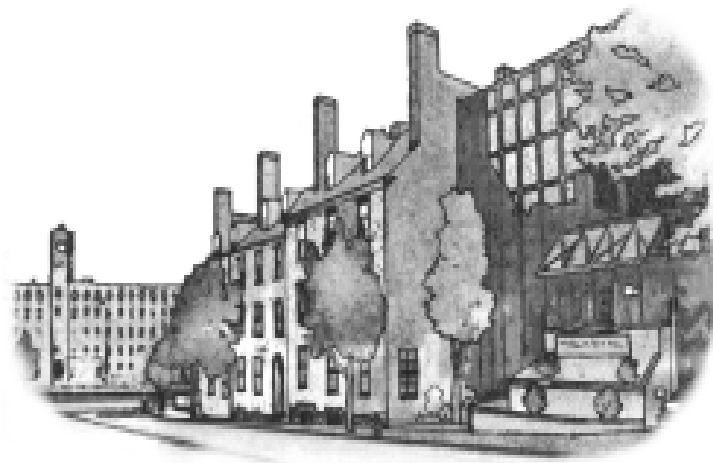


Dealing with Discipline Issues Under the IDEA and Section 504

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of certain aspects of Section 504 of the Rehabilitation Act of 1973, and of the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. 1400 *et seq.* This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. Overview

The purpose of this material is to assist the educator in understanding how Section 504 and the IDEA impact disciplinary and behavioral issues. The goal of this material is to enable educators to properly implement disciplinary and behavioral interventions which comply with the intent of Section 504 and with the requirements of the IDEA.

II. The IDEA

A. The Philosophy Behind the IDEA

The fundamental concept behind the IDEA is that every student is entitled to a free appropriate education at public expense (FAPE). The IDEA is predicated on the goal of preserving the requirement of a FAPE. The presumption extends to students who have suspended or expelled by a school district. 20 USC 1412(a)(1)(A) explicitly states that local school districts must ensure that a FAPE is available to “*children with disabilities who have been suspended or expelled from school.*” (emphasis added).

B. The Consequences of Disciplining a Student Without Preserving a FAPE

Educators who administer discipline without consideration of the IDEA protections afforded children with disabilities can produce the following adverse consequences for the District:

- ⊗ Denial of an education to a child who is statutorily entitled to an education;
- ⊗ Financial and programmatic exposure for Compensatory Education awards;
- ⊗ In an egregious case, potential exposure for civil rights violations;
- ⊗ Litigation and legal fees;
- ⊗ Transaction costs associated with administrative hearings;
- ⊗ A complaint investigation with the Office for Civil Rights and the risk of an adverse finding.

The manner in which an educator disciplines a student may give rise to a challenge that it violates a student’s due process rights. For example, in the case of Rasmus v. State of Arizona, 24 IDELR 824 (D. Ariz. 1996), a student with ADD and an emotional disability was locked in a small, lighted, unfurnished room, (the “time-out”

room), where the student could hear and speak with the teacher, and could be observed by the teacher, as discipline for violent behavior. The Court found that the School's conduct did not violate the student's due process rights since the interference with his liberty interests was de minimis. The employees were also granted immunity by the court.

The decision by the Court in these circumstances was within the exercise of its discretion. There is no guarantee that another court would rule in accord with this decision.

C. The Practical Reduction of the Long-Term Suspension Option

Long-term suspensions constitute a Change in Placement and must be preceded by: a Manifestation Determination Review; Functional Behavioral Assessment, Behavior Intervention Plan, and Parental Assent. As demonstrated by the "Hypothetical Long-Term Suspension" checklist, the long-term suspension does not exist as a practical disciplinary action for an educationally disabled student, except in the rare case of parental investment in the disciplinary action.

A principal does not have the latitude to suspend any student beyond ten (10) days for a single infraction. However, the principal may inadvertently cause the superintendent to run afoul of the law if she recommends a long-term suspension for an identified student without understanding that a long-term suspension is considered a *disciplinary action involving a change in placement for more than ten (10) school days*. See e.g. 20 USC Sec. 1415(k)(1)(C).

Any removal from school in excess of ten (10) days triggers a panoply of procedural rights and rules that reduce the likelihood that an educationally disabled student will ever be the subject of a long-term suspension. The simple rule of thumb to follow is that a long-term suspension will **always** require the provision of a FAPE, will **always** have to be preceded by a finding that the disciplined behavior was **not a manifestation** of the educational disability, will always have to be preceded by a **functional behavioral assessment** and will always have to be preceded by parental assent to a change in placement. In short, there are so many procedural hurdles to be surmounted before implementing a long-term suspension, that long-term suspensions will frequently **not** be a viable disciplinary action for an educationally disabled student. The following Hypothetical Procedural Checklist for Long-term suspensions illustrates these requirements:

1. Long-Term Suspension Checklist¹

- Step One: Long-Term suspension is contemplated for an educationally disabled student.

¹ Do NOT attempt this process without consulting the Special Education Director.

