IOWA DEPARTMENT OF EDUCATION
(Cite as 23 D.o.E. App. Dec. 302)

In re: Benjamin F. B.,	)	
	)	
Benjamin F. B.,	)	
Michael B. and	)	
Jacquelin F. B., Appellants	)	Decision
	)	
v.	)	
	)	
Des Moines Independent Community	)	
School District, and Heartland Area	)	
Education Agency 11,	)	Doc. # SE-300
	)	
Appellees	)	

The above entitled matter was heard by Administrative Law Judge Susan Etscheidt on July 22, 2005, in Des Moines, Iowa. The hearing was held pursuant to Section 256B.6, Code of Iowa and 20 U.S.C. § 1415, and was conducted pursuant to 34 C.F.R. Part 300 and Chapter 281-41, Iowa Administrative Code (I.A.C.). The Appellants were present and represented by Curt L. Sytsma, Legal Director for The Legal Center for Special Education. The Appellees were represented by Andrew Bracken, of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C. The hearing was open to the public at the request of the Appellant.

Procedural History

On June 6, 2005, the appellants requested a due process hearing. Three issues were identified:

1. violations of Section 1415(k)(4) of the 1997 IDEA by permitting the administration to override the determinations made by the IEP team on manifestation determination questions;
2. violation of Section 1415(k)(4) of the 1997 IDEA by expelling Benjamin from school for conduct that was a manifestation of his disability; and
3. violation of Section 1412(a)(1)(a) and 1415(k)(4) by expelling Benjamin from school without providing special education and related services.

Although originally requesting declaratory relief, the removal of the expulsion from his permanent record, compensatory special education and related services, and attorney fees, the Appellants at the hearing modified the request for relief to not include compensatory special education or related services.

A pre-hearing conference call was held June 17, 2005 to clarify the issues for hearing. The date for the hearing was scheduled for July 22, 2005. On August 9, 2005, the Appellants filed a request for briefing schedule and continuance. The following briefing schedule was established: by Friday, August 26, 2005, the Appellants' brief will be due by close of the business day; by Friday, September 9, 2005, the Appellees' brief will be

due by close of the business day; and by Friday, September 16, 2005, the Appellants' reply brief will be due by close of the business day. The matter was continued until September 30, 2005. On September 15, 2005, the Appellants filed a request for a modified briefing schedule and continuance. The briefing schedule was modified to schedule the Appellants' reply brief for Wednesday, September 21, 2005. The matter was continued until October 12, 2005

Rulings on Motions

The counsel for the Appellants entered a motion to include the parents as parties to the action on July 20, 2005, citing the authority of the Administrative Law Judge to designate such an inclusion [281—41.114(4) Iowa Rules of Special Education (February, 2000)]. Prior to the commencement of the hearing, the Appellees entered a resistance to the motion, arguing that Ben was an eighteen-year-old student who became vested with all rights previously accorded to his parents [281—41.111(1) Iowa Rules of Special Education (February, 2000)] and that his parents should be included as witnesses not as parties. The motion to include the parent as parties was granted.

Findings of Fact

At the time of the hearing, Benjamin F.B. was an eighteen-year-old young man who had recently received a diploma from Roosevelt High School in Des Moines, Iowa. Throughout his education in the Des Moines Independent School District, Ben had excelled. His progress through elementary and middle school is documented in the record, as is his high school achievement. He was enrolled for courses at Central Academy, a specialized program for gifted students, located at the DMICSD's Central Campus and at the Pappajohn Center in downtown Des Moines. For his senior year classes, Ben attended Roosevelt High School for his morning classes and attended other classes at Central Campus and Pappajohn Center in the afternoon. Ben was enrolled in Advanced Placement (AP) classes, earning college credit. All witnesses testified that Ben was an intelligent, gifted young man. Ben maintained a 3.0 or better GPA throughout his high school career. Despite some minor disciplinary problems of tardiness and truancy, Ben was not considered by school officials to be a discipline problem.

According to testimony by Ben's mother, Jacquelin, Ben had received psychiatric services since middle school. Ben was first diagnosed with Oppositional Defiant Disorder (ODD), dysthysthymia, and attention-deficit-hyperactivity disorder (ADHD) by Dr. Patricia M. Al-Adsanti (School Record at p. 154), who prescribed Ritalin. On 8/26/98, the doctor reported that Ben displayed aggression, anger, and difficulty with self-control (School Record at p. 148). Later reports from Dr. Al-Adsanti continued the diagnosis of ADHD, while reporting the ODD was improving (School Record at p. 149) and later "resolved" (School Record at p. 151). Ben continued "to struggle with issues around peer relationships, control, and impulsively being oppositional" and to get "stuck in battles for control and for compliance that are destructive to him and other people, and he then does not know how to get out of them" (School Record at p 163). A report dated 4/16/99 indicated that "Ben continues to struggle with issues around control and getting into battles that he cannot get out of and that are somewhat destructive within relationships." She noted that Ben "continues to get into battles where he knows he is

wrong and knows that they are destructive, but because he automatically takes an oppositional stance, he gets stuck in them and cannot get out (School Record at 151). On 5/21/99, a report from Dr. Al-Adsanti reported that Ben was doing relatively well in school (School Record at p. 152). Dr. Al-Adsanti left the area, and Ben began receiving services from Dr. Michael L. Hopkins. In a letter to school district officials following the school assault incident, Dr. Hopkins described Ben has a gifted ADHD student who internalizes his problems: "Ben's impulsivity creates messes in his life that are hard for him to resolve calmly and in a timely manner. His short hot temper, while not seen by all, has been a problem for Ben in relationships" (School Record at p. 147).

The Altercation February 18, 2005

The facts surrounding the misconduct central to this appeal are largely undisputed. As Ben was leaving Central Campus to go to the Pappajohn Center on February 18, 2005, an associate from Central Campus observed Ben lighting a cigarette outside the main entrance to the school. The associate asked Ben to accompany him to the office, and Ben refused. The associate reported the incident to Vice Principal Vic Glawe. After checking the entry area, Mr. Glawe reviewed Ben's schedule and determined he would be at the Pappajohn Center. Mr. Glawe drove to the Pappajohn Center and arranged to speak to Ben in the hallway. Ben admitted he was smoking, but when asked by Mr. Glawe to empty his pockets, Ben refused. As Ben turned to leave, Mr. Glawe reached with one hand to grasp Ben's arm just above the elbow. Ben jerked his arm away, and the altercation became physical. Mr. Glawe's glasses were knocked off. Mr. Glawe attempted to grab and hold Ben, who violently resisted the hold by striking Mr. Glawe numerous times and shouting profanities. Ben broke free of the hold and ran from the building. A white flask containing alcohol fell from his coat pocket. Mr. Glawe contacted Principal Gary McClanahan who responded by getting into his car to search for Ben. He escorted Ben to the office, where school resource officer Sergeant Mark Buzynski determined that Ben would be charged with a public offense and took Ben into custody. Ben was also charged with four violations of the DMICSD discipline policy: intentional display of disobedience or disrespect, assault/battery, disorderly conduct, and unauthorized possession (School Record at p. 118-124). Principal McClanahan recommended to the Department of Student Services that Ben be considered for expulsion(School Record at p. 16).

