

Behavior and Discipline

Building principals and school administrators are responsible for ensuring that schools are safe, disciplined, and drug free. Children with disabilities have many protections under the IDEA; however, special education law cannot interfere with school safety.

If a school takes disciplinary action against a child with a disability, it must notify the parents the same day and inform them of their procedural safeguards. A child with a disability is subject to the same consequences or punishments as other children, but a child with a disability is guaranteed certain protections under the IDEA.

Remember that nothing in the IDEA prohibits a school from reporting a crime committed by a student with a disability to local law enforcement. If a school does report a crime to law enforcement, it must ensure that copies of the student's special education and disciplinary records are transmitted to the law enforcement agency to the extent permitted under the Family Educational Rights and Privacy Act (FERPA).¹

Disciplinary Actions

The 10-day rule: (otherwise known as the "FAPE-free zone")

School personnel may remove a child with a disability who commits a violation of the student code of conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for **not more than 10 school days**, to the extent such alternatives are applied to students without disabilities. That is, if a student with a disability is removed from the educational setting for less than 10 days in a school year, the school is not required to convene an IEP team meeting, conduct a manifestation determination, do a functional behavioral assessment, develop a behavior intervention plan, or provide services, if educational services are not provided to students without disabilities who are similarly removed.

Once past the 10 "FAPE-free" days, the school's responsibilities change.

Change of Placement

In determining whether to order a change of placement for a student with a disability who violates a student code of conduct, school personnel may consider any unique circumstances on a case-by-case basis. A change of placement occurs if:

- 1) The student is removed for more than 10 consecutive school days.
- 2) The student is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year and because of such factors as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.

In-school suspensions, partial days, and bus suspensions

¹ Absent prior parental consent, FERPA permits disclosure if it is pursuant to a subpoena or court order, in connection with an emergency, or in accordance with a specific state statute.

The comments to the federal regulations address these tricky areas as follows:

- In-school suspensions are not counted toward the 10 days if the child is afforded the opportunity to continue to appropriately progress in the general curriculum, continue to receive services as set forth in his or her IEP, and continue to participate with nondisabled peers to the extent he or she would in the current placement.
- Portions of a day that a child is suspended do count toward the 10 cumulative days.
- Bus suspensions count if transportation is part of the student's IEP and no alternative transportation is provided.

Manifestation Determination

A manifestation determination is required if the school is considering removing a child with a disability from his or her educational placement for more than 10 school days in a given school year when that removal is deemed a change of placement or placement is made in an interim alternative educational setting (IAES).

The manifestation determination: The manifestation determination must be conducted by “the local educational agency, the parent, and relevant members of the IEP team (as determined by the parent and the local educational agency).” The law does not specify who “relevant members of the IEP team” are, but logic dictates that they would be those team members with an expertise regarding the student’s disability and teachers or administrators with direct knowledge of the student and/or the disciplinary incident.

Procedures: The manifestation determination must take place within 10 school days of any decision to change the placement of a child with a disability due to a violation of the student code of conduct. The team conducting the manifestation determination must review all relevant information in the student’s file, including the student’s IEP, any teacher observations, and any relevant information provided by the parents.

Standard of review: The conduct shall be deemed to be a manifestation of the child's disability if either of the following applies:

- 1) The conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- 2) The conduct in question was the direct result of the public education agency's failure to implement the IEP.

If the behavior *is* a manifestation: If the team conducting the manifestation determination determines that the behavior is a manifestation of the child's disability, the IEP team must:

- 1) Conduct a functional behavioral assessment (FBA), if one has not already been done;
- 2) Implement a behavior intervention plan (BIP), if one has not already been implemented.
- 3) If a BIP is already in place, review it and revise it as necessary to address the current behavior.
- 4) Return the child to the placement from which the child was removed *unless*:
 - a. The offense involved "special circumstances" (drugs, weapons, or serious bodily injury); or
 - b. Parents and school agree to a change of placement as part of the modification of the BIP.

If the behavior is *not* a manifestation: If the team conducting the manifestation determination determines that the behavior is not a manifestation of the child's disability, the school may go forward with regular disciplinary action, but must continue to provide the student with a free appropriate public education (FAPE).

Provision of Services

If the disciplinary action that gave rise to the removal was not a manifestation of the student's disability, the school may apply the relevant disciplinary procedures to a child with a disability in the same manner and for the same duration as for a nondisabled child. However, in the case of a student with a disability who has been removed from his or her current placement for more than 10 days in a given school year, for the remainder of the removal period, the school must provide services to the extent necessary to enable the child to progress in the general curriculum and appropriately advance toward achieving the goals set out in his or her IEP. Services may be provided in an interim alternative educational setting.

