



Following the Rules: *Discipline for Students with Disabilities*

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Special Rules for Students with Disabilities



- Students with disabilities are “special” when it comes to discipline.
 - Special education student (eligible under IDEA).
 - Student in process of being assessed for special education.
 - Student whom the local educational agency (LEA) had a “basis of knowledge” the student might be a special education student.
 - Students who qualify as an individual with a disability under Section 504 of the 1973 Rehabilitation Act.
- California law defers to IDEA federal law and regulations regarding suspension and expulsion of special education students. (Ed Code 48915.5)

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Why Are There Special Rules?



- Prior to the amendments to the Education of the Handicapped Act (EHA) in 1975, (now known as Individuals with Disabilities Education Act) disciplinary measures were often used to exclude children with disabilities from public schools because they were “more difficult” to educate than nondisabled children.
- Public Law 94-142 was developed, with one of its primary goals being the elimination of any exclusion of children with disabilities from education.

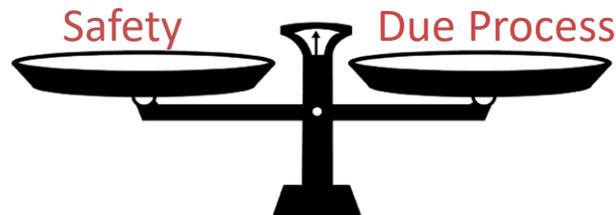
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Why Are There Special Rules?



- IDEA reauthorizations of 1997 and 2004, Congress recognized that in certain instances schools need increased flexibility to deal with safety issues while maintaining needed due process protections in the IDEA.
- IDEA emphasizes proactive approach to addressing behavior.



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IDEA's Proactive Approach to Behavior



- For children with disabilities whose **behavior impedes their learning or that of others**, IEP teams must **consider**, as appropriate, and address in the child's IEP, the use of positive behavioral interventions and other strategies to address the behavior.
- Regardless of student's eligibility category!
- Consider and implement behavior interventions for students well before the point when the student is facing removal.
- Not just for behavior that violates school rules.
 - E.g., frequent absences, lack of participation

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Students Not Yet Eligible



- “We’ve got an expulsion coming up, but the student is just a general education student.”
- General education students – not already identified as needing special education – may be entitled to the protections under the IDEA.
- Compliance with the regulations is critical to ensuring defensibility and minimizing risk for challenges to disciplinary decisions.



When May Students Who Are Not Eligible Receive Protections Before Disciplinary Removals?



- When there's a “**basis of knowledge**” that the LEA knew (or **should have known**) that the child was a child with a disability under IDEA.
- Based on what the LEA knew (or should have known) *prior to* the behavior underlying the disciplinary action!



What triggers a “basis of knowledge” that a student has a disability?



- If, before the behavior that precipitated the disciplinary action...
 - Parent expressed concern in writing to supervisory or administrative personnel, or the student’s teacher, that the child needs special education;
 - The parent requested an evaluation; or
 - Student’s teacher or other district personnel expressed specific concerns about a pattern of behavior directly to the director of special education or to other supervisory personnel.



What triggers a “basis of knowledge” that a student has a disability?



- **However**, the LEA **will not** be deemed to have a basis of knowledge if...
 - Parent has not allowed an evaluation of the child;
 - Parent has refused special ed services; or
 - Child has been evaluated and determined not to be eligible under IDEA.



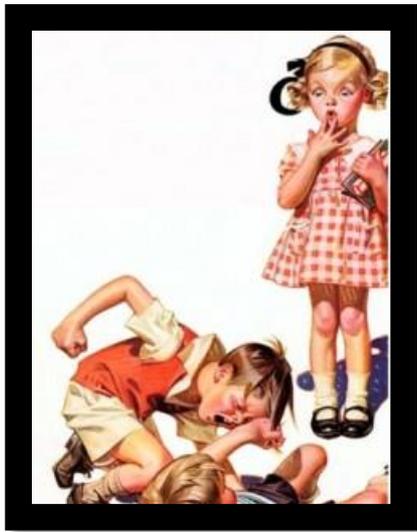
Does an LEA Have to Assess a Child Who Is Pending a Removal for Disciplinary Reasons?



- If parent requests an evaluation of a child after the child has been recommended for expulsion, LEA must conduct an evaluation in an **expedited manner**.
- Child remains in the educational placement determined by school authorities.
- Hold IEP meeting to determine eligibility.
 - ✓ If not eligible, process stops and general ed discipline procedures apply.
 - ✓ If eligible, conduct a manifestation determination.



A student eligible for special education has committed an act that constitutes grounds for suspension or expulsion. Now what??



Certain protections are triggered when a removal of a student with disabilities constitutes a

“change in placement”

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What is a Removal?



- Any instance in which a child is removed from his/her educational placement for disciplinary purposes, such as suspension or expulsion.
- Special education students are “removed” when they cannot:
 - Progress in Reg. Ed. Curriculum;
 - Receive services or progress on goals listed on their IEP;
 - or
 - Participate with non-disabled peers to the extent dictated by their IEP.

Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46715 (August 14, 2006)

- CAUTION: “We just had parent come pick up the student, but we didn’t issue a suspension.”

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Is there a “Change in Placement”?



- Occurs in the disciplinary context when:
 - The removal is for more than 10 consecutive school days; or
 - The child has been subjected to a series of removals that constitute a pattern:
 - Because the series of removals total **more than 10 school days in a school year**;
 - Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
 - Because of 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.

