DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 2000-08 S2000:103

DECISION UPON STATE LEVEL REVIEW

DOUGLAS COUNTY SCHOOL DISTRICT RE1,
Petitioner,

v.

[Student], through his parents [Mother] and [Stepfather],
Respondent.

This decision constitutes the state level review of the decision of the impartial hearing officer ("IHO") pursuant to the Individual with Disabilities Education Act ("IDEA" or "the Act"), 20 U.S.C Sections 1400 *et seq*., and Part II, Section A, VII of the Fiscal Years 1995-97 State Plan of the Colorado Department of Education ("the State Plan") in the above-captioned case.

[Student] (hereafter referred to as "the student") is a child with an emotional disability who is entitled to a free appropriate public education ("FAPE") under IDEA. At the time this action was initiated, the student was enrolled at [High School], which is located Douglas County School District R.E. 1 (hereafter referred to as "the district"). In May 1999, the student allegedly tricked another [High School] student into taking LSD by offering that student breath freshener and instead placing drops of the drug onto his tongue. In the fall of 1999, the student's individualized education program ("IEP") team determined that his alleged misconduct in the spring was not a manifestation of his disability. The student, by and through his parents [Mother] and [Stepfather], (hereafter referred to as "mother" or "step-father" or collectively as "parents"), then sought a due process hearing before an IHO challenging that decision.

The IHO disagreed with the IEP team's decision and determined that the student's alleged misbehavior in the spring of 1999 was a manifestation of his disability. The district then filed this appeal. Thomas S. Crabb, Esq., of Caplan & Earnest, L.L.C., represents the Douglas County School District R.E. 1. The student and his parents are representing themselves.

Although the district raises several issues on appeal, the central question in this case is whether the student's IEP team properly found that his alleged misconduct in the

spring of 1999 was not a manifestation of his educational disability. For the reasons set forth below, the administrative law judge agrees with the IEP team's conclusion.

PROCEDURAL BACKGROUND/ISSUES ON APPEAL

The student submitted his request for a due process hearing on January 21, 2000. The IHO conducted a three-day due process hearing on February 29, 2000, March 1 and 2, 2000, and issue his Findings and Decision on March 13, 2000.

While the central question in this case is seemingly straightforward, the factual circumstances giving rise to the legal issue are complicated because the student's disability was not formally assessed until the fall of 1999-several months after the alleged LSD incident. The student's mother had requested a special education evaluation of her son in April 1999, but the assessment could not be completed before the end of the school year and was, therefore, postponed until the fall. Accordingly, there was no IEP in place at the time the student allegedly dispensed drugs to the unwitting student. At the time of the manifestation determination, the IEP team relied on the student's IEP that had been developed in the fall of 1999. The outcome of the manifestation review is important to the student and his parents because the district is seeking to expel the student.

Taking these and other facts into consideration, the IHO determined that the student's disability did not impair his ability to control or to understand the impact and consequences of his alleged misbehavior. The IHO found, however, that the district should have identified the student's disability in the spring of 1999, and its failure to do so and to implement an appropriate IEP and behavior intervention strategies at that time violated its statutory obligations under IDEA.

The district appealed the IHO's decision on April 4, 2000. On appeal, the district argues that the IHO's finding that the student could control and understand the impact and consequences of his alleged behavior is irreconcilable with his conclusion that the student's behavior was a manifestation of his disability. The district also contends that the IHO erred in finding that the district violated its "child find" obligations under state and federal law and its state statutory obligation to complete a disability assessment and develop an IEP within the proper time frame. The district complains that the IHO relied on those supposed violations in concluding that the student's alleged misconduct was a manifestation of his disability. Finally, the district asserts that the IHO improperly placed the burden of proof on the district.

The school district submitted its opening brief and request for oral argument on May 12, 2000, after receiving an extension to do so. The student responded on May 31, 2000, and the district filed its reply on June 9, 2000. Oral argument was heard on September 13, 2000, at the Division of Administrative Hearings in Denver, Colorado. Neither the student nor any one on his behalf appeared at oral argument.

During oral argument, the district informed the administrative law judge that the student was no longer attending a Douglas County school. At the conclusion of the

hearing, the administrative law judge granted the parties until September 29, 2000, to submit any additional legal arguments. The district submitted a post-hearing brief on September 29, 2000, at which time the matter became ready for decision.

SCOPE OF REVIEW

Upon state level review of an impartial hearing officer in a due process proceeding, the administrative law must make an independent decision based on an impartial review of the IHO's decision. 20 U.S.C. Section 1415(g). The administrative law judge may seek or accept additional evidence if needed. *Id*.; 34 C.F.R. Section 300.510(b)(3)-(4); Part II, Section A, VII, B 9 b of the State Plan. Upon issuance of a final state decision, any aggrieved party may file a civil action in state or federal court. In the civil proceeding, the court may take additional evidence and is also required to render an independent decision, based on a preponderance of the evidence, while giving due weight to the findings at the state level. 20 U.S.C. Section 1415(I)(2): *Board of Educ. Of Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 206 (1982).

Given the analogous positions of the administrative law judge and the civil court reviewing the state level decision, the case law establishing the standard and nature of review of state decisions at the district court level is instructive. (The authority of state level reviewing officers and district courts to take additional evidence makes the standard of review different from the standard typical in appellate review.) The appropriate standard of review of state level decisions has been characterized as *de novo*. *Kruell v. New Castle County Sch. Dist*., 642 F.2d 687, 692 (3rd Cir. 1981). A district court must exercise its discretion in giving appropriate weight to the finding of the state administrative agency. *Town of Burlington v. Dep't of Educ. for the Comonwealth of Massachusetts*, 736 F.2d 773, 791-92 (1st Cir. 1984), *aff'd sub nom Sch. Comm. of the Town of Burlington v. Dep't of Educ. of Massachusetts*, 471 U.S. 359 (1985). Under this scope of review, deference should be given to the factual findings of the IHO in order to respect the emphasis IDEA places on that hearing procedure. However, the state level review officer's ability to take new evidence and the requirement that she make an independent decision suggest that she should give less deference to the findings of the IHO than would be accorded in conventional reviews of agency fact-finding. *Doyle v. Arlington County Sch. Bd*., 953 F.2d 100 (4th Cir. 1991); *Kerkam v. McKenzie*, 862 F.2d 884 (D.C. Cir. 1988). The state level review officer may, therefore, reject the factual findings of the IHO, if that officer explains the reasons for doing so. *See Doyle*, 953 F.2d 100; *Kerkam*, 862 F.2d 884. The standard of review of conclusions of law is de novo. *Gregory K. v. Longview Sch. Dist*., 811 F.2d 1307 (9th Cir. 1987). Whether a school district has satisfied the requirements of IDEA is a mixed question of law and fact, which is subject to do novo review. *Board of Education of Murphysboro v. Illinois State Board of Education*, 41 F.3d 1162, 1166 (7th Cir. 1994).

