In the Matter of: [Student], by and through his parents, [Mother] and [Stepfather], Petitioner, v. DOUGLAS COUNTY SCHOOL DISTRICT #1, Respondent.	FINDINGS AND DECISION CASE NO. L2000:103 Impartial Hearing Officer Andrew J. Maikovich

I.

INTRODUCTORY STATEMENT

The above-captioned hearing was held at Douglas County School District #1 offices in Castle Rock, Colorado, on February 29, March 1 and 2, 2000.

Petitioner requested the hearing pursuant to the Individuals with Disabilities Education Act (IDEA), as amended, 20 U.S.C. Section 1450, 34 C.F.R. Section 300, et seq.

The issue identified by the Impartial Hearing Officer (IHO) in a pre-hearing order and at the beginning of the hearing was whether Respondent's IEP team was correct when it determined that the actions [Student] on May 25, 1999, were not a manifestation of his disability.

II.

FINDINGS OF FACT

1. [Student] is a 15-year-old student enrolled in the ninth grade at [High School].
2. [Student]'s mother is [Race], father is [Race], and stepfather is of [Race] descent.
3. [Student] was relatively successful in school through the fifth grade.
4. [Student]'s mother and stepfather moved to [City] in the middle of his sixth grade year. [Student] had a difficult time adjusting to the move.
5. [Student] has shown signs of depression and emotional problems since the sixth grade.
6. [Student] began attending [Middle School] in seventh grade. He was suspended at various times for defiance, stealing, and lighting a bottle of cologne while at school.

7. Because of his problems at [Middle School], [Student] moved in with his father and attended [Middle School 2] in the Cherry Creek School District sometime during his seventh grade year.
8. In early April 1998 (eighth grade), [Student] was expelled from [Middle School 2] for being habitually disruptive. (Habitually disruptive is when a student has three or more significant incidents of disruption.) Incidents leading to [Student]'s one-year expulsion included fighting, leaving classes without approval, sleeping under tables in the library, marijuana possession, and using inappropriate language with teachers. The expulsion was for one year.
9. [Student] returned to live with his mother, [Mother], and stepfather, [Stepfather], in April 1998.
10. Because of his expulsion from the Cherry Creek School District, [Student] did not begin ninth grade until January 4, 1999 (second semester). At that time, [High School] accepted [Student] on a deferred expulsion contract, which basically required [Student] to remain out of serious trouble or the expulsion would be reinstated.
11. On or about February 14, 1999, [Student] attempted suicide by ingesting approximately 36 Dramamine (over-the-counter medication). He was hospitalized at [ ]. [High School] was told that [Student] had overdosed on medication, but was not told specific facts regarding the incident.
12. In February 1999, [High School] assigned assistant principal [Assistant Principal] to supervise [Student] ([Assistant principal 2] had previously been assigned to [Student] based on the alphabetical assignment of names.) As a person of color, [Assistant Principal] believed [Student] might be able to relate to him. The IHO credits the testimony of [Assistant Principal] as being particularly forthright and truthful during the hearing.
13. In mid-March, [Student] was suspended from [High School] for tardiness/truancy, which violated his deferred expulsion agreement.
14. In mid-April, [High School] special education administrators began deferring special education assessment requests to the following school year (September). This is due to the fact that assessments take approximately 45 days and the spring 1999 semester ended on May 25.
15. On an undefined date in April, [Student] was suspended for using profanity and shoving a student into a locker.
16. On April 26, 1999, [Mother] asked an administrator at [High School] about having [Student] assessed for a disability. [Mother] was told it was late in the year and they'd have to get back to her to see if there was enough time to complete the assessment by the end of the school year.

17. [High School]'s special education team placed [Student] on a list to receive an assessment in fall 1999. This information was not forwarded to [Mother].
18. In April and May 1999, [Mother] and [High School] principal [Principal] had a number of discussions regarding [Student]. [Principal], who has a son with [health concern], was very concerned about [Student]'s health. He recommended that [Mother] contact a hospital in [Other State] about her son.
19. On or about April 29, 1999, [Student] returned to school from his second suspension.
20. On or about May 10, 1999, [Student] began taking Wellbutrin, a drug which appeared to reduce his violent tendencies but made him lethargic and, as [Mother] described, "zombie-like."
21. On May 25, 1999, which was the last day of school, [Student] brought LSD to school in a bottle of breath freshener. [Student] asked another student if he would like to use the breath freshener. The student said he did. [Student] placed more than one drop on the student's tongue. [Student] told the student he had just given him acid. The student began hallucinating and was taken to the hospital, where test results showed he had LSD in his system.
22. The incident occurred at or near the end of the school day. [Assistant Principal] was responsible for investigating the incident on behalf of the school district. Because it was the last day of school, [Assistant Principal] was unable to fully investigate the incident at that time. [Student] left the school building on May 25 before school officials could interview him about the incident. Other potential witnesses had left the building prior to being interviewed.
23. [Student] ran away from home for three days after the incident.
24. On or about June 5, 1999, [Student]'s best friend died in an automobile accident.
25. [Student] does not make friends easily and has not had a close friend since the accident.
26. On or about July 14, 1999, [Mother] contacted [Chairwoman], chairwoman of the special education department at [High School], to discuss her concern that her son was not being assessed for an educational disability. [Chairwoman] discussed the request with Assistant Director of Special Education [Assistant Director].
27. On or about July 15, [Mother] talked to [Assistant Director] and explained her concerns about the district's failure to test [Student]. [Assistant Director] said he'd look into it, but that it would probably be performed in the fall as the teachers were out for the summer.
28. In July 1999, [Student] began seeing clinical psychologist [Psychologist].
29. In July and August 1999, [Mother] would have numerous discussions with [Assistant Principal] about having [Student] assessed, the investigation of the May 25 incident, as the following school year.

