

Student Discipline: The Manifestation Determination and the “Special Circumstances” Exception

December 6, 2010



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A Word of Caution

No two cases are exactly alike. This material is designed to provide administrators with a broad understanding of certain aspects of the law pertaining to the discipline of students with educational disabilities. 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

This material is designed to provide administrators with a broad understanding of certain aspects of the law pertaining to the discipline of students with educational disabilities. In particular, the manifestation determination and the “special circumstances” exception to student discipline under the Individuals with Disabilities Education Act (“IDEA”). This material does not include every aspect of the law and you are strongly encouraged to seek a legal opinion from your school district’s legal counsel regarding any specific case.

A. Understanding the Federal Presumption: Preservation of a FAPE

The Individuals with Disabilities Education Improvement Act [IDEA] as amended in 2004 requires that all children with disabilities be afforded a “free appropriate public education.” 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 Sec. 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).

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 Checklist³

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

³ Do NOT attempt this process without consulting the Special Education Director.

constitute a change in placement to which they have the right to disagree and trigger the “stay-put” provisions of the IDEA;

- ❑ Step Three: 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) business 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 headmaster 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.

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

School personnel may remove a child with a disability who violates a code of conduct from their current placement to:

1. An appropriate interim alternative educational setting;
2. Another setting; or

3. Suspension for not more than ten (10) days (short-term suspension)

to the extent such alternatives are applied to children without disabilities. 34 C.F.R. 300.530(b); Ed 1124.01.

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.

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

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

Under the IDEA, a change in placement occurs when a child is subjected to a series of removals that constitute a pattern:

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

34 CFR 300.536(a)(2). 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.

The public agency is responsible for determining "on a case-by-case basis" whether a pattern of removals constitutes a change of placement, however, this determination is subject to review through the IDEA's due process procedures. 34 CFR 300.536(b).

An in-school suspension generally will not count towards the 10-day removal if the student has the opportunity to continue to progress in the general curriculum, to continue with the services in his/her IEP, and to continue to participate with non-disabled children to the same extent as they would in their current placement. Fed. Reg., Vol. 71, No. 156 at 46715; see also Delaware (OH) City Sch. Dist., 51 IDELR 257

(Under Section 504, the “determination of whether a series of suspensions creates a pattern of exclusion is made on a case-by-case basis based on a number of factors, including the length of each suspension, the proximity of each suspension to one another, and the total time the student is excluded from school. Generally, whether an in-school suspension should be counted depends upon whether educational and special services were provided during the in-school suspension”).

However, in-school suspensions may be considered as a removal when determining whether there is a pattern of removals. For example, if the behavior that led to the in-school suspension is substantially similar to the behavior in previous incidents, then the in-school suspension may qualify as a removal. Fed. Reg., Vol. 71, No. 156 at 46715 (“portions of a school day that a child has been suspended may be considered as a removal in regard to determining whether there is a pattern of removals”) (emphasis added).

If a student receives transportation as a related service, then a bus suspension is a suspension for purposes of the 10 days. Fed. Reg., Vol 71, No. 156 at 46715 (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.

In proposing the federal regulations, the US Department of Education 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.

Fed. Reg., Vol 71, No. 156 at 46715. However, “discipline must not be used as a means of disconnecting a child with a disability from education.” Id.

The cumulative suspension is 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:

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;
- ❑ If the behavior is a manifestation, the IEP Team must conduct a **functional behavioral assessment**, unless the LEA had conducted one prior to the behavior that resulted in the change of placement, and develop 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.

D. The Components of the Manifestation Determination Review Meeting

1. Who attends the Meeting?

The Manifestation Determination Review Meeting is conducted by the IEP Team. Ed 1102.03(s). 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:

- 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;
- Any teacher observations;
- The placement.

3. 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,
- The conduct in question had a direct and substantial relationship to the child’s disability; or,
- 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 a functional behavioral assessment prior to the determination; or,

- 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.

