Minnesota Journal of Law & Inequality

Volume 42 | Issue 2 Article 5

September 2024

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Recommended Citation
Matthew Schmitz, *20 Years Later: Qualified Immunity as a Model for Improving Manifestation Determination Reviews under the Individuals with Disabilities Education Act*, 42(2) LAW & INEQ. 155 (2024), DOI: https://doi.org/10.24926/25730037.699.

Minnesota Journal of Law & Inequality is published by the University of Minnesota Libraries Publishing.

20 Years Later: Qualified Immunity as a Model for Improving Manifestation Determination Reviews Under the Individuals with Disabilities Education Act

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Introduction

In 2015, a high school student in the Bristol Township School District faced suspension for twisting a teacher's arm.[1] According to witness accounts, the student, Z.B., was play-fighting with his friend and girlfriend between classes when a teacher, Mr. Donnelly, who did not know the students, told them to stop.[2] After Mr. Donnelly asked twice, Z.B. stopped and walked to class with his arm around his girlfriend.[3] Mr. Donnelly, perceiving Z.B. as having put his girlfriend in a headlock, told Z.B. to remove his arm multiple times and eventually grabbed Z.B.[4] Feeling Mr. Donnelly grab his arm, Z.B. grabbed Mr. Donnelly's arm and twisted it, giving Mr. Donnelly a sprained shoulder.[5] As the school considered whether to suspend Z.B., they faced a challenge that is familiar to any school: the challenge of balancing school safety and the educational needs of students who misbehave.[6]

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1. Bristol Twp. Sch. Dist. v. Z.B., No. CV-15-4604, 2016 WL 161600, at *1, *2 (E.D. Pa. Jan. 14, 2016).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Antonis Katsiyannis & John W. Maag, *Manifestation Determination as a Golden Fleece*, 68 EXCEPTIONAL CHILD. 85, 92 (2001); *see also* Jennifer D. Walker & Brittany L. Hott, *Navigating the Manifestation Determination Review Process*, 24 BEYOND BEHAV. 38, 38 (2015) (describing this balance and the accompanying challenges in the context of manifestation determination reviews).

The ability to discipline students is important for properly functioning schools, but in recent years school officials across the country are questioning the wisdom of discipline that excludes students from the learning environment.[7] Part of the motivation for critiquing exclusionary discipline—a term for disciplinary action like suspension or expulsion that removes students from their standard education setting—is the general increase in 'behavior problems' among students and the emerging evidence that mental health challenges play a key role in student behavioral issues.[8] Some school officials recognize that restorative practices which prioritize the student's growth may create more positive outcomes than excluding them from the classroom environment.[9] The movement towards restorative practices, however, is far from universal across the country and faces several key challenges.[10]

In Z.B.'s case, an additional factor complicated the school's decision on exclusionary discipline: his severe Attention Deficit/Hyperactivity Disorder (ADHD).[11] This diagnosis, in turn, brings Z.B. within a group of students who have faced the brunt of traditional suspension practices: students with disabilities.[12] Recent trends suggest that students with disabilities face exclusionary discipline at a rate disproportionate to their non-disabled peers.[13] Disability status is not the only source of disparity either, as students who are both disabled and Black face an even greater risk of school exclusion, following the larger trend that schools exclude Black and Native students from the classroom more often than any other racial groups.[14] These trends are troubling

7. Andrea Peterson, *Schools Are Looking at All Alternatives to Avoid Suspending Students*, WALL ST. J. (Jan. 4, 2023), https://www.wsj.com/articles/schools-are-looking-at-all-alternatives-to-avoid-suspending-students-11672838456 [https://perma.cc/2U5P-BYN7].

8. *Id.*

9. *Id.*

10. *Id.*

11. Bristol Twp. Sch. Dist. v. Z.B., No. CV-15-4604, 2016 WL 161600, at *2 (E.D. Pa. Jan. 14, 2016).

12. Amy E. Fisher, Benjamin W. Fisher & Kirsten S. Railey, *Disciplinary Disparities by Race and Disability: Using DisCrit Theory to Examine the Manifestation Determination Review Process in Special Education in the United States*, 24 RACE ETHNICITY & EDUC. 755, 755 (2021).

13. Donna St. George, *Biden Warns Schools Not to Overpunish Students with Disabilities*, WASH. POST (July 19, 2022), https://www.washingtonpost.com/education/2022/07/19/school-discipline-special-ed-biden/ [https://perma.cc/B7RD-WAQR] ("According to federal data, students served by the Individuals with Disabilities Education Act represented 13 percent of school enrollment across the nation but were handed nearly 25 percent of out-of-school suspensions in 2017-2018, the most recent school year available.").

14. Fisher et al., *supra* note 12, at 757 ("On average, for every 100 students with

enough that both the Obama and Biden Administrations have issued federal guidance aimed at addressing the disparate disciplinary treatment of students with disabilities in recent years.[15]

Removing students with disabilities from school settings, by definition, deprives them of access to key shared educational experiences.[16] Although the U.S. Supreme Court has found that American students do not enjoy an affirmative right to an education at the federal level,[17] there is still a good amount of statutory and state constitutional law that aims to create universal access to American public education.[18] Exclusionary discipline not only hinders such efforts to promote access to education, but it can also have a powerful negative impact on student success and wellbeing.[19] Some evidence even suggests that exclusionary discipline can make unwanted behaviors more likely to occur, actively working against its own purpose.[20]

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an IDEA identified disability label, White students lost 43 days to suspension whereas Black students lost 121 days . . . ."); St. George, *supra* note 13; Risa Johnson, *Native American Students Suspended at Higher Rates than Peers. New Report Looks at Solutions*, PALM SPRINGS DESERT SUN (Feb. 6, 2020), https://www.desertsun.com/story/news/2019/09/30/report-native-american-students-suspended-higher-rates-than-others/2391474001 [https://perma.cc/E6J6-4NLN].

15. St. George, *supra* note 13.

16. Allan G. Osborne, *Discipline of Special-Education Students Under the Individuals with Disabilities Education Act*, 29 FORDHAM URB. L.J. 513, 514 (discussing occurrences of some students with disabilities being totally excluded from public schools, thus preventing them from succeeding in their educational programs).

17. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 38 (1972) (rejecting the District Court's finding that "education is a fundamental right or liberty").

18. *E.g.*, Trish Brennan-Gac, *Educational Rights in the States*, AM. BAR ASS'N (Apr. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_2_civil_rights/educational_rights_states/ [https://perma.cc/86AE-Z737] (citing California, Connecticut, Washington, West Virginia, Mississippi, Oklahoma, Wisconsin, and Kentucky among those states that have found a fundamental right to education under their constitution); 20 U.S.C. § 1400(d)(1)(A) (describing the general purpose of IDEA as ensuring statutory entitlement to free appropriate public education to all children with disabilities).

19. *See, e.g.*, Elizabeth M. Chu & Douglas D. Ready, *Exclusion and Urban Public High Schools: Short- and Long-Term Consequences of School Suspensions*, 124 AM. J. EDUC. 479, 500 (2018) (finding connections between suspensions and weaker attendance, increased tardiness, decreased completion of credits, and higher dropout rates, as well as graduation rates).

20. Peterson, *supra* note 7, at 2 ("Instead of changing the problematic behavior, suspensions and being sent to the principal's office can make acting out more likely, says Jill Sharkey, a professor in the department of counseling, clinical and school psychology at the University of California, Santa Barbara.").