30. On or about August 24, 1999, [Assistant Principal] completed his investigation regarding [Student]'s May 25 actions and suspended him for 10 days with a recommendation of expulsion. [Exhibit 7.] ([Student] had not been identified as having an educational disability at this time.)
31. [Assistant Principal] offered [Mother] a home schooling option at that time, which [Mother] rejected.
32. Because of [Mother]'s request for an assessment and a potential manifestation hearing if the district determined [Student] in fact had an educational disability, [Student] returned to school following his 10-day suspension.
33. On September 1, 1999, [Stepfather] faxed a written consent to [Assistant Principal], asking him to proceed with a special education evaluation. [Exhibit A.]
34. At [Mother] 's request, [Student]'s special education referral meeting (initial meeting in the IEP process) was moved from September 17 to September 3, 1999.
35. On September 3, 1999, [Mother] signed the Douglas County School District's permission for assessment form. [Exhibit B. Although both "yes" and "no" boxes are checked, all parties were aware that [Mother] intended only the "yes" boxes to be marked]. At that time, the Douglas County School District provided [Mother] with a "pink book" listing her rights and protections under the law.
36. On September 3, 1999, [Parents] attended a special education referral meeting with various [High School] personnel. One of the primary objectives of a referral meeting is to identify a history of a student and to tailor the assessments to the student and his or her potential disability. [Exhibit C]. The result of the referral meeting was that [Student] should be assessed for a potential educational disability.
37. Between September 3, 1999, and October 7, 1999, Douglas County School District personnel tested [Student] for purposes of determining whether he had an educational disability. Speech/Language pathologist [SLP] tested [Student] for language; [Student] tested above average. ([Student] often presents himself to adults as a polite, articulate young man.) Special Education teacher [SpEd Teacher] performed the educational testing; [Student] tested average to above-average in all areas. Social worker [Social Worker] prepared a social/family history profile. School psychologist [School Psychologist] performed tests to identify an emotional disability; the tests provided indicators that [Student] might have an emotional disorder.
38. In September, [Student] began the process of being removed from Wellbutrin at the request of [Psychologist].

39. On September 9, 1999, [Mother] filed a complaint with the Department of Education, Office of Civil Rights, that the Douglas County School District had discriminated against her son on the basis of disability and race by not conducting a timely special education evaluation on her son based on her April request.

40. On October 7, 1999, an Individualized Education Program (IEP) team was assembled to review the assessments and determine whether [Student] had an educational disability under the IDEA. The team included [Mother], parent advocate [Advocate], and various school district personnel. [Exhibit F, page 2. [Social Worker] also attended but failed to sign the participant sheet.] [Student]'s personal psychologist, [Psychologist], participated in the IEP meeting. All members of the team were allowed to participate.

41. Based on the assessments and discussions, the IEP team determined that [Student] had a significant identifiable emotional disability (SIED) that prevents him from receiving reasonable educational benefit from general education. [Exhibit F, page 17.] The team found that [Student] did not have a learning disability. An IEP was developed for [Student] at that time.[1] There was no dissent from the final assessment and contents of the IEP.

42. On November 9, 1999, Douglas County School District sent [Parents] a letter informing them that it intended to suspend [Student] from school because of the May 25, 1999, incident and that it intended to expel him.

43. On November 18, 1999, a manifestation determination team made up of [Student]'s IEP team held its first meeting to determine whether [Student]'s actions on May 25, 1999, was a manifestation of his disability. [Exhibit J.]

44. Near the end of the November 18 meeting, [Mother] requested additional time to be able to obtain and provide the team with information from [Student]'s present and previous psychologists, [Psychologist] and [Psychologist 2].

45. On or about December 1, 1999, Douglas County School [School Psychologist] asked [Mother] for permission to talk to [Psychologist 2], who was [Student]'s psychologist from June 1997 to August 1998. [Mother] refused permission. [Mother] had previously provided [School Psychologist] with permission to speak with [Student]'s present psychologist, [Psychologist].

46. On January 6, 2000, the manifestation determination team reconvened to discuss the case. [Exhibit J, page 3.] At this time, [Mother] provided the team with a letter from [Psychologist]. [Exhibit L.]

[1] All members of [Student]'s IEP team agreed with the terms of the IEP at the time it was developed. For purposes of this hearing, the IEP is considered to be appropriate for [Student] at the time of development.

