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## Disciplining Students with Disabilities: A Comparative Analysis of K-12 and Higher Education

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# DISCIPLINING STUDENTS WITH DISABILITIES: A COMPARATIVE ANALYSIS OF K-12 AND HIGHER EDUCATION

## I. INTRODUCTION

This article focuses on the rights of students with disabilities in higher education disciplinary proceedings and compares current practices in higher education with those in K-12 education.

Many disabilities are associated with specific negative behavioral patterns. As a result of these behaviors, students with disabilities may be more likely to violate codes of student conduct.<sup>1</sup> To prevent potential violations of disabled students' due process rights in K-12 education, these students are protected by a number of procedural safeguards under the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Because IDEA applies only to students in federally funded K-12 education programs, students with disabilities in higher education are not afforded these protections. To protect their rights, these students rely on Section 504 of the Rehabilitation Act of 1973 (Section 504)<sup>3</sup> and the Americans with Disabilities Act of 1990 (ADA).<sup>4</sup> However, because these laws were drafted with the intent to protect all individuals with disabilities generally and are not specifically tailored to address the needs of individuals in educational settings, there are no specific provisions protecting due process rights in a disciplinary setting. Therefore, these students may not have an opportunity for their disability to be considered as an ingredient in the

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1. See, e.g., *What is ADHD?*, KIDSHHEALTH, [http://kidshealth.org/parent/medical/learning/adhd.html#a\\_Related\\_Problems](http://kidshealth.org/parent/medical/learning/adhd.html#a_Related_Problems) (last visited May 28, 2012) ("At least 35% of kids with ADHD also have oppositional defiant disorder, which is characterized by stubbornness, outbursts of temper, and acts of defiance and rule breaking. Conduct disorder is similar but features more severe hostility and aggression. Kids who have conduct disorder are more likely to get in trouble with authority figures and, later, possibly with the law. Oppositional defiant disorder and conduct disorder are seen most commonly with the hyperactive and combined subtypes of ADHD.")

2. Individuals with Disabilities Education Act, 20 U.S.C. § 1415(k)(1)(C) (2006).

3. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 701 (2006).

4. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006).

behavior that resulted in an alleged violation of a code of student conduct.

The goals of this article are threefold. First, it aims to explore current practices in higher education relating to disciplinary proceedings involving students with disabilities. Second, the article's main objective is to determine whether, and to what extent, it would benefit institutions of higher education to develop policies and procedures mimicking the manifestation determination procedures for K-12 education set forth in IDEA and its pertinent regulations.<sup>5</sup> Finally, this article contains recommendations to higher education administrators hoping to include such a procedural safeguard in their disciplinary systems.

## II. OVERVIEW OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

### *A. Purpose of IDEA and Legislative Intent*

The Individuals with Disabilities Education Act (IDEA) recognizes that “[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society.”<sup>6</sup> In enacting IDEA, Congress acknowledged that “[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”<sup>7</sup> Despite the onus placed on states, local educational agencies (LEAs),<sup>8</sup> and educational service agencies (ESAs)<sup>9</sup> to provide an education for all

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5. See e.g., 20 U.S.C. § 1415; 34 C.F.R. § 300.530.

6. 20 U.S.C. § 1400(c)(1).

7. *Id.*

8. For the purposes of IDEA, “[t]he term ‘local educational agency’ [LEA] means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.” *Id.* § 1401(19)(A).

9. For the purposes of IDEA, “[t]he term ‘educational service agency’— (A) means a regional public multiservice agency—(i) authorized by State law to develop, manage, and provide services or programs to local educational agencies; and (ii) recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and

children with disabilities, in enacting IDEA, Congress asserted a national interest in “assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.”<sup>10</sup>

One specific goal of IDEA is to guarantee that all children with disabilities have access to “a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . . .”<sup>11</sup> In order to accomplish this goal, Congress asserted the importance of access to educational programs for children with disabilities, even in circumstances when they exhibit behavioral challenges directly associated with their disability.<sup>12</sup> The comments to the IDEA regulations acknowledge this complex relationship between disability and discipline, stating that “the Act recognizes that a child with a disability may display disruptive behaviors characteristic of the child’s disability and the child should not be punished for behaviors that are a result of the child’s disability.”<sup>13</sup> Congress’s answer to this problem was the development of several procedural safeguards, most specifically the manifestation determination, to ensure protection of children with disabilities in disciplinary processes.

### *B. Current Definitions Under IDEA and the Manifestation Determination Requirement*

Part B of IDEA, as most recently amended in 2004,<sup>14</sup> defines a “child with a disability” as a child “(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual

secondary schools of the State; and (B) includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school.” *Id.* § 1401(5)(A)-(B).

10. *Id.* § 1400(c)(6).

11. *Id.* § 1400(d)(1)(A).

12. See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,720 (Aug. 14, 2006) (to be codified at 34 C.F.R. pts. 300-301) [hereinafter 71 Fed. Reg. 46,540].

13. *Id.*

14. See *IDEA – the Individuals with Disabilities Education Act*, NICHCY (Apr. 2012), <http://nichcy.org/laws/idea>.

impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.”<sup>15</sup> Under this definition, simply having a diagnosed disability is not enough for a child to qualify for protection under IDEA; the child must also require special education or related services.<sup>16</sup>

IDEA is legislation passed under the spending clause of the Constitution;<sup>17</sup> therefore, states that opt out of federal funding for its schools are not subject to its provisions. To date, however, every state has accepted the funding attached to IDEA and is thereby bound by its provisions.<sup>18</sup>

Under the current provisions of IDEA, any child with a disability who is subject to disciplinary action that may result

15. 20 U.S.C. § 1401(3)(A)(i)-(ii).

16. The evaluation of a child and subsequent creation of an Individualized Education Program (IEP) by an IEP Team (as defined *infra*, note 42) is an integral step in qualifying for protections afforded by IDEA. Before providing special education and related services to a child with a disability, “[a] State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation” of the child. *Id.* § 1414(a)(1)(A). The evaluation may be initiated by “a parent of a child, or a State educational agency, other State agency, or local educational agency. . . .” *Id.* § 1414(a)(1)(B). If the evaluation is not initiated by a parent, the LEA (as defined in *supra*, note 8) must obtain parental consent before evaluating a child to determine if he or she is a child with a disability. *Id.* § 1414(a)(1)(D)(i)(I). In conducting the evaluation, the LEA is required to “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining— (i) whether the child is a child with a disability; and (ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities. . . .” *Id.* § 1414(b)(2)(A)(i)-(ii). After an assessment is completed, “(A) the determination of whether the child is a child with a disability . . . and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child . . . ; and (B) a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent.” *Id.* § 1414(b)(4)(A)-(B). If the child is determined to be a child with a disability, the LEA must convene an IEP Team to create an Individualized Education Program (IEP). *Id.* § 1414(d)(2). An IEP is a written statement for each child with a disability that is developed, reviewed, and revised and includes specific information on the nature of the child’s disability and any accommodations that are necessary to ensure the student receives a free appropriate public education (FAPE). *Id.* § 1414(d)(1)(A)(i).

17. See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295-96 (2006) (“Our resolution of the question presented in this case is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause.”).

18. NANCY LEE JONES ET AL., *INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): BACKGROUND AND ISSUES*, 36 n.4 (2004).

in a “change in placement” (i.e., a removal from school for a period of greater than 10 days)<sup>19</sup> is entitled to a “manifestation determination.”<sup>20</sup> A manifestation determination is a meeting held outside of the student conduct process to determine if the behavior for which the student is being disciplined is a direct result (manifestation) of the student’s specific disability.<sup>21</sup> This process involves a review of the student’s record and input from special education practitioners, the student’s classroom teacher, and the student’s parents.<sup>22</sup> The outcome of a manifestation determination hearing follows one of two paths. If the behavior is found to be a manifestation of the student’s disability, the school cannot change the student’s educational placement (i.e., remove the child from school for more than ten consecutive days);<sup>23</sup> however, the student would be required to follow a behavioral plan and could be subject to removal of certain privileges.<sup>24</sup> If the behavior is not found to be a manifestation of the student’s disability, the school can discipline the student to the same extent as any student

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19. 20 U.S.C. § 1415(k)(1)(C).

20. *Id.* § 1415(k)(1)(E)(i).

21. *Id.*

22. *Id.* § 1415(k)(1)(E). Here, IDEA refers to the IEP (Individualized Education Program) Team, which is defined as “a group of individuals composed of—(i) the parents of a child with a disability; (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment); (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child; (iv) a representative of the local educational agency who—(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency; (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi); (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (vii) whenever appropriate, the child with a disability.” *Id.* § 1414(d)(1)(B)(i)-(v).

23. *Id.* § 1415(k)(1)(F)(iii). See also *Manifestation Determination*, NICHCY (Sept. 2010), <http://nichcy.org/schoolage/placement/disc-details/manifestation>.

