

***Discipline Essentials  
Under the IDEA and Section 504  
(and Manifestation  
Determinations)***

Presented by:

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January 7, 2025

# What Laws Apply

- The Individuals with Disabilities Education Act
- Section 504 of the Rehabilitation Act
- State laws and regulations governing special education
- **But before you apply special education statutes: Don't forget about laws governing discipline for all students (removal, in-school and out of school suspensions, and expulsions-whether discretionary or mandatory).**

- Both the IDEA and Section 504 of the Rehabilitation Act have long provided that disabled students **cannot be expelled or subjected to a disciplinary “change in placement”** unless the PPT or the Section 504 Team first determines that the conduct in question was **not** a manifestation of the student’s disability.
- The rationale behind this mandate is to protect students from being punished for their disability.

- First thing to determine: Is the proposed discipline a “change in placement” under the law?
  - If no, you can generally discipline regardless of disability;
  - If yes, the IDEA’s procedural safeguards kick in and you must follow the required steps (including manifestation determinations) before removing the student from school.

## Connecticut General Statutes Section 10-233c:

Any local or regional board of education may authorize the administration of the schools under its direction to suspend from school privileges a pupil whose conduct on school grounds or at a school sponsored activity is violative of a publicized policy of such board or is seriously disruptive of the educational process or endangers persons or property or whose conduct off school grounds is violative of such policy and is seriously disruptive of the educational process.

Please Note: May also suspend from transportation services only.

“Unless an emergency exists, **no pupil shall be suspended without an informal hearing by the administration, at which such pupil shall be informed of the reasons for the disciplinary action and given an opportunity to explain the situation**, provided nothing herein shall be construed to prevent a more formal hearing from being held if the circumstances surrounding the incident so require, and further provided no pupil shall be suspended more than ten times or a total of fifty days in one school year, whichever results in fewer days of exclusion, unless such pupil is granted a formal hearing pursuant to sections 4-176e to 4-180a, inclusive, and section 4-181a.”

- Public Act 24-45 lowers from ten consecutive school days to **five consecutive school days** the maximum term for an **in-school** suspension.
- The Act revises the standard for determining when a school may issue an **out-of-school** suspension for students in **preschool through grade two** to circumstances where a student's conduct on school grounds constitutes behavior that "causes physical harm." **(You can still do mandatory expulsions for students in pre-K through grade two).**
- When students in **preschool through grade two** receive an out-of-school suspension, such students must receive trauma-informed and developmentally appropriate services that align with any behavioral intervention plan, IEP, or Section 504 plan immediately upon the student's return to school after the suspension; school boards must also consider whether to convene a PPT meeting to evaluate whether the student may need special education or related services.
- **Out-of-school** suspensions for such "**young**" students cannot exceed **five consecutive school days**; for students in grades 3 through 12, the maximum remains ten consecutive school days.

# Suspension and Special Education

- An authorized school administrator can suspend the student for up to 10 school days in the same manner that a non-disabled student would be suspended.
- During such a suspension, there is no requirement to hold a PPT meeting (or manifestation determination) or conduct a functional behavior assessment.
- During the first ten cumulative days of suspension, there is no requirement to provide a free appropriate public education (“FAPE”).



# Suspension - What is a Change in Placement

A series of short-term suspensions that cumulate to more than 10 school days during a school year may or may **not** be a change in placement depending on the circumstances.

A removal from school is a “change in placement” if:

1. The removal is for more than 10 consecutive school days (e.g., an expulsion); or
2. The child has been subjected to a series of removals that constitute a pattern:
  - a. Because the series of removals total more than 10 school days in a school year;
  - b. Because the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; and
  - c. Because of such additional factors 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.

- In-School Suspensions – do they count toward days of removal?
- OSEP and State Guidance: They do NOT count as long as:
  1. the child is afforded the opportunity to continue to appropriately participate in the general curriculum;
  2. the child continues to receive the services specified on the child's IEP from highly qualified teachers ; and
  3. the child continues to participate with non-disabled children to the extent that he or she would have in his or her current placement.
- As noted in the Guidance, if the in-school suspension setting is available to children without disabilities, the time with non-disabled peers criteria is met, even if on any given day the child with a disability is the only child placed in in-school suspension.

