team must review the information pertinent to that decision, including the child's IEP, his teachers' comments, and any information provided by the parents. This review clearly may occur before or during the course of

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19 *Id.*

20 U.S. Dept. of Educ., *Assistance to States for the Educ. of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. 46540-01 (Aug. 16, 2006).

21 *Id.*

22 *Id.*

23 34 C.F.R. § 300.530(e)(1) (2014).

24 U.S. Dep't of Educ., *supra* note 20.

an MDR hearing."[25] Additionally, the Fourth Circuit stressed that "if the school system has already fully made up its mind before the parents ever get involved, it has denied them the opportunity for any meaningful input," and accordingly, "school officials must come to the IEP table with an open mind."[26]

In an MDR, the Team is not required to determine whether the conduct that violated the school code did in fact occur.[27] However, the Office of Special Education Programs ("OSEP") provided guidance, clarifying that "there may be instances where a hearing officer, in his discretion, would address whether such a violation has occurred."[28] According to OSEP, "[t]he IDEA and its implementing regulations neither preclude nor require that a hearing officer determine whether a certain action by a student with a disability amounts to a violation of the school district's Student Code of Conduct."[29] In Massachusetts, for example, a hearing officer determined that a student had carried or possessed a weapon on school grounds.[30] In contrast, in Hawaii, a hearing officer refused to determine where a violation occurred as it "would essentially deputize manifestation determination teams, and in turn, administrative hearings officers and federal courts, as appellate deans of students."[31]

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25 Fitzgerald v. Fairfax Cnty. Sch. Bd., 556 F. Supp. 2d 543, 559 (E.D. Va. 2008) (holding on appeal that the school board did not violate Individuals with Disabilities Education Act's (IDEA) procedural provisions in conducting Manifestation Determination Review (MDR) hearing).

26 Doyle v. Arlington Cnty. Sch. Bd., 806 F. Supp. 1253, 1262 (E.D. Va. 1992), *aff'd,* 39 F.3d 1176 (4th Cir. 1994).

27 *See* 20 U.S.C. § 1415(k)(1)(E)(i)(I-II) (2012) (noting that the Team, with the aid of the local educational agency and the parent, review all relevant information in the student's file as well as information provided by the parents to determine (1) if the conduct was caused by or had a direct and substantial relationship to the child's disability; or (2) if the conduct in question was the direct result of the local educational agency's failure to implement the Individual Education Plan (IEP)).

28 Letter from the U.S. Dep't of Educ., Office of Special Educ. and Rehabilitative Services, to Tomas Ramirez III (Dec. 5 2012), *available at* http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/12-013849r-tx-ramirez-mdh12-5-12.pdf.

29 *Id*.

30 *In re* Scituate Pub. Schs., 47 IDELR 113 (SEA MA 2007).

31 Danny K. ex rel. Luana K. v. Dep't of Educ., Hawai'i, No. CIV. 11-00025 ACK, 2011 WL 4527387, at *12 (D. Haw. Sept. 27, 2011).

Although the IDEA falls silent,[32] the United States Supreme Court determined in 2005 that the party seeking relief bears the burden of persuasion.[33] However, many states have statutes that determine the burden of persuasion. [34]

As deference is given to Teams to determine whether conduct is the manifestation of a student's disability, few cases are appealed to Circuit courts.[35] As a result, advocates may have the most success with appeals based on compliance with express statutory rights such as timeliness of the MDR, completion of a Behavior Intervention Plan (BIP), or presence of parents during an MDR.

III. EFFECTIVE MDR ADVOCACY – STUDENTS ON A 504 PLAN OR IEP

Effective advocacy begins before the meeting and continues once the meeting is concluded. The following text provides suggestions for the preparation, meeting, and post-meeting stages of the process.

A. Preparation

As with any Team meeting, a thorough review of the student's records is a critical first step. If the MDR is already scheduled, you must make sure that there is time to review the records, even if that means postponing the meeting. In addition, you should also find out who from the school will be in attendance. The parent or student may have a suggestion as to who from the school he or she would like present. If you are an attorney, notify the school of your planned attendance. The school may want to have their attorney present if you are going to be there. You do not want to surprise them and then have the meeting delayed.

In addition, review past evaluations, past discipline, previous IEPs, medical records, and any outside evaluations. The length of this preparation will depend on whether this is a current or new client. With a new client, prepare by creating charts which summarize: (1) a

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32 National Council on Disability, *Position Statement, Individuals with Disabilities Ed Act Burden of Proof* (Aug. 9, 2005), *available at* http://www.ncd.gov/publications/2005/08092005.