47. At the end of the meeting, the manifestation determination team, with the exception of [Mother], determined that the actions of [Student] on May 25, 1999, were not a manifestation of his disability. However, the team told [Mother] that it would give her until January 13, 2000 (one week), to provide it with additional information from [Psychologist 2].
48. On January 14, 2000, [Psychologist 2] faxed the school a one-page opinion regarding the manifestation determination issue. [Exhibit P.]
49. On January 14, 2000, the fax containing [Psychologist 2]'s opinion was briefly discussed by certain members of the manifestation determination team. [Assistant Director] and [School Psychologist], [Assistant Principal], and [SpEd Teacher] discussed [Psychologist 2]'s memorandum at the end of an administrative meeting. It is unclear whether [Social Worker] or [SLP] attended the discussion.
50. On January 20, 2000, Assistant Director of Special Education [Assistant Director] mailed a letter to [Parents] informing them that the manifestation determination team had considered [Psychologist 2]'s letter and maintained its opinion that [Student]'s actions on May 25, 1999, were not a manifestation of his disability. [Exhibit Q.]
51. On January 21, 2000, [Parents] requested a due process hearing with respect to the manifestation determination team's decision. [Exhibit U.]
52. Because of the "stay put" provision of the IDEA, [Student] is currently attending [High School] under the provisions of his IEP.
53. On February 3, 2000, the Department of Education, Office of Civil Rights, found Respondent did not violate Title VI of the Civil Rights Act of 1964 or Section 504 of the Rehabilitation Act of 1973 by failing to conduct a special education evaluation of [Student] during the spring semester of 1999. [Exhibit R.]
54. [Student]'s behavior improved during the fall 1999 semester. [Student] has had no significant disciplinary actions taken against him by the Douglas County School District during the 1999-2000 school year.
55. [Student] has low feelings of self-worth.
56. Being interracial, [Student] has difficulty identifying his position in the community of [City], which is predominately white. [Student] experienced at least two incidents involving racial taunting and name calling.
57. [Student] appears tired and somber a lot of the time. He also has problems with migraine headaches. These physical characteristics are indicators of potential emotional problems, including depression.

58. [Student] is often untruthful when discussing himself. He often makes up to make himself appear important. Most of [Student]'s stories are an effort to make himself look "tough" or "cool" to others.

59. [Student] is not a sociopath, psychotic, delusional, or thought-disordered.

60. At his parent's direction, [Student] has taken monthly urinalyses (UA's) in 1998 and 1999. All tests have been negative. [Student]'s disability is not caused or exacerbated by drug use or drug addiction.

III.

DECISION

In this case, [Parents] represented themselves pro se. While they represented their son's interests well, the IHO had difficulty at times understanding how their recitation of the facts correlated with the law under the IDEA. In fact, the IHO began the hearing with only a general familiarity of manifestation determinations.

At the conclusion of the initial telephone conference between the parties, the IHO identified the issue in the hearing as whether Douglas County School District #1 was correct when its IEP team determined the actions of [Student] on May 25, 1999, were not a manifestation of his disability. This issue was again identified in the pre-hearing order and the IHO's introductory remarks at the hearing. At the beginning of the second day of the hearing, Petitioner argued that the IHO had, in fact, allowed testimony beyond the issue in the case. The IHO denied Petitioner's motion for a continuance and told Petitioner that he would only consider evidence that was related to the manifestation determination issue.

In this opinion, references are made to a variety of legal issues, such as whether Respondent timely identified and assessed [Student]. The IHO only considered these issues as they relate to the IEP team's manifestation determination and not as separate issues in and of themselves.

This hearing involves a number of legal issues that integrate various state and federal laws. In an effort to make the IHO's opinion more easily understandable, the discussion in this opinion has been divided into four sections:

- Burden of proof
- [Student]'s educational disability under the IDEA
- [Student]'s behavior on May 25, 1999
- IEP team's manifestation determination decision

Section 1— Burden of proof

In the prehearing order and introductory remarks, the IHO placed the burden of proof in the case on the Respondent. Respondent disagreed and cited cases that held the burden is on the party who challenges an IEP team's determination regarding a child's disability and educational program.

The cases cited by Respondent did not involve manifestation determinations. The burden of proof for manifestation determinations is established in 34 C.F.R. § 300.525(b)(1), which states, "In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the requirements of § 300.523(d)." (See also Laurens County School Dist. #55, 31 IDELR ¶ 204.)

Respondent has the burden of proof in this hearing.

Section 2— [Student]'s educational disability under the IDEA

In this case, it is important to understand the child's disability prior to attempting to apply the law. Both parties spent considerable time at the hearing explaining [Student]'s disability to the IHO, and in Respondent's case, describing how the IDEA relates to the disability.

On October 7, 1999, the IEP team determined that [Student] had a significant identifiable emotional disability (SIED) that prevents him from receiving reasonable educational benefit from general education.

Under the IDEA, a "child with a disability" includes a child with a serious emotional disturbance (SED) who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.7(a)(1). SED is defined by a general set of characteristics listed in 34 C.F.R. § 300.7(c)(4)(i).[2]

[2] "[Emotional disturbance] does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance." 34 C.F.R. § 300.7(c)(4)(ii). In this instance, [Student] was identified as having an emotional disturbance, thereby requiring the school district to consider social maladjustment as it may impact [Student]'s educational disability.