- Step Two: Parents are **notified** that a long-term suspension is being contemplated and they are apprised of all their disciplinary due process rights, and their IDEA rights, including the fact that a long-term suspension would constitute a change in placement to which they have the right to disagree and trigger the “stay-put” provisions of the IDEA
- Step Three: Within ten (10) days a **manifestation determination review** must be conducted which results in a determination that the student’s behavior was NOT a manifestation of their educational disability. If the behavior is a manifestation, then there can be no long-term suspension and any change in placement must be by agreement
- Step Four: Within ten (10) school days after the eleventh day or after commencing a removal that constitutes a change in placement, the IEP team must conduct a **functional behavioral assessment**, develop and implement a behavior intervention plan to address the causal behavior. If student has an existing behavior intervention plan, that plan must be reviewed and modified, within ten days, if at least one IEP team member desires a revision to the plan
- Step Five: The parents must **agree** to the change in placement, which must be preceded by an IEP Team meeting with the parents. (In the event of parental disagreement stay-put will be triggered and the goal of a long-term suspension will be effectively stymied)
- Step Six: The superintendent would have to be furnished with the recommendation for long-term suspension, the student’s special education records, the manifestation determination results, and evidence of the parental assent to the change in placement.

PRACTICE POINTER: The IDEA amendments effectively and practically eliminate the option of a long-term suspension for an educationally disabled student except in rare circumstances.

D. Discipline Procedures

1. The Traditional Disciplinary Options: Short-Term Suspensions and Short-Term Alternative Educational Settings

The traditional disciplinary options afforded the principal with regard to IDEA students are the short-term suspension or the alternative educational setting. They are defined as follows:

1. Short-Term Suspension. A suspension of a student for up to ten school (10) days in any school year.
2. Alternative Educational Setting. A change in placement for ten school (10) days or less to an “interim” alternative educational setting, e.g. an in-school suspension, library suspension, tutored at-home suspension. The interim setting should be designed to implement the IEP.

With regard to in-school and out-of-school suspensions, the US DOE has opined that “[p]ortions of a school day that a child had been suspended may be considered as a removal in regard to determining whether there is a pattern of removals.” 71 Fed. Reg., No. 156, 46715 (Aug. 14, 2006) (emphasis added).

Either of these disciplinary options may be used for up to **ten school days in any school year** without convening an IEP Team, without engaging in a manifestation determination, without conducting a functional behavioral assessment, and without developing or reviewing a behavior intervention plan.

2. Cumulative Suspensions in Excess of Ten (10) School Days in the School Year

The greatest area of difficulty for the principal is the case in which an educationally disabled student has cumulative suspensions which exceed ten days in a given school year.

Cumulative suspension refers to a pattern based on such factors as the length of each removal, total amount of time student is removed, and proximity of removals to one another. In some cases, where a student’s suspensions are remote and short in duration, the decision may be made not to treat the suspensions as cumulative. This will usually be the exception rather than the rule.

If a student receives transportation as a related service, then a bus suspension is a suspension for purposes of the 10 days. 71 Fed. Reg., No. 156, 46715 (Aug. 14, 2006) (emphasis added).

Therefore, if a student receives transportation as a related service, and is suspended from the bus, then the public agency must either: 1) treat the suspension as part of the 10 days or 2) provide alternate transportation.

Similarly, in-school suspensions may count toward the ten days if the in-school suspensions if the behavior that led to the in-school suspension is substantially similar to the behavior in previous incidents. 71 Fed. Reg., No. 156, 46715 (Aug. 14, 2006) (emphasis added).

In proposing federal regulations, the US Department of Education has observed, *“It is important for purposes of school safety and order to preserve the authority that school personnel have to be able to remove a child for a disciplinary infraction for a short period of time, even though the child already may have been removed for more than ten (10) school days in that school year, as long as the pattern of removals does not itself constitute a change of placement of the child.”* See Comments to proposed 34 CFR 300.530. However, “discipline must not be used as a means of disconnecting a child with a disability from education.” The cumulative suspension is also the most likely event to create exposure on the part of a school district to compensatory education, costly out-of-district placements, and a reallocation of district resources.

The following procedures should be followed with any suspension decision that results in a cumulative suspension in excess of ten school days:

3. CUMULATIVE SUSPENSION PROCEDURE

- Student disciplinary record is checked to determine previous suspensions;
- Within ten (10) school days of the offending behavior an IEP Team must be convened to conduct a **manifestation determination review** of the relationship between the child’s disability and the behavior subject to the disciplinary action;
- The suspension decision should, when possible, be deferred until after the **manifestation determination review**. If the student’s behavior is not a manifestation of their educational disability, then they may be disciplined in excess of ten (10) days **but steps must be taken to provide a FAPE. The parents must be apprised of their rights to appeal this decision to an impartial due process hearing.**

- If the **manifestation determination** is affirmative; that the behavior is a manifestation of the disability, then **suspension is not an option** and placement can only be changed through the IEP Team process. Regardless of the determination the Team should consider whether program or placement require modification;
- Within ten (10) school days of the behavior that leads to discipline an IEP Team is convened to consider behavioral interventions. This includes conducting a **functional behavioral assessment** and developing a **behavioral intervention plan** which consists of an assessment plan and appropriate behavioral interventions to address the behavioral problem. If a plan has already been developed, the goal of the meeting is to review the plan and modify it as necessary;
- Reentry planning. Consider what steps need to be taken to facilitate reentry post suspension.

E. The Components of the Manifestation Determination Review Meeting

1. Who attends the Meeting?

The Manifestation Determination Review Meeting is conducted by the LEA, parent and relevant members of the IEP Team. Parents **MUST** be invited to attend the Manifestation Determination Review Meeting. The LEA must give the parent(s) five (5) days notice of the Manifestation Meeting.