24. *Id.* § 1415(k)(1)(F)(i) (2006). A behavioral intervention plan is a concrete representation of observations and recommendations made during a functional behavioral assessment. These plans are used to provide guidance to educators in relation to changing a child’s behavior. See, e.g., *Behavioral Intervention Plan*, PUBLIC SCHOOLS OF N.C., EXCEPTIONAL CHILDREN DIVISION, <http://www.ncpublicschools.org/ce/supportprograms/resources/behavioral/> (last visited Feb. 5, 2012).

without a disability who had committed the same infraction.<sup>25</sup>

There are two important exceptions to this requirement. The first exception, or the so-called “ten-day rule,” allows school personnel to remove a child who violates a code of student conduct for ten or fewer consecutive school days, to the same extent that it would apply such a discipline measure to a child without a disability.<sup>26</sup> Because a removal to an interim alternative educational setting, another setting, or via suspension for a period of not more than ten consecutive school days does not constitute a “change of placement” under IDEA,<sup>27</sup> no manifestation determination needs to be conducted in these situations.<sup>28</sup> Additionally, districts may continue to remove students with disabilities for not more than ten consecutive days for separate incidents involving violations of the code of student conduct “so long as those removals do not constitute a change of placement.”<sup>29</sup> The factors to be considered in determining whether a pattern of removals constitutes a change of placement are:

[Whether] the series of removals total more than 10 school days in a school year; . . . [whether] the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; and . . . [whether] such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.<sup>30</sup>

Furthermore, school districts may not repeatedly assign short-term suspensions as a means of avoiding the normal change of placement procedures that govern long-term removals.<sup>31</sup>

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25. 20 U.S.C. § 1415(k)(1)(C).

26. 34 C.F.R. § 300.530(b)(1) (2010). *See also* SEN. JUDD GREGG, FINAL S. 1248 COMMITTEE REPORT LANGUAGE: INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2003, S. REP. NO. 108-185, at 43-44 (2003), *available at* <http://www.nasponline.org/advocacy/IDEACommittee.pdf> [hereinafter S. REP. NO. 108-185].

27. 34 C.F.R. § 300.530(b)(1).

28. 20 U.S.C. § 1415(k)(1)(E); *Id.* § 1415(k)(1)(B).

29. LUCY WOOD, IDEA 2004 AND DISCIPLINE: A BEGINNER’S GUIDE 7 (2006), *available at* [www.ldat.org/pdf/IDEA\\_2004\\_Discipline.pdf](http://www.ldat.org/pdf/IDEA_2004_Discipline.pdf).

30. 34 C.F.R. § 300.536.

31. Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,406, 12,616 (Mar. 12, 1999) (to be codified at 34 C.F.R. parts 300 & 303).

The second exception occurs in instances where the disciplinary action is related to alleged violations involving weapons, controlled substances, or serious bodily injury.<sup>32</sup> A manifestation determination does not need to be held before removing a student from school for more than ten days if the student “carries or possesses a weapon . . . ;”<sup>33</sup> “knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance . . . ;”<sup>34</sup> or “. . . has inflicted serious bodily injury upon another person.”<sup>35</sup> In these cases, a student with a disability can be placed in an interim alternative setting for up to forty-five days without “regard to whether the behavior is determined to be a manifestation of the child’s disability. . . .”<sup>36</sup> The Senate Committee on Health, Education, Labor and Pensions (Senate HELP Committee) justified the absence of a manifestation determination before a change in placement in these cases, recognizing the “inherent and immediate dangers connected” with such behavior and the necessity for school personnel to “retain the ability to take swift action to address these situations, to ensure the safety of all students, teachers,

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32. 34 C.F.R. § 300.530(g). *See also* S. REP. NO. 108-185, *supra* note 26, at 44.

33. 20 U.S.C. § 1415(k)(1)(G)(i). For the purposes of IDEA, “[w]eapon has the meaning given the term ‘dangerous weapon’ under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.” Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300.530(i)(4) (2010). Under that statute, “[t]he term ‘dangerous weapon’ means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length.” 18 U.S.C. § 930(g)(2) (2006).

34. 20 U.S.C. § 1415(k)(1)(G)(ii). For the purposes of IDEA, controlled substance “means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c).” 34 C.F.R. § 300.530(i)(1). “Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.” *Id.* § 300.530(i)(2).

35. 20 U.S.C. § 1415(k)(1)(G)(iii). For the purposes of IDEA, “[s]erious bodily injury has the meaning given the term ‘serious bodily injury’ under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.” 34 C.F.R. § 300.530(i)(3). “[T]he term ‘serious bodily injury’ means bodily injury which involves—(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; . . .” 18 U.S.C. § 1365(h)(3)(A)-(D) (2006).

36. 20 U.S.C. § 1415(k)(1)(G).



and other [school] personnel.”<sup>37</sup> The Committee argued that even if the child’s behavior is later determined to be a manifestation of his disability, “it is critical that schools have the flexibility to keep the child out of his regular setting for up to 45 days.”<sup>38</sup> However, even in these cases, schools are required to conduct a manifestation determination in order to discipline a student with a disability to the same extent as any other student (for example, by expulsion).<sup>39</sup>

Barring these exceptions, a manifestation determination hearing must be conducted prior to implementing a disciplinary sanction resulting in a change of educational placement. However, the exceptions in situations involving illegal drugs, weapons, or serious bodily injury only allow a school administrator to change the placement of the child before conducting a manifestation determination, and do not grant the administrator discretion to circumvent the process and unilaterally change the child’s placement.

The process for conducting a manifestation determination review is fairly straightforward. First, a manifestation determination must occur “[w]ithin 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct . . . .”<sup>40</sup> IDEA does not require a manifestation determination to be conducted before scheduling or conducting an expulsion hearing; “rather, the requirement to conduct the manifestation . . . determination is triggered on the date that the decision is made to implement a removal that constitutes a change of placement.”<sup>41</sup> During the manifestation determination proceeding:

the LEA, the parent, and relevant members of the child’s IEP [Individualized Education Program] Team<sup>42</sup> (as determined

37. S. REP. NO. 108-185, *supra* note 26, at 44.

38. *Id.*

39. 20 U.S.C. § 1415(k)(1)(C).

40. 34 C.F.R. § 300.530(e)(1).

41. Redacted letter from Patricia J. Guard, Acting Dir., Office of Special Educ. Programs, U.S. Dep’t of Educ. (Mar. 18, 2005), *available at* [http://www.google.com/url?sa=t&rect=j&q=&esrc=s&source=web&cd=1&ved=0CG0QFjAA&url=http%3A%2F%2Fwww2.ed.gov%2Fpolicy%2Fspccod%2Fguid%2Fidea%2Fletters%2F2005-1%2Fredact031805discip1q2005.doc&ei=S-27T7GiAsSX6QH2tqXVCg&usg=AFQjCNEyv3ewinehGfeYgMuQ4dWw45E-8w&sig2=X\\_qaqi86v99UVoH84dJ\\_DQ](http://www.google.com/url?sa=t&rect=j&q=&esrc=s&source=web&cd=1&ved=0CG0QFjAA&url=http%3A%2F%2Fwww2.ed.gov%2Fpolicy%2Fspccod%2Fguid%2Fidea%2Fletters%2F2005-1%2Fredact031805discip1q2005.doc&ei=S-27T7GiAsSX6QH2tqXVCg&usg=AFQjCNEyv3ewinehGfeYgMuQ4dWw45E-8w&sig2=X_qaqi86v99UVoH84dJ_DQ).

42. Here, IDEA refers to the IEP (Individualized Education Program) Team,

by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine . . . [i]f the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or . . . if the conduct in question was the direct result of the LEA's failure to implement the IEP.<sup>43</sup>

Pursuant to the regulations, if the consensus among the LEA, the parent, and members of the child's IEP Team is that either of the above conditions has been met, the conduct in question "must be determined to be a manifestation of the child's disability."<sup>44</sup> The legislative history of the regulations clarifies the threshold in determining that a child's conduct was a manifestation of his or her disability. "[I]t must be determined that 'the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, and was not an attenuated association, such as low self-esteem, to the child's disability.'"<sup>45</sup>

If it is determined that the conduct was a manifestation of the child's disability, the IEP Team must follow several steps. First, the IEP team must conduct a functional behavioral assessment (FBA) of the child and implement a behavioral intervention plan (BIP).<sup>46</sup> An FBA focuses on "identifying the

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which is defined as "a group of individuals composed of—(i) the parents of a child with a disability; (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment); (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child; (iv) a representative of the local educational agency who—(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general education curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency; (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi); (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (vii) whenever appropriate, the child with a disability." 20 U.S.C. § 1414(d)(1)(B)(i)-(v) (2006).

43. 34 C.F.R. § 300.530(e)(1).

44. *Id.* § 300.530(e)(2).

45. 71 Fed. Reg. 46,540, *supra* note 12, at 46,720 (quoting H. R. CONF. REP. NO. 108-779, at 225 (2004)).

46. 34 C.F.R. § 300.530(f)(1)(i). *See also Manifestation Determination, supra* note 23 ("[I]f a child's misconduct has been found to have a direct and substantial

function or purpose behind a child's behavior" and "involves looking closely at a wide range of child-specific factors" including social, affective, and environmental factors.<sup>47</sup> The U.S. Department of Education asserts that "knowing why a child misbehaves is directly helpful to the IEP Team in developing a BIP that will reduce or eliminate the misbehavior."<sup>48</sup> The IEP Team is not required to conduct an FBA if the LEA completed such an assessment before the behavior that resulted in the change of placement occurred.<sup>49</sup> If a BIP has already been developed,<sup>50</sup> the IEP Team must review and modify it as necessary to address the behavior that resulted in student discipline.<sup>51</sup>

After making this determination, the IEP Team must return the child to the placement from which he or she was removed, "unless the parent and the LEA agree to a change of placement as part of the modification of the [BIP]."<sup>52</sup> However, if it is determined that the child's disability caused the violation of the school code, the "stay put" rule applies,<sup>53</sup> which prohibits a school district from unilaterally changing a child's placement without the permission of the parent.<sup>54</sup> If the LEA, parent, and members of the IEP Team determine that the behavior for which the child is being disciplined was the result of the LEA's failure to accommodate the student's disability,

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relationship to his or her disability, the IEP team will need to immediately conduct a FBA of the child, unless one has already been conducted.").

