

## Special Education Discipline Update



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## Caution

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## FAPE First

*“The IEP team must...in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.”*

34 CFR 300.324

## FBA/BIP

*“It is important for teams . . . to understand the powerful role a properly conducted [FBA] can have in reducing a student’s behavior.... Understanding what may be motivating a student’s behavior, will assist districts in the development of a BIP, which when implemented with fidelity should effectively reduce or eliminate the behavior.”*

MDE Guidance, June 2020

## Discipline Protections

## Who Qualifies?

- Eligible student with disability?
  - IDEA or Section 504
  - School “deemed to have knowledge *before* the behavior” subject to discipline
- *Never* make assumptions; *always* review the student’s record

### Students Not Yet Eligible

*“A child who has not been determined to be eligible for special education and related services..., and who has engaged in behavior that violates a code of student conduct, may assert **any** of the protections provided for in this part **if the LEA had knowledge** that the child was a child with a disability **before** the behavior that precipitated the disciplinary action occurred.”*

20 USC 1415(k)(5)(A)

### What Constitutes “Knowledge?”

- Parent expressed concern in writing to supervisor, administrator, or teacher that student needs sp.ed. and related services
- Parent requested sp.ed. evaluation
- Student’s teacher or other personnel expressed specific concern about pattern of behavior directly to district sp.ed. director or other supervisory personnel

### No “Knowledge” If

- Parent did not permit sp. ed. evaluation
- Parent refused sp. ed. services
- Student was evaluated but determined ineligible

### If “Knowledge”

- Student entitled to same protections as students with disabilities
- Conduct evaluation
- Conduct MDR
- Provide services to enable student to continue to participate in general ed curriculum, although in another setting, after 10<sup>th</sup> day of removal

### Letter to Nathan (OSEP, 2019)

- If school is deemed to have knowledge, it may *not* postpone MDR/other protections until after eligibility is determined
- Must conduct MDR within 10 school days from change of placement
- At MDR meeting, members must review all relevant information, including information that formed basis for knowledge (e.g., parent/teacher concerns)

### Change of Placement

### What Constitutes a Change of Placement?

- Removals for more than 10 consecutive days in single school year
- Removals for more than 10 cumulative days in school year and a pattern of removal
- Placement in an IAES for weapons, drugs, serious bodily injury, or dangerousness

### Removals

“Any instance in which a [swd] is removed from his/her educational placement **for disciplinary purposes**”

- In-school suspension
- Out-of-school suspension
- Expulsion
- Removal to IAES
- Hearing officer removal

MDE Guidance, May 2020

### “For Disciplinary Purpose”

Will the student –

- Continue to be involved in/make progress in general ed curriculum
- Receive IEP instruction/services
- Participate with nondisabled peers to the same extent as if in current placement

MDE Guidance, May 2020

### Examples

- Pattern of office referrals
- Requesting parent pick up or sending students home for a “day off”
- Imposing conditions for return (e.g. risk assessment)
- Requiring student to leave early
- Removals per a BIP

MDE Guidance, May 2020

### In-School Suspension

Will the student –

- Continue to be involved in/make progress in general ed curriculum
- Receive IEP instruction/services
- Participate with nondisabled peers
- Have instruction from certified teacher

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### Partial Days

- “Counting partial days of disciplinary removal must be consistent with the district’s attendance procedure. For example, when attendance...is counted for each period, disciplinary removals also should be counted for each period. A full day would be the accumulation of the total number of periods of disciplinary removal.”
- Remember FAPE!

MDE Guidance, May 2020

### Transfer Students

Consider all removals in the school year to determine

- Pattern
- Change of placement
- Need for services
- FAPE

MDE Guidance, May 2020

### “Pattern of Removal”

- Series of removals that total more than 10 school days in a year;
- Student’s behavior is substantially similar to previous incidents; and
- Other factors, including:
  - Length of each removal
  - Total amount of time removed
  - Proximity of removals to each other

### MDE Guidance

*“The district should consider the setting, antecedent, behavior, and consequence of each incident, when determining whether the series of removals constitutes a pattern.”*

MDE Guidance, June 2020

### How Often?

*“The district must make this determination for each subsequent removal, which includes both in-school suspensions, out-of-school suspensions, and in some instances short term removals from class which occur on a regular basis....”*

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### Document Pattern

School should:

- have written procedures for determining pattern of removal, including who makes decision
- Be prepared to provide evidence of its decision making process

### Shortened School Day

Sending student home early or shortening school day may constitute a pattern of removal if done:

- repeatedly, and
- outside of IEP process

*Letter to Mason* (OSEP, 2018)

## Procedural Requirements for Change of Placement

- Provide educational services
- Provide FBA or behavioral intervention services, as appropriate, to prevent behavior recurrence
- Conduct a manifestation determination
- Provide notice of removal and procedural safeguards -- immediately

## Notice of Procedural Safeguards

*“On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA **must notify the parents** of that decision, and provide the parents the procedural safeguards notice described in § 300.504.”*

IDEA Reg. 300.530(h)

## Manifestation Determination

*“Within **10 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 LEA, the parent, and relevant members of the child’s IEP Team (as determined by the parent and the LEA) must review **all relevant information in the student’s file, including the child’s IEP**, any teacher observations, and any relevant information provided by the parents to determine....”*

IDEA Reg. 300.530(e)(1)

## MDR Team

*“... the LEA, the parent, and relevant members of the child’s IEP Team (as determined by the parent and the LEA)....”*

## MDR Team May Include

- Other “qualified” persons selected by the LEA or parent, including those who are knowledgeable about:
  - Disability’s impact on behavior
  - Student and his/her disabilities
- Avoid “stacking the deck”

## Timing Is Critical

*“Within **10 school days** of any decision to change the placement of a child with a disability . . . .”*

### Pattern Timing

*“For a student who has been issued multiple removals of one, two or three days in length, it is possible the student is able to complete their suspensions and return to school even before one MDR is completed. Although the **district has 10 school days**...to conduct the MDR... every effort should be made to conduct the MDR within the time of the removal.”*

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### MDR Team Reviews

*“... **all relevant information** in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents....”*

### Other Information to Consider

- Investigation and police reports
- Photographs or videos
- Student and witness statements
- Information which provides insight into the conduct’s relationship to the student’s disability(ies), e.g., was the conduct related to student’s ADHD and impulsivity or was there planning and forethought

### Manifestation Questions

- Was conduct caused by, or did it have a direct and substantial relationship to, disability?
- Was conduct a direct result of school’s failure to implement IEP?
- If answer is yes to either question, conduct is a manifestation

### What Is the “Conduct in Question”?

- Look at the *facts*
  - Administrative write-ups
  - Witness statements
  - Video
  - Police report
- Review all incidents triggering recommended discipline
- What about persistent disobedience?

### What Is the Student’s “Disability”?

- Look first to the IEP
- *But* be prepared to consider other impairments or disabilities raised by the parents, which may be “*other relevant information*”

### Consider Full Picture

*“The review of relevant information is intended to present a picture of the whole child and **not a specific focus on category of eligibility.**”*

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### IDEA 2004 Changes MDR Standard

*“It is [the] intention of the Conferees that the conduct in question was caused by, or has a direct and substantial relationship to, the child’s disability, and is not an attