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Disability, Discipline, and Illusory Student Rights

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ABSTRACT

Congress enacted the Individuals with Disabilities Education Act (IDEA) to prevent the widespread exclusion of children with disabilities from public schools. While today's schools no longer formally exclude students with disabilities, they routinely achieve this same end through school discipline policies. In fact, students with disabilities are at greater risk of suspension and expulsion than any other student population. The suspension rate for students with disabilities is more than twice that of their peers. Likewise, one out of every four students arrested at school is a student with disability. These high rates of discipline, in turn, help funnel students with disabilities into juvenile detention centers at alarmingly high rates.

The IDEA contains statutory provisions that ostensibly guard against these problems. In particular, the Act prohibits schools from suspending and expelling students for behavior that is rooted in their disabilities. Based on original empirical research, this Article demonstrates that these provisions, while well-intended, are woefully inadequate to achieve their goal. First, the evidentiary standard for demonstrating that misbehavior is rooted in a disability is unfeasible. It requires students to prove their disability caused the misbehavior, even when evidence to make this showing is essentially unavailable. Second, the statutory provision presumes that decisionmakers can reliably judge whether a particular misbehavior is rooted in disability. This assumption is flawed because disabilities and the behaviors that they produce vary across individuals, time, and circumstance. Thus, neither science nor the evidence typically presented at discipline hearings allows for concrete distinctions between disability-related and nondisability-related misbehavior. The confluence of these two points essentially requires students to affirmatively demonstrate the unknowable, tilting the standard strongly in favor of excluding students with disabilities—the exact opposite of the IDEA's overall goal.

This Article argues that current flaws can be mitigated by altering the burden of proof and expanding the type of data that schools must gather and rely upon in making decisions regarding the exclusion of students with disabilities.

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INTRODUCTION

Forty years ago, students with disabilities had to fight for the right to be included in public school and educated alongside their peers.[1] After a series of class action litigation victories, they prompted Congress to enact sweeping legislation, the Education for All Handicapped Children Act (EAHCA), now known as the Individuals with Disabilities Education Act (IDEA).[2] The statute threw open the schoolhouse doors for students with disabilities and promised to transform their educational opportunities. Under the EAHCA, students with disabilities secured the right to a free appropriate public education in classrooms alongside their peers.[3] Yet, it has now become clear, more than forty years after its enactment, that this once celebrated law has largely failed to live up to its core promise of ensuring an inclusive environment for all students with disabilities.[4] Schools have quietly used suspension and expulsion as a way to shuttle students with disabilities back out of the classroom, excluding them from general education and forcing them into alternative learning environments. Current data reveal that schools suspend students with

1. LAURA ROTHSTEIN & SCOTT F. JOHNSON, SPECIAL EDUCATION LAW, 11–13 (3rd ed. 2000).
2. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended in scattered sections of 20 U.S.C. (2012)) [hereinafter EAHCA]. *See generally* Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866 (D.D.C. 1972) (holding that District of Columbia cannot exclude students with disabilities from public schools); Pa. Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972) (holding that state statutes excluding students with intellectual disabilities from public schools were unconstitutional). In 1990, Congress renamed the Education for All Handicapped Children Act the Individuals with Disabilities Education Act., Pub. L. No. 101-476, § 901(a), 104 Stat. 1103, 1141–42 (1990).
3. *See* EAHCA, 89 Stat. 773.
4. *See* U.S. DEP'T EDUC. OFFICE FOR CIVIL RIGHTS, DATA SNAPSHOT: SCHOOL DISCIPLINE, ISSUE BRIEF NO. 1, 1 (2014), https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf [https://perma.cc/VH7C-CZJ4] [hereinafter DOE, DISCIPLINE SNAPSHOT] (finding that "students with disabilities are more than twice as likely to receive an out-of-school suspension . . . than students without disabilities" and face disproportionate rates of arrests and referrals to law enforcement); *see also* SUE SWENSON & RUTH E. RYDER, U.S. DEP'T EDUC., DEAR COLLEAGUE LETTER ON THE INCLUSION OF BEHAVIORAL SUPPORTS IN INDIVIDUALIZED EDUCATION PROGRAMS 2 (2016), https://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps—08-01-2016.pdf [https://perma.cc/8S3P-F34J] (finding that during the 2013–14 school year, 10 percent of all children with disabilities, ages 3 through 21, were subject to a disciplinary removal of ten school days or less, with children of color with disabilities facing higher rates of removal and issuing guidance to "clarify that schools . . . must provide appropriate behavioral supports to children with disabilities").

disabilities at more than twice the rate of their peers.[5] This disproportionate punitive attention serves to funnel students with disabilities into the school-to-prison pipeline.[6]

Students with disabilities are subjected to arrests at rates much higher than their nondisabled peers. While students with disabilities are just 12 percent of the general student population, they represent a quarter of students referred to law enforcement or subjected to school-related arrests.[7] Students of color are disproportionately identified as students with disabilities and likewise are disproportionately represented in the juvenile justice system.[8] African American male students with disabilities may be the most impacted by disciplinary exclusions, with several studies indicating that this cohort is suspended at a far higher rate than any other group.[9] Research on students who have been arrested as juveniles overwhelmingly points to poor long-term outcomes, including higher school dropout rates,[10] lower rates of employment,[11] and increased risk of adult incarceration.[12]

5. DOE, DISCIPLINE SNAPSHOT, *supra* note 4, at 1.
6. SARAH E. REDFIELD & JASON P. NANCE, AM. BAR ASS'N, SCHOOL-TO-PRISON PIPELINE, PRELIMINARY REPORT 40 (2016), https://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf [https://perma.cc/H3RU-WHGY]. *Id.* at 39 (describing the ways that students with disabilities face disproportionate suspensions and referrals to law enforcement as well as disproportionately confined in correctional facilities).
7. DOE, DISCIPLINE SNAPSHOT, *supra* note 4, at 7.
8. REDFIELD & NANCE, *supra* note 6, at 34–35 (finding that the risk index for over-representation of students with disabilities in the juvenile justice population was the "largest for American Indian-Alaskan Native students, followed by African American and then Hispanic students").
9. As Daniel Losen and Jonathan Gillespie observed:

> Applying these three lenses together—race, gender and disability—yields a more disturbing image than any one of the categories alone. . . . The group that consistently had the highest rate of suspension is African-American male students with disabilities. In some of the largest districts in the U.S., suspension rates for this group reached more than 70% of their enrollment.

DANIEL J. LOSEN & JONATHAN GILLESPIE, CTR. FOR CIVIL RIGHTS REMEDIES, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 29 (2012), *quoted in* REDFIELD & NANCE, *supra* note 6, at 35.

10. Randi Hjalmarsson, *Criminal Justice Involvement and High School Completion*, 63 J. URB. ECON. 613, 628 (2008) (finding that arrested and incarcerated students are less likely to graduate high school than non-arrested students).
11. JUSTICE POLICY INST., STICKER SHOCK: CALCULATING THE FULL PRICE TAG FOR YOUTH INCARCERATION 28–32 (2014), http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf [https://perma.cc/4G8L-WECN] (summarizing several studies finding incarceration of youth leads to reduced employment prospects and future earning potential).
12. REBECCA A. COLMAN ET AL., N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., LONG-TERM CONSEQUENCES OF DELINQUENCY: CHILD MALTREATMENT AND CRIME IN EARLY ADULTHOOD

On its face, the IDEA recognizes these risks and purports to protect students with disabilities from them. Before a school can suspend or expel a child with a disability, the IDEA requires schools to make a "manifestation determination," meaning the school must examine whether the student's disability caused or played a substantial role in the misbehavior at issue.[13] If the behavior is either sufficiently rooted in disability or the direct result of a school's failure to implement special education services, then the IDEA prohibits the school from unilaterally excluding the student.[14] But, if behavior does not stem from a disability or inappropriate school services, the school can discipline the student as it would any other.[15] In theory, this process should keep the discipline rate for students with disabilities somewhere close to that of their peers. The fact that their discipline rates are worlds apart[16] suggests that something has gone awry.

This Article theorizes that the problem lies in the statutory text itself. The evidentiary burden in a manifestation determination hearing, which requires a student to prove that her disability played a role in misbehavior, makes it impractical for most students to prevent their exclusion, even when their misbehavior actually stems from a disability. This is a direct, albeit unintended, consequence of changes that Congress made to the IDEA over the years. Congress initially provided more protection to students, but, fearing that the statutory protections might make it too hard for schools to exclude an exceptionally troubled or dangerous student, Congress streamlined the process, narrowing the nexus inquiry between behavior and disability.[17] The IDEA now swings too far in the other direction and makes it too easy for schools to exclude almost any student.

First, the IDEA imposes an exceedingly stringent and impractical standard in order to invoke protections against exclusion. More specifically, it asks whether the misconduct was "caused by, or had a direct and substantial relationship to, the child's disability," or whether it was the "direct result" of the school's "failure to implement" a special education service.[18] The problem is that this seemingly clear statutory language does not align with the science

33 (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/226577.pdf [https://perma.cc/9LWN-AQN9] (finding the vast majority of delinquent youth included in study sample later entered the adult criminal justice system).

13. 20 U.S.C. § 1415(k)(1)(E) (2012).
14. *Id.* § 1415(k)(1)(F).
15. *Id.* § 1415(k)(1)(C).
16. *See* DOE, DISCIPLINE SNAPSHOT, *supra* note 4, at 3.
17. S. REP. NO. 108-185, at 43 (2003).
18. 20 U.S.C. § 1415(k)(1)(E).

regarding internal decisionmaking. Indeed, science has yet to fully explain the relationship between an adolescent's internal decisionmaking processes and external behavior.[19] Thus, the statute asks a question that educators and courts often lack the tools to answer. As a result, educators and courts lack an evidence-based methodology to determine what behaviors are caused by disability.

Second, the IDEA's standard presumes that questions of disability and misbehavior are readily categorized, and that disabilities are fixed and their scope well-defined. In other words, the statute presumes that educators can isolate learning disabilities and compartmentalize behaviors that are rooted in the disability from all other behavior. The difficult reality is that individuals' behaviors are idiosyncratic and science does not allow for concrete distinctions between disability-related and nondisability-related behavior.[20] Disabilities are fluid, and thus their causal relationship to behavior occurs along a spectrum.[21] But rather than acknowledge the complexity of the relationship between behavior and disability, the IDEA demands schools draw lines around behavior attributed to disabilities, which in turn leads to arbitrary results.

By imposing such a strict standard, which is not well suited to the science around disability, the IDEA effectively requires students to affirmatively demonstrate the unknowable and tilts the standard in favor of a finding of "no nexus" between the disability and misbehavior. This Article's empirical analysis reveals that students who appeal a school's substantive finding of "no manifestation" of disability only win 36 percent of the time.[22] When students win appeals, it is often for procedural reasons and not by demonstrating that their behavior was substantially related to their disability, evidencing the

19. *See generally* Michael N. Tennison & Amanda C. Pustilnik, *"And If Your Friends Jumped Off a Bridge, Would You Do It Too?": How Developmental Neuroscience Can Inform Legal Regimes Governing Adolescents*, 12 IND. HEALTH L. REV. 533, 557–65 (2015) (discussing several different scientific models for studying adolescent "processing incentives" and finding that "[i]n particular, adolescents suffer relative to adults in their capacities to assess what is a good versus a bad risk, to inhibit impulses, and to silence the inner roar of concerns about what their peers think of them").

20. Julia C. Dimoff, Comment, *The Inadequacy of the IDEA in Assessing Mental Health for Adolescents: A Call for School-Based Mental Health*, 6 DEPAUL J. HEALTH CARE L. 319, 323 (2003) ("[T]he identification of these disorders is made more difficult because there is such a wide spectrum of diagnostic choices," making "[t]he diagnosis process . . . erratic and inaccurate at times resulting in over-diagnosis as well as under-diagnosis.").

21. *Id.*

22. *See infra* Subpart II.B.1.

extremely difficult burden on students to prove a nexus between behavior and disability.[23]

A qualitative analysis of manifestation determination appeals identifies at least two systemic problems. First, courts struggle with the complexity of the causal inquiry itself.[24] Rather than confront these complexities, courts either place added weight on expert testimony or teacher observations, neither of which necessarily answers the specific legal questions before the court.[25] Moreover, heavily weighting expert testimony significantly disadvantages students because they do not have equal access to experts.[26] Second, courts elevate process over substance, effectively assuming that schools have reached an accurate outcome so long as they conformed to the required process.[27]

The net result of these problems is to leave schools largely free to exclude students for misbehavior that may very well be rooted in disability—a result that is at odds with both the overarching goals of the IDEA and the intent of the discipline provision itself.[28] While the IDEA generally mandates an individualized approach to student disabilities, the stringent causal standard unduly narrows the focus to a specific category of disability, which may not align with a student's individual circumstances.[29] Likewise, the statute's requirement that students prove that their misbehavior is directly caused by their disability means that the statute does not actually protect many children from exclusion.[30] Finally, though the IDEA mandates an appropriate education with individualized services, the discipline provision creates a perverse incentive to limit services to the type that can be implemented easily and with consistency.[31] In essence, the provision only looks to see what the school was doing, not what it should have been doing. Consequently, the discipline provision's narrow focus on existing services contravenes the IDEA's central mission for an individualized and holistic provision of special education services.

23. *See infra* Subpart II.B.1.a.
24. *See infra* Subpart II.B.2.a.
25. *See infra* Subpart II.B.2.a(1).
26. *See infra* Subpart III.B.4; *see also* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 303–04 (2006) (holding the Individuals with Disabilities Education Act (IDEA) does not allow recovery for non-attorney expert's fees).
27. *See infra* Subpart II.B.2.b.
28. 20 U.S.C. § 1400(d) (2012); *see generally* Honig v. Doe, 484 U.S. 305, 308 (1988) (finding that the schools could not unilaterally remove students with disabilities from school for "dangerous or disruptive conduct growing out of their disabilities").
29. *See infra* Subpart III.A.
30. *See infra* Subpart III.B.
31. *See infra* Subpart III.C.

This Article proposes to resolve these conflicts with three improvements to the discipline process for students with disabilities. First, the burden of proof in discipline appeals should be allocated to school districts. Schools have better access to and control over the vast majority of evidence relied upon to make discipline decisions. Moreover, allocating the burden to schools would incentivize them to ensure accuracy in their initial decision around whether disability was involved in the misconduct. Second, the causal inquiry itself must change. Rather than asking whether the disability was a direct or substantial cause of the misbehavior, the standard should simply ask whether, by a preponderance of the evidence, the misbehavior was rooted in disability. Lastly, districts must begin to engage in more comprehensive and uniform data-gathering with respect to disability and behavior. Only then can courts begin to answer the causal inquiry with some level of reliability and objectivity.

This Article begins by examining the historical context for the discipline provisions in the IDEA and reviews the provision's amendments leading up to the current standard. Part II surveys the landscape of MDR appeals under the IDEA's 1997 disciplinary provision as compared with the current 2004 amendments. It also analyzes an original data set of discipline appeals over the last twelve years and articulates the resulting trends. Part III argues that the IDEA's current discipline protections are illusory for three reasons: First, the provisions fail to account for variances in disability; second, they set insufficient limits on exclusion of students with disabilities; and finally, they contain perverse incentives which are at odds with the broader purpose of the statue. Part IV proposes several solutions to ensure a more just and equitable discipline process that adequately serves the broader goals of the IDEA.

I. HISTORY OF DISCIPLINE UNDER THE IDEA

A. IDEA: Background and Basic Principles

The movement championing educational equality for children with disabilities was borne out of the crusade for racial desegregation and the notion that separate but equal was inherently unequal.[32] Prior to the enactment of the EAHCA, school boards regularly excluded children with disabilities from the

32. *See* Brown v. Bd. of Educ., 349 U.S. 294 (1955); ROTHSTEIN & JOHNSON, *supra* note 1, at 11–13; *see also* Mitchell L. Yell, David Rogers & Elisabeth Lodge Rogers, *The Legal History of Special Education: What a Long, Strange Trip It's Been!*, 19 REMEDIAL & SPECIAL EDUC. 219 (1998) (examining early legal efforts to "ensure a free, appropriate education for students with disabilities up to and including the enactment of the Individuals with Disabilities Education Act Amendments of 1997").

general education classroom.[33] By 1975, about half of all children with disabilities were receiving either an inappropriate education or no education at all.[34] Many others were "warehoused" in special classes or otherwise neglected in the educational system until they eventually dropped out.[35] In the midst of this exclusion of children with disabilities, the civil rights movement achieved its watershed victory in *Brown v. Board of Education*[36] when the U.S. Supreme Court held that excluding children based on race was not only inequitable, but also constitutionally impermissible.[37] By applying the winning legal arguments of *Brown*, disability rights advocates found new avenues to attack the inequitable practices used to segregate and exclude students with disabilities from education.[38] Two lawsuits, *Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania*[39] and *Mills v. Board of Education*,[40] set the stage for sweeping disability rights legislation ending exclusion of children with disabilities and establishing due process protections prior to infringing on educational rights.[41]

In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA) to "ensure that all [handicapped] children have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs, . . . [and] to ensure that the rights of [handicapped] children . . . are protected."[42] The EAHCA, now known as the Individuals with Disabilities Education Act (IDEA),[43] is essentially a

33. *See* ROTHSTEIN & JOHNSON, *supra* note 1, at 11–13.
34. EAHCA, Pub. L. No. 94-142, 89 Stat. 773 (1975); H.R. REP. NO. 94-332 (1975); S. REP. NO. 94-168 (1975), *as reprinted in* U.S.C.C.A.N. 1425, 1432.
35. *See* H.R. REP. NO. 94-332, at 2.
36 347 U.S. 483 (1954).
37. *Id.* at 495 (holding that educating black children in separate schools was "inherently unequal," and thus forbidden by the Fourteenth Amendment).
38. *See* ROTHSTEIN & JOHNSON, *supra* note 1, at 11–12.
39. 343 F. Supp. 279 (E.D. Pa. 1972) (approving consent decree that enjoined Pennsylvania from denying education to students who were "mentally retarded").
40. 348 F. Supp. 866 (D.D.C. 1972) (holding the District of Columbia's exclusion of children with disabilities from access to public education violated the Fourteenth Amendment's due process clause).
41. Both *PARC* and *Mills* applied *Brown v. Board of Education*, 347 U.S. 483 (1954), to hold that the Fourteenth Amendment requires that states who offer education to nondisabled children also offer an equally appropriate education to disabled children. *Pa. Ass'n for Retarded Children*, 343 F. Supp. at 297; *see also Mills*, 348 F. Supp. at 875.
42. 20 U.S.C. § 1400(d) (2012). The EAHCA is technically an amendment to the 1970 Education of the Handicapped Act (EHA), which had provided grants for states to provide special education services. Pub. L. No. 91-230, 84 Stat. 121 (1970).
43. 20 U.S.C. § 1400(a).

grant-making statute that originated under the Spending Clause.[44] When states agree to its terms, they receive federal dollars to support the cost of special education services.[45] At the heart of the IDEA is the promise to provide all children with disabilities a "free appropriate public education"[46] (FAPE) in the least restrictive environment (LRE), meaning in the regular education classroom with nondisabled peers.[47] Schools provide FAPE through designing and implementing individualized education programs (IEPs), a blueprint of special education and related supports and services.[48] The LRE requirement is, of course, not without exceptions.[49] But, the IDEA creates a strong presumption for inclusivity, and, in fact, states can only exclude a child with disabilities from general education "when the nature or severity of the disability is such that education in regular classes . . . cannot be achieved satisfactorily."[50] Further, when schools seek to remove a child from the regular education classroom, the child's parents can invoke procedural protections including the right to notice and the right to request a hearing.[51]

44. The Spending Clause authorizes the Federal government to spend money to support the "general Welfare." U.S. CONST. art I, § 8, cl. 1.
45. 20 U.S.C. § 1412.
46. The meaning of the phrase "free appropriate public education" was first addressed by the Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). There the Court set forth a two-part inquiry to determine whether a school had met its obligation to confer FAPE. The first question is whether the "State complied with the procedures set forth" in the statute. The second is whether the "individualized education program" (IEP) was reasonably calculated to "enable the child to receive educational benefits." *Id.* at 206–07. Essentially, the provision of FAPE contains both procedural and substantive rights. More than thirty years later, the Court revisited this issue in *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 999 (2017). In *Endrew F.*, the Court held: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* Thus, the substantive aspect of FAPE obligates schools to develop IEPs which help a child progress toward her academic and functional goals.
47. 20 U.S.C. § 1400(d)(1)(A).
48. *Id.* § 1414(d).
49. *See* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1050 (5th Cir. 1989) (upholding decision where lower court and hearing officer found that a child with developmental disabilities was not entitled to education in regular classroom).
50. 20 U.S.C. § 1412(a)(5)(A). Appellate Courts interpret the LRE requirement slightly differently. While all courts agree that the IDEA favors integration whenever possible, they differ on the test to determine when the requirement has been met. The U.S. Supreme Court has yet to provide definitive guidance. *See, e.g.*, Hartmann v. Loudoun Cty. Bd. of Educ., 118 F.3d 996 (4th Cir. 1997); Sacramento City Unified Sch. Dist., Bd. Of Educ. v. Rachel H. 14 F.3d 1398 (9th Cir. 1994); *Daniel R.R.*, 874 F.2d; Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983) (reversing a decision approving placement of a child with severe intellectual disability in a specialized school and requiring a determination of whether needed services could be provided in a more integrated setting).
51. 20 U.S.C. § 1415.

Although the IDEA guarantees more than just access to education, much of the class-based litigation that laid the groundwork for the statute's inception centered on school exclusion.[52] Generally, though not always, this exclusion from school was due to behavioral concerns.[53] Often behavior, or rather a child's inability to conform his or her behavior to the expected norms, was the basis for removal from the general education classroom.[54] Thus, the IDEA has attempted to address, in various forms, schools' ability to exclude behaviorally challenging children with disabilities.

B. Early Court Rulings

While the original statute did not specifically address discipline, suspensions and expulsions were a central concern from the law's inception.[55] When federal courts began analyzing discipline under the EAHCA, they quickly determined that the statute's guarantee of FAPE prevented schools from unilaterally expelling students with disabilities.[56] Courts held that

52. *See generally* Yell, Rogers & Rogers, *supra* note 32.
53. *Id.*; *see also* Mills v. Bd. of Educ., 348 F. Supp. 866, 875 (D.D.C. 1972).
54. In *Mills*, school officials excluded children whom they considered to have "behavior problems" from classes without providing any notice to their parents or opportunity for alternate education. *Mills*, 348 F. Supp. at 869–70.
55. During the 1973–74 hearings on educational services for children with disabilities, concerned parents testified about the damaging effects a lack of special education services had on their children. *To Provide Financial Assistance to the States for Improved Educational Services for Handicapped Children: Hearings on S. 6 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Public Welfare*, 93d Cong. (1973–74). One parent's testimony drew a particularly important connection between the lack of appropriate special education services and subsequent undesirable behavior. Mrs. Gordon Huddleston testified on behalf of her severely hearing-impaired son, David. *Id.* at 796. Upon moving to South Carolina, David entered a regular education classroom with virtually no special education supports or services. *Id.* at 797. He had previously lived in several different states, all with services ranging from supportive resource teachers who made use of audiovisual aides, to one-on-one help in math, reading, and language in a regular education setting. *Id.* at 796–97. After a year, David started falling behind, became frustrated, and his behavior became disruptive. *Id.* at 797. He was particularly disruptive in those subjects where he could not keep up. Instead of offering David extra services and supports to overcome his learning challenges, the school turned to discipline. *Id.* Eventually, after being told that David "was just not able to function in his classroom setting," his parents pulled him out of public school and enrolled him in a private school. *Id.* at 798.
56. In *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978), the first federal court case analyzing discipline under the EAHCA, a Connecticut District court held that expulsions amount to a change in placement and thus upheld an injunction which prevented the school from holding an expulsion hearing for a high school student with learning disabilities and "limited intelligence." *See also* Sherry v. N.Y. State Educ. Dep't, 479 F. Supp. 1328 (W.D.N.Y. 1979); P-1 v. Shedd, No 78-58 (D. Conn. Mar. 23, 1979).

expulsions amounted to changes in educational placement and thus impacted the statute's guarantee of education in the least restrictive environment.[57] Consequently, courts held that prior to unilaterally changing placement through expulsion, schools had to provide students with certain procedural protections.[58] Part of these protections included an inquiry into whether a nexus existed between the misbehavior that was the subject of the expulsion and the child's disability.[59] This concept became known as a "manifestation determination."[60] Essentially, the statute required schools to make a finding that a student's misbehavior was not a manifestation of his or her disability in order to enact a change in placement, through long-term suspension or expulsion.[61] When misbehavior was not rooted in disability, the child could be disciplined like any other and, likewise, could be suspended or expelled.[62] In short, students with disabilities had a right to an education, but that right did not amount to a guarantee. As one court wrote, "[i]t is not the purpose of the [EAHCA] to provide handicapped students placement which will guarantee their education despite the students' will to cause trouble."[63]

In *S-1 v. Turlington*,[64] the Fifth Circuit Court of Appeals ultimately set forth several of the principles that became the foundation for the IDEA's discipline provisions.[65] Importantly, the court took a broad view of this nexus concept. Its conclusions were twofold: First, the connection between misbehavior and disability is not limited to behavioral disabilities or a certain

57. *Stuart*, 443 F. Supp. at 1243.
58. *See id.*; *see also* Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979) (interpreting the Act as requiring an assessment of whether the disruptive behavior was linked to the plaintiff's intellectual disability before school could expel child).
59. *Koger*, 480 F. Supp. at 229.
60. 20 U.S.C. § 1415(k)(1)(E) (2012).
61. S-1 *ex rel.* P-1 v. Turlington, 635 F.2d 342, 346 (5th Cir. 1981), *abrogated by* Honig v. Doe, 484 U.S. 305 (1988).
62. *Id.* at 348.
63. *Koger*, 480 F. Supp. at 229.
64. *S-1*, 635 F.2d 342 (holding the EAHCA prevented schools from unilaterally expelling a class of students with varying intellectual disabilities for violations of the student code of conduct without first holding manifestation determinations to decide whether misbehaviors were related to disabilities).
65. The Fifth Circuit set forth principles that would become the foundation of the IDEA's "manifestation determination" framework, including that the manifestation determination must: (1) be individualized as to the particular student at issue's unique circumstances; (2) be made by a trained and knowledgeable group of people; and (3) focus on the relationship between misconduct and disability. It also held that schools, not students, should bear the burden of making this determination, and that even when conduct was determined not to have been a manifestation of a disability, a complete cessation of educational services is not permitted under the statute. *Id.* at 346–50.

category of disability;[66] and second, it does not turn solely on whether the student knew right from wrong.[67] Rather, the court envisioned an analysis which included the indirect effects of disability on behavior. For instance, an orthopedically handicapped child who provoked fights as a way of dealing with the stress and feelings of vulnerability brought on by his physical disability demonstrated a sufficient nexus between his disability (physical impairment) and misconduct (fights).[68]

Though the concept of analyzing the nexus between misbehavior and disability was beginning to take a firm hold in discipline cases involving the EAHCA, courts disagreed as to the exact parameters of this nexus.[69] Some courts, like the Fifth Circuit, were willing to take a broad approach and consider attenuated or tangential behavior to be rooted in disability, but others wanted a brighter and more direct line established between misbehavior and disability in order for IDEA protections to apply. The Fourth Circuit, in *School Board of the County of Prince William v. Malone*,[70] took a broad view of this nexus when it determined that a student's actions, as a "go-between" to purchase drugs on three separate occasions, was causally related to his learning disability, and thus, the child could not be expelled.[71] The lower court explained the connection as follows: "A direct result of [the student's] learning disability is a loss of self-image, an awareness of lack of peer approval occasioned by ridicule or teasing from his chronological age group . . . [which] make[s] him particularly susceptible to peer pressure."[72] The appellate court agreed and summarized the test as "whether the behavior for which the child was expelled was caused *in some way* by his handicap."[73] Here, the court embraced a flexible notion of nexus, one where behavior may stem from secondary effects of a

66. *Id.* at 346–47.
67. "A determination that a handicapped student knew the difference between right and wrong is not tantamount to a determination that his misconduct was or was not a manifestation of his handicap." *Id.* at 346.
68. *Id.* at 347.
69. *Compare* Sch. Bd. of Cty. of Prince William v. Malone, 762 F.2d 1210 (4th Cir. 1985) (upholding lower court's determination that a student's participation as an unpaid intermediary in several drug transactions was related to his learning disability), *with* Doe *ex rel.* Gonzales v. Maher, 793 F.2d 1470, 1480 (9th Cir. 1986) (stating that behavior would not be viewed as related to a child's disability unless the disability significantly impairs the child's behavioral controls).
70. 762 F.2d 1210 (4th Cir. 1985).
71. *Id.* at 1212.
72. *Id.* at 1216.
73. *Id.* at 1217 (emphasis added). The Court also discussed the inquiry as behavior over which the disabled student may have little or no control. *Id.*

disability. One's low self-esteem, if brought on by having a disability, would be enough to establish a nexus between misbehavior and disability.

Other courts took a more stringent approach and required that the nexus between misbehavior and disability be "direct and substantial." In *Doe v. Maher*,[74] the Ninth Circuit Court of Appeals described the nexus as conduct that is "caused by, or has a direct and substantial relationship to, the child's handicap."[75] A child's conduct is a manifestation of her disability only if the disability "significantly impairs the child's behavioral controls" rather than conduct that "bears only an attenuated relationship" to the disability. This court also looked at an example of peer pressure but came to the opposite conclusion as the court in *Malone*. Here, the court suggested that a physical disability resulting in lowered self-esteem was illustrative of an "attenuated relationship" falling outside the scope of protection.[76] Whereas in the Fourth Circuit a child misbehaving out of low self-esteem rooted in his disability could not be expelled, in the Ninth Circuit, the same behavior would make a child subject to expulsion. The U.S. Supreme Court affirmed the Ninth Circuit's judgment in *Honig v. Doe*,[77] but it did not expand on the Ninth Circuit's iteration of nexus.[78]

The Supreme Court's ruling in *Honig v. Doe* solidified the IDEA's fundamental prohibition against exclusion of children with disabilities from the regular classroom; however, it left open the central question of what standard should be used to determine when a child with a disability is afforded these protections. The Supreme Court characterized the dispute as whether the IDEA prohibited schools from unilaterally excluding children with disabilities for "dangerous or disruptive conduct *growing out of their disabilities*."[79] It held that the IDEA's "stay put" provision prevented schools from enacting long-term discipline on students with disabilities when their misconduct was related to disability.[80] But, the Court did not explore the nexus between misbehavior

74. 793 F.2d 1470 (9th Cir. 1986).
75. *Id.* at 1480 n.8.
76. *Id.*
77. 484 U.S. 305 (1988).
78. *See generally id.*
79. *Id.* at 308 (emphasis added).
80. In *Honig v. Doe*, the Supreme Court's analysis centered on the IDEA's "stay put" doctrine which mandates that once discipline proceedings begin, a child cannot be removed from her then-current placement unless the school and her parents agree to do so. The Court held that "stay put" applied to all manner of misbehavior and did not contain a "dangerous exception" for serious or dangerous misconduct. *See Honig*, 484 U.S. at 325. The Court instead indicated that schools could suspend a child for up to ten days without running

and disability further. It did not provide guidance on distinguishing between disruptive conduct "growing out" of a disability and disruptive conduct unrelated to disability. Thus, there is no Supreme Court interpretation of the manifestation determination process. Rather, the 2004 amendments to the IDEA codified the Ninth Circuit's interpretation of the nexus analysis in manifestation determinations.[81] Thus, the broader nexus interpretations advanced by the Fourth and Fifth Circuits is no longer applicable. Instead, schools and parents alike are tasked with applying a narrow and more direct causation standard, despite the Ninth Circuit's own acknowledgement of the standard's inherent flaws:

> Our analysis to this point assumes the ability to distinguish between handicap-related and handicap-related behavior by means of the processes and safeguards applicable to handicapped students under the [IDEA]. This is an assumption that Congress requires us to make. Although we have no doubt that the distinction exists, we recognize readily the difficulty in distinguishing between the two types of behavior in practice. Still, by receiving federal funds a state assumes that burden: those who accept the sovereign's pay cannot complain of his terms of acceptance.[82]

The IDEA now requires a "direct and substantial" relationship between misbehavior and disability in order to invoke disciplinary protections, but the statute fails to unpack this nexus further. Schools and parents are left wondering how much and what type of evidence is necessary to demonstrate a "direct and substantial" nexus, and they often do not have the requisite data to make fair, evidence-based decisions.[83] Before delving into the practical impact of the IDEA's discipline provisions, the next Subpart sets forth the two iterations of the IDEA's discipline provisions, first codified in the 1997 amendments and later modified in the 2004 amendments, and examines them in detail.

C. The Disciplinary Process Under the IDEA

The EAHCA did not explicitly contain a provision regarding the discipline of children with disabilities, other than the "stay put" doctrine which

afoul of the IDEA, but if they wanted to suspend for longer, they would need to seek leave of a court, which later became known as a "*Honig* injunction." *Id.*

81. 20 U.S.C. § 1415(k)(1)(E) (2012).
82. Doe *ex rel.* Gonzales v. Maher, 793 F.2d 1470, 1482–83 (9th Cir. 1986).
83. *See infra* Subpart II.B.

demanded students be permitted to remain in their then-current placement when invoking the IDEA's due process rights.[84] However, as noted above, courts were tackling issues of discipline from the statute's inception and were inferring protections for children with disabilities.[85] As matters of discipline cropped up regularly in schools across the country, and because courts had interpreted the EAHCA to require a nexus finding prior to enacting long-term discipline, in 1995 the Department of Education's Office of Special Education Programs (OSEP) issued a memorandum interpreting the concept known as a "manifestation determination."[86]

The 1997 amendments to the IDEA (1997 discipline provision) marked the first time this concept of manifestation determinations was written into the statute.[87] The 1997 discipline provisions clearly set forth schools' requirements under the IDEA prior to changing the placement, through suspensions or expulsions, of a student with disabilities who violated the discipline code. Schools could suspend students for a short period of time (ten days or fewer) without holding a manifestation determination, so long as it applied equivalent punishment to students without disabilities.[88] For long-term suspensions (more than ten days) or expulsion, a school first had to convene a manifestation determination. Schools were required to hold a meeting of the IEP team, which included parents and other qualified persons, within ten days of making the decision to enact long-term suspension or expulsion. This meeting, referred to as a manifestation determination review (MDR), had the sole purpose of exploring "the relationship between the child's disability and the behavior subject to disciplinary action."[89]

Under the 1997 discipline provisions, the behavior was not a manifestation of disability only if the IEP team first considered "all relevant information" (including the child's IEP and placement)[90] and then made three

84. *See Honig*, 484 U.S. at 325.
85. *See supra* Subpart I.B.
86. *See generally* Judith E. Heumann, *OSEP Memorandum 95–16*, 22 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 531 (1995). OSEP stated that any time a school seeks to suspend a student for more than ten days, "a group of persons knowledgeable about the student must determine whether the student's misconduct was a manifestation of his or her disability," but did not provide further guidance on how the group was supposed to make this determination or upon what factors it should be based. *Id.* at 533.
87. Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, § 615, 111 Stat. 37 (codified as amended at 20 U.S.C. §§ 1400–1491o (2012)).
88. *Id.*
89. *Id.*; *see also* Terry Jean Seligmann, *Not as Simple as ABC: Disciplining Children With Disabilities Under the 1997 IDEA Amendments*, 42 ARIZ. L. REV. 77, 124 (2000).
90. Relevant information includes evaluation and diagnostic results, observations of the child, and the child's IEP and placement. Seligmann, *supra* note 89, at 101–02.

findings: (1) The IEP and placement were appropriate and all services contained therein were implemented with fidelity; (2) the disability did not impair the student's ability to understand the impact and consequences of the behavior subject to disciplinary action; and (3) the disability did not impair the student's ability to control the behavior subject to disciplinary action.[91] In essence, the 1997 discipline provisions contained a presumption that a student's disability was related to the misconduct, unless all three factors were met.

The provision made clear that when a nexus between disability and misconduct was established, the misbehavior at issue was a manifestation of the student's disability and schools could not enact long-term discipline. Instead, schools were obligated to return the student back to her educational placement.[92] However, it also created an exception for certain types of more serious conduct. If the student's misconduct involved weapons or drugs, the school could unilaterally place her in an interim alternative education setting (IAES) for up to forty-five days without holding an MDR.[93] Regardless of the ultimate placement decision, Congress clarified in the 1997 discipline provisions that educational services could not cease entirely.[94] Congress adopted earlier courts' holdings that schools have a continuing FAPE obligation under the statute—an obligation that is not extinguished by student misbehavior.[95]

The legislative history of the 1997 amendments to the IDEA demonstrates heightened contention surrounding the issue of discipline.[96] School officials were concerned that additional protections for children with disabilities would

91. *Id.*
92. *Id.*
93. 20 U.S.C. § 1415(k)(1)(G) (2012). The IDEA's Interim Alternative Education Setting (IAES) provision grew out of school officials' frustrations with what they felt were roadblocks preventing them from adequately enforcing discipline. In 1994, Congress passed the Improving America's Schools Act, which, among other things, amended the IDEA's stay put provision to give schools unilateral authority to remove a child with a disability to an IAES for up to forty-five days if the child was determined to have brought a firearm to school. This provision was later expanded to include drugs and serious bodily injury. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518.
94. *See* Seligmann, *supra* note 89, at 111–12.
95. In *S-1* ex rel. *P-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir. 1981), the Fifth Circuit held that even when schools enact long-term suspensions or expulsions, they continue to have an obligation to provide some level of educational services. This obligation remains in the current law and requires schools to provide educational services "so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." 20 U.S.C. § 1415(k)(1)(D)(i).
96. *See* Seligmann, *supra* note 89, at 78–79. A previous attempt to reauthorize the IDEA proved unsuccessful largely because of differences over discipline. *Id.* at 78 n.7.

make it more difficult to ensure school safety when dealing with dangerous students.[97] Congress was keenly aware of the tension and discussed its attempt to strike "a careful balance between the [school district's] duty to ensure that school environments are safe and conducive to learning for all children, including children with disabilities, and the [school district's] continuing obligation to ensure that children with disabilities receive a free appropriate public education."[98]

In 2004, the IDEA's disciplinary provisions were amended in an effort to streamline the process and in response to complaints that schools were hamstrung in their abilities to effectively impose long-term discipline on students with disabilities.[99] The IDEA's current discipline provisions still call for a manifestation determination prior to enacting long-term discipline, but this analysis now focuses on just two questions to determine whether the misbehavior in question was related to disability[100]: First, whether the misconduct was "caused by" or had a "direct and substantial relationship to, the child's disability"; and second, whether the misconduct was "the direct result of the [school's] failure to implement the IEP"?[101] If the answer to either question is yes, then a sufficient nexus exists such that IDEA protections apply to prevent long-term exclusion.[102]

The 2004 causation language is taken directly from the Ninth Circuit's opinion in *Doe v. Maher*, which demands a stronger nexus between

97. S. REP. NO. 105-17, at 28 (1997); H.R. REP. NO. 105-95, at 108 (1997). Opponents also perceived a double-standard for children with disabilities. If a school attempted to expel a child with a disability and her parents invoked "stay put," the child would often return to the classroom while the lengthy administrative process worked its way toward resolution. Children without disabilities were not provided with that second chance. Seligmann, *supra* note 89, at 88.