2. What Material Should the Team Consider?

The IEP Team should consider “all relevant information,” including, but not limited to, the material listed in the following checklist:

3. Information to Consider in a Manifestation Determination Review Meeting.

- Relevant information provided by the parents;
- Evaluation and diagnostic results;
- Prior disciplinary history;
- Description of the behavior;

- Observations of the student;
- The child's IEP;
- The placement.

4. How does the Team make a Manifestation Determination?

During the manifestation meeting, the Team will review the information set forth above to determine whether:

- The conduct in questions was caused by the child's disability; or,
- Whether the conduct in question had a direct and substantial relationship to the child's disability; or,
- If the conduct in question was the direct result of the local educational agency's failure to implement the child's IEP.

If any of the above inquiries are answered in the affirmative, then the child's conduct shall be determined to be a manifestation of the child's disability.

If the Team determines that the child's conduct was a manifestation of his disability, the Team shall:

Conduct a functional behavioral assessment, and implement a behavioral intervention plan for the child, provided that the Local Educational Agency had not conducted the assessment prior to the determination;

If the child has already had a behavioral intervention plan, then the Team shall review the plan and modify it, as necessary to address the behavior;

Except under "special circumstances," the child must be returned to the placement from which he was removed, unless the parent and Local Educational Agency agree to a change of placement as part of the modification of the behavioral intervention plan.

With every meeting, but particularly in the event there is a determination of no manifestation, the parents must be apprised of their rights under the IDEA to appeal this decision to an impartial due process hearing.

F. Examples of Court Decisions Regarding Manifestation

1. ADD and Risk-Taking/Thrill-Seeking Behavior Add up to a Manifestation

Richland Sch. Dist. v. Thomas P., 32 IDELR 233 (W.D. WIS 2000). In this unusual case, a student committed forty-thousand dollars worth of vandalism at two elementary schools. The school conducted a manifestation determination prior to the recommended expulsion. Because the student was diagnosed as learning disabled, the school determined that the student's behavior had nothing to do with his disability. Subsequently, the boy was evaluated and diagnosed by a clinical psychologist with ADD and dysthymia. The clinical psychologist concluded that these disabilities led to his involvement in the criminal incident. At the hearing officer level, the officer set aside the expulsion. A Federal Court affirmed the officer's decision based on testimony by the clinical psychologist that young men with ADD are chemically attracted to risk-taking and thrill-seeking behavior and do not think about the consequences.

2. Not All Juvenile Behavior Is a Manifestation

Randy M. v. Texas City Ind. Sch. Dist., 32 IDELR 168 (S.D. TX 2000). A young man with a learning disability and his friend allegedly ripped off the break-away pants of a female student. The district's IEP team concluded that the action was not a manifestation of the boy's learning disability. The team recommended suspension and placement in an alternative school. The parents sought due process and injunctive relief to terminate the suspension. The school district prevailed at the hearing level and the parents appealed that decision to Federal Court. The Federal Court affirmed the hearing officer's decision, and ruled that the district was "justified in taking stern and aggressive remedial action."

3. The Manifestation Standard

In MAST Community Charter School, the Pennsylvania State Education Agency rejected the parents challenge to the manifestation determination. 47 IDELR 23 (Pa. state Ed. Agency Dec. 26, 2006). The student had been identified as eligible for special education and related services while in was in fourth grade and had made significant academic and behavioral progress during the period of fourth through ninth grade. During that time, the student had been taking medication to assist in controlling his impulsive behavior. At the end of his ninth grade year, the student's parents took him off of the medication.

In October 2006 (tenth grade), the student was suspended for ten days after he took a three-inch folded hunting knife to school. The student informed school officials that he carried the knife to protect himself when he walked in his neighborhood. The district convened a manifestation meeting, which was initially postponed at the request of his parents, who had obtained an emergency evaluation. At the student's

manifestation meeting, the team reviewed his records, IEP, and the evaluation, and determined that the weapons violation was not a manifestation of the student's disability. Therefore, the team recommended placement in a 45-day interim alternative setting.

The parents disagreed with this decision and requested a due process hearing. The SEA agreed with the team, noting that since there was no dispute that the district had been implementing the IEP, the behavior would be a manifestation only if the disability caused, or had a substantial relationship to, the conduct in question. The SEA held that the student's deliberate decision to bring the knife to school on a regular basis, was not caused by, or substantially related to, his disability which was largely due to impulsive behaviors. Accordingly, the student could be disciplined in the same manner as children without disabilities.

Similarly, in Baltimore County Public Schools, the student, a sixteen year old with psychiatric and behavioral disorders, was suspended for using illegal drugs prior to going to school. 46 IDELR 179 (Md. State Ed. Agency May 25, 2006). On the day he was suspended, the student had taken psychiatric medication, which he had not taken for three-weeks. After taking the medication, the student became drowsy and lethargic. The student's instructional assistant noticed that the student had his head on his desk, and after asking the student to come to his desk, told him "You are high as a kite." The student replied "No shit, you're just noticing?"