33 Schaffer ex rel. v. Weast, 126 S.Ct. 528, 549 (2005).

34 Robert W. D. Wright, *Schaffer v. Weast: How Will the Decision Affect You?* (November 21, 2014, 2:30 PM), http://wrightslaw.com/law/art/schaffer.impact.owright.htm.

35 Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 ED. LAW REP. 732, 732-33 (2002).

progression of the student's IEPs, highlighting similarities and differences as well as changes in accommodations, services, and placement; (2) a chart of past evaluations, highlighting supportive information; (3) a chart of disciplinary history focusing on frequency and severity; and (4) a chart of any hospitalizations and changes in medications.

Next, it is important to meet with the student and family to discuss what an MDR is, how the meeting will proceed, and most importantly, the two questions to be addressed by the Team. If the child is being disciplined and is not on an IEP or 504 plan, find out if the child has received any mental health services or if any concerns have been raised with the school regarding the child's emotional state. Explore possible outcomes of the meeting with the student and parents and inquire as to whether the student is willing to undergo additional (or first-time) evaluations.

Determine who the student's collaterals are and, if at all possible, arrange for someone with knowledge of the student's disability to be at the meeting. If that person cannot be physically present, see if he or she can call in or prepare a letter connecting the child's disability to the conduct at issue. Note that you can enlist several people to perform this role – ideally this can be one of the student's mental health providers, as well as service providers such as mentors, social workers, etc.

Review the Diagnostic Statistic Manual of Mental Disorders Fifth Edition ("DSM-5")[36] in preparing your notes for the meeting. Look at each applicable diagnosis and connect the diagnostic criteria to the student's alleged conduct. Also, bring the manual to the meeting. This is helpful should other diagnoses be discussed, and it also helps to set the stage and demonstrate to everyone at the meeting that you have done your homework and are prepared to advocate for this student.

Create an outline for yourself with the main points that you want to cover at the meeting. The outline can include points such as the student's behavioral and disciplinary history, his or her diagnoses and the corresponding diagnostic criteria. Finally, for each of the questions to be asked at the meeting, have a bulleted list of points that you believe supports a finding of a manifestation.

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[36] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed., American Psychiatric Publishing) (2013).

B. At the Meeting

At the MDR Team meeting, all relevant members are required to attend.[37] It does not have to be the entire Team, but must include those best positioned to answer the mandated questions. If the Team is going to make any changes to the IEP, the entire Team must be present. As a reminder, the required participants to a Team meeting are: the parent/guardian, at least one regular education teacher, at least one special education teacher, a representative of the school district with knowledge of existing resources, a professional qualified to interpret evaluation results, and other individuals at the discretion of the parent or school district. The student is also invited, if he or she is fourteen years of age or older.

Note that often a school district will have a manifestation determination worksheet. The questions that are answered at an MDR were changed in the 2004 reauthorization of the IDEA.[38] As a result, these spreadsheets may not have been updated and could still contain the pre-2004 questions. Also, the school may try to insist on answering other questions, such as (1) Does the student know right from wrong?; (2) Is there an exemption from the code of conduct listed in the IEP?; and (3) Is the student able to control his behavior? Because you are trying to work as a Team at this stage, do your best to steer the school away from discussing issues like whether the student knows right from wrong or whether his or her conduct was wrong because this can steer the conversation towards moral responsibility, which is not the focus. Keep the discussion focused on the required questions. Have the people you bring to the meeting speak to these questions.

If the student has Attention Deficit Hyperactivity Disorder (ADHD), discussions of whether or not the student is taking medication are inappropriate and should be limited to the diagnostic characteristics of ADHD and whether the conduct in question was caused by or had a substantial relationship to the disability. Even in situations where the connection between the conduct and the student's disability is more proximate than direct, information on the emerging

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[37] 20 U.S.C. § 1414(d)(1)(B) (2015).

[38] U.S. DEPT. OF EDUCATION, BUILDING THE LEGACY: IDEA 2004 (2009), *available at* http://idea.ed.gov/explore/view/p/,root,dynamic,QaCorner,7, ("The 2004 amendments to section 615(k) of the IDEA were intended to address the needs expressed by school administrators and teachers for flexibility in order to balance school safety issues with the need to ensure that schools respond appropriately to a child's behavior that was caused by, or directly and substantially related to, the child's disability.").

understanding of adolescent brain development and the effect of trauma on brain development may be helpful in making this connection.

Finally, at this meeting, and in any disciplinary meeting that might follow, (if no manifestation is found) advocate in a way so that the school personnel see the student as a whole person, not as just the action they are being disciplined for. This is where other people who work with the student outside of school can be very helpful. The focus should be on how we can support the student, not punish him or her.

The MDR meeting is also a good opportunity to review the current IEP. If you are going to do that, let the Team chairperson know so that the appropriate amount of time is allotted for the meeting.

If the student's behavior is either: 1) caused by, or had a direct and substantial relationship to the student's disability; or 2) the direct result of the Local Education Agency's failure to implement the IEP, then the school cannot proceed with disciplinary action, and the student remains in his or her current placement (unless it is a "special circumstance"), and the district must take immediate steps to remedy the deficiencies. At this point, the parent may be asked to consent to a Functional Behavioral Assessment (FBA) and you may want to advocate for any other testing you feel is appropriate. The FBA process, when done correctly, can be a problem-solving process for addressing student behavior.[39] A well-executed FBA will (1) identify problematic behaviors through observation, interviews, scales and manipulation; (2) investigate antecedents and triggers; and (3) be performed by someone with appropriate training and certification.[40] Coming on the heels of the FBA, a Behavioral Intervention Plan (BIP) will be developed.[41] This can be seen as a plan of action to manage the student's behavior. Your advocacy throughout the FBA and BIP process is crucial to address the underlying causes of the student's difficulties.

If the answer to both questions is "no," the school may proceed with disciplinary action, and the district must provide services during any removal for students on IEPs.[42] The regulations are not explicit

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39 "Under 34 C.F.R. § 300,324(a)(2)(i) (2014), the use of positive behavioral interventions and supports must be considered in the case of a child whose behavior impedes his or her learning or that of others." *Id.*

40 *Id.*

41 34 C.F.R. § 300.324(a)(2)(i) (2014).

42 20 U.S.C. § 1415(k)(1)(C).

that the child must have exactly the same number of hours of instruction as they received in school, but the level of services must be enough to allow the child to make reasonable progress.[43] Also, an FBA and a BIP may still be deemed to be appropriate. If you are seeing a pattern of disciplinary actions without any progress, this is a chance to request these or other evaluations.

Note that if the conduct involves weapons, drugs, or serious bodily injury, the student may be sent to an Interim Alternative Educational Setting (IAES) determined by the Team for forty-five days regardless of the outcome of the MDR.[44] If this is the situation, see our suggestions under (III)(D)(1) below.

C. Post-Meeting Advocacy

Manifestation decisions and decisions on services that will be provided to a student during a period of exclusion are appealable. Due process hearings on these issues are provided expedited treatment, which means that the hearing must occur within twenty school days of when the complaint was filed and the decision must be issued within ten days after the hearing.[45] All of the preparation you have done for the MDR will be extremely useful in laying out your due process request.

Often, the first contact you have with a client may be at a time of crisis, when they are facing suspension or expulsion. Short-term navigation, hopefully successful, of the discipline process for students with disabilities may just be the beginning of a longer relationship to advocate for appropriate accommodations, services, and placement for this student, so that future disciplinary actions do not occur.

D. Other Considerations

1. Extended evaluation as an alternative to discipline

A school may be utilizing the disciplinary process in an effort to remove a difficult student that the school is unable or unwilling to adequately serve. Often, particularly in cases where it may be difficult to link the behavior to the disability (e.g., student who brings a weapon to school and is on an IEP for a learning disability) a conversation with the appropriate school contact or the school's attorney about an extended evaluation at an out-of-district placement may be fruitful in

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43 *See* 71 Fed. Reg. 46726 (2006).

44 *See* 20 U.S.C. § 1415(k)(1)(G) (2014).

45 20 U.S.C. § 1415(j)(4)(B) (2014).

avoiding the disciplinary action and therefore the MDR. As one example, if the student is going to be placed in an IAES regardless of the outcome of the MDR, perhaps it is worthwhile moving quickly to select an appropriate placement (if there is a choice) and in so doing, convincing the district not to pursue the disciplinary action and preserve your client's record.

2. Timing relative to disciplinary hearing

Typically, the MDR would be held before any disciplinary hearing. It would not make sense to conduct a suspension or expulsion hearing before determining whether or not there is a manifestation. If the LEA schedules a disciplinary hearing without having scheduled an MDR, this may be a sign that the decision is a foregone conclusion. Push back on this scheduling, and if you are not successful, this fact should be used in appealing the MDR.