47. U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON DISCIPLINE PROCEDURES 14 (2009), *available at* [http://idea.ed.gov/object/fileDownload/model/QaCorner/field/PdfFile/primary\\_key/7](http://idea.ed.gov/object/fileDownload/model/QaCorner/field/PdfFile/primary_key/7).

48. *Id.*

49. 34 C.F.R. § 300.530(f)(1)(i).

50. Some children will have undergone an FBA and have a BIP in place prior to the manifestation determination. "[I]n the case of a child whose behavior impedes the child's learning or that of others, [the IEP Team shall] consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. . . ." 20 U.S.C. § 1414(d)(3)(B)(i) (2006). *See also Special Factors in IEP Development*, NICHCY (Sept. 2010), <http://nichcy.org/schoolage/iep/meetings/special-factors>.

51. 34 C.F.R. § 300.530(f)(1)(ii) (2010).

52. *Id.* § 300.530(f)(2).

53. *Id.* § 300.530(b)(1). *See also* S. REP. NO. 108-185, *supra* note 26, at 44.

54. 20 U.S.C. § 1415(j) (2006). The "stay put" rule does not apply when the student has engaged in a behavior that is enumerated in § 1415(k)(1)(G) or if the behavior is determined not to be a manifestation of the student's disability. *See* Ellen M. Chambers, *Stay Put*, SPEDWATCH (Feb. 2008), *available at* <http://www.spedwatch.org/files/Stay-Put.pdf>.

“the LEA must take immediate steps to remedy those deficiencies.”<sup>55</sup>

Alternatively, if, after a manifestation determination has been conducted, it is determined that the behavior that gave rise to the violation of the school code was not a manifestation of the child’s disability, “school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities,” including changes in placement exceeding ten consecutive school days.<sup>56</sup>

Once a manifestation determination is made, the ruling need not be reexamined in light of new information about the child’s disability.<sup>57</sup> IDEA and its pertinent regulations “do not provide for the ‘reopening’ of a manifestation determination review where a subsequent evaluation determines, after the manifestation determination has been made, that the child has an additional disability that is related to the behavior.”<sup>58</sup> However, “the ten-day timeline . . . is not intended to preclude the IEP team from making an appropriate determination that additional evaluations must be completed in order to make a manifestation determination.”<sup>59</sup> However, a child who has not been determined to be eligible for special education and related services under IDEA may assert any of the protections provided for under the regulations if the LEA had constructive knowledge that the child “was a child with a disability before

55. 34 C.F.R. § 300.530(e)(3).

56. *Id.* § 300.530(c). See also *Manifestation Determination*, *supra* note 23 (“In either case of ‘no,’ school personnel have the authority to apply the relevant disciplinary procedures to the child with disabilities in the same manner and for the same duration as the procedures would be applied to a child without disabilities, except—and this is very important—for whatever special education and related services the school system is required to provide the child with disabilities under §300.530(d).”).

57. Letter from Stephanie S. Lee, Dir., Office of Special Educ. Programs, U.S. Dep’t of Educ., to Geoffrey A. Yudien, Legal Counsel for Vt. Dep’t of Educ. (Aug. 1, 2003), available at <http://www2.ed.gov/policy/speeed/guid/idea/letters/2003-2/yudien080103discip2q2003.pdf>.

58. *Id.*

59. *Id.* (“For example, where a student is being reevaluated to determine the existence of an additional disability, such as emotional disturbance, and engages in misbehavior prior to the completion of the evaluations, it may be appropriate for the IEP team to convene the review within the ten-day timeline, but decide to continue the review at a later time in order to consider the results of the completed evaluations.”).

the behavior that precipitated the disciplinary action occurred.”<sup>60</sup> An LEA would be considered to have constructive knowledge of a child’s disability, for example, if a parent expressed concern to supervisory or administrative personnel or a teacher of the child stated in writing “that the child is in need of special education and related services.”<sup>61</sup> The LEA would also have knowledge of a child’s disability if “[t]he parent of the child requested an evaluation of the child”<sup>62</sup> or “[t]he teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.”<sup>63</sup> Otherwise, the LEA would not be considered to have knowledge of the child’s disability and the child “[might] be subjected to the disciplinary measures applied to children without disabilities who engage[d] in comparable behaviors . . . .”<sup>64</sup>

If there is a disagreement as to the outcome of the manifestation determination, the parent or guardian of the child may request a due process hearing through the state educational agency designated to hear such appeals.<sup>65</sup> The specific rules governing the appeals process are determined by state regulations.<sup>66</sup> IDEA does, however, set guidelines about notice,<sup>67</sup> burdens of proof,<sup>68</sup> statutes of limitations,<sup>69</sup> the

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60. 34 C.F.R. § 300.534(a).

61. *Id.* § 300.534(b)(1).

62. *Id.* § 300.534(b)(2).

63. *Id.* § 300.534(b)(3).

64. *Id.* § 300.534(d)(1).

65. *Id.* § 300.532(a).

66. *See e.g.*, WOOD, *supra* note 29, at 11.

67. 20 U.S.C. § 1415(b)(7)(A)-(B) (2006). The requesting party must file a notice including the name and address of the child and the name of her school, a description of the problem and facts relating to the problem, and a proposed resolution of the problem. *Id.* § 1415(b)(7)(a)(ii). The due process complaint notice shall be deemed to be sufficient unless the non-complaining party within fifteen days “notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).” *Id.* § 1415(c)(2)(A); *Id.* § 1415(c)(2)(C). The non-complaining party must respond within ten days and include “(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint; (bb) a description of other options that the IEP Team considered and the reasons why those options were rejected; (cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (dd) a description of the factors that are relevant to the agency’s proposal or refusal.” *Id.* § 1415(c)(2)(B)(i)(I). The hearing officer shall make a determination “on the face of the notice of whether the notification meets the requirements” within five days of receipt of the notification and shall immediately

ability to bring a civil action,<sup>70</sup> and attorney's fees.<sup>71</sup> During the pendency of the appeal, the child would remain in the interim alternative education setting for "stay put" purposes.<sup>72</sup> In instances where the student's alleged conduct poses an immediate danger to himself or others, the parent may request an expedited process by which a hearing must occur within twenty days of the request and a determination made within ten days of the hearing.<sup>73</sup>

### *C. Continuation of Services and the Dangerousness Exception*

Under IDEA, LEAs have an obligation to provide educational services to all students with disabilities who are removed from school for more than ten days.<sup>74</sup> Any services provided after the ten-day period must enable the child "to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP."<sup>75</sup> Likewise, a student with a disability who has been expelled from school has a continuing right to receive a free appropriate public education (FAPE).<sup>76</sup> Therefore, an LEA can never completely terminate its services to a student with a disability, even if the student is

notify the parties in writing of the determination and, in some cases, may permit amendment of the complaint. *Id.* § 1415(c)(2)(D)-(E). An issue not addressed in the complaint may not be raised at the hearing. *Id.* § 1415(c)(2)(B).

68. *Id.* § 1415(k)(3)(B)(i). The burden of persuasion falls on the party seeking relief. *See Schaffer v. Weast*, 546 U.S. 49 (2005).

69. 20 U.S.C. § 1415(b)(6)(B). The statute of limitations is two years from the date the party knew or should have known about the events forming the basis for the complaint unless state law speaks specifically to the matter.

70. *Id.* § 1415(i)(2).

71. A court may award fees to a parent who prevails in a civil suit. *Id.* § 1415(i)(3)(B). Fees may also be assessed against a parent's attorney when the complaint is frivolous, unreasonable, without foundation, or against the parents or their attorney if the litigation is conducted for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. *Id.* § 1415(i)(3)(B)(i)(I)-(II).

72. *Id.* § 1415(k)(4)(A). The child remains in the alternative setting until the hearing officer issues a decision or the time period expires, whichever happens first, unless the parties otherwise agree. *See also* 34 C.F.R. § 300.533 (2010).

73. 20 U.S.C. § 1415(k)(4)(B).

74. *Id.* § 1415(k)(1)(D)(i).

75. *Id.* *See also* 34 C.F.R. § 300.530(d)(1)(i).

76. 20 U.S.C. § 1412(a)(1)(A).

permanently removed from school through the proper procedures.

Additionally, there is no dangerousness exception to the “stay put” rule<sup>77</sup> and, therefore, an LEA is prohibited from unilaterally changing the placement of a child with a disability based on misconduct.<sup>78</sup> If an LEA believes that maintaining the current placement of a child is “substantially likely to result in injury to the child or others, [it] may appeal the decision by requesting a hearing.”<sup>79</sup> If the hearing officer agrees with the LEA and determines that “maintaining the current placement of the child is substantially likely to result in injury to the child or to others,” the hearing officer may order a change of placement to an appropriate interim alternative educational setting for not more than forty-five school days.<sup>80</sup> An LEA may also obtain a temporary injunction to prevent a dangerous child with a disability from attending school.<sup>81</sup> But the presumption in favor of maintaining the child’s current placement “can [be] overcome only by showing that [to do so] is substantially likely to result in injury either to himself or herself, or to others.”<sup>82</sup>

### III. CURRENT LAW, POLICY, AND PRACTICE IN HIGHER EDUCATION

#### *A. Disability in Higher Education, Generally*

While there are no federal statutes or regulations relating specifically to the discipline of students with disabilities in higher education, there are several federal statutes that provide general protections for students with disabilities at colleges and universities. Because IDEA only applies to students in K-12 education, institutions of higher education draw their definitions of “disability” from Section 504 of the Rehabilitation Act of 1973 (Section 504)<sup>83</sup> and the Americans

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77. *Honig v. Doe*, 484 U.S. 305, 325 (1988) (“Conspicuously absent from § 1415(e)(3), however, is any emergency exception for dangerous students.”).