Expulsion Review Team Interviews

When a recommendation for expulsion is received by the Department of Student Services, an independent expulsion review team is convened to investigate the allegation and develop a recommendation. When a recommendation for expulsion is considered, the school social worker becomes the facilitator for the family involved (School Record at p. 195). Several interviews were conducted by non-school personnel following the incident, between February 25 and March 1, 2005. In his interview, Ben reported that he "screwed up" but that Mr. Glawe crossed the line when he grabbed him (School Record at p. 21). Ben acknowledged that he was carrying a flask of whisky and refused to consent to the search because he was afraid he would be caught with the alcohol. Ben's father reported that the situation was handled inappropriately by both Ben and Mr. Glawe. He also reported that Ben has issues with smoking and alcohol, as well as anger management

issues (School Record at p. 23). Principal McClanahan's interview revealed his preference that Ben be expelled due to extremely violent behavior impacting the safety of students and staff. He also acknowledged "that there is a lot more going on with this student than this particular incident" (School Record at p. 24). Mr. Glawe reported that Ben's violence shocked him, and that the violence was due to the influence of alcohol (School Record at p.26). Several phone interviews were also conducted between February 26 - 28, 2005, including interviews with band teachers Mr. Trey Marcellus and Mr. Joe Rich. Mr. Marcellus concluded that "there were many times that Mr. Rich and myself felt that Ben could turn on one of us and become violent" (School Record at p. 61). Mr. Rich also described "negative" experiences with Ben (School Record at p. 62). The expulsion review team recommended on March 1, 2005 that Ben be expelled for the remaining 13 weeks of school and placed in an alternative program to complete the remaining coursework necessary for graduation (School Record at p. 12-15). Superintendent Eric Witherspoon concurred with the Expulsion Review Team's recommendation to expel Ben (School Record p. 10-11). Emily Burroughs testified that as the social worker serving as the facilitator and liaison between the Appellants and the school she had numerous contacts with Ben and his parents. When the Appellants asked for a meeting to determine if Ben's preexisting diagnosis of ADHD was related to the misconduct of February 18, 2005, Ms. Burroughs contacted Central Administration and decided to conduct a manifestation determination (Transcript at p. 57).

The Manifestation Determination

On March 3, 2005 a manifestation determination meeting was held. A group of individuals met to consider whether Ben's preexisting ADHD was related to the February 18, 2005 misconduct (School Record at 124). Participants in the meeting were Ben and his parents, Principal McClanahan, school psychologist Deb Hill-Davis, social worker Emily Burroughs, educational consultant Ann Benzshawel, school administrator Vallery Griffis, and teacher Dennis Johnson.

Program Review – Current Placement

This section of the report noted that Ben had 24 of the 21 needed credits towards graduation with a current GPA of 3.196. Currently he has C's in AP English and Psychology, an A in Econ, an A in AP American History, a B- in Creative Writing, and a D in AP World History. Ben needed Economics and American History to fulfill graduation requirements. Teachers have indicated that they do not feel that Ben is currently working to his potential. He scored a 32 on his ACT Test and a 1390 on his SAT Test.

Section 1

This section of the report noted that Ben had no IEP or 504 Plan. In the review of relevant records, the team recorded that Ben was originally diagnosed with ADHD in 5th grade and that Ben is currently receiving services from Dr. Michael Hopkins. Dr. Hopkins' services currently address Ben's poor judgment in confrontational situations, anger management, and impulsivity. Ben has been receiving Ritalin since 1998. Behavioral incidents were reviewed, including office referrals, suspensions, and interactions with teachers and peers. A sophomore year incident involving rude comments in memory books was included, as well as concerns of Mr. Marcellus, Ben's Band Instructor, and Mr. Mahler, Ben's AP Psychology teacher. Several teachers

reported changes in Ben's behavior, including inattentiveness and noncompliance. The form indicated that there were no behavioral goals related to the current behavior.

Section 2

The Manifestation Determination report noted that there were no behavioral goals related to Ben's current behavior, but that there was a documented history of this behavior. Ben's prior altercation with a minister on a church retreat was similar to the February 18, 2005 incident. The misconduct was not a behavior normally seen from Ben, according to the report. Although for the question "is there a pattern of predictability to this behavior" the "yes" response is checked, the following explanation is provided: "No pattern could be identified prior to this incident. If Ben does not comply with a request and adults place their hands on him in an attempt to force him to comply, Ben may react physically." The report also noted that "school officials were not aware of the previous incident with the minister, Ben's work with Dr. Hopkins, or that Ben is currently taking medication" (School Record at p. 6). Although no pattern to the consequences of the behavior was noted, several explanations concerning the function of the behavior were offered. Parents reported Ben's behavior was an attempt to avoid confrontation with flight. Administrative officials concluded Ben's behavior was an attempt to conceal cigarettes and alcohol, while Ben's explanation was that he was trying to keep people's hands off of him. For the question, "Did the child's disability impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action?" the "yes" response is checked. Ben, his parents, and the staffing team agreed that although non-compliance was a concern since middle school, "the frequency, intensity, and duration of behaviors at school for the past 4 years have not been significant enough for a referral to the staffing team for intervention...the staffing team concludes that at the time of the physical altercation Ben did not understand the impact and consequences of the behavior and that his response to the situation was affected by symptoms of his diagnosis of ADHD and his being under the influence of alcohol."

Section 3

Section 3 of the report noted that although the possession of cigarettes and alcohol were pre-mediated, the physical altercation was impulsive. The staffing team concluded that Ben's disability impaired his ability to control the behavior subject to the disciplinary action, and that the misconduct was a direct manifestation of his disability. The Central Campus administration did not agree that the behavior was a direct manifestation, and recommended expulsion. The staffing team concluded a return to the current placement at Roosevelt was not in Ben's interest, and recommended transfer to an alternative placement with a behavior intervention plan. Although Ben and his parents advocated for a return to Roosevelt and Central Campus, they signed and apparently agreed with the recommendation for transfer to an alternative setting. Principal McClanahan and teacher Dennis Johnson indicated they did not agree with the manifestation determination decision (School Record p. 4-9).

Testimony Concerning the Manifestation Determination

Ben's mother testified that the incident on February 18, 2005 was related to Ben's disability. Ben had on-going difficulties, and the parents had contacted principals, vice principals, and teachers, but no one suggested an evaluation or special education. As parents, they knew Ben needed assistance, so they arranged for private services. When

asked why she believed that another incident was not likely to occur if returned to the Roosevelt and Central Campus placement, Ben's Mother responded that such an occurrence was unlikely "within the context of the remaining school year." Ben's mother testified that she had never requested an evaluation, nor believed her son required special education to progress academically and did not request special education or related services for Ben. However, Ben's mother testified that Ben now could benefit from special education to address his impulsivity and organizational needs.

Ben's father also testified that Ben's difficulties were related to his ADHD and that he had received on-going private assistance to address the problems arising from that disability. Ben testified that his disability caused him to act impulsively on February 18, 2005 and that he would have benefited from special education.

Dr. Hopkins testified that although Ben had interpersonal difficulties, they were not significant enough to request school accommodations. However, Ben continued to have difficulties with interpersonal relationships.

School psychologist Deb Hill-Davis testified that the group reviewed Ben's history, the letter from Dr. Hopkins, the concerns of teachers including Mr. Marcellus, and concluded that Ben had ADHD and that there was a relationship between the ADHD and the misconduct of February 18, 2005. Ms. Hill-Davis testified that she became aware of behavioral incidents and their relationship to Ben's ADHD in the manifestation determination meeting. Although no pattern had previously been established, information shared led the team members to conclude that in a similar situation Ben would react in the same manner. She testified that the on-going diagnosis of ADHD with the on-going attention to anger management led the team to its conclusions of both Ben's disability and of the relationship between that disability and the misconduct.

Social worker Emily Burroughs testified the team looked at school data, his diagnosis, critical incidents, and parental data during the manifestation discussion. She also indicated that her prior discussions with Ben led her to a conclusion that he exhibited very rigid thinking and thinking errors that resulted in a pattern of avoiding accountability. These disabilities impacted his education, since thinking errors enabled Ben to justify inappropriate behavior and avoid personal responsibility.

Educational consultant Ann Benzshawel testified that her conclusions were based on a review of information from relevant records and a consideration of information from Dr. Hopkins regarding Ben's diagnosis and his therapy for poor judgment in confrontations, anger management, and impulsivity. Additionally, teachers report that Ben's "filters" were not working and that his behavior had changed over the course of the school year which were indicators to Ms. Benzshawel that a staffing team should address these issues. These conclusions led the team, absent the agreement of the two members, to establish a relationship between Ben's disability and the misconduct. As a result, the team did not recommend continued placement at Roosevelt and Central Campus, but an alternative placement with a behavior intervention plan.