FINDINGS OF FACT

The facts giving rise to the student's due process challenge and the district's appeal are for the most part uncontested, although the parties' interpretation of these facts and their legal import is disputed. The IHO made extensive findings of fact, which the administrative law judge substantially adopts. However, for the sake of clarity, the administrative law judge makes additional, independent factual findings based on her review of the entire record.

For example, at oral argument, the district proffered that the student was no longer enrolled in a district school. The administrative law judge then raised the question of whether the matter was moot. In order to address that issue, the district was permitted to present evidence on that limited issue. Thus, the administrative law judge has made findings of fact with respect to that jurisdictional question which was not before the IHO.

Based upon the entire record presented on state level review, the administrative law judge makes the following finding of facts relating to the issues raised on appeal:

1. The student is a highly intelligent, seventeen-year-old boy (DOB [Date]) with a history of emotional problems. He has been classified as having a Significant Identifiable Emotional Disability ("SIED"), which qualifies him as a child with a disability for purposes of IDEA.

2. At the time of the incidents giving rise to this action, the student was enrolled at [High School], which is in Douglas County School District RE.1.

3. The student's mother [Mother] is [Race] and his father [Father] is [Race]. They are divorced. His stepfather [Stepfather] is [Race]. By coincidence, his father and stepfather share the same surname.

4. The student has attended seven different schools since kindergarten. He was relatively successful in school through the fifth grade. While in the sixth grade, the student's mother and stepfather moved to [City]. The student had a difficult time adjusting to the move. When he was ten or eleven years old, he began showing signs of depression.

5. For his seventh grade year, the student was enrolled at [Middle Shool] in Douglas County School District. His grades began to decline, and he began having behavioral problems. He was suspended for defiance, stealing, and in the fall of 1996, for lighting a bottle of cologne while at school. The student then moved in with his biological father for the remainder of his seventh grade year.

6. During the 1997-98 school year, the student lived with his father in Aurora and attended [Middle School 2] in the Cherry Creek School District. In April 1998, the student was expelled from the Cherry Creek School District for a full

calendar year, through April 1999. The grounds for expulsion were: "continued willful disobedience and persistent defiance of proper authority and behavior on or off school property that is detrimental to the welfare or safety of other pupils or of school personnel" – *i.e.*, habitually disruptive behavior. The specific incident leading to his expulsion involved the student using obscene language to encourage a fight between two other students. A teacher admonished the student, who kept being provocative even after security officers separated the fighters. The teacher touched the student on the shoulder and he patter her had away. Then he got within inches of the teacher's face and told her not to touch him. He remained in her face, and the teacher told him to make a decision. The student walked away and pounded on the school door. He then apologized, and when the teacher refused his apology, the kicked the school door. In addition to this incident, the student's 1997-98 school year was plagued by other behavioral problems: missing detention; forging passes; tardiness; truancies; disrupting class; harassing students; and possessing marijuana.

7. After his expulsion, the student returned to his mother's house in [City] in Douglas County.

8. On January 4, 1999, he began attending [High School] for his ninth grade year. [High School] accepted the student under a deferred expulsion agreement. The agreement provided that if the student did not behave appropriately at [High School] for the remainder of the Cherry Creek School District expulsion, then the expulsion would be reinstated.

9. At the time they agreed to the deferred expulsion contract, school officials did not know the details of the student's misconduct at [Middle School 2]. They only knew that he had assaulted or had been in an altercation with a teacher.

10. In mid-February 1999, the student ingested numerous Dramamine tablets. He was hospitalized at [ ]. [High School] officials were aware that the student had overdosed on some medication, but they did not know the specific facts regarding the incident and thought that the overdose was accidental.

11. During his spring semester at [High School], the student missed a lot of school because of absences, the Dramamine overdose, two suspensions and the reinstatement of his Cherry Creek expulsion. The student was disciplined for being truant and tardy, using profanity and shoving another student into a locker. The student's Cherry Creek expulsion was reinstated in mid-March because he violated his deferred expulsion agreement. He returned to [High School] at the end of April 1999, following the conclusion of the Cherry Creek expulsion period.

12. In February 1999, at the mother's request, [High School] assigned Assistant Principal [Assistant Principal], an [Heritage], to supervise the student, particularly with respect to disciplinary issues. As a person of color in a predominantly non-minority school and neighborhood, and given the racial diversity of his family, the

student had difficulty adjusting to his environment and fitting in. By pairing the student with [Assistant Principal] the school and student's mother hoped to provide the student with someone he could relate to.

13. In march 199, the student began taking Ritalin and the school administered one dose daily.

14. When a special education evaluation request is received at [High School], the special education team schedules a referral meeting with the parents to discuss the nature of their concern, what interventions that have been tried, the criteria for special education eligibility, and if special education testing is warranted. The parents must sign a written permission form before the school can proceed with the assessment. After the testing is complete, an IEP meeting is held to assess whether the child has an educational disability and is entitled to special education and related services.

15. Around April 15 of each school year, [High School] special education administrators begin deferring special education assessment requests to the following school year. There are several reasons for deferring requests. The assessments take approximately 45 days to complete, and scheduling the required meeting is particularly difficult given end-of-school year activities, including final exams. Also, school administrators are hesitant to initiate assessments so close to the end of the school year for fear that they will not be completed in time and different personnel would have to resume the process the next fall.

16. On April 26, 1999, in a conversation with school officials, the student's mother raised the issue of having the student undergo a special education evaluation. The initial referral meeting and assessment, however were deferred until the fall semester of the 1999-2000 school year. The reasons for the delay were not thoroughly explained to the mother, and she was not advised of her rights under IDEA at the time.

17. In late spring of 1999, [High School] principal [Principal] had several discussions with the student's mother about his disciplinary problems. [Principal], who has a son with [health concern], was empathetic and expressed concern about the student's mental health.

18. According to the school's investigation, on May 25, 1999, the last day of the school year, the student brought LSD to school in a bottle of breath freshener. The student allegedly asked another student if he would like some breath freshener. Then he allegedly placed several drops of the LSD-tainted breath freshener on the other student's tongue and told him he had just given him "lavender acid." The drugged student began hallucinating and was taken to the hospital, where test results confirmed he had LSD in his system.[1]

---

[1] The administrative law judge's findings with respect to the alleged incident are limited to the school's reporting of the misconduct. She makes no finding as to whether the incident actually occurred, which is a question that is not before her.