34 CFR 300.530(f)(1).

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. 34 CFR 300.530(f)(2).

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

E. Examples of Court Decisions Regarding 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.

F. The "Special Circumstances" Exception: Disciplining Students with Disabilities who bring Weapons or Drugs to School, or Inflict Serious Bodily Injury on Another

In cases involving students with disabilities who bring weapons or drugs to school, the administrator should issue an immediate ten day short-term suspension, and initiate the process through the Headmaster 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 interim setting is determined by the **IEP Team**. 34 CFR 300.531.

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 to place the child at the interim setting, 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. 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 case of Bisbee Unified School District No. 2, 110 LRP 7292 (Ariz. SEA Jan. 6, 2010) illustrates the "serious bodily injury" provision.

The relevant facts are as follows: the student, an elementary school student with high-functioning autism, had a behavioral intervention plan (BIP) as part of his IEP. The student was "large and very strong for his age, and c[ould] be very aggressive in his behaviors. He ha[d] exhibited violence towards teachers and other students in the past when he [wa]s experiencing these aggressive behavior 'episodes.'"

On September 2, 2009, the student had an aggressive episode. School staff followed the BIP, but the student did not calm down and his behaviors continued to escalate. The classroom was cleared of other students and the principal came to the room to assist in calming/controlling the student. The student was laying on the floor, throwing items, and reacting violently; thus, the teacher and his aide decided to physically restrain the student by holding down his arms and legs so that he would not hurt himself or them. The principal assisted by holding down the student's legs. At some point during the incident, the principal stopped holding the student's legs and began to use his cell phone to call for more assistance. The student believed that the principal was calling his parents to have them come to the school; the student lunged at the principal and tried to grab the phone. During the altercation, the student kicked the principal and the principal felt a "sharp pain." The principal continued trying to restrain the student.

A police officer assigned to the school arrived shortly thereafter, and determined that, for safety reasons, it was best to place the student in handcuffs. The student was handcuffed until the parent arrived and student calmed down. Later that day, the principal filed assault charges against the student. The principal also went home because his knee and shoulder hurt; however, he did not call an ambulance or go to an emergency room and he did not see a doctor until September 24, 2009 (22 days later). During the hearing, the principal testified that his knee was swollen and his shoulder hurt after the incident. The day after the incident, the principal filled out Worker's

Compensation forms.

The student was suspended for 6 days, and a manifestation meeting was held on September 14. The IEP team, including the principal, determined that the conduct was a manifestation of the student's disability but decided to place the student in an interim alternative educational setting (IAES) for 45 days because the student caused serious bodily injury to the principal. The IAES placement was at the high school, in a room with a one-to-one instructor who was supervised by a special education teacher. The student worked on his IEP goals and the general education program and remained in that placement for 45 days. The student made good progress in that setting.

With regard to the placement at the IAES, the hearing officer found for the parent. The student did not cause serious bodily injury to the principal. Serious bodily injury requires "extreme physical pain," and the evidence did not support a finding that the student caused the principal extreme physical pain. In particular, the principal did not testify that he experienced extreme or severe pain in his knee, and his acts following the incident did not support a finding of extreme physical pain. The principal "did not cry out in pain, drop to the floor, become unconscious, call for an ambulance, or do anything else that one would expect when a person is in 'extreme' pain." The hearing officer found that while the principal was in pain, he was not in "extreme" pain. Thus, placement in the IAES was improper and violated the IDEA.

However, the IAES placement provided the student with meaningful benefit, and enabled him to continue to receive services and make progress toward achieving his IEP goals; thus, compensatory education was not necessary.

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

Checklist for a Drug, Weapon, or Serious Bodily Injury Case: Student Identified with an Educational Disability

- Ten (10) day suspension decision is made by the administrator;
- Student Service Director and Headmaster 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 Headmaster for further disciplinary action. The Headmaster 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;

1. 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.

2. 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'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.

G. 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); 34 CFR 300.532(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 to the child or to another, 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).