# FAPE During Out-of-School Suspensions

- There is no obligation to provide FAPE to a disabled student during the first 10 days of out-of-school suspension;
  - Disabled students, however, cannot be treated differently than regular education students. If a regular education student can turn in homework etc. during suspension, the disabled student must be able to do so as well
- On the 11<sup>th</sup> cumulative day of such removal for the school year, the student **must** be provided with FAPE during any out-of-school suspension.

- Once a decision is made to change the placement of a disabled student for a disciplinary reason (including expulsions, even “mandatory” expulsions), special education procedural requirements kick in.
- Notice Requirement
  - On the date a decision is made to make a change in placement, the school district must:
    - Notify the parent of the decision; and
    - Provide the parent with their procedural safeguards notice.

Make sure to document that the procedural safeguards were provided.
- Manifestation Determination
  - **Within 10 school days**, the district must convene a PPT meeting to conduct a manifestation determination.

# Manifestation Determination

- Manifestation determinations must be made by the PPT
- The PPT must review:
  - The student's IEP,
  - Any teacher observations,
  - Any relevant information provided by the parents, and
  - All other relevant information in the student's file (including evaluations, any BIPs, etc.).

# Manifestation Determination

The PPT must answer two questions:

1. Was the conduct in question caused by, or had a direct and substantial relationship to the child's disability, and
2. Was the conduct in question the direct result of the district's failure to implement the IEP?

## Was the conduct in question caused by, or had a direct and substantial relationship to the child's disability?

### Some things to consider

- The child's disciplinary history (total number of suspensions, reason for the suspensions, how close together were the suspensions),
- Type of conduct compared to the child's disciplinary history (isolated instance versus repeated conduct, is the conduct substantially similar to previous misconduct or something new),
- Impulsivity v. forethought.
- If there is a Behavior Intervention Plan, is the behavior addressed by said BIP?
- **Don't be obsessed by labels (including primary exceptionality).** Look at prior evaluations/data, even PLOPs for information regarding the nature/extent of a disability.

# Manifestation Determination

## Was the conduct in question the direct result of the district's failure to implement the IEP?

Need to answer two questions:

1. Whether the programs and services described in the IEP were provided as written. If yes, then no further discussion is needed.
2. If no, then the team needs to ask whether the failure to implement the IEP as written directly resulted in the behavior in questions.

**This is not a chance to second-guess the actual IEP!**



# Manifestation Determination

- If the answer to either of the questions is “yes”, then the PPT **must** determine that the conduct **was** a manifestation of the disability.
- If the answer to both questions is “no”, then the behavior is **not** a manifestation of the student’s disability.

- The manifestation determination must be made **by the PPT**.
- It cannot be made by the board of education that hears the expulsion case.
- It cannot be made by an expulsion hearing officer if the board uses a hearing officer.
- The parents cannot appeal the manifestation determination through the expulsion hearing process.
- If the parents want to challenge the manifestation determination, they must do it through the expedited due process hearing procedure.

## WHAT IF THE PPT FINDS THE BEHAVIOR IS A MANIFESTATION?

- The district may not expel the student or make any other disciplinary change in placement based on the incident, and
- The district must return the student to the placement from which he/she was removed, unless the parents and the district agree on a different placement.
- Changes of placement may still be discussed and agreed upon through the PPT process.

- The PPT must also do the following:
  - If a functional behavioral assessment has not been conducted on the student previously, the district must conduct a functional behavioral assessment and create and implement a behavior intervention plan;
  - If a behavior intervention plan is already in place, the district must review it and modify it as necessary to address the behavior.

# Manifestation Determination

## WHAT IF THE PPT FINDS THE BEHAVIOR IS **NOT** A MANIFESTATION OF THE CHILD'S DISABILITY?

- The district may discipline the student in the same manner and duration as it would discipline a non-disabled student in the same situation
  - If it was an expellable offense (whether mandatory or discretionary), the district can move for expulsion
- If the student is expelled or otherwise has a disciplinary change in placement, the student must still receive FAPE, just in a different setting
- If appropriate, the PPT must conduct a functional behavior assessment and create a behavior intervention plan aimed at addressing the behavior underlying the removal

# “Should Have Known” Students- Those not yet Identified

- The IDEA explicitly provides that a child not yet eligible for special education may still assert any of the protections contained in the IDEA if the school district had **knowledge** that the child had a disability before the behavior that precipitated the disciplinary action occurred.
- **This includes following the manifestation determination review provisions** under 34 C.F.R. §300.530(e), **even if** the child has **not** yet been found eligible for special education and related services.