19. The alleged incident occurred near the end of the school day. [Assistant Principal] was responsible for investigating the matter on behalf of the school district. Because the reported incident occurred at the end of the day on the last day of school, [Assistant Principal] was unable to fully investigate the incident at that time. The student left the school building on May 25 before school officials could interview him about the incident, and other potential witnesses had left the building prior to being interviewed.

20. The Douglas County Sheriff's Department investigated the matter soon after it allegedly occurred. As part of their investigation, they attempted to interview the student but were unable to because he had run away for a few days shortly after the alleged incident.

21. Although the student had previously had confrontation with other classmates, he had never before harmed a student using deception. In the past, his conflicts with other students were aggressive, but more reactive. He would be combative if he felt he were being attacked or wanted to demonstrate his toughness and bravado. His alleged misconduct on May 25 was therefore uncharacteristic of his typical aggressive behavior toward other students.

22. In mid-July, 1999, the other contacted [Assistant Director], Assistant Director of Special Services for Douglas County School District, and [Team Leader], [High School]'s special education team leader, about the delay of her son's evaluation. [Team Leader] explained the referral process and the reasons for the delay.

23. On September 1, 1999, the student's stepfather signed a letter for the mother giving her permission to proceed with the evaluation. And on September 3, 1999, the mother signed the school district's permission form authorizing the district to evaluate her son. Also on that form, she acknowledged that she was informed of and understood her rights as a parent with respect to the process.

24. The school convened a referral meeting for the student on September 3, 1999. One of the primary objectives of a referral meeting is to identify the nature of a student's problems and to determine if other alternatives to special education are available. Those involved in the student's referral meeting concluded that he should be assessed for a potential educational disability.

25. After these evaluations and tests were completed, the student's IEP team met on October 7, 1999. At that meeting, the team determined that the student has an educational disability: Significant Identifiable Emotional Disability. According to the definition provided in the student's IEP, which tracks the language of the state statute: "A child with a significant identifiable emotional disability shall have emotional or social functioning which prevents the child from receiving reasonable education benefit from general education." The IEP team determined that the indicators of emotional or social functioning that are disabling for the student are: a) exhibits pervasive sad affect, depression, and feelings of worthlessness; b) persistent medical complaints not due to a medical condition; c) exhibits withdrawal and avoidance of social interaction to an

extent that maintenance of satisfactory interpersonal relationships is prevented; d) displays consistent pattern of aggression toward objects or persons to an extent that development or maintenance of satisfactory relationships is prevented; e) pervasive oppositional, defiant, or noncompliant responses; and f) significantly limited self-control, including an impaired ability to pay attention. Notably , the IEP team found that the student does not exhibit a persistent pattern of stealing, lying or cheating.

26. The IEP team developed an individualized education program to address his special education needs. The goals of his IEP focused on: a) helping him meet the criteria to become eligible to apply to the United State Air Force, a goal which the student had identified; b) controlling his behavior and performance in school be developing self-monitoring skills; c) performing consistently in school and learning to identify and express his feelings appropriately; d) helping him to graduate from high school. The objectives to meet those goals were primarily related to helping the student concentrate on his assigned tasks at school and help him to work on his relationships with peers and teachers by addressing his feelings. The IEP prescribed that he would meet with a special education teacher for a half hour each week and spend an hour with a mental health provider each week. Given his identified disability, the IEP was appropriately tailored to enable the student to gain educational benefit from his program, and all members of the IEP team agreed with the IEP as developed.

27. Prior to October 7, 1999, the student had never been screened for or diagnosed as having an educational disability.

28. The student's mother, private psychologist [Psychologist], and advocate [Advocate] actively participated at the October 7, 1999, IEP meeting, and their input was taken into consideration by the IEP team. The student's mother did not object to or disagree with the conclusion that her son had SIED, nor did she disagree with the contents of the IEP. However, later, in relation to the manifestation determination review, she questioned the adequacy of the IEP.

29. The IEP meeting occurred 23 school days after the mother gave her written permission to evaluate the student.

30. Over the past several years, the student has been treated by many different psychologists with little success. Indeed, he has had numerous different diagnoses, including: attention deficit disorder, depression, bipolar disorder, typical teenage angst. In addition, he has been prescribed several psychotropic medications. His treating psychologist from June 1997 to August 1999, [Psychologist 2], diagnosed the student as suffering from depression and conduct disorder. [Psychologist 2] believed that the student's mental condition might have kept him from caring about his actions or being able to control them. [Psychologist] began treating the student in July 1999. He diagnosed the student as having depression and an attachment/separation problem. [Psychologist] attributed the student's May 1999 conduct to his inability to separate properly from his mother; that is, he misbehaves in order to get attention from his mother and school officials. [Psychologist] believed that the student knew that distributing LSD was wrong but that his

emotional disability compelled him to do it. The feeling of empowerment and freedom in carrying out the bad act was irresistible in the face of his feelings of low self-worth, an active denial of those unpleasant feelings. His depression impacted his ability to act appropriately and to control his behavior. [Psychologist] has helped the student make significant progress with his behavior. The administrative law judge finds that the student's psychologists offered a compelling reason for why the student may have acted out as he supposedly did in May 1999. While it appears obvious there are psychological reasons for why the student misbehaves, the psychologists' testimony did not, however, convince the administrative law judge that the student's disability cause his May misdeed.

31. The parties agree the student had the same educational disability on May 25, 1999, that he had on October 7, 1999, although the severity of the illness was different.

32. The student was suspended from August 25, 1999, through September 8, 1999, for his alleged distribution of LSD in May 1999.

33. On September 9, 1999, the mother filed a complaint with the Department of Education, Office of Civil Rights. Her complaint alleged, among other things, that the district discriminated against her son on the basis of disability and race by failing to conduct a timely special education evaluation of her son. The Office of Civil Rights found that the district postponed the evaluation for legitimate, non-discriminatory reasons on February 3, 2000.

34. After completing its investigation of the alleged May 25 incident and reviewing the special education assessment and the student's IEP, the school district recommended that the student be expelled subject to the outcome of a manifestation review. In a letter dated November 9, 1999, [Principal] sent a letter to the parents advising them that as a consequence of the student's behavior in May, the school was suspending him and recommending expulsion.