98. S. REP. NO.105-17, at 28; H.R. REP. NO.105-95.

99. S. REP. NO. 108-185, at 15 (2003).

100. The current discipline provisions are set forth in the procedural protections section of the statute, 20 U.S.C. § 1415(k)(1). This section refers to a "manifestation determination" as the process by which "relevant" members of the IEP team meet to make a decision regarding the nexus between misbehavior and disability. Practitioners often refer to this meeting using the 1997 discipline terminology as a "manifestation determination review" or "MDR." *See, e.g.*, Bill Brownley, *Handling a Manifestation Determination Review (MDR): A "How To" for Attorneys*, WRIGHTSLAW (Sept. 22, 2014), http://www.wrightslaw.com/info/discipl.mdr.strategy.htm [https://perma.cc/HQG6-4VMC].

101. 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e) (2017). However, in circumstances involving weapons, drugs, or serious bodily injury, the statute still allows schools to unilaterally remove a student to an Interim Alternative Educational Setting (IAES) for up to forty-five days without first holding a manifestation determination. 34 C.F.R. § 300.530(g).

102. 20 U.S.C. § 1415(k)(1)(E).

misconduct and disability to invoke protections.[103] The plain language of the statute indicates that a "direct" link, that is, one that does not take into account attenuated behaviors, must be made between behavior and disability in order for IDEA protections to apply. Gone is the broader nexus inquiry set forth in earlier court decisions that accounted for attenuated effects of disability.[104] Gone, too, are the 1997 discipline provisions' considerations of appropriateness of the IEP and placement.[105] Rather, parents and relevant members of the IEP team (collectively, the MDR team) must base the inquiry on the IEP as it currently stands, regardless of whether the IEP is effective or appropriate.[106] The only question related to the IEP is whether a lack of implementation was the "direct cause" of the child's behavior.

The Department of Education's Office of Special Education Programs (OSEP) administers the IDEA and develops and disseminates guidance and policy interpreting the IDEA's regulations.[107] OSEP's interpretations of the 2004 discipline provisions confirm that the provision was amended to require a narrower, more direct nexus between misconduct and disability. The OSEP guidance indicates that a disability must significantly impair a student's behavioral controls and not be merely an "attenuated association, such as low self-esteem," in order to demonstrate that the behavior at issue was a manifestation of the student's disability.[108]

The current discipline provisions maintain all the timeframes established by the 1997 provisions, but are more explicit about schools' obligations after the MDR finding.[109] If the MDR team makes a decision that the behavior was a

103. Doe *ex rel.* Gonzales v. Maher, 793 F.2d 1470, 1480–81 (9th Cir. 1986).
104. Sch. Bd. of Cty. of Prince William v. Malone, 762 F.2d. 1210 (4th Cir. 1985).
105. Individuals with Disabilities Education Act Amendments for 1997, 20 U.S.C. § 1415(k)(4).
106. The IDEA does not refer to an "MDR team," but rather calls for "the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and local educational agency)" to conduct the manifestation determination. 20 U.S.C. § 1415(k)(1)(E)(i). This Article refers to that group of persons as the "MDR team."
107. 20 U.S.C. § 1402. *See generally US Department of Education Principal Office Functional Statements: D. Office of Special Education Programs*, U.S. DEP'T EDUC., https://www2.ed.gov/about/offices/list/om/fs_po/osers/special.html (last updated Feb. 12, 2016) [https:// perma.cc/MPM2-VDVC].
108. Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46383, 46720 cmts. (Aug. 14, 2006) (codified as amended at 34 C.F.R. §§ 300–301). OSEP also characterizes the new criteria as "broad and flexible," stating that the inquiry involves a consideration of multiple individualized factors, including "the inter-related and individual challenges associated with many disabilities." *Id.*
109. The 1997 discipline provisions contained many of the same requirements related to functional behavioral assessments and behavioral intervention plans, but the current provisions contain clearer and more direct instructions on the subject. *Compare*

manifestation of disability, it must conduct "functional behavioral assessment" and implement a "behavioral intervention plan" if it has not already done so.[110] The student must return to the educational setting from which he or she was removed, unless the student's parents and school agree that a different educational setting would better serve the student's needs.[111] The 2004 provisions also add the category of "serious bodily injury" to the types of conduct for which a student can be immediately removed to an interim alternative educational setting for up to forty-five days without holding an MDR.[112]

The initial MDR typically takes place at the school, and while it must adhere to the statutory requirements, it is often an informal meeting as it does not occur before an adjudicative body. For this reason, OSEP has described it as a "collaborative process" and one that does not require a burden of proof.[113] Parents who are dissatisfied with the outcome of an MDR have the right to appeal it using the IDEA's due process provisions.[114] This initial MDR appeal is much more formal as both sides, parent and school, appear before an independent hearing officer appointed by the state educational authority.[115] School districts must ensure that this appeal is held within twenty school days.[116] During this time, the student remains in the alternative educational setting, which may be the student's home, pending the decision.[117] While the IDEA is silent on the issue of burden of proof at this stage of review, most courts

Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, § 1415(k)(1)(B) *with* 20 U.S.C. § 1415(k)(1)(F)(i)-(ii).

110. 20 U.S.C. § 1415(k)(1)(F). If an MDR finds that a child's misbehavior was rooted in disability, the IEP team must conduct a functional behavioral assessment to help determine the reason or "function" of the misbehavior. Based on this new data, the IEP team must create and implement a behavioral intervention plan (BIP) to address the misbehavior and prevent its reoccurrence. *Id.* § 1415(k)(1)(F)(i). If a behavioral intervention plan already exists, the IEP team must review and modify it as necessary to address the problematic behavior. *Id.* § 1415(k)(1)(F)(ii).
111. *Id.* § 1415(k)(1)(F)(iii).
112. *Id.* § 1415(k)(1)(G). The 2004 amendments added the category of "serious bodily harm" to the 1997 categories of drugs and weapons on school grounds for which students could be removed to an interim alternative educational setting for up to forty-five school days.
113. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,723 (Aug. 14, 2006).
114. 20 U.S.C. § 1415(k)(3). School districts may also appeal an MDR decision under this section if they believe that maintaining the child in the current placement is "substantially likely to result in injury to the child or to others." *Id.*
115. *Id.* § 1415(f); 34 C.F.R. § 300.511(b) (2017). The state educational authority may be the state's department of education or whatever public agency is responsible for the education of the child, as determined under state laws.
116. 20 U.S.C. § 1415(k)(4)(B).
117. *Id.* § 1415(k)(4)(A). Parents and school officials can mutually agree to another setting.

hold that the burden rests with the moving party at this initial stage of appeal.[118] The hearing officer is tasked with reviewing the appropriateness of the MDR as well as the current placement.[119] If parents are dissatisfied with the hearing officer's decision, they may appeal that decision to federal district court.[120]

Disciplining students with disabilities has long been controversial under the IDEA.[121] While the statute was designed to remedy the segregation of students with disabilities, discipline through long-term suspensions and expulsions has continued to exclude this group of students. Recent data suggest that students with disabilities are being suspended at more than twice the rate of children without disabilities.[122] This inequitable discipline is, in many ways, reflective of the same concerns that troubled parents and led Congress to enact the EAHCA.[123] While today's students with disabilities have a right to an appropriate education, they are still too often denied equal educational opportunities because of inequitable disciplinary practices. Part II provides a landscape of MDR decisions before hearing officers and in federal district courts under the IDEA's 1997 discipline provisions as compared with the 2004 amendments and attempts to make both quantitative and qualitative findings as a means of charting a better path forward.

II. IMPLEMENTATION OF THE IDEA'S DISCIPLINARY PROVISIONS

A. Prior Studies of Appeal Outcomes Under 1997 and 2004 Discipline Provisions

IDEA's 1997 Amendments marked the first time the statute codified protections for students with disabilities with respect to school discipline.

118. *See infra* Subpart III.B.4.
119. 20 U.S.C. § 1415 (k)(3)(B).
120. *Id.* § 1415(i)(2)(A). Some states have two levels of state agency-level review before a parent can appeal to federal district court. *See generally* Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3 (2010) (compiling results of a state-by-state survey of the hearing officer systems to identify, in part, whether the system is one-tier or two-tiered).
121. *See supra* notes 96–99.
122. *See supra* note 4.
123. *Compare* Stipulation and Agreement of Settlement at 2, E.B. et al. v. N.Y.C. Dep't of Educ., No. 02-cv-05118-ENV-MDG (E.D.N.Y. May 13, 2015) (alleging that from 1999 to 2015, New York City Department of Education violated their rights "by engaging in conduct that denies to class members access to a free appropriate public education as defined in 20 U.S.C. § 1401(a) (FAPE) and due process before being excluded from school"), *with* Mills v. Bd. of Ed., 348 F. Supp. 866, 868 (D.D.C. 1972) (seeking to enjoin the defendants from excluding plaintiff students from the District of Columbia Public Schools and/or denying them public education based on their disability).

Some theorized that the provisions would result in immunity for students with disabilities who violate school rules,[124] but the limited research assessing actual outcomes under the 1997 provisions suggests otherwise.[125] Data from this period are sparse and the number of published appeals minimal—and thus the resulting research is limited. One study, however, concluded that schools remained largely free to exclude students.[126]

Perry Zirkel reviewed thirty-seven published decisions based on IDEA's 1997 discipline provisions and found schools won 78 percent of MDR appeals.[127] In these cases, courts found the student's misbehavior was not a manifestation of disability, which permitted the school to discipline the student as it would any other.[128] In those limited instances when students won, courts focused on whether the student's disability affected his or her ability to control behavior, an inquiry not relevant in the IDEA's 2004 MDRs.[129]

Regardless of the effect of the 1997 provisions, the point of the 2004 amendments was to make it easier for schools to discipline students with disabilities. In fact, OSEP acknowledged a likely increase in manifestation determination hearings, "as school personnel take advantage of the streamlined

124. *See* Perry A. Zirkel, *Manifestation Determinations Under the Individuals With Disabilities Education Act: What the New Causality Criteria Mean*, 19 J. SPECIAL EDUC. LEADERSHIP 3, 7 (2006) ("This finding is contrary to the prediction that IDEA 1997 would result in 'most students with disabilities being immune from regular education disciplinary action.'" (quoting Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1, 60 (2000))).

125. *See id.* (finding that, of all student challenges to a school's finding that misbehavior was not related to disability, 78 percent failed).

126. *Id.*

127. *Id.* The thirty-seven decisions were published between 1997 and 2005 and were decided under the IDEA's 1997 Amendments. The study focused on appeals because of the difficulty in accessing data at the initial MDR level. States do not publicly report individual findings from MDRs. Reviewing MDR appeals will only provide a small snapshot of a much broader picture because appeals do not reflect the hundreds of MDRs decided in favor of the student that were not appealed by the school district. *See generally* Walter A. Zilz, *Manifestation Determination: Rulings of the Courts*, 18 EDUC. & L. 193 (2006), which analyzes ninety-nine published MDR opinions and Office of Civil Rights complaints between 1994 and 2003. Notably, this study finds that courts decided fairly equally between schools and students. However, because the author did not break down his analysis into cases published prior to the 1997 amendments, but rather analyzes the entire group, it is difficult to know what effect the 1997 amendments had on case outcomes. Thus, the findings were not included as a comparison.

128. *See* Zirkel, *supra* note 124, at 7.

129. *See id.*

process to pursue disciplinary actions against those students with disabilities who commit serious violations of student codes of conduct."[130]

Research analyzing effects of the IDEA's 2004 discipline provisions is similarly sparse. Professor Zirkel authored another study examining MDR appeals between 2005 and 2009.[131] In it, he reviewed fourteen appeals and found that approximately 65 percent of decisions determined that conduct was not a manifestation of disability.[132] He concluded that these outcomes were significantly influenced by three main factors: (1) the relative evidentiary weight of school district witnesses versus parents' experts; (2) the burden of proof; and (3) the characterization of a child's actions as impulsive rather than deliberate.[133]

B. Current Study of Appeal Outcomes Under 2004 Discipline Provisions

While Zirkel's study provides keen insight regarding the landscape of MDR appeals, the sample size is too small to draw strong conclusions. This Article looks at a much larger sample across more years. Between July 1, 2005, and July 1, 2016, courts published opinions in 134 MDR appeals.[134] Independent Hearing Officers, appointed by state departments of education, provide the first level of MDR review and their opinions represent the vast majority of cases in the current data set.[135] A smaller number of opinions arise

130. Perry A. Zirkel, *Manifestation Determinations Under the New Individuals With Disabilities Education Act: An Update*, 31 REMEDIAL & SPECIAL EDUC. 378, 379 (2010) (citing OSEP's interpretive comments).
131. *See id.* at 381.
132. *See id.* at 382.
133. *See id.*
134. This data set does not claim to encompass all manifestation determination appeals that occurred between July 1, 2005, and July 1, 2016, because not all states publish decisions from these hearings online. The author attempted to compile a representative national data set by searching for decisions involving "manifestation determinations" and excluding opinions decided on unrelated issues, such as administrative exhaustion. The opinions were pulled from Westlaw, LEXIS, and the Individuals with Disabilities Education Law Reporter (I.D.E.L.R.). Because states do not publish every administrative decision online, there remains a question of whether published hearing/review officer decisions are representative of the cases that actually appear before hearing officers. However, at least one empirical study indicates that using published data for decisions on a national level is of at least moderate value. *See generally* Anastasia D'Angelo et al., *Are Published IDEA Hearing Officer Decisions Representative?*, 14 J. DISABILITY POL'Y STUD. 241 (2004) (looking at whether published hearing officer decisions are representative of the totality of such decisions and finding that a review of published decisions on a national basis is of moderate value).
135. 20 U.S.C. § 1415(f) (2012). Of the 134 cases in this data set, 117 were resolved before hearing officers at the administrative level. See CLAIRE RAJ, RAJ DATA (2018),

out of federal district court and federal courts of appeals.[136] The vast majority of appeals were filed by students; only two appeals (1.5 percent) were filed by schools.[137]

The current study of appeals is a small snapshot of a much broader disciplinary picture. OSEP's most recent statistics indicate that about 75,000 students with disabilities were disciplined for more than ten days in the 2013–14 school year alone; thus, an equivalent number of MDRs should have been held prior to each of these changes in placement.[138] The current study finds that in the corresponding years, courts heard approximately fourteen appeals.[139] The scarcity of MDR appeals could mean a number of things. Students may be: (1) satisfied with the decision at the MDR and thus not inclined to appeal; (2) unaware of their right to appeal; (3) aware of their rights, but unable to access an attorney or other advocate to help guide them through the process; or (4) cynical about their chances of winning on appeal given the stringent nexus standard. Thus, a study of MDR appeals does not necessarily reflect the discipline landscape at the ground level, but it can provide lessons about how courts view the IDEA's discipline provision and whether students can find appropriate redress in court. Moreover, the holdings in these cases presumptively shape how schools evaluate the disability nexus in later MDR hearings.

https://www.uclalawreview.org/wp-content/uploads/securepdfs/2018/05/Raj-Data.pdf [https://perma.cc/QSV7-VN8J].

136. Sixteen cases were decided at the federal district court level and one case was decided at the federal appellate court level. *See* RAJ, *supra* note 135.

137. Two of the 134 appeals were filed by schools. *See* RAJ, *supra* note 135.

138. U.S. DEP'T OF EDUC., OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS., OFFICE OF SPECIAL EDUC. PROGRAMS, 38TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 70 exhibit 42 (2016), http://www.ed.gov/about/reports/annual/osep [https://perma.cc/J8W6-ZADB] [hereinafter IMPLEMENTATION OF IDEA]. OSEP's data set is limited to students age three through twenty-one served under IDEA Part B in states for which data are reported. *Id.* The data collected in Exhibit 42 represent the number of children removed from their educational placements for disciplinary purposes for greater than ten days. *Id.*

139. Dates for appeals were tracked by date of the issued opinion. Because there is some lag time between when an appeal is filed and when it is heard, the dates of issued opinions do not correspond to when an appeal was filed. Further, court opinions do not follow the school year cycle. Nevertheless, it is clear that an extreme disparity exists between the number of MDRs held at the school level and the percentage that were appealed. *See* IMPLEMENTATION OF IDEA, *supra* note 138, at 70.

1. Empirical Findings

An examination of these MDR appeals reveals three points. First, students are more likely to win appeals based on process rather than substance. Second, "soft disabilities" appear most frequently in MDR appeals and are disproportionately represented in discipline cases. Third, students appeal most frequently when their underlying misconduct involves actual or threatened violence. These empirical findings, combined with the qualitative findings in Subpart II.B.2, suggest that the IDEA may not be imposing serious limitations on schools' ability to exclude students. To the contrary, students with disabilities such as ADHD and Emotional Disturbance—the disabilities one would expect the discipline provisions to provide protection for—find themselves both excluded from school and, in turn, appealing that exclusion at a much higher rate than other students.

a. Students Are More Likely to Win Appeals Based in Process Than Substance

Out of the 134 cases studied, courts side with schools in 53 percent of cases and with students in 47 percent of cases.[140] More telling, however, are the grounds on which schools and students win. Courts decide cases on procedural grounds about half the time and substantive grounds the other half.[141] Procedural decisions typically focus on whether the school provided proper notice to the family or held a hearing within the timeframe required by statute.[142]

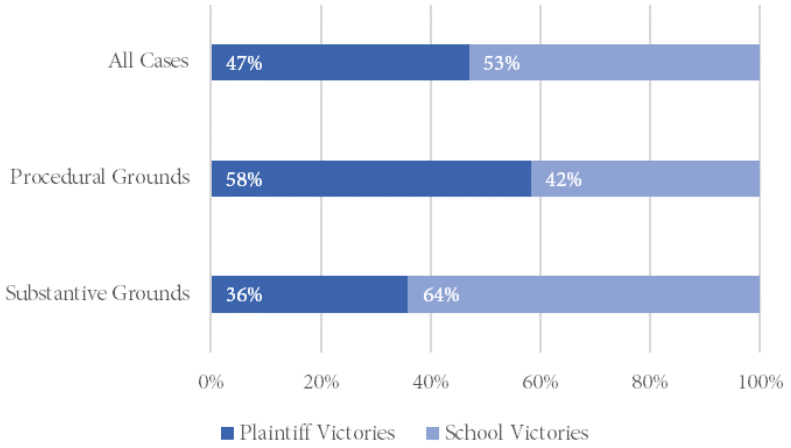
140. Students won in sixty-three out of 134 cases and schools won in seventy-one out of 134 cases. The use of the word "courts" is meant to encompass those decisions made at the administrative level before hearing officers. "Students" describes the party representing the interest of the student in the case, regardless of whether that party is actually the parent, individual student, or other interested party. *See* RAJ, *supra* note 135.