In amending the Individuals with Disabilities Education Act (IDEA) in 1997, Congress worked to provide a clearer fail-safe to protect students with disabilities from suspensions and expulsions that result from manifestations of their disability.[21] This protection was what the Bristol Township School District turned to in response to Z.B.'s alleged misconduct.[22] Labelled "manifestation determination reviews" (MDRs), the process grew out of Congress's preference for keeping students in the least restrictive environment (LRE) possible for their education.[23] The key component of the MDR process is requiring schools to call a meeting with the student's individualized education program (IEP) team whenever out-of-school suspensions cross a ten-day threshold indicating long-term suspensions.[24] The outcome of the meeting—with three limited exemptions for weapon possession, causing serious bodily injury, and drug possession or use—depends on whether the student's behavior was a manifestation of their disability.[25] Schools cannot exclude students beyond ten days for manifestations, but they can exclude beyond ten days for non-manifestations.[26] In Z.B.'s case, the school found his failure to follow directions and his physical response to being touched were not manifestations of his ADHD, which enabled them to exclude him for over ten days.[27] A hearing officer later overturned that determination and the district court sustained the hearing officer's decision, meaning the school had to conduct another MDR before they could exclude Z.B. long-term.[28]

Through the MDR process, Congress responded to legal concerns in the 1980s and 1990s about the conflict between school suspension practices and the IDEA's stay-put rights, which prohibit changes in student placement without parental consent and input.[29] Recent evidence on disciplinary disparities, however, suggests that

21. Fisher et al., *supra* note 12, at 756.

22. Bristol Twp. Sch. Dist. v. Z.B., No. CV-15-4604, 2016 WL 161600, at *5 (E.D. Pa. Jan. 14, 2016).

23. Osborne, *supra* note 16, at 513–15. Per the definition used to determine state funding eligibility, LRE aims to educate children with disabilities in the same spaces as children without disabilities "[t]o the maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A). It also seeks to limit the removal of students to situations "when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.*

24. Osborne, *supra* note 16, at 530–32.

25. 20 U.S.C. § 1415(k)(1)(G).

26. Osborne, *supra* note 16, at 530.

27. *Bristol Twp. Sch. Dist.*, No. CV-15-4604, 2016 WL 161600, at *5.

28. *Id.* at *6–7, *15.

29. *See, e.g.*, Stuart v. Nappi, 443 F. Supp. 1235, 1242 (D. Conn. 1978) (raising concerns about this gap in legislative guidance).

the MDR process fails to protect at least some students with disabilities from undue discipline.[30] The fact that the federal government and state counterparts largely do not track schools' reasons for suspensions complicates the task of understanding these disciplinary disparities.[31] The failure to protect students with disabilities from long-term exclusions is impactful, in part, because schools play a large role in exposing students to society, and the lessons students learn from school policies can shape their views of societal values.[32] With the eyes of students on their schools, the educational and legal communities need to pay close attention to what the MDR process prioritizes and whether the process fulfills its promises to students and parents.

In addition to concerns about effectiveness, Congress needs to fit the MDR framework to our dynamic societal understandings of disability as a social identity.[33] For example, the social model of disability, which Michael Oliver brought to the forefront in 1990, shifted scholarly and popular focus away from the inherent qualities of the individual, which seem to play a central role in MDRs.[34] Oliver argues society should instead focus on the ways human organizations actively disable a person.[35] In other words, ways in which society *disables* people rather than ways in which people *have a disability*.[36] In the context of Oliver's thinking, the MDR's focus on the medical disability category and its symptoms is more in line with the traditional medical model of disability—rigid attachment to scientific classifications.[37] By shifting its focus and

30. Fisher et al., *supra* note 12, at 755.

31. Maria Polletta, Tara García Mathewson & Fazil Khan, *Inside Our Analysis of Attendance-Related Suspensions in Arizona*, HECHINGER REP. (Dec. 6, 2022), https://hechingerreport.org/inside-our-analysis-of-attendance-related-suspensions-in-arizona/ [https://perma.cc/FTT8-76JC].

32. John Dewey, *The School and Social Progress*, *in* THE SCHOOL AND SOCIETY 31–32 (Univ. of Chi. Press ed., 1907) ("[The school] has a chance to affiliate itself with life, to become the child's habitat, where he learns through directed living; instead of being only a place to learn lessons having an abstract and remote reference to some possible living to be done in the future. It gets a chance to be a miniature community, an embryonic society.").

33. *See* Fisher et al., *supra* note 12, at 763 ("The compounding identities of being a racial minority and having a disability label symbolically represent an even further deviation from normativity than either identity alone, likely influencing school personnel to exclude Black students with disabilities at particularly high rates.").

34. Deborah J. Gallagher, David J. Connor & Beth A. Ferri, *Beyond the Far Too Incessant Schism: Special Education and the Social Model of Disability*, 18 INT'L J. INCLUSIVE EDUC. 1120, 1123 (2014).

35. *Id.*

36. *Id.*

37. Walter A. Zilz, *Manifestation Determination: Rulings of the Courts*, 18 EDUC. & L. 193 (2006) (citing the three questions raised by 34 C.F.R. § 300.523).

embracing recent methods of thinking about disability, the MDR process could create greater respect for disabled people and more fully acknowledge their status as human agents.[38]

In line with the notion that society views children differently than it views adults, school officials enjoy a form of legal protection for their wrongful actions distinct from that provided by MDR procedure.[39] As public officials acting under the color of state law, teachers are vulnerable to civil rights claims under Section 1983 when they interfere with the rights of others.[40] Like any other public official challenged under Section 1983, they also have access to the judicially created qualified immunity defense.[41] Qualified immunity arose from policy concerns about protecting public officials from harassment and allowing for sufficient notice when their conduct might violate Section 1983.[42] The general qualified immunity framework, in contrast to the MDR standard, focuses on whether the official violated someone's constitutional or legal rights and whether those rights were clearly established.[43] That standard—in particular the "reasonable official" language that accompanies it—places the focus squarely on the individual, their notice, and their choices.[44] If substituted for the current MDR framework, this qualified immunity model and its focus on the individual could both provide more robust protections for students and put their personhood rather than their disability at the center.

This Article will present the case for modifying the MDR standard to resemble qualified immunity, bolstering the protections given to students with disabilities. Part I will summarize the legal development of both the IDEA's MDR process and Section 1983 qualified immunity. It will pay specific attention to the public policy concerns that helped shape each framework, the contours of the frameworks, and how those contours have changed over time. Part II will analyze three key flaws in the MDR process—its exemptions, its notice implications, and its failures to respect student agency—and discuss how qualified immunity addresses these concerns. It

38. *See* Dewey, *supra* note 32, at 43–44 ("Those modifications of our school system which often appear (even to those most actively concerned with them, to say nothing of their spectators) to be mere changes of detail, mere improvement within the school mechanism, are in reality signs and evidences of evolution.").

39. *See* Sarah Smith, *The Problem of Qualified Immunity in K-12 Schools*, 74 ARK. L. REV. 805 (2022).

40. 42 U.S.C. § 1983; *see also* Smith, *supra* note 39.

41. Smith, *supra* note 39, at 813.

42. *Id.*

43. *Id.* at 806–07.

44. *Id.* at 807.

will also note the potential positive impact this modified framework could have in combatting disproportionate discipline and promoting a social model of disability. Finally, the conclusion will couch these issues in the general environment of student discipline and the rights of students with disabilities, discussing some of the practical concerns surrounding a modified framework and the issues scholars, researchers, and legislators should focus on next.

I. Background

A. The Development of the MDR

The Education for All Handicapped Children Act (EHA), which Congress passed in 1975, represented a significant expansion of procedural and substantive protections for students with disabilities and laid the foundation for the modern IDEA.[45] Though it did not speak to student discipline, the EHA mandated that all students receive their education in the LRE and put in place procedural avenues for parents to challenge changes in student placement.[46] Among the earliest cases of individuals seeking redress for the EHA's failures to respond to disciplinary actions, particularly when those disciplinary actions involved changing student placement, was *Stuart v. Nappi*.[47] In *Stuart*, a student with learning disabilities and behavioral challenges requested an injunction from a ten-day suspension.[48] The United States District Court for the District of Connecticut noted the incompatibility between a disabled student's statutory "right to remain in her present placement," on the one hand, and the school's prerogative to maintain order and safety, on the other.[49]

Although Congress did not include a formal "stay-put right" in the statute for almost twenty years,[50] the *Stuart* court granted the injunction, acknowledging the necessity of keeping the school from unilaterally interfering with the student's placement stability

45. Osborne, *supra* note 16, at 513–14.

46. *Id.* at 513–14.

