

PRACTICAL ANALYSIS AND GUIDANCE: Discipline and Attendance Issues

Students with disabilities are entitled to additional protections in discipline to ensure that these students are not disciplined for behavior that results from their disabilities or the public agency's failure to properly implement the students' educational programs. The key to this process is the manifestation determination meeting. Schools must invite a representative from the Institute to these meetings and use the proper Alpine forms. These additional protections do not apply to every disciplinary situation; they apply when a student with disabilities is facing discipline that will result in a change of placement. Changes in placement, by law, are defined as removals that result in the student being out of school for ten or more consecutive school days or a series of removals that total more than ten school days in a year and constitute a pattern. These additional protections generally apply to students with disabilities eligible under either IDEA or Section 504. (*See*, Chapter N, Section 504; Appendix C, Discipline Flowcharts.)

FREQUENTLY ASKED QUESTIONS

When does discipline for a student with a disability under IDEA differ from general education?

The law allows a public agency to suspend (or assign a disciplinary change of placement to an alternative setting to) a student with a disability for ten cumulative school days in a year due to discipline infraction(s) before significant and specific procedural safeguards take effect for the student. To ensure compliance with the law, building administrators should count out-of-school suspensions accrued at other schools or school systems during the current school year toward the ten days of out of school suspension. After the initial ten days of out-of-school suspension, the public agency must conduct a manifestation determination before suspending or expelling the student.

When must the agency convene a manifestation determination meeting?

The student is entitled to a manifestation determination any time the discipline will result in a change of placement. By law, changes in placement are defined as removals that result in the student being out of school for ten or more consecutive school days or a series of removals that total more than ten school days in a year and constitute a pattern. Generally, from the first time that a student is facing discipline that will result in the student having been excluded for more than ten days in a school year and thereafter any time the student faces suspension/exclusion, the IEP team will need to conduct a manifestation determination meeting.

When the student gets close to ten days of suspension in a school year, should the student's team convene a manifestation determination meeting?

A manifestation determination meeting is only appropriate when assigned discipline creates a change of placement, i.e., will total more than ten days out of school. If the student is close

to ten days, but not yet facing discipline of more than ten days out of school, the team should look carefully at the student's needs and special education program to determine whether the student is being offered a free appropriate public education. The team's review should include consideration of progress and behavioral data, the need for a new or updated FBA, and the sufficiency of the current support. If behavior has been exhibited previously or the student's service providers have concerns about the adequacy of evaluations or services, then an annual IEP meeting should be convened. If considering a significant change of placement, the reevaluation requirement will kick in. (*See, Chapter B, Evaluations and Reevaluations.*) If the IEP team considers a significant change of placement, then it must consider reevaluation. (*See, Chapter B, Evaluations and Reevaluations.*)

What is the sequence of events for assigning discipline and conducting manifestation determination meetings?

1. School administration sends notice to student of offense and proposed discipline.
2. School team issues notice of manifestation determination meeting.
3. School team convenes a manifestation determination meeting. If the team determines that the conduct is NOT a manifestation of the student's disability, the IEP team should propose services to be in place for the student during the period of suspension/expulsion.
4. School administration provides student with a suspension/expulsion hearing, if applicable.
5. School administration notifies student of final disposition.

(*See, Appendix A, Manifestation Determination Agenda and Notes.*)

NOTE: When a manifestation determination is conducted, the school team should provide the parents with a copy of the procedural safeguards notice (unless the student's file amply documents that the parents have received and understand the procedural safeguards notice within the last year – quite frankly, with the procedural safeguards notice, you can't be too careful).

How soon must a manifestation determination meeting take place?

Generally, a manifestation determination meeting should take place within a few days of the offense or the determination to discipline the student. In order to ensure the parents receive proper notice, the public agency representative should contact the parents by phone and deliver the notice by email, facsimile, hand delivery, or in person at the meeting (if the parents sign agreement to such notice). Unless the student has already been excluded ten days in the school year, the student clearly may serve suspension while waiting for the meeting to be held. Suspension becomes more problematic when the student already has been excluded for ten or more days already in the school year. In such cases, the team should convene very quickly and immediately should begin providing work to go home and/or interim services until the meeting can take place.

What role does the student's IEP team play in a Manifestation Determination meeting?

In most cases, building personnel (e.g., building special education administrator, school psychologist, mental health service provider, the case manager or student's special education teacher) can lead and conduct manifestation determination (MD) meetings. In complicated or unusual cases or when an advocate or private consultant is going to accompany the parent, the school psychologist should confer with a lead administrator and/or determine whether a district-level representative should attend a MD meeting. The team leader should prepare for the MD by having the following materials available for the team to review:

- Student's current IEP, telephone number and address;
- Student's eligibility report;
- Psychological report;
- Behavior Intervention Plan (BIP) (if applicable);
- Functional Behavior Assessment (if developed); and
- Other materials or documentation that pertain to the student's educational program.