The instructional assistant brought the student to the nurse, who believed that the student's drowsiness and slower reactions were caused by his psychiatric medication. The student was sent back to class; when the behavior continued, his teacher sent him back to the nurse's office and the assistant principal ordered the nurse to conduct an impairment assessment. Following the assessment, the nurse determined that he was impaired; the student subsequently told the nurse that he had smoked a joint before school. He was suspended and sent home; the district later recommended that he be expelled because of his use of illegal drugs.

The District convened a manifestation meeting and determined that the student's behavior was not a manifestation of his disability. His parents appealed that decision, arguing that the student's therapist had opined that his conduct was substantially related to, or caused by, his disability. The SEA rejected that argument, noting that the opinion that the "student has a major psychiatric disability which has had a significant impact on his psychological, social and academic development" was not the equivalent of an opinion that the student's "specific behavior was caused by, or had a direct and substantial relationship to student's disability."

In contrast, in Philadelphia City School District, the SEA held that the district erred when it determined that the student's behavior was a not manifestation of his disability. 47 IDELR 56 (Pa State Ed Agency Jan. 10, 2007). During the 2005-06 school year, the student, who had been identified as eligible for services since 1998,

engaged in serious threatening behavior. This behavior resulted in the student's placement being changed to a private school for students with emotional disabilities. During the first part of the 2006-07 school year, the student broke into the private school on several occasions, to use the school computers to download pornography. Eventually, the student stole the school's computer server and related equipment. He was caught after he offered to sell the stolen items to other students. He was suspended for three days, and the school officials recommended transferring the student to a remedial disciplinary setting.

A manifestation meeting was convened, it was determined that the student's behavior was not a manifestation of his disability, and the parents were given notice that the district was recommending placement in a remedial disciplinary setting. The parents disagreed with this decision and requested due process.

The SEA reversed the hearing officer's decision, holding that the student's conduct had a direct and substantial relationship to his disability. The SEA believed that it was "more likely than not" that the student's ED, which was marked by inappropriate behaviors, attention-seeking and ODD, caused or was substantially related to his repeated break-ins, which culminated in theft of items. Because the behavior was a manifestation of the student's disability, the district could not change his placement without parental consent.

G. The Components of the Functional Behavioral Assessment and the Behavior Intervention Plan

1. Defining Functional Behavioral Assessment and Behavior Intervention Plans

The New Hampshire rules now define a functional behavioral assessment as "an assessment of a student's behavior." Ed 1102.02(t).

The term behavior intervention plan is defined as "the positive behavior interventions and supports incorporated in the student's IEP" Ed 1102.01(n) (emphasis added).

2. So what happens during the meeting?

The IEP Team conducts the FBA, develops an assessment plan and a behavior intervention plan. If a behavior intervention plan is already in place, the purpose of the meeting is to review and amend the plan to make it more responsive to the student's needs.

3. Parents Are Entitled to IEEs When They Disagree with a Functional Behavioral Assessment

34 IDELR ¶ 34 (OSEP Opinion, June 7, 2000). OSEP has taken the position that a functional behavioral assessment is “a re-evaluation under Part B.” OSEP has reasoned that parents who disagree with a functional behavioral assessment are entitled to an IEE. If the IEE is requested, the LEA must without unnecessary delay either initiate due process to show that its evaluation (functional behavioral assessment) was appropriate, or ensure that the IEE is publicly funded unless the LEA demonstrates in a hearing that the evaluation sought by the parent does not meet agency criteria.

H. Disciplining Students with Disabilities who bring Weapons or Drugs to School

In cases involving students with disabilities who bring weapons or drugs to school, the principal should issue an immediate ten day short-term suspension, and initiate the process through the superintendent and the Student Services Department for determining whether the student should be placed in an **interim alternative educational setting** for up to **45** school days, without regard to whether the behavior is a manifestation of the child’s disability.

The 45 day interim alternative placement is available for the following violations:

- Student carries or possesses a “weapon” to school or a school function;
- Student knowingly possesses or uses drugs at school or a school function; or
- Student sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function; or
- Student inflicts serious bodily injury upon another person while at school, on school premises, or at a school function.

Serious bodily injury is defined as “bodily injury which involves:

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.” 34 CFR 300.530(i)(3).

The district must notify the parents of the decision, and of their procedural safeguards, on the date on which the disciplinary decision is made. The district's decision is appealable, but the child will remain in the alternate setting pending appeal.

The 45 day interim alternative placement gives the IEP Team time to determine whether there will be a long-term change in placement. As discussed below, whether or not the student is also subjected to discipline, i.e., expulsion or long-term suspension, is a function of the manifestation determination review process. However, regardless of the determination, a student with disabilities, even the student who brings a gun to school, **will always be entitled to a FAPE**. The only result to be determined is where that FAPE will be provided.

