

Placement and School Discipline



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1—Background

States, schools, and communities are understandably very concerned with school safety these days. Providing safe environments in which children can learn, free of drugs and violence, is one of education's top priorities. In keeping with that concern, it's not surprising that IDEA includes provisions that address the discipline of children with disabilities in school settings and at school functions.

IDEA's discipline provisions were first introduced in the 1997 amendments and have been retained in the 2004 amendments, where they've been streamlined. Even so, they remain complex, spelling out the authority of school personnel to take disciplinary action when the student violating the code of conduct is a student with a disability. Under certain conditions, the actions that schools can take include removing students with disabilities from their current placement, placing them in an interim setting or, if appropriate, suspending or expelling them. This authority may be exercised only in specific circumstances, which we will discuss here.

2—Limitations of This Discussion

As we've said, IDEA's discipline provisions are complicated. Using them to make decisions about which disciplinary actions may legitimately be taken in any given situation involves many variables, many "if-this, then-that" decision points. It's not possible to quickly summarize the provisions, certainly not in enough detail for readers to be able to apply them faithfully.

Therefore, this not-so-brief overview will limit itself to identifying the major variables that are involved in disciplinary decision making that can affect a student's placement. This will give you a sketch of how disciplinary decisions are made. However, this is not a substitute for reading the actual discipline regulations in IDEA.

3—School Codes of Conduct

At the beginning of the school year, children often receive guidelines of expected standards of behavior, dress, academic integrity, and attendance, as well as the consequences of violating those standards. IDEA addresses the extent to which schools may take disciplinary action when a child with disabilities violates a local code of student conduct. These codes vary from place to place, so it may be important for you to get a copy of your local school district or State policies with respect to acceptable (and unacceptable) student conduct.

4—Overview of IDEA's Discipline Procedures

It's helpful to have a quick look at the sections used to organize IDEA's disciplinary procedures. We've listed them below. These will give you an idea of the aspects that must be considered when disciplinary action is taken with a student with a disability.

- Authority of school personnel
- Manifestation determination
- Services provisions
- Interim alternative educational setting (IAES)
- Appeals
- Child's placement during appeals
- Protections for children not determined eligible for special education and related services
- Change of placement because of disciplinary removals
- Additional aspects

5—Authority of School Personnel

Let us say that a child with a disability has violated a code of student conduct. The question that many school systems, families, and advocates then ask is: What authority do school personnel have to discipline that child?

First-Time Violation. School personnel may remove a child to an appropriate interim alternative educational setting (IAES), another setting, or suspension for not more than 10 school days in a row—to the extent those alternatives are applied to children without disabilities. You may hear this referred to as “the 10-day rule.”

Does the student continue to receive special education services during the time of removal? It’s important to know that schools do not have to provide students with disabilities with special education services during a removal of up to 10 school days in one school year—as long as they also do not provide educational services to children without disabilities who are similarly removed [§300.530(d)(3)].

Additional Violations. What if the child violates a code of conduct more than one time in the same school year? Can school personnel remove that child again for up to and including 10 school days in a row?

Yes—and for each separate incident of student misconduct— under two conditions. Those conditions are:

- Additional removals from the current educational placement may occur so long as they are for not more than 10 school days in a row in a school year and they do not constitute a “change of placement” in the disciplinary context under §300.536. [§300.530(b)(1)]
- Beginning with the **11th cumulative day** in a school year that a child is removed, the school system must provide services to the extent required in §300.530(d). [§300.530(b)(2) and (d)(4)-(5)]

You may be wondering what constitutes a “change of placement”? We’ll talk about that in a moment, since it’s a critical issue in IDEA’s discipline procedures. First, though...

What happens to a child on the 11th cumulative day? Answer: The school system must provide services to the child to the extent required under §300.530(d), which clarifies that the child must continue to receive educational services so that the child can continue to participate in the general education curriculum (although in another setting), and progress toward meeting the goals in his or her IEP.

6—What’s a Change of Placement?

School personnel have the authority to make additional removals of a child with a disability for not more than 10 consecutive school days in the same school year for separate incidents of misconduct—as long as those removals do not constitute a change of placement under §300.536. Section 300.536 states that a change of placement occurs if:

- 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.

What factors are to be considered in determining if the series of removals constitutes a pattern? IDEA states in §300.536 that a pattern would exist—

- when the series of removals total more than 10 school days in a school year;
- when the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; and
- when additional factors exist such 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.

The school system determines on a case-by-case basis whether a pattern of removals constitutes a change of placement. This determination is subject to review through due process and judicial proceedings.