47. 443 F. Supp. 1235, 1235 (D. Conn. 1978).

48. *Id.* at 1239.

49. *Id.* at 1241 ("[T]he right to remain in her present placement directly conflicts with Danbury High Schools's [sic] disciplinary process.").

50. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 615(k)(7)(A), 111 Stat. 37, 60 (1997) ("[T]he child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.").

through the disciplinary process.[51] Building on this idea, the District Court for the Northern District of Indiana, in *Doe v. Koger*, recognized the EHA's clear statement that schools must determine if students are disruptive because of their disability before enacting a suspension.[52]

Subsequent cases further defined this simple determination into a structure Congress would later adopt as the MDR.[53] From the Fifth Circuit, *S-1 v. Turlington* defined expulsion as a change in educational placement that, under EHA regulations at the time, required review by a specialized team to determine whether the child's disability caused the behavior.[54] In *Honig v. Doe*, the Supreme Court further refined the threshold for disciplinary changes of placement.[55] Relying on a Department of Education Office of Civil Rights interpretation, the Court held that suspensions shorter than ten days were not a change of placement, but anything beyond ten days would require the specialized review mentioned in *S-1*.[56] In *Light v. Parkway C-2 School District*, the Eighth Circuit created an exception to these specialized reviews in instances where students posed a danger to oneself or others.[57] The court reasoned that "[e]ven a child whose behaviors flow directly and demonstrably from her disability is subject to removal where that child poses a substantial risk of injury to herself or others."[58]

Taken together, the various federal courts created a system to address the EHA's failure to guide exclusionary discipline wherein exclusionary discipline totaling more than ten days would trigger specialized determinations unless the student's behavior posed a danger to themselves or others.[59] Congress refined and codified this procedure in the 1997 amendments to the IDEA under the MDR name.[60] The amended language required IEP teams to perform the newly-termed MDRs with the help of other qualified individuals.[61] Accompanying regulations from the Department of Education in

51. *Cf. Stuart*, 443 F. Supp. at 1243.

52. Doe v. Koger, 480 F. Supp. 226, 229 (N.D. Ind. 1979).

53. Osborne, *supra* note 16, at 518, 520, 525.

54. 635 F.2d 342, 347–48 (5th Cir. 1981).

55. 484 U.S. 305, 325 n.8 (1988) (citing the position of the Office of Civil Rights within the Department of Education considering a suspension of up to ten schooldays to not be a change in placement).

56. *Id.*

57. 41 F.3d 1223, 1228 (8th Cir. 1994).

58. *Id.* at 1228.

59. Osborne, *supra* note 16, at 530.

60. *Id.* at 529.

61. *Id.* at 530.

1999 set up three statements that the specialized team must affirm or deny to reach a decision.[62] In 2004, however, an additional amendment to the IDEA replaced these inquiries with a two-part, disjunctive determination.[63]

The amended regulatory standard directs the MDR team to determine "[1] if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or [2] if the conduct in question was the direct result of the local educational agency's failure to implement the IEP."[64] This change established two possible avenues for overturning the exclusionary discipline.[65] The first route maintained an emphasis on what scholars have called the "relationship test" but defined it more explicitly than the previous standard.[66] In the context of Z.B.'s case from before, the MDR team would answer the question of whether Z.B.'s ADHD caused him to disobey Mr. Donnelly and twist his arm.[67] If this was the cause, the school's list of disciplinary options for that incident would no longer include long-term exclusions.[68] If his ADHD did not cause the behavior, the school would be free to exclude Z.B. for more than ten days, unless the second avenue applied.[69]

The second avenue is more focused on the school's actions, where the first focuses on the student's actions.[70] This avenue asks whether the school has provided the services it promised in the student's IEP—that is, whether it has implemented the IEP.[71] If the school has failed to implement the IEP, the next question is whether those missing services directly led to the student's behavior.[72] Turning again to Z.B.'s case, the facts in *Bristol Township* do not mention what his IEP included, but if part of the IEP involved an intervention or service that was not implemented and that failure

62. Zilz, *supra* note 37, at 194–95 (citing 34 C.F.R. § 300.523).

63. Maria M. Lewis, *Were the Student's Actions a Manifestation of the Student's Disability? The Need for Policy Change and Guidance*, 25 EDUC. POL'Y ANALYSIS ARCHIVES 1, 6 (2017) (quoting 20 U.S.C. § 1415(k)(1)(E)).

64. 20 U.S.C. § 1415(k)(1)(E).

65. Walker & Hott, *supra* note 6, at 45 (demonstrating the two-prong approach).

66. Justin P. Allen, *The School Psychologist's Role in Manifestation Determination Reviews: Recommendations for Practice*, 38 J. APPLIED SCH. PSYCH. 1, 2 (2022).

67. Bristol Twp. Sch. Dist. v. Z.B., No. CV-15-4604, 2016 WL 161600, at *3 (E.D. Pa. Jan. 14, 2016).

68. *Id.*; Osborne, *supra* note 16, at 530.

69. *See* Osborne, *supra* note 16, at 530; *see also* Lewis, *supra* note 63, at 6; *see also* 20 U.S.C. § 1415(k)(1)(E).

70. 20 U.S.C. § 1415(k)(1)(E).

71. *Id.*

72. *Id.*

caused this incident, the school would not be able to exclude Z.B. for more than ten days.[73] If his IEP was properly implemented or if the failure to implement did not cause this incident, the school would be allowed to exclude Z.B. for the same length of time as it would have excluded a non-disabled student.[74] This all assumes that the student's behavior is outside of the three exemptions for (1) seriously injuring themselves or other people, (2) weapon possession, and (3) drug possession or use.[75]

One of Congress's expressed goals behind this new standard was crafting "a uniform standard for student behavior and set[ting] clear expectations of students" as well as working to "return the focus of teachers and students to the learning that is happening in the classroom . . . ."[76] In its report, the House of Representatives included praise from the National Association of Elementary School Principals (NAESP) and American Federation of Teachers (AFT) extolling the flexibility and simplification that the new standard and accompanying procedural changes offered.[77] The report describing the 2004 amendments highlights the flexibility they added to the process and suggests that school safety was a strong priority.[78]

Since Congress developed and amended the MDR, scholars have taken a critical view of its scope of protection and overall effectiveness.[79] The scholarship is divided between those critics who focus on the procedure's disciplinary outcomes and those who focus on the theoretical assumptions behind it.[80] Scholars who emphasize the alarming trends in disciplinary disparities between disabled and non-disabled students often point to areas within the federal regulations that the Department of Education should clarify.[81]

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73. *Bristol Twp. Sch. Dist.*, No. CV-15-4604, 2016 WL 161600, at *4; Osborne, *supra* note 23, at 530.

74. *Id.*; Osborne, *supra* note 16, at 530.

75. 20 U.S.C. § 1415(k)(1)(G). Each exemption is confined to behavior on school premises or at a school function. *Id.*

76. H.R. REP. NO. 108-77, at 119 (2003).

77. *Id.* at 119–20.

78. *Id.*

79. Zilz, *supra* note 37, at 202–04 (recounting results of an empirical study of MDR cases).

80. *Compare* Justin P. Allen & Matthew T. Roberts, *Practices and Perceptions in Manifestation Determination Reviews*, 53 SCH. PSYCH. REV. 31 (2021) (taking a very practical line of critique) *with* Katsiyannis & Maag, *supra* note 6 (focusing more on the theoretical implications of the process).