After the meeting, the student's case manager should follow up with recommendations that were made by the MD team. If the student is removed from his current placement, then the child must receive a Functional Behavior Assessment (or an update to an existing FBA) and behavioral intervention services and modifications (including review and modification of an existing BIP) to ensure the behavior does not recur.

Who must attend manifestation determination meetings?

The public agency must ensure that the parent and relevant members of the child's IEP (as determined by the parent and the agency) participate in the MD meeting. It is ideal to have a school psychologist at MD meetings. In addition, the building special education administrator, mental health service provider(s), student's special education teacher, and at least one of the student's general education teachers should attend.

What role does local administration play in manifestation determinations?

Local administrators are expected to:

- Know who students with disabilities entitled to protections are and notify the case managers if discipline is being contemplated.
- Provide the student with due process in accordance with agency policy.
- Prepare a discipline letter consistent with the public agency's policy/practice and send the letter to the parents with a copy to the student's case manager.
- Consult the student discipline record to determine the number of days the student has been suspended out of school.

- If the recommended suspension will take the student over ten days, contact the student's case manager immediately to arrange the IEP/Manifestation Determination meeting, including notifying the parents.
- Participate in the manifestation determination meeting.

How can a school team strengthen the legal defensibility of its discipline practices for students with disabilities?

- Communicate with your building level special education team early and often.
- Use discipline systems that are clear and fairly applied for all students.
- Assign consequences appropriate to the misconduct.
- Convene the IEP team to review and revise, as necessary, the student's IEP and/or behavior support plan (BSP) early on if the student begins to have behavioral difficulties/incur disciplinary infractions.
- Consult with your special education personnel who are knowledgeable of these regulations.
- Ensure that the building special education team informs building level administrators of the students with disabilities that have IEPs, especially those with behavior support plans, at beginning of every school year and updates the information as the student's IEPs or behavior plans change.

What happens if the student's conduct is determined to be a result of the student's disability or the failure of the public agency to implement the student's IEP?

If the IEP/Manifestation Determination team determines that the behavior exhibited by the student is related to the student's disability, then the student cannot be assigned a disciplinary change of placement, i.e. suspension or expulsion from school. The MD team will be required to conduct an FBA (if not already done) and implement (or review and modify) a BIP for the student. In addition, the IEP team should review the student's IEP to determine whether revisions can be made so that the student may be successful in his/her educational setting. Modifications to be considered may include the following:

- Development or modification of a behavior management plan;
- Social skills instruction, including replacement behaviors instruction;
- Guidance counseling or mental health services; and/or
- Additional service time in special education.

IMPORTANT: The IEP team can always determine that a change of placement is appropriate for the student, as long as the team complies with the procedural requirements for the change in placement—consideration of reevaluation and prior written notice. Ideally, when a contentious disciplinary scenario makes clear a change of placement is necessary, the parents will agree. If the parents will not agree and the IEP team truly believes that the student requires a change of placement in order to receive a free appropriate public education, the case manager should contact the lead administrator for support.

What happens if the student’s conduct is determined NOT to be a result of the student’s disability or the failure of the public agency to implement the student’s IEP?

If the MD team determines that the behavior exhibited by the student **is not related** to his/her disability and **is not related** to a failure to implement the student’s IEP, then the student may be assigned the same discipline that a nondisabled student would receive. However, the agency must continue to provide special education services and, if the IEP team finds it appropriate, must provide for a functional behavioral assessment and develop or revise the student’s behavior intervention plan.

What happens to a student with disabilities if there is no agreement on whether the behavior was a manifestation of the student’s disability?

If the team, including the parents, cannot reach consensus, then the public agency must make the determination and provide the parents with prior written notice. The parents can request mediation and/or a due process hearing to resolve a dispute regarding the manifestation determination. If the parents of an IDEA student request due process, then “stay-put” is triggered and the student must remain in his/her current placement until the dispute is resolved, unless the family and agency agree to a non-disciplinary change of placement. Mediation is not sufficient to trigger stay-put. (*See, Chapter J, Dispute Resolution*).

NOTE: Unlike IDEA, Section 504 does not include an explicit stay-put provision guaranteeing the student will remain in his current educational placement pending the resolution of due process disputes between parents and schools.

Are students with disabilities who are suspended or expelled entitled to services during the exclusion period?

Yes. During exclusions after the first ten days in a school year, the public agency is obligated to provide a program that will "enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." 34 C.F.R. § 300.530(d)(1)(i). The program is not legally required to include every service the child would receive if not excluded. In its comments to the 2006 regulations, OSEP said:

We believe the extent to which educational services need to be provided and the type of instruction to be provided would depend on the length of

the removal, the extent to which the child has been removed previously, and the child's needs and educational goals. For example, a child with a disability who is removed for only a few days and is performing near grade level would not likely need the same level of educational services as a child with a disability who has significant learning difficulties and is performing well below grade level. The Act is clear that the public agency must provide services to the extent necessary to enable the child to appropriately participate in the general curriculum and appropriately advance toward achieving the goals in the child's IEP.