78. *Id.* at 308.

79. 34 C.F.R. § 300.532(a).

80. *Id.* § 300.532(b)(2)(ii).

81. *Honig*, 484 U.S. at 327.

82. *Id.* at 328.

83. 29 U.S.C. § 701 (2006).

with Disabilities Act (ADA).<sup>84</sup>

*1. Section 504 of the Rehabilitation Act of 1973*

Section 504 of the Rehabilitation Act of 1973 (Section 504) states that “[n]o otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .”<sup>85</sup> Under Section 504, “the term ‘program or activity’ means all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . .”<sup>86</sup> In addition to protecting students with disabilities from discrimination in the college admissions process,<sup>87</sup> the regulations pertaining to Section 504 also protect students with disabilities from discrimination in “any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services . . . .”<sup>88</sup> Section 504 covers all colleges and universities that accept federal funding, whether private, public, or religiously affiliated,<sup>89</sup> leaving very few institutions to which it does not apply.<sup>90</sup>

84. 42 U.S.C. § 12101 (2006).

85. 29 U.S.C. § 794(a).

86. *Id.* § 794(b)(2)(A).

87. 34 C.F.R. § 104.42 (2010) (“Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment . . .”).

88. *Id.* § 104.43(a).

89. See *Questions and Answers on Disability Discrimination Under Section 504 and Title II*, U.S. DEP’T OF EDUC., OFF. CIV. RTS., <http://www2.ed.gov/about/offices/list/ocr/qa-disability.html> (last modified Nov. 17, 2005). See also DEBORAH LEUCHOVIOUS, ADA Q&A . . . THE ADA, SECTION 504 & POSTSECONDARY EDUCATION 1 (2003), available at <http://www.pacer.org/parent/php/PHP-c51g.pdf> (“If a school receives federal dollars—regardless of whether it is private or public—it is also covered by the regulations of Section 504 of the Rehabilitation Act requiring schools to make their programs accessible to qualified students with disabilities.”).

90. There are only a handful of institutions that fall into this category—perhaps most famously Grove City College in Pennsylvania and Hillsdale College in Michigan. See *GCC Financial Aid*, GROVE CITY C. (2012),



It is important to note that, unlike in K-12 education, there is no requirement under Section 504 compelling institutions of higher education to identify students with disabilities.<sup>91</sup> Thus, in higher education, the onus is on the student to identify herself to college or university personnel as eligible for protection under Section 504.<sup>92</sup>

## 2. *Americans with Disabilities Act of 1990*

Under the Americans with Disabilities Act of 1990 (ADA), “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>93</sup> For the purposes of the ADA, a “qualified individual” is:

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of

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[http://www.gcc.edu/GCC\\_Financial\\_Aid.php](http://www.gcc.edu/GCC_Financial_Aid.php) (“The College does not accept any direct or indirect Federal financial aid.”); *Frequently Asked Questions*, HILLSDALE C. (2009), [http://www.hillsdale.edu/admissions/faq/faq\\_list.asp?iSectionID=1&iGroupID=45&iQuestionID=108](http://www.hillsdale.edu/admissions/faq/faq_list.asp?iSectionID=1&iGroupID=45&iQuestionID=108) (“To avoid the hassles of government control, Hillsdale College announced its decision to end participation in all federal financial aid programs in 1985. In 2007, Hillsdale announced that it would no longer accept State of Michigan taxpayer subsidies earmarked for student financial aid, thereby making the College completely independent of taxpayer support.”). A college is considered to accept federal funding if even one student receives a federal grant or loan. See *Grove City Coll. v. Bell*, 465 U.S. 555, 573-74 (1984) (“We conclude that the receipt of BEOG[’s] [Basic Educational Opportunity Grants] [sic] by some of Grove City’s students does not trigger institution-wide coverage under Title IX. In purpose and effect, BEOGs represent federal financial assistance to the College’s own financial aid program, and it is that program that may properly be regulated under Title IX.”).

91. Section 104.32 of the regulations provides for the location of children with disabilities in preschool, elementary, and secondary education. “A recipient that operates a public elementary or secondary education program or activity shall annually: (a) Undertake to identify and locate every qualified handicapped person residing in the recipient’s jurisdiction who is not receiving a public education; and (b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient’s duty under this subpart.” 34 C.F.R. § 104.32(a)-(b).

92. See LEUCHOVIUS, *supra* note 89, at 3 (“If you do not require any accommodations, you can choose to keep this information private. If you do need accommodations because of your disability, however, you must disclose in order to receive them. A school cannot provide any service, modification or accommodation when it does not know one is required. It is a student’s responsibility to make their needs known in advance.”).

93. 42 U.S.C. § 12132 (2006).

services or the participation in programs or activities provided by a public entity.<sup>94</sup>

The term “disability” is defined as “a physical or mental impairment that substantially limits one or more major life activities of such individual; . . . a record of such an impairment; or . . . being regarded as having such an impairment . . . .”<sup>95</sup> Learning is included under the ADA as a major life activity.<sup>96</sup> The regulations associated with Title II of the ADA apply to any State or local government and “[a]ny department, agency, special purpose district, or other instrumentality of a State or States or local government,” including public colleges and universities.<sup>97</sup> Private colleges and universities are covered by Title III of the ADA.<sup>98</sup> However, the ADA does not apply to colleges and universities controlled by religious entities and, therefore, students enrolled in these institutions are not covered.<sup>99</sup>

### *B. Identifying Students with Disabilities in Higher Education*

Institutions of higher education do not have a duty to identify students with disabilities.<sup>100</sup> Students in higher

94. *Id.* § 12131(2).

95. *Id.* § 12102(1)(A)-(C).

96. 29 C.F.R. § 1630.2(i) (2010).

97. 42 U.S.C. § 12131. *Id.* § 35.104; *See also* LEUCHOVIUS, *supra* note 89, at 1 (“Title II of the ADA covers state funded schools such as universities, community colleges and vocational schools.”).

98. 42 U.S.C. § 12181(7)(J) (“The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce . . . (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education”); *See* 28 C.F.R. § 36.104 (2010) (“Place of public accommodation means a facility operated by a private entity whose operations affect commerce and fall within at least one of the following categories . . . (10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education. . . .”); *See also* LEUCHOVIUS, *supra* note 89, at 1 (“Title III of the ADA covers private colleges and vocational schools.”).

99. 42 U.S.C. § 12187 (“The provisions of [the ADA] shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 . . . or to religious organizations or entities controlled by religious organizations, including places of worship.”).

100. *See, e.g.*, Arne Duncan & Russlynn Ali, *Transition of Students With Disabilities To Postsecondary Education: A Guide for High School Educators*, U.S. DEPT OF EDUC., OFF. CIV. RTS. (Mar. 2011), <http://www2.ed.gov/about/offices/list/ocr/transitionguide.html> (“Institutions do not have a duty to identify students with disabilities. Students in institutions of postsecondary

education are responsible for notifying college or university staff of their disability if they need any accommodations.<sup>101</sup> Therefore, students who do not require accommodations may, if they choose, keep information about their disability status private.<sup>102</sup>

Colleges and universities may require specific documentation as verification of a student's disability before certain accommodations are made.<sup>103</sup> Generally, schools require documentation from a trained professional that diagnoses the disability, describes how the condition limits a major life activity, and supports the student's request for specific accommodations.<sup>104</sup> Once the student has "registered" his disability, he is eligible for services under Section 504 and the ADA.

### *C. Disciplinary Authority and Procedures, Generally*

Institutions of higher education have broad authority to set standards for student behavior, including standards of academic performance and social behavior.<sup>105</sup> This authority may extend to student behavior off-campus "when relevant to any lawful mission, process, or function of the institution."<sup>106</sup> Furthermore, "the institution is not limited to the standards or

education are responsible for notifying institution staff of their disability should they need academic adjustments. High schools, in contrast, have an obligation to identify students within their jurisdiction who have a disability and who may be entitled to services.").

101. *Id.*

102. LEUCHOVIVUS, *supra* note 89, at 3.

103. *Id.* at 2.

104. *See, e.g.*, STUDENT DISABILITY SERVS., U. IOWA, REQUIREMENTS FOR PROFESSIONAL REPORTS DOCUMENTING ACCOMMODATION NEEDS OF STUDENTS WITH AD/HD (2009), available at <http://www.uiowa.edu/~sds/documents/ADHD-guidelines.pdf>. *See also* *Documentation Guidelines*, U. IOWA, <http://www.uiowa.edu/~sds/documentaionguidelines.shtml> (last visited May 29, 2012); *Disability Services FAQ*, CURRY C., <http://www.curry.edu/resources-and-services/student-services/disability-services/disability-services-faq.html> (last visited May 29, 2012); *Access Center*, AUGSBURG C., <http://www.augsburg.edu/accesscenter/> (last visited May 29, 2012); *Documentation Guidelines*, NE. U., <http://northeastern.edu/drc/gettingstarted/docguidelines.html> (last visited May 29, 2012).