If a series of short suspensions constitutes a change of placement, the **IEP team** determines the extent to which services are necessary to enable the child to progress in the general curriculum and appropriately advance toward achieving the goals set out in his or her IEP during future removals. If the same series of short suspensions does *not* constitute a change of placement, the **school principal in consultation with at least one of the child's teachers** decides what educational services to offer.

Special Circumstances

School personnel may remove a student with a disability to an interim alternative educational setting (IAES) for not more than 45 *school days*, regardless of whether the behavior is a manifestation of the student's disability in the following cases:

- 1) The child carries or possesses a weapon to or at school, on school premises, or to or at a school function;
- 2) The child 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 function; or
- 3) The child has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function.

The term "weapon" means a 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.

The term "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.

The term "serious bodily injury" does not apply to every assault, but applies in situations that do not involve a weapon, but that involve:

- 1) substantial risk of death;
- 2) extreme physical pain;
- 3) protracted and obvious disfigurement; or
- 4) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Interim Alternative Educational Setting (IAES) placements

School personnel may remove a student to an IAES for 45 school days under the “special circumstances” discussed above without initiating a due process hearing. At the end of that 45-day period, if the school believes it would be dangerous for the student to be returned to his or her original placement, the school can request an expedited due process hearing to request that the student remain in the IAES for an additional 45 school days.

A school that believes that maintaining the child in the placement he or she was in when the disciplinary incident occurred would result in injury to the child or to others may request an expedited due process hearing to have the child removed to an appropriate IAES for up to 45 school days. Schools may make repeated requests for the hearing officer to order the student to remain in the IAES for an additional 45 school days if they believe it would be dangerous to return the child to the original placement.

The IAES is determined by the IEP team. It must be appropriate and enable the student to continue to participate in the general curriculum, although in a different setting, and to progress toward meeting the goals set out in his or her IEP. In the IAES, the student must receive the services and modifications described in his or her IEP, as well as services and modifications to address the behavior so that it does not recur.

Appeals

Expedited due process hearings: IDEA allows the parent of a child with a disability who disagrees with any decision regarding placement (i.e., the IAES) or the manifestation determination, or a school that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, to request an expedited due process hearing. The hearing shall occur within 20 *school* days of the date the hearing is requested, with a determination resulting within 10 *school* days after the hearing.

| **“Stay put”:** If a parent files for an expedited due process hearing, “stay put” placement is in the IAES during the pendency of the appeal. That is, the student remains in the IAES until the hearing officer decides the case, or until the time period for which the school has assigned the student to the IAES has run out, whichever occurs first.

Hearing Officer Authority: In an expedited due process hearing, the hearing officer has the authority to order a change of placement. The hearing officer can either return the child to the placement from which the child was removed, or may order the child to an appropriate IAES for not more than 45 school days if the school can prove that returning the child to his or her current placement is “substantially likely to result in injury to the child or to others.”

Protections for Children Not Yet Eligible for Special Education and Related Services

A child who has not yet been determined eligible for special education but who commits a violation of the student code of conduct may assert the rights and protections under IDEA's disciplinary provisions if the school had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action took place. A school will be deemed to "have knowledge" if, prior to the violation:

- 1) The parent of the child expressed concern in writing to the school's supervisory or administrative personnel or to the child's teacher that the child is in need of special education and related services;
- 2) The parent had requested that the child receive an evaluation for special education; or
- 3) The child's teacher or other school personnel had expressed directly to the director of special education or to other supervisory personnel specific concerns about a pattern of behavior demonstrated by the child.

Exception: The school will *not* be deemed to "have knowledge" if, prior to the disciplinary action (1) the parent refused to allow the school to evaluate the child, (2) the parent refused to allow the school to provide services to an eligible child, (3) the school had already evaluated the child and the child was determined to not be a child with a disability, or (4) the child's parent has revoked consent for special education and related services.

If the parent requests an evaluation of the child during the time period that the child is subject to disciplinary action, the school must conduct the evaluation in an expedited manner. During the pendency of the evaluation, the child remains in the educational placement determined by the school.

- While not required by law, if a parent had previously refused to allow the school to either evaluate the child or provide services, prior to any long-term suspension or expulsion, the school may want to offer the parents a second chance as a best practice.

Behavior and Discipline: 34 C.F.R. §§ 300.530 through 300.536

Controlled Substance/
Illegal Drug: 20 U.S.C. § 1415(k)(7)(A) and (B);
21 U.S.C. § 812(c)

Serious Bodily Injury: 20 U.S.C. § 1415(k)(7)(D);
18 U.S.C. § 1365(h)(3)

Weapon: 20 U.S.C. § 1415(k)(7)(C);
18 U.S.C. § 930(g)(2)