


 ATTORNEYS AT LAW

OAPSA
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 Conference

2018 SPECIAL EDUCATION UPDATE
 Discipline of Disabled Students Under
 IDEA and Section 504

Presented by David S. Hirt
 Peters Kalail & Markakis Co., LPA
 www.ohioedlaw.com

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**DISCIPLINING STUDENTS WITH
 DISABILITIES**

- General suspension considerations
- “Disability” under IDEA and Section 504
- The two “Ten-day” rules when disciplining a disabled child
- Suspension
 - “Pattern of removal” causing a change in placement
- Expulsion
 - General expulsion considerations
 - Manifestation determination review
- Interim alternative educational settings
- Protections for child not yet identified as a “child with a disability”

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INITIAL CONSIDERATIONS

The student violates the code of student conduct
 Can you establish that the student received a copy of the code of student conduct at the beginning of the school year?

Due process requirements for suspending the student
 The District must give the student:

1. Written notice of intent to suspend that states the allegation(s); and
2. An opportunity to challenge the reasons for the intended suspension or otherwise explain the student’s actions.

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INITIAL CONSIDERATIONS

If the principal decides to suspend the student after the informal hearing with the student, the principal gives the student written notice of the suspension.

Then, the principal gives the parent written notice of the suspension.

The suspension may be appealed to the board of education or its designee.

INITIAL CONSIDERATIONS

Will the student be referred to the superintendent for possible expulsion?

Does the code of student conduct allow the student to be expelled for any of the violations committed by the student?

In the notice of referral for expulsion, do not list violations committed by the student that are not expellable offenses.

INITIAL CONSIDERATIONS

Is the student a “child with a disability” under IDEA?

Is the student a “disabled child” under Section 504?

The answers to these questions affect whether:

- a. Educational services must be provided during the disciplinary placement,
- b. Whether and when a manifestation determination review must be completed; and
- c. Whether the child can be disciplined at all.

“CHILD WITH A DISABILITY”
PURSUANT TO IDEA

A student is a “child with a disability” pursuant to IDEA if the student has one or more of the IDEA-designated disability conditions (e.g., specific learning disability, emotional disturbance, autism, etc.) and needs specially designed special education because of the disability.

“DISABLED” OR “HANDICAPPED” CHILD
UNDER SECTION 504

“Individual with a disability” under Section 504 means a person who: (i) has a physical or mental impairment that substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment.

“DISABLED” OR “HANDICAPPED” CHILD
UNDER SECTION 504

A person is disabled under Section 504 if he or she has a physical or mental impairment that **substantially limits** one or more major life activities.

“Substantially limits” means “materially restricts,” which means any restriction.

“DISABLED” OR “HANDICAPPED” CHILD UNDER SECTION 504

A person is disabled under Section 504 if he or she has a physical or mental impairment that substantially limits one or more **major life activities**.

“Major life activities” include, but are not limited to: caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, communicating, and the operation of any major bodily function (this is a compilation from Section 504 regulations and the Americans with Disabilities Amendment Act).

THE TWO DIFFERENT “TEN-DAY” RULES

There are two different “ten-day” rules that apply to discipline under IDEA and Section 504 regulations:

1. Ten-day rule for denial of educational services; and
2. Ten-day rule for change of placement and completion of a manifestation determination review (“MDR”).

TEN-DAY RULE FOR DENIAL OF SERVICES

Under IDEA, educational services can be denied a child with a disability, because of disciplinary reasons, for only ten total days each school year.

The District must provide educational services starting on the 11th cumulative day of removal because of disciplinary reasons.

The services must provide the child with the opportunity to progress in the general curriculum and on his or her IEP goals and objectives.

TEN-DAY RULE FOR DENIAL OF SERVICES

There is no ten-day rule for denial of services under Section 504.

A school district is not required to provide educational services to a Section 504 student on the 11th cumulative day of disciplinary removal (unless the district provides such educational services to non-disabled children).

TEN-DAY RULE FOR CHANGE OF PLACEMENT AND COMPLETION OF AN MDR

Although IDEA and Section 504 regulations use different phrases (“change of placement” under IDEA; “significant change of placement” under Section 504 regulations), both phrases mean the same thing:

1. A removal from the regular educational setting for more than 10 consecutive days (e.g., expulsion); or
2. A series of short-term removals that add up to 10 or more days when the series of removals is a “pattern of removal” (e.g., a series of suspensions).

TEN-DAY RULE FOR CHANGE OF PLACEMENT AND COMPLETION OF AN MDR

The importance of recognizing a “change in placement” or “significant change of placement” is that both IDEA and Section 504 regulations require the completion of an MDR in conjunction with a change of placement/significant change of placement when that change is the result of discipline.