81. *See, e.g.*, Allen & Roberts, *supra* note 80, at 31 (suggesting reincorporation of school psychologists into MDR meetings); Jennifer D. Walker & Frederick J. Brigham, *Manifestation Determination Decisions and Students with Emotional/Behavioral Disorders*, 25 J. EMOTIONAL & BEHAV. DISORDERS 107, 116

These areas include reincorporating school psychologists into the determination meetings and finding more measurable ways to determine the connection between disability and behavior.[82] Perhaps most damning is the critical observation that MDRs present a robust combination of subjective determinations and deferential court treatment that makes accountability for the determination team elusive.[83] Students not only face an amorphous 'relationship test' standard but also a reviewing court that applies an unfavorable presumption on appeal.[84] Because of its vague nature, the relationship test reinforced in the 2004 reauthorization of the IDEA is one area that deserves further review.[85] Among the suggested changes, some scholars have proposed altering and developing the standard beyond its 2004 amended form to include other previously used or discussed factors.[86] Others propose adjusting the current framework by lowering the standard of causation and placing the burden of proof on the school rather than the student.[87]

Theoretical critiques of the MDR process, in contrast, tend to look at its relationship with the medical model of disability.[88] In particular, they note a troubling assumption.[89] The MDR process, critics argue, assumes that a student's ability status controls their intentionality.[90] In other words, it assumes students with disabilities are not active participants in navigating the situation that resulted in a punishable behavior. Instead, they are passengers

(2017) (suggesting potential for the development of team decision-making training models across special education meetings); Maria M. Lewis, *Navigating the Gray Area: A School District's Documentation of the Relationship Between Disability and Misconduct*, 120 TCHRS. COLL. REC. 1, 6, 24 (2018) (noting the tendency for subjectivity in the MDR analytical process and its potential to compound with deferential treatment of MDR decisions by the courts).

82. Allen & Roberts, *supra* note 80, at 31; Walker & Brigham, *supra* note 81, at 116.

83. Lewis, *supra* note 81, at 6; Clare Raj, *Disability, Discipline, and Illusory Student Rights*, 65 UCLA L. REV. 860, 890 (2018) ("[C]ourts simply ask whether the MDR team fully considered all of the relevant information before it.").

84. Raj, *supra* note 83, at 889–90.

85. Allen, *supra* note 66, at 5.

86. Lewis, *supra* note 81, at 16–17 (advocating for a combination of the 1997 and 2004 standards); Fisher et al., *supra* note 12, at 764.

87. Raj, *supra* note 83, at 920 ("Congress should amend IDEA's discipline provision to require schools to demonstrate by a preponderance of the evidence that the conduct in question was: (1) not rooted in disability, and (2) not the result of the school district's failure to implement an appropriate IEP whenever schools seek to enact long-term exclusion of children with disabilities.").

88. Katsiyannis & Maag, *supra* note 6, at 89–90.

89. Fisher et al., *supra* note 12, at 759.

90. *Id.*

in a vehicle that their disability is driving. Despite the good intentions behind this assumption, some scholars argue that it deemphasizes student agency and does not fully recognize their personhood.[91] Theoretical critics, like practical critics, respond to these scholars' concerns by proposing new questions that should determine the MDR process.[92] The common thread between the two lines of critique, then, is the belief that the MDR process and standard still requires refining and reworking, which is where the qualified immunity framework might provide helpful insight.[93]

B. The Development of Qualified Immunity

Qualified immunity provides school officials, among others, with protection from both liability and the expense of trial in Section 1983 claims involving constitutional rights violations.[94] It arises in the context of motions to dismiss or summary judgment and works to avoid the expense of discovery for claims that plaintiffs do not substantiate or instances where the right violated was not clearly established.[95] This violation-of-rights and clearly-established standard, while subject to its own criticism, also arose from policy concerns about fair warning, protecting the discretion of public officials, and the unwise diversion of official energy and resources.[96]

The foundational case for modern understandings of qualified immunity is *Wood v. Strickland*.[97] In *Strickland*, students expelled for spiking punch at an extracurricular meeting brought a claim under Section 1983 against decision makers at the school.[98] When

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91. *Id.*

92. Katsiyannis & Maag, *supra* note 6, at 93–94 (suggesting four questions concerning a student's ability to interpret and respond to the situation, including whether the student "possess[es] the requisite skills to engage in an appropriate alternative behavior" and "interpret[s] the situation factually or distort[s] it to fit some existing bias"); Fisher et al., *supra* note 12, at 764.

93. *See* Katsiyannis & Maag, *supra* note 6; *see also* Fisher et al., *supra* note 12; *see also* Lewis, *supra* note 81; *see also* Raj, *supra* note 83.

94. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*, 62 FLA. L. REV. 851, 851–52 (2010). *See also* Justin Driver, *Schooling Qualified Immunity*, EDUC. NEXT 8 (Mar. 23, 2021), https://www.educationnext.org/schooling-qualified-immunity-should-educators-be-shielded-from-civil-liability/ [https://perma.cc/5MWN-RSWG].

95. Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 TOURO L. REV. 501, 501–02 (2008).

96. Smith, *supra* note 39, at 805 (recounting Supreme Court cases that have described these policies).

97. 420 U.S. 308 (1975). Ironically for our purposes, *Strickland* centers around the exclusionary discipline of students. *Id.*

98. *Id.* at 308, 311.

determining whether school officials could be held liable in their official capacity, the Supreme Court advanced a standard based on whether the official "knew or reasonably should have known that the action [they] took . . . would violate the constitutional rights of the student affected" and whether they had "a belief that [they were] doing right."[99] This standard, the Court said, would protect the good faith efforts of public officers and keep lawsuits from chilling their discretion.[100] The Court's standard had an objective component—reasonable basis for the belief one was acting lawfully—and a subjective component—good faith belief.[101]

A few years later, in *Harlow v. Fitzgerald*, a case concerning conspiracy by former White House aides, the Court honed the standard's objective knowledge component.[102] As part of its holding, the Court articulated that "a reasonably competent public official" would be aware of the "clearly established" law covering their behavior.[103] Therefore, officials would not enjoy immunity from violations of clearly established laws and rights.[104] In *Anderson v. Creighton*, however, the Court raised the bar on constructive knowledge, holding that "the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[105] This ensured laws were established "on the ground"—in the practical realities facing an official—rather than in some abstract sense.[106]

In *Anderson*, the Court also advanced an explicit rationale for not focusing more on the "precise nature" of the unique duties and rights involved in each of its qualified immunity cases.[107] Creating various immunities to meet the particulars of a situation "would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide."[108] The most beneficial rule would be a general standard that public officials can apply to many situations rather than several more specific exceptions and

99. *Id.* at 321–22.
100. *Id.* at 317–18.
101. Jeffries, *supra* note 94, at 852 (citing Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974)).
102. 457 U.S. 800, 817–18 (1982).
103. *Id.* at 818–19.
104. *Id.*
105. 483 U.S. 635, 640 (1987).
106. Jeffries, *supra* note 94, at 854.
107. *Anderson*, 483 U.S. at 643.
108. *Id.*

modifications.[109] This explanation follows from the Court's priority to create a clear and reliable sense of protection.[110]

In the wake of these cases, the current two-prong standard depends on (1) establishing a violation of a constitutional or statutory right occurred and (2) showing that right was clearly established when the violation occurred.[111] This standard, like its previous versions, works to ensure both that the teacher or public official is on notice of a particularized right and that the plaintiff proved the violation enough to avoid frivolous suits.[112] Qualified immunity, however, has been a frequent subject of scholarly criticism.[113] Among the most pressing concerns are whether, in practice, immunity is necessary to protect public officials' discretion and whether the clearly established prong provides a predictable standard.[114] The doctrine has also taken on significant criticism in the context of litigating police misconduct that violates constitutional rights.[115] Courts, policy makers, and the public should take these critiques seriously, but they do not necessarily prevent the beneficial use of the qualified immunity framework in other contexts.[116] One example, as this Article argues, could be student discipline, where qualified immunity presents an insightful and robust framework for protecting discretion against unwarranted punishment, a model that the MDR process may be able to emulate.