Accordingly, if a student has been out of school, struggling academically or is not showing progress on IEP goals, the public agency should consider additional direct special education support services. While it may not be typical for a suspended/expelled student to receive related services, it is possible that a significantly disabled student facing an extended removal would be eligible for such services.

Who determines where a student will attend school or receive services during a period of suspension or expulsion?

Of course, the requirement that the student be educated in the least restrictive environment does not apply during a period of proper suspension/expulsion. Nonetheless, principals cannot unilaterally decide where students with disabilities attend school. A properly constituted IEP team must determine the appropriate services needed in order to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

If the student is not allowed on campus, where can the services be provided?

IEP teams must determine the interim alternative educational settings in which the student can receive services during the exclusion period. Most frequently, services are proposed for an off-campus, neutral location (such as a public library or a school district office). Liability and safety factors may be considered when determining whether staff members will be permitted to provide services in the home.

How are those services documented?

The documentation requirement can be met a variety of ways. Appendix A includes a Manifestation Determination Agenda and Notes form that the IEP team can use to fulfill the essential requirement that the team document its conduct of the manifestation determination and services to be provided during the period of exclusion.

After a student committed a serious disciplinary offense, his parents told us that we should have known the student was eligible for special education. What do we do now?

The law affords the protections available to a student with disabilities to a student that the public agency had knowledge might be eligible. In order to be deemed to have knowledge,

before the behavior occurred, the parent must have: (1) expressed concern in writing to supervisory or administrative personnel or the teacher of the child that the child is in need of special education; or (2) must have requested an evaluation pursuant to the law. Also, the agency is deemed to have knowledge if a teacher or other school personnel expressed specific concerns about a pattern of behavior to the lead administrator or other supervisory personnel.

If it appears that the public agency might have had knowledge, then the agency should afford the child the special education disciplinary procedural safeguards, meaning conducting a manifestation determination based on the child's suspected disability.

PRACTICE TIP: Because sorting through behaviors and attempting to attribute or not attribute them to a student's disability can require significant discussion of the student's psychological evaluations, it is ideal practice to have psychologists coordinate such meetings and to include mental health professionals and other related service providers, as appropriate. This is especially true when the team is meeting pending evaluation because it was deemed to or did have prior reason to suspect the student's eligibility but did not act.

If the public agency did not have knowledge, then the agency can implement the discipline while conducting an evaluation of the child (as efficiently as possible) and moving through the eligibility process. (See, Chapter C, Eligibility Determination and Categories of Eligibility).

Do students whose parents have revoked consent for special education services still receive the additional discipline protections?

No, students for whom consent for placement has been revoked are considered general education students (unless the public agency has subsequently placed the child on a 504 plan, which is generally not advised). (See, Chapter N, Section 504). If this situation arises, confer with the lead administrator.

Does in-school suspension count toward the ten days?

No, the ten days include only exclusions out of school, such as suspension and expulsion. Days where the child is "sent home" or the parents are asked to pick the child early may be considered "constructive suspension" and probably would count towards the ten days, especially if suggested by the school. In-school suspension and other discipline measures can be used with students, but should not be used to such an extent that they really are removals from the student's educational program. During in-school suspension, students with disabilities must still be given access to their special education services and the general curriculum and be provided necessary supports.

Does bus suspension count towards the ten days?

It depends upon whether the proposed suspension is from transportation services that are included in the student’s IEP. If a student receives special transportation and could not get to school if subject to a bus suspension, then a student may have a good legal argument that the days should be considered toward the ten days. However, if the bus transportation is not part of the child’s IEP, a bus suspension would not constitute a suspension that would count toward the ten days.

Does the agency need to conduct a manifestation determination when the disciplinary offense involves a weapon, drugs, or serious bodily injury?

Yes, within ten school days of any decision to assign a disciplinary change of placement to a student with a disability, the public agency must conduct a manifestation determination. However, when the removal is for weapons, drugs, or serious bodily injury, school personnel may remove the child to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is a manifestation of the child’s disability. (See, Appendix C, Discipline Flowchart.)

Does the law limit the public agency’s ability to contact law enforcement regarding the behavior of students with disabilities?

No, nothing in IDEA limits the public agency’s ability to consult law enforcement or the ability of law enforcement to exercise their responsibilities. The agency must ensure that it forwards to the agency to which it reports the crime copies of the special education and disciplinary records of the child.

When a student is suspended or expelled, how are the absences counted?

Recently, the Colorado legislature removed the requirement that suspensions and expulsions be considered unexcused absences for purposes of the local board’s student attendance policy. Absences due to suspension or expulsion are considered “excused” for truancy purposes.