141. Reviewing courts evenly split their decisions between procedural and substantive grounds, with sixty-seven courts reaching decisions based on procedure and sixty-seven based on substance. *See* RAJ, *supra* note 135.

142. *See*, *e.g.*, Avila v. Spokane Sch. Dist. 81, 64 I.D.E.L.R. 171 (Wa. State Educ. Agency Nov. 3 2014) (deciding whether a student's multiple suspensions constituted a pattern of similar behavior resulting in the need for an MDR, rather than an analysis of the nexus between misbehavior and disability); *see also*, *e.g.*, Sch. Bd. of Norfolk v. Brown, 769 F. Supp. 2d 928, 946–49 (E.D. Va. 2010) (evaluating whether the team adequately considered all relevant information in the file); Sch. Dist. of the City of Flint, 66 I.D.E.L.R. 197 (Mich. State Educ. Agency Apr. 22, 2017) (evaluating whether a school district's failure to convene an MDR for a pattern of suspensions that amounted to more than ten days violated the IDEA); Warrenton-Hammond Sch. Dist. No. 30, 63 I.D.E.L.R. 180 (Or. State Educ. Agency Feb. 20, 2013) (deciding whether a school violated the IDEA when it failed to reschedule an MDR); Dep't of Educ., 56 I.D.E.L.R. 115 (Haw. State Educ. Agency Dec. 15, 2010)

Substantive decisions analyze the nexus between misconduct and disability.[143]

Figure 1. Percentage of MDR Appeals Won on Either Procedural or Substantive Grounds



The outcomes in these two categories of cases are drastically different. On matters of substance, students win only 36 percent of the time.[144] On matters of procedure, students win in 58 percent of cases.[145] In other words, students frequently win when they allege that the school failed to hold the MDR in the

(whether the right members of the MDR team were present). To be clear, students do not always win procedural claims, as courts sometimes find that despite procedural error, schools have not violated the IDEA where the procedural error does not result in substantive harm. *See*, *e.g.*, Pikes Peak Bd. of Coop. Educ. Servs. 66 I.D.E.L.R. 56 (Col. State Educ. Agency July 1, 2015) (holding school's failure to provide sufficient notice of meeting time, date, and purpose to grandparent did not amount to substantive harm when grandparent was present at the MDR with an advocate).

143. "Substantive decisions" is used in this Article to mean that courts considered one of the two questions outlined in the IDEA's discipline provisions: (1) whether the conduct at issue was caused by or had a direct and substantial relationship to the disability; or (2) whether the conduct was the direct result of the school's failure to implement the IEP. 20 U.S.C. § 1415(k)(1)(E) (2012).

144. When looking at opinions that were decided on issues of substance, schools win 64 percent of the time (forty-three out of sixty-seven cases) and parents only win 36 percent of those cases (twenty-four out of sixty-seven). *See supra* Figure 1.

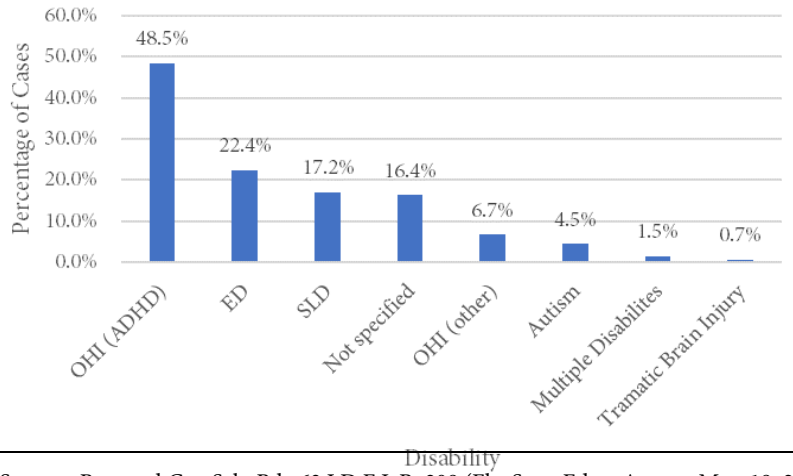
145. Parents win 58 percent (thirty-nine out of sixty-seven) of cases decided on procedural grounds and schools win 41 percent (twenty-eight out of sixty-seven) of cases decided on procedural grounds. *See supra* Figure 1.

requisite ten days or failed entirely to hold the MDR.[146] But students struggle to win claims when they argue that their misbehavior is rooted in disability.[147]

b. Soft Disability Categories of Disability Appear With Most Frequency

Disability categories appearing most frequently in MDR appeals fit into a type known as "soft disabilities," a term used to describe disabilities that are internal and thus difficult to objectively measure.[148] Unlike hard disabilities like hearing impairments, soft disabilities, such as learning disabilities, cannot be diagnosed through a medical or biological test, but rather rely on an evaluator's subjective judgement.[149] Unsurprisingly, they are also more prone to misdiagnosis or over-diagnosis, and thus represent some of the largest categories of disabilities served under the IDEA, including specific learning disabilities and other health impairments such as Attention Deficit and Hyperactivity Disorder (ADHD).[150]

Figure 2. Frequency of Each Category of Disability in Appeals[151]



146. *See, e.g.*, Broward Cty. Sch. Bd., 63 I.D.E.L.R. 208 (Fla. State Educ. Agency Mar. 18, 2013); Prince George's Cty. Pub. Schs., 110 L.R.P. 72206 (Md. State Educ. Agency July 2, 2010).
147. *See, e.g.*, Z.H. *ex rel.* R.H. v. Lewisville Indep. Sch. Dist., No. 4:12-CV-775, 2015 WL 1384442, at *20 (E.D. Tex. Mar. 24, 2015).
148. REDFIELD & NANCE, *supra* note 6, at 36.
149. *See* Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 123–24 (2009) (arguing that the current measurements for soft disabilities excessively rely on inconsistent criteria; for example, an evaluator may have a child take multiple IQ tests and use the one that will produce the favored outcome).
150. IMPLEMENTATION OF IDEA, *supra* note 138, at xxv.
151. Those students who are identified as having more than one disability are counted under each category for which they qualify. Thus, the total percentage listed amounts to more than 100 percent because it represents the number of times the specific category of disability was the subject of an MDR appeal. The "multiple disabilities" category includes students who were listed as such with no further specificity as to disability type.

Because soft disabilities are internal and difficult to measure, they prove troublesome for manifestation determinations. The goal of such a determination is to trace the relationship between disability and behavior. Soft disabilities are harder to objectively measure; thus, it becomes more challenging to determine behaviors that are definitively associated with the disability from those that are not.

ADHD is by far the most frequently occurring disability in MDR appeals, constituting 48 percent of appeals.[152] ADHD falls under the broader IDEA disability category of Other Health Impairment (OHI), which represents less than 13 percent of students with disabilities overall.[153] "Emotional disturbance" is the second most frequent, representing 22 percent of appeals[154]; however, this category only accounts for about 5 percent of the overall IDEA population.[155] In contrast, students with "specific learning disabilities" make up roughly 40 percent of the overall population[156], but only 17 percent of appeals.[157] Clearly, this comparison is not exact, as the MDR cases only reflect those students who elected to appeal unfavorable MDR decisions, and not the overall number of students participating in MDRs. These data are reflective of the broader data on discipline indicating that students with these types of disabilities are among the most likely to be disciplined in school.[158] The finding is also consistent with earlier findings under the 1997 amendment.[159]

152. Other Health Impairment (OHI) is a category of disability that is sometimes considered a catch-all because it is used to describe a variety of chronic health problems that result in limited strength, vitality, or alertness. *See generally* 34 C.F.R. § 300.8(c)(9) (2017). ADHD falls under the category of OHI, but courts will sometimes specify it as the IDEA eligible disability in their opinions. The data analysis contains two separate columns for OHI, one which captures those cases that specifically name ADHD and those cases where OHI is listed without specific reference to the underlying disability.

153. *Fast Facts: Students With Disabilities*, NAT'L CTR. EDUC. STATISTICS, https://nces.ed.gov/fastfacts/display.asp?id=64 [https://perma.cc/UL4M-VL4Z].

154. *See* RAJ, *supra* note 135.

155. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 153.

156. *Id.* "Specific learning disability" is defined as a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language. This disorder may manifest itself in an imperfect ability to listen, think, read, write, spell, and/or perform mathematical calculations. 34 C.F.R. § 300.8(c)(10).

157. *See* RAJ, *supra* note 135.

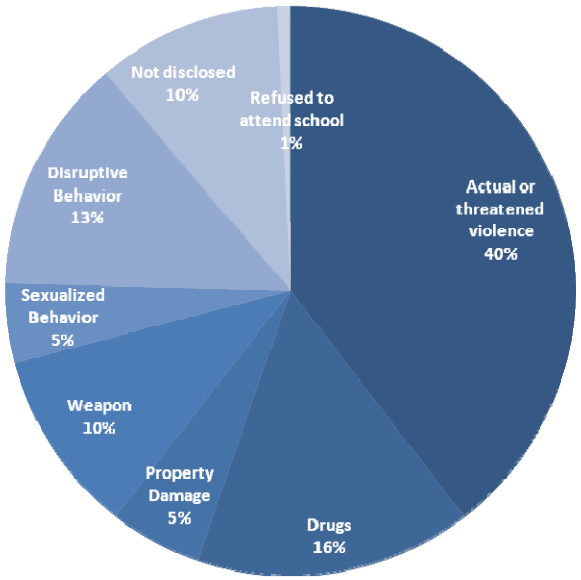
158. IMPLEMENTATION OF IDEA, *supra* note 138, at 72.

159. Zirkel's study found that ADHD was the most commonly occurring category of disability in MDR appeals, followed by "emotional disturbance" and "specific learning disability." Zirkel, *supra* note 124, at 7.

c. Students Appeal Misconduct Involving Actual or Threatened Violence With the Most Frequency

Students who appeal MDR decisions are most frequently appealing misconduct involving actual or threatened violence, representing about 40 percent of all MDR appeals.[160] The second most frequent category of misconduct involves drugs (16 percent), followed by disruptive behavior (13 percent).[161] To be clear, this does not necessarily reflect types of behaviors that are most frequently disciplined, but rather types of behaviors which are most frequently appealed. It is impossible to draw hard conclusions from these data, but a few underlying concerns may explain the statistics. Students may suffer the most severe punishment when they engage in actual or threatened violence and thus may seek to appeal a harsh discipline sanction through the MDR process. Alternatively, students engaging in this type of misconduct may earnestly feel that their misbehavior was rooted in disability and that the MDR was unjust. Finally, it could be that schools generally are disciplining this behavior most frequently with long-term exclusion and thus the appeals do in fact represent the frequency of school-level discipline.

Figure 3. Appeals by Misbehavior Type



160. *See* RAJ, *supra* note 135.
161. *See* RAJ, *supra* note 135.

Setting aside MDR appeals, national data demonstrate that students who fall into certain categories of disability encounter long-term discipline and are the subject of MDRs at disproportionate rates.[162] The current study illustrates that when students appeal these MDR decisions, courts are more likely to rule in their favor when procedural claims are involved.[163] To the contrary, when the substantive question of nexus between disability and misbehavior is at issue, courts more often adopt a deferential posture towards schools and uphold a decision of no manifestation.[164]

2. Qualitative Lessons From MDR Appeals

A comparison of cases that tackled the substantive questions posed under the current MDR inquiry—the relationship between misconduct and disability and the relationship between misconduct and failure to implement the IEP—reveals two broad themes. First, courts struggle with the complexity and uncertainty surrounding an analysis of how to determine the effects of a disability. They often rely on experts to assist with the analysis but have varying degrees of success. Second, courts elevate form over substance and assume that as long as proper procedure is followed, a just result will be reached. However, in the case of MDRs, strict adherence to process does not guarantee just outcomes.

a. The Complex Causal Connection Between Disability and Behavior

Across numerous cases, courts struggle to define the scope of students' disabilities. Determining scope is the first step in the MDR analysis. To decide whether conduct is a manifestation of disability, one must first define how the disability manifests in an individual child.[165] Specifically, what behaviors can reasonably be attributed to disability and what behaviors fall outside of that scope? Without an accurate picture of scope, the question of whether misconduct is sufficiently rooted in disability is tenuous at best. To be clear, this analysis is not an exact science, but it is the central question to be answered in an MDR. Without clear and credible evidence on which to base this analysis,

162. IMPLEMENTATION OF IDEA, *supra* note 138, at 72.
163. *See* RAJ, *supra* note 135.
164. *See* RAJ, *supra* note 135.
165. OSEP's interpretation of the manifestation determination requirement instructs schools to analyze how disability affects a particular child rather than a more general analysis. Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,720 (Aug. 14, 2006).

it is impossible to reliably determine whether a student should be suspended or otherwise excluded from school.

Courts struggle because they have yet to develop a framework for weighing and sorting the evidence they typically see in MDR appeals. Instead, courts simply ask whether the MDR team fully considered all of the relevant information before it.[166] That information can include a multitude of items including IEPs, psychological evaluations, standardized test scores, grades, teacher comments on report cards, teacher observations, and parent insights.[167] Optimally, this information will provide a clear picture of how the child's disability impacts his or her behavior in a variety of settings and across a number of years. In reality, MDR teams are unlikely to find such a clear and extensive picture. Rather, they make decisions based on incomplete evidence more akin to snapshots of the student taken on a given day and at a given time.[168] Moreover, when courts review an MDR team's decision, they ask only whether the team examined the evidence before it.[169] In other words, courts allow the picture to be dictated by the evidence the school chooses to collect, rather than the information it needs to collect. As a result, the court's analysis becomes a function of the school's behavior rather than a systematic approach to the evidence.

(1) Reliance on Experts

In theory, expert testimony is the best sort of evidence a court could get, and for that reason courts give their testimony enormous weight.[170] However, in the context of MDR appeals, overreliance on experts leads to several problems. First, students do not always have access or the ability to engage their own experts, whereas schools typically have school psychologists on hand to testify.[171] Second, even when students are able to hire an expert witness,

166. *See infra* Subpart II.B.2.b.
167. 20 U.S.C. § 1415 (k)(1)(E)(i) (2012).
168. *See* Bristol Twp. v. Z.B. *ex rel.* K.B., 67 IDELR 9 (E.D. Pa. 2016).
169. *See infra* Subpart II.B.2.b.
170. For example, where students have used experts, they have been able to overcome the strong presumption in favor of schools on substantive issues. *See e.g.*, Twp. High Sch. Dist. 214, 54 I.D.E.L.R. 107 (Ill. State Educ. Agency Feb. 4, 2010) (overturning school's finding of no manifestation based on evidence presented by student's psychologist opining a connection between misconduct (threats posted on Facebook) and disabilities (ADHD, learning disabilities, and bipolar disorder)).
171. *See* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) (holding that parents cannot recover experts' fees when prevailing in IDEA actions); *see generally* Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE

courts may still afford more weight to the school's expert.[172] And third, even when expert opinion is available, it may not always illuminate whether a nexus exists between conduct and disability, yet courts still rely on their testimony to reach definitive conclusions. Experts can provide needed guidance, but their testimony alone can rarely determine the direct cause of a child's behavior.

Consider, for example, two cases where the question of impulsivity was central to the determination of whether conduct was related to disability. In *Danny K. v. Department of Education*,[173] a sixteen-year-old receiving special education services due to his ADHD set off an explosive device in the boys' bathroom.[174] The student brought suit challenging the MDR finding but did not present expert testimony. The court upheld a finding of no nexus between misconduct and disability and relied on the school's expert who testified that the student's ADHD, which impacted his ability to plan and organize, could not be involved because the misconduct at issue required extensive planning.[175] In *Township High School District 214 v. Illinois State Educational Agency*,[176] a teenager receiving special education services for his learning disabilities, ADHD, and bipolar disorder posted a message on Facebook which threatened another student. At the subsequent MDR, the school-based members of the team decided that his misconduct was not directly related to his disability because "[the] student took a series of steps requiring intentional choices in order to send the Facebook message."[177] The hearing officer, however, relying on the student's expert witnesses, overturned the MDR decision, finding that the student's disability impacted his ability to plan as well as understand the

DAME L. REV. 1413 (2011) (discussing the many obstacles facing poor parents' enforcement of IDEA protections).

172. Courts may defer to school experts when the school expert has more personal knowledge about the child, as opposed to the student's expert who may have been engaged to provide one evaluation solely for the purposes of litigation. *See, e.g.*, Z.H. *ex rel.* R.H. v. Lewisville Indep. Sch. Dist., No. 4:12CV775, 2015 WL 1384442, at *16 (E.D. Tex. Mar. 24 2015) (crediting school psychologist over parent's expert in part because school psychologist, unlike parent expert, observed child in classroom setting).

173. 57 I.D.E.L.R. 185 (Haw. State Educ. Agency Sept. 27, 2011).

174. *Id.*

175. The school psychologist testified:

> [Student's] conduct was not a manifestation of his diagnosis of the ADHD inattentive type because the act of setting an explosive off at school is a planned activity. It requires sustained attention. It requires follow through with directions. So students with ADHD, inattentive type, they have difficulty organizing tasks and following through with directions because they are easily distracted, and they tend to overlook the details of the task.

Id.

176. 54 I.D.E.L.R. 107 (Ill. State Educ. Agency Feb. 4, 2010).

177. *Id.* at 475.

consequences of his actions, and thus, he could not have planned the threat or comprehended the consequences of posting it.[178]

The difference in outcomes may have been related to a multitude of case-specific factors, including that the student in *Township High* was able to produce more evidence suggesting that his disabilities impacted his ability to fully comprehend the consequences of his actions.[179] Nevertheless, the opposite results reached in the above cases is also illustrative of the limits of expert testimony. In one case, the expert found that because the student's actions involved planning, and his disability impacted his ability to plan, his disability could not have been involved. The second court took the opposite approach, finding that because the disability impacted planning, and the misconduct involved planning, the disability must have been involved. The experts could have been correct in both cases, but they also could have been wrong in both. They simply cannot know with certainty whether a disability was directly involved. In essence, experts are not able to provide courts with enough information to meet a direct causation standard. Thus, even with assistance of expert testimony, the issue of nexus is not clear-cut.

Expert evidence can certainly offer clarity to the nexus decision but, as with most evidence, expert conclusions are not certainties; rather, they are simply additional lenses through which to view the question of disability and misbehavior. *Z.H. v. Lewisville Indep. Sch. Dist.*[180] highlights the uncertainty that persists around this nexus standard even with expert testimony. In *Z.H.*, the student's doctor testified that the child's disability meant that he simply "could not restrain [him]self from lashing out when agitated by others."[181] This testimony, coupled with documented struggles with peer relationships, was enough to convince the first reviewing court to take a broader view of the child's

178. *Id.* at 477–78.
179. *Id.*
180. 113 L.R.P. 1859 (Tex. State Educ. Agency 2012).
181. The child received services under the categories of "emotional disturbance" and "other health impairment" (for his ADHD). *Id.* at *4. At the MDR, the child's parents argued that the conduct was related to their child's recently diagnosed autism, which included documented difficulty with peer relationships. *Id.* at *6. Despite these documented struggles with peer interactions, the school-based MDR team determined that the incident was not directly or substantially related to the child's disability in large part because it chose to focus on different aspects of his disability. The school-based members focused on the child's ADHD and impulsivity. Thus, they were able to separate the planned creation of a shooting list from an impulsive act associated with ADHD and to determine that the conduct was not a manifestation of his ADHD. *Id.* The parents appealed the MDR to an independent hearing officer, the first level of review for MDR appeals. Z.H. *ex rel.* R.H. v. Lewisville Indep. Sch. Dist., 113 L.R.P. 1859 (Tex. State Educ. Agency 2012) (holding that the student's behavior (creation of a shooting list) was a manifestation of his disability).

disability and ultimately find that the student's misconduct, creating a list of students he wanted to shoot, was related to his disability.[182] On appeal, the court took a much narrower view of the scope of this child's disability, finding that the misconduct was outside of the scope of this child's disability.[183] The court grounded its decision in the school psychologist's conclusion that creation of the shooting list was not related to the child's disabilities.[184] Ultimately, the student in this case wanted the court to take a broad view of disability and supported this position through his expert. The court, however, sided with the school's narrower view supported by the school's expert. The case highlights the difficulty of defining the scope of disability, even with the benefit of expert opinions. It also demonstrates courts' willingness to defer to schools' experts when faced with countervailing opinions.

The limits of expert opinions expose a core problem with the structure of the IDEA's MDR provision. The statute asks MDR teams to treat a disability as though it is a medically diagnosable condition with clear and immutable characteristics, rather than an artificial label placed on loosely connected groups of behaviors.[185] While expert testimony can provide insights into a certain category of disability generally, it cannot always provide definitive guidance as to whether a behavior is directly linked to disability in a particular student.

(2) Reliance on Teacher Observations

In addition to experts, teacher observations play an enormous role in determining the scope of a student's disability. Teacher observations of student behavior help form the baseline by which to judge the misconduct at issue and its relationship to a student's disability.[186] Teacher observations are, of course,

182. The hearing officer cited to a record containing years of evidence suggesting poor social development, inability to read people, inability to react appropriately to social interactions, and anxiety. *Lewisville Indep Sch. Dist.*, 113 L.R.P. 1859.

183. The judge focused solely on impulsivity to find that an act of creating a shooting list over several days was outside of the narrowly defined scope of the child's disability, a central component being impulsivity. *Lewisville Indep. Sch. Dist.*, 113 L.R.P. 1859, at *14–16.

184. *Id.* at *16.

185. *See generally* Antonis Katsiyannis & John W. Maag, *Manifestation Determination as a Golden Fleece*, 68 EXCEPTIONAL CHILD. 85 (2001) (explaining that disability categories are socially constructed and socially negotiated); Carol Thomas, *How Is Disability Understood? An Examination of Sociological Approaches*, 19 DISABILITY & SOC'Y 569 (2004) (discussing the sociological understandings of what constitutes disability).

186. 20 U.S.C. § 1415(k)(1)(E)(i) (2012); *see also* Fitzgerald v. Fairfax Cty. Sch. Bd., 556 F. Supp. 2d 543, 562 (E.D. Va. 2008).

an important piece of the broader picture, but these observations are simply circumstantial or corroborative evidence. Teacher observations are not a definitive diagnosis or expert conclusion on the scope of one's disability. Yet, courts sometimes elevate teacher observations to expert levels, citing to teacher testimony to set the parameters of disability. In the MDR context, behavior falling outside of those limits is not attributable to the disability.

For example, in *Fitzgerald v. Fairfax County School Board*,[187] the district court placed great weight on teachers' testimony of the student as "often persuaded by other students to engage in inappropriate behavior, such as laughing, talking out of turn, or otherwise causing classroom distractions," when affirming the school's decision that the student's conduct (shooting paintballs at his school building) was not a manifestation of his anxiety.[188] The court essentially relied on teacher observation to define the scope of the student's disability. It ultimately reasoned that since the student had planned and executed the paintball shooting spree, he was not "persuaded by other students" and thus the conduct could not be attributed to his disability.[189] The problem here is not necessarily with the outcome, but rather with the method. Essentially, the court relied on the teacher's observations to help define the scope of the student's disability and then held that the conduct at issue fell outside of that scope.

Some courts recognize teacher observations as only circumstantial evidence and not definitive. In *Bristol Township v. Z.B.*,[190] the court drastically discounted teachers' conclusions when it reversed an MDR team's finding that a student's aggressive actions toward a teacher were not a manifestation of his ADHD.[191] The court discounted teachers' conclusions about the student's behavior, finding that the school-based members of the MDR team failed to

187. 556 F. Supp. 2d at 543.

188. *Id.* at 562. The student was eligible for services under the category of "emotional disturbance" due to elevated anxiety symptoms that interfered with his school attendance and performance. The court, crediting teacher observations of the student's behavior, characterized the misconduct as falling outside of the scope of disability and simply "juvenile outbursts . . . not atypical of teenage boys in general." *Id.*

189. *Id.*

190. Bristol Twp. Sch. Dist. v. Z.B. *ex rel.* K.B., 67 I.D.E.L.R. 9 (E.D. Pa. 2016).

191. In *Bristol Township v. Z.B.*, a seventeen-year-old high school student with "severe" ADHD was caught roughhousing in the hallway with his friends. A teacher witnessed the incident and intervened, which led to an altercation between student and teacher. At the school level, the MDR team found the conduct was not a manifestation of the student's ADHD for two reasons. First, the team determined that physical aggression was not generally associated with ADHD, and second, the team had never observed aggression from this particular student. *Id.*

thoroughly investigate and consider all relevant contributing factors.[192] Importantly, the court was not willing to uphold the MDR determination when it relied primarily on generalizations about the symptoms of ADHD rather than actual firsthand knowledge of how ADHD affected the student at issue.[193] The court discounted teachers' claims of a lack of aggressive behavior from the student as dispositive of a lack of connection between disability and conduct.[194] Yet, even here this court based its ruling on a lack of evidence to make such a determination, rather than any predetermined framework for the evidence.[195] It remanded the case to the MDR team for reconsideration with additional evidence.[196] Ultimately, it was not able to say with certainty that the MDR team reached the wrong conclusion, only that it had not considered enough information before reaching its conclusion.

To be clear, teacher observations can and should play a central role in determining how a disability affects an individual student, but a more structured and evidence-based approach is necessary for this information to produce consistent and reliable results. First, it should be acknowledged that teacher observations do not amount to clinical diagnoses of disability and observations alone should not define the scope of a child's disability.[197] Second, teacher observations should be collected in a consistent and uniform way to provide a clear and more objective picture of a student's behavior. Currently, teacher reporting is mired in subjectivity and bias. Teachers may only recall the observations that are memorable—times when the student caused a disturbance rather than the mundane hours that the student behaved as any other.[198] A single teacher's observations may be colored by the time of day in

192. *Id.*
193. *Id.* at 45–46. The court faulted the school for failing to consider how ADHD affected this particular student, including facts such as the time of day when the incident occurred and the effect of medicine. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 49.
197. 20 U.S.C. § 1415(k)(1)(E) (2012). The IDEA directs the MDR team to consider "all relevant information" rather than relying on any one data source when making a decision about the nexus between disability and misconduct.
198. *See* ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 2–3 (3d ed. 1997) (attributing the following major factors that affect the extent to which an eyewitness accurately observes and even and is able to retrieve it: (1) the extent to which the event in question stood out from (or blended with) its surroundings; (2) whether conditions or simultaneous events helped or interfered with observation; (3) what the witness was doing at the time of the event; (4) whether the witness is by nature a careful observer; (5) whether the witness was under stress at the time of the event; (6) the witness' own self-interest, expectations, and preconceptions); *see also* DANIEL L. SCHACTER, THE SEVEN SINS OF MEMORY: HOW THE MIND FORGETS AND REMEMBERS (2001).

which she interacts with the student, the relationship she has with him, or the peer group that he interacts with in her class.[199] If the goal is to reach some sort of evidence-based solution that distinguishes behavior that is rooted in disability from behavior that is not, more data—specifically, more objective data—must be gathered in order to completely and accurately define the scope of disability. Two appropriate steps forward are: (1) to acknowledge the shortcomings of teacher observations in the nexus determination process as it stands; and (2) to begin to remediate some of those shortcomings by establishing more consistent data collection methods that are longitudinal in nature and that consider a variety of interactions with the child.

b. Elevation of Process Over Substance

A third issue arises when courts seem to elevate process over substance. That is, courts look to whether the team considered "all relevant information in the student's file" and answered the two questions proposed by the MDR as evidence of a sound decision.[200] If satisfied that procedure was followed, courts determine that the MDR team's conclusion was correct.[201] Likewise, when procedure is flouted, courts are skeptical of the result.[202] However, unlike other sections of the IDEA that contain highly specific and detailed procedures, the guidance surrounding manifestation determination decisions is comparatively sparse, and intentionally so.[203] Congress's intent when drafting the 2004 amendments was to "streamline" the MDR process.[204] A perhaps unintended result is that reliance on sparse procedures is not sure to produce a substantively equitable result.

199. Students on certain types of medication prescribed to control ADHD symptoms may act differently once the effects of the medication begin to subside. *See, e.g.*, Bristol Twp. Sch. Dist. v. Z.B., 67 I.D.E.L.R. 9, 44–45 (overturning school district's finding of no manifestation in part because the school failed to consider the time of day in which the misconduct occurred).

200. 20 U.S.C. § 1415(k)(1)(E).

201. In *Danny K.*, the court cited the MDR team's use of worksheets to support its conclusion that the team had deliberated thoughtfully before coming to its conclusion that the conduct was not a manifestation of disability. Danny K. v. Dep't of Educ., 57 I.D.E.L.R. 185, 1031 (Haw. State Educ. Agency Sept. 27, 2011).

202. In *Bristol v. Z.B.*, the court placed great weight on the fact that the school psychologist had pre-populated the MDR worksheet, answering "no" to both questions prior to the MDR meeting. The court was concerned with bias on the part of the school and a lack of complete investigation into the incident and for these reasons remanded the case. *Bristol Twp. Sch. Dist.*, 67 I.D.E.L.R. 9 at 40.

203. *Compare* 20 U.S.C. § 1414(d) (describing the process for developing an IEP), *with* 20 U.S.C. § 1415(k)(1)(E).

204. *See supra* Subpart I.C.

Courts are notoriously wary of "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review."[205] But this deference presumes that adherence to procedures will produce the correct result and that educators and not courts are in the best position to make accurate and just decisions. These assumptions simply do not hold true in the context of MDR decisions.

In the context of MDRs, adhering to process means a particular group of people, familiar with the student, must consider "all relevant information" and make a determination about the nexus between misbehavior and disability.[206] Neither the statute nor the regulations provide guidance on how to collect those data or what methodology may be relied upon to ensure that a fair representation of the student's behaviors across time forms the basis for the team's decision. Thus, schools make their own decisions about what information to gather as part of the student's file, and at least where MDRs are concerned, these data often paint an incomplete picture of the child. Moreover, the statute does not require schools to solicit expert opinion as to the student's disability, but only asks that "relevant members of the IEP Team" review "relevant information" in the file.[207]

Educators are not mental health experts, nor do they possess crucial insights into concomitant effects of disability. They too will need guidance from psychologists or other medical professionals in order to help accurately define the scope of a child's disability. Yet, the MDR process does not guarantee expert participation. In fact, due to national shortages of school psychologists, this level of expertise may often not be available to MDR teams when making initial decisions about the nexus between misconduct and disability.[208] Courts, on the other hand, may have the benefit of expert testimony at the time of an MDR appeal. With this additional and crucial information, courts may be better positioned to serve as a check when schools make poor decisions, in part due to incomplete data. Thus, courts should not trust that by merely following process, MDR teams have the necessary data and guidance to reach sound conclusions.

205. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982). In a seminal case determining what schools must do in order to meet their obligation to provide FAPE under the IDEA, the Court announced: "In assuring that requirements of [the IDEA] have been met, courts must be careful to avoid imposing their view of preferable educational methods upon states." *Id.* at 207.

206. 20 U.S.C. § 1415(k)(1)(E).

207. *Id.*

208. NAT'L ASS'N SCH. PSYCHOLOGISTS, SHORTAGES IN SCHOOL PSYCHOLOGY: CHALLENGES TO MEETING THE GROWING NEEDS OF U.S. STUDENTS AND SCHOOLS 1 (2017).

As the above Parts illustrate, reaching an accurate and valid decision regarding the nexus between misconduct and disability under the IDEA's 2004 discipline provisions is fraught with difficulty. The statute calls for an unworkable standard and fails to provide enough process to ensure fair outcomes. Thus, the discipline provisions fail to effectively protect students with disabilities from unwarranted school exclusions. The following Part discusses more thoroughly the ways in which the discipline provisions fail to live up to their purpose.

III. THE IDEA'S ILLUSORY DISCIPLINE PROVISIONS

A. Failure to Account for Disability Variances

To become eligible for special education services under the IDEA, a student must first fit into one of thirteen categories of disability.[209] But the IDEA also indicates that the specific category of disability should not be a basis for limiting or defining the special education and related services that a school offers a child as part of her IEP.[210] In fact, beyond initial eligibility, the specific category of disability in which a child falls need not play any role in developing an appropriate IEP.[211] Once a child is identified as needing special education services, those services are meant to be highly individualized to "prepare them for further education, employment and independent living."[212] Courts have repeatedly held that the "IDEA charges schools with developing an appropriate education program, not with coming up with a proper label with which to describe [the child's disabilities]."[213] Schools are required to develop

209. *See generally* 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8 (2017) (defining "child with a disability"); *see also* Weber, *supra* note 149 (analyzing several reasons for confusion around IDEA eligibility including confusion around how to accurately identify children with learning disabilities).

210. 20 U.S.C. § 1412(a)(3)(B) ("Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.").

211. *Id.*

212. 20 U.S.C. § 1400(d)(1)(A); *see also* Bd. of Educ. v. Rowley 458 U.S. 176, 201 (1982) (setting forth the substantive standard required by FAPE to mean access to special education that is "*individually* designed to provide educational benefit" (emphasis added)).

213. Heather S. *ex rel.* Kathy S. v. Wisconsin, 125 F.3d 1045, 1055 (7th Cir. 1997); *see also* Fort Osage R–1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 (8th Cir. 2011); Wood v. Katy Indep. Sch. Dist., 163 F. Supp. 3d 396, 409 (S.D. Tex. 2015); C.H. *ex rel.* C.H. v. Nw. Indep. Sch. Dist., 815 F. Supp. 2d 977, 985 (E.D. Tex. 2011).

appropriate IEPs that ensure progress in the general education curriculum, and they can be held liable when they fall short.[214]

The MDR provision, however, operates entirely contrary to this individualization by prioritizing the category of disability above the specific circumstances of the child. MDR teams first consider whether the student's misconduct was "caused by" or had a "direct and substantial relationship to" a disability.[215] To answer this question, teams must first have a complete understanding of the child's disability, and often look to the child's initial eligibility category to anchor this analysis.[216] Students may attempt to provide a more complete picture by introducing information from doctors or other treating medical professionals.[217] But, when this information broadens the scope of the originally identified disability, MDR teams and courts are reluctant to consider that information.[218] Instead, they revert back to the assumption that the child's disability is limited to the category in which she initially qualified for IDEA services.[219] The effect of doing so, however, is to make the initial disability categorization determinative in the MDR analysis, rather than its serving merely as an assessment of the individual child's behaviors over time, the evolved understanding of her disability, or whether the school is meeting the child's individual needs.

Not only is this approach logically inconsistent with the overall goals of the IDEA, but it also conflicts with various statutory, regulatory, and policy prescriptions. OSEP advises MDR teams to engage in an individualized analysis to determine how the disability manifests in a particular child, rather than how the disability may manifest generally.[220] The IDEA requires schools to engage in a highly individualized process when drafting the IEP.[221] As to the

214. *See Rowley*, 458 U.S. at 177.
215. 20 U.S.C. § 1415(k)(1)(E).
216. *See, e.g.*, OHIO DEP'T OF EDUC., OPTIONAL FORM OP-3 MANIFESTATION DETERMINATION http://education.ohio.gov/getattachment/Topics/Special-Education/Federal-and-State-Requirements/Procedures-and-Guidance/Ohio-Required-Forms/Form-OP-3-Manifestation-Determination.doc.aspx (containing section on "nature of disability"); TENN. DEP'T OF EDUC., MANIFESTATION DETERMINATION REVIEW FORM ED-5492 (2017).
217. *See* Z.H. *ex rel.* R.H., No. 4:12cv775, 2015 WL 1384442, at *4–6 (E.D. Tex. Mar. 24, 2015).
218. In *Z.H.*, parents argued that their child was autistic, but the court said the MDR team did not have to consider autism since the child was not categorized as autistic for purposes of IDEA eligibility. *Id.* at *13. *See also* Fitzgerald v. Fairfax Cty. Sch. Bd., 556 F. Supp. 2d 543, 561–62 (E.D. Va. 2008) (noting that the child's primary diagnosis was anxiety and thus narrowed the focus of inquiry to determine whether the misconduct was rooted in the child's anxiety).
219. *Z.H.*, 2015 WL 1384442, at *13.
220. Assistance to States, *supra* note 108.
221. 20 U.S.C. § 1414(d) (2012); 34 C.F.R. § 300.324 (2017).

IEP, the statute and regulations are clear: Services should not be conditioned on the category of disability.[222] Instead, the IEP team must engage in a broad assessment of the child's strengths, and academic, developmental, and functional needs, among other things.[223] IEP teams must also take notice when students' behaviors impede their learning.[224] When necessary, the IEP team must consider interventions that may help the student learn to better manage problematic behaviors.[225] This requirement exists for students regardless of their disability category or diagnosis. Inherent in these requirements is the notion that the school has an obligation to address certain troublesome behaviors when they impede learning, regardless of the child's labeled disability.[226]

Consider, for instance, a child who is eligible for services under the category of "hearing impairment."[227] While the child may not have a behavioral disability, the child may exhibit troublesome behaviors as a result of the school's failure to communicate effectively with the child. Under statutory and regulatory provisions, the school should address those behaviors through teaching and interventions, and it should include those services in the IEP.[228] To be clear, those services are not tied to the disability category of eligibility, but the IDEA requires this individualization with respect to the IEP and its interventions.