35. Because of scheduling difficulties, the manifestation review did not begin until November 18, 1999. The members of the manifestation review team, which consisted of members of the IEP team, considered whether the student's alleged misconduct on May 25, 1999, was a manifestation of his disability. The team reviewed the student's evaluation and test results, information provided by the student's parents, and the personal observations of others. At the conclusion of this meeting, the mother requested additional time to provide the team with information from the student's psychologists.

36. On January 6, 2000, the manifestation determination team reconvened. The student's mother offered a letter from [Psychologist]. At the conclusion of the meeting, the team determined that the student's action on May 25, 1999, were not a manifestation of his disability. The mother took exception to the decision and sought to provide additional information from [Psychologist 2], another of the student's previous

psychologists. The team agreed to defer its decision until reviewing information supplied by [Psychologist 2]. (The IEP team had previously sought input from [Psychologist 2], but the mother had refused to give her permission. The mother place more emphasis on [Psychologist]'s diagnoses and seemed, herself, less convinced about the value of [Psychologist 2]'s diagnoses and treatment.)

37. [Psychologist 2]'s letter opined that the student's depression and conduct disorder in May 1999 might have impaired his ability to comprehend or care about the impact and consequences of his behavior and that he acted out and behaved improperly as an effort to relieve his depression and to express his internal distress, *i.e.*, his chronic feelings of low self-worth and confused identity. Nonetheless, on January 14, 2000, [Assistant Director] informed the parents that the manifestation determination team had concluded that the student's May 25, 1999, actions were not a manifestation of his disability.

38. The IEP team's determination that [Student]'s behavior was not a manifestation of his disability was based on the conclusions: a) that his placement was appropriate that his IEP was designed appropriately to provide reasonable educational benefit: b): that the student could understand the impact and consequences of his behavior and c) that he could control his behavior. These conclusions were, in turn, based on several facts which the administrative law judge finds to be true: The student has above-average intelligence and an exceptional ability to understand and use language; the student could, at times, present himself as an articulate, self-possessed young man when he wanted to; the student is not a sociopath, psychotic, delusional or thought-disordered; the student seemingly indicated that he knew what he did was wrong when he ran away from home soon after the alleged incident; the student's alleged actions were not impulsive in that they required planning and premeditation in order to execute the scheme; the student's purported misconduct was not consistent with the nature of his SIED; the alleged May 25, 1999, incident was atypical of his past misdeeds in that it was characterized by chicanery and involved drugs. Indeed, the school psychologist, [School Psychologist], testified that had the student instigated a fight with another student, she would have viewed this behavior as consistent with his disability.

39. On January 21, 2000, the student's parents requested a due process hearing challenging the manifestation determination team's decision.

40. The student has withdrawn from the district and moved in with his biological father, who resides within the boundaries of the Cherry Creek School District.

41. The district intends to institute proceedings to expel the student based on his spring 1999 conduct, pending the outcome of this proceeding.

DISCUSSION AND CONCLUSIONS OF LAW

One preliminary legal issue that was not before the IHO needs to be addressed before proceeding with the manifestation issue: Since the student no longer attends a Douglas County school, is this case moot?

A. A Controversy Remains Between the Parties, and It Is Capable of Repetition, Yet Evading Review.

Although the student has moved back in with his biological father and is not attending a Douglas County school, the district maintains that this case is not moot because it will pursue expulsion proceedings pending an outcome in its favor on state level review. The district also contends that if the student is ultimately expelled, that expulsion will affect his rights to attend school in Douglas County as well as other school district statewide.

The mootness doctrine derives from Article III of the U.S. Constitution, which requires that federal courts decide only actual cases or controversies between litigants. *United States v. Dominguez-Carmona*, 166 F.3d 1052, 1055 (10th Cir.), *cert. denied*, 528 U.S. 831 (1999). Thus to be actionable, "a suit must be defined and concrete, touching the legal relations of parties having adverse legal interests." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). A case becomes moot "when events occur which resolve the controversy underlying it. [citations omitted.] In such a situation, a federal court decision provides no resolution between the parties to the lawsuit and therefore, constitutes a constitutionally impermissible advisory opinion." *Donimguez-Carmona*, 166 F.3d at 1055. The Tenth Circuit has stated that an advisory opinion is an action that is "not constitutionally justiciable because the parties are not adverse or do not have a significant stake in the controversy. *McKinney v. Gannett Co., Inc*. 694 F.2d 1240, 1251 (10th Cir. 1982). The Colorado Supreme Court has added that a case becomes moot only when relief, if granted, would have no practical legal effect upon the existing controversy. *Brown v. Colorado Dep't of Corrections*, 915 P.2d 1312, 1313 (Colo. 1996).

In this case, both the student and the school district have a stake in the controversy, even though the student is no longer attending a district school. The school district has recommended expulsion proceedings pending the outcome of the manifestation review. Thus the administrative law judge's decision in this matter will have practical legal effect on the controversy. A ruling in the district's favor will significantly affect the student's rights. For instance, if the student's misconduct is deemed not to be a manifestation of his disability and he is ultimately expelled for a period of twelve months, he may not attend a Douglas County School as a resident student if he moves back in with his mother and stepfather or as a nonresident student under Colorado's Public Schools of Choice statute. *See* Sections 22-33-106(3)(c) and 22-36-101(3)(e), C.R.S. (2000). And, if he is expelled, other school districts may exclude him from attending their schools. *See* Sections 22-36-101(3)(e) and 22-33-106(3)(c), C.R.S. (2000).

If he is not expelled because his misconduct is deemed a manifestation of his disability, he is entitled to attend a Douglas County school as a resident (if he moves back in with his mother) or as a nonresident student under Colorado's Public Schools of Choice statute. *See* Section 22-36-101(1)(b), C.R.S. (2000).

The school district's right to discipline students in order to protect the safety of its other students is also at issue. If a student subject to disciplinary proceedings could simply withdraw from a district school and thereby moot any pending disciplinary measures and then later reenroll in a district school, the district's ability to discipline students would be frustrated. In the same vein, a litigant cannot escape judicial scrutiny by simply ceasing an offending practice to defeat the court's intervention in a dispute. The court maintains its power to determine the legality of the challenged practice. *See United Air Lines, Inc. v. Cit and Couty of Denver*, 973 P.2d 647, 652 (Colo. App. 1998), *aff'd*, 992 P.2d 41 (Colo. 2000).

Moreover, the controversy between the parties is "capable of repetition, yet evading review," an exception to the mootness doctrine. The "capable of repetition, yet evading review" exception is "limited to the situation where two elements combined: (1) the challenged action was in duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (quoting *Illinois Elections Bd. V. Socialist Workers Party*, 440 U.S. 173, 187 (1975)). The expectation must be reasonable or there must be a demonstrated probability that the same controversy will recur. *Murphy v. Hunt*, 455 U.S. at 482.