The Department of Education acknowledged in response to a public comment:

...what constitutes “substantially similar behavior” is a subjective determination. However, we believe that when the child’s behaviors, taken cumulatively, are objectively reviewed in the context of all the criteria in paragraph (a)(2)...for determining whether the series of behaviors constitutes a change in placement, the public agency will be able to make a reasonable determination as to whether a change in placement has occurred. Of course, if the parent disagrees with the determination by the public agency, the parent may request a due process hearing pursuant to §300.532. (71 Fed. Reg. 46729)

7—Case-by-Case Determinations

Under a new provision in IDEA, school personnel may consider whether a change in placement that is otherwise permitted under the disciplinary procedures is appropriate and should occur. We italicize those words to stress their importance. At first glance, this provision may appear to give school personnel the authority to unilaterally determine a change of placement for a child, but this is not so. School personnel must exercise this new authority on a case-by-case basis, and they can only use this authority if the removal would otherwise be consistent with the other provisions in §§300.530-300.536.

In other words: School authorities may only exercise their discretion on a case-by-case basis to allow removals for unique circumstances if the other disciplinary procedures have been satisfied.

What are unique circumstances? If school personnel now have the authority to take any unique circumstances or factors into consideration as part of change-of-placement decision making, what kind of circumstances might they consider? According to the Department:

Factors such as a child’s disciplinary history, ability to understand consequences, expression of remorse, and supports provided to a child with a disability prior to the violation of a school code [of student conduct] could all be unique circumstances considered by school personnel when determining whether a disciplinary change in placement is appropriate for a child with a disability. (71 Fed. Reg. 46714)

Is the IEP team involved in a case-by-case determination? According to the Department of Education, not officially:

[W]e do not believe it is appropriate to define a role for the IEP Team in this paragraph. There is nothing, however, in the Act or these regulations that would preclude school personnel from involving parents or the IEP Team when making this determination. (71 Fed. Reg. 46714)

Which school personnel are involved? IDEA’s regulations do not specify the answer to this question. The Department explains that “...such decisions are best made at the local school or district level and based on the circumstances of each disciplinary case.” (71 Fed. Reg. 46714)

8—Parent Notification

Parent notification is a very important aspect of implementing IDEA’s discipline procedures. On the date when the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision and provide the parents the procedural safeguards notice described in §300.504. [§300.530(h)]

9—Manifestation Determination

If a decision is made to change the child’s placement because of a violation of a code of student conduct, then a **manifestation determination** must be conducted within 10 school days of that decision [§300.530(e)]. The purpose of the manifestation determination is to determine whether or not the child’s violation of the student code of conduct is substantially linked to his or her disability.

What's presented below is limited to summarizing what occurs if the determination is "yes" (the behavior was a manifestation of the child's disability) or "no" (the behavior wasn't a manifestation).

A determination of "yes." There are two scenarios under which the manifestation determination would be "yes." These are when the conduct:

- was a manifestation of the child's disability, or
- was the direct result of the LEA's failure to implement the child's IEP.

If either condition is met, the student's conduct must be determined to be a manifestation of his or her disability [§300.530(e)(2)-(3) and (f)]. But it matters which of the two conditions was the basis for the determination of "yes."

"Yes," for failure to implement the IEP. If the group determines that the child's misconduct was the direct result of the LEA's failure to implement the child's IEP, the "LEA must take immediate steps to remedy those deficiencies." As the Department explains, if such a determination is made:

The LEA has an affirmative obligation to take immediate steps to ensure that all services set forth in the child's IEP are provided, consistent with the child's needs as identified in the IEP. (71 Fed. Reg. 46721)

What about placement? Unless the behavior involved weapons, drugs, or serious bodily injury—called special circumstances—the child would be returned to the placement from which he or she was removed as part of the disciplinary action. However, the parent and LEA can agree to a change of placement as part of the modification of the behavioral intervention plan. [§300.530(f)(2)]

"Yes," for conduct directly related to disability. If the group finds that the child's misconduct had a direct and substantial relationship to his or her disability, then the group must also reach a manifestation determination of "yes." Such a determination carries with it two immediate considerations:

- Functional behavioral assessment (FBA)—Has the child had one? Does one need to be conducted?
- Behavioral intervention plan (BIP)—Does the child have one? If so, does it need to be reviewed and revised? Or if the child does not have one, does one need to be written? [§300.530(f)]

Thus, if a child's misconduct has been found to have a direct and substantial relationship to his or her disability, the IEP team will need to immediately conduct a FBA of the child, unless one has already been conducted. According to the Senate HELP committee:

An FBA focuses on identifying the function or purpose behind a child's behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP Team in developing a BIP that will reduce or eliminate the misbehavior.[2] In addition to conducting an FBA (if necessary), the IEP team must also write a BIP for the student, unless one already exists. If a plan does already exist, then the IEP team will need to review and modify it, as necessary, to address the behavior.