The educational disability under the Exceptional Children's Educational Act that corresponds to the IDEA's SED disability is SIED. 1 C.C.R. 301-8, § 2220-R-2.02(5). SIED behavior characteristics are more specific that those listed for SED in the IDEA. However, whether discussing SED or SIED, the criteria are by nature more subjective and less quantitative than the criteria for other disabling conditions, such as cognitive disabilities or visual handicaps. Hoffman v. East Troy Community School District, 29 IDELR 1074. For example, a child with manic depression that interferes with his or her receiving reasonable educational benefit from general education would be identified as SIED. Children with bi-polar disorders or other emotional problems that interfere with obtaining reasonable educational benefit from general education also would be labeled as SIED. Therefore, without more specific background information, the mere label of "SIED" does not specifically identify how the child's disability interferes with his or her education. Rather, taken as a whole, the indicators of SIED are more instructive and descriptive—suggesting the terrain of SIED through behavioral patterns or prototypes rather than marking it with fixed boundaries. Hoffman, *supra*.

The same SIED indicators listed in the Colorado Code of Regulations were memorialized in a checklist by Douglas County School District #1. The checklist is used by IEP teams to determine whether a student has an emotional disability covered by the law. On October 7, 1999, [Student]'s IEP team reviewed the indicators listed on the checklist and determined that [Student] did qualify for special education services because of SIED. [Exhibit F, page 17.]

Because the ultimate issue in this case is whether Respondent's IEP team was correct when it determined the actions of [Student] on May 25, 1999, were not a manifestation of his disability, identifying the behaviors leading to the IEP team's identification of [Student]'s SIED disability classification is important.[3] With respect to the large box on the left of Exhibit F, page 17, the IHO finds the emotional or social functioning characteristics were identified based on the following behaviors (for purposes of this discussion, the boxes are numbered 1 through 12, going from top to bottom):

Box 1: [Student] exhibited depression and feelings of worthlessness.

Box 4: [Student]'s persistent physical complaints included migraines, stomach aches, and being tired.

Box 5: [Student] exhibited withdrawal and avoided social interaction to an extent that maintenance of satisfactory interpersonal relationships is prevented. As described by [Student]'s

[3] No evidence was presented at the hearing that any member of the IEP team voiced disagreement with the determinations (the boxes that were checked) exhibited in Exhibit F, page 17. Opinions may vary as to the specific reasons a box was checked, rather than whether the box should or should not have been checked.

teacher, [Teacher], something always goes wrong when [Student] appears to be making a friend. [Exhibit E, page 1 of the second stapled packet.] [Student]'s only close friend died in a car accident in June 1999.

Box 8: [Student] displays consistent patterns of aggression towards objects or persons to the extent that development or maintenance of satisfactory relationships is prevented. [Student] has had numerous conflicts with students, teachers, and family members.

Box 9: Pervasive oppositional, defiant, or non-compliant responses. Once again, [Student] has had numerous conflicts with students, teachers, and family members.

Box 10: Significantly limited self-control, including an impaired ability to pay attention. [School Psychologist] testified that she believed the box was checked because of [Student]'s difficulty in paying attention in class rather than self control. The IHO finds the intent of the entire IEP team was broader and included the plain meaning of the statement, "significantly limited self-control, including an impaired ability to pay attention." The IHO bases this opinion in part on [School Psychologist]'s assessment summaries, which state [Student] "may feel that he cannot control his thoughts" and "feelings of not being in control of his own behavior and difficulty focusing or attending class is significantly impacting his ability to access the general curriculum." [Exhibit F, page 9.] During the manifestation determination meeting on January 6, 2000, [School Psychologist] stated that [Student]'s "depression may impact his ability to act appropriately and control his behavior…" [Exhibit J, page 4, sixth bullet.] The IHO finds that while [Student]'s behaviors did show signs of limited self-control—particularly those actions leading to school discipline—his limited control generally involved impulsive acts when [Student] felt challenged or threatened, rather than long deliberative actions of defiance.

Section 3— [Student]'s behavior on May 25, 1999

The behavior exhibited by [Student] on May 25, 1999, that testimony showed was considered relevant by the manifestation determination team during its deliberation included:

- [Student] brought LSD to school in a bottle of breath freshener.
- [Student] asked another student if he would like to use the breath freshener. The student said he did.
- [Student] placed more than one drop on the student's tongue.
- [Student] told the student he had just given him acid.

- The student began hallucinating and was taken to the hospital, where test results showed he had LSD in his system.
- [Student] ran away from home for three days after the incident.

During his testimony, Assistant Director of Special Education [Assistant Director] said that [Student] laughed after telling the student he had given him acid. No other IEP members mentioned [Student]'s laughing when identifying facts they considered significant with respect to his May 25 behavior.

Section 4— The IEP team's manifestation determination decision

The general procedures and requirements for conducting a manifestation determination review are identified in 34 C.F.R. § 300.523 and 20 U.S.C. § 1415(K)(4). After considering all relevant information, the IEP team and other qualified personnel may determine that the behavior of the child was not a manifestation of the child's disability only if the IEP team and other qualified personnel determine that—

(i) In relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

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

(iii) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

34 C.F.R. § 300.523(c)(2)(i-iii).

The IHO will look at all three of the requirements individually.

(i) In relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement

In this case, [Student] did not have an IEP at the time of the behavior in question. [Mother] verbally requested an assessment on April 26, 1999. Douglas County School District #1 personnel placed [Student] on a waiting list for the fall. [Student] began the formal assessment process on September 3, 1999. An IEP was developed and agreed to by [Student]'s IEP team on October 7, 1999.

Very little evidence at the hearing was directed specifically at the requirement under 34 C.F.R. § 300.523(c)(2)(i). Petitioner generally argued Respondent's delay in assessing [Student] violated the law. Respondent appeared to argue that because no IEP existed at the time of the behavior at issue (May 25, 1999),

the requirement under 34 C.F.R. § 300.523(c)(2)(i) does not apply. In the alternative, the manifestation determination team did review and determine that [Student]'s IEP was appropriate for him on October 7, 1999, the day it was developed. Therefore, the IHO also considered the issue of whether the determination that [Student]'s IEP was appropriate on October 7 should be considered retroactive to May 25.

Petitioner argued that Respondent failed to assess [Student] in a timely fashion on two separate occasions:

(1) After [Mother] made a verbal request on April 26

(2) Throughout the spring semester as part of the District's "child find" obligation

The IHO will look at each of Petitioner's arguments separately.

According to 1 C.C.R. 301-8, § 2220-R-4.01(2)(c), "[o]nce a written special education referral has been initiated, assessment, planning, determination of disability, and, if disabled, IEP development shall be completed within 45 school days from the point of initiation of the special education referral." The law also has a parental notification provision. "A parent of any child referred shall be informed of the referral and of all procedural safeguards relevant to children potentially eligible for special education, including procedures for resolving differences." 1 C.C.R. 301-8, § 2220-R-4.01(2)(b).

In mid-April, [High School] special education administrators began deferring special education assessment requests to the following school year (September). This was due to the fact that assessments take approximately 45 school days and the spring 1999 semester ended on May 25. It is undisputed that on April 26, 1999, [Mother] made a verbal request to a Douglas County School District #1 employee to have her son assessed. It is unclear exactly what information was provided to [Mother] at that time. The Douglas County School District employee did not provide [Mother] with a copy of the "pink book" that the Douglas County School District provides to parents as part of its responsibility to inform them of the procedural safeguards as described in 1 C.C.R. 301-8, § 2220-R-4.01(2)(b). The IHO finds that school district employee told [Mother] that accurate assessments could not be completed by the end of the semester, so they were being postponed to the fall semester. [Mother] signed a written permission form to have [Student] assessed on September 3. [Exhibit B.] It is undisputed that [Student]'s assessment and IEP were developed well within 45 days following the school district's receipt of the written assessment form.

[Mother] argues that Respondent violated 1 C.C.R. 301-8, § 2220-R-4.01(2)(c), by failing to assess [Student] within 45 days of her verbal request on April 26. The IHO agrees.

Respondent had good reasons for postponing [Student]'s assessment until the fall. Because many of the special education teachers are not under contract in the summer, other District personnel would have been required to

conduct the assessments, or the assessment team might have changed during the process. By having [Student]'s actual IEP team members actually conduct the assessments allows them to begin obtaining personal knowledge about [Student]. This, in turn, might help the team develop a more accurate IEP.[4]

The fact that Respondent had good reasons for postponing the assessments, however, does not mean it did not violate 1 C.C.R. 301-8, § 2220-R-4.01(2)(c) or 4.01(2)(b). Once a parent verbally requests an assessment for their child, a school district is responsible for informing the parent of his or her rights and procedural safeguards. [Mother] was not told that she had a right to have the assessments within 45 days or offered the blank written permission form the Respondent relies on with respect to this issue. "The referral process shall be accessible to any person, organization or agency having an interest in the education of the child." 1 C.C.R. 301-8, § 2220-R-4.01(2). Not informing [Mother] of her rights and options restricts, rather than promotes, access to the process. All Douglas County School District #1 personnel who testified with respect to this issue said the district would have performed the assessments within 45 days of [Mother]'s verbal request had Petitioner demanded it. Petitioner cannot waive a right she did not know existed just because the district had good reasons for its actions.

With respect to the manifestation determination issue in this case, however, the IHO finds Respondent's procedural violations with respect to its failure to provide a notice of rights and to assess [Student] within 45 school days are harmless error. Even if Respondent had provided [Mother] with the blank written permission form on April 26, and even if [Mother] had signed it and demanded that the assessments be completed within 45 school days, [Student]'s assessments and IEP would not have been developed prior to the May 25, 1999, behavior that is at issue in this hearing. In the IHO's opinion, after a full discussion regarding the benefits of postponing the assessments, it is likely [Mother] would have agreed to postpone the assessments to the fall. Regardless of her decision, however, the issue before the IHO would be unaffected.

Petitioner's second argument with respect to Respondent's failure to [Student] in a timely fashion involves the district's "child find" responsibilities. In general, states are required to effect policies and procedures to ensure that all children with disabilities in need of special education and related services are identified, located, and evaluated. 20 U.S.C. § 1401(3)(A), 34 C.F.R. § 300.125(a). It is a school's responsibility, not the parents', to refer,

[4] In response to a complaint by Petitioner, the Department of Education Office of Civil Rights (OCR) found that the Douglas County School District postponed the evaluation for a legitimate non-discriminatory reason. Because OCR did not address the issue whether the postponement violated state of Colorado regulations, the issue is ripe for this hearing.

and if needed, obtain an evaluation of students who may require special education programs and services. Pleasant Valley Community Sch. Dist., 28 IDELR 1295.

