

**DISCIPLINE – BEHAVIORAL  
MANAGEMENT, TRUANCY,  
MALTREATMENT**

**MASE**

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**BEST PRACTICES**

*Presented By*

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*These materials are designed to accompany a presentation and are not intended to be legal advice.*

## **Handling Special Ed. Discipline Situations Under The New IDEA**

### **A. RECENT AND COMING CHANGES TO STATE AND FEDERAL LAW**

- IDEA Became Effective July 2005
- IDEA Federal Regulations took effect October 13, 2006
- Additional Anticipated Changes in Special Ed. Law that will likely effect discipline approaches:
  - Minnesota Statutes
  - Minnesota Rules

### **B. BASIC PRINCIPALS FOR DISCIPLINE OF SPECIAL EDUCATION STUDENTS**

Unilateral Placements: Generally, a School District cannot *unilaterally* change a student's special education placement without Parental consent (Note: some exceptions apply).

Expulsion for Conduct Related to Disability: Schools cannot under any circumstances expel a student for misconduct that is a manifestation of the student's disabling condition.

Case-By-Case Determinations: School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of [the regulations], is appropriate for a child with a disability who violates a code of student conduct.

[OSEP Commentary]: OSEP chose not to include language in the regulations that would impede the discretion of school administrators to determine whether a change in placement is an appropriate disciplinary response. OSEP stated: "factors such as a child's discipline 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 could be unique circumstances considered by school personnel when determining whether a disciplinary change in placement is appropriate . . ." It also has stated that the regulations do "not independently authorize school personnel, on a case-by-case basis, to institute a change in placement that would be inconsistent [with other federal requirements]."

Short Term Removals: School personnel may remove a child with a disability . . . from their 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 children without disabilities).

- The freedom to use a short term removal may be compromised if a series of short term removals adds up to a *de facto* change in placement.

- FAPE standard does not necessarily apply during the first 10 days.

Long Term Removals: If school personnel seek to order a change in placement that would exceed 10 school days and the behavior . . . [is] determined not to be a manifestation of the child's disability . . . , the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities.

- FAPE standard applies to students removed for more than 10 school days.

### C. WHAT CONSTITUTES A CHANGE IN PLACEMENT?

The federal regulations now provided that a “change in placement” occurs if –

- (1) The removal is for more than 10 consecutive school days; or
- (2) The child has been subjected to a series of removals that constitute a pattern—
  - (i) Because the series of removals total more than 10 school days in a school year;
  - (ii) *Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals;* and
  - (iii) 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. (34 CFR Sec. 300.536).

Partial Day Removals: *Portions of a school day* that a child had been suspended are included in determining whether the child has been removed for more than 10 cumulative school days or subjected to a change of placement.

***Practice Pointer:*** *Advise staff to error on the side of caution. If a student is experiencing frequent short term removals from class or part of the school day on a regular basis, the IEP team should be convened to discuss the nature of the student's misconduct, whether it is related to his disabling condition, and whether further assessment or revision to the IEP/Behavior Plan are necessary.*

In School Suspension (ISS): OSEP has stated that: “An [ISS] would not be considered [a suspension under IDEA] . . . as long as the child is afforded the opportunity to continue to appropriately progress in the general curriculum, continue to receive the services on [the] IEP, and continue to participate with non-disabled children to the extent they would have in their current placement.”

Bus Suspensions: Whether a **bus suspension** would count as a day of suspension . . . depends on whether . . . transportation is a part of the child's IEP.

- If . . . [transportation is] part of the child's IEP, a **bus suspension** would be treated as a suspension . . . unless [the school] provides the bus service in some other way. . .
- If . . . [transportation is] not a part of the child's IEP, a **bus suspension** would not be a suspension under [IDEA]. In those cases, the child and his or her parents would have the same obligations to get to and from school as a nondisabled child who had been suspended from the bus.

Who Decides that a Change in Placement Has Occurred? The “public agency” decides on a “case-by-case” basis whether a change in placement has occurred. (34 C.F.R. Sec. 300.536).

#### **D. WHO IS PROTECTED BY IDEA DISCIPLINE PROVISIONS?**

Generally: The following groups are covered by IDEA disciplinary procedural protections:

- All Special Education Students
- Students Qualifying for 504 Protections
- Children who have not yet been determined to be eligible for special education if the school *had knowledge* that the child had a disability *before* the behavior that precipitated the disciplinary action occurred.

Imputed Knowledge: The school shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred:

- The parent has expressed concern in writing to [school administration], or teacher of the student that he/she is in need of special education;
- The parent has requested an evaluation; or
- The teacher or other personnel has expressed specific concerns about a pattern of behavior demonstrated by the student, directly to the director of special education or to other supervisory personnel.