The following check list will assist the principal in addressing the disciplinary and IDEA issues involved in a weapon or drug case:

1. Checklist for a Drug or Weapon Case: Student Identified with an Educational Disability
 - Ten (10) day suspension decision is made by the principal;
 - Student Service and superintendent are immediately notified and furnished with a written report;
 - Local Law Enforcement is immediately notified in accord with the Safe School Zones Act, NH RSA 193-D:1 et seq, and provided with copies of the student's special education and disciplinary records;
 - IEP Team is immediately convened, but in no case later than ten (10) business days to meet with the parents and engage in the following:
 - Manifestation Determination Review;**
 - Functional Behavioral Assessment;** and
 - determination of a 45 day **interim alternative educational placement.**
 - Parents must be apprised of their IDEA rights during this Team Meeting;
 - If the Team makes a "no manifestation" determination, the determination should be immediately reported and referred to the superintendent for further disciplinary action. The superintendent

should be furnished with copies of the student's special education and disciplinary records;

- ❑ In the case of a "no manifestation" decision, the student may be expelled under a district's zero-tolerance disciplinary policy. However, the IEP Team must propose and offer an alternative long-term placement which provides a FAPE. The Team should meet before the expiration of the 45 days to determine a long-term FAPE placement during the suspension/expulsion. If the parent appeals this proposed placement, the student returns to the local school under stay-put.
 - ❑ If the parents appeal the "no-manifestation" decision then there is an expedited Hearing at the State Department of Education, the student stays in the interim alternative placement pending the decision of the Hearing Officer, but may return to the local school after day 45, even if subject to discipline such as expulsion, unless the Hearing Officer has ruled in favor of the district;
 - ❑ If the Team makes a Manifestation Determination, then there is no discipline beyond the ten days and placement may only be changed through the IEP Team process;
 - ❑ After 45 days the student must return to the school if there has been a manifestation determination, unless the Team process results in a change in placement;
2. The Requirements for the 45 Day Interim Alternative Educational Placement

The 45 day interim alternative educational setting must:

-be selected so as to enable the student to continue to participate in the general curriculum, although in another setting, and to continue to receive the services and modifications called for in the student's IEP such that she will meet her IEP goals; and

-include services and modifications designed to prevent recurrence of the behavior.

3. Alternative Placement in Cases Where the Student Presents a "Likely Danger to Themselves or Others"

In some cases, a student who has not violated the drug or weapon prohibition presents a potential danger to themselves or to others if they remain in their current

placement. In those circumstances, the School District's first step should be to convene the IEP Team and seek the assent of the parents to a change in placement on an expedited basis. However, if the parents disagree, the District may seek an order from a Hearing Officer granting it permission to engage in a 45 day interim placement during the pendency of the appeal regarding the Team's placement decision. The Administration should be involved in the decision whether or not to seek such an emergency order.

I. Protection for children not yet eligible for special education services

A child who has violated the code of student conduct and who has not yet been determined to be eligible for special education and related services may assert the protections provided by the IDEA if the LEA had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. 20 U.S.C. § 1415(k)(5)(A). The IDEA goes on to establish standards for when a district has a "basis of knowledge." The district must afford the child IDEA protection if:

1. the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
2. the parent of the child has requested an evaluation of the child pursuant to section 614(a)(1)(B); or
3. the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

34 CFR 300.534.

A district is **not** deemed to have knowledge if the parent of the child has:

- not allowed an evaluation of the child; or
- has refused services; or
- the child was evaluated and it was determined that the child did not have an educational disability.

If a district is deemed not to have knowledge of a child's disability, then it may discipline the child as it disciplines any nondisabled child. The district, however, may not turn a blind eye to a child's needs even if it is determined not to have knowledge of

a child's disability. If an evaluation is requested, the evaluation shall be conducted "in an expedited manner," but the child shall remain in the placement determined by school authorities pending the results of the evaluation. If the results indicate that the child has an educational disability, then the child shall be offered special education and related services.

1. Court Cases Involving the Definition of "Knew or Should Have Known"

a. The definition of "knew or should have known"

Board of Educ. of the Hartland Consolidated Schs., (Michigan) 34 IDELR 28 (SEA Opinion, March 17, 2000). An eleven-year-old student brandished a knife in his class at two students who were teasing him. The district expelled the student. There was no manifestation determination by the district, since the student had not been identified as disabled. The parents argued to the hearing officer that the district knew or should have known that their son was a student in need of special education and eligible for special education services, and that on that basis his expulsion was unlawful. The hearing officer heard cumulative testimony which convinced him that a history of vast behavioral issues demonstrated the need for special education services and thus the district had the "knowledge" that the student was in need of special education services. On that basis, the hearing officer concluded that the District violated the IDEA when it expelled him without following the IDEA's disciplinary provisions.

b. Prior School District Evaluation Finding That Student Does Not Meet IDEA Relieves District of IDEA Compliance .

Cabot Sch. Dist. (AK), 34 IDELR 78 (SEA Opinion, November 5, 2000). A student was expelled from the school district for violating its drug policy by carrying ADHD medication in her school backpack. She had previously been expelled and then allowed to return to school for providing students with an over-the-counter laxative medication as a joke. The parents argued that the district knew or should have known that their daughter was a student with a disability. However, the district argued that a previous evaluation determining that the student did not qualify as educationally disabled under the IDEA was presumptive evidence that the district could not have been vested with knowledge that this student was a student with a disability.

The hearing officer found particularly persuasive the fact that a pre-expulsion evaluation had been conducted which did not appear to establish any disability or need for special education and related services. The hearing officer specifically noted that the mother did not challenge that examination or that decision by a subsequent request for due process prior to the expellable offense.

c. District's Awareness of Student's Disruptive and Inattentive Behaviors and Poor Academic Performance Are Sufficient to

Place District on Notice of Suspected Disability and
Warrants Setting Aside Expulsion Due to the District's
Failure to Make a Timely Assessment

Jurupa Unified School District, 34 IDELR 53. This thirteen-year-old ADHD student had been enrolled in the district since kindergarten. He was expelled near the end of the seventh grade for making remarks threatening to cause physical harm to a teacher. The father testified that his son had been "very hyper," a constant talker, and always "on the move" since the age of four or five. There was frequent contact between the teachers, principals and parents with regard to the behavioral problems that this student presented. In addition to the disruptive behaviors, the student began to experience academic difficulties in the third grade.