105. General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education, 45 F.R.D. 133, 145 (W.D. Mo. 1968) ("In the field of discipline, scholastic and behavioral, an institution may establish any standards reasonably relevant to the lawful missions, processes, and functions of the institution.").

106. *Id.*

the forms of criminal laws.”<sup>107</sup> Accordingly, codes of student conduct typically address both social and academic misconduct. Examples of social misconduct may include alcohol and drug violations, issues of compliance with college or university officials, hazing, and civility to other students,<sup>108</sup> while standards of academic misconduct would govern cheating, plagiarism, or other acts of academic dishonesty.<sup>109</sup>

Student conduct systems at public institutions must be designed so as to provide due process to the charged student if the possible sanction is a temporary or permanent separation from the institution.<sup>110</sup> However, “due process in the context of academic discipline does not necessarily require students be given a list of witnesses and exhibits prior to the hearing, provided the students are allowed to attend the hearing itself.”<sup>111</sup> Moreover, institutions of higher education are not required to allow charged students to have a lawyer present during disciplinary hearings.<sup>112</sup>

107. *Id.*

108. *See, e.g.*, AUGSBURG C., AUGSBURG COLLEGE STUDENT GUIDE 5-12, 29-35, available at <http://www.augsburg.edu/studentguide/documents/studentguide.pdf> (last modified Aug. 16, 2011); CURRY C., STUDENT HANDBOOK SPRING 2012 52-74 (2012), available at [http://www.curry.edu/Documents/PDF/Student%20Services/Handbook\\_2012-v8.pdf](http://www.curry.edu/Documents/PDF/Student%20Services/Handbook_2012-v8.pdf).

109. *See, e.g.*, AUGSBURG C., *supra* note 108, at 2-5; CURRY C., COURSE CATALOG 2011-2012 20-26 (2011), available at [http://www.curry.edu/Documents/PDF/Academic/Undergraduate\\_Course\\_Catalog.pdf](http://www.curry.edu/Documents/PDF/Academic/Undergraduate_Course_Catalog.pdf); *Community Standards*, U. CONN., [http://www.community.uconn.edu/student\\_code\\_appendix.html](http://www.community.uconn.edu/student_code_appendix.html) (last visited May 29, 2012) [hereinafter U. CONN.].

110. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961) (“[D]ue process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.”).

111. *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 23 (D. Me. 2005) (citing *Nash v. Auburn Univ.*, 812 F.2d 655, 662-63 (11th Cir. 1987)).

112. *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (“Even if a student has a constitutional right to *consult* counsel . . . we do not think he is entitled to be represented in the sense of having a lawyer who is permitted to examine or cross-examine witnesses, to submit and object to documents, to address the tribunal, and otherwise to perform the traditional function of a trial lawyer. To recognize such a right would force student disciplinary proceedings into the mold of adversary litigation.”). It is also important to note that an incident that is the subject of a school disciplinary hearing may be the subject of a criminal court proceeding, as well. In these cases, the college or university need not defer or cancel the judicial proceedings pending the outcome of criminal trials in order to avoid “double jeopardy” or self-incrimination. *See Grossner v. Trs. of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y.

Many colleges and universities follow similar processes in adjudicating student discipline cases. The student conduct process is typically initiated when a member of the college or university community identifies a student as allegedly having violated the code of student conduct.<sup>113</sup> These complaints are usually made in writing to the appropriate office, sometimes referred to as the office of student conduct, judicial affairs, or community standards.<sup>114</sup> Alternatively, some schools filter student conduct issues through the Dean of Students.<sup>115</sup>

Colleges and universities typically classify violations of the code of student conduct as fitting one of three categories: academic violations, violations of college or university policy, or violations of residence hall policies.<sup>116</sup> Each category of violation may have a specific procedural process, and may include an individual administrative hearing with a college or university official<sup>117</sup> or review by a board of the accused student's peers.<sup>118</sup> This article will focus on the individual administrative hearing process for violations of college or university policy, excluding academic misconduct.<sup>119</sup>

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1968); *see also* *Paine v. Bd. of Regents*, 355 F. Supp. 199 (W.D. Tex. 1972). Furthermore, courts have rejected the notion that the outcome of a college disciplinary proceeding would affect the fairness of a criminal trial. *Nzuve v. Castleton State Coll.*, 335 A.2d 321 (Vt. 1975). However, if an institution chooses to proceed with its judicial hearing while a criminal case is pending, it may be required to allow the charged student to have a lawyer present. *See Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978). Therefore school administrators may decide to delay campus judicial proceedings until a criminal trial is complete.

113. *See* AUGSBURG C., *supra* note 108, at 12-14; CURRY C., *supra* note 108, at 43-51; *Administrative Hearings*, NE. U. OFF. STUDENT CONDUCT & CONFLICT RESOL., <http://www.northeastern.edu/osccr/disciplinary/adminhearings.html> (last visited May 29, 2012); U. ARIZ., STUDENT DISCIPLINARY PROCEDURES (2009), *available at* <http://deanofstudents.arizona.edu/sites/deanofstudents.arizona.edu/files/studentdisciplinaryprocedures.pdf>; U. CONN., *supra* note 109, at 6-10; *Judicial Procedure for Alleged Violations of the Code of Student Life (2010-11 Academic Year)*, U. IOWA (Aug. 21, 2010), <http://dos.uiowa.edu/judicial-procedure-for-alleged-violations-of-the-code-of-student-life/> [hereinafter U. IOWA].

114. *See* CURRY C., *supra* note 108, at 43; U. CONN., *supra* note 109, at 1.

115. *See, e.g.*, U. ARIZ., *supra* note 113; U. IOWA, *supra* note 113.

116. *See, e.g.*, AUGSBURG C., *supra* note 108, at 12; CURRY C., *supra* note 108, at 43-51.

117. *See, e.g.*, AUGSBURG C., *supra* note 108, at 12-13; CURRY C., *supra* note 108, at 43-51.

118. *See, e.g.*, NE. U., GUIDE TO THE STUDENT CONDUCT PROCESS 5, *available at* [http://www.northeastern.edu/osccr/pdfs/Guide\\_to\\_the\\_Student\\_Conduct\\_Process.pdf](http://www.northeastern.edu/osccr/pdfs/Guide_to_the_Student_Conduct_Process.pdf).

119. The concept of addressing disability in instances of alleged academic violations of the student code of conduct was addressed by the Supreme Court of Vermont in *Bhatt v. Univ. of Vt.*, 958 A.2d 637 (Vt. 2008). In *Bhatt*, a student falsified

After a complaint is filed, the student is notified in writing of the alleged violation of the code of student conduct.<sup>120</sup> The student then schedules a conduct meeting with the appropriate adjudicator or hearing officer.<sup>121</sup> Depending on the particular philosophy of student conduct to which the university subscribes, meetings may be designed to be educational rather than punitive and focus on student learning rather than student punishment.<sup>122</sup> During the meeting, the hearing officer shares the basis of the charges with the student and generally asks questions relating to the incident and the student's understanding of college or university policy.<sup>123</sup> The hearing

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an evaluation for a surgical rotation allegedly completed at another institution. Accepting Bhatt's claim that the incident was isolated, the University placed him on probation. However, the University learned at a later date that Bhatt had falsified other documents relating to his admission, including an undergraduate diploma. During a subsequent hearing relating to this behavior, Bhatt stated that he had Tourette's syndrome and the behavior was a result of a related obsessive behavior disorder. Despite Bhatt's disclosure, the University Committee on Fitness voted to dismiss Bhatt and he later filed suit alleging that the University did not take his disability into account during the sanctioning process. The court recognized that this case dealt with "the decisions of an academic institution about the ethical and academic standards applicable to its students" and "accord[ed] deference to the academic institution in making [such] judgments." *Id.* at 642 (citing *Falcone v. Univ. of Minn.*, 388 F.3d 656, 659 (8th Cir. 2004); *Mershon v. St. Louis Univ.*, 442 F.3d 1069, 1078 (8th Cir. 2006); *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1047-48 (9th Cir. 1999)). Additionally, the court recognized that the University was acting for "multiple purposes" in dismissing Bhatt, including enforcing academic standards, protecting patients being treated by medical students, maintaining trust between students and others, and producing students who can go on to residencies and a profession practicing medicine. *Id.* The decision also stresses that the case is one of "egregious misconduct" including lying, falsification of documents, and failure to meet academic requirements and attempting to cover up the failure. *Id.* at 644. The court supported Bhatt's dismissal, but noted that the disclosure of his disability occurred in the second disciplinary hearing and only as a means of seeking mitigation for punishment and that Bhatt had "never requested that the College take any steps to accommodate his disability, at least . . . prior to the disciplinary action." *Id.* The court clarified that the onus is placed on the student to disclose such disability and seek accommodation "before the situation deteriorates to the point of misconduct. . . ." *Id.* at 645. The court conceded, however, that Bhatt may have had a persuasive "argument if he had raised his disability and the need for an accommodation during or after the first disciplinary proceeding." *Id.*

120. See, e.g., *CURRY C.*, *supra* note 108, at 43-51; *U. IOWA*, *supra* note 113.

121. *Id.*

122. See, e.g., *Sanctions*, NE. U. OFF. STUDENT CONDUCT & CONFLICT RESOL., <http://www.northeastern.edu/osccr/disciplinary/sanctions.html> (last visited May 30, 2012).