TRIGGER FOR MDR FOR A DISABLED CHILD UNDER SECTION 504

Keep in mind that a disabled child under Section 504 may or may not have an accommodation plan.

The trigger for needing to complete an MDR for a disabled child under Section is *not* whether the child has an accommodation plan.

It is the fact that the child is disabled, not whether the child has an accommodation plan, that causes the requirement to complete an MDR before instituting a significant change of placement because of disciplinary reasons.

SUSPENSION

CHANGE OF PLACEMENT

A change of placement under IDEA, or a significant change of placement under Section 504 regulations, is:

1. A removal from the regular educational setting for more than 10 consecutive days (e.g., an expulsion); or
2. A series of short-term removals that add up to 10 or more days when the series of removals is a "pattern of removal" (e.g., a series of suspensions).

**CAN THE CHILD BE DISCIPLINED?
IS THE DISTRICT CHANGING
THE CHILD'S PLACEMENT?**

Is the District changing the child's placement because of the suspension? In other words, is the current suspension part of a "pattern of removal"?

The principal must answer this question immediately because changing the child's placement for disciplinary reasons triggers the need for the "relevant members" of the IEP team or Section 504 team, along with personnel familiar with the child's misconduct, to complete a manifestation determination review.

**IS THE DISTRICT CHANGING
THE CHILD'S PLACEMENT?**

If the new suspension causes the child to be suspended for a total of more than 10 non-consecutive days in the current school year, the District is changing the child's placement if the suspensions are a "pattern of removal."

**IS THE DISTRICT CHANGING PLACEMENT
BECAUSE THE SUSPENSIONS ARE A PATTERN
OF REMOVAL?**

The District administration, not the IEP team or Section 504 team, determines whether a series of suspensions is a pattern of removal and, therefore, a change of placement/significant change of placement.

The parents do not get any input.

**PROVISION OF SERVICES WHEN THERE IS
NO CHANGE OF PLACEMENT
(IDEA ONLY)**

“School personnel, in consultation with at least one of the child’s teachers,” not the IEP team, determine where and how services will be provided when the suspension is not part of a pattern of removal. OAC 3301-51-05(K)(2)(d)(iv).

**IS THE DISTRICT CHANGING PLACEMENT
BECAUSE THE SUSPENSIONS ARE A PATTERN
OF REMOVAL?**

Factors to examine to determine if there is a pattern of removal (and therefore a change of placement):

1. Whether the child’s behavior is substantially similar to that displayed prior to previous suspensions;
2. The length of each suspension;
3. The total time the child has been suspended;
4. The proximity in time of the suspensions.

**IS THE DISTRICT CHANGING PLACEMENT
BECAUSE THE SUSPENSIONS ARE A PATTERN
OF REMOVAL?**

The District should notify the parent in writing of its determination whether the suspensions are a pattern of removal and give parent notice of procedural safeguards.

Under IDEA, the District’s determination that a series of suspensions are not a pattern of removal is subject to a due process hearing, which will *not* be expedited.

**PROVISION OF EDUCATIONAL SERVICES
(TEN-DAY RULE REVISITED)**

Under IDEA, even if the District administration determines that the current suspension is not part of a pattern of removal and, therefore, not a change in placement, the District must still provide educational services to the student starting on day 11 of the cumulative removals.

The services provided should give the student the opportunity to progress in the general curriculum and progress on his or her IEP goals and objectives.

**PROVISION OF EDUCATIONAL SERVICES
(TEN-DAY RULE REVISITED)**

There is no ten-day rule for denial of services under Section 504.

A school district is not required to provide educational services to a Section 504 student on the 11th cumulative day of disciplinary removal (unless the district provides such educational services to non-disabled children).

**PROVISION OF SERVICES UNDER IDEA
ARE YOU CHANGING PLACEMENT?**

Who determines the disciplinary placement and how services will be delivered depends on whether you are changing placement:

1. If you are changing placement, the IEP team decides the disciplinary placement and how services will be delivered. OAC 3301-51-05(K)(20)(d)(v).
2. If you are not changing placement, the administration and at least one teacher decides the disciplinary placement and how services will be delivered. OAC 3301-51-05(K)(20)(d)(iv).

Under IDEA, the disciplinary placement of the student during provision of services, whether determined by the IEP team (after a change of placement) or by the administration (when there is no change of placement), is subject to an expedited due process hearing.

EXPULSION

NOTICE OF REFERRAL FOR EXPULSION

The principal's written notice of suspension, given to both the student and the parent, may contain notice that the principal will refer the student to the superintendent for consideration for expulsion.