The Expulsion Hearing

On March 10, 2005, an expulsion hearing was held. The Board of Directors of the DMICSD reviewed the facts, including the manifestation determination. The Board noted that the manifestation determination was "not a unanimous" conclusion, and that various proposals for placement were presented. The majority favored an alternative placement with a behavioral intervention plan for the remainder of the school year. Ben and his parents favored a return to Roosevelt, while officials of Central Campus recommended expulsion.

In reaching its conclusion, the Board first undertook to determine if Ben was an eligible individual entitled to protections under Section 504 of the Vocational Rehabilitation Act or the Americans with Disabilities Act. It is important to note that the Board did not address IDEA eligibility and did not draw conclusions concerning Ben's IDEA eligibility. The Board concluded that "the school was unaware of Ben's diagnosis or the course of any treatment" and that "the fact that Ben has the diagnosis of ADHD does not, in and of itself, prove that he is impaired by his condition." The Board found that Ben "does not suffer from a physical or mental impairment that substantially limits a major life activity," was "not a disabled student such that he should not be held accountable for his conduct on February 18, 2005." The Board's decision was to expel Ben and to transfer him to an alternative location where he could complete the course work necessary for graduation and receive a diploma from Roosevelt. He was not allowed to graduate with his class (School Record at p. 118-131).

Following his expulsion from the Des Moines Public Schools, Ben was provided an opportunity to complete the remaining coursework towards graduation through a district program offered at the Grubb Y. When Ben refused to participate in the program, social worker Emily Burroughs arranged for Ben to receive credits through the Des Moines Area Community College (DMACC) Credit Recovery Program. Ben received credit for American history and social studies based on test results from the California Achievement Test. Ben was issued a diploma from Roosevelt High School in June of 2005 (School Record p. 321).

Following the expulsion, the appellants filed for a due process hearing, alleging that the DMISD violated the IDEA by taking that disciplinary action (School Record at p. 200). They assert that the manifestation determination was sound and rational in finding Ben's misconduct was related to his disability and that the Des Moines Independent Community School District Board of Directors did not have the legal authority to override that IEP team decision by expelling Ben. The Appellees argue that Ben was not an individual with a disability and was thereby ineligible for IDEA protections.

Conclusions of Law

Standing

The Appellants argue that the Des Moines Independent School District does not have the legal standing to utilize the IDEA's due process procedures to challenge the IEP team's determinations on the eligibility and manifestation questions. They cite three lines of

authority: the Iowa Rules of Special Education, the principles of the Supreme Court's decision in *Rowley*, and the holding in the Supreme Court's decision in *Honig v. Doe*. The Appellants note that the Iowa Rules of Special Education permit a school district to use IDEA's due process procedures under limited circumstances involving the need to evaluate or initially provide services absent parent consent [281--41.113(1)(c) Iowa Rules of Special Education (February, 2000)]. Since neither the IDEA statute nor the Iowa Rules of Special Education permit school districts to use due process for other reasons, the Appellants conclude the Des Moines Independent School District lacks legal standing to utilize the IDEA due process procedures to challenge the IEP team's determinations. Additionally, they argue that *Board of Education of Hendrick Hudson Central School District v. Rowley* [458 U. S. 177, 102 S. Ct. 3034 73 L. Ed. 2d 690 (1982)] entrusts the IEP team – not administrative officials or school boards – to determine appropriate programs for students with disabilities. Ben's IEP team met to discharge its duty to determine whether a child with disabilities needs special education and related services. The Appellants also argue that granting standing to the DMICSD would eviscerate the stay-put protections of the IDEA emphasized in *Honig v. Doe* [484 U. S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)]. They argue that the school district by-passed the determinations of March 3, 2005 and unilaterally changed Ben's placement by expelling him from school. A school district merely claiming that IEP team determinations were "above and beyond the law" would permit any school district to routinely escape the duty to comply with the IDEA stay-put provisions.

The Appellees argue that "standing applies to a plaintiff's right to sue and assert claims for perceived injuries and does not relate to a defendant's ability to resist those claims after being subjected to the jurisdiction of the court" (Appellee Brief p. 46). They argue convincingly that the District did not file the due process action and is not seeking redress of injury, an action where standing could be challenged. They cite Iowa Supreme Court rulings clarifying that standing doctrine questions if the complaining party is properly situated to request an adjudication of the issue [*Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa Supreme Court, 2004); *Alons v. Iowa District court for Woodbury County*, 698 N.W.2d 858 (Iowa Supreme Court, 2005)], and is not related to a defendant's ability to resist claims.

Conclusion 1: The school district did not initiate this action to challenge the manifestation determination by the IEP, but was named as "the party against whom an appeal is taken" [281—41.112 Iowa Administrative Rules of Special Education (February, 2000)]. Called to this tribune to resist claims that it violated IDEA and to defend the decision to expel Ben, the Appellees may present evidence and testimony relevant to the appeal. Contrary to the Appellants' assertion that the DMICSD is seeking relief from the determinations of the IEP team and sanction for it failure to meet IDEA obligations, the Appellants initiated this action in response to Ben's expulsion and are seeking declaratory relief, the removal of the expulsion from Ben's permanent record, and attorney fees. Subjected to the jurisdiction of this tribunal, the Appellees are resisting claims that they violated the provisions of IDEA. Rather than using the "IDEA forums to challenge the IEP team's determinations" (Appellants' Brief, p. 21), the Appellees are

defending the decision to expel Ben. The argument that the District lacks standing in this matter is without merit.

Burden of Proof

The IDEA is silent on which party bears the burden of proof in a due process hearing. In fact, due to inconsistent application of burden in the circuit courts, the U. S. Supreme Court will settle the controversy in *Weast v. Schaffer* [377 F.3d 449, 41 IDELR 176 (4th Cir. 2004), *Cert. Granted* Feb. 22, 2005]. On appeal from the 4th Circuit, school district officials argued that public school officials are presumed to act in good faith compliance with their legal obligations. The presumption of inadequacy which accompanies a district burden was viewed as inconsistent with the policies of IDEA for districts to develop appropriate educational program. Therefore, the party alleging that public officials did not meet their legal obligations bears the burden of proving that violation of duty and the allocation of burden is to the party seeking relief.

The Appellants argue that the Des Moines Independent Community School District bears the burden of proving that the Board of Directors had the legal authority to expel Ben from school by showing that the determination of the IEP team was not supported by substantial evidence. The Appellees contend that the parents challenging the disciplinary action against Ben by asserting his eligibility under IDEA have the burden of proving that eligibility.

The Appellants rely on an Eighth Circuit discussion of burden which noted that "at the administrative level, the District clearly had the burden of proving it complied with the IDEA" [*E.S. ex rel. Stein v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998)]. Appellees proposed that since the 8th Circuit decision did not place burden of proof before the ALJ as a matter for the appellate appeal, the discussion of burden *obiter dicta*.

Conclusion 2: Although the Appellants correctly point to the school district burden in manifestation determination disputes concerning expulsions [*S-1 ex rel. P-1 v. Turlington*, 635 F.2d 342, 348-49 (5th Cir. 1981); *Kaelin v. Grubbs*, 682 F.2d 595, 600 (6th Cir. 1982)], that responsibility is placed on the district by the IDEA statute [20 U.S.C. § 1415(k)(6)(B)(i)]: "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 such child's disability"(emphasis added). In this appeal, the Appellants are challenging the disciplinary action of the school district by asserting Ben's eligibility and subsequent extension of procedural protections under IDEA. The Appellants must, therefore, bear the burden of proof in this matter.

Discipline of Students with Disabilities

For students with disabilities, disciplinary sanctions which result in suspensions from their IEP services for more than 10 days constitute a change of placement, triggering several procedural safeguards [*Stuart v. Nappi*, 443 F. Supp. 1235 (DC CT 1978)]. These procedural safeguards are intended to limit the school's right to expel students with

disabilities [*Doe v. Koger*, 480 F. Supp., 225, 228 (ND IN 1978)] if the misconduct was related to the child's disability. Prior to taking such disciplinary action, the IEP team and other qualified personnel must conduct a review of the relationship between the child's disability and the behavior subject to the disciplinary action [20 U.S.C. § 1415(k)(4)(A)(ii)] . In carrying out the review, the IEP team may determine that the behavior of the child was not a manifestation of the child's disability only if the IEP team (a) first considers all relevant information including evaluation and diagnostic results, including such results of other relevant information supplied by the parents of the child; observations of the child; and the child's IEP and placement; and (b) then determines that 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 child's disability did not impair the ability of the child to understand the impact and consequences of the behavior; and the child's disability did not impair the ability of the child to control the behavior subject to the disciplinary action [20 U.S.C. § 1415(k)(4)(c)]. If the behavior was not a manifestation, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child [see also 281 I.--41.72 Iowa Rules of Special Education (February, 2000)].

In *S-1 v. Turlington* [653 F.2d 342, 347 (5th Cir. 1981], the 5th Circuit held that students with disabilities may not be suspended for more than 10 days or expelled if the misconduct was related to their disability, and that such a decision "must be made by a specialized and knowledgeable group of persons." IEP teams, not school officials, must determine if disruptive behavior is a manifestation of a child's disability and if the child's educational placement needs to be changed [*Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982)].

The law clearly prohibits the application of disciplinary sanctions which would change a child's education placement without the prior application of procedural safeguards. Change of placement requires notice, evaluation, and IEP team deliberation and determination. An additional procedural safeguard involves the maintenance of the child's IEP services pending the outcome of an appeal. If a parent files a complaint concerning the identification, evaluation, educational placement, or provision of a free appropriate public education involving an eligible child, the child will remain ("stay put") in the current educational placement pending the outcome of the appeal [20 U.S.C. § 1415(j)]. Although the school district in *Honig v. Doe* (1988) sought a "dangerousness" exception to this provision, the Supreme Court held that no such exception was envisioned in the law, and that the procedural protections of the law were intended to "strip schools of the unilateral authority they traditionally employed to exclude disabled students" [484 U.S. at 323, 108 S. Ct. at 604]. School officials could consider the use of time out or study carrels for the student remaining in the then-current placement, but that long-term suspensions or expulsions were not options. The school district could attempt to overcome the "stay put" provision by invoking the aid of the courts to issue an injunction based on a substantial likelihood of injury if the current placement was maintained. If the child had been placed in an interim alternative education setting as part of the disciplinary action, the child would remain in the interim setting pending the

outcome of the appeal. If the school district proposes to change the child's placement following the expiration of the interim placement, the child's current placement would be that placement prior to the interim setting [20 U.S.C. § 1415(k)(7)].

These procedural safeguards are available to individuals eligible for IDEA services. These safeguards may also be applicable to children not yet identified as eligible for IDEA protections, if the school district had knowledge of the child's potential eligibility. Appellants acknowledge that at the time of the prohibited conduct of February 18, 2005, Benjamin had not been identified as a child with a disability within the meaning of the IDEA. However, the Appellants argue that the school district had knowledge of Ben's potential eligibility for IDEA's procedural safeguards and protections.

Discipline of Children Not Yet Identified

The IDEA specifically addresses disciplinary procedures for children not yet eligible for special education and related services at 20 U.S.C. § 1415(k)(8):

> A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated any rule or code of conduct of the local educational agency (including behavior related to drugs or alcohol) may assert any of the protections provided for in this part if the local educational agency had knowledge that the child was a child with a disability **before the behavior that precipitated the disciplinary action occurred** (emphasis added).

The law further specifies four conditions that would deem a district had knowledge that the child may have been eligible as a child with a disability: a) if the parent of the child had expressed concern in writing to personnel of the appropriate educational agency that the child was in need of special education and related services; b) if the behavior or performance of the child demonstrated the need for such services; c) if the parent had requested an evaluation of the child; or d) if the teacher or other local education agency personnel had expressed concern about the behavior or performance of the child to the director of special education or other personnel of the agency [20 U.S.C. § 1415(k)(8)(B)]. Federal regulations and the Iowa Rules of Special Education reiterate that the LEA had this knowledge **before** the behavior precipitating disciplinary action and clarify that the fourth criteria of teacher knowledge requires that the teacher had expressed concern about the behavior or performance of the child **to the director of special education of the agency or to other personnel in accordance with the agency's established child find or special education referral system** [34 C.F.R. § 300.527; 281—41.73(3) Iowa Rules of Special Education (February, 2000)] (emphasis added). The language specifying to whom concern is expressed describes those individuals responsible for determining if an evaluation for eligibility should be conducted.

The IDEA further specifies that a district would not be deemed to have knowledge under the above conditions if the district either (1) conducted an evaluation under §§300.530-300.536 and determined that the child was not a child with a disability or (2) determined that an evaluation was not necessary. Under either option, parents would have been provided notice [34 C.F.R. § 300.527(c)]. If the agency did not have knowledge of

potential eligibility and protections, the child may be subject to the same disciplinary measures as applied to children without disabilities. However, students with disabilities must be provided special education and related services throughout the period of disciplinary action (e.g., long-term suspension or expulsion)[34 C.F.R. § 300.121(d)]. If the district is in the process of initiating an evaluation at the time for misconduct, it would be to have knowledge that the student may be an eligible student (*Fresno Unified School District*, 103 LRP 6549 (SEA CA 2002). Also, even if a district evaluation had determined a student ineligible for IDEA services, intervening events or actions subsequent to the evaluation and prior to the misconduct would put the agency on notice of the student's potential need for special education services (34 C. F. R. Part 300 Att. 1, p. 12629). For example, although the district in *Riverside Unified School District* diagnosed the student with "moderate" ADHD but ineligible for special education, his deteriorating grades and numerous conduct violations between the evaluation and the misconduct put the district on notice regarding possible eligibility [see also 281 I.A.C. § 41.73].

Several judicial and administrative decisions have determined that school districts must extend IDEA protections to not-yet-identified students under one or more of the four conditions. The decisions also show the relationship between the extension and the need for a determination of eligibility. For example, in *Hacienda La Puenta Unified School District of Los Angeles v. Honig* [19 IDELR 150 (9th Cir. 1992)], parents of a student expelled from school for frightening another student with a starter pistol challenged that the district did not identify their son as emotionally disturbed, and that the misconduct was a manifestation of his disabling condition. The parent had repeatedly expressed concerns about behavior and school performance. The district convened a child study team, later evaluated the student, and determined the student did not meet the criteria for special education. Later that year, the student was expelled. The Ninth Circuit held that federal regulations make plain that, even though not previously identified as disabled, the student's alleged disability may be raised in an IDEA administrative due process hearing, and that any contrary result would frustrate the core purpose of the IDEA, which is to prevent schools from indiscriminately excluding disabled students from educational opportunities: "If we found issues concerning the detection of disabilities to be outside the scope of IDEA 'due process hearing,' school district could easily circumvent the statue's strictures by refusing to identify students as disabled." The court's conclusion was that **all students with disabilities**, whether or not possessing "previously identified exceptional needs," are entitled to the procedural protections. In *W. B. v. Matula*, 67 F. 3d 484, 488 (3rd Cir. 1995) the parent met with the principal to discuss concerns about her child's behavioral problems and met with the child's teachers and other school officials to discuss behavioral and academic problems. The child's teacher also reported to the parent and other school officials numerous behavioral incidents and suggested to the parent that the child may have ADHD. The parent specifically asked the school to refer her child for an evaluation. This evidence led the Court to conclude that the child direct had an **obligation to initiate "child find" duties**. In *J.B. v. Independent School District No. 191* [21 IDELR 1157 (D.C. MN 1995), the court held that the district's argument that if a student was not receiving special education, he was not disabled, to be without merit. The student was not receiving any special education, and was in full time, regular

educational placement when disciplinary action was taken against him. However, the district was aware of the possibility that he might have ADHD and was aware that the student was flunking all of his classes at the time of the misconduct [see also *Jurupa Unified School District*, 34 IDELR 53 (SEA CA 2000) (finding student expelled in error since district knew of disruptive and inattention behavior throughout educational career, and difficulties in reading, written expression, and mathematics may have indicated a learning disability; parents asserted that student was "**expelled instead of assessed** for special education"); *Westbrook School Department*, 32 IDELR 251 (SEA ME 2000) (finding "abundant evidence" that student had a learning disability at time of expulsion. The school district **failed to identify and consider** the student's disability at the time of expulsion); *Main School Administrative District 49*, 35 IDELR 174 (SEA ME 2001) (finding sufficient evidence that student met the criteria for emotional disturbance and that refusal to permit her to return to school after misconduct without a manifestation determination based on a suspected disability was a violation of IDEA; the district was **ordered to schedule evaluations** and provide an interim IEP); *Reed Custer C. U. School District 255*, 102 LRP 3065 (SEA IL 2001) (finding district has "extensive information" indicating student's eligibility for special education services. Teacher report, parental written concerns and request for evaluation, and independent evaluations of ADHD would deem school district to have knowledge of eligibility); *Milton Public Schools*, 35 IDELR 297 (SEA MA 2001) (finding that prior to evaluation indicating student was not eligible for special education, IDEA protections should have been extended due to mother's oral request for an evaluation. **Once deemed ineligible**, stay-put did not apply and student could be expelled); and *Redlands Unified School District*, 39 IDELR 249 (SEA CA 2003) (finding district knew of student's inappropriate behavior, poor academic performance, diagnosis of depression and possible ADHD at time of misconduct)] (emphasis added).

In ascertaining if the school district had knowledge of a child's potential eligibility, *Rodiriecus L. v. Waukegan School District* [24 IDELR 563 (7th Cir. 1996) warned that a "flexible" approach utilizing multiple and convergent sources of fact must suggest that the child had a disability requiring special education services: "We wish to make clear that parents of other young offenders should not conclude that they can use this approach to allow the hindsight opinion of some 'expert' to qualify a delinquent child for preliminary protections under the Act. For a child not previously diagnosed as disabled, the statement of one social worker, teacher, or doctor excusing a child's aberrant behavior because of some perceived problem should be considered insufficient to meet the standard of [extending the IDEA protections]." For the student in *Rodiriecus*, the court noted that "school officials had neither knowledge nor reasonable suspicion to base a rational decision that Rodiriecus was in fact disabled. In fact his academic performance, although not outstanding, did not raise their suspicions and they deemed it "average." Neither the parent nor the guardian nor Rodiriecus requested any special education....(and) not one single individual, teacher, guardian, parent, or social official proposed or suggested that Rodiriecus may be in need of special education." In another district court decision, a mother's request for help was not alone sufficient to trigger the child find duty [*Reid v. District of Columbia*, 40 IDELR 255 (DC DC 2004)]. The parent had not requested an evaluation and there was no evidence that the child's teacher

expressed concern about his performance or behavior to agency personnel. Similarly, in *Alex K. v. Wissahickon School District* [40 IDELR 210 (E.D. PA 2004)], the district court held that expression of concern conveyed by parents to school officials about the academic performance of their child did not trigger "child find" duties. During a meeting with the principal, the parents informed the principal that their son might have learning difficulties and they were looking for placements. The principal told the parents if they would like an evaluation to put the request in writing, which they did not do. The court held that the discussion between the principal and parents alone was insufficient to trigger "child find" duties and, therefore, the school district was held not to have been on notice of the child's disabilities. Clearly, certain conditions alert the LEA of a child's potential eligibility and substantiate the need for an evaluation.

The Appellants are asserting IDEA protections should be extended to Ben based on the fourth condition of 20 U.S.C. § 1415(k)(8)*:* that a teacher had expressed concern about the behavior or performance (Appellant Reply Brief at p. 5). While the Appellants chose not to "dwell" on the basis for extending the protections based upon meeting that criterion (Appellants' Brief p. 6), it is important to note that absent the extension, Ben could not "stay" the disciplinary action of expulsion under 20 U.S.C. § 1415(k)(8*)*.

The Appellants assert "Perhaps the most compelling evidence on this score concerns the statements made by Treg Marcellus and Joe Rich, Roosevelt Band Teachers. Mr. Marcellus stated that '[t]here were many times that Mr. Rich and myself felt that Ben could turn on one of us and become violent" [Record at 61] . Clearly, 'the teacher of the child . . . ha[d] expressed concern about the behavior or performance of the child . . . to other personnel of the agency" 20 U.S.C. § 1415(k)(8)(B)(iv) [Appellant Brief at p. 5]. It is important to note that these comments from both Mr. Marcellus and Mr. Rich (School Record at pp. 60-62) came **after** the incident of February 18, in phone interviews conducted on February 28, 2005. More importantly, conversations between two teachers do not meet the criteria of [20 U.S.C. § 1415(k)(8)(B)(iv)] which under Iowa regulations require that "the teacher of the individual, or other personnel of the local educational agency, **has expressed concern about the behavior or performance of the individual to the director or to other personnel in accordance with the agency's established child find or special education referral system of the agency**" [281—41.73(3)(b)(4) Iowa Administrative Rules of Special Education (February, 2000)].

Further, in arguing the sound and rational basis for the team's manifestation determination, the Appellants point to the on-going diagnosis of ADHD and services by Dr. Mike Hopkins as well as comments by AP Psychology teacher Mr. Mahler, and Roosevelt teacher Terry Gioffredi. However, the District was not aware of Dr. Hopkins' diagnosis and treatment until the March 3, 2005 manifestation meeting and the interviews with Mr. Mahler and Terry Gioffredi were conducted after the February 18, 2005 altercation. As noted in the manifestation determination report (School Record at p. 6), no member of that team had **prior** knowledge of those events or concerns.

The Appellees argue that none of the four "deemed to have knowledge" conditions put the district on alert of Ben's potential eligibility. Ben's parents' neither expressed

concern nor requested an evaluation prior to Februrary 18, 2005. The minor disciplinary problems prior to the altercation of February 18, 2004 would not put the district on alert, and the Appelless argue that disciplinary referral alone does not constitute the basis of knowledge that a student is disabled [*Dickinson Independent School District*, 29 IDELR, 290 (SEA TX 1998)]. School psychologist Deb Hill-Davis testified that Ben's disciplinary record did not indicate severe disciplinary problems. The manifestation determination document indicated that Ben's behavior was not "significant" to convince educational professionals to initiate a referral for special education eligibility. The Appellees cite *In Re: Thoedor A.*, 26 IDELR 1090 (SEA IA 1997) (finding student did not have IDEA disability affecting academic performance), *Francis Howell R-III School District*, 37 IDELR 89 (SEA MO 2001) (finding school was unaware of ADHD treatment by a private physician and no concern or request for evaluation prior to suspension), and *Miller v. Board of Education of Caroline County*, 690 A.2d 577, 25 IDELR 811 (Ct. Sp. App. MD 1997) (finding that although student may have ADHD, no evidence to suggest need for special education) in support of their argument that there was little or no evidence to support the contention that the district should be "deemed to have knowledge" of a potential disability. The conclude that "stray remarks" cannot be vaunted over overwhelming evidence that prior to February 18, 2005, the LEA did not have knowledge alerting them to Ben's potential eligibility for IDEA services.

Importantly, following the altercation of February 18, 2005, administrator McClanahan recommended to the Department of Student Services that Ben be expelled and explained to the Appellants that the Department would conduct a thorough review of the case (School Record at p. 16). This review, conducted by an Expulsion Review Team, is central to the "deemed to have knowledge" issue. In his interview with a member of the Expulsion Review Team, Ben's father did not mention Ben's ADHD, Dr. Hopkins' services, or describe behavioral or performance concerns. He did not request an evaluation or the need for special education or related services. Additionally, based on the accumulated interview data, the Expulsion Review Team did not recommend an evaluation for eligibility but rather concluded Ben should be expelled. The Expulsion Review Team must include a school psychologist or social worker (School Record at p. 195). Ben's Expulsion Review Team included school psychologists Lisa Odson and Emily Olson, and school social workers Kevin Wet and Jim Mitchell (School Record at p. 13). The recommendation of this team, including school psychologists and social workers, was not that an evaluation be conducted but rather that Ben be expelled from school. Based on that recommendation, Superintendent Witherspoon proposed expulsion and the Board of Directors concluded that an expulsion was justified.

Conclusion #3: It is clear from the evidence and the testimony that the LEA did not have "knowledge" that Ben "was an eligible individual **before** the behavior that precipitated the disciplinary action occurred [20 U.S.C. § (k)(8)(A); 34 C.F.R. § 300.527(a); 218—41.73(3)(a) Iowa Rules of Special Education (February, 2000)] (emphasis added).

<u>Knowledge of Potential Eligibility Triggering Child Find Obligations</u>
The "deemed to have knowledge" language of the discipline provisions affirms the child-find obligations of the IDEA. All children with disabilities...and who are in need of

special education and related services, are [to be] identified, located, and evaluated [20 U.S.C. § 1412(a)(3)(A)]. The duty is "triggered when the school has reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" [*Department of Education, State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1192 (D.C. HW 2001)]. The student in *Hawaii* had 79 absences and numerous behavioral referrals that should have alerted the district to the student's possible eligibility. The court noted that the threshold for "suspicion" was relatively low, and that the inquiry was not whether or not the student actually qualified for services, but rather if she should be referred for an evaluation.

The four conditions which may put a school district on alert prior to disciplinary action are congruent with those conditions which may lead a multidisciplinary team or child study team to consider evaluating any child for special education services: teacher concern addressed to a member of that team, parent concern or request for an evaluation, or the behavior or performance of a child indicating the need for special education services. If the multidisciplinary or child study team believes the child has a disability impacting educational performance, an evaluation of eligibility will be conducted.

Numerous judicial and administrative decisions clearly establish that a district "deemed to have knowledge" of potential eligibility must first ascertain the student's eligibility for IDEA services and protections, and then, if the student is found eligible, conduct a manifestation determination. After a student was suspended for the remainder of the year for a weapon offense, her parents sought a preliminary injunction to reinstate the student to her pre-suspension status pending a determination of her IDEA eligibility [*Ellen Doe v. Renfro Manning*, 21 IDELR 357 (W.D. VA 1994)]. The district court granted the injunction and ordered that the student receive tutorials outside of school **until her eligibility was determined**. In *Jeffrey S. v. School Board of the Riverdale School District* [21 IDELR 1164 (W.D. WI 1995)], the expulsion of a high school student for violent misconduct was annulled. The student qualified for special education due to an emotional disturbance, but was withdrawn from the special education program at the parent's request. The student subsequently was involved in the violent misconduct. Prior to the expulsion hearing, the parent submitted a doctor's diagnosis of ADHD, but the board did not conduct a re-evaluation or manifestation determination. The student was expelled for the remainder of the year and was provided homebound instruction. The court was persuaded by the parents' argument that the school board had **reasonable cause to believe he was in need for a formal evaluation** of his status either because of his conduct or because an independent evaluation revealed that need, and that the school board was required to refrain from proceeding with the expulsion hearing until a re-evaluation had been accomplished. Although qualified professionals reviewed his record and determined he was not in need of special education services, a formal re-evaluation was required to cease IDEA services. In *Colvin v. Lowndes County School District* [32 IDERL 32 (N. D. MI 2000), the district court opined that the school district **failed to evaluate** a student with ADHD and expelled him for possession of a knife: "The court is of the opinion that the school district overlooked (the parents') request as well as (the student's) academic performance in violation of the IDEA. Whether (the student) is suffering from a learning disability or an emotional disorder, this court cannot determine.

It is clear, however, that (the student) was contending with some type of problem. At a minimum, the school district **should have provided testing to ascertain** whether it was a learning disability" [see also *North Pocono School District*, 102 LRP 5310 (SE PA 1998)] (finding a district should have been aware of a student's need for special education prior to seeking expulsion for weapon-related misconduct: "**rather than an expulsion, the District should have sought an expedited evaluation**"); *Crown Point Community School Corporation*, 32 IDELR 77 (SEA IN 2000) (finding student's "lazy eye" did not qualify student for IDEA services as visually impaired. Awareness of misconduct did not unduly influence the **child study team in its determination of ineligibility**); *Pocono Mountain School District*, 102 LRP 10422 (SEA PA 2000)(finding that the district should have known of the child's eligibility due to academic and behavioral difficulties, and in lieu of an expulsion hearing, "a manifestation determination should have been conducted by a multidisciplinary **team following an expedited evaluation**"); *Sherwood School District*, 36 IDELR 256 (SEA OR 2002) (finding that student with a long history of behavior problems, a diagnosis of ADHD and depression, and expressed concerns from the school psychologist and parents sufficient to put the district on alert of potential eligibility. Once suspicious, it is the responsibility of the district, not the parent, **to determine if an evaluation was necessary**)(emphasis added).

Child find duties are also triggered when a request for an evaluation is made during the period of disciplinary action. The Appellants agree, and suggest that if the question of eligibility "comes up" during the discussion of disciplinary action, an expedited evaluation must be conducted. Indeed, "if a request is made for an evaluation of an individual during the period in which the individual is subjected to disciplinary measures under paragraph (1) or (2), the evaluation shall be conducted in an expedited manner." If the individual "is determined to be an eligible individual, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services" [20 U.S.C. § 1415(k)(8)(C)(ii)]. Importantly, the LEA's responsibility to conduct an expedited evaluation is only triggered "if a request is made for an evaluation" during the time period referenced above.

Evaluation to Ascertain Eligibility and Need

The reason the Appellants chose not to "dwell" on the "deemed to have knowledge" criteria for extension of IDEA procedural protections was because "the School District can and did conduct an expedited evaluation pursuant to 20 U.S.C. § 1415(k)(8(c)(ii), which is the second method whereby the protections of the IDEA may be extended to a child who was not previously identified as eligible for services" (Appellants' Brief p. 6). The Appellants are correct in concluding that the second method to "stay" the disciplinary action of expulsion is to conduct an evaluation of eligibility for IDEA services and safeguards. The Appellants argue that an expedited evaluation was conducted at the time of the manifestation determination meeting. It was "so expedited" that the team was able to consolidate the determination that the child had a qualifying disability and that the misconduct was a manifestation of his disability.

Expedited or not, evaluation procedures to ascertain a child's eligibility for services (and protections) under the IDEA are explicit.

The IDEA defines a child with a disability as a child with mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities and, by reason thereof, needs special education and related services [20 U.S.C. § 1401(3)(A)]. To qualify with ADD under the category of "other health impairment," a child must exhibit an attention deficit "with respect to the educational environment" [34 C.F.R. § 300.7(c)(9)] that "adversely affects a child's educational performance [34 C.F.R. § 300.7(c)(9)(ii)]; (281--41.5 Iowa Rules of Special Education (February, 2000)]. The "need for special education" due to a disability that "adversely affects a child's educational performance" is established in an evaluation of eligibility [20 U.S.C. §1414(a)(1)(B)]. Iowa regulations define an "eligible individual" as "an individual with a disability who is handicapped in obtaining an education and who is entitled to receive special education and related services [281--41.5 Iowa Rules of Special Education (February, 2000)].

The evaluation consists of procedures to determine whether a child is a child with a disability and to determine the educational needs of the child [20 U.S.C. §1414(a)(1)(B)(i- ii)]. Prior to an evaluation, parental consent must be obtained [20 U.S.C. §1414(a)(1)(C)]. The conduct of the evaluation is clearly detailed, including the use of a variety of assessment tools "to gather relevant information, including information provided by the parent, that may assist in determining whether the child is a child with a disability" [20 U.S.C. §1414(b)(2)(A)]. The evaluation provisions require that the child be assessed in all areas of suspected disability [20 U.S.C. §1414(b)(3)(C)] and that the information assists in determining the educational needs of the child [20 U.S.C. §1414(b)(3)(D)]. Upon completion of administration of tests and other evaluation materials, the determination of whether the child is a child with a disability "shall be made by a team of qualified professionals and the parents of the child," and a copy of the evaluation report and the documentation of determination of eligibility is to be provided to the parents [20 U.S.C. § 1414(a)(4)(B)]. Federal regulations require that in interpreting evaluation data for the purpose of determining if the child is a child with a disability and the educational needs of the child, the public agency shall "draw upon information from a variety of sources" and "ensure that information from all these sources is documented and carefully considered" [34 C.F.R. § 300.535(a)]. If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed [281--41.50(4) Iowa Rules of Special Education (February, 2000)]. In sum, the child's eligibility must be established and documented.

Establishing the "need for special education" due to a disability that "adversely affects educational performance" is at the heart of the IDEA evaluation procedures. The presence of a disability alone is not enough to qualify a child to receive special education services under IDEA; in addition, the child must also be in need of those services to progress and obtain an adequate educational benefit [*JD by JD v. Pawlet School District,* 33 IDELR 34 (2nd Cir. 2000)]. In *J.D.*, a gifted student's bid for special education

services was denied because his exceptional academic performance showed he did not require such services. The 2nd Circuit held that his difficulty with interpersonal relationships and negative feelings, while signs of an emotional disability, **did not have an adverse effect on the student's educational performance**. Absent adverse effects of a disability necessitating special education services, courts held children ineligible for special education services. A guidance counselor's contact with a student's teachers and the counselor's dissemination of bi-weekly progress reports to the parents was not evidence that a teacher or other personnel at the high school expressed concern over behavior or performance to the director of personnel in the child find or special education referral system [*Mr. and Mrs. R. V. West Haven Board of Education*, 36 IDELR 211 (D.C. CT 2002)]. School personnel did not notice problems, there were no disciplinary reports other than one ten-day suspension, and school personnel did not know of outside services provided to the student. Although the parent had asked a counselor to do something because her son was struggling, that **request alone was not evidence that the student's behavior or performance demonstrated his need for special education services**. The District Court found his behavior typical for his age and academic performance average, both with "some fluctuations that were typical of adolescents." In an earlier case from Iowa, *In Re: Theodor A.*,29 IDELR 1090 (SEA IA 1997), the Administrative Law Judge found that the IDEA protections did not apply to a 14-year-old student expelled from school for vandalism. There was no evidence that the student was a student with a disability at the time of his expulsion, or that the district knew or reasonably should have known that the student was in need of special education. The student's grades **did not reflect declining academic performance, and the school did not regard the student as having behavior or emotional problems which affected his educational performance**. Therefore, the IDEA protection did not apply and his expulsion was valid (emphasis added).

Several judicial and administrative decisions examined whether a student diagnosed with ADHD required special education services due to the adverse effect of the disability on educational performance. If the child's ADHD impacted educational performance and the evaluation revealed the need for special education services, IDEA's discipline provisions were extended. In *Richland School District v. Thomas P.* [32 IDELR 233 (W.D. WI 2000)], a student's untreated ADHD had a negative impact on educational performance as evidenced in both academic and behavioral difficulties. The disability was also related to misconduct concerning vandalism. The court warned that the opinion should not be read to suggest that a student who commits a reprehensible act may avoid disciplinary action by running to a psychologist and obtaining a post-hoc diagnosis of ADD.

Other decisions clarified that a diagnosis of ADHD alone was insufficient to establish a child's need for special education services or that the ADHD had not negatively affected the child's educational performance. In *West Chester Area School District*, [35 IDELR 235 (SEA PA 2001), an appeals panel ruled that a child's diagnosis of AHDH did not equate with special education eligibility: "a diagnosis of ADD and the salutary efforts of a district to provide classroom accommodations should not translate into IDEA eligibility." Rather, the "**essential element of the need for special education" is determinative of eligibility, and the child did not require "adaptations in content,**

methodology, or delivery of instruction" – the definition of special education. In *West Haven Board of Education*, [37 IDELR 56 (SEA CT 2001), a hearing officer concluded that although the student had a diagnoses of ADHD, the disability did not adversely affect his educational performance: "It appears from the credible evidence that the student is of above average ability, that his academic performance is mostly in the above average range in an academically challenging program....Other than help with homework and meeting deadlines, there is no service the Parents could articulate which the school should provide the student. These types of needs can be met in the regular education program through the progress reports and after school assistance from teachers, which is available to all students at the high school, including this student." In *Paron School District* [36 IDELR 254 (SEA AK 2002)], a student with a medical diagnosis of ADHD displayed inattention, poor impulse control, distractibility, and inability to control activity levels. However, the ADHD **did not adversely affect his educational performance**, evidenced by participation in the gifted and talented program. In *Gregory-Portland Independent School District* [39 IDELR 168 (SEA TX 2002)], a hearing officer concluded that a student was not eligible for special education services due to her ADHD since she was making adequate progress in regular education without such services. Although she had received warning and after-school detentions, the discipline imposed on the student **was neither extensive nor frequent enough to interfere with her education**. Most discipline was due to tardiness or failure to attend detention for being tardy, and consistent of after-school time and not time out of class or out of school. In *Conroe Independent School District* [39 IDELR 172 (SEA TX 2003)], a hearing officer concluded that a 15-year-old with ADHD did not require special education services due to ADHD, and concluded that "qualifying for special education services **requires not only an identified disability, but also an educational need for services due to the disability**. *Jurupa Unified School District*, 41 IDELR 80 (SEA CA 2004) (student with medical diagnosis of ADHD was not eligible for special education, a manifestation review, or behavior plan. **ADHD was not negatively affecting his educational performance**, as evidenced in test results, teacher observations, his grades, and his behavior. Sexual misconduct was not "impulsive, reactive, or egocentric behaviors" arising from AHDH." In *Flour Bluff Independent School District* [41 IDELR 109 (SEA TX 2004)], a hearing officer found that the **student did not have an attention deficit to such a degree as to cause her to have an educational need that can only be met with special education and that the ADHD did not prevent her from making adequate progress without special education** [see also *Bloomfield Hills Public Schools*, 102 LRP 16377 (SEA MI 2002) (finding **no adverse educational effects** due to family-reported ADHD); *Cornwall-Lebanon School District*, 102 LRP 8730 (SEA PA 2000) (finding student diagnosed ADHD was addressed through regular education interventions and student **did not require special education to gain educational benefit**); *Aransas County Independent School District*, 29 IDELR 141 (SEA TX 1998) (finding student's ADHD **did not adversely affect educational performance**); *Flour Bluff Independent School District*, 41 IDELR 109 (SEA TX 2004) (finding student's ADD and ED caused anxiety, but that she **did not require special education to progress and receive educational benefit**); *Tredyffrin/Easttown School* District, 36 IDELR 149 (SEA PA 2002) (finding that neither student's Asperger's syndrome **nor ADHD limited the students social interaction to an extent requiring special education services**); *Rochester City School*

