

Special Disciplinary Rules for Special Education and Section 504 Students



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Discipline of Special Education Students (Current & Prospective)



Discipline of Special Education Students

- Suspension or expulsion must be in accordance with federal law. (Ed. Code Section 48915.5.)
- Federal law requires ***continued services*** for suspended or expelled students.
- IEP may require alternate transportation for students suspended from the bus.

Students Not Yet Eligible for Special Education

- A student **not yet** identified as eligible for special education, who has violated a code of student conduct, may assert the disciplinary protections afforded to students with a disability **IF**:
 - District had **knowledge** that student was a child with a disability **BEFORE** the conduct that precipitated the disciplinary removal occurs. 20 U.S.C. § 1415(k)(5)(B)



Students Not Yet Eligible for Special Education

What constitutes a “basis of knowledge”?

- LEA can be deemed to have KNOWLEDGE that a child is a child with a disability if **before the behavior that led to the disciplinary action:**
 - Parent **expressed concern in writing** to supervisory or administrative personnel, the appropriate educational agency, or to one of student’s teachers, that student is in need of special education and related services.
 - Parent **requested an evaluation** of the student; **OR**
 - Student’s teacher, or other LEA employee, expressed specific concerns about a “pattern of behavior” demonstrated by student to the director of special education or other LEA supervisory personnel.

(34 C.F.R. §300.534(b).)

Students Not Yet Eligible for Special Education

Circumstances when LEA is deemed NOT to have knowledge:

- LEA deemed to not have knowledge that student is a child with a disability if:
 - Parent has not allowed an evaluation of the student,
 - Parent has refused services for the student, or
 - Student has been evaluated and determined not to be a child with a disability.

(34 C.F.R. § 300.534(c).)

Students Not Yet Eligible for Special Education



- If the LEA did not have knowledge prior to taking disciplinary measures against the student, the student is subject to the same discipline as a general education student.
- **However**, “[i]f a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures ... the evaluation shall be conducted in an **expedited** manner.”

Students Not Yet Eligible for Special Education

What do we do while the expedited assessment is pending?



- “Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.”

34 C.F.R. § 300.534(d)(2)(ii)

Students Not Yet Eligible for Special Education

What if the results of the assessment indicate the student is eligible?

- “If the child is determined to be a child with a disability ... the [LEA] must provide special education and related services....”

34 C.F.R. § 300.534(d)(2)(iii)

Anaheim Union High Sch. Dist. v. J.E.

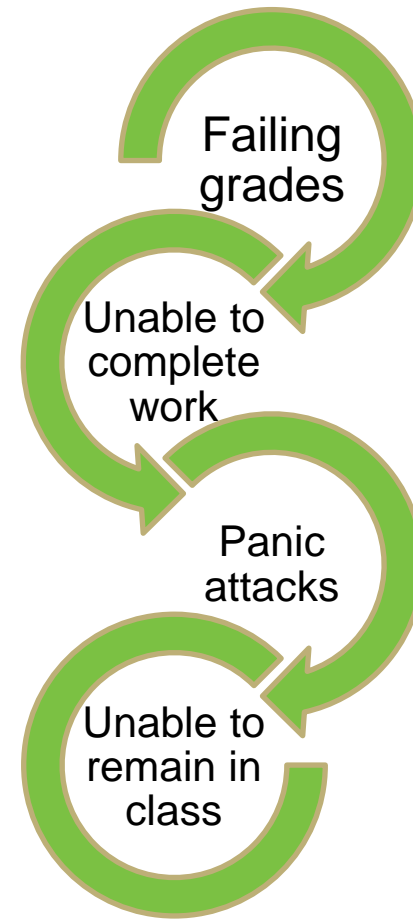


- District should have conducted a manifestation determination review for 10th grade student not yet eligible for special education before moving him to an alternative school.

(N.D. Cal., May 2013) 61 IDELR 107

Anaheim Union High Sch. Dist. v. J.E., (continued)

- District had a “**basis of knowledge**” because at student’s 504 meeting, his teacher expressed concern about a **pattern of behavior**.