Knowledge Not Imputed: A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if:

- The parent of the child has not allowed an evaluation;
- The parent has refused spec. ed. services; or
- The child has been evaluated and it was determined that he/she was not a child with a disability.

Request for Evaluation After Misconduct: If a request is made for an evaluation of a child “during the time period in which the child is subjected to disciplinary measures . . . the evaluation shall be conducted in an expedited manner. If the child is

determined to be a child with a disability . . . the school must provide special education and related services . . . except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.”

#### **E. PARENT NOTIFICATION REQUIREMENT**

The new IDEA initially stated that: “[n]ot later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.” The regulations have clarified this position to now state: “[o]n the date on which 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.” (34 CFR 300.530(h)).

#### **F. ALTERNATIVE EDUCATIONAL PLACEMENTS (IAES)**

In General: Placement allowed for 45 *school days* (previously 45 calendar days). Removal to IAES may occur:

- If Student carries or possesses a weapon to or at school, on the school premises, or to 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 the school premises, or at a school function; *or*
- Has inflicted serious bodily injury upon another person while at school, on the school premises or at a school function.

What Weapons Violations Apply? The term "dangerous weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length. 18 U.S.C. § 930(g)(2). Case Law varies on what constitutes a “weapon”

- ISD No. 279 (SEA MN 1999)(Paintball gun not weapon)
- Anaheim (SEA CA)(Paper clip used to cut not weapon)
- ISD No. 831 (SEA MN 1999)(Pencil used to stab not weapon)
- Anchorage School District (SEA AL 2005)(School scissors=weapon)

What constitutes a controlled substance or illegal drug?

- The term "controlled substance" means "a drug or other substance identified under Section 202(c) of 21 U.S.C. § 812 (Schedules of the “Controlled Substances Act are extensive and include marijuana, cocaine, heroin, amphetamines, and anabolic steroids)

- The term “illegal drug” essentially means a controlled substance that is not legally possessed or used under the supervision of a licensed health-care professional
- An inhalant is not a controlled substance under 21 U.S.C. § 812
- OSEP has not made it clear if use of drugs during school day but off school property qualifies as possessing or using drugs at school

Serious Bodily Injury: “Serious bodily injury” means “bodily injury” that involves one or more of the following:

- A substantial risk of death;
- Extreme physical pain;
- Protracted and obvious disfigurement; or
- Protracted loss or impairment of the function of a bodily member, organ or mental faculty.
- “bodily injury” means - (A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of the function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary.

[Note] One hearing officer from California recently determined: “Student conduct, that resulted in a mild concussion to one pupil and a broken nose to another pupil did not involve serious bodily injury within the meaning of 20 U.S.C. section 1415(k)(1)(G). There was no evidence of extreme physical pain, substantial risk of death, or protracted injuries of the kind described in the federal definition.” *Tehachapi Unified School District* , 106 LRP 22450 (SEA Cal. 2006).

Carry Over of IAES over Consecutive School Years: OSEP clarified that the IDEA does not prevent schools “from requiring the child to fulfill the remainder of the [45 day or IAES ] placement when a new school year begins” because school officials have flexibility in this regard under the statute.

Home as the IAES: OSEP refused to state that placement in the child’s home during the IAES would be unsuitable. Instead, OSEP has indicated that factors such as the length of the removal, the extent to which the student has previously been removed from his/her placement and the child’s IEP goals and needs are factors to be considered in determining whether an IAES placement in the home is appropriate.

***\*\* Practice Pointer: The “serious bodily harm” standard for purposes of a 45 day removal under IDEA is not a well defined standard at this time. Check with legal counsel before employing this standard.\*\****

## **G. EDUCATIONAL SERVICES DURING REMOVALS**

Expelled special education students (where misconduct is not related to the disability) and students who are placed in an IAES for special circumstances (i.e. weapons,

drugs or serious bodily harm) must: (1) 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 in his or her IEP; and (2) receive, as appropriate, an FBA and behavior intervention services and modifications, that are designed to address the behavior violation so that it does not happen again.

[OSEP Comment]: OSEP states that they do not interpret, “*participate* to mean that a school or district must duplicate every aspect of the services that a child would receive in his or her normal classroom. For example, it would not generally be feasible for a child removed for disciplinary reasons to receive every aspect of the services that a child would receive if in his chemistry or auto mechanics class . . .” It has further stated: “While children removed for more than 10 school days in a school year must continue to receive FAPE, we believe the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child’s IEP. An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline.”