The father testified that he always thought that something was wrong with his son, but that no one at the school ever advised him to have his son assessed or taken to a doctor for diagnosis or treatment. On that basis the father contended that the district should have known several years prior to the student's expulsion, in July 2000, that he had a disability based upon both his behavior and failing grades. The hearing officer was persuaded by the evidence and concluded that the district knew of the student's disruptive and inattentive behavior and poor academic performance prior to the time of his expulsion, and thus the student was entitled to the protection of the IDEA. On that basis, the hearing officer ruled that the expulsion was in error and reversed it.

J. Notice Requirements

On the date that the decision is made to make a removal that constitutes a change of placement of an educationally disabled child due to a violation of the code of conduct, the District must:

- Notify the Parent of the decision; and,
- Provide the parent with their procedural safeguards notice.

34 CFR 300.530(h); see also 20 U.S.C. § 1415(k)(1)(H).

K. Appeals

Parents who disagree with the placement decision or the manifestation determination may request a due process hearing. If the LEA believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others it may request a hearing. 20 U.S.C. § 1415(k)(3)(A). The hearing officer may order that the child be returned to the placement from which he was removed or, if the hearing officer determines that maintaining the current placement is substantially likely to result in injury, she may order that the child's placement be changed to an

appropriate interim alternative educational setting for not more than 45 school days. Id. at § 1415(k)(3)(B)(ii).

III. Section 504

A. The Regulatory Framework

Pursuant to 34 C.F.R. 104.4(b), discrimination occurs when a school district denies a student with a disability the opportunity to participate in or benefit from an aid, benefit or service which is afforded non-disabled students. Examples of discriminatory conduct in the area of behavior or discipline include the following:

- Denial of credit to a student whose absenteeism is related to his/her disabling condition;
- Suspending a student for greater than ten (10) days for behavior related to his/her disability;
- Expelling a student for behavior related to his/her disabling condition.

B. The Ten (10) Day Rule

As a general rule, a school district may not expel a student with a disability or suspend the student for more than ten (10) cumulative days during the school year for conduct related to the student's disability. This rule exists under Section 504 and the IDEA.

C. The Discipline of Section 504 Students

Under Section 504 a suspension or disciplinary removal of a student with a disability for more than ten (10) days may not be imposed without a determination that the student's misconduct is not a manifestation of his/her disability. See OCR Response to Williams, 21 IDELR 73 (OCR 1994). If the student's misconduct is related to the disability, the student may not be suspended for more than ten (10) days. If the misconduct is not related to the disability, the school district may impose normal disciplinary measures, subject to the parents' right to request an impartial hearing.

1. The Section 504 Manifestation Determination

The manifestation determination is made by convening a meeting of the 504 team to determine if the conduct was related to the disability. If the team decides that the conduct was related to the disability the district cannot expel the child and the team will need to consider alternate service and placement options. If the team determines that the conduct was unrelated to the disability, the district may proceed with long term suspension/expulsion of the child. Before this takes place the parent must be informed of their rights, including their right to request a hearing as to whether the manifestation

determination was correct. This hearing process occurs under the Section 504 due process hearing requirements, and is not an IDEA due process hearing.

2. Cumulative Suspensions

OCR has opined that “[t]he permanent exclusion of a child with a handicap or exclusion for an indefinite period, or for more than ten (10) consecutive school days constitutes a ‘significant change in placement’ under Section 504. See OCR Memorandum re: Discipline of Students with Disabilities (OCR April 18, 1991).

A series of suspensions that are each of ten (10) days or fewer in duration that create a pattern of exclusions may be deemed under Section 504 to constitute a ‘significant change in placement.’ The determination of whether a series of suspensions creates a pattern is made on a case-by-case basis. However, OCR has opined that serial exclusions may never be used to avoid the requirements of re-evaluation before suspensions of more than ten (10) days.

OCR has identified the following factors to be used when determining whether a series of suspensions has resulted in a significant change in placement:

- the length of each suspension;
- the proximity of the suspensions to one another; and
- the total amount of time the child is excluded from school.

See e.g. Ponca City (OK) Sch. Dist., 20 IDELR 816 (July 1993). OCR has opined that a series of suspensions that, in the aggregate, are for ten (10) days or less during the school year do not constitute a significant change in placement. See OCR Memorandum re: Discipline of Students with Disabilities (OCR April 18, 1991).

As the following opinions demonstrate, the change in placement determination is not based on a specific number of cumulative days.

In Ralph C. Mahar Regional School District (MA), the parents filed a complaint with OCR, asserting that the District had discriminated against her son. 45 IDELR 103 (OCR 2004). The student had received one-day suspensions on November 2, November 19, and November 30, 2004, and was sent home for disciplinary reasons on October 26. On December 6, he received a ten-day suspension, which he began serving on December 7. At a manifestation meeting on December 14, the team concluded that the behavior was a manifestation of the student’s disability. On November 15, the District convened a team meeting to propose a 45-day diagnostic evaluation and placement in a therapeutic setting. By December 1, the parents had not formally responded to the District’s proposal, and the District filed a request for an emergency hearing regarding placement and evaluation. On December 2, the parent responded to the District’s proposal, agreeing with the placement but disagreeing with the length of the placement. During a December 16 pre-hearing conference, the

parents and the district agreed to an eight-week diagnostic placement. The student began attending the school on December 21.