Colorado has codified its child identification requirements in 1 C.C.R. 301-8, § 2220-R-4.01, which in part states, "Child identification shall include child find, special education referral, assessment and determination of disability and eligibility for special education and shall be the responsibility of the administrative unit in which the child attends school or, if (s)he is not enrolled in school, it shall be the responsibility of the administrative unit in which the child resides." Districts that fail to properly identify children with educational disabilities can be responsible for providing unidentified students with compensatory education. See Ashland Sch. Dist., 28 IDELR 630; Independent Sch. Dist. #11, 29 IDELR 311.

A school district is deemed to have knowledge that a child has a educational disability if—

(1) The parent of the child has expressed concern in writing…to personnel of the appropriate educational agency that the child is in need of special education or related services;
(2) The behavior or performance of the child demonstrates the need for these services;
(3) The parent of the child has requested an evaluation of the child…
(4) The teacher of the child or other personnel of the local educational agency has expressed concern about the behavior or performance of the child to the director of special education of the agency or to other personnel of the agency.

34 C.F.R. § 300.527(b)(1-4).

In this case, [Mother] testified that she learned about a school districts' child find requirements through telephone conversations with local and national mental health organizations. It is undisputed that [Mother] made a request for assessments to Douglas County School District personnel on April 26. The question is whether Respondent should have suspected the presence of [Student]'s disability prior to that time.[5]

The IHO finds that Respondent had "knowledge" of [Student]'s disability during the spring 1999 semester and should have referred him for special education based on the following information it possessed:

- [High School] accepted [Student] on a deferred expulsion contract, which meant that [Student] had been suspended from the Cherry Creek School District for at least three serious incidents of disruption in the school environment ("habitually disruptive behavior").

[5] The standard used with respect to a school district's obligation to identify learning disabled children has varied between cases. See Ashland Sch. Dist., 28 IDELR 630 ("should have suspected the presence of a disability"); PJ v. Eagle-Union Community Sch. Corp., 30 IDELR 119 ("school did not have knowledge or reasonable suspicion that the student was disabled"); Hoffman v. East Troy Community Sch. Dist., 29 IDELR 1074 ("reasonable cause to believe").

- In the spring 1999 semester, [Student] was suspended twice for disruptive behavior.
- In addition to the suspensions, [Assistant Principal] testified that he talked to [Student] on other occasions about inappropriate behavior that did not rise to disciplinary action. These included tardies, ditching class, and confrontations with students (some of which were "his fault, some not his fault").
- On or about February 14, 1999, [Student] overdosed on an over-the-counter medication. At the time, it appears the school thought it was an accidental overdose rather than a suicide attempt.
- [Principal] had numerous discussions with [Mother] about [Student]'s mental health. [Principal], who has a child that suffers with [health concern], felt great empathy for [Student] and was very concerned about [Student]'s life, as opposed to his lack of success in school.
- [Student] was failing all classes throughout the semester.

In addition to the above facts, both [Principal] and [Assistant Principal] testified that they believed [Student] was an "at-risk" student during the spring 1999 semester. ([Principal] testified that his definition of "at-risk" is different that the district's definition of "at-risk." He was not asked to explain the difference, nor explain the district's policy.) Evidence also showed that [Student] wears his emotions on his sleeve. When [Student] is angry, which apparently was often during the spring 1999 semester, people know he is angry. [Student]'s indicators are not hidden.

[Student] was identified as a student with SIED on October 7, 1999. By stipulation, Respondent agreed that [Student] had SIED and was protected by the IDEA on the date of the behavior, May 25, 1999. It is clear to the IHO that [Student] had SIED throughout the spring 1999 semester and probably years before that. In Respondent's proposed findings of fact, it stated, "The indicators of SIED under the Exceptional Children's Act are specified at 1 C.C.R. 301-8 § 2220-R-42.02(5). That section requires that the indicators of social/ emotional dysfunction *must be in existence over a period of time rather than in isolated incidents or transient, situational responses to stressors in the child's environment,* and requires that the indicators be pervasive and exist to a marked degree." (emphasis provided by Respondent).

In the IHO's opinion, [Student]'s behaviors and performance listed above demonstrate that he had a need for special education services during the spring 1999 semester. Therefore, by law, Respondent is deemed to have "knowledge" that [Student] had an educational disability. 34 C.F.R. § 300.527(b).

Again, the only issue before the IHO is the IEP team was correct when it determined the actions of [Student] on May 25, 1999, were not a manifestation of his disability. Therefore, the IHO must determine how the finding with respect to the Respondent's "knowledge" of [Student]'s special education needs affects the issue at hand.

Returning to 34 C.F.R. § 300.523(c)(2)(i), an IEP team may determine that the behavior of the child was not a manifestation of a child's disability only if it determines that in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement. The IHO finds as a matter of law, a school district that fails its statutory obligation to identify a student with an SIED educational disability and thereby fails to implement an appropriate IEP and behavior intervention strategies cannot satisfy the first element required of it in a manifestation determination review.

The IHO finds no statutory or regulatory authority by which the 34 C.F.R. § 300.523(c)(2)(i) requirement can be waived. The regulations provide for instances when a school district does not have knowledge that a child is a child with a disability. "If an LEA does not have knowledge that a child is a child with a disability…prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as applied to children without disabilities who engaged in comparable behaviors..." 34 C.F.R. § 300.527(c)(1). In this case, Respondent had knowledge of [Student]'s disability.