In *Honig v. Doe*, 484 U.S. 305 (1988), the United States Supreme Court addressed a similar situation, albeit in a more complicated case. In *Honig*, the San Francisco Unified School District ("SFUSD") sought to expel two emotionally disturbed children from school for violent and disruptive conduct related to their disabilities. (That Supreme Court case was decided before Congress enacted statutory protections for children who engaged in misconduct as a result of their disabilities, the very protections at issue in this case.) At the time the case was brought before the United States Supreme Court, one student was 24 years old and no longer eligible for services under IDEA. The other student who was not faced with any proposed expulsion or suspension proceedings and no longer resided within the SFUSD remained entitled to FAPE and his claims were not moot. The Supreme Court reasoned that given the nature of that student's continued eligibility for educational services, the nature of his disability, and the fact that he would likely be subjected to the same type of unilateral school action again, the case as to him was "capable of repetition, yet evading review."

Although dissimilar in terms of its scope and the IDEA provisions at issue, the *Honig* case is nevertheless instructive on the issue of mootness. In *Honig*, the student whose claims remained viable was no longer a resident of the SFUSD and there appeared to be no live controversy between the parties, yet the Supreme Court was persuaded that given the nature of conflict between the parties and the student's disability and history of conduct, the same issues would recur in the future.

Similarly, in this case, the student is no longer a district student, but he has moved back and forth between his mother and biological father on several occasions. Indeed, historically, when he has had problems at school within one district, he has moved in with his other biological parent and transferred to a school in another district. Given this pattern, there is a reasonable expectation that the student will move back in with his mother and attend a Douglas County school again. And if he continues to have behavioral issues at school as he has in the past, it is reasonable to expect that he will face another manifestation review by a Douglas County school. If he does and then leaves the district again to live with his biological father, the district and its disciplinary policies will be undermined and it will left without recourse because the student can always evade discipline by leaving the district.

For all these reasons, the administrative law judge concludes that the case is not moot.

B. The Student's May 25, 1999, Misconduct Was Not a Manifestation of His Disability.

The Individuals with Disabilities Education Act provides federal money to state and local agencies for the education of disabled children. *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 722 (10th Cir. 1996). To qualify for federal funding, a state must demonstrate that it has a policy that assures all disabled children the right to a free appropriate public education ("FAPE"). 20 U.S.C. Section 1412(I); *Board of Education of the Hendrick Hudson Central Sch. Dist. Westchester County v. Rowley*, 458 U.S. 176, 180-81 (1982).

The right to a free appropriate public education includes many protections, including safeguards for disabled students who misbehave as a result of their disabilities. 20 U.S.C. Section 1415(k)(4). When a child with a disability engages in misconduct that violates the local educational agency's codes of conduct, the child is entitled to a manifestation determination review to consider whether the child's actions were caused by his or her disability. If the misconduct can be attributed to the child's disability, then the child may not be disciplined. 20 U.S.C. Section 1415(k)(4); 34 C.F.R. Section 300.523.

In carrying out a manifestation review, the IEP team may determine that the behavior of this child was not a manifestation of such a child's disability only if the IEP team –

(i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including –

(I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

(II) observations of the child; and

(III) the child's IEP and placement; and

(ii) then determines 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; and

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

20 U.S. C. Section 1415(k)(4)(C); 34 C.F.R. Section 300.523

If it is determined that the misbehavior of the child was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities. 20 U.S.C. Section 1415(k)(5)(A). However, if the public agency initiates disciplinary procedures, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by those making the final decision about disciplinary action. 20 U.S.C. Section 1415(k)(5)(B).

In this case, at the time of the student's alleged malefaction, he had not been identified as a special education student. Because, however, his mother had sought a special education evaluation in April 1999, he is entitled to IDEA's protections. Where a parent has requested a special education evaluation before the child engages in misconduct subjecting him to discipline, IDEA provides that the child is entitled to the same protections as those disabled students who already have an IEP. In such cases, the district is deemed to have knowledge that the child has a disability. 20 U.S.C. Section 1415(k)(8); 34 C.F.R. Section 300.527.

Understanding the nature of the student's educational disability is critical to assessing whether his misconduct was a result of that disability. Although he parties stipulated that the student suffered from the same educational disability in the spring of 1999 that was identified in the fall of 1999, the parents maintain that their son's mental condition was aggravated in the spring, that he was much more aggressive, and that his conduct was less controlled. The parents seem to believe that if their son's disability had been assessed in the spring of 1999, when it was more severe, an IEP that addressed that

kind of behavior might have saved him from his actions. The district maintains that the student may have other emotional or mental problems in addition to his SIED, but that the focus of the manifestation determination hearing is on whether his SIED is responsible for his behavior.

Under IDEA, a "child with a disability" includes a child with a serious emotional disturbance. 20 U.S.C. Section 1401(3)(A). [2] The term does not apply to children who are socially maladjusted unless they are determined to have an emotional disturbance.

SIED is defined in the Rules for the Administration of the Exceptional Children's Educational Act, 1 CCR 301-8, Section 2220-R-2.02(5): "A child with a significant identifiable emotional disability shall have emotional or social functioning which prevents the child from receiving reasonable educational benefit from regular education." And the indicators of social\emotional dysfunction must have existed over a period of time and are not isolated incidents or transient situational responses to stressors in the child's environment. 1 CCR 301-8, Section 2220-R-2.02(5)(b)(ii).

The IEP team determined that the student exhibited many of the indicators of social\emotional dysfunction: he shows signs of depression and feelings of worthlessness; he complains of physical pains not due to a medical condition; he withdraws and avoids social interaction to an extent that he cannot maintain satisfactory interpersonal relationships; he displays a consistent pattern of aggression toward objects or persons to an extent that he cannot develop or maintain satisfactory relationships; he is pervasively oppositional, defiant, or noncompliant; and he has significantly limited self-control, including an impaired ability to pay attention. He doesn't exhibit a persistent pattern of

---

[2] C.F.R. Section 300.7(a) defines "child with a disability" as

> a child evaluated in accordance with Sections 300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

"Emotional disturbance" is defined in the federal regulations as follows:

> (4)(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance; (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C) Inappropriate types of behavior or feelings under normal circumstances. (D) A general or pervasive mood of unhappiness or depression, (E) A tendency to develop physical symptoms or fears associated with personal or school problems. (ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

stealing, lying or cheating. In summary, the student's history of mental/emotional illness doesn't include episodes of using deception to carry out a calculated scheme. In the past, the student's depression, feelings of worthlessness, and his inability to develop or maintain healthy social relationships have exhibited themselves by his attacking other when he has felt attacked; egging other on to fight; bragging about being involved with gangs.

In this case, in the course of the manifestation review, the IEP team appropriately considered the student's IEP and placement, observations of the child by school staff, and evaluations and diagnoses by the student's private psychologists in coming to their conclusion. Indeed, the IEP team extended the manifestation review after the initial meeting in order to allow the mother to submit information from [Psychologist 2], one of the student's private psychologists.

Considering the information before the IEP team, the administrative law judge agrees that the student's behavior was not a manifestation of his SIED.

1. In Relationship to the Behavior Subject to Disciplinary Action, the Student's IEP and Placement Were Appropriate.

The first determination required by the statute, 20 U.S.C. Section 1415(k)(4)(C)(ii)(I), is problematic as written. It presumes that there is an IEP in place that addresses the offending conduct. ("[I]n relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate…") The statute gives little guidance when an IEP is silent as to the misbehavior. In this case, the statutory analysis of Section 1415(k)(4)(C)(ii)(I) is complicated by the fact that the student did not have an IEP at the time of his misconduct. And the IEP that was developed for him on October 1999, did not specifically address the offending conduct. Thus, applying this provision in this case poses two challenges: The first is to determine if the child should have had an IEP in May 1999, and the second is to decide if an "appropriate" IEP should have addressed the student's alleged misconduct.

There are two ways that the district could be charged with failing its obligations under 20 U.S.C. Section 1415(k)(4)(C)(ii)(I). One is that the school district should have had an IEP in place once the student's mother requested a special education referral in April 1999. The other is that the district should have identified the student as requiring special education services consistent with its "child find" responsibilities and have implemented an appropriate IEP in the spring of 1999.

a. Mother's Oral Request for Special Education Evaluation.

The student's mother requested orally on April 26, 1999, that her son be referred for special education services. She submitted a written request on September 3, 1999, and an IEP was developed on October 7, 1999. 1 CCR 301-8, Section 2220-R-4.01(2)(c) provides that "[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 regulations also provide that the parent be informed of "all procedural safeguards relevant to children potentially eligible for special education." 1 CCR 301-8, Section 2220-R-4.01(2)(b).

The school administrators developed an IEP within 45 days of the mother's written request. They did not fail their statutory obligation to the student to assess him within 45 days of his mother's oral request since the statute does not address oral requests. 1 CCR 301-8, Section 2220-R-4.01(2)(c). Moreover, the school district's delay was reasonable given when the oral request was made and the end of the year constraints it faced. The mother's request was made with only a month of school left, and scheduling issues made it unlikely that the evaluation process could be completed before the summer recess. Indeed, the Office of Civil Rights considered this very issue and concluded that the school's delay was excusable and not discriminatory.

Nevertheless, the administrative law judge agrees with the IHO and the parents that at the time the parent made her request, she should have been advised of her rights. The school district's reliance on the fact that the mother did not sign a written permission form until September 1999, which is when her notification rights were officially triggered, misses the point that it should have advised her of their IDEA rights earlier on in the process.

This technical failure on the part of the school district, however, does not change the outcome of the case. Even had the mother known of her right to insist upon an evaluation within 45 days of her request, and the school district sought to comply with her request, it is highly improbable that an IEP could have been in place for the student at the time of the May 25 incident. And, even had an IEP been in place, it would not necessarily have addressed the kind of misconduct the student allegedly carried out on May 25, 1999. Thus, the district did not fail to implement an appropriate IEP pursuant to the mother's April 1999 oral request.

b. District's Child Find Obligations.

Federal law requires states to implement policies and procedures to identify and evaluate children with disabilities who may be in need of special education and related services. 20 U.S.C. Section 1401(3)(A); 34 C.F.R. Section 300.125(a). Colorado's regulations provide that "[c]hild 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." 1 CCR 301-8, Section 2220-R-4.01.

In his Findings and Decision, the IHO found as a matter of law that "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."[3]

The administrative law judge disagrees with this legal finding as applied to the facts in this case. The district did not fail its statutory "child find" responsibilities. The IHO concluded that the district had knowledge of the student's disability, and therefore failed its "child find" obligations. The IHO relies on the definition of knowledge in 20 U.S.C. Section 1415(k)(8) and 34 C.F.R. Section 300.527. Those provisions state that a child who has not been determined to be eligible for special education and related services and who has engaged in misconduct may assert IDEA's protections if the district had knowledge that the child had a disability before the child committed the misdeed. Those federal provisions state:

> A local educational agency shall be deemed to have knowledge that a child is a child with a disability if –
>
> (i) 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 and related services;
>
> (ii) behavior or performance of the child demonstrates the need for such services;
>
> (iii) the parent of the child has requested an evaluation of the child…
>
> (iv) the teacher of the child, or other personnel of the local education agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

20 U.S.C. Section 1415(k)(8) 34 C.F.R. Section 300.527(b)(1)-(4)

In essence, because it is undisputed that the district had "knowledge" of the student's disability for purposes of being entitled to IDEA's protections, the IHO reasoned the district failed its duty to identify the student as potentially disabled and

---

[3] The district protests that the IHO decided an issue outside the scope of the hearing issues. Specifically, the district asserts that whether the district met its "child find" obligations was not an issue before the IHO, and that it did not have an opportunity to properly address the issue. The administrative law judge disagrees. While "child find" was not specifically enumerated as a hearing "issue," its relevance was certainly foreseeable given the mother's position that the district should have had her son evaluated earlier in the 1998-99 school year and that had her son had an IEP in place, he might have avoided these troubles altogether. Thus, the administrative law judge concludes that the child find issue is subsumed within the issue of whether the student's IEP was appropriate and whether the district fulfilled its statutory obligations to the student. Moreover, the school district presented evidence – albeit limited – on the "child find" issue.

failed to implement an appropriate IEP. The IHO also relied on the facts that [High School] accepted the student on a deferred expulsion contract because the student had been habitually disruptive; the student was suspended twice in the spring for disruptive behavior at [High School]; the student had other disciplinary problems which did not rise to disciplinary action; the student overdosed on medication; [Principal] had discussions about the student's problems with his mother; and the student was failing his classes.

In hindsight, it might seem clear that the student had a disability. Certainly, [High School] staff were aware that the student had behavioral and disciplinary problems. [High School] staff members, however, had very little time to get to know the student. While they accepted him on a deferred expulsion, they did not know the specifics of why he was suspended from Cherry Creek Schools other than that he had assaulted a teacher. The student did not begin school until January 1999, and he was absent for various reasons, including for a month due to the reinstatement of his Cherry Creek expulsion. The school thought that the medication overdose was accidental. It was clear to [Assistant Principal] the assistant principal who was counseling the student that he had difficulty fitting in at the school. [Principal] had, perhaps the best understanding of the student's depression based on his conversations with the student's mother. It is not clear when exactly those conversations took place, but the administrative law judge believes it was in late spring after the student's overdose on medication.

To have any effect on the outcome of this case, officials at [High School] would have had to have identified the student as potentially educationally disabled before April 10, 1999, 45 days before the end of the school year. Given that the student's expulsion was reinstated in March, and he did not return to school until the end of April, school officials at [High School] had essentially three months to identify the student, who was new to the school, under its child find obligations.

Neither the statute nor regulations establish a deadline by which time children who are suspected of having a disability must be identified and evaluated. The courts have, therefore, inferred a requirement that the schools carry out their child find duties within a reasonable time after they are on notice of a child's behavior that is likely to indicate a disability. *See, e.g., W.B. v. Matula*, 67 F.3rd 484, 501 (3rd Cir. 1995). In *Matula*, a six-month delay from the time school officials were on notice of the child's potential disability was at issue. The *Matula* court reasoned that a factfinder could deem a six-month delay unreasonable. Also, in *Matula*, school districts were immediately aware after the start of the school year that the student had behavioral problems: the first-grade child did not pay attention in class; he fought with other students; he failed to remain seated; he made continuous noises and repeatedly touched other students; and he urinated and defecated in his pants.

In this case, the past details of the student's disciplinary history was not known to school officials, nor were the symptoms of his disability as pronounced as in *Matula*. And the student's behavioral problems at [High School] in the early spring semester

seemed typical of misbehaving teenagers – tardies, truancies, minor conflicts with other students. Indeed, one of the student's former therapists characterized his problems as teenage angst. Most students with disciplinary problems, especially truancies and tardies, do not necessarily have disabilities. Since the student was new to the school, and given the nature of his misconduct in early spring, and the fact that the school had so little time to assess whether the students' problems were merely disciplinary or disability-related, the administrative law judge concludes that the school did not violate its child find obligations.

The school district argues that even had the school district identified the student as needing special education services in the spring of 1999, the offered services would not have addressed his offending May 1999 conduct. The district points to the fall 1999 IEP as proof. The district reasons that the student had the same disability in the spring and fall of 1999, and his IEP team developed an IEP that does not address the type of behavior the student was accused of in the spring. That is because that type of misbehavior is not related to the student's educational disability, according to the district. Because the school district relies heavily on this argument and because the manifestation determination review team relied on the student's fall 1999 IEP, the administrative law judge will consider what an "appropriate" IEP would have been in the spring of 1999 and evaluate whether the fall 1999 IEP was appropriate in relation to the alleged misconduct.

c. An Appropriate IEP.

Where, as in this case, an IEP does not address the conduct subject to discipline, two interpretations of Section 1415(k)(4)(C)(ii)(I) are possible. One is that the IEP is necessarily inappropriate because it does not address such misbehavior. The other is that the fact that the IEP does not address the issue, itself, indicates little connection between the misconduct and the child's disability.

The first interpretation is unacceptable as a matter of logic. For instance, if a child's IEP addressed only his dyslexia because the child had no history of behavioral problems, and the child then stabbed another student, it would be absurd to conclude that his IEP was deficient because it did not address such unforeseeable conduct.

The second interpretation is equally flawed when applied strictly. An IEP that does not deal with the misconduct at issue cannot presumptively mean that the child's misconduct and disability are unrelated. For example, if a mentally disabled student who engaged in sexually aggressive behavior because his disability impaired his understanding of appropriate sexual behavior attacked another student, and his IEP failed to address such behavior in his IEP, then the IEP's silence on the issue would not indicate a lack of causality between the child's disability and the misconduct. The IEP would be inappropriate because it did not address the aspect of the child's disability.

Straddling these two interpretations of the statute, the challenge before the decision-maker is to determine whether the fact that the student's IEP did not address his

alleged misconduct was appropriate. This inquiry keeps the decision-maker focused on the intent of the statute: to determine if the misconduct is a manifestation of the child's disability. In reading 20 U.S.C. Section 1415(k)(4)(C)(ii) as a whole, it appears the statute is trying to get at whether the child should be held accountable for his actions. Only if the school had in place all the mechanisms available to it to hopefully avert such misconduct and the child understood and could have controlled his misbehavior, could a disabled child be held responsible for his actions. In short, the manifestation inquiry can be distilled down to the questions: Did the school do all it could to help the child not to misbehave in this way? And, could the child have helped himself from misbehaving this way?

The district argues that any IEP developed in the spring of 1999 would have resembled the IEP formulated in October 1999. And the fact that the fall IEP did not address the subject behavior is significant. The parties stipulated that the student had the same educational disability in May 1999 that he did in October 1999. The indicators of SIED under the Exceptional Children's Act specify that "the social/emotional dysfunction must be in existence over a period of time rather than in isolated incidents or transient, situational responses to stressors." And, although the IEP team was aware of the student's alleged misconduct on May 25, 1999, his IEP did not address what appeared to be the student's aberrant behavior on that date.[4] In other words, the district's supposed failure in determining earlier in the spring semester the student's need and entitlement to special education services is of no consequence. Even had the district somehow identified his emotional disability in March and had an IEP in place in May, the IEP would not have addressed the kind of behavior the student engaged in in May. The district maintains, persuasively, that the student's May 1999 behavior was so atypical of his past misdeeds that it is unlikely that any IEP developed in the spring of 1999 would have anticipated this kind of conduct and have had intervention strategies in place.

The student's parents counter that after seeing [Psychologist], the student's behavior improved considerably over the summer months. They argue that the student was not assessed until the fall of 1999 and that his disability presented itself differently in the spring of 1999. The parent's and the student's psychologists also stress the reasons for the student's behavior. The student's psychologists, not being educational psychologists who focus on disabilities recognized under IDEA, used different language to describe their diagnoses of the student. The testimony of [Psychologist], whom the parents relied on most heavily, discussed the student's conduct disorder in terms of his separation issues, i.e., that the student would misbehave in order to get his mother's attention and draw her back into his life. The parents also attributed their son's conduct to his lack of self-esteem and identity problems. While these issues are serious ones, they were never specifically related to the student's SIED.