OCR determined that the fourteen days that the Student was suspended amounted to a significant change in placement, which triggered the District's obligation to hold a manifestation meeting. OCR found that the District complied with its obligation to convene a manifestation meeting by holding a meeting on December 14, the 6th day of the 10-day suspension, and the 10th day the Student was excluded from school during the school year. OCR also found that the student's new placement began within 10 days after the last suspension began, and within the 10-day 'cooling down period' described in Honing v. Doe, 485 U.S. 305 (1988); therefore, OCR concluded that the District did not discriminate against the student by excluding him from school during the period of December 15 through December 17. However, the District was required to inform parents, orally and in writing, of their child's right to return to school after there has been a determination that the misconduct was a manifestation of the child's disability. The District was also required to amend the student's educational records to reflect that he was not suspended as of December 14.

Similarly, in Santa Barbara (CA) School District, parents filed a complaint which alleged that the District discriminated against their child by denying him a FAPE. 43 IDELR 172 (2004). The parents alleged that the District made significant changes in the Student's placement without evaluating the Student and without conducting a manifestation meeting. Between October 2003 and January 2004, the student was transferred to three different schools and suspended six times (for a total of 23 days). OCR found that this constituted a significant change in placement, which triggered the District's obligation to evaluate the Student to determine if the misconduct was a manifestation of the Student's disability and to review the Student's placement.

In contrast, in Ponca City (OK) School District, three students with disabilities were given a series of suspensions which were shorter than ten (10) days individually, but in their aggregate, totaled more than ten days. Parents complained, asserting that the suspensions constituted a significant change in placement and the District failed to conduct an evaluation. The first student was suspended three times during the school year, for a total of 12 days. The second student received two suspensions in a three-month period, for a total of 11 days. The third student received four suspensions during the school year, for a total of 23 days suspended. OCR found that given the length of the suspensions, and their proximity to one another, the suspensions did not constitute a pattern of exclusions that amounted to a change in placement. Therefore, the District complied with Section 504.

3. The Re-Evaluation Process

The manifestation determination is achieved through the re-evaluation process. According to OCR, before implementing a suspension or expulsion that constitutes a significant change in the placement of a student with a disability, the district must

conduct a re-evaluation of the student to determine if the misconduct in question is caused by the student's handicapping condition or if the student's current educational placement is appropriate.

a. Step One: Appropriateness of the Current Educational Placement

The individuals making the manifestation determination must first determine whether the current educational placement is appropriate. Two questions are to be answered in determining plan appropriateness:

1. Are the accommodations in the student's 504 plan appropriate as they relate to the current misconduct?
2. Were the accommodations in place at the time of the alleged infraction?

If the consensus is that the plan is not appropriate as it relates to the current misconduct or that it was not substantially complied with, then the suspension/expulsion proceeding should cease and the team should review and update the current plan.

If the team determines that the plan is appropriate and in place, then it must consider whether the misconduct is the result of the student's disability.

b. Step Two: Is the Misconduct Caused by the Child's Handicapping Condition?

The district must then determine whether the misconduct is caused by the child's handicapping condition. OCR has opined that this determination may be made by the same group of individuals who made the initial placement decision under Section 504. The group must have available to it information that "competent professionals would require, such as: psychological evaluation data related to behavior; and relevant information current enough to understand the child's current behavior."

OCR is of the opinion that the "determination may not be made by the individuals responsible for the school's disciplinary procedures such as the school principal or school board officials, who may lack the necessary expertise and personal knowledge about the child to make such a determination. These individuals, however, may participate as members of the placement decision group.

If the misconduct is not caused by the child's handicap, the child may be excluded from school in the same manner as similarly situated non-handicapped children are excluded.

Note: the fact that a student may in theory be deprived of educational services does not mean that this is the best practice. In fact, school districts may wish to afford some level of service even in the event of expulsion.

If the misconduct is caused by the handicapping condition, the evaluation team must continue the evaluation under the requirements of Section 504 for re-evaluation and placement, to determine whether the child's current educational placement is appropriate. The team should also consider what behavioral accommodations may be appropriate.

c. Step Three: Procedural Safeguards

If there is a significant change in placement, then the parents' procedural safeguards under Section 504 are triggered. These requirements include the opportunity for substantive due process, which includes, at a minimum, the following:

- appropriate notice to parents;
- an opportunity for the examination of records;
- an impartial hearing with the participation of parents;
- an opportunity for legal counsel; and
- a review procedure.

Parents should be informed of their rights and should be afforded a hearing if they disagree with the determination regarding the relationship of the behavior to the handicap or with regard to the subsequent placement proposal made by the team whether the behavior is determined to be caused by the handicap.