123. See, e.g., *AUGSBURG C.*, *supra* note 108, at 12; *CURRY C.*, *supra* note 108, at

officer, after weighing the information presented by the complainant and the accused student, makes a determination based on a preponderance of evidence as to whether the student was in violation of the code of student conduct.<sup>124</sup> After making such a determination, the hearing officer typically considers appropriate sanctions,<sup>125</sup> which may range from a warning to suspension or expulsion and could include removal from institution-provided housing. Hearing outcomes and notification of sanctions are usually provided in writing.<sup>126</sup>

Many colleges and universities have taken a proactive stance in addressing student conduct issues before situations escalate to the level of disciplinary action by establishing student-concern teams comprised of staff from various institutional departments. Representation on these teams varies from institution to institution, but typically includes Public Safety or Campus Police, Counseling Services, Residence Life and Housing, and Judicial Affairs. Many institutions also include representatives from Disability Services in these meetings.<sup>127</sup> The goal of establishing student-concern teams is to identify students with academic, behavioral, and social issues.<sup>128</sup>

Identification of students may arise in a variety of situations, including notification from a faculty member or academic advisor that a student has missed many classes and is not doing well academically; expressions of concern from residence hall staff that a student is not fitting in socially;

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43-51; U. IOWA, *supra* note 113.

124. U. IOWA, *supra* note 113. *See also* U. ARIZ., *supra* note 113, at 6 (“[T]he University Representatives will have the burden of showing that a violation of the Student Code of Conduct was more likely than not to have been committed by the student.”); AUGSBURG C., *supra* note 108, at 12.

125. *See, e.g.*, AUGSBURG C., *supra* note 108, at 12; CURRY C., *supra* note 108, at 43-51; U. IOWA, *supra* note 113.

126. *See, e.g., Id.*

127. E-mail from Cathy Cocks, Dir. of Cmty. Standards, Univ. of Conn., to author (Jan. 26, 2011, 15:27 EST) (on file with author); E-mail from Ann Garvey, Vice President of Student Affairs, Augsburg Coll., to author (Feb. 2, 2011, 09:11 EST) (on file with author); E-mail from Erica Humphrey, Dir. of Judicial Affairs, Curry Coll., to author (Feb. 1, 2011, 18:56 EST) (on file with author); Telephone Interview with Stephen Linhart, Dir. of Judicial Affairs, Univ. of Colo. Colo. Springs (Feb. 2, 2011); E-mail from Rosie McSweeney, Dir. of Student Conduct & Conflict Resolution Servs., American Univ., to author (Jan. 26, 2011, 15:08 EST) (on file with author).

128. *See* E-mail from Cathy Cocks, *supra* note 127; E-mail from Ann Garvey, *supra* note 127; E-mail from Erica Humphrey, *supra* note 127; E-mail from Rosie McSweeney, *supra* note 127.

involvement of the student in an alleged violation of the code of student conduct; or notification that the student is experiencing an emotional trauma, such as a death in the family.<sup>129</sup> Once a concern is raised about a student, the team typically meets to look into the situation and determine if more than one area of the student's life is affected, and subsequently devises a plan identifying who should reach out to the student and in what ways.<sup>130</sup> Student information in student concern meetings can be shared in a variety of ways. Some schools share information freely based on the philosophy that issues presented in the meetings are shared on a need-to-know basis in order to properly assess the student's situation and address the issues.<sup>131</sup> If information is gathered outside of the committee, only select information about the particular student is shared.<sup>132</sup>

#### *D. Disciplinary Processes for Students with Disabilities*

Unlike children in K-12 education, disability status is not considered in higher education disciplinary processes and, therefore, students with disabilities are not shielded from discipline because they are able to show that the behavior was related to their disability.<sup>133</sup> Students with disabilities in higher education may, therefore, be disciplined to the same extent as any other student, up to and including dismissal, regardless of whether or not the offending behavior was a manifestation of their disability.<sup>134</sup> Most schools do not set

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129. See E-mail from Erica Humphrey, *supra* note 127.

130. *Id.*

131. *Id.*

132. *Id.* For example, if the student concern team wanted to verify that a student has been attending classes, the academic representative would contact the faculty members asking about that narrow issue, but not giving any other specific information. The team may also sometimes ask the residence life staff member responsible for the student's living community to check on a student or ask what she knows or has observed about a student. There is not always a need to elaborate on why the team is asking for information.

133. Stephen B. Thomas, *College Students and Disability Law*, LD ONLINE (2000), <http://www.ldonline.org/article/6082/>.

134. See *Tylicki v. St. Onge*, 297 F. App'x 65, 67 (2d Cir. 2008) (Student's "requested accommodation—a manifestation hearing as contemplated by the IDEA—[was] not reasonable, given that the IDEA does not apply to [students in higher education] and neither the ADA nor the Rehabilitation Act require such a procedure. In



forth separate disciplinary policies or procedures in relation to students with disabilities. More importantly, colleges and universities do not typically affirmatively identify students with disabilities in student conduct situations.<sup>135</sup>

However, in certain situations students may be identified as having a disability in an incident report or may self-identify as having a disability during the course of an incident.<sup>136</sup> There does not seem to be a consensus in the field as to whether this requires any follow-up on the part of student conduct offices. At American University, for example, the Director of Student Conduct does not verify whether a student is registered with the Disability Support Services office or Academic Support Services office if such a disclosure occurs.<sup>137</sup> In contrast, at the University of Connecticut, if such a disclosure occurs at any point during the conduct process, the student is referred to the Center for Students with Disabilities.<sup>138</sup>

In instances where students with disclosed disabilities are involved in a student conduct issue, institutions may or may not consult with disability services. For example, student conduct at American University consults with disability services throughout the investigatory, adjudicatory, and sanctioning processes.<sup>139</sup> Other institutions, such as Augsburg College, only consult with disability services if a student brings an individual from either the disability services or counseling center into the disciplinary process by request.<sup>140</sup> Other colleges and universities have very limited contact between

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other words, the ADA and the Rehabilitation Act permit [the institution] to discipline a student even if the student's misconduct is the result of disability."); *Robinson v. Green River Cmty. Coll.*, 2010 WL 3947493 (W.D. Wash. Oct. 7, 2010) (Student asserted that her suspension following disruptive conduct on campus was discriminatory based on her mental illness. Summary judgment was granted to the college, dismissing the ADA claims); *Fedorov v. Bd. of Regents for Univ. of Ga.*, 194 F. Supp. 2d 1378 (S.D. Ga. 2002) (Student dismissed by state university's dental school for drug abuse brought suit alleging discrimination and constitutional violations. On defendant's motion for summary judgment, the court held that dismissal of student did not violate Rehabilitation Act).

135. See E-mail from Ann Garvey, *supra* note 127; E-mail from Erica Humphrey, *supra* note 127; E-mail from Cathy Cocks, *supra* note 127.

136. E-mail from Rosie McSweeney, *supra* note 127.

137. *Id.*

138. E-mail from Cathy Cocks, *supra* note 127.

139. E-mail from Rosie McSweeney, *supra* note 127.

140. E-mail from Ann Garvey, *supra* note 127.

student conduct and disability services.<sup>141</sup>

Some institutions include provisions in their procedures for students to request accommodations in student conduct hearings.<sup>142</sup> For example, The University of Connecticut has a provision in its code of student conduct specifically addressing accommodations for students with disabilities.<sup>143</sup> The code applies the ADA definition of a person with a disability and states that in order to request accommodation in the conduct process, the student must follow the appropriate process through the Center for Students with Disabilities.<sup>144</sup> The code also provides that “[r]easonable accommodations depend upon the nature and degree of severity of the documented disability” and, while “priority consideration” will be given to the specific accommodation requested by the student, there is no guarantee that “a particular accommodation must be granted if it is deemed not reasonable and other suitable techniques are available.”<sup>145</sup>

#### IV. ADOPTING POLICIES MIRRORING IDEA IN THE FIELD OF HIGHER EDUCATION

Because institutions of higher education have the power to create and implement policies and procedures relating to student discipline, there is no bar on creating a policy that mirrors the procedural safeguards set out in IDEA.<sup>146</sup> While there are strong policy considerations favoring adopting such policies in the field of higher education, many practitioners raise concerns about the scope and practical application of implementation.

##### *A. Arguments in Support of Adopting Policies Mirroring IDEA*

There are several viable arguments in support of adopting procedures in the field of higher education similar to those set out in IDEA. The primary argument is one in favor of taking a

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141. E-mail from Erica Humphrey, *supra* note 127.

142. E-mail from Cathy Cocks, *supra* note 127.

143. U. CONN., *supra* note 109, at 9-10.

144. *Id.* at 9.

145. *Id.* at 10.

146. *See supra* Part III.C.

proactive stance on discipline issues involving students with disabilities. The intent of such policies would be to protect students with disabilities from unnecessary disciplinary sanctions. By implementing procedures to determine whether a student's behavior is directly related to his disability, colleges and universities could intervene and actively educate the student about the relationship between his disability and community standards of behavior. Second, implementing such a procedural safeguard would ensure that students with disabilities are not deprived of any accommodations available under the ADA or Section 504. Because assuring that students with disabilities are afforded due process may be a concern when colleges and universities are developing policies and procedures, adopting the procedural safeguards set forth in IDEA would eliminate any question as to whether disciplinary procedures comply with these requirements.