# More on “Should Have Known” Students

Knowledge will be imputed to the school district, if prior to the incident that otherwise would lead to discipline:

1. The child's parents express their 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;
2. The parent requested an evaluation of the child; or
3. The teacher of the child or other personnel expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education or other supervisory personnel of the district.

34 C.F.R. §300.534(b)

# Even More on “Should Have Known” Students

A school district is NOT deemed to have knowledge if:

1. The parent has not allowed an evaluation to take place;
2. The parent has refused services under the IDEA;
3. The parent has revoked consent for services under the IDEA; or
4. The child has been previously evaluated and determined not to be a child with a disability.

If the district does not have “knowledge”, then the child may be subjected to the disciplinary measures applied to non-disabled students.



## **BEWARE:**

CT Ag. Reg. 10-76d-7(c) requires school districts to promptly refer to the PPT all children who:

1. Have been suspended (including in-school suspensions) repeatedly; or
2. Whose behavior, attendance or progress in school is considered unsatisfactory or at a marginal level of acceptance.

It is likely a hearing officer could find that a child who displays any of the above conduct would be considered a “should have known” student.

- Where LEA is “deemed to know” that child has a disability: can LEA postpone manifestation determination meeting until after completion of initial evaluation or initial IEP Team meeting? Must the evaluation be expedited?
- **OSEP Response:** Manifestation determination review (MDR) provisions apply even if the child has not been found eligible for SPED/related services.
- Within 10 school days of any decision to change placement of a child with a disability because of violations of code of student conduct: LEA, parent, *and* relevant members of child’s IEP team **must conduct an MDR**.
- This provision does not include an exception to allow additional time to complete an evaluation prior to conducting the MDR. While a LEA may choose or find it necessary to expedite evaluations in these circumstances, expedited evaluations are only required in situations where the LEA is not deemed to have knowledge that the child may have a disability and a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures. **Query: Parties’ agreement?**

# Manifestation of What?

- If the LEA cannot postpone the MDR pending completion of the initial evaluation, how should the LEA conduct the MDR, given the fact that: 1) the LEA may have little to no information about the student's disability; and 2) the purpose of the MDR is to determine whether the behavior is the result of the student's disability?
- **OSEP Response:** Under 34 C.F.R. §300.530(e)(1)(ii), when conducting the MDR, the LEA, the parents, and relevant members of the IEP Team (as determined by the parents and the LEA) must review **all relevant information in the child's file, including any teacher observations and any relevant information provided by the parents**, to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability.

# Manifestation of What?

- **OSEP:** “We appreciate that the LEA would not have the IEP to use in its assessment of whether the behavior was a manifestation of the child’s disability in these situations.”
- Nevertheless, it would still be possible for the LEA to convene a group of knowledgeable persons, as determined by the parents and the LEA, who would be able to conduct the MDR even before the LEA has made its eligibility determination, if the LEA cannot conduct the evaluation before the MDR. **The group would likely consider the information that served as the LEA’s basis of knowledge that the child may be a child with a disability under IDEA, such as concerns expressed by a parent, a teacher or other LEA personnel about a pattern of behavior demonstrated by the child.**

# FAPE for Expelled Students

- What does FAPE mean when a student is expelled?
  - The student must receive services to enable the student to participate in the general curriculum, although in another setting, and
  - To progress toward meeting the goals set out in the student's IEP.
- This does NOT mean the student must receive every aspect of every service the student would receive in his/her regular setting.

# FAPE for Expelled Students

- Per the U.S. Department of Education:
  - A LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline;
  - The special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP.

# Expedited Due Process Hearings

- If a parent disagrees with the manifestation determination made by the PPT, the parent may request an expedited due process hearing.
- “Stay-put” for the student during the hearing process would be the interim alternative placement made by the school pending the hearing’s outcome.
- “Stay-put” is NOT the placement from which the student was removed.

# Expedited Due Process Hearing Timelines

- A resolution meeting must be held within 7 days of receiving notice of the request for a due process hearing;
- The hearing shall be held within 20 school days of the date the complaint was filed;
- The hearing officer then has 10 school days to issue his/her decision.
- Unlike other hearings, the regulations do NOT permit any extensions of the timelines.



Even the if conduct is a manifestation of a student's disability, a school district (via its administration) may unilaterally remove the student for up to 45 school days in 3 situations:

1. if a disabled student carries a weapon to or possesses a weapon at school, on school premises, or at a school-sponsored function,
2. if the student knowingly possesses, sells or solicits a controlled substance while at school, on school premises or at a school-sponsored function, or
3. if the student has inflicted serious bodily injury upon another person while at school, on school premises or at a school-sponsored function.