Suspensions for Ten Days or Less That Are Not A Change in Placement: There is no requirement under federal law to provide educational services to a special education student who has been removed from his or her current placement for *less than 10 days in the school year*. (Note Minnesota Law requires alternative educational services after 5 school days)<sup>1</sup> However, if a Student has been removed from his or her current placement 10 total school days in the same school year, the school must provide services to the Student. The services must permit the Student to: (1) 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 (2) to *progress* toward meeting the goals in his or her IEP. (34 CFR Sec. 300.530(d)).

Who Decides What Services Must Be Provided? When ever the disciplinary action will result in a “change in placement” the new placement must be determined by the IEP team. If the disciplinary removal does not constitute a “change in placement” but the school is obligated to provide services under the standard stated in 34 CFR Sec. 300.530(d), “*school personnel in consultation with at least one of the child’s teachers*” may determine the services necessary to enable the child to participate in

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<sup>1</sup> "Alternative educational services" may include, but are not limited to, special tutoring, modified curriculum, modified instruction, other modifications or adaptations, instruction through electronic media, special education services as indicated by appropriate assessment, homebound instruction, supervised homework, or enrollment in another district or in an alternative learning center under section 123A.05 selected to allow the pupil to progress toward meeting graduation standards under section 120B.02, although in a different setting.

the general ed. curriculum and to progress toward meeting goals on his/her IEP. (34 CFR Sec. 530(d)(4)).

FBA Requirement: OSEP has stated that: “we must recognize that Congress specifically removed from the Act a requirement to conduct a functional behavioral assessment or review and modify an existing behavioral intervention plan for all children within 10 days of a disciplinary removal, regardless of whether the behavior was a manifestation or not. \* \* \* We also recognize, though, that as a matter of practice, it makes a great deal of sense to attend to behavior of children with disabilities that is interfering with their education or that of others, so that the behavior can be addressed, even when that behavior will not result in a change in placement. Regulations are clear that FBA will be required for expulsions (i.e. disciplinary removals that exceed 10 consecutive school days) and IAES for “special circumstances” (i.e. 45 day removal for drugs, weapon or serious bodily injury).

***\*\*Practice Pointer: Failure to develop an FBA evaluation plan and the failure to have the IEP team develop an appropriate IEP for the period of removal are frequently raised as issues in due process hearings and in MDE complaints. Consider incorporating these obligations in team checklists or forms.\*\****

## H. MANIFESTATION DETERMINATIONS

Meeting Procedures: Manifestation determination meeting must be held within 10 school days of decision to change placement;

- “Team” required to review ***all relevant information in the student’s file***
  - Student’s current IEP;
  - Student’s most recent school evaluation/reevaluation;
  - Student’s most recent Functional Behavioral Assessment(FBA)
  - Student’s current behavior plan;
  - Any additional information provided by Student’s parent/guardian (describe).
  
- New law does not require formal IEP team meeting – only requires parents and “relevant members” of IEP team. However, Minnesota statute requires IEP team meeting.

Relatedness or Manifestation Determination Questions:

(1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, ***the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA)*** must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if ***the LEA, the parent, and relevant members of the child's IEP Team determine*** that a condition in either paragraph (1)(i) or (1)(ii) of this section was met.

(3) ***If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.*** (34 CFR Sec. 300.530(e)).

***\*\*Practice Pointer: The new manifestation test reaffirms the importance of staff documentation. Team members need to ensure that their documentation demonstrates implementation of the student's IEP and behavior plan, particularly with students who engage in frequent acts of misconduct.\*\****

Practical Effects of New Standard: The New Test appears to:

- Simplifies the Inquiry of the IEP team
- Lessens the impact of procedural error in overturning manifestation determinations
- Focuses on issues of implementation rather than overall appropriateness of the IEP
- Raises the standard for determining that conduct ***was a manifestation*** of the student's disabling condition.

## **I. APPEALING IAES AND MANIFESTATION DETERMINATIONS**

Grounds for Appeal: Parents can request an expedited hearing:

- To challenge the school's decision to place a student in an IAES;
- To contest the appropriateness of the IAES; or
- To contest the IEP team's manifestation determination.

Appeal Process: The expedited hearing must occur within 20 school days of the hearing request and the decision must be issued 10 school days after the hearing (compare Minnesota law requiring a decision w/in 10 calendar days of a request). During any appeal the student must remain in the IAES pending decision or the end of the term of the IAES.

## **J. OTHER OPTIONS FOR RESPONDING TO DANGEROUS MISCONDUCT**