This broad and holistic approach to IEPs is hindered by the MDR provisions. MDRs shift the focus back to the category of disability because the MDR team is directed to dissect a student's behavior and draw lines between those that are firmly rooted in disability and those that are not.[229] To do this, MDR teams look to the category of disability for which the child is receiving services. A hearing-impaired student who gets in a fight would likely lose an MDR, even if the student's IEP contained counseling services to help teach more appropriate responses to frustration. The MDR team would likely

222. 20 U.S.C. § 1412(a)(3)(B); 34 C.F.R. § 300.111.
223. 34 C.F.R. § 300.324. These academic and functional needs are the driving factors that shape the child's IEP. NAT'L CTR. FOR LEARNING DISABILITIES, IDEA PARENT GUIDE 39–40 (2006), https://www.ncld.org/wp-content/uploads/2014/11/IDEA-Parent-Guide1.pdf [https://perma.cc/8W66-6CV7].
224. 20 U.S.C. § 1414(d)(3).
225. *Id.*; 34 C.F.R. § 300.324(2)(i) (stating that IEP teams must consider the use of positive behavioral interventions and supports and other strategies that may help address problematic behaviors).
226. SWENSON & RYDER, *supra* note 4, at 4.
227. 34 C.F.R. § 300.8(c)(5).
228. 20 U.S.C. § 1414(d)(3).
229. *Id.* § 1415(k)(1)(E).

conclude that the hearing impairment did not "cause" or was not "directly and substantially" related to the fight.[230] This is despite the fact that the IDEA would have instructed the IEP team to provide counseling services to address the child's behaviors.[231] Moreover, a failure to provide such services could have resulted in a manifestation finding, but if the services are in place, no such finding is warranted.[232] In essence, the child's disability results in troublesome behavior that is recognized and addressed in one section of the statute (dealing with IEPs) and effectively ignored in another (dealing with MDRs).

The only way the MDR team can ensure children with disabilities are not unfairly excluded from regular education is to engage in these broader inquiries. Otherwise, the categories of disability play a determinative role and the actual needs of students play none. As in the IDEA's IEP provisions, the focus of the inquiry should be individualized and should fully explore how an individual child experiences disability—whether or not those experiences are grounded in her eligibility category.

B. Insufficient Limits on the Exclusion of Students With Disabilities

Legislative history and case law both emphasize that the purpose of the IDEA's disciplinary provisions is to further the statute's central guarantee of a free appropriate public education (FAPE) for children with disabilities.[233] The IDEA was enacted to put an end to exclusionary practices that prevented children with disabilities from accessing a meaningful education.[234] The core tenet of the IDEA's discipline policies—that children with disabilities should not be excluded from education based on misbehavior related to their disabilities—ties directly into the IDEA's guarantee of FAPE.[235] Yet, the IDEA's current disciplinary structure is at odds with that stated goal. The plain language of the IDEA's manifestation determination provision demands an extremely close nexus between conduct and disability in order to invoke the IDEA's protections of FAPE. This high standard of causation makes it more likely that students with disabilities will be excluded for behaviors rooted in their disabilities.

230. *Id.* § 1415(k)(1)(E).
231. *Id.* § 1414(d)(3).
232. The IDEA directs MDR teams to find that a manifestation exists when the misconduct was the "direct result" of school's failure to implement the IEP. *Id.* § 1415(k)(1)(E)(i)(II).
233. *See supra* Subpart I.C.
234. *See supra* Subpart I.B.
235. 20 U.S.C. § 1412.

First, the MDR inquiry does not sufficiently account for scientific uncertainty around disability and behavior. Second, it fails to ensure decisions are based on sufficient and objective data. Third, the scientific uncertainty coupled with incomplete data leads to arbitrary results. Fourth, in light of the uncertain nature of results, courts unfairly saddle parents with the burden of proof.

1. The Problem of Scientific Uncertainty

The IDEA requires that a child's IEP team review all relevant information to determine: (1) if the conduct in question 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 IEP.[236] Each question assumes that evidence can establish or disprove a direct causal link and that the statutory process can fairly evaluate it. In reality, the statute requires MDR teams to undertake a nearly impossible task. Determining whether a child's internal processes motivated a certain external behavior is not a question that can be answered with a high degree of scientific certainty. At least two fundamental problems get in the way of certainty. First, disabilities and their associated behaviors are fluid, not static. Thus, disabilities themselves are difficult to accurately define. Second, no single test exists to determine the degree to which a person's judgment was impaired by a disability—or by anything else for that matter.

The IDEA's disability categories are social constructs created to help describe commonly occurring or linked behaviors.[237] This, of course, is not to say that disabilities are not real or valid, but rather that certain disability categories, those representing internal or invisible disabilities, are harder to objectively define.[238] These types of disabilities, often referred to as "soft disabilities," can in turn be difficult, if not impossible, to accurately measure.[239] Moreover, soft disabilities make up the largest percentage of disability categories in special education. These categories include, but are not limited to,

236. *Id.* § 1415(k)(1)(E).
237. Katsiyannis & Maag, *supra* note 185, at 85, 89–91 (describing how disability categories are "socially defined and socially negotiated").
238. *See generally* Erik Parens & Josephine Johnston, *Facts, Values, and Attention-Deficit Hyperactivity Disorder (ADHD): An Update on the Controversies*, CHILD & ADOLESCENT PSYCHIATRY & MENTAL HEALTH, Jan. 2009, at 3 (describing a "zone of ambiguity" in diagnosis of ADHD where physicians differ as to whether the diagnosis is warranted).
239. *See* REDFIELD & NANCE, *supra* note 6, at 36.

learning disabilities (such as dyslexia or dyscalculia), ADHD, intellectual disabilities, depression, and anxiety.[240]

These types of disabilities exist on a wide spectrum and fall under several different IDEA categories of disability.[241] They are also accompanied by a host of varied behaviors. In other words, a single disability may manifest itself through a number of different traits and characteristics.[242] Similarly, the same exact traits do not occur in all people with the very same category of disability.[243] They may not even appear in one individual consistently or over time may be heightened or subdued. If these disabilities cannot be easily diagnosed or measured, determining whether a particular behavior, trait, or characteristic is the result of the disability is even more difficult. Scientists have long studied the highly complex intellectual and emotional processes that influence a person's decisionmaking,[244] but they have been unable to arrive at a single test or method for determining the specific factors that contributed to or influenced a particular behavior. Likewise, no empirically validated scientific method exists to determine whether a student's misconduct was caused by disability.[245]

Notwithstanding these scientific and practical limitations, the MDR inquiries treat disabilities as though they were constant, measurable, and

240. The Department of Education collects national data on a number of indicators regarding children with disabilities. These data reveal that the categories of specific learning disability, emotional disturbance, OHI, and intellectual disability have consistently topped the charts as the largest categories of disability. *Fast Facts: Students With Disabilities*, *supra* note 153.

241. 20 U.S.C. § 1401; *see also* Tina Taylor Dyches & Mary Anne Prater, *Disproportionate Representation in Special Education: Overrepresentation of Selected Subgroups*, *in* CURRENT ISSUES AND TRENDS IN SPECIAL EDUCATION: IDENTIFICATION, ASSESSMENT AND INSTRUCTION, 56, 59–61 (Festus E. Obiakor et al. eds., 2010) (discussing the dramatic increase in students diagnosed with certain categories of disability).

242. For example, Autism Spectrum Disorder (ASD) is characterized as a neurodevelopmental disorder but exists on a spectrum from mild to severe. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 50–51 (5th ed. 2013). Milder forms of ASD share many of the same characteristics as the IDEA disability category of "emotional disturbance," including "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers." 34 C.F.R. § 300.9 (c)(4)(i)(B) (2017). Intellectual disability and ASD can also frequently co-occur. AM. PSYCHIATRIC ASS'N, *supra*, at 50–51.

243. For example, symptoms of ADHD manifest differently in boys and girls, contributing to what many believe is a significant under-diagnosis of ADHD in girls. *See* Rhonda S. Black, *Can Underidentification Affect Exceptional Learners?*, *in* CURRENT ISSUES AND TRENDS IN SPECIAL EDUCATION, *supra* note 241, at 37, 42–43; Nicole Crawford, *ADHD: A Women's Issue*, 34 AM. PSYCHIATRIC ASS'N : MONITOR ON PSYCHOL. 28, 28 (2008).

244. B. A. Meller et al., Judgment and Decision Making, 49 Ann. Rev. Psychol. 447 (1998).

245. Antonis Katsiyannis & John W. Maag, *supra* note 185, at 91.

external. To escape long-term discipline, a student must demonstrate with certainty that her ambiguous internal disability caused an external behavior or prove the equally nebulous point that the school's failure to implement the IEP directly caused her misconduct.[246] In this respect, the IDEA's discipline provisions demand that schools and parents engage in a process for which no valid methodology exists.

The statute demands that teams establish the nexus between the disability and misbehavior with the highest level of certainty. The MDR team must determine the behavior was "caused by" or had a "direct and substantial" relationship to the disability or a "direct result" of the school's failure to implement a provision of the IEP.[247] "Caused by" is the strongest nexus one could impose, because it means that the disability was the reason for the misconduct. One might argue that the word "substantial," meaning "largely but not wholly that which is specified," was intended to slightly lower the standard.[248] But, whatever qualification "substantial" added is undercut by the fact that it is preceded by the adjective "direct," which means "absolute, exact."[249] By adding "direct" and the conjunctive "and" to "substantial," Congress strongly suggests that the disability must have clearly influenced the misconduct—and done so to a substantial degree.[250] Collectively, these phrases indicate a congressional intent to require a tight and certain nexus, even though evidence is typically incapable of establishing such a nexus.

Take, for example, the very common scenario in which a child receiving special education services to assist with his ADHD is suspended for fighting.[251] Under the MDR provision, the team must first appropriately define how ADHD manifests in this particular child. ADHD has multiple accompanying symptoms, ranging from the most commonly thought of impulsivity to the lesser known proclivity to engage in high-risk behaviors.[252] The child's IEP may characterize her behavior as impulsive, off-task, and aggressive. Nonetheless,

246. 20 U.S.C. § 1415(k)(1)(E).
247. *Id.*
248. *Substantial*, Merriam-Webster, https://www.merriam-webster.com/dictionary/substantial [https://perma.cc/RD8K-2P7G] (defining "substantial" as "being largely but not wholly that which is specified").
249. *Direct*, Merriam-Webster, https://www.merriam-webster.com/dictionary/direct [https://perma.cc/M9R6-NRBP].
250. *Substantial*, *supra* note 248.
251. ADHD is the category of disability that appears the most in MDR appeals. *See supra* Subpart II.B.1.b.
252. *See generally* Kerrie Glass et al., *ADHD and Comorbid Conduct Problems Among Adolescents: Associations With Self-Esteem and Substance Use*, 3 ADHD: ATTENTION DEFICIT & HYPERACTIVITY DISORDERS 29 (2011).

an MDR team cannot be certain that the child's ADHD "caused" her to engage in the fight. It will likely struggle to determine to what degree the ADHD affected her decision to engage in the fight, and whether the fight was "directly and substantially" related to the disability and not more general teenage proclivities. Thus, a child whose behavior is rooted in disability cannot, using this nexus standard, be separated from a child whose behavior is not so rooted. Both may be excluded for failure to show a direct and substantial nexus between disability and misconduct. Consequently, the IDEA's protections against exclusion are illusory.

2. Insufficient and Unreliable Data

The discipline provisions ask schools to consider "all relevant information in the student's file, including the child's IEP, any teacher observations and any relevant information provided by parents" before answering the two causation questions.[253] While that information is certainly relevant, the directive to review "all relevant information" is too flexible to ensure that schools are collecting sufficient data to form a complete and objective picture of how disability affects behavior. OSEP sought to clarify the directive, writing that the manifestation determination "will analyze the child's behavior as demonstrated across settings and across time when determining whether the conduct in question is a direct result of the disability."[254] But neither the statute nor regulations provide explicit guidance on how schools are to ensure that they have appropriate data-gathering protocols in place with which to provide MDR teams with the necessary objective data occurring across time.

Without such directives in place, schools are free to determine what data to collect (or not). This liberty gives schools control over a significant percentage of the evidence that an MDR team will consider. This could allow a school, either intentionally or through basic neglect, to subvert the MDR process. For instance, many schools do not have consistent methods in place to capture critical data such as teacher observations.[255] As a result, teachers

253. 20 U.S.C. § 1415(k)(1)(E).

254. Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,720 (Aug. 14, 2006).

255. Barbara Means, et. al., *Implementing Data-Informed Decision Making in Schools-Teacher Access, Supports and Use*, U.S. Department of Education, Office of Planning, Evaluation and Policy Development, Washington, DC 2009, Executive Summary ix, www.ed.gov/about/offices/list/opepd/ppss/reports.html. "Even though teacher access to data systems is growing rapidly, systems often lack the kinds of data that teachers find most useful for instructional decision making. Among teachers who said they had access to a student data system (Exhibit 1), the data most frequently available to these teachers

participating in an MDR rely on their memory of a child's behavior.[256] The retrospective memory is both subjective and burdened by the bias of the fact that the student has now engaged in some behavior for which the teacher or the teacher's employer wants to remove the student. Rather than discount or filter this evidence, courts often assign teacher observations the highest value when determining whether a sufficient nexus exists.[257] The teachers who testify are not necessarily representative, and schools are under no obligation to collect data from all of a student's teachers, much less have multiple teachers participate in the MDR. To the contrary, schools have the authority to determine their relevant members of the team.[258] Thus, decisionmakers rely upon a set of data which is biased at worst, and random and piecemeal at best, to make very narrow and specific causation determinations.

This nonstructured approach, combined with a problematic standard of proof, allows schools with ill intent to take advantage of the system. Schools with poor data-gathering protocol are at an advantage when they want to expel or otherwise exclude a student with a disability. Upon deciding to expel a student for the misconduct, such a school can focus its evidence around the particular incident for which the student is being expelled. Without additional evidence to help understand a broader and more complete picture of the child, the evidence presented by the school will have a nearly conclusive effect. Students will face an uphill battle to challenge the school's decision, not only because they will carry the burden of proof at the MDR appeal, but also because the majority of the evidence surrounding the child's behavior rests in the control of school officials. Thus, both the unreasonable nexus standard and lack of guidance ensuring broader objective data gathering may lead to arbitrary decision making, if not unjust results.

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were student attendance data (74 percent) and grades (67 percent). Only 55 percent of the teachers with access to a student data system (or 41 percent of all teachers) had access to their current students' performance on benchmark or diagnostic tests." Jennifer D. Walker & Brittany L. Hott, Navigating the Manifestation Determination Process: A Teacher's Perspective, 24 BEYOND BEHAV. 38, 46 (2015). (recommending a uniform method of collecting data across schools: "A method for collecting and comparing information that includes empirically and socially valid measurements could make the process more acceptable to those who find it lacking in guidance.")

256. *See supra* Subpart II.B.2.a.

257. *Id.*

258. Fitzgerald v. Fairfax Cty. Sch. Bd., 556 F. Supp. 2d 543, 552 (E.D. Va. 2008) (holding that the IDEA does not give parents veto power over MDR members, but rather the parents determine who they wish to include in addition to the participants invited by the school).

3. Arbitrary Results

A study of MDR appeals confirms that drawing a direct and certain line between disability and conduct is inherently difficult and is further complicated by the lack of objective evidence. For example, in *Z.H. v. Lewisville Independent School District*,[259] the first reviewing court reversed the MDR team's finding of no manifestation, determining that sufficient evidence demonstrated a nexus between Z.H.'s disability and his alleged misconduct in creating a shooting list.[260] Based on the same evidence, the reviewing court reversed and upheld the MDR decision.[261] The disagreement between the two courts largely revolved around a psychological assessment that was performed after the misbehavior. The first court deemed this assessment an important piece of evidence for developing a complete picture of the child's disability, but the later court rejected the evidence altogether, deciding instead to limit its review to only that evidence that was before the MDR team at the time it made the nexus determination.[262] In essence, one court chose a broad view of disability and invited evidence to help clarify this view, and the other viewed disability as static, and it limited evidence to conform to this view.[263] Thus, because science does not allow for the precise sorting and categorizing of disability required by the statute, courts are forced to make arbitrary distinctions when considering the weight and credibility of the evidence before them and the need for additional evidence to help clarify the determination.[264]

259. Z.H. *ex rel.* R.H. v. Lewisville Indep. Sch. Dist., 113 L.R.P. 1859 (Tex. State Educ. Agency May 24, 2012).
260. *Id.*
261. Z.H. *ex rel.* R.H. v. Lewisville Indep. Sch. Dist., No. 4:12cv775, 2015 WL 1384442 (E.D. Tex. Mar. 24, 2015).
262. *Id.* (holding that because child was not classified as autistic and not served by his IEP for autism, school was right to limit the MDR inquiry to IDEA eligibility categories of ED and OHI (ADHD)).
263. The IDEA permits district courts hearing administrative appeals to "hear additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(C)(ii) (2012). With this provision, the IDEA seems to acknowledge that a complete record from which to make an informed and just decision may include evidence that was not available to the school or even the administrative law court at the time they considered the case. For a more in-depth discussion on courts' interpretation of this provision, *see generally* Dennis Fan, *No Idea What the Future Holds: The Retrospective Evidence Dilemma*, 114 COLUM. L. REV. 1503 (2014), which argues in favor of permitting retrospective evidence—evidence that arises after the IEP is written—when considering whether an IEP was reasonably calculated such that it conferred FAPE.
264. The IDEA gives reviewing courts the ability to hear additional evidence at the request of a party. 20 U.S.C. § 1415(i)(C)(ii) (2012).

Further, schools are not given specific guidance on how to collect reliable data upon which to base the MDR inquiries. In fact, there is no guidance to ensure an evidenced-based, objective, and consistent determination with respect to a child's behaviors in school from which to draw conclusions about nexus. This lack of guidance leads to inconsistent and arbitrary line-drawing at the MDR level with some teams taking a broad view of disability that is defined by a student's past behaviors, and other teams taking a narrower approach, limiting the scope of disability to typical characteristics associated with that disability.

Reviewing courts, too, are left with little statutory guidance on which to rest their decisions: (1) Did the team review all evidence before them; (2) did they individualize their determination; and (3) did they find a direct and substantial relationship between disability and behavior or between misconduct and failure to implement the IEP? Without specific guidance to the contrary, courts arbitrarily rely on teacher observations, medical diagnoses,[265] classifications of disability,[266] and expert testimony to help analyze whether the MDR team reached the correct result. Although each can be helpful to the determination, not one standing alone could provide the degree of certainty required by the statute. Consequently, neither MDR teams nor courts regularly have all relevant information before them such that they can make accurate inferences about the nexus between misconduct and disability with the level of certainty required by the IDEA.

4. Misplaced Burden of Proof

The statute and regulations are silent as to who bears the burden of proof at the initial level of an MDR. OSEP has weighed in to say that "the concept of burden of proof is not applicable to the manifestation determination" since MDRs do not take place before a formal adjudicative body.[267] The practical implication of not assigning a burden of proof is that students bear the burden. School representatives (teachers, administrators, school psychologists)

265. Fitzgerald v. Fairfax Cty. Sch. Bd., 556 F. Supp. 2d 543, 561–62 (E.D. Va. 2008).

266. *Z.H.*, 2015 WL 1384442 at *12–13 (holding that because child was not classified as autistic and not served by his IEP for autism, school was right to limit the MDR inquiry to IDEA eligibility categories of ED and OHI (ADHD)).

267. Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,383, 46,723–24 (Aug. 14, 2006). OSEP reasons that since MDRs are not formal court hearings, but rather informal, they did not require a burden of proof. Unlike hearings before an adjudicative body, MDRs are meant to foster joint participation between parents and school members to reach a fair decision as to the relationship between misconduct and disability.

typically outnumber student representatives (parents) at MDRs.[268] When school-based members of the team view the case with a similar lens and when the decision is not unanimous, the split falls on party lines, with school-based members voting no on manifestation and the parents voting yes. Thus, the initial appeal of an MDR is almost always filed by a parent (on behalf of the parent's child) who disagrees with the school's determination of no manifestation.[269] Once before an independent hearing officer, appealing students, as the pleading party, bear the burden of proof unless a state statute designates otherwise.[270]

OSEP interprets MDRs as collaborative meetings where parents and school members jointly participate to reach a just outcome. As such, OSEP dismisses the need for a burden of proof.[271] While the goal of a fair and appropriately inclusive meeting is noble, it is simply not reflective of the reality of MDRs. MDRs can be highly contentious meetings that often situate parents against school officials. Parents and schools can have diametrically different views, motivating factors, and goals. Parents are motivated to find a nexus between their child's conduct and disability to ensure their child can remain in school, rather than face long-term discipline or expulsion. Schools, when at their best, are able to be objective, but can also be motivated to find ways to exclude problematic children. By remaining silent on the burden of proof, the statute places an undue burden on parents to convince schools that their child deserves leniency. Although MDRs call for a team decision, when parents disagree with a school's position, the school's decision will likely win the day. Thus, schools have ultimate authority to make the final decision in MDRs, and the burden of proof is on students to show that the school's decision was in error.

Even more troubling, schools are given the advantage of unilaterally making the manifestation finding with incomplete, and at times, biased data. As discussed, schools have imperfect data collection structures in place and the

268. The discipline provisions require that "relevant members of the IEP Team" make the manifestation determination. 20 U.S.C. § 1415(k)(1)(E)(i). The IEP team is made up of parents, at least one regular education teacher, at least one special education teacher, a representative of the local school district, an individual who can interpret evaluation results (typically a school psychologist), and the child, whenever appropriate. *Id.* § 1414(d)(1)(B).

269. *See supra* Subpart II.B.

270. *See generally* Perry A. Zirkel, *Who Has the Burden of Persuasion in Impartial Hearings Under the Individuals with Disabilities Education Act?*, 13 CONN. PUB. INT. L.J. 1 (2013); *see also* Sch. Bd. v. Brown, 769 F. Supp. 2d 928, 938 (E.D. Va. 2010); New Haven Unified Sch. Dist., 113 L.R.P. 28568 (Cal. State Educ. Agency May 20, 2013).

271. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,723.

IDEA does not effectively incentivize more robust and objective data gathering. And schools make determinations of manifestation based on such data without having to clear any burden that could help ensure enough evidence is presented to reach a sound decision. Compounding the inequity is the highly compressed timeline in which MDRs must statutorily be held. MDRs must be held within ten school days of the decision to impose long-term discipline.[272] Parents wishing to supplement the evidence considered at the MDR with outside experts or other professionals having additional insight into their child's disability are hard-pressed to secure this information within ten days. Thus, the evidence before the team largely consists of evidence created by the school members and solely under their control.

The burden on students at MDR appeals is often their downfall. Courts regularly cite students' failure to meet their burden of proof when affirming a school's MDR decision.[273] In many cases, students are unable to marshal sufficient evidence to overcome evidence proffered by schools, which often includes teacher observation as well as expert testimony.[274] Even setting aside whether the manifestation determination was correct, students often lack the ability to challenge the school's determination with countervailing opinions beyond those of their parents.

This unequal distribution of access to relevant evidence and control over decisionmaking is inconsistent with the IDEA's core guarantee of a free appropriate education in an inclusive setting. By effectively making schools judge and jury at MDRs, the statute fails to place important checks

272. 20 U.S.C. § 1415(k)(1)(E)(i). "Long-term discipline" is used in this Article to mean discipline that would effectively be a change of placement per the IDEA. A change in placement is discipline that removes a child from her current educational setting for more than ten consecutive school days or removals for separate incidents of misconduct that total more than ten consecutive school days if those incidents demonstrate a pattern of similar behavior. 34 C.F.R. § 300.536 (2017).

273. *See supra* Subpart II.A (discussing Zirkel study, which found burden of proof to be a significant factor in outcomes of MDR appeals).

274. For example, in *Los Angeles Unified School District*, 111 L.R.P. 60703 (Cal. State Educ. Agency Aug. 15, 2011), the parents were unable to convince the independent hearing officer that their son's sale of a prescription drug was not the result of ADHD or a specific learning disability. The parents testified as to their opinion regarding a nexus between the student's disability and misconduct, but did not offer any expert testimony. The school offered testimony from a special education teacher, assistant principal, and school psychologist. The hearing officer found the parents failed to meet their burden of proof. *See also* Reeths-Puffer Schs., 52 I.D.E.L.R. 1389 (Mich. State Educ. Agency Feb. 9, 2009) (holding parents failed to meet their burden of proof to demonstrate that the student's misconduct, bringing a knife to school, was not a result of his ADHD where the parents' and student's testimony failed to rebut the school's testimony from school social workers, a school speech/language pathologist, and a school psychologist).

on schools' ability to exclude children through long-term discipline, ultimately undermining the IDEA's guarantee of FAPE. As the IDEA was borne out of a fight to end the exclusion of children with disabilities from the regular school environment, this guarantee of inclusion is at the very heart of the statute. Currently, the MDR process fails to adequately safeguard that essential right. One way to remedy this failure would be to assign schools the burden to prove why a child's conduct is not rooted in her disability when schools seek to exclude that child from regular education. While the initial stage of an MDR does not occur before an independent adjudicative body, assigning a burden would provide further guidance to MDR team members as to the strength and weight of evidence required prior to a finding of "no nexus" between behavior and disability. This potential solution is discussed further in Part IV of the Article.

C. Misalignment of Incentives

The second question posed by the IDEA's 2004 MDR provision asks the team to consider whether the conduct was "the direct result of the [school's] failure to implement the IEP."[275] There are a few problems with the inquiry. First, by imposing a direct causation requirement, the language creates a perverse incentive to limit special education services in order to avoid potential fault under this provision.[276] Second, it requires the MDR team to take two fictions to be reality: (1) that the underlying IEP is appropriately addressing the child's needs; and (2) that the team has an objective way of discerning causation. The language in the current MDR standard marks a distinct change from the 1997 manifestation determination provision. The old statute asked MDR teams to consider the broader question of whether the IEP and placement were appropriate.[277] An inappropriate IEP or placement created an assumption that

275. 20 U.S.C. § 1415(k)(1)(E)(i).

276. While it is admittedly unlikely that a school would limit services purely to win an MDR under this provision, the broader point is that the direct causation standard is out of step with the IDEA's broader FAPE requirement. For example, in *MaST Community Charter School*, 47 I.D.E.L.R. 23 (Pa. State Educ. Agency Dec. 26, 2006), the IHO found that a school's failure to implement counseling services as specified in the IEP was not directly related to the student's misconduct of bringing a knife to school. Even if counseling services were a core component of the child's IEP, it would be difficult to demonstrate a direct link between lack of services and subsequent student behavior. Thus, this provision does little to incentivize and support other sections of the IDEA, which demand that schools provide special education and related services tailored to the unique needs of an individual child. 20 U.S.C. § 1414(d)(1)(A).

277. *See supra* Subpart I.C.

the school contributed, at least in part, to the student's misbehavior.[278] Such a standard not only acknowledged the inexact test for determining actual causation, but also reinforced other sections of the IDEA which call for appropriate IEPs. The current standard does the opposite. It asks the MDR team to consider whether the IEP was being implemented, but it does not ask MDR teams to consider whether the IEP was actually appropriate.[279] Further, it demands an extremely close nexus in order to tie lack of services to misconduct. Under this standard, the quality and effectiveness of an IEP become irrelevant. So long as the school implements the IEP it adopted, the working assumption is that the student's misbehavior is not a function of anything the school did or did not do. And even when the school fails to implement components of an IEP, that failure must be the direct cause of misconduct before the school will bear any responsibility for its failure.

The current standard is flawed in three respects. First, it incentivizes schools to offer fewer services, or to limit support and services offered in the IEP to those it knows it can implement consistently, rather than allowing the child's needs to define services.[280] Although other sections of the IDEA mandate appropriate IEPs,[281] limiting liability in the MDR provision is at minimum in conflict with the school's fundamental obligation to confer FAPE. Though it may be unlikely for a school to shirk its duty to provide adequate services solely due to the MDR provision, the provision at the very least fails to consistently support the statute's core mandate—that schools confer FAPE.[282] Where the MDR provision could serve as a second check on schools' obligations, it instead allows schools to escape scrutiny for ineffective IEPs.[283] At a minimum, this MDR provision fails to support the broader statutory goals of ensuring appropriate individualized services for children with disabilities.

Second, the provision assumes the initial IEP was appropriate and fails to consider the many reasons an IEP could be flawed, ranging from poor drafting,

278. Greenwich Bd. of Educ., 44 I.D.E.L.R. 27 (Conn. State Educ. Agency Mar. 14, 2005) (overturning school's finding of no manifestation in part because student's IEP goals did not adequately address his related services needs stemming from his disabilities which impacted his behavior).

279. 20 U.S.C. § 1415(k)(1)(E)(i).

280. Section 1414 (d)(1)(A) requires that IEPs include a statement of "how the child's disability affects the child's involvement and progress in the general education curriculum." The IEP team is tasked with developing the special education and related services that will help address the effects of disability and progress towards annual goals. *Id.* § 1414(d)(1)(A)(i)(IV).

281. *Id.* § 1414 (d).

282. *Id.* § 1412 (a)(1).

283. *See supra* note 275.

to incomplete information, to the reality that education is not an exact science and can involve much trial and error. The effect of this assumption is to force the student to bear the cost of an inappropriate IEP. If the school fails to draft an IEP that sufficiently addresses the student's behavioral struggles, the student, not the school, suffers the consequence of this error. The student, who may have been able to avoid the misconduct if given the proper coaching and tools, is disciplined despite the school's failure to provide him with those tools.

Finally, this inquiry forces the MDR team to assume fictitiously that causation is something measurable and observable, as though an MDR team could definitively know when a service or lack of service was the direct cause of misbehavior. Demanding such a close nexus, one that is virtually unknowable, again puts the student at a disadvantage. The student faces an uphill battle to essentially prove that but for the school's failure, the student would not have engaged in the misconduct. Rather than acknowledge the uncertainty around causation, the practical effect of the current provision is to essentially assume the school's actions or inactions had no effect on the student's ability to conform her behavior to school norms. This, too, appears to be in tension with broader statutory goals which place the burden on schools to appropriately address not just academic but also behavioral concerns that impede a student's ability to progress in school.[284]

The unrealistic and limited nature of this inquiry actually makes it possible for schools to benefit from their own violations. Although schools have statutory obligations to ensure complete and thorough IEPs reasonably calculated to provide FAPE, the discipline provisions fail to comport with those obligations at the very least, and at worst may provide incentives to flout or minimize them. Moreover, the IDEA's due process protections do not fully cure the problem. Even though students can bring a complaint for a FAPE violation more generally, that claim is brought outside of the MDR context, taking it out of expedited review.[285] Thus, claims attacking the appropriateness of the IEP will often come too late for a child who has already been suspended or expelled from school. More importantly, a claim attacking the IEP more

284. 20 U.S.C. § 1414 (d)(1)(A)(i)(I). (discussing the precise requirements for IEPs and a consideration of both academic achievement and functional performance) ; *see also* 20 U.S.C. § 1414(d)(3)(B) (speaking directly about a "child whose behavior impedes [her] learning" and directing teams to consider the use of "positive behavioral interventions and supports, and other strategies" to address that behavior).

285. 20 U.S.C. § 1415(k)(3)-(4). MDR appeals focus only on disagreements regarding placement or manifestation determination under the disciplinary provisions of the IDEA, not on the general provisions of FAPE.

generally, even if won, may not provide a basis to retroactively undo the MDR finding and subsequent punishment.

IV. SOLUTIONS

A. Allocate Burden of Proof in Disciplinary Appeals to Schools

While students have the right to appeal an MDR decision using the IDEA's due process procedures,[286] they carry the burden of proving that the MDR decision was improper.[287] An evidentiary burden necessarily falls on one party or the other, but placing it on students is inequitable. First, at the MDR, a school can conclude that a child's conduct is not a manifestation of disability on very slim evidence. As addressed above, the school may have based that decision on incomplete, subjective evidence. Second, by saddling students with the burden on appeal, courts presumptively assume that this very slim evidence is valid. In other words, the district, in effect, gets a double presumption.

This inequity could be cured by shifting the burden to schools at an MDR appeal. Shifting this burden would also address a number of other problems raised above. It would: (1) incentivize schools to rely on more complete and objective data; (2) acknowledge the information asymmetries inherent between schools and students and rightly put the onus on schools who have more access and control of relevant evidence; and (3) recognize schools' statutory obligation to provide FAPE, and place the burden on schools when they want to divest themselves of those obligations.

To be clear, the text of the IDEA does not currently speak to burden of proof at administrative hearings, known as due process hearings. Rather, the current burden is court-made and relatively new. Until fairly recently, many courts placed the burden of proof on school districts in IDEA due process hearings, particularly those challenging the provision of FAPE.[288] But in a 2005 case addressing challenges to IEPs, *Schaffer v. Weast*,[289] the Supreme Court held that the burden of proof would not be allocated based on the substantive issues

286. *Id.* § 1415(k)(3)(A).
287. *See generally* Zirkel, *supra* note 270.
288. E.S. *ex rel.* Stein v. Indep. Sch. Dist., 135 F.3d 566, 569 (8th Cir. 1998) ("At the administrative level, the District clearly had the burden of proving that it had complied with the IDEA."); Carlisle Area Sch. v. Scott P. *ex rel.* Bess P., 62 F.3d 520, 533 (3d Cir. 1995) ("In administrative . . . proceedings, the school district bears the burden of proving the appropriateness of the IEP it has proposed."); Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396, 1398 (9th Cir. 1994) ("The school clearly had the burden of proving at the administrative hearing that it complied with the IDEA.").
289. 546 U.S. 49 (2005).

in the case, but rather based on which party was seeking relief.[290] The Court narrowed its holding to apply only to challenges of the validity of an IEP. "We hold no more than we must to resolve the case at hand: the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."[291] Lower courts, however, have taken that narrow holding and extended it to MDR appeals, placing the burden of proof on students.[292] In fact, the only time that courts place the burden of proof on a school district is when state legislatures adopt the burden in state law.[293] Surprisingly, courts have not even questioned whether *Schaffer* is applicable in the discipline context, but have simply applied it even though an IEP is not at issue in an MDR appeal.

The differences between challenging an IEP and an MDR are too significant for courts to carelessly extend the burden of proof from one to the other. First, the Court in *Schaffer* explicitly limited its ruling to complaints about IEPs in administrative hearings.[294] Thus, the *Schaffer* holding should be accurately construed as applying only to challenges to an IEP and should not be expanded to encompass challenges to an MDR. Second, manifestation determinations and IEPs are governed by separate sections of the IDEA, and they serve wholly distinct purposes.[295] A student's challenge regarding an IEP may focus on questions of appropriateness of special education services, whereas an MDR appeal addresses only the nexus between misconduct and disability. More specifically, IEP cases involve claims that a school's proposed special education plan does not convey an educational benefit or claims that the school improperly implemented the plan. Either way, the IEP challenge is essentially a denial of the IDEA's guarantee of FAPE, to which the *Schaffer*

290. *Id.* at 62.
291. *Id.*
292. Sch. Bd. of City of Norfolk v. Brown, 769 F. Supp. 2d 928, 938 (E.D. Va. 2010) (finding that parent petitioner carried the burden of proof at the initial level of review before an independent hearing officer (citing *Schaffer*, 546 U.S. at 62)); *See*, *e.g.*, Moses Lake Sch. Dist., 59 I.D.E.L.R. 24 (2012); L.A. Unified Sch. Dist., 111 L.R.P. 60703 (Cal. State Educ. Agency Aug. 15, 2011); Elk Grove Unified Sch. Dist., 52 I.D.E.L.R. 60 (Cal. State Educ. Agency Jan. 14, 2009); Balt. Cty. Pub. Sch., 106 L.R.P. 53472 (Md. State Educ. Agency 2006).
293. Connecticut, Delaware, and the District of Columbia each place the burden of proof on school districts in all matters relating to the appropriateness of a program as well as placement decisions. *See*, *e.g.*, DEL. CODE ANN. tit. 14, § 3140 (2017). In Connecticut, the public agency bears "the burden of proving the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency" in "all cases." CONN. AGENCIES REGS. § 10-76h-14 (2009).
294. *See Schaffer*, 546 U.S. at 62.
295. 20 U.S.C. § 1414(d) (2012) governs development of IEPs; § 1415(k)(1) governs schools' ability to enact long-term discipline, which the statute categorizes as "[p]lacement in an alternative educational setting."

holding should apply. MDR appeals, in contrast, focus on a much narrower provision in the IDEA that look only at the nexus between misbehavior and disability and the school's proposed placement.[296] The provision of FAPE is not at issue. Thus, the rationale supporting *Schaffer* does not apply to MDR appeals.

To conclude that *Schaffer* does not apply, however, still leaves open the question of what burden of proof should apply to an MDR appeal. When a statute is silent, the general rule is that plaintiffs bear the burden of proving their claim.[297] However, there are important exceptions to the general rule. For instance, "policy considerations, convenience, and fairness" may warrant a different allocation.[298] In the context of MDRs, all three factors point heavily toward placing the burden on the school.

First, the huge informational asymmetries between schools and parents are impossible to overcome at the initial MDR level. Schools are the repository for the majority of education-related information about the child as well as the underlying event that is the subject of the appeal. As guardians of this information, it is not only fair but also convenient to allocate the burden of proof to them. Second, the MDR standard is already exceedingly deferential to schools. Further, schools have the "final say" as to whether the nexus was met because school representatives outnumber student representatives and are given ultimate decisionmaking authority at the MDR. Thus, fairness dictates that schools should bear the burden of defending their decision, often predominately based on their data, should it be appealed. Third, the IDEA imposes affirmative obligations on schools to provide an appropriate and

296. *Id.* § 1415(k)(3)(B). The IDEA limits an MDR hearing officer's role to two types of decisions. Hearing officers can either: (1) return the child to placement from which she was removed; or (2) order a change in placement to an appropriate interim alternative educational setting for not more than forty-five days. In the first instance, the hearing officer would return a child if she disagreed with the school's finding that the conduct was not a manifestation of disability or if the school violated other procedures required for MDRs. In the second instance, the hearing officer could order the student to a new educational setting upon finding that maintaining the current placement is substantially likely to result in injury to the student or others. *Id.* In either scenario the inquiry only involves the student's misconduct and subsequent behavior, rather than a general provision of FAPE. *Id.*

297. *See Schaffer*, 546 U.S. at 56–57.

298. Justice Ginsberg makes this point in her *Schaffer* dissent and argues that schools have better access to relevant information, greater control over the potentially more persuasive witnesses (those directly involved with the child's education), and greater overall educational expertise than parents. *Id.* at 63–64 (Ginsburg, J., dissenting). Although these arguments did not win the day in *Schaffer*, they are substantially more persuasive when applied to an MDR appeal.

inclusive education for students with disabilities. Courts should place the burden on schools, not students, when schools seek to absolve themselves of those obligations.

1. Correcting Information Asymmetries

Manifestation determinations are not based in objective, evidence-based inquiries, but rather on inferences, observations, and assumptions. In the best-case scenarios, these inferences are based on a number of observations occurring over time and across settings, but in the worst-case scenarios, conclusions are drawn from one observed incident meshed with biases and assumptions.[299] From the initial MDR meeting through the appeal, schools have greater access to and control over critical information upon which the MDR decision is based. Schools determine not only what information to collect, but also how to collect it. They have control of witnesses, in the form of teachers and students, and can decide on their own relevant members of an MDR team. Parents, on the other hand, are not witnesses to the conduct that resulted in the discipline, are not in a position to contradict teacher observations, and are less able to know whether IEP services are being implemented with fidelity.