The IEP team must also address a child's misbehavior via the IEP process as well. As the Department explains: When the behavior is related to the child's disability, proper development of the child's IEP should include development of strategies, including positive behavioral interventions, supports, and other strategies to address that behavior... When the behavior is determined to be a manifestation of a child's disability but has not previously been addressed in the child's IEP, the IEP Team must review and revise the child's IEP so that the child will receive services appropriate to his or her needs. Implementation of the behavioral strategies identified in a child's IEP, including strategies designed to correct behavior by imposing disciplinary consequences, is appropriate... even if the behavior is a manifestation of the child's disability. (71 Fed. Reg. 46720-21)

What about placement? The child must be returned to the placement from which he or she was removed as part of the disciplinary action, with two exceptions:

- if the behavioral infraction involved special circumstances of weapons, drugs, or serious bodily injury; or
- if the parents and LEA agree to change the child's placement as part of the modification of the BIP.

If either of these exceptions apply, then the child need not necessarily return to the same placement.

If the Determination is “No.” A manifestation determination of “no” means either that:

- the child's behavior was not caused by or did not have a direct and substantial relationship to the child's disability; or
- the child's behavior was not the direct result of the LEA's failure to implement the IEP.

In either case of “no,” school personnel have the authority to apply the relevant disciplinary procedures to the child with disabilities in the same manner and for the same duration as the procedures would be applied to a child without disabilities, except—and *this is very important*—for whatever special education and related services the school system is required to provide the child with disabilities under §300.530(d). We'll talk about that in a moment. But first...there's a bit more to understand about the overall authority of school personnel.

10—Authority of School Personnel in Special Circumstances

In addition to the general authority of school personnel to remove a student with disabilities from his or her current placement in disciplinary situations, school personnel also have the authority to remove a student with disabilities for what's known as “special circumstances.” These circumstances apply to a child with a disability:

- who carries a **weapon** to or possesses a weapon at school, on school premises, or at a school function;
- who knowingly possesses or uses illegal **drugs**, or sells or solicits the sale of a controlled substance, at school, on school premises, or at a school function; or
- who has inflicted **serious bodily injury** upon another person while at school, on school premises, or at a school function under the jurisdiction of a State educational agency (SEA) or a local educational agency (LEA). [§300.530(g)]

In any of these circumstances, school personnel may remove a student to an interim alternative educational setting (IAES) for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability.

11—Providing Services to Students During Periods of Removal

After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, the school system must provide services to the student during any subsequent days of removal, to the extent required under §300.530(d).

And what does §300.530(d) require?

Which services, under which circumstances, and who decides? The services that a school system must provide to a student with a disability under disciplinary removal and the extent to which any services need to be provided will depend on many factors and sometimes a combination of factors, including but not limited to:

- whether the child's behavior infraction was determined to be a manifestation of his or her disability;
- whether educational services are provided to children without disabilities removed for the first 10 days or less in a school year;
- how long the disciplinary removal is supposed to last;
- how many days of removal the child has already been subject to in this school year as part of other disciplinary actions; and
- the nature of the child's infraction (e.g., did it involve a weapon, drugs, or serious bodily injury).

Obviously, the “extent of services” question can have many possible answers. This is reflected in the provisions at §300.530(d), which can be characterized by their “if-this, then-that” nature. They also cannot be summarized adequately—the details matter all.

12—Appealing a Disciplinary Decision

Both the LEA and the parent of the child with a disability have the right to request a due process hearing to appeal decisions taken during disciplinary procedures, although the reasons these parties may do so differ. Summarizing these:

- Parents may appeal decisions regarding placement of their children (under §§300.530 and 300.531);
- Parents may appeal decisions regarding manifestation determination under §300.530(e); and
- The LEA may appeal a decision to maintain the current placement of the child, if the LEA believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others. [§300.532(a)]

Procedures for filing a due process complaint. A hearing is requested by filing a due process complaint. Some points to note about the process include:

- The public agency must inform the parent of any free or low-cost legal or other relevant services in the area. [§300.507(b)]
- The due process complaint must remain confidential. [§300.508(a)(1)]
- The party who files a due process complaint must forward a copy of the complaint to the SEA. [§300.508(a)(2)]
- The due process complaint must include specific information: name of the child; address of the child’s residence; name of the child’s school; description of the nature of the problem, including any related facts; and a proposed resolution of the problem (to the extent known and available to the filing party at the time). [§300.508(b)]

Expedited hearings. The parent and the LEA have the opportunity for an expedited due process hearing on the disciplinary matter about which they are disagreeing. The expedited hearing must comply with IDEA’s provisions for due process hearings (including hearing rights, such as a right to counsel, presenting evidence and cross-examining witnesses, and obtaining a written decision), although clearly the timelines for the hearing will be speeded up. The SEA or LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing. [§300.532(c)(2)]

Can due process be avoided? IDEA strongly favors avoiding due process hearings, when possible, by resolving disputes through alternate, less adversarial and more cost-effective means. Mediation is specifically mentioned as an option when a due process hearing, including when an expedited due process hearing, is requested. Under IDEA, parties can choose to use mediation to resolve a dispute regardless of whether a due process hearing has been requested, and a parent can choose not to have a resolution meeting, if the parent and the school district agree instead to use mediation to resolve their differences.