II. Analysis

The MDR process suffers from at least three flaws that a qualified immunity framework could help correct. The first is its treatment of students on the extremes who under the current

109. *Id.*

110. Wood v. Strickland, 420 U.S. 308, 318–19 (1975).

111. *See, e.g.*, Doe v. Aberdeen Sch. Dist., 2022 U.S. App. LEXIS 21118, at *8–9 (8th Cir. Aug. 1, 2022).

112. Smith, *supra* note 39, at 813.

113. *See, e.g.*, Smith, *supra* note 39 (discussing qualified immunity in the context of schools); Hayden Carlos, *Disqualifying Immunity: How Qualified Immunity Exacerbates Police Misconduct and Why Congress Must Destroy It*, 46 S.U. L. REV. 283 (2018) (describing how qualified immunity interacts with police misconduct).

114. *Id.* at 817–18.

115. *See, e.g.*, Carlos, *supra* note 113.

116. Scholarship specifically targeting qualified immunity reform will naturally be more comprehensive and persuasive on this subject than this Article, with its focus on MDRs. For the purposes of this Article, it is enough to recognize that the qualified immunity doctrine is mired in controversy in the context of public officials and police officers but may have redeeming value if its mechanisms can serve to protect students from undeserved exclusions.

system fall into a set of exemptions that abandon the mission of determining when a student's disability causes their behavior.[117] The second is the failure of the MDR process to ensure notice for student-actors before they are disciplined for their behavior.[118] The third—more psychosocial—flaw is the MDRs' failure to respect the agency of students with disabilities and communicate to those students that the school and the law view them as full human persons. Together, these flaws make it difficult for students to understand and capitalize on the presumption in their favor baked into MDRs.[119] Congress can remedy that ineffectiveness by replacing the current MDR inquiries with a qualified-immunity-inspired framework: to exclude a student long-term, the school must prove (1) that the student violated a school policy, and (2) that the policy was clearly established at the time of the violation to the extent that a reasonable student with this disability would have known their actions were in violation of the policy.[120] This section explores each of the current structure's weaknesses in turn and how a qualified immunity framework would address them.

A. The Congressional Choice to Exempt Certain Behaviors

Congress's choice to craft exemptions from the MDR standard raises concerns about whether the current 'relationship test' is the best possible framework. The essence of the statutory protection is that schools should discipline students only if their behavior was independent of their disability.[121] By carving out exemptions for weapon possession, drug possession, and serious bodily harm,[122] the statutory structure abandons its concern with manifestations and entirely favors the school's prerogative to govern safety. Recall that

117. Raj, *supra* note 83, at 899 ("The MDR provision . . . prioritiz[es] the category of disability above the specific circumstances of the child.").

118. *See, e.g.*, Off. for C.R., U.S. Dep't of Educ., Fact Sheet: Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973, at 3 (2022), https://www2.ed.gov/about/offices/list/ocr/docs/504-discipline-factsheet.pdf [https://perma.cc/NDA7-C22Z] (requiring notice to parents but not students).

119. Raj, *supra* note 83, at 901 ("The plain language of the IDEA's manifestation determination provision demands an extremely close nexus between conduct and disability in order to invoke the IDEA's protections of FAPE [free appropriate public education]. This high standard of causation makes it more likely that students with disabilities will be excluded for behaviors rooted in their disabilities.").

120. *See, e.g.*, Doe v. Aberdeen Sch. Dist., 42 F.4th 883, 890 (8th Cir. 2022) (exemplifying the current language used in the Eighth Circuit for qualified immunity on which the MDR process could build).

121. 20 U.S.C. § 1415(k)(1)(E)(i)(I).

122. 20 U.S.C. § 1415(k)(1)(G) (carving out the special circumstances receiving distinct treatment under the statute).

the House Report on the 2004 amendments specifically cited its concern with prioritizing school safety.[123] As such, under the exemptions, the student who brings drugs into the school surrenders their statutory protections for the sake of the school's safety precautions.

Our public disinterest in allowing students to attend public schools after their violent acts may make it easier to justify these exemptions,[124] and it is hard to blame schools and parents for wanting to protect student safety. In that vein, it is important to remember that schools have access to non-exclusionary discipline and short-term exclusionary discipline regardless of the MDR findings.[125] Long-term exclusions are only one possible disciplinary measure. Because schools still have other disciplinary tools and because the MDR exemptions deny a subset of students access to procedural protections in contrast to the purpose of the MDR, there may be room for a more comprehensive approach.[126] Comprehensive approaches are even more worth exploring in light of Congress's 2004 aim to find an MDR standard that could "provide[] for a uniform and fair way of disciplining children with disabilities in line with discipline expectations for children without disabilities."[127] While a determination process with carveouts can still meet this goal, a standard without any exemptions lends itself better to uniform and fair treatment.

The current exemptions create, somewhat arbitrarily, situations where schools determine their discipline for certain categories of behavior differently than they do for others. The exemptions also leave out non-violent bullying behavior and sexual assault, actions that can be at least as damaging as drugs and violence. Even for those areas it covers, the current structure requires school officials to make the difficult decision of whether behavior falls into these exempt categories. Rather than trying to categorize student behavior within an exemption, educators and students alike might benefit from applying the same questions to all students whether their behavior was dangerous or not. For these extreme cases, the result could still be the same in many cases—the

123. H.R. REP. NO. 108-77, at 119 (2004).

124. Katsiyannis & Maag, *supra* note 6, at 92 (citing John W. Maag & Kenneth W. Howell, *Special Education and the Exclusion of Youth with Social Maladjustments: A Cultural-Organizational Perspective*, 13 REMEDIAL & SPECIAL EDUC. 47 (1992)).

125. *See, e.g.*, *Discipline*, Minn. Dep't Educ., https://education.mn.gov/mde/fam/disc [https://perma.cc/Y7XH-Y4BJ].

126. *Id.*

127. H.R. REP. NO. 108-77, at 118 (2004).

school excluding the student long-term—but the MDR team would apply the standard consistently and communicate it clearly.

In other words, the qualified immunity framework can provide a standard that applies in all cases, while addressing the policy concerns that motivate the current exemptions. This framework lends itself to broad application by using "reasonable student" language. Under Section 1983, this language blocks claims against public officials if they prove that "a reasonable officer could have believed" they acted in line with the law that was clearly established at the time.[128] A similar standard could protect students from discipline if a reasonable student with their disability could have believed they acted in line with the clearly established school rules.

A "reasonable student with a given disability" standard—rather than the bare reasonable student—is the practical equivalent to the reasonable official because courts "occasionally consider defining characteristics of the person whose conduct is being evaluated" when defining reasonableness.[129] By linking the inquiry with the student's specific disability, for example a reasonable student with autism,[130] this standard is flexible enough to account for the different levels of challenge that people from various disability backgrounds face. If combined with reforms aimed at bringing more expertise into the MDR process,[131] the reasonable student with a given disability standard would provide at least as much predictability as the current 'relationship test,' and arguably more.

By using a reasonableness standard, the qualified immunity framework addresses the current exemptions by categorizing each of the exempt behaviors as reasonably out of line with school policy. More precisely, the MDR team would determine that a reasonable student with their disability should know those behaviors are against school policy. In the process, reasonableness allows decision

128. Jeffries, *supra* note 94, at 852 (quoting Anderson v. Creighton, 483 U.S. 635, 641 (1987)).

129. Carrie L. Hoon, *The Reasonable Girl: A New Reasonableness Standard to Determine Sexual Harassment in Schools*, 76 WASH. L. REV. 213, 226 (2001).