In Arizona Community Development School District, a student, who had been identified as an individual with a disability (bi-polar disorder) and who qualified for services under Section 504, was suspended for 10 school days after he brought marijuana to school. 46 IDELR 54 (OCR July 18, 2005). The principal recommended that he be brought before the school board for expulsion proceedings. Prior to making that recommendation, the principal convened a meeting to determine whether the student's actions were a manifestation of his disability. In addition to the student and his parents, the Director of Special Education, the principal, vice-principal, the student's home-room and Creative Writing teacher and a psychologist attended the meeting. After reviewing the student's 504 Plan, his education records, counseling logs, information on bi-polar disorder, and a doctor's note provided by the student's parents, as well as receiving input from all individuals present, the team (over the objection of the parents and the psychologist) determined that the student's behavior was not a manifestation of his disability. OCR found that the District complied with the requirements pertaining to the composition of manifestation teams and closed the complaint.

D. Drugs and Alcohol – The “current user” distinction

According to OCR, drug and alcohol addiction may be handicapping conditions covered by Section 504 so long as a person **is not a current user of alcohol or illegal drugs.**

Under the ADA, an individual who is currently engaged in the illegal use of drugs is not a handicapped individual under Section 504. However, a person who is addicted to drugs who is not a current user may be handicapped and entitled to all of the rights under Section 504. Similarly, a person erroneously regarded as engaged in the illegal use of drugs may also be regarded as handicapped under Section 504.

OCR has observed that, “because alcohol and illegal drug users are not protected by Section 504, school districts may take disciplinary action regarding the use or possession of illegal drugs or alcohol against any student with handicaps who currently is engaged in the illegal use of drugs or in the use of alcohol **to the same extent that disciplinary action is taken against non-handicapped persons for the same behavior.** Furthermore, the local due process protections do not apply to disciplinary actions regarding the use or possession of illegal drugs or alcohol by students with handicaps who are currently engaged in the illegal use of drugs or in the use of alcohol.

A child who has a handicapping condition other than alcoholism or drug addiction and who is not engaged in the illegal use of drugs or the use of alcohol, receives the protection of Section 504, even when in the possession of illegal drugs or alcohol. OCR has observed, “For example, if a mentally retarded child who does not use drugs or alcohol is found in possession of drugs or alcohol, the school district would be required to determine whether this misbehavior resulted from the child’s handicapping condition.”

E. Dangerous Students

OCR has stated that “[w]here a child presents an immediate threat to the safety of others, officials may promptly adjust the placement or suspend the child for up to ten (10) school days in accordance with rules that are applied even handedly to all children.” However, unlike the IDEA, Section 504 does not contain a dangerousness exception.

F. Alternative Discipline

“Occasional detentions and similar forms of discipline do not require re-evaluation or determination of the cause of the misconduct under Section 504. Generally detentions would not constitute a significant change in placement, particularly if they occur before or after instructional hours. If, however, a pattern of disciplinary actions for behaviors caused by, or symptomatic of, the child’s disability develops, there

might be sufficient cause to believe that a Section 504 violation is occurring.” See OCR Response to Williams, 21 IDELR 73 (OCR 1994).

G. 45 Day Rule – Drugs, Weapons and Serious Bodily Injury

Although OCR has not yet weighed in on the issue, the forty-five (45) day rule which applies to drugs, weapons and serious bodily injury under the IDEA should be available to districts under Section 504.

H. Cessation of Educational Services

The Department of Education has interpreted the non-discrimination provisions of Section 504 to permit school districts to cease educational services during periods of disciplinary exclusion from school where that exclusion is for misconduct that was not a manifestation of the student’s disability, and non-disabled students in similar circumstances do not receive educational services.

In Norfolk (VA) City Public Schools, the Office for Civil Rights (“OCR”) received a complaint from a parent who alleged, among other things, that the District failed to implement the student’s Section 504 plan while the student was assigned to a 15-day in-school suspension. 46 IDELR 21 (OCR, Southern Division, D.C. May 11, 2005). During the 2003-04 school year, the student was enrolled in the 11th grade at the public high school. During the period of February 4, 2004 through June 4, 2004, the Student had nine disciplinary infractions, served 15 days of in-school suspension (“ISS”) and 8 days of out-of-school suspension. The District’s ISS policy “is a structured alternative to out-of-school suspension that gives the students the opportunity to continue their education while experiencing the consequences of their actions and decisions.” Students are given a discipline packet to complete; the students also work on schoolwork, if it has been provided by their teachers. Students are responsible for gathering assignments from teachers prior to reporting to their ISS.” At the time of the student’s ISS, there were no policies pertaining implementing Section 504 plans for children assigned to ISS and the ISS teacher was not aware that the student had a Section 504 plan. OCR found that the 504 plan was not being implemented and determined that the District must adopt a policy regarding the implementation of Section 504 plans for students assigned to ISS.

IV. The New Hampshire Rules

New Hampshire’s Rules pertaining to discipline of children with disabilities are set forth in Ed 1124. Ed 1124.01 requires LEAs to develop discipline procedures that are consistent with the provisions of 34 CFR 300.530-300.536.

When a child with a disability has been removed from his or her current placement for more than 10 days in a school year, the LEA must:

- Provide services necessary to provide the child with a disability an opportunity to progress in the general curriculum consistent with the child's IEP and
- Must provide services necessary to enable the child to continue to participate in the general education curriculum, as provided by 34 CFR 300.530(d)(1)(i).

Ed 1124.02. Pursuant to 34 CFR 300.530(d)(1)(i), children with disabilities that have been removed from their current placement must continue to receive educational services that enable them to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in their IEPs.