Further, psychologists often play the dispositive role in the manifestation determination, but only one side has consistent and realistic access to them. Schools typically have a psychologist on staff, whereas timing and resources often bar parents from obtaining their own psychologist. Even parents with the financial means to hire outside experts are hard pressed to secure an expert's participation at a hearing with less than ten days' notice. Thus, basic access to a psychologist can skew the evaluation of data in a school's favor.

The IDEA itself recognizes the serious problem that unequal access to a psychologist creates. If a student claims a denial of FAPE, the IDEA gives parents the right to seek out an independent educational evaluation (IEE) and the district must either pay for it or prove why its evaluation is sufficient.[300] The Court in *Schaffer* emphasized that this right is key to leveling the playing field for families, indicating that schools "have a 'natural advantage' in information

299. *See, e.g.*, Bristol Twp. Sch. Dist. v. Z.B. *ex rel.* K.B., 67 I.D.E.L.R. 9 (E.D. Pa. Jan. 14, 2016) (finding school-based members of MDR team had predetermined that student's misbehavior (hitting a teacher) was unrelated to his ADHD prior to objectively considering all relevant evidence).

300. 34 C.F.R. § 300.502 (2017).

and 'expertise.'"[301] Unfortunately, this general right to a psychologist in the context of challenging FAPE does very little, if anything, to assist a family in the context of the immediate determinations made in an MDR.

In the MDR context, parents only have the right to request an IEE when they claim the child has a disability that the school has yet to identify.[302] In the typical MDR, however, the central issue is the nexus between conduct and an existing disability, not some additional disability. Thus, parents often have no assistance procuring a second opinion from an expert unaffiliated with the school district. Simply requiring schools to share their information with parents is not enough to offset this disadvantage and leaves parents in a position where they must trust the schools' judgment or challenge those judgments after the fact.

2. Minimizing Strict Causation Standard

Second, it is not only the control over information that hints of unfairness, but also the high bar a student must clear in order to meet the manifestation standard as well as the school's ultimate decisionmaking authority. As discussed above, in order to find that a student's misconduct was a manifestation of her disability, an exceedingly close nexus must exist that sufficiently roots the behavior in her disability. Setting such a high standard means that it will be easier to justify the absence of a nexus than to find that a disability caused or substantially caused behavior. The standard itself puts students at a disadvantage. Further, when there is disagreement at the MDR level as to nexus, the school's positon will always win out because there are simply more school-based members of the MDR team.[303] If the school effectively makes the call on whether a manifestation of disability exists such that the child is granted or denied the protections of the IDEA, the school should carry the burden of justifying that decision should it be appealed.

3. Policy Considerations

Finally, policy considerations also demand that school districts be allocated the burden of proof at MDR appeals. As Justice Ginsburg so aptly

301. *See Schaffer*, 546 U.S. at 60.
302. 20 U.S.C. § 1415(k)(5) (2012).
303. While nothing in the statute or regulations suggests that MDRs decisions are to be made by a majority vote, logic suggests that where a group is tasked with a decision, the more members of the group who are aligned together, the more likely it becomes that their decision carries the day.

pointed out in her dissent in *Schaffer*, the IDEA is unlike other civil rights legislation in that it places an affirmative obligation on schools to provide students with FAPE.[304] Schools have a responsibility to ensure that children with disabilities receive an appropriate and inclusive education. When schools try to relieve themselves of this duty, as they do when they attempt to expel a student, they should carry the burden of proving why the child is no longer owed the benefit. Admittedly, schools must still provide special education services to children who are expelled from school, but the level of service is considerably less than what the child would have received had she remained in school.[305] Allocating the burden of proof to school districts would reinforce the IDEA's central tenet—that schools owe students with disabilities an appropriate and inclusive education. When schools take steps to shed themselves of this obligation, the burden is rightly on the school, not the student, to demonstrate why the obligation is no longer owed. Doing the opposite and placing the burden on students is more likely to lead to flawed outcomes. The MDR determination to be made necessarily involves ambiguities and the current system resolves them all in favor of the school. Doing so is particularly problematic in light of the fact that the school already has so many other built-in advantages. Shifting the burden of proof to schools would provide a necessary check on schools' handling of the MDR process.

Beyond internal consistency with the statute's guarantee of FAPE, schools' disproportionate application of discipline toward students with disabilities warrants shifting the burden to schools to prove why the discipline is warranted. A 2014 national study indicates that students with disabilities are more than twice as likely to receive out-of-school suspensions as students without disabilities.[306] Students with disabilities are suspended for nonviolent

304. *See* Schaffer v. Weast, 546 U.S. 49, 64 (2005) (Ginsburg, J., dissenting); *see also* 20 U.S.C. § 1412(a)(1).

305. 20 U.S.C. § 1415(k)(1)(D). Schools have a continuing obligation to provide educational services to students who are suspended or expelled, regardless of the MDR outcome. Such services must "enable the child to continue to participate in the general education curriculum . . . and to progress toward meeting [IEP] goals." *Id.* OSEP has clarified that schools are not required provide these students with "exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline." However, the education services must enable the child to continue to participate in the general curriculum and to progress toward meeting IEP goals. Assistance to States for the Education of Children With Disabilities, 71 Fed. Reg. 46,540, 46,716 (Aug. 14, 2006).

306. DOE, Discipline Snapshot, *supra* note 4 (finding that students with disabilities are more than twice as likely to receive an out-of-school suspension (13 percent) than students without disabilities (6 percent)).

behaviors at higher rates as well.[307] When a student with a disability is suspended or expelled, he risks losing access to quality special education services. Although the IDEA clearly states that special education services cannot cease, it does not guarantee the same level of service that the child was receiving prior to the suspension or expulsion.[308] Moreover, research over the last decade consistently illustrates that school suspensions do not work as an effective punishment tool and may, in fact, reinforce misbehavior.[309] Nor are they an effective tool to address the perceived problem of youth violence or school safety.[310] Given their questionable efficacy, disproportionate use, and potential harm to students with disabilities, it seems illogical to impose a discipline standard that favors exclusion over students' right to inclusion.

B. Lower the Standard of Causation Necessary to Demonstrate a Nexus Between Disability and Misbehavior

Congress should amend IDEA's discipline provision to require schools to demonstrate by a preponderance of the evidence that the conduct in question was: (1) not rooted in disability, and (2) not the result of the school district's failure to implement an appropriate IEP whenever schools seek to enact long-term exclusion of children with disabilities. It both lowers the causation standard required to demonstrate a nexus between misconduct and disability and shifts the burden to school districts to demonstrate evidence that the standard has been met. The proposal would help to account for the inexact science around disabilities and information asymmetries inherent in MDRs, encourage schools to collect more objective evidence upon which to base nexus decisions, and better reflect the marginal benefits of suspensions and expulsions and significant potential harms of imposing such discipline on

307. Russell J. Skiba, Special Education and School Discipline: A Precarious Balance, 27 Behav. Disorders 81, 89 (2002) (finding that students with disabilities are disproportionately excluded from school, despite the strictures of the IDEA's discipline provisions).

308. 20 U.S.C. § 1415(k)(1)(D); *see, e.g.*, Troy City Bd. of Educ., 27 I.D.E.L.R. 555 (Ala. State Educ. Agency 1998) (finding a school's post-expulsion placement of a tutoring service was appropriate even though it did not occur in a regular education setting because it allowed a student to continue progress towards IEP goals); *see also supra* note 297.

309. Pamela A. Fenning et al., Call to Action: A Critical Need for Designing Alternatives to Suspension and Expulsion, 11 J. Sch. Violence 105, 105–06 (2012) (noting most school districts continue to use out-of-school suspensions even for minor disciplinary issues even though they tend to actually exacerbate problematic behaviors and also may lead to academic issues).

310. Skiba, *supra* note 307, at 90 (finding that school suspensions fail to change the behavior of difficult students or make for safer school environments, and rather appear to lead only to further suspensions and school dropouts).

students with disabilities.[311] Further, this proposal harmonizes the discipline section with the IDEA's overall goal of ensuring individualized education services through an appropriate IEP.

The proposed amendment aims to address four key problems with the current MDR provision. First, it better acknowledges the limited utility of long-term exclusion and acts as a needed check on schools' ability to impose long-term suspensions and expulsions. Second, it removes the impractically stringent causation standard and asks schools to determine whether it was more likely than not that disability was involved. Third, it rebalances all of the problems related to information asymmetries and insufficient data collection. For instance, shifting the evidentiary burden to schools at the MDR hearing would incentivize schools to collect more objective data, improving the reliability of findings regarding whether a disability was involved in a students' misbehavior. Fourth, and most important, placing the burden on the school furthers the overarching goal of the IDEA: to ensure an inclusive education for children with disabilities. A reallocation of the burden of proof would not prevent a school from excluding a student, but it would require a school to affirmatively justify its actions when its intent was to divest a student of his normal access to education.

Such changes would surely provoke opposition. The IDEA's discipline provisions have always been controversial.[312] Schools will likely claim, as they have in the past, that encumbering their ability to impose suspensions and expulsions would prevent them from advancing effective discipline strategies and ensuring safe school environments for all children.[313] This opposition, however, lacks substance. Long-term school exclusion may solve an immediate need to rid the school of a difficult student, but it fails to change or impact the likelihood of future misconduct.[314] Thus, school districts would be arguing for discretion for discretion's sake, not some educational interest. Further, schools would still retain the ability to immediately exclude those students who pose

311. *Id.* at 81–97.

312. The Norwood Amendment (Amendment 13 to H.R. 1, the No Child Left Behind Act of 2001) attempted to eliminate the mandatory provision of special education services for children with disabilities who have been suspended or expelled for behavior involving drugs, weapons, or aggravated assault and battery. 147 Cong. Rec. H2, 582–83 (daily ed. May 23, 2001) (statement of Rep. Norwood). The Sessions Amendment (Amendment 604 to S. 1, the Better Education for Students and Teachers Act of 2001) attempted to allow schools to apply uniform discipline standards to students with disabilities and those without, regardless of the MDR determination. 147 Cong. Rec. S6, 198 (daily ed. June 13, 2001) (statement of Sen. Sessions).

313. *See supra* Subpart I.C.

314. *See supra* note 301 and 302.

serious threats to safety for up to forty-five days.[315] During this time, schools can convene IEP meetings to discuss modifications that may help improve behavior as well as discuss alternative placement options if the current setting does not have the capability to provide supports and services that effectively address the troubling behaviors.[316]

What the proposal aims to do is prevent schools from simply excluding the student without thinking of ways to treat the root problem. Importantly, the proposal does not take away schools' ability to enact long-term discipline; it merely asks that, prior to doing so, they collect evidence demonstrating a student's disability was likely not involved in misconduct. If the student's disability was involved, the proposal incentivizes schools to engage their resources and find ways to address troublesome behaviors.[317] Schools remain free to impose other forms of discipline as well as other strategies to effectuate positive behavioral changes, so long as they do not effectively change the placement of student with disabilities.[318] For instance, schools could institute restorative justice models[319] and positive behavioral interventions and supports,[320] both of which have proven to be more effective strategies than

315. 20 U.S.C. § 1415(k)(1)(G) (2012) (permitting schools to immediately remove students who bring weapons to school, possess illegal drugs or controlled substances while at school, or inflict serious bodily injury upon persons on school grounds or during school functions).

316. The IEP team can agree on a different placement even when behavior was determined to be rooted in disability, as long as both parents and school officials jointly agree to the new placement. 20 U.S.C. § 1415(k)(1)(F)(iii).

317. The proposal is consistent with the recent federal guidance calling on schools to ensure they provide appropriate behavioral interventions and supports to limit the harmful effects of school exclusions on students with disabilities. *See* SWENSON & RYDER, *supra* note 4.

318. The IDEA only limits schools' ability to discipline students for more than ten consecutive school days, or when a pattern of removals for substantially similar behavior accumulates to more than ten school days. 34 C.F.R. § 300.536 (2016).

319. Restorative justice programs focus on peaceful and non-punitive approaches to addressing harm and place "repairing harm done to relationships and people over and above the need for assigning blame and dispensing punishment." TREVOR FRONIUS ET. AL., WESTED JUSTICE & PREVENTION CTR., RESTORATIVE JUSTICE IN U.S. SCHOOLS: A RESEARCH REVIEW 1 (2016), https://jprc.wested.org/wp-content/uploads/2016/02/RJ_Literature-Review_20160217.pdf [https://perma.cc/9WLZ-JXA2].

320. The Department of Education uses Positive Behavioral Interventions and Supports (PBIS) to mean "a multi-tiered behavioral framework used to improve the integration and implementation of behavioral practices, data-driven decision making systems, professional development opportunities, school leadership, supportive [school] policies, and evidence-based instructional strategies." OSEP TECHNICAL ASSISTANCE CTR., U.S. DEP'T OF EDUC., POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS: IMPLEMENTATION BLUEPRINT: PART 1—FOUNDATIONS AND SUPPORTING INFORMATION 5 (18th ed. 2015), https://www.pbis.org/Common/Cms/files/pbisresources/PBIS%20Part%201%2018%20Oct%202015%20Final.docx [https://perma.cc/MH3D-NHBH].

suspensions and expulsions.[321] Thus, the proposal serves as a check on the use of long-term discipline and encourages schools to consider more efficacious options.

Second, the proposal keeps the concept of manifestation determinations in place while acknowledging the futility of imposing a strict standard of causation. Rather, it attempts to balance the lack of evidence-based methodology with a need to provide some guidance by which to analyze behavior and disability. It asks schools to review objective evidence and decide that behavior is likely not rooted in disability before enacting long-term discipline. Structuring the language in this way removes the direct causation standard, which in turn encourages a more realistic inquiry into the nexus between misbehavior and disability. If schools decide that a child's disability was likely not involved, then they are free to discipline the student as they would any other.

Third, explicitly placing the burden on schools at the MDR further nudges schools by encouraging them to base their decisions in consistent and objective evidence. Rather than haphazardly relying on teacher observations, schools would want a more complete picture of the child's behavior across time in order to make a determination about whether and how disability may have affected behavior. Schools, not parents, have the best access to information upon which to base these decisions. It seems not only fair, but prudent, to encourage schools to effectively gather this evidence to ensure more objective and consistent decisions.

Finally, a standard that favors a student's right to be educated in an inclusive environment should trump a school's right to engage in ineffective discipline techniques that disproportionately harm students with disabilities. From its inception, the IDEA focused on the unwarranted exclusion of children with disabilities from regular education. The current MDR provision acts as a loophole around the IDEA's guarantee of FAPE, providing schools with a way to exclude "problem" children with disabilities. Amending the standard by imposing a burden of proof on schools at the MDR more appropriately acknowledges that schools owe students with disabilities a right to an

321. *See generally* FRONIUS ET AL., *supra* note 319, at 26 (concluding that while more studies are needed before conclusive findings can be made, preliminary evidence suggests that restorative justice may have positive effects across several outcomes related to discipline, attendance and graduation, climate, and culture); SWENSON & RYDER, *supra* note 4, at 5 (citing several studies that demonstrate a correlation between the use of school-wide, small group, and individual behavioral supports that use proactive and preventative approaches, and increases in academic engagement and achievement, and fewer suspensions and dropouts).

appropriate education in an inclusive environment and rightly places the burden on schools to demonstrate why they no longer have to provide that right.

C. Systemize Data Gathering

Notwithstanding the inherent difficulty of MDR decisions, schools could still arrive at more consistently objective outcomes if they practiced better data gathering. The Department of Education should incentivize such practices through additional guidance around data collection.[322] At a minimum, schools should routinely collect teacher observations of student behaviors in a more consistent and objective way.[323] Schools could also be encouraged to have regular team meetings to discuss problematic student behaviors prior to the need for long-term suspensions or expulsions.

School districts currently vary in terms of what information they routinely collect about a student's behavior and discipline record. Some routinely collect teacher observations about student behaviors, while others do not. But if observations are key to manifestation determination findings, schools should be collecting them with more consistency and uniformity. Otherwise, when a manifestation determination occurs, the MDR team is forced to determine the root of the child's actions without a complete picture of the child's struggles. Scholars critical of the MDR methodology likewise recommend more thorough data collection to remedy some of the deficits in the current process.[324]

322. *See generally* NAT'L COUNCIL ON DISABILITY, BREAKING THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS WITH DISABILITIES 58 (2015) (pointing out flaws in current data collection and calling for amendments to ensure more complete disciplinary data to facilitate a more nuanced analysis of discipline patterns).

323. There are currently several different types of applications in existence for tracking and compiling student behavior. *See, e.g.*, Matthew Lynch, *Problems with Unruly Classroom Behavior? There's an App for That*, EDUC. WEEK (Apr. 20, 2017, 7:00 AM), http://blogs.edweek.org/edweek/education_futures/2017/04/problems_with_unruly_classroom_behavior_theres_an_app_for_that.html [https://perma.cc/WVP3-K2Z7] (describing several applications designed to help teachers monitor and track problem behaviors in the classroom).

324. For instance, Jennifer D. Walker and Brittany L. Hott suggest that schools should collect antecedents and consequences of each instance of discipline because such information may be useful in MDRs. "An "antecedent" is an event or circumstance that happens immediately before the behavior of concern and may include changes in schedules, requests from adults, or wait time. Antecedents may also include things that are unobservable such as hunger or effects of medication. "Consequences" happen immediately after the behavior at issue, and may reinforce the unwanted behavior. Examples of consequences include attention from peers or adults, task avoidance, removal to another location." Jennifer D. Walker & Brittany L. Hott, *Navigating the Manifestation Determination Process: A Teacher's Perspective*, 24 BEYOND BEHAV. 38, 40 (2015).

Rather than base decisions haphazardly on what may or may not be a complete data set, schools should affirmatively endeavor to collect relevant information about students with disabilities in a more consistent and objective way. The IDEA's regulations should require more specific and regular collection of data surrounding students' behavior such that schools are motivated to engage in the admittedly difficult task of implementing structures to efficiently do so.

CONCLUSION

The IDEA was enacted against the backdrop of exclusionary practices that locked children with disabilities out of public schools, forcing them into separate and unequal learning environments. At its core, the statute is akin to a civil rights law, proclaiming that children with disabilities have equal rights to an appropriate and inclusive education and guarding against policies or practices that attempt to exclude them. The disproportionate use of suspensions and expulsions on students with certain categories of disability is simply the latest form of exclusion. Rather than locking the front door, schools now force students with disabilities out the back door. And despite the statute's founding principles, the IDEA's discipline provisions fail to defend against such exclusion.

The fault lies in the statutory text itself, as well as in the failure to give schools more guidance regarding implementation of the discipline provisions. The statute attempts to accomplish the dual goals of guarding against unwarranted exclusion and not standing in the way of schools' authority to enact discipline of their choosing. But these goals are in conflict, and thus cannot both be effectively met by this single law. Congress tacitly acknowledged this conflict through a standard that is inherently biased toward school exclusion. By doing so, Congress undermined the core principal of the IDEA. Instead, the discipline provisions should be amended to err on the side of inclusion and support the statute's broader purpose of an appropriate and inclusive education for all children.