In this case, and IEP was developed for [Student] on October 7, 1999, which included behavior intervention strategies. Special education teacher [SpEd Teacher] testified [Student]'s current IEP is working.[6] [Social Worker] [Student]'s primary school contact regarding behavior issues, testified that [Student]'s behavior has improved since the institution of the IEP. [Student] has not been suspended for inappropriate behavior during the 1999-2000 school year.

Regardless of the reason for [Student]'s improved behavior during the present school year, the intent of the manifestation determination review requirements is to ensure that students with an educational disability only receive a change in placement after receiving the services required by law. In this instance, Respondent's failure to timely identify [Student] as required by child find regulations denied him this right.

[6] Testimony showed that [Student] is flunking all courses but one (computers). According to testimony, [Student]'s IEP primarily focuses on behavior. The issue of whether [Student]'s IEP is working academically is not before the IHO. Also, at the time the IEP was developed, all members of the IEP team agreed with its terms. The IHO accepts it as accurate.

The IHO will now review his findings with respect to the other requirements under 34 C.F.R. § 300.523(c)(2).

(ii) The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action

With respect to [Student]'s understanding the consequences of his actions, Respondent can meet its burden by showing that [Student] knew his actions were wrong and that some form of discipline might be taken as a result. Respondent is not required to prove that [Student] understood the specific punishment he might receive because of his actions. The evidence clearly shows that [Student] understood the impact and consequences of his actions on May 25, 1999.

[Psychologist 2] was the only witness to testify that [Student] might be unable to comprehend the consequences of his actions. [Psychologist 2] testified that [Student]'s inability to concentrate might cause him to not comprehend the consequences of his actions. [Psychologist 2] also testified that [Student] may not have cared about the consequences and that he fails to profit from knowing the consequences of his actions—both of which imply [Student] understood the consequences.

[School Psychologist] stated in her review of the assessment data that "[Student] needs to see how his behavior impacts what happens to him,…" [Exhibit F, page 9.] [School Psychologist]'s statement was in reference to [Student]'s work at school, however, rather than his understanding of right and wrong.

[Mother]'s explanation for [Student]'s behavior—that he does wrong things so that she, as his mother, gets drawn into his life—implies that [Student] chooses to act inappropriately specifically because he knows it is wrong.

All of the other witnesses at the hearing were consistent in their opinion that [Student] knows right from wrong. The expert upon whom Petitioner relies most significantly, [Psychologist], testified that "[Student] knew it was wrong." [Psychologist] further testified that [Student] doesn't feel exempt from cause and effect, and that "he understands everything can blow up in his face."

The evidence as a whole is clear on this issue. [Student] left the scene of the May 25 incident before school personnel arrived. He ran away from home for three days following the incident. Both acts reflect that [Student] knew he was in trouble. [Student], who is average to above-average in intelligence, also knows the use and possession of drugs has serious consequences. [Student] was suspended from school in the seventh grade for possession of marijuana.

At his parent's bequest, he has taken monthly urinalyses (UAs) for the past two years. It is inconceivable [Student] would not have known that giving or taking drugs on school property was wrong behavior.

Respondent has met its burden with respect to this issue.

(iii) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action

As discussed in an earlier section, the SIED disability is primarily identified by a series of behaviors and characteristics rather than quantitative tests, and the diagnosis is therefore more subjective than for many other learning disabilities.[7] Therefore, by its very nature, the determination required under 34 C.F.R. § 300.523(c)(2)(iii) is also relatively subjective.

For purposes of analyzing whether [Student] had an impaired ability to control his behavior during the events of May 25, the IHO focused closely on the behaviors exhibited by [Student] that led to his SIED identification. In most instances, the IHO gave great weight to observations and opinions confirmed by multiple witnesses.[8]

Taking all of the evidence into consideration, including exhibits and testimony, the IHO finds [Student]'s educational disability incorporates the following characteristics:

Depression: All of the expert witnesses agreed that [Student] suffers from depression. There is some disagreement as to its severity.

Image: [Student] has a poor self image. [Student]'s IEP team checked the box which, in part, relates that the student has feelings of worthlessness. [Psychologist] testified that "[Student] hates himself." [Psychologist 2] testified that [Student] has poor self-esteem and would act "tough" to counteract that feeling. Assistant principal [Assistant Principal] testified that image was very important to [Student]. [Assistant Principal] said [Student] wanted to be known as a "tough guy," who wasn't going to be "beaten down." [Student] frequently lies, most of the time in an attempt to make himself look tough or cool. [Student] said he had an older brother in the Crips, when in fact he does not have an older brother. [Student] said he had been deejaying at rave parties on the weekends, when in fact he was grounded and couldn't leave the house. These types of lies are related to the appearance [Student]

[7] Tests also play a role in identifying emotional disabilities. [See Exhibit E; and resulting analysis and summary, Exhibit F, pages 7-15].

[8] One notable exception to this generalization is Respondent witnesses' universal emphasis on the fact that drugs were not previously part of [Student]'s modus operandi. While the IHO believes this fact is relevant to the analysis, the IHO believes the *reason* [Student] committed the acts on May 25 is of greater materiality than the objects used during the behavior.

attempted to project. Many of [Student]'s confrontations with students at school appeared triggered by challenges to his person, either by students [Student] thought were putting him down or teachers demanding he conform his behavior to their requests.

Trust: [Student] does not have close friends. [Psychologist] testified that [Student] does not trust people, including teachers. This was confirmed by [Assistant Principal], who after many conversations with [Student] in the spring, testified that [Student] was "guardedly cautious" and that he only knew [Student] "at a certain level." According to [Assistant Principal], their "relationship hadn't progressed to where he could tell me everything." According to [Psychologist], [Student]'s "afraid to ask for help."

Defiant: [Psychologist 2] testified that [Student] was defiant and hostile as part of a conduct disorder. The IEP team determined that [Student] shows "pervasive oppositional, defiant, or non-compliant responses" [Exhibit F, page 17.]

In addition to these observations, the IHO identified various actions that had caused [Student] to be disciplined at school from the seventh grade to the present. These behaviors included defiance, stealing food, lighting a bottle of cologne at school, fighting, leaving classes without approval, sleeping under tables in the library, marijuana possession, and using inappropriate language towards teachers.

Taking all of the preceding evidence into consideration, the IHO compared it to [Student]'s behavior on May 25, which included:

- Bringing LSD to school in a bottle of breath freshener.
- Asking another student if he would like to use the breath freshener.
- Placing acid on the student's tongue.
- Telling the student he had just given him acid.
- Leaving the scene of the incident before district personnel arrived.
- Running away from home for three days after the incident.

Taking the evidence as a whole, the IHO finds that the manifestation determination team was correct in deciding [Student]'s disability did not impair his ability to control the behavior. In the IHO's opinion, the majority of [Student]'s previous improper behaviors were an attempt to make himself look good, powerful, or tough. While [Student]'s prior actions may have resulted in an injury to other persons (e.g., fighting, throwing a student into a locker), they always appeared to have some relationship to [Student]'s attempt to project an image. The IHO views the primary intent of [Student]'s May 25 behavior was to injure another person. Rather than

projecting a "tough" or "cool" persona, [Student] left the scene and ran away from home. [Psychologist] testified that with regard to the [Student]'s May 25 behavior, he was "sure this was planned," rather than an impulsive act triggered by an isolated incident.

Once again, the IHO concedes manifestation determinations are subjective in nature. [Student] did not testify about his mental state at the time of the incident. The IHO is merely projecting his belief as to [Student]'s intent on the day in question. No evidence was presented, however, that the other student had posed a threat to [Student] prior to the incident or challenged his sense of worth.

Before leaving the question on whether [Student]'s disability impaired his ability to control the behavior, the IHO would like to discuss a few of the arguments the parties presented at the hearing.

Petitioner relies heavily on [Psychologist]'s diagnosis that [Student] has an attachment disorder. The IHO's understanding of this diagnosis is that any severe bad act by [Student] is a manifestation of this disorder (a way to thrust [Mother] into [Student]'s life). While the IHO neither agrees nor disagrees with the attachment disorder diagnosis, and the IHO believes some children may have a disability that causes them to perpetrate bad acts in random form, the IHO was not persuaded by a preponderance of the evidence that this case exists here.

Petitioner also argued that the IEP team did not know [Student] in the spring, but only the fall when he had changed. Petitioner relies almost exclusively on the opinions of [Psychologist], however, who did not meet [Student] until the summer and had not made a formal diagnosis at the time of the IEP meeting on October 7, 1999.

With respect to Respondent's case, a number of manifestation determination team members testified that Petitioner's expert witnesses failed to express their opinions in terms of [Student]'s educational disability—instead focusing on [Student]'s general psychological state, in particular their DSM-IV diagnoses. [Exhibit Q, letter from [Assistant Director] to [Parents].] However, it is not the responsibility of outside experts to describe their opinions in terms of school psychology, but is the responsibility of a school district's psychological experts to try to discern how outside information relates to a student's educational disability. IEP teams must consider, in terms of the behavior subject to disciplinary action, all relevant information. 34 C.F.R. § 300.523(c)(1). Just as a parent is not required to understand technical aspects of the law before providing relevant information, neither should a parent's experts' opinions receive less scrutiny because they are not couched in educational terminology.

Taking the evidence as a whole, however, and for the reasons presented earlier, the IHO finds Respondent has met its burden with respect to this issue.

IV.

CONCLUSION

Based on the above findings and conclusions, it is the decision of the Impartial Hearing Officer that:

1. Respondent failed to meet its statutory responsibility of identifying [Student] as a student with an educational disability during the spring 1999 semester. As a result, Respondent failed to implement an appropriate IEP and behavior intervention strategies for [Student] as required by 34 C.F.R. § 300.523(c)(2)(i). Therefore, [Student]'s behavior on May 25, 1999, must be considered a manifestation of his disability.

   Respondent and Petitioner should discuss whether [Student]'s IEP is appropriate and whether the IEP team should be reconvened to discuss as needed. Because [Student] has remained in his present placement throughout the hearing process due to the stay put provisions of the IDEA, no compensatory education is required.

As requested at the end of the hearing, the IHO will mail this decision to the Petitioner, Respondent's legal representative, and the Colorado Department of Education. Either party may request a state level review by contacting the State Department of Education if dissatisfied with the decision and findings rendered by the IHO. An Administrative Law Judge will be appointed to hear the appeal.

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Andrew J. Maikovich
Date: March 13, 2000