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Counting the Days of Suspension



- Portions of a school day that a child has been suspended may be considered a removal in determining whether there is a pattern of removals.

71 Fed. Reg. 46,715 (2006).

- There is no guidance as to how to calculate a partial day - whether it is to be "rounded up" to a full day.
- If an administrator sends a student home for the day, the prudent course is to count that entire day against the 10-day limit.
- A "school day" means any day, including a partial day that children attend school for instructional purposes. "School day" has the same meaning for all children in school, including children with and without disabilities.

34 CFR § 300.11 (c)(1).

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10 Day “*FAPE Free*” Zone...Sort Of



- LEAs may “remove” a student with a disability for up to 10 school days regardless of his/her disability.
- After the 10th school day of removal, a student must continue to receive educational services to allow the student to participate in the general educational curriculum, although in another setting, and to progress toward meeting his/her IEP goals.

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Manifestation Determination – 2 Key Questions



- Within **10 school days** of removing a student beyond the 10th day, the LEA, parents, and relevant members of IEP team are required to meet to determine:
 1. Was the conduct **caused by**, or did it have a **direct and substantial relationship** to, the student's disability; or
 2. Was the conduct the **direct result** of the LEA's **failure to implement** the student's IEP?

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If the Misconduct is Found to Be a Manifestation of the Child's Disability...

- Return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement; and
- Either:
 - Conduct a functional behavioral assessment, unless the LEA conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; OR
 - If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior;



If the Misconduct is Found to NOT Be a Manifestation of the Child's Disability



- Then the child is subject to the same sanctions for misconduct as a child without a disability.
- MODIFIED FAPE REQUIREMENT
 - Child must continue to receive educational services so as to 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.
 - Not required to provide children exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline.
- Parents have the right to appeal this decision by filing a due process complaint.

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But There Are Exceptions...



- **3 special circumstances** when an LEA may remove a student to an interim alternative educational setting for **45 school days**:
 - Carries or possesses a **weapon** at school, on school premises, or at a school function;
 - Knowingly possesses or uses illegal **drugs**, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school functions; or
 - Has inflicted **serious bodily injury** upon another person while at school, on school premises, or at a school function.
- Whether or not behavior is manifestation of a student's disability.

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Still Hold a Manifestation Determination under Special Circumstances?



- YES, an IEP team is required to hold a manifestation determination review each time that a student is removed for more than 10 school days, **even in cases where the removal is made for violation of 34 C.F.R. § 300.530(g) (removals for weapons, drugs, or serious bodily injury).**

William S. Hart UHSD, OAH Case No. 2016030901 (May 10, 2016)

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What is Considered 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”
- Exclusion for pocket knife with blade less than 2½ inches
- Cases:
 - “Adult size scissors” – yes
 - “Safety scissors” – no



(34 C.F.R. §300.530(i)(4); 18 U.S.C. §930(g); Student v. California Montessori Project (OAH 2011) No. 2011030849)

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What is considered “serious bodily injury?”



- The injury will require more than minor medical treatment from a school nurse.
 - Substantial risk of death;
 - Extreme physical pain;
 - Protracted/obvious disfigurement;
 - Protracted loss or impairment of function of bodily member, organ or mental faculty.



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Who Determines Interim Alternative Educational Setting?



- IEP team decision.



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And There Are More Exceptions...

- An LEA may request an **expedited due process hearing** when it believes that maintaining the current placement of the child is **substantially likely to result in injury** to the child or to others seeking an order to change the student's placement to an appropriate interim alternative educational setting for not more than **45 school days**.
- **Even if the conduct was a manifestation of a student's disability.**
- Unlike unilateral removals, LEA can ask ALJ to renew IAES placement for additional 45 school days.
(34 C.F.R. §532(b)(2)-(3); 71 Fed. Reg. 46723 (Aug. 14, 2006))
- Court may grant temporary restraining order (i.e., Honig injunction) to remove Student who is considered dangerous.



Manifestation Determinations Under Section 504



- Although the term "**manifestation determination**" does not appear in the regulatory language of Section 504, OCR and most courts interpret Section 504 as requiring an MDR in connection with disciplinary actions that constitute a significant change in placement.
- Conducted in substantially the same way, regardless of whether the student is IDEA-eligible or covered only under Section 504.
- The determination of whether a student's misconduct is related to his disability must be made by people knowledgeable about the student and the meaning of the evaluation data.

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Manifestation Determinations Under Section 504



- Must consider a broad range of data that competent professionals would require and relevant information that is recent enough to afford an understanding of the student's behavior, such as a psychological evaluation.
- Example: A district violated Section 504 when the MDR team failed to consider a pending physician's assessment regarding a suspected link between the student's aggressive behavior and medicine he was taking for asthma.

See Quincy (WA) Sch. Dist. No. 144-101, 52 IDELR 170 (OCR 2009)

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OSERS Guidance on Behavioral Supports to Students with Disabilities



Dear Colleague Letter, 116 LRP 33108 (August 1, 2016)

- Guidance intended to clarify schools obligation to provide appropriate behavioral supports to children with disabilities who require such supports in order to receive FAPE.
- 2 resource documents to assist teachers and school leaders with classroom management strategies and assist schools in implementing schoolwide behavioral efforts.
- <http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf>

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Questions



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THANK YOU



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