SUPERINTENDENT'S WRITTEN NOTICE OF INTENT TO CONSIDER EXPULSION

The superintendent must give written notice of intent to consider expulsion to both the parent and the student.

At a minimum, the notice and envelope should be addressed to both the parent and the student.

Some courts have vacated an expulsion because notice of intent to expel was given only to the parent.

CHANGING PLACEMENT FOR DISCIPLINARY REASONS

A “change of placement” under IDEA, and a “significant change of placement” under Section 504 regulations, is:

1. A change in the child's educational setting for more than 10 consecutive school days (i.e., an expulsion), or
2. A change in the child's educational setting for more than 10 non-consecutive school days where the changes are a “pattern of removal.”

CHANGING PLACEMENT FOR DISCIPLINARY REASONS

An expulsion is a change of placement under IDEA and a significant change of placement under Section 504 regulations.

Making a change of placement or a significant change of placement because of disciplinary reasons requires the “relevant members” of the IEP team or Section 504 team, and personnel familiar with the student's misconduct, to complete a manifestation determination review.

MANIFESTATION DETERMINATION REVIEW

The MDR is meant to prevent disability discrimination:

If the student's actions that violated the code of student conduct are a manifestation of the child's disability, changing the child's placement for disciplinary reasons (i.e., expelling the child) would amount to disciplining the child because of his or her disability.

Disciplining a student because of his or her disability is disability discrimination.

MANIFESTATION DETERMINATION REVIEW

Under IDEA, the "relevant members" of the IEP team (as determined by the District and parents), along with personnel familiar with the student's misconduct, must complete an MDR "within ten 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 MDR can occur up to 10 school days after the superintendent expels the student, but most school districts complete the MDR before the expulsion hearing.

MANIFESTATION DETERMINATION REVIEW

Under Section 504 regulations, an "evaluation" must be completed before making a "significant change of placement," i.e., before the expulsion.

OCR interprets "evaluation" in the disciplinary context to mean an MDR.

MANIFESTATION DETERMINATION REVIEW

The student's conduct is a manifestation of his or her disability if:

1. The conduct was caused by the student's disability; or
2. The conduct had a direct and substantial relationship to the student's disability; or
3. The conduct was the direct result of the District's failure to implement the IEP or Section 504 plan.

MISCONDUCT THAT IS A MANIFESTATION OF THE CHILD'S DISABILITY

If the student's conduct was a manifestation of the student's disability, the student cannot be expelled.

MISCONDUCT THAT IS A MANIFESTATION OF THE CHILD'S DISABILITY

If the misconduct of a "child with a disability" is a manifestation of the child's disability, then the IEP team must complete (or modify) a functional behavior assessment and behavior intervention plan, and modify the IEP if appropriate. ODE has removed from its regulations the requirement that the FBA and BIP be completed within 10 days of the MDR.

MISCONDUCT THAT IS A MANIFESTATION OF THE CHILD'S DISABILITY

If the misconduct of a “disabled child” is a manifestation of the child’s disability, then the Section 504 team should determine whether any modifications to the child’s placement, services, or accommodations are appropriate.

The Section 504 team must determine how to address the student’s behavior, and the team should modify the accommodation plan accordingly.

INTERIM ALTERNATIVE EDUCATIONAL SETTING

Even if the child with a disability (IDEA) or disabled child (Section 504) cannot be expelled because the misconduct was a manifestation of the student’s disability, the Superintendent can order the student to a 45 school-day Interim Alternative Educational Setting (“IAES”) in three limited circumstances.

INTERIM ALTERNATIVE EDUCATIONAL SETTING

Although interim alternative educational settings are provided for only in the IDEA and its regulations, the Cleveland office of OCR has approved disciplinary administrative guidelines that allow for an IAES for disabled students under Section 504 for the same limited reasons that an IAES is available for a child with a disability.

INTERIM ALTERNATIVE EDUCATIONAL SETTING

The Superintendent can order the student to a 45 school-day IAES if the student:

1. Carried a “weapon” to, or possessed a “weapon” at, school, on school premises, or to or at a school function;
2. Knowingly possessed or used illegal drugs, or sold or solicited the sale of a controlled substance, while at school, on school premises, or at a school function; or
3. Inflicted “serious bodily injury” on another person while at school, on school premises, or at a school function.

INTERIM ALTERNATIVE EDUCATIONAL SETTING

“Weapon” means a “dangerous weapon,” which is 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 it does not include a pocket knife with a blade of less than 2 ½ inches in length.”