District, 31 IDELR 178 (SEA NY 1999) (finding student's ADHD did not necessitate providing special education or related services); *Cabot School District*, 34 IDELR 78 (SEA AK 2000) (finding previous district evaluation showed ineligibility although student was diagnosed with ADHD. **No behavior prior to expulsion incidents raised "red flags" demonstrating the need for special education services**, since discipline violations were minor and infrequent with no pattern indicating existence of any particular disability); *Alvord Unified School District*, 34 IDELR 279 (SEA CA 2001) (finding "no basis of knowledge" that student threatening violence was disabled. Student had no difficulties in academics or social interactions, and five-year earlier referral for anger management would not cause suspicion. Diagnosis of depression not available to team at time of expulsion decision); *Francis Howell R-III School District*, 37 IDELR 89 (SEA MO 2001) (finding that although the student had been diagnosed and treated by a physician for ADHD, the **district had no reason to suspect a disability requiring special education services** until the parents asserted such after a weapon-related incident); *Colton Joint Unified School District*, 104 LRP 41096 (SEA CA 2004) (finding that the student's dress code violations, bus violations, and single incident of drinking alcohol at school **did not necessarily demonstrate a need for special education services** due to emotional disturbance. The student's participation in school counseling was part of the general education program and the substance abuse counseling was standard procedure for students disciplined for alcohol use)(emphasis added). As these decisions illustrate, determining a child's need for special education and related services must involve an analysis of the effect of the disability on educational performance

In Rodiriecus L. v. Waukegan School District [24 IDELR 563 (7th Cir. 1996), the court found it "interesting to note that...there was no request for special education for the student...the demand was simply that Rodiriecus remain in school." The court also noted that the Act was not designed to act as a shield to protect a disruptive child from routine and appropriate school discipline: "If the stay put provision is automatically applied to every student who files an application for special education, than an avenue will be open for disruptive, non-disabled students to forestall any attempts at routine discipline by simply requesting a disability evaluation and demanding to "stay put," thus disrupting the educational goals of an already over-burdened and oft times classified as a chaotic public school system" (p. 566).

An evaluation establishes the "need for special education" due to a disability that "adversely affects educational performance." Invoking the IDEA protections prior to disciplinary action seeks to establish a child's disability and need for special education services. The Appellants assert that the team had adequate documentation of not only a disability but also of the relationship between the disability and the misconduct. The Appellees counter that the group gathered for the manifestation review did not conduct and expedited evaluation and determine that Ben was a "child with a disability" for purposes of 20 U.S. C. § 1401(3). Rather, the group learned that Ben was diagnosed with ADHD.

A properly-conducted evaluation may have confirmed the ADHD diagnosis and established Ben's need for special education services. But such an evaluation was never

requested prior to or following the misconduct of February 18, 2005, thus the District's responsibilities to conduct an expedited evaluation pursuant to 20 U.S.C. § 1415(k)(8)(C)(ii) were not triggered.

The Appellants argue that Ben's eligibility was established in a consolidated, expedited manner at the manifestation determination meeting. Although members of the group conducting the manifestation determination review later testified that they concluded Ben had ADHD and that his disability affected his thinking and judgment, there was no discussion or documentation at that meeting that Ben was eligible for IDEA services as a "child with a disability" [20 U.S.C. § 1401(3)]. Parental consent for an IDEA evaluation was neither sought nor obtained [20 U.S.C. § 1414(a)(1)(C)]. A variety of assessment tools to evaluate Ben in all areas of suspected disability was not utilized [20 U.S.C. § 1414(b)(2)(A)]. A determination of Ben's educational needs was not conducted [20 U.S.C. § 1414(a)(1)(B)(i-ii)]. A copy of the evaluation report and the documentation of determined eligibility was not provided to Ben or his parents [20 U.S.C. § 1414(a)(4)(B)].

Neither the conclusion of the manifestation determination team that Ben had ADHD nor the conclusions that there was a relationship between his ADHD and the misconduct satisfy the child find duties of IDEA or the substantive requirements of an eligibility evaluation. The Appellees correctly note that identifying an impairment does not alone satisfy the eligibility test under the IDEA: there must also be the determination that because of the impairment, the student needs special education and related services. Even if the school district had determined that Ben had an ADHD, they must subsequently determine that the ADHD required the provision of special education or related services. Ben's ADHD must adversely impact his educational performance, an effect confirmed by the evaluation data.

Despite the absence of an evaluation for eligibility, several facts might suggest that Ben did not have "a need for special education" due to a disability that "adversely affects a child's educational performance [20 U.S.C. § 1414(a)(1)(B)]. Ben was enrolled in rigorous courses and maintained a high GPA. Neither Ben nor his parents requested classroom accommodations and none were necessary based on his documented achievement. The evidence suggests Ben did not require special education and was able to access and progress in the general curriculum. He participated in the advanced program at Central Campus which offered high-level and rigorous courses. At no time did Ben or his parents suggest he required "specially designed instruction." Although members of the manifestation review team testified that they concluded Ben had ADHD and "thinking errors," no witness offered testimony to indicate Ben required special education and no one asked or confirmed that special education would be provided. In fact, all witnesses testified that Ben was progressing very well without the aid of special education. Even Ben's mother, who is a certified special educator, testified that she did not believe Ben required special education or related services to progress academically. Members of the manifestation determination team noted that while Ben's behaviors had been an on-going concern, the behaviors were not significant enough for referral for special education eligibility. Dr. Hopkins, while confirming Ben's ADHD, testified that

he did not recommend any type of school-based services or accommodations, since Ben's educational performance was not adversely affected. As the Appellees persuasively argue, the Appellants' reason for invoking IDEA protections was not to secure special education services, but rather to avoid the disciplinary sanction of expulsion.

There is no evidence or testimony that the Appellants requested an IDEA evaluation which would trigger the expedited evaluation required at 20 U.S.C. § 1415(k)(8)(c)(ii). In fact, Ben's IDEA eligibility is not mentioned throughout the Board of Director's expulsion hearing. Rather, 504 and ADA potential protections are addressed. Concern that "a 504 plan was never initiated" was also recorded on the manifestation report (School Record at p. 7). An expulsion a student eligible for 504 services would be a change in placement requiring a manifestation determination [see *Washington (CA) Unified School District*, 29 IDELR 486 (OCR 1998)]. However, prior to accessing those procedural safeguards, an individual's eligibility for 504 services and protections must also be established by an evaluation (34 C.F.R. § 104.35) with substantive and procedural components similar to IDEA.

Conclusion #5: The Appellants did not request an IDEA evaluation and, importantly, a procedurally and substantively valid evaluation was not conducted to determine Ben's eligibility for IDEA services. The "expedited evaluation" the Appellants assert was conducted on March 3, 2005 did not meet the procedural or substantive requirement of IDEA for eligibility determination. Absent an adequate evaluation to establish Ben's disability and his need for special education services, Ben and his parents may not assert rights under the IDEA – including the constitution of an IEP team or the provision of special education. An eligibility determination confirms not only that a student has a disability, but establishes the individual's need for special education due to that disability adversely affecting educational performance.

Without eligibility, Ben and his parents may not invoke IDEA protections – including refuge from expulsion. The manifestation determination review procedures apply only to individuals found eligible prior to misconduct or to individuals deemed eligible following misconduct based on an evaluation triggered by reasons to suspect a disability or a request for evaluation during the disciplinary period. The manifestation determination and procedures for dissent of that determination [I.A.C. 281—41.51, Iowa Rules of Special Education (February, 2000)] apply to eligible individuals. The group gathered on March 3, 2005 did not have the authority to deliberate manifestation for IDEA protections for a student not eligible for IDEA services. The Appellants' argument that the Des Moines Independent School District did not have legal authority to override the manifestation determination and subsequently expel Ben without special education services fails since Ben was not eligible for IDEA services or procedural protections for disability-related misconduct.

Decision

The Des Moines Independent Community School District and the Heartland Area Education Agency prevail on all substantive issues in this appeal. The expulsion of Benjamin F. B. will remain effective.

Motions and objections not previously ruled upon, if any, are hereby over-ruled.

Any party who is aggrieved by the findings and decision can bring civil action [20 U.S.C. § 1415(i) (2) (A)]. A party initiating civil action in federal court shall provide an informational copy of the petition or complaint to the department within 14 days of filing the action. The action may be brought in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy [§ 281-41.124(2) Iowa Rules of Special Education (February, 2000)].

Susan Etscheidt, Ph.D.
Administrative Law Judge

9/26/05
Date