Timing of the MDR and taking of disciplinary action is particularly critical in the case of regular education students who may be eligible to use the protections of an MDR if they can show that the district had knowledge that the student was a student with a disability prior to the behavior subject to discipline.[46] There is no legal authority on point, but we advocate that the evaluations must be conducted prior to the disciplinary action and MDR in order to be able to appropriately answer the questions required in the MDR.

3. When the behavior is or could be considered delinquent/criminal

If a student is facing charges for the conduct in question or there is still the possibility that charges could be brought, the parent or advocate needs to tread carefully. If at all possible, for any student in this situation, consult with their delinquency attorney before proceeding to a disciplinary hearing or MDR.

Anything the student or parent says at the disciplinary hearing and the MDR (one or both may be recorded depending on state law) may be discoverable by the prosecution. We advise our clients not to discuss the incident in question given the pending or possible charges.

Additionally, as in other situations, the student may deny the conduct for which they are accused. In this instance, you can deny the conduct, but go on to advocate that if the conduct did occur it was substantially related to the student's disability. This can be awkward,

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[46] *See* 20 U.S.C. § 1415(k)(5)(b).

but hopefully school personnel recognize the larger consequences facing the student beyond school discipline, which are preventing him or her from discussing the incident. The key here, as in all MDR and disciplinary advocacy, is to have the district see the student as more than the conduct that brought them to the hearing and understand that "each of us is more than the worst thing we've ever done."[47]

4. "Re-doing" an MDR

Sometimes you may be brought into a case after the MDR has taken place. In some instances you may be able to negotiate with the school district to "re-do" an MDR when the parent was unrepresented and did not fully understand the proceeding. We have also "redone" an MDR when subsequent evaluations shed more light on the student's underlying disability and more clearly connects the behavior and the disability. These were also cases in which the student was already at a new placement and the district was more "comfortable" finding a manifestation secure in the knowledge that the student would not be returning to his prior school.

IV. CONSIDERATIONS FOR GENERAL EDUCATION STUDENTS

A. "Not Yet Eligible" Students For Whom the District Has "Knowledge"

As discussed within the legal framework, students who have not previously been found eligible for services may have a right to an MDR if the LEA had knowledge of the disability.[48] In these situations, a thorough review of the student's records and interviews with the student and his or her parents or guardians can provide the evidence of "knowledge" that you need. As discussed previously, ideally the MDR should take place after the student has been evaluated.

If there is a disagreement about knowledge and the need for an MDR, this is also something that can be pursued via a due process hearing, which will receive expedited treatment.

B. Students where there is "No Basis of Knowledge"

Finally, if you become involved in a case in which a student is being excluded and there is no "knowledge" that you can allege, it may still be appropriate to request an evaluation if your review of the

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47 BRYAN STEVENSON, JUST MERCY 17 (2014).

48 34 C.F.R. 300.534(a) (2014).

student's records and discussions with the student and his or her parents indicate that there may be an underlying disability. If the student and parents agree, you can guide them through the eligibility determination process. A school is obligated to evaluate a student, even if he or she is currently excluded from school. Through this process the student may become eligible for more services than they are currently receiving.

Note that if "a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be conducted in an expedited manner."[49] We have found no specific guidance on what "an expedited manner" means in terms of timeline and various states may have their own guidance or case law. However, it should certainly be less than that provided for in an initial evaluation under regular circumstances, i.e., a sixty day federal requirement which may be shortened by state regulation.

V. Future Direction

More effective advocacy at MDRs will help to reduce the disproportionate number of students with disabilities who are disciplined for behavior that is related to their disability. However, our efforts to combat this problem must go further. Delinquent offenses for minor school-based misbehavior should be eliminated. Police presence within schools should be greatly reduced or eliminated. Increased training of delinquency attorneys in disciplinary protections for special education students will help. Finally, increased education and training of school personnel, law enforcement, and the judiciary as to the link between a child's disability and behavior is needed to reduce the number of special education students being disciplined for conduct that they cannot control without support.

VI. Conclusion

A student with a disability facing exclusion from school has unique due process rights. At the heart of those protections is the right to a Manifestation Determination in which she, through her parents, advocate, or attorney, can connect the conduct being disciplined to her disability or establish that her IEP was not being properly implemented. While advocacy at this intersection of discipline and special education comes with challenges, it is an excellent opportunity

[49] 20 U.S.C. § 1415(k)(5)(D)(ii) (2014); 34 C.F.R. § 300.534(d)(2)(i) (2014).

to not only ward off continued exclusion, but also to shine a light on areas where additional services or a different placement may be needed. Knowledge of the law in this area, coupled with a thorough approach before, during, and after the MDR will enhance your advocacy on behalf of students.