### *B. Arguments Against Adopting Policies That Mirror IDEA*

One compelling argument against adopting policies that specifically protect students with disabilities in higher education disciplinary procedures is that, unlike in K-12 education, the obligation to provide access to a "free appropriate public education" (FAPE) does not apply in higher education.<sup>147</sup> Therefore, colleges and universities are not required to provide any protections to students with disabilities beyond what is required by the ADA and Section 504 as applicable to individual institutions. In short, the thought is that because such procedures are not required, there is no compelling argument as to why policies mirroring IDEA should be adopted in higher education. Second, many administrators see the adoption of policies like those laid out in IDEA as a logistical nightmare, citing the need for uniformity in standards of behavior, complication of the student discipline process, disclosure requirements under the Family Educational Rights and Privacy Act (FERPA), and extant difficulties in

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147. It is important to note, however, that K-12 education is a right protected only by state constitutions, not the Federal Constitution. Because IDEA is Spending Clause legislation, Congress could choose to intercede in the realm of higher education at some future point to link acceptance of federal funding to policies providing specific procedural safeguards for students with disabilities. See, e.g., *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006).

managing the large caseload of judicial offices.<sup>148</sup> Third, other professionals see the student conduct process as a means through which students with disabilities might strengthen their self-advocacy skills, and assert that affirmatively identifying students or instituting procedural safeguards, such as the manifestation determination, would deprive the student of an important educational opportunity.<sup>149</sup>

## V. POLICY PROPOSALS AND CONSIDERATIONS

If a student were to qualify for protection under a policy adopted specifically to protect students with disabilities in student conduct situations within higher education, including procedural safeguards mirroring those in IDEA, he or she would thereby be entitled to a “manifestation determination” similar to that set forth in IDEA. Any such policy should pertain only to a student: (1) who has previously been identified as having a disability and registered for an accommodation with the institution; (2) has allegedly violated the code of student conduct in such a manner which could result in removal from school;<sup>150</sup> and (3) whose alleged offense does not involve carrying or possessing a weapon,<sup>151</sup> knowingly using or possessing illegal drugs, selling or soliciting the sale of a controlled substance,<sup>152</sup> or inflicting serious bodily injury upon another person.<sup>153</sup> Such a policy would require that the

148. See, e.g., E-mail from Cathy Cocks, *supra* note 127; E-mail from Rosie McSweeney, *supra* note 127.

149. E-mail from Erica Humphrey, *supra* note 127.

150. The definition of what constitutes a “removal” might vary from institution to institution based on class attendance policies. A removal in higher education should be defined as a separation that would result in a student missing more class meeting periods than would be allowed by the institution’s absence policies. There would be no need to conduct a manifestation determination for a suspension totaling fewer than the number of days which are allowed as excused absences by school policy. For example, if the institution generally allows four unexcused absences from a course before a failing grade is issued, a manifestation determination would not need to be conducted until this threshold was reached.

151. The term “weapon” would be given the same meaning as in 18 U.S.C. § 930(g)(2) (2006). See *supra* note 33.

152. The term “controlled substance” would be given the same meaning as in 34 C.F.R. § 300.530(i)(1) (2010). See *supra* note 34. The term “illegal drug” would be given the same meaning as *Id.* § 300.530(i)(2). See *supra* note 34.

153. The term “serious bodily injury” would be given the same meaning as 18 U.S.C. § 1365(h). See *supra* note 35.

student register his or her disability with the school prior to the occurrence of any violation of the code of student conduct, and should also expressly prohibit the student from raising the disability as an affirmative defense in student conduct hearings. The narrow scope of application would allow schools to maintain standards of conduct for all students, regardless of disability, in instances involving weapons, controlled substances, and violent behavior. Framing a policy in this way would comport with many institutions' philosophies that such infractions pose an immediate threat to the school community and would potentially fall within many schools' zero-tolerance policies.

Based on research gathered in connection with this article, most school administrators advocate against instituting procedural safeguards in disciplinary processes for students with disabilities in higher education, generally preferring the processes their institutions currently employ. Despite this pervasive attitude in the field, colleges should consider adopting a procedural safeguard similar to the manifestation determination laid out in IDEA if for no other reason than it would ensure due process for students with disabilities throughout the student conduct process. However, there are several issues that should be considered before implementation of such a policy.

#### *A. Disability Discrimination and Student Discipline*

The ADA and Section 504 prohibit discrimination on the basis of disability in all aspects of an educational program or activity.<sup>154</sup> This prohibition extends to the student conduct process. To ensure that students with disabilities are appropriately accommodated in the student discipline process, any student conduct policies developed should include language that gives the institution "flexibility to take actions separate from the regular discipline process and procedures to deal with situations that involve issues of . . . disabilities . . ." <sup>155</sup> Including express language in institutional policies that provides this flexibility would allow for administrators to

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154. Miriam J. McKendall, *How to Navigate the Intersection of Student Disability and Discipline Issues*, CHRON. HIGHER EDUC., Apr. 30, 2010, available at <http://chronicle.com/article/How-Should-Colleges-Navigat/65233/>.

155. *Id.*

deviate from written processes and procedures without being seen as giving favorable or preferential treatment to students with disabilities.

*B. Family Educational Rights and Privacy Act (FERPA) and Disclosure*

Many institutions struggle with the question of how and to what extent to share information about students in disciplinary proceedings, specifically citing potential violations of FERPA.<sup>156</sup> It is therefore useful to examine what exactly FERPA does and does not allow in terms of information sharing and disclosure.

FERPA prohibits “the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization . . . .”<sup>157</sup> Once a student reaches the age of eighteen, or “is attending an institution of postsecondary education,” the student is able to give consent for disclosures.<sup>158</sup> Consent is required in all but a few limited circumstances. One exception to the consent requirement is a disclosure made to “other school officials . . . within the educational institution . . . who have . . . legitimate educational interests” in the information, including “the educational interests of the child for whom consent would otherwise be required . . . .”<sup>159</sup> Under this language, administrators are able

156. See, e.g., E-mail from Cathy Cocks, *supra* note 127.

157. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g(b)(1) (2006).

158. *Id.* § 1232g(d).

159. *Id.* § 1232g(b)(1)(A). See also 34 C.F.R. § 99.31(a)(1)(A)(i) (2010) (“An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required . . . [if t]he disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.”). Other instances that do not require parent or student consent for disclosure of records include disclosures to other school officials at an institution where the student wishes to enroll; to some authorized representatives of the state and Federal government; in connection with a student’s application for financial aid; to organizations conducting studies for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, so long as such studies will not permit the personal identification of students and their parents by persons other than representatives of such organizations and the information will be destroyed when no longer needed for the purpose for which it is conducted; to accrediting agencies; to parents of a dependent student; in connection with an emergency; or in connection with

to disclose any information about a student to other college officials with a legitimate interest in the information.<sup>160</sup> Additionally, nothing in FERPA prohibits an institution from disclosing information about disciplinary action taken against a student to school officials who have a legitimate educational interest (including that of the student) in the behavior of the student.<sup>161</sup>

It would be fairly easy for administrators to make the case that there exists a legitimate educational interest in disclosing the disability status of a student to the student conduct office if such a student is facing disciplinary action. Additionally, there is a legitimate educational interest for student disability services offices to receive information from student conduct offices about students who are involved in the discipline process. A disclosure in either instance would result in protecting the educational interests of the student, and such information sharing is entirely within the parameters of FERPA disclosures.<sup>162</sup> Schools may choose, as a matter of institutional policy, to have more stringent policies regarding FERPA disclosures but need only follow the guidelines set forth in the federal law and regulations to be in full compliance with FERPA standards.<sup>163</sup>

### *C. Identifying Students with Disabilities in the Disciplinary Process*

There are several ways in which an institution could identify students with disabilities in the disciplinary process in order to determine whether they are eligible for procedural safeguards. The first would be to include language in written notification of charges against students informing them of the availability of accommodations as long as they meet specified criteria, such as previously registering with the disability services office. This approach would place the onus on the

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a Grand Jury or other subpoena for records. See 20 U.S.C. § 1232g(b)(1)(A)-(J).

160. See Nancy E. Tribbensee & Steven J. McDonald, *FERPA Allows More Than You May Realize*, INSIDE HIGHER ED (Aug. 7, 2007), <http://www.insidehighered.com/views/2007/08/07/ferpa>.

161. 20 U.S.C. § 1232g(h)(2). See also U. S. DEP'T OF EDUC., LEGISLATIVE HISTORY OF MAJOR FERPA PROVISIONS 4 (June, 2002), *available at* <http://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpaleghistory.pdf>.

162. See Tribbensee & McDonald, *supra* note 160.

163. *Id.*

student to self-identify to the student conduct office and therefore eliminate any questions of a FERPA violation.<sup>164</sup> A second means by which an institution could identify students with disabilities in the disciplinary process is through broad information sharing. For example, the disability services office could provide the relevant school offices with a list of all students who are registered with their office, but not include specific information about the nature of their disabilities. Student conduct offices could then cross-check the names of any students who are facing a qualifying disciplinary action (as defined in Part IV of this article) to determine if students are eligible for a manifestation determination as discussed below. If institutions choose not to create such a list, the student conduct office could consult with disability services on an individual basis in order to determine if a student is eligible for any procedural safeguards. Third, the disability services could disclose a student's information upon request from a disciplinary committee as part of a disciplinary procedure. Under this option, a student would be able register with the disabilities services office in advance, but keep the information confidential until disclosure was necessary.

#### *D. Inclusion of Disability Services in Student-Concern Teams*

One way to streamline the process of identifying students with disabilities who are involved in disciplinary proceedings would be to include disability services offices in the student-concern team meetings mentioned in Part III-C. Many institutions include counseling services in such meetings in order to better ascertain information about a student.<sup>165</sup> Including disability services in student concern team meetings would facilitate sharing of information on a need-to-know basis and would, again, bypass any concerns an institution may have about a potential FERPA violation based on the educational

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164. However, as discussed *supra* Part V.B, disclosure of information to other school officials with a legitimate educational interest in the information is permitted under FERPA. See 20 U.S.C. § 1232g(b)(1)(A); *Id.* § 1232g(h)(2).

165. See, e.g., E-mail from Cathy Cocks, *supra* note 127; E-mail from Ann Garvey, *supra* note 127; E-mail from Erica Humphrey, *supra* note 127; E-mail from Rosie McSweeney, *supra* note 127.



interests of the parties involved in the disclosure.<sup>166</sup> Additionally, disability services would be able to follow up individually with students about whom concerns were raised in the meetings, potentially avoiding a later disciplinary situation.

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166. Any information-sharing process including practitioners should be in full compliance with the provisions set forth in FERPA (as discussed *supra* Part V.B). Additionally, the privacy provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) may be implicated if a student receives counseling services related to his disability. Providing such services would qualify the institution as a “health care provider” under the regulations. See 45 C.F.R. § 160.103 (2010). (“Health care provider means . . . a provider of medical or health services (as defined in section 1861(s) of the Act, 42 U.S.C. 1395x(s))”). The definition of “medical and other health services” includes “qualified psychologist services” and “clinical social worker services. . . .” 42 U.S.C. § 1395x(s)(2)(M)-(N) (2006). Such counseling services would therefore qualify as “health care” under HIPAA. 45 C.F.R. § 160.103. (“Health care means care, services, or supplies related to the health of an individual. Health care includes, but is not limited to, . . . counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body”). However, the privacy provisions of HIPAA apply only if the school transmits “health information in electronic form in connection with a ‘HIPAA transaction.’” GERALD W. WOODS, HIPAA PRIVACY RULE PRIMER FOR THE COLLEGE OR UNIVERSITY ADMINISTRATOR 3 (Dec. 2002), available at <http://www.acenet.edu/AM/Template.cfm?Section=Home&TEMPLATE=/CM/contentdisplay.cfm&CONTENTID=8499>. A HIPAA transaction is defined as “the transmission of information between two parties to carry out financial or administrative activities related to health care.” 45 C.F.R. § 160.103. If the institution falls under this definition, HIPAA privacy standards would apply. “[O]nce a provider becomes a covered entity, all of its PHI [Protected Health Information] is subject to the Rule. The covered entity’s written records and oral communications, as well as its electronic ones, become subject to the Rule’s requirements.” WOODS at 3. “Most Colleges will have only a few activities qualifying as ‘covered functions’ under the Privacy Rule. In that event, the College may declare itself to be a ‘hybrid entity’ and designate a health care component or components that will contain the covered functions. Only the health care component is then subject to the Rule, but disclosure of protected health information to the non-health care component is treated the same as disclosure to a separate legal entity. For example, if a College’s only covered function is its counseling center, the College may declare itself a hybrid entity, designate the center as its health care component and ensure that the health care component complies with the Rule.” *Id.* “The HIPAA Privacy Rule establishes national standards to protect individuals’ medical records and other personal health information and applies to health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically. The Rule requires appropriate safeguards to protect the privacy of personal health information, and sets limits and conditions on the uses and disclosures that may be made of such information without patient authorization.” *The Privacy Rule*, U.S. DEPT HEALTH & HUM. SERVICES., <http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/index.html> (last visited May 30, 2012). See also 45 C.F.R. §§ 160.101, 164.306, 164.502.

*E. Manifestation Determinations*

If institutions choose to adopt a manifestation determination process for students with disabilities in higher education, it should only be utilized in the situations similar to those outlined in IDEA. In higher education, a manifestation determination should be utilized only where the student: (1) is previously identified as having a disability and registered for an accommodation with the institution; (2) has allegedly violated the code of student conduct in such a manner which could result in removal from school; and (3) the offense did not involve carrying or possessing a weapon, knowingly using or possessing illegal drugs, selling or soliciting the sale of a controlled substance, or inflicting serious bodily injury upon another person.<sup>167</sup> If the student does not meet all three of these criteria, there would be no need to conduct a manifestation determination.

*1. Process<sup>168</sup>*

Once initiated, the manifestation determination process would largely mirror that employed in K-12 education, but be simplified to comport with other higher education procedures. The manifestation determination would occur within ten days of the decision to remove the student from school. As in K-12 education, the manifestation determination need not be conducted prior to scheduling or conducting the disciplinary hearing; the review would be triggered on the date that the decision is made to remove the student.

During the manifestation determination process, the judicial officer, a disability services representative, and the student would review all relevant information in the student's

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167. *See supra* Part IV and notes 147-150. Unlike in K-12 education, no manifestation determination would ever be required in situations involving drugs, weapons, or bodily harm, regardless of long-term consequences for the student in a higher education setting. This standard differs from that laid out in IDEA based on the philosophy that these infractions would pose an immediate threat to the school community and would fall within many schools' zero-tolerance policies.

168. The process outlined in this section of the article is merely a model of a policy that could be implemented by an institution. Individual institutions should take care to make sure that any new policy including procedural safeguards in the disciplinary process for students with disabilities should reflect institutional culture and comport with any previously adopted codes and regulations.

file, including information about the student's disability.<sup>169</sup> The two questions at issue would be: (1) did the behavior have a direct and substantial relationship to the student's disability, and (2) was the behavior a direct result of the institution's failure to accommodate the student's disability. The answer to either of these questions would be "yes" if the general consensus among the judicial officer, the disability services representative, and the student is that either of the preceding questions could be answered in the affirmative. All three members need not fully agree on the issue, but a general understanding should be reached as to whether or not the behavior was a manifestation of the student's disability. Appeals would be heard by the Dean of Students or, if the Dean is the primary adjudicatory authority in the student conduct process, whichever entity is specified to hear appeals. The student removal should remain in place until the appeals process is complete.

## 2. "Yes" outcomes

If the conduct is determined to be a manifestation of the student's disability, several steps should be taken. First, the judicial officer and the disability services representative should confer about the student's behavior and implement a behavior management plan. The behavior management plan need not be as formalized as a behavior intervention plan under IDEA and its regulations. Such a plan might involve a temporary suspension, a temporary or permanent change of housing placement, or other similar sanctions. The plan should consider social, affective, and environmental factors in order to best address the student's behavior. Once developed and implemented, the student should then be allowed to resume classes and, if appropriate, return to his residential community. If the conduct is determined to be a result of the institution's failure to accommodate the student's disability, the institution should take immediate steps to rectify the situation.

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169. Institutions could choose, at their discretion, to include parents in this process as well, taking care to follow FERPA disclosure requirements and secure a waiver from students before discussing a student's disciplinary situation with his or her parents.

### 3. "No" outcomes

If it is determined that the behavior for which the student is being disciplined is not a manifestation of the student's disability, the judicial officer may apply the relevant sanctions in the same manner and to the same extent as would be applied to any other student.

### 4. Other considerations

Like the manifestation determination process in IDEA, a policy allowing for such a procedural safeguard need not allow for the "reopening" of a manifestation determination where a student registers his or her disability with disability services *after* a conduct proceeding has taken place, but an institution could choose to include such a provision at its discretion. In practice, however, if a student suspects that the behavior is a manifestation of a previously undocumented disability and discloses a pending evaluation within the ten-day timeline, the results of that evaluation should be considered in whether or not the student should be granted a manifestation determination. Additionally, the institution's policy should include information about whether the student is entitled to a manifestation determination if the institution had constructive knowledge of the student's disability prior to the behavior for which the student is being disciplined. Constructive knowledge at the higher education level would consist of the student or a faculty or staff member alerting disability services, counseling services, or academic affairs (who would in turn alert disability services) in writing of a suspected disability. Disability services would then follow up with the student to determine whether he or she is eligible to register for services.

## VI. CONCLUSION

Balancing the rights of students with disabilities in disciplinary proceedings with the interests of the larger institutional community is a complicated task. As a result, Congress has interceded in K-12 education by providing certain procedural safeguards via IDEA. In higher education, however, the means by which to achieve such a balance have been entirely at the discretion of the individual institution.

Current practice in the field of higher education attempts to hold all students to the same standard of behavior, regardless of disability. This position, although in line with the ADA and Section 504, may put a student whose behavior is directly linked to her disability at risk for disciplinary action when she may not have been entirely cognizant or conscious of the potential harm resulting from her actions. Because institutions of higher education are required to accept students with disabilities and provide education, related services, and housing for these students under federal law, colleges and universities must also accept the responsibility that such a task requires.

Incorporating a manifestation determination process into the conduct systems of colleges and universities would provide students with disabilities the opportunity to address the intersection of behavior and their specific disability. This is a particularly appealing outcome for institutions that focus on the development of the whole student. In providing such a procedure, the institution goes beyond ensuring individual due process rights; it provides an educational opportunity for the student about how to manage his or her behavior. This educational opportunity is not one to be taken lightly. A student with a disability should be able to rely on support systems in a safe learning environment to aid him or her in managing behavior as it relates to his or her disability. Granting students with disabilities the opportunity to reflect on their behavior and discuss its consequences will further their understanding of the specific challenges their disabilities may hold in the world beyond the university walls and, ultimately, would assist their development as members of society.

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