(N.D. Cal., May 2013) 61 IDELR 107

Anaheim Union High Sch. Dist. v. J.E., (continued)

- The District argued that “pattern of behavior” refers to behavior involving **disciplinary incidents**. If interpreted otherwise, the District argued, then all 504 meetings would confer a “basis of knowledge” regarding a Student’s disability.
- The District also argued that the teacher or personnel must specifically indicate that the student is **in need of a special education evaluation**.

What do you think the court said?

(N.D. Cal., May 2013) 61 IDELR 107

Anaheim Union High Sch. Dist. v. J.E., (continued)

Lessons Learned:

- **A “pattern of behavior” is not limited to disciplinary issues.**
 - The phrase does not specify of limit the behavior or behaviors that must be observed.
 - Having a disability does not always result in a disciplinary problem.
- **Staff does not have to specifically state that the child is in need of special education or should be evaluated.**
 - Congress did not write the law as including this requirement. A teacher/staff must express specific concerns about a pattern of behavior, but nothing in the law indicates that the teacher/staff must also indicate that the students needs special education.

(N.D. Cal., May 2013) 61 IDELR 107

Stay Put

Maintenance of Current Educational Placement

- “When an appeal has been made under §300.532 [regarding disciplinary placement, IAES, or the manifestation determination], the child must remain in the interim alternative educational setting pending the decision of the hearing officer until the expiration of the [disciplinary time period, e.g., 45-days for IAES or the duration of the disciplinary period for behavior found not to be a manifestation of a student’s disability], unless the parent and SEA otherwise agree.”

(34 C.F.R. §300.533)



Short-Term Removals

- “School personnel ... may remove a child with a disability who violates a code of student conduct ... to an appropriate **interim alternative educational setting**], another setting, or suspension, for:
 - Not more than ten (10) consecutive school days (to the extent those alternatives are applied to children without disabilities), and
 - For additional removals of not more than ten (10) consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536).”

(34 C.F.R. § 300.530(b)(1).)

When to Conduct a Manifestation Determination

- A manifestation determination is required to be conducted when:
 - A student has violated a code of conduct,
 - The District wants to discipline the student for the violation, **and**
 - The discipline will result in a removal that constitutes a **change of placement** for the student.
 - This includes change of school sites for disciplinary reasons!



Change of Placement

- A change of placement occurs if the removal is for more than ten (10) consecutive school days; or
- The child has been subjected to a series of removals that constitute a pattern.



34 C.F.R. § 300.536(a)(1)

Pattern of Removal Factors

- When student's removals total more than 10 school days in a school year;
- Student's behavior is "substantially similar" to the student's behavior that resulted in prior removals; **and**
- Because of "additional factors" (e.g., length of removals, total amount of time removed, and proximity of removals)

34 C.F.R. § 300.536(a)(2)

* **General rule of thumb: removals of 10 school days in a school year should be a red flag to see if a change of placement is occurring.**

Special Notices of Manifestation Determination Review Meetings EC 48915.5

- If a change of placement for purposes of a discretionary expulsion recommendation is being proposed for a special education child who is a **foster care child**, the attorney for the child and an appropriate representative of the child welfare agency shall be invited to participate in the IEP meeting that makes the MD determination.
- If the child is a **homeless child or youth**, and is proposed a change of placement due to the discretionary expulsion recommendation of the LEA, the LEA liaison for homeless children/youth shall be invited to the IEP meeting to the MD meeting.

Timeline for a Manifestation Determination Review

- An MDR must occur within 10 **school** days of any decision to change a student's placement because of a violation of the code of student conduct.

34 C.F.R. § 300.530(e)

Manifestation Determination Review

- The LEA, the parent, and relevant IEP team members must review all relevant information and answer two questions:
 1. Was the misconduct caused by, or directly and substantially related to, the child's disability?
 2. Was the misconduct the direct result of the LEA's failure to implement the IEP?

34 C.F.R. § 300.530(e)(1)



If either condition is met, the conduct is a manifestation of the child's disability.

34 C.F.R. § 300.530(f)(2)

Manifestation Determination Review (continued)

- Reaching a manifestation determination should include a review of all relevant information, including:
 - Previous assessment data
 - Discipline records
 - Attendance records
 - Report cards/progress reports
 - Previous IEPs
 - Consider unidentified disability
 - Teacher(s) observations
 - Relevant parent information
 - Brief write-up by psychologist that will assist team in answering the two ultimate questions.