INTERIM ALTERNATIVE EDUCATIONAL SETTING

“Serious bodily injury” means a bodily injury that involves:

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

INTERIM ALTERNATIVE EDUCATIONAL SETTING

If the superintendent orders the student to an IAES, the IEP team or Section 504 team must meet to determine what the setting will be and how educational services will be provided to the student.

The superintendent's order placing the student in an IAES, and the IEP team or Section 504 team's determination of what the IAES will be, is subject to a due process hearing. Under IDEA only, such a hearing will be expedited.

OPTIONS IF STUDENT CANNOT BE EXPELLED OR ORDERED TO AN IAES

Under IDEA, if neither an expulsion nor an IAES is available, and the parents will not agree to a change of placement, the Board can file a due process complaint to obtain an order from a hearing officer for a change of placement.

The Board must convince the hearing officer that "maintaining the current placement of the child is substantially likely to result in injury to the child or others."

The due process hearing will be expedited because the child stays in his or her current (non-disciplinary) placement pending the hearing officer's decision.

MISCONDUCT THAT IS NOT A MANIFESTATION OF THE CHILD'S DISABILITY

If the student's conduct was not a manifestation of his or her disability, the superintendent can order an expulsion.

EXPULSION OF A CHILD WITH A DISABILITY (IDEA)

The “expulsion” of a child with a disability (IDEA) is better thought of as a change of placement without parental consent. The District must provide educational services starting on the 11th cumulative day of removal in a school year, i.e., the first day of the “expulsion,” or earlier if there has been discipline previously in the school year.

EXPULSION OF A DISABLED CHILD (SECTION 504)

The expulsion of a disabled child under Section 504 is a true expulsion. The District is not required to provide educational services to the child unless it provides educational services to non-disabled children during an expulsion.

The Section 504 team should, however, convene to determine whether any additional evaluation of the child is needed, and whether any modification of the accommodation plan is appropriate.

“EXPULSION” OF A CHILD WITH A DISABILITY

When a child with a disability (IDEA) is expelled, the superintendent provides written notice of the expulsion to the parent, which should include a statement that the IEP team will meet to determine the student’s disciplinary placement:

The superintendent orders the “expulsion,” but it is the IEP team that determines where the student will be placed during the “expulsion” and how educational services will be delivered.

DISAGREEMENT OVER MDR AND DISCIPLINARY PLACEMENT

The parents' disagreement with the outcome of the MDR (IDEA and Section 504) is subject to a due process hearing. Under IDEA only, the due process hearing will be expedited.

In the case of a child with a disability (IDEA), the child's placement during the "expulsion" is also subject to an expedited due process hearing.

The student stays in the disciplinary placement pending the outcome of the due process hearing.

PROTECTIONS FOR CHILDREN NOT DETERMINED ELIGIBLE FOR SPECIAL EDUCATION

Under IDEA only, a child who has not been determined eligible for special education may, nevertheless, assert the "protections" to which a disabled child is entitled if the school district "had knowledge...that the child was a child with a disability" before the child's misconduct occurred.

PROTECTIONS FOR CHILDREN NOT DETERMINED ELIGIBLE FOR SPECIAL EDUCATION

The school district "had knowledge" if, before the misconduct, the child's:

1. Parent expressed concern in writing to supervisory or administrative personnel, or a teacher of the child, that the child is in need of special education and related services; or
2. Parent requested a multi-factored evaluation; or
3. Teacher or district personnel expressed specific concerns about the child's pattern of behavior directly to the special education director or other district supervisory personnel.

**PROTECTIONS FOR CHILDREN
NOT DETERMINED ELIGIBLE
FOR SPECIAL EDUCATION**

The school district will not be deemed to “have knowledge” if:

1. The child’s parent:
 - a. has not allowed a multi-factored evaluation, or
 - b. has refused special education and related services; or
2. The child has been evaluated and determined not to be a child with a disability.

**PROTECTIONS FOR CHILDREN
NOT DETERMINED ELIGIBLE
FOR SPECIAL EDUCATION**

Some examples of the “protections” to which the child is entitled:

1. Educational services starting on the 11th day of discipline;
2. Completion of an MDR within 10 days of the decision to change the child placement (presumes the child is ultimately identified);
3. Due process hearing (arguably limited to child find).

**PROTECTIONS FOR CHILDREN
NOT DETERMINED ELIGIBLE
FOR SPECIAL EDUCATION**

If the parent requests an MFE or special education after the child’s misconduct, the child can be disciplined like a regular education child, but the district must perform the MFE in an expedited manner (unless the district gives prior written notice that it refuses to complete an MFE).

The child remains expelled while the expedited MFE is completed. No educational services need be provided.

Peters
Kalail &
Markakis
CO., L.P.A.

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