130. RESTATEMENT (SECOND) OF TORTS § 283A cmt. b (AM. L. INST. 1965) also supports a 'reasonable student with a given disability' standard considering its preference towards holding children to a distinct expectation. "A child of tender years is not required to conform to the standard of behavior which it is reasonable to expect of an adult. His conduct is to be judged by the standard of behavior to be expected of a child of like age, intelligence, and experience." *Id.* That distinct expectation refers to "a child of like age, intelligence, and experience" with disability status fitting neatly within a child's experience. *Id.*

131. Allen & Roberts, *supra* note 80, at 1.

makers to consider that not every drug, weapon, or violence policy is equally clear and that not every student understands the intersection between their behaviors and policies in the same way. Decision makers might find that it was reasonable for a student experiencing psychosis, for example, to think their dangerous act in response to a trigger was within the school policy.[132] The same determination team, however, might find that a student with ADHD should know that dangerous behavior violated the policy. This applies not only to behavior that would fall within the exemptions, but it would also allow MDR teams to recognize that reasonable beliefs about compliance with attendance standards, class rules, and other less severe behaviors might vary with both disability category and the clarity of the policy.

Under the qualified-immunity-inspired standard, there may be some students who face disabilities that are so severe it is hard to recognize much agency in their actions. Admittedly, a qualified immunity framework asks educational officials to adopt a disputed and somewhat uncommon belief that they can treat all students as responsible parties that can understand at least some aspects of school policies. That said, the operative element of what a reasonable student *should know* violates school policy still asks MDR teams to consider how a student's disability impacts their awareness of the interaction between policy and behavior. For some students, after the appropriate diagnosis, this constructive knowledge may be minimal or non-existent. The determination team is not required to hold students with severe disabilities to the same expectations as their peers. MDR teams should, however, reserve such prioritization of disability impact over student agency for students whose disabilities demonstrably impact their agency. While this rare case may sound ripe for an exemption—for example, "unless that student's disability substantially restricts their ability to know school policy"—such cases are part and parcel of the knowledge element. The knowledge element asks teams to see the student as a human actor who makes choices for which the school can hold them responsible unless, like a public official unable to understand how their actions collide with individual rights, the student's constructive knowledge is sufficiently impaired.

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132. For a discussion of supporting students experiencing psychosis, see Jason Schiffman, Sharon A. Hoover, Caroline Roemmer, Samantha Redman & Jeff Q. Bostic, *Supporting Students Experiencing Early Psychosis in Middle School and High School*, NAT'L ASSOC. STATE MENTAL HEALTH PROGRAM DIRECTORS (2018), https://www.nasmhpd.org/sites/default/files/Guidance_Document_Supporting_Students.pdf [https://perma.cc/5L37-C49U].

Incorporating the disability category also opens concerns that decision makers, often lacking empirical data and disability-specific expertise, will be ill-equipped to define how a reasonable student with a complex disability would understand school policy. This concern about bias is important and exists both in the current 'relationship test' and a qualified immunity framework.[133] It opens valid questions beyond the scope of this Article about whether Congress should include independent parties and judicial processes within the larger MDR procedure.

This concern also points, however, to one of the most important and impactful elements of a qualified immunity framework: the burdens on the parties. Under the qualified immunity framework, the parties attempting to hold government officials accountable must allege facts sufficient to constitute a violation and convince the court that a reasonable official at the time of the incident should have known their behavior violated the relevant rights.[134] Applied to students, this would mean the school would have to prove both that the violation occurred, and the rule was clearly established. That shift would strengthen the presumption in students' favor and make for more consistent and manageable court review of MDR decisions. Change of this sort is consistent with at least one suggested modification offered by current MDR scholars.[135] In contrast to the weak and temporary stay-put protections of the current MDR, this model can provide the teeth necessary to discourage schools from allowing their biases to impact the discipline process. Legal scholars, educators, and Congress will still need to address issues of measurability, bias, and sufficient resources, but placing the burden of proof on the school does more to deter bias than the existing standard.[136] At the same time, the modified framework also respects students as agents and creates stronger protections against improper exclusion by placing the students' decision-making processes at the center of its investigation.

133. Lewis, *supra* note 81, at 24.

134. Saucier v. Katz, 533 U.S. 194, 201 (2001), *limited by* Pearson v. Callahan, 555 U.S. 223, 232 (2009) (rejecting the rigid order *Saucier* set for determining the two questions).

135. Raj, *supra* note 83, at 920.

136. *See, e.g.*, Fisher et al., *supra* note 12, at 760.

B. Notice to Students and the School's Culpability

While MDR inquiries consider the school's responsibility for potentially insufficient provision of IEP services,[137] this is where the current required consideration of the school's potential fault stops. In particular, the current structure does not consider the school's responsibility for poorly defined and lightly communicated policies.[138] This concern is key because of its notice implications and because schools in many parts of the country can suspend students for something as innocuous as missing classes.[139] Likely in part because of the deference they give to MDR teams, federal courts have yet to address this issue and do not currently require schools to properly inform students of their policies before disciplining them.[140] The closest any federal government body has come to requiring notice of the code of conduct is a United States Department of Education requirement that schools notify all students after the fact of their violation when considering suspension.[141] Some state statutes require that conduct regulations be "clear and definite to provide notice to [students]" but not every state has set that requirement.[142] Further, even those that do aim to proactively notify students still provide for instances where decision makers do not need to consider student notice.[143]

Under current MDR procedure, the possibility remains that schools can discipline a student for violating policies of which the student was not aware.[144] For example, suppose that when Z.B. physically responded to Mr. Donnelly touching him, the school district did not have a clear and well-distributed policy on how students should respond to teachers physically intervening in

137. 20 U.S.C. § 1415(k)(1)(E)(i)(II).

138. Osborne, *supra* note 16, at 518, 520, 525.

139. Tara García Mathewson & Maria Polletta, *When the Punishment Is the Same as the Crime: Suspended for Missing Class*, HECHINGER REP. (Dec. 6, 2022), https://hechingerreport.org/when-the-punishment-is-the-same-as-the-crime-suspended-for-missing-class/ [https://perma.cc/FQ4P-5LZ9].

140. Raj, *supra* note 83, at 890. The closest the Supreme Court has come is *Goss v. Lopez*, 419 U.S. 565, 581 (1975), which established that schools must give students notice of the charges against them for suspensions of ten days or fewer, but this notice comes after the behavior in question.

141. Walker & Hott, *supra* note 6, at 38.

142. *See, e.g.*, Pupil Fair Dismissal Act, MINN. STAT. § 121A.45, subd. 2(a)–(c) (2022) (providing three permissible grounds for dismissal with only the first explicitly mentioning notice to students); *see also* NEB. REV. STAT. § 79-262.

143. *Id*.

144. *Cf.* 20 U.S.C. § 1415(k)(1)(B) ("School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days . . . .").

situations.[145] A seventeen-year-old student exposed to our cultural discussions of self-defense might have every reason to think the school has a policy that mirrors what he knows about his surrounding world.[146] A teacher grabbing his arm, depending on Z.B.'s personal experiences and the teacher's strength or aggression, might lead Z.B. to think more about these self-defense ideas as a natural caveat to the school's general and unnuanced policy on physical contact.[147] This perceived caveat could make Z.B.'s views of his behavior reasonable, in the absence of a clear school policy prohibiting students from physically responding when teachers touch them.[148]

Nothing in the statutory language of the IDEA or accompanying regulations requires setting clear expectations that can help students avoid getting caught in the grey area.[149] This is, in part, because courts and legislatures have hesitated to interfere with school policy-making decisions, finding educators better suited to make those calls.[150] This judicial and legislative restraint makes sense, since educators have more specific training on behavioral expectations and have many demands on their time.[151] Congress, however, should not hesitate to intervene where there is evidence that schools fail to respect the rights of students, as the stark disparities in disciplining students with disabilities suggests.[152] Legislators and judges, more than educators, are experts on how society should handle clashes between procedures and individual rights.[153]

Like its Section 1983 predecessor, a qualified immunity MDR framework that requires clearly established policies can protect students from their failure to anticipate both changes in policy and

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145. The record does not say whether this policy existed but does allude to a general policy against assault of students and teachers. Bristol Twp. Sch. Dist. v. Z.B., No. CV-15-4604, 2016 WL 161600, at *4 (E.D. Pa. Jan. 14, 2016).