- These are defined to include a drug or other substances in Section 202 of the Schedules I-V of the Controlled Substance Act (21 U.S.C. §812(c));
- It does not include a controlled substance that is legally possessed or used under the supervision of a licensed health care professional.

This is defined as:

- 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 that such term does not include a pocket knife with a blade of less than 2 ½ inches in length.

# Serious Bodily Injury

- Bodily injury is defined as injury that involves:
  - A substantial risk of death;
  - Extreme physical pain;
  - Protracted and obvious disfigurement; or
  - Protracted loss or impairment of a bodily member, organ or mental faculty.

# IAES - Who Decides and What can be Challenged?

- While the decision to place a student in an interim alternate educational setting (IAES) may belong to the school administration, the actual setting must be determined by the PPT.
- Parents who disagree with the IAES may request an expedited due process hearing.
- “Stay put” would be in the IAES during the pendency of the expedited hearing (or the length of time the student was to be removed, whichever is shorter).

## Through a Due Process Hearing

- If a district believes that maintaining a disabled student's current placement is substantially likely to result in injury to the child or others, a school district can request that a hearing officer order the placement of a child in an alternative educational placement for a period of up to 45 school days.
  - Would be through an expedited due process hearing.
  - May be repeated for additional 45 school days removals if the district believes returning the child to the original placement is substantially likely to result in injury to the child or others.

## Through the Federal Courts

- If the student's conduct constitutes a danger to himself or others or is seriously disruptive of the educational process, a school can petition a federal court to issue an injunction preventing the child from returning to school.
- The district must establish:
  - That returning the child would pose a substantial risk of injury to himself or to others, or will be seriously disruptive to the educational process; and
  - That the district has already made a reasonable effort to accommodate the child's disability so as to minimize the likelihood that the child will injure himself or others.

NOTE – if the district's manifestation determination finds that the conduct was the direct result of a failure to implement the student's IEP, it is unlikely these requirements could be met.

- The IDEA specifically states that nothing within the IDEA prohibits an agency from reporting a crime committed by a student with a disability.
- If a crime is reported, the IDEA requires that the district ensure copies of the special education and discipline records are transmitted to the authorities
  - This transmission, however, must only be done within the confines of the requirements of FERPA.
  - Transmitting personally identifiable information can only be done with written parental permission.
- **PRACTICE TIP:** Be certain the district is not reporting criminal conduct of students with disabilities in a discriminatory manner.



***DISCIPLINE UNDER  
SECTION 504 OF THE  
REHABILITATION ACT***

- Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) prohibits disability discrimination in programs and activities that received federal financial aid.

“No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ....”

# Section 504 Students and Discipline? How Is It Different?

- In light of OCR and court guidance, largely the same as for special education students (including “manifestation determinations”), but ....
- Section 504 explicitly permits a school district to take disciplinary action against a student with a disability who is currently engaging in the illegal use of drugs or alcohol to the same extent such disciplinary action is taken against students who are not disabled. You can discipline where the misconduct involves the current use of illegal drugs or alcohol.
- Unlike under the IDEA, the “special” Section 504 due process and placement procedures (including manifestation determination reviews) do **NOT** apply to such disciplinary actions against “Section 504 only” students.
  - This exception does not apply to those students who previously used such substances but are not current users.

- While the IDEA is a funding statute, Section 504 of the Rehabilitation Act is a civil rights statute.
- Under Section 504, students and their parents may sue in federal court for damages against the school district AND against individuals.
- It is extremely important, therefore, that when dealing with disciplinary issues such as expulsion, that school districts provide to a 504 student similar protections as are afforded to students identified under the IDEA.
- Compliance with the IDEA's placement procedures is one means, and therefore the safest means, of complying with Section 504's procedural requirements.

- Out-of-school suspensions under Section 504?
  - Similar to the IDEA, if the suspension does not equate to a change in placement (i.e., not more than 10 days or if not a “pattern”), the student may be suspended following the school’s regular suspension proceedings,

# Section 504 and Suspensions

- What about in-school suspension?
  - Similar to the IDEA, time in in-school suspension is not considered a change in placement if the student receives the accommodations outlined in the child's Section 504 plan during the period of the in-school suspension.
  - If a child is not provided with the instructional services, modifications and accommodations outlined in the child's Section 504 plan during the period of in-school suspension, the time spent serving an in-school suspension is counted for purposes of determining if a significant change in placement has occurred (similar to the IDEA).

- Parents who disagree with a Section 504 decision regarding placement and/or the determination that behavior was not caused by a disability may request a Section 504 hearing.
- Unlike under the IDEA, the district establishes its own Section 504 hearing procedures and the district chooses the hearing officer to make the decision.
- Note that these procedures do not apply when the misconduct involves the current use of illegal drugs or alcohol.

# Yes, There's More: Recent OCR Guidance on Discipline

- On July 19, 2022, the U.S. Department of Education's Office of Civil Rights ("OCR") released *Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973*.
- As its title suggests, it is a comprehensive overview of OCR's view of the rights of "Section 504-only" students with disabilities on student discipline matters.
- However, it has a wider remit than the title suggests in terms of its broad applicability to Section 504 as a whole (not just disciplinary matters).
- **This guidance may be relevant to special education students as well.**



# New OCR Guidance: “Positive Behavior Supports”

- While Section 504 plans are spartan when compared to IEPs, OCR noted the importance of Section 504 plans containing individualized behavioral supports for responding to students with disability-based behaviors that interfere with their own *or* others’ ability to learn, while also explaining how the school will implement the supports and the Section 504 Team can determine whether the supports are effective.
- Supplementary aids and services under Section 504 to enable students to participate in the regular academic (and non-academic) environment include preferential seating, counseling services, **and the implementation of a behavior intervention plan (BIP)**.
- Although not specifically discussed in Section 504’s regulations, OCR notes that a functional behavioral assessment (FBA) may be an important evaluative tool for developing and implementing a BIP and ***incorporating the BIP into the student’s Section 504 plan.***

# OCR - Update and Evaluate

- A student's disability-based behavioral needs are likely to change over time, for example, because a student's mental health worsens ***or the environmental conditions at the student's home or school deteriorate, resulting in an adverse emotional or mental effect on the student.*** This triggers a duty to (re)evaluate.
- For example, a school may find it necessary to conduct an additional evaluation based on the student developing new or more significant behaviors that impede learning following the loss of a close relative.
- Similarly, a student may need an additional evaluation if the student's behaviors have improved significantly such that the placement no longer reflects the student's current needs.

OCR offers as examples of information for the Section 504 team to consider:

- any previous evaluations of the student with respect to disability-based behavior;
- the student's Section 504 plan (including any behavioral supports the student needs), any updates to the plan, **and information about whether the current plan is being implemented with fidelity;**
- psychological or medical evaluation data related to the behavior at issue;
- relevant information provided by the student's parents or guardians;
- academic records;
- relevant discipline records, including information on whether previous disciplinary actions led to changes in behavior, and incident reports, including any involving SROs or other law enforcement officials, consistent with applicable Federal or State privacy protections; and
- relevant teacher notes, observations, and data collected about the behavior.

- OCR states: “If a single person, such as a principal who is in charge of the school’s general disciplinary process for all students, alone determined whether a student’s behavior was based on the student’s disability, such a unilateral decision would not comply with Section 504.”
- The same logic may apply to special education students at PPT meetings!

- OCR indicates that modifications to school disciplinary policies may be needed to avoid disability discrimination against an individual student or a group of students with disabilities.
- Reasonable modifications can also include not applying a policy to students for behaviors that are manifestations of their disability or disabilities.
- Reasonable modifications can include adapting a policy to support a student's behavioral needs.

# OCR: Protecting Yourself

- For example, with respect to a student with a disability who harassed a classmate, the school could (as an interim measure) move the student with a disability to a different classroom within their current placement (if one is available) from that of the classmate who was harassed. Moving to a different classroom would not be a significant change in placement if the student could receive the same instruction, services and modifications in the new classroom, alongside students without disabilities to the same extent.
- OCR notes that in emergency circumstances, a school may seek to impose an immediate short-term disciplinary removal of a student with a disability because the student's behavior presents a serious and immediate threat to the safety of the student or of others that cannot be mitigated by other means.
  - OCR would review the facts to determine whether a school's conduct was reasonably necessary to ensure safety, including under circumstances where an immediate removal would result in a pattern of removals.
- **Query:** In addition to suspensions, could a district use the 45-day interim alternate placement for weapons/serious bodily injury cases just like the IDEA? (**Why not?**)



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