In the context of an expedited due process hearing, parents and the LEA have available to them either the resolution process or the mediation process as vehicles for resolving their differences without having to conduct an expedited due process hearing. They also may choose to waive either option and proceed directly to an expedited due process hearing. [§300.532(c)(3)] Waiving the resolution meeting, however, requires that both parties agree in writing to do so.

13—Authority of the Hearing Officer

If the parents and LEA have not resolved their disagreement via a resolution meeting or mediation, and the due process hearing goes forward, the hearing officer must issue a decision in an expedited due process hearing. In

making that decision, the hearing officer may:

- (i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of §300.530 or that the child's behavior was a manifestation of the child's disability; or
- (ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

14—LEA's Recourse to Returning a Student to His or Her Original Placement

Suppose that a hearing officer determines in an expedited due process hearing that a removed student will return to his or her original placement, and the LEA disagrees, believing that doing so is substantially likely to result in injury to the child or others. Does the LEA have any recourse but to return the child to the original placement?

Yes, the LEA does, but it's a limited one: to appeal the hearing officer's determination through another expedited due process hearing. The procedures we've just described "may be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others" [§300.532(b)(3)].

Note that the LEA has the discretion to remove a child with a disability to an IAES for up to 45 school days, if the special circumstances involving weapons, drugs, or serious bodily injury are present. If the special circumstances are not involved, then school officials must seek permission from the hearing officer (71 Fed. Reg. 46722 using the process of appeal just described.

15—May The Hearing Officer's Determination Be Appealed?

Yes. Any "party aggrieved by the findings and decision in the hearing may appeal to the SEA" [§300.514(b)(1)]. In some instances, bringing a civil action is also possible.

16—The Child's Placement During the Appeal Process

Where will the child be placed until a decision on the appeal is issued—the original placement from which the child was removed during the disciplinary action, the interim alternative educational setting (IAES) to which he or she has been removed, or another setting that the parents and the school system agree to? Historically, the "stay-put" principle required that child remain in his or her original placement. Now, under IDEA 2004, that's no longer true.

General Answer: The "default" placement during an appeal now is the IAES. IDEA states that the child must remain in the IAES chosen by the IEP team until the hearing officer makes his or her decision on the appeal or the time period for the child's removal expires—whichever comes first—unless the parent and the SEA or LEA agree otherwise.

17—Other Aspects of IDEA's Discipline Procedures

In addition to the issues identified above, IDEA's discipline procedures contain two other elements we'd like to touch upon in closing, so you're aware of them.

Basis of knowledge. Suppose this situation: A student who has not yet been found to be a "child with a disability" under IDEA has violated a code of student conduct. The school system takes disciplinary action according to its policies—at which time the student asserts that, in fact, he or she is a "child with a disability" as IDEA defines that term and that the protections under IDEA must guide the discipline policies that are applied. Is this permissible?

Answer: Of course the answer is "sometimes" and "under certain circumstances." The pivot point, without a doubt, is whether or not the school system had knowledge that the child was a "child with a disability" when the child

violated the code of student conduct. This is called “Basis of Knowledge.” Follow the link to learn the details.

Reporting crimes. Do IDEA’s discipline procedures allow school systems to report crimes that are committed by children with disabilities? Yes, they do. Similarly, the law does not prevent State law enforcement and judicial authorities from exercising their responsibilities. The agency reporting the crime must ensure that copies of the special education and disciplinary records are transmitted for consideration by the appropriate authorities— however, only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act (FERPA), a Federal law that protects the privacy of children’s education records.

18—Yet More Aspects of IDEA’s Discipline Procedures

This has hardly been a “brief look” at how disciplinary action can affect a student’s placement. But when you see the amplitude of IDEA’s actual provisions, there’s no doubt that this summary only scratches the surface of what decision makers and parents need to know when disciplining a student with a disability. We would reiterate that this summary is not a sufficient guide for making those decisions. The links below, to the verbatim regulations and to the details, will help you more closely define the steps and considerations that are involved when determining how a child with a disability will be disciplined when he or she violates a code of student conduct.

National Dissemination Center for Children with Disabilities