146. *See also* Erica Terrazas, *When My Child is Disciplined at School*, TEX. APPLESEED 4 (Jan. 2009), https://senate.texas.gov/cmtes/81/c530/SB33-EricaTerrazas-1.pdf [https://perma.cc/7JYY-2HVS] (discussing Texas schools' use of Disciplinary Alternative Education Programs (DAEPs) allowing schools to consider student intent, self-defense, and disciplinary history).

147. *Bristol Twp. Sch. Dist.*, No. CV-15-4604, 2016 WL 161600, at *7.

148. *Id*.

149. As previously mentioned, at least two state legislatures require 'clear and definite' policies, but the practice seems to be far from universal.

150. *But see* Michael Benjamin Superfine & Roger D. Goddard, *The Expanding Role of the Courts in Educational Policy: The Preschool Remedy and an Adequate Education*, 111 TCHRS. COLL. REC. 1796 (2009).

151. *Id*.

152. *Id*.

153. *Id*.

answers to questions that fall in grey areas.[154] Students whose behavior online, for example, does not neatly fit within current school policies can enjoy protection from the harmful effects of exclusionary discipline. This is especially important because school officials, unlike Congress or executive agencies, may not always have time to define comprehensive policies in new areas of behavior that emerge over time, with technological development and changing cultural context.[155] This lack of clarity may even be the case for behaviors, like unexcused absences, where 'unexcused' may be a vague standard despite the fact that absences have long been cause for school discipline.[156] This protection is important not just for students with disabilities, but for all students. It is unrealistic to expect all students to understand the nuances and scope of policies that school officials, as experts on school policy, could not comprehensively develop.

The requirement that schools clearly establish policies can protect student discretion without sacrificing the most operative component of the 'implementation of the IEP' prong in the existing MDR standard.[157] As a tool that helps students participate in the curriculum and receive their education with nondisabled students, IEPs by necessity work to help students understand and navigate the school environment.[158] On the basic level of establishing standards of conduct and assisting students in meeting them, clearly establishing a policy is an essential part of schools implementing the IEP.[159] In other words, the shift to a qualified immunity framework still holds schools accountable for implementing the IEP.

The reasonableness consideration also allows for nuance by permitting findings of degree. The mother in *Bristol Township* hesitated to agree with the MDR finding in part because she believed that "some portions of this [incident] were due to [Z.B.'s]

154. Jeffries, *supra* note 94, at 859 ("In such areas, the chief effect of qualified immunity is to avoid damages liability for failure to anticipate developments in the law.").

155. Osborne, *supra* note 16, at 513–14.

156. *See generally* Christopher A. Kearney, Carolina Gonzálvez, Patricia A. Graczyk & Mirae J. Fornander, *Reconciling Contemporary Approaches to School Attendance and School Absenteeism: Toward Promotion and Nimble Response, Global Policy Review and Implementation, and Future Adaptability (Part 1)*, FRONTIERS IN PSYCH. 1 (2019) (describing methodological advances in our understanding of student absences that challenge the dichotomy of "excused" and "unexcused" absences).

157. 20 U.S.C. § 1415(k)(1)(E).

158. 20 U.S.C. § 1414(d)(1)(A)(i)(II)(aa).

159. *Id.*

Disability."[160] The current 'relationship test,' as her response suggests, asks an either-or question about the relationship between a disability and the behavior deserving discipline: *either* the disability caused the behavior, and long-term exclusion is not allowed, *or* the disability did not cause the behavior, and long-term exclusion is allowed.[161] In contrast, a qualified immunity framework would allow determination teams to find and acknowledge the role of a student's disability, while still finding that the student should have reasonably known their behavior violated school policy.[162] For example, the determination team could have found that Z.B.'s failure to follow directions and his physical response to Mr. Donnelly were a manifestation of his ADHD, but still found that he should have reasonably known his behavior violated school policy.[163] By moving the inquiry from an all-or-nothing determination of causation to one that prioritizes the student's decision-making and notice, a qualified immunity framework creates room for much-needed nuance in understanding and describing potentially punishable student behavior. This nuance further underscores the need to provide more resources and expertise for determination teams as they weigh these various factors.

C. Failure to Respect Students as Full Persons

The lack of a notice requirement in the current framework also speaks to how the MDR framework views the agency of students with disabilities.[164] Instead of looking to understand the choices a disabled student made and their awareness of policies guiding that behavior—among other relevant circumstances—the determination only asks if the student made a choice at all.[165] Whether the student made the best decision based on the information they had in that moment is irrelevant to the determination.[166] This leaves the possibility that, in accordance with an ill-defined policy, schools could exclude a student who acted thoughtfully simply because the

160. Bristol Twp. Sch. Dist. v. Z.B., No. CV-15-4604, 2016 WL 161600, at *5 (E.D. Pa. Jan. 14, 2016).

161. *Id.* at *4.

162. *See* Smith, *supra* note 39.

163. The doctor assigned to the determination, Dr. Catherine Newsham, conceded that the failure to follow directions was likely connected to Z.B.'s ADHD. *Bristol Twp. Sch. Dist.*, No. CV-15-4604, 2016 WL 161600, at *5.

164. Fisher et al., *supra* note 12, at 758.

165. *See* 20 U.S.C. § 1415(k)(1)(E).

166. *Bristol Twp. Sch. Dist.*, No. CV-15-4604, 2016 WL 161600, at *4.

student's disability was not connected enough to their actions.[167] Conversely, students who had notice of a well-defined policy and acted less carefully can avoid discipline if the determination team finds enough connection between their action and the disability.[168] Not only does this ignore the discretionary role of the student in their own behavior, but it fails to encourage thoughtful use of that discretion.[169] This flaw in the standard has the potential to ask either more or less of students than they are capable of, rather than looking to their true understanding of how their behavior coincides with school rules.

The choice to ignore the discretion of students with disabilities also separates them from the adults with whom they share the school environment. Had the facts of *Bristol Township* been different, Mr. Donnelly could have injured Z.B., and Z.B. could have attempted a Fourth Amendment excessive force claim under Section 1983.[170] Putting the merits of that case aside, Mr. Donnelly would enjoy the protection of qualified immunity and full recognition of his discretion. The reviewing court would consider whether he reasonably should have known that his choice to grab Z.B. violated Z.B.'s rights.[171] The same level of deference to his discretion might also control the school's decision on whether to suspend Mr. Donnelly from work.[172] The current MDR standard, however, does not require a determination team to afford Z.B. the same consideration.[173] This is most important in situations like Z.B.'s where there is some ambiguity and potential blame for the physical altercation on both the part of the teacher and the student.[174] There seems to be no clear explanation in the MDR policy development record for why our system gives less deference to students with disabilities—or students in general—than we do to school officials, despite the severe consequences of long-term exclusions. This change to the MDR could help rectify that discrepancy.

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167. Fisher et al., *supra* note 12, at 758.

168. *Id*. at 764.

169. *Id*.