Student v. Poway USD

CASE-IN-POINT: MD Test

- Student with ADHD qualified under OHI
- Student's unique needs relating to his ADHD were distraction, off-task behavior, impulsivity in class consisting of talking and acting-out, and difficulty in working independently
- Student's ADHD symptoms were described as severe
- Student made a "dry ice bomb" which he hid in bathroom stall, which exploded and injured a teacher when the cap hit the teacher upon explosion
- District held a MDR, and found that student behavior was not a manifestation of his disability because he methodically planned it
- Parents disagreed with the determination and filed for an expedited hearing

Student v. Poway USD

- The issue at hearing was:
 - Was Student's conduct on February 1, 2010, which led to his expulsion, caused by, or determined to have a direct and substantial relationship to his ADHD, and therefore a manifestation of his disabilities?
- At hearing, Parent contended that student's behavior was impulsive and direct manifestation of his disability
- School psychologist credibly testified that Student's conduct involved a chain of behaviors that do not support a finding of impulsivity:
 - 1) Student researched how to obtain dry ice,
 - 2) procured the dry ice,
 - 3) chose a vacant place to construct the bomb – the bathroom,
 - 4) constructed the bomb, and
 - 5) chose a location to hid the bomb- a bathroom stall, while he waited for detonation

Student v. Poway USD

- OAH found that:
 - IEP team appropriately determined behavior not a manifestation and that there was no failure to implement IEP, and
 - evidence showed student's behavior was not substantially or directly related to his ADHD, as student constructed and planned the hiding of the dry ice bomb, and IEP team considered all relevant information before concluding behavior was not a manifestation of student's disability.

(Parent v. Poway Unified School District, (July 27, 2010) OAH Case No. 2010060622)

Manifestation Determination Review (continued)

When the Behavior is a Manifestation:

1. Return student to Placement

- The child must be returned to his/her placement, unless:
 - An IAES is appropriate (“Big 3,” a.k.a. “special circumstances”),
OR
 - The parent and the LEA agree to a change of placement.

2. Conduct an FBA and implement a BIP, or review and, as necessary modify an existing BIP.

34 C.F.R. § 300.530 (f)(1) & (2)

Manifestation Determination Review (continued)

When the Behavior is a Manifestation:

- 3. Immediately remedy** any deficiencies that resulted in the failure to implement the student's IEP, if necessary.

34 C.F.R. § 300.530 (e)(3)



Manifestation Determination Review (continued)

When the Behavior is not a Manifestation:

Apply disciplinary procedures as usual

- “If the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child’s disability ... school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities.”

34 C.F.R. § 300.530(c)

Practice Tips

Always Answer Both MDR Q's

- Misconduct caused by the student's disability may also indicate that:
 - The IEP provides insufficient behavioral interventions and supports, and/or
 - The IEP has not been properly implemented.
- The MDR team should identify and address all causes of the misconduct.
 - Consider need for updated/new assessment(s)

The Appeal Process

Either party may request an expedited OAH hearing:



- A parent who disagrees with a placement decision, or a negative MDR determination; or
- An LEA that believes maintaining the child's current placement (as a result of a positive MDR determination) is **substantially likely to result in injury** to the child or others.

34 C.F.R. § 300.532(a)

Continuation of Services

FAPE in the Disciplinary Setting

- A student removed from his/her placement because of a change of placement (e.g, more than 10 consecutive school days, pattern of removal, 45 day IAES) must:
 - Continue to receive a FAPE “so as to enable the child to continue to participate in the general education curriculum ... and to progress toward meeting [IEP] goals”; and
 - Receive, as appropriate, an FBA, and behavioral intervention services and modifications designed to address the behavior violation so it does not recur.

34 C.F.R . § 300.530(d)

Continuation of Services

Short Term Removals

- FAPE is not required for removals of 10 school days or less, if services are not provided to non-disabled students who are similarly removed.

11th Day Rule

However, after removal for 10 school days in same school year, during any subsequent days of removal, LEA must provide educational services that will enable student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in IEP.

IAES: Special Circumstances

- **Regardless** of the MDR determination outcome, a student may be removed to an IAES for up to 45 school days if he/she commits one of the “Big 3”:
 1. “Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under [SEA or LEA jurisdiction]”;
 2. “Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under [SEA or LEA jurisdiction]”;
or
 3. “Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under [SEA or LEA jurisdiction].”

34 C.F.R. § 300.530(g)

45 Day IAES - Serious Bodily Injury

- “[T]he term “serious bodily injury” means bodily injury that involves:
 - A substantial risk of death;
 - Extreme physical pain;
 - Protracted and obvious disfigurement; or
 - Protracted loss or impairment of the function of a bodily member, organ, or mental faculty[.]”

18 U.S.C. § 1365(h)(3)

IAES – Best Practices

- IAES placements:
 - IEP team must determine the IAES for disciplinary removals that constitute a change of placement
 - Ensure that for the period of the removal, appropriate related services are offered that will permit the child to make progress on his goals
 - Discuss and make an offer of IAES at the MD meeting
 - **Send prior written notice (PWN) of the IAES offer concurrently with notice of the MD decision if no MD meeting was held, or as soon as the 45 Day automatic removal to IAES is invoked (*next best*)

Section 504 Discipline



OCR Interpretation of 504 Regulation

“The Section 504 implementing regulation requires the District to conduct a re-evaluation (including, where appropriate, a manifestation determination) if the District contemplates a significant change in placement, including a long-term suspension of more than 10 days (and, in some cases, cumulative short-term suspensions exceeding 10 days within a school year). Pursuant to Section 504, if the group (after conducting a Section 504 compliant re-evaluation) determines that the misconduct is not a manifestation of the student’s disability, the school district may move forward with the proposed discipline in the same manner as for similarly situated non-disabled peers; otherwise, the team must continue the evaluation and determine whether the student’s current educational program is appropriate.”

Letter of Finding, OCR Complaint No. 11-13-1266 (March 11, 2014)

Discipline of 504 Students

- Manifestation Determination
 - Must be conducted before a disciplinary change of placement is contemplated.
 - **Within 10 days** from the decision to change the child's placement.
 - Section 504 statute & regulations do not provide the specific standard to consider when making this determination.
 - Following the IDEA standard for providing procedures related to disciplinary actions will sufficiently meet requirements of 504.

Discipline of 504 Students (continued)

- Manifestation Determination Standard established in IDEA regulations:
 1. Was the conduct in question caused by, or was there a direct and substantial relationship to the child's disability?
OR
 2. Was the conduct in question the direct result of the District's failure to implement the 504 Plan?

Discipline of 504 Students - Exclusions

Are current illegal users of drugs excluded from protection under Section 504?

- Generally, yes. Section 504 excludes from the definition of a student with a disability, and from Section 504 protection, any student who is currently engaging in the illegal use of **drugs** when a covered entity acts on the basis of such use. (There are exceptions for persons in rehabilitation programs who are no longer engaging in the illegal use of drugs).

Are current users of alcohol excluded from protection under Section 504?

- No. Section 504's definition of a student with a disability does not exclude users of alcohol. However, Section 504 allows schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities.

(Frequently Asked Questions About Section 504 and the Education of Children with Disabilities (OCR))

Practice Pointers

- ✓ Know when a change of placement is occurring by keeping in mind the 10 cumulative school day rule.
- ✓ Be aware of possible “patterns of removal” based on removals totaling more than 10 school days in a school year for substantially similar behavior.
- ✓ Consider and answer both MDR questions, using all available information about the student’s disability.
- ✓ Consider how the student’s disability manifests itself in that particular student; do not make generalizations based on disability categories.
- ✓ Don’t forget to provide FAPE in the disciplinary setting.
- ✓ Consider whether you have a “basis of knowledge” for students not yet identified/or who are identified under a different disability category.

How Would You Handle It?

- During an expulsion hearing following a negative MDR, the Student and/or Parent attempts to use the expulsion hearing as an opportunity to “re-litigate” the MDR before the Administrative Panel or the Board.



As the District's representative, what would you do?

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Question & Answer
Session

Thank You

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