---

[4] A cynical person might view this decision as a calculated one by school administrators who were anticipating the student's manifestation determination review. However, the parents and their son's psychologists who participated in the IEP process could have insisted that the IEP should address the kind of behavior their son was accused of. Indeed, they could have challenged the IEP for not addressing this kind of behavior and sought a due process review on the ground that the IEP was deficient. Instead, they have maintained that the 1999 IEP is appropriate even if it has not been successful.

The mother speculates that if the school had properly screened the student and discovered his disability in the spring of 1999, he might have been placed in a setting outside of the school and the school might have put into place behavioral intervention strategies that would have prevented the May 1999 incident. It is agonizing, especially for the student and his parents to consider what might have happened in the spring had an IEP been in place – even one that did not address such aggressive, duplicitous behavior. Would closer monitoring of any type by the school have made any difference? These "what ifs" against the backdrop of the mother's wishing that her son's disability had been identified many years earlier are no doubt frustrating. This frustration and speculation cannot, however, dictate the outcome in this case. Whether the student should or could have been identified as having a learning disability earlier in his educational career is not before the administrative law judge. The student had myriad problems and went back and forth between school districts when his problems at a particular school were uncontrollable. His being volleyed back and forth between school districts may have had as much to do with the student's not being identified as needing special education services as any failure on the part of school officials in Douglas County and Cherry Creek Schools.

When the mother finally discovered her son's rights under IDEA, the district acted appropriately. The student's IEP focused on the student's attention problems at school. Taking into account the student's above-average abilities, the IEP sought to help the student improve his academic performance and his ability to develop and maintain social relationships. The IEP addressed the student's aggressive behavioral by trying to help him express his feelings in less provocative ways.

The administrative law judge is persuaded that the nature of the May 1999 misconduct was atypical of the student's past misbehavior, and the IEP appropriately did not address such conduct. In the past, the student had acted out when provoked, or he tried to provoke others. He bragged about belonging to gangs and tried to make himself seem tough and invincible. Most of his disciplinary problems related to being truant and tardy or having conflicts with other students, *e.g.* shoving another student in a locker. In the past, his most serious infractions involved igniting a cologne bottle and getting into an altercation with a teacher. Nothing in his past disciplinary history resembled the alleged May 1999 conduct: a devious plot intended to harm another student. Indeed, at the hearing the school psychologist testified that had the student instigated a fight with another student, she would have viewed this behavior as consistent with his disability. Although difficult to do, making these often subtle distinctions between what behavior is related to a disability and what is not is required by the statute. The statute is intended to protect disabled students from discipline for misconduct not within their control; it was not enacted to allow disabled students to escape the consequences of all misdeeds simply by attributing the wrongful conduct to their disability.

2. <u>The Student's Disability Did Not Impair His Ability to Understand the Impact and Consequences of His may 1999 Alleged Misconduct.</u>

The IHO concluded and the administrative law judge agrees that the student understood the impact and consequences of what he allegedly did on May 25, 1999, when he tricked another student into ingesting LSD.

The evidence as a whole demonstrates that the student understood that his alleged distribution of LSD was wrong and had serious consequences. The student, who is highly intelligent, waited until the end of the last day of the school year before allegedly carrying out his scheme, and immediately after the alleged misdeed, he left school before he could be interviewed about the matter. And, he ran away from home soon after the incident. The IHO also pointed out that the student had been suspended from school in the seventh grade for possessing marijuana and had been subject to monthly urinalysis tests as a result. Therefore, the student knew that the use and possession of drugs was illegal and in violation of school policies. The IHO rightly pointed out that it is inconceivable that the student did not know that possessing and distributing drugs at school was wrong and would subject him to serious discipline. Even the student's psychologist, [Psychologist], conceded that the student knew what he did what wrong; indeed, that was the allure of the scheme.

3. The Student's Disability Did Not Impair His Ability to Control His May 1999 Alleged Misconduct.

The evidence presented at hearing demonstrates that the student's alleged actions on May 25, 1999, were not impulsive. Many aspects of the scheme belie the planning involved in its execution. To carry out the scheme, the student had to acquire LSD, then disguise the LSD as breath freshener. He then waited until the last hour of the last day of school to execute his plan. He put some drops of breath freshener on his tongue[5] and then asked another student if he wanted some. When the other student assented, he put the breath freshener on his tongue and told him he had just given him "lavender acid."

The details and deviousness of the plan indicate both premeditation and malice. In the past, the student had bullied other students out of defensiveness or had intimidated them, *e.g.*, by telling them he was a gang member. Or he had imperiled other students by lighting a cologne bottle or doing other thoughtless acts. He had never before been as calculating or deceptive.

The lack of impulsivity and the planning required to carrying out the scheme convince the administrative law judge that the student's supposed misconduct was within his control.

The parents and the student's psychologists contend that while the student could physically could control his actions, his psychological state prevented him from being in control. According to [Psychologist] and the mother, the student's poor self image, his attachment disorder and separation issues with his mother compel him to do bad acts to

[5] It is unclear from the record whether the drops of breath freshener he supposedly put on his own tongue were tainted or not.

make him seem tough and to draw his mother into his life. Indeed, all of the student's actions could be explained by this theory of behavior.

However, the administrative law judge finds that this observation explains why the student does what he does, not whether he can truly control his behavior. No evidence in the record demonstrates that the student couldn't control his actions because of his SIED. He is not psychotic or disabled in such a way that he is incapable of controlling his actions.

C. Miscellaneous Issues on Appeal.

The school district claims that the IHO inappropriately assigned the district the burden of proof. The district maintains that the parents who are challenging the manifestation decision of the IEP team bear the burden of proof. In support of its position, the district cites several Tenth Circuit cases holding that the burden of proof in due process proceedings is on the party attacking the IEP team's determination.

The administrative law judge agrees with the IHO's conclusion that C.F.R. Section 300.525(b)(1) dictates that the burden of proof lies with the school district. That federal regulation 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 Section 300.523(d).

Contrary to the district's interpretation, this provision does not merely set forth the IHO"s responsibilities. It also indicates that the "public agency" must bear the burden.

While the burden of proof with respect to reviews of the adequacy of IEP's falls on the party attacking the IEP, manifestation reviews are different. Because the district is seeking to discipline the student, it should bear the burden of proof.

DECISION AND ORDER

It is the decision of the Administrative Law Judge that the IHO's decision is reversed. The student's alleged misconduct on May 25, 1999, was not a manifestation of his disability.

This decision of the Administrative Law Judge is the final decision on state level review. State Plan, Part II, Section A, VII, B 10.

DATED: August 9, 2001
Denver, Colorado

_____
SUNHEE JUHON
Administrative Law Judge