170. Doe *ex rel.* Doe v. Hawaii Dept. of Educ., 334 F.3d 906, 909 (9th Cir. 2003) ("[T]he right of a student to be free from excessive force at the hands of teachers employed by the state was clearly established as early as 1990 . . . .").

171. *Bristol Twp. Sch. Dist.*, No. CV-15-4604, 2016 WL 161600, at *3.

172. *Id*. at *7.

173. Lewis, *supra* note 81, at 2.

174. *See* Bristol Twp. Sch. Dist. v. Z.B., No. CV-15-4604, 2016 WL 161600 (E.D. Pa. Jan. 14, 2016).

D. The Possible Risks of Implementing a Reasonableness Standard

It is worth noting the potential drawbacks to reasonableness and its expansive scope. Determination team members would still have room to insert their biases, both through the factors they choose to consider and their evaluation of whether those factors weigh for or against the student. The MDR for Z.B.'s interaction with his teacher demonstrates this risk.[175] The hearing officer found that the determination was "based on the broad, general determination that [Z.B.'s] conduct in this case did not fit within the general characteristics/usual symptoms of ADHD."[176] That general conclusion, combined with the finding that the investigation was essentially a "rubber stamp," suggests that the school officials were relying more on their stereotyped thinking than critical analysis of the particular facts.[177] By putting the student's disability at the center of its focus, the 'relationship test' invites determination team members to engage these stereotypes in their decision-making.[178]

A qualified immunity framework also creates the risk of focusing on "characteristics" and "usual symptoms" since it would compare students with reasonable members of their same general disability group.[179] Reasonableness mitigates these concerns, however, by allowing for consideration of various other non-disability-related factors. In Z.B.'s case, those might include his possible self-defense perception, his understanding of the rules, and his lack of teacher-student relationship with Mr. Donnelly.[180] Determination team members might still let their biases about children and types of disabilities color their decision on these and other factors, but those biases would not be as disability specific, and other concerns could more easily overshadow them.

A final issue is the specific difficulty courts have had interpreting the "clearly established" element of the qualified immunity framework.[181] Whether or not the law is "clearly established" is far from a simple yes-or-no question.[182] For example, the Eleventh Circuit has described three distinct categories of law with varying degrees of its "relation to precedent" in trying to figure

175. *Id.* at *6.
176. *Id.* at *5.
177. *Id.* at *7.
178. Lewis, *supra* note 81, at 24.
179. *Bristol Twp. Sch. Dist.*, No. CV-15-4604, 2016 WL 161600, at *6.
180. *Id.* at *2–4.
181. Jeffries, *supra* note 94, at 853.
182. *Id.*

out what establishment means.[183] There are also key questions about how much generality decision makers should consider in determining whether a rule or policy is clearly established: should decision makers recognize the rule as established merely in abstract terms, or are the particular facts necessary for establishment?[184] Returning to Z.B.'s hypothetical self-defense belief, would clear establishment require the school to have disciplined previous students who physically responded when teachers touched them, or would generalized comments from the school about student responses be enough?

Schools also will not be able to side-step the concerns about where clearly established policies come from.[185] School officials may write policies in various locations or release them orally. MDR teams must decide whether they expect students to only know the written policies or whether they should expect awareness of oral policies, implied expectations, and common-sense principles. The question of proper sources may be easier in schools than in other contexts, since the realm of school policies is less dense than the statutory, regulatory, and constitutional laws that apply to government officials, but which policies to apply remains a difficult question.

There is no reason to believe that educators, with primary tasks and skills lying elsewhere, will be better able to sort through what it means for a school policy to be clearly established than courts are.[186] Determination team members may also have biases towards finding that a policy was clearly established, especially if they were the ones who drafted the policy.[187] As mentioned before, however, the requirement that schools prove the policy was clearly established provides more fodder for judicial oversight and accountability.[188] On a more basic level, it requires schools to put in writing their reasons for believing the policy was clearly established, which may do more to encourage reflection.[189] The burden of proof for the school may not erase bias concerns, but like several other features of the qualified immunity framework it does more to prevent bias than the existing standard.[190] The end result

183. *Id.* (citing Vinyard v. Wilson, 311 F.3d 1340, 1350–51 (11th Cir. 2002)).

184. *Id.* at 855–56 (looking to *Pearson v. Callahan* and *Fields v. Prater* as polar opposites on the generality of scope courts should take in their reviews).

185. *Id.* at 858–59.

186. *See* Superfine & Goddard, *supra* note 150.

187. *See* Fisher et al., *supra* note 12, at 759.

188. Smith, *supra* note 39, at 117–18.

189. Jeffries, *supra* note 94, at 858–59.

190. Fisher et al., *supra* note 12, at 756.

of the qualified-immunity-inspired modification would be an MDR process that erases a few clear flaws in the current approach while sending a message to students with disabilities that schools respect them as responsible and capable agents.

Conclusion

As schools work to refine their disciplinary policies over the coming months and years, they face countless challenges, such as a lack of mental health resources and general staffing concerns, that will make it harder to override exclusionary discipline as the default setting.[191] Still, some schools seem resolved to fight for an improved disciplinary system, and the ongoing concern over disproportionate discipline of students with disabilities, particularly disabled Black students, is a vital part of that reform discourse.[192] Together with the persistent presence of disability activism both within and beyond schools,[193] disciplinary trends emphasize the need to revise a MDR standard that has not been overhauled in two decades.[194] The qualified-immunity-inspired framework proposed here offers to make headway both on issues of disability rights and finding equitable disciplinary rates between disabled and non-disabled students.

Most of the improvements that Congress should make to the MDR are more resource-based and procedural.[195] Scholars have highlighted the potential for biases to have undue weight in the determination process,[196] the lack of empirical tools measuring the role of different disabilities in students' behaviors,[197] and the lack of both requirements and funding for the proper level of expertise during MDR meetings.[198] These same resource concerns explain why outright bans on suspensions are not feasible, though ending the practice of suspensions is an admirable goal given the growing evidence that they are a harmful practice.[199] If teachers cannot

191. *See* Peterson, *supra* note 7.

192. Fisher et al., *supra* note 12, at 757.

193. *Cf.* Gallagher, *supra* note 34, at 1121 (responding to the social model's impact on special education policy debates).

194. Fisher et al., *supra* note 12, at 756.

195. *E.g.*, *id.* at 759.

196. *Id.*

197. Katsiyannis & Maag, *supra* note 6, at 91 ("There are no empirically validated methods to make a determination as to whether or not misbehavior was related to a disability . . . .").

198. Fisher et al., *supra* note 12, at 761.

199. *See* Satoria Ray, *The Case for Banning School Suspensions*, PROGRESSIVE MAG. (Apr. 22, 2021), https://progressive.org/public-schools-advocate/the-case-for-

exercise some exclusionary discipline in proper situations and if school districts continue to face resource shortages, schools will be spreading their teachers even thinner and could exacerbate an already troubling teacher scarcity.[200] Suspensions remain a practical necessity until schools are funded to provide for the needs of students who behave in extreme ways and to support the teachers who serve them.

In practice, then, the change in framework proposed here may not have its most positive consequences without also addressing these additional flaws in the procedural steps and supporting determination teams. Nonetheless, identifying the driving inquiries that best serve the purposes of the MDR process and respecting disabled students' full personhood is an important first step in reforming disciplinary practices for students with disabilities. The changes may seem semantic to some, but they could be a key move towards bringing the disability rights movement fully into the realm of K-12 education and removing an artificial obstacle for many students with disabilities, sending the clear message that they are as capable and responsible as their peers.

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200. Alia Wong, *Overworked, Underpaid? The Toll of Burnout is Contributing to Teacher Shortages Nationwide*, USA TODAY (Dec. 27, 2022), https://www.usatoday.com/story/news/education/2022/12/21/why-there-teacher-shortage-schools-struggled-nationwide-2022/10882103002/ [https://perma.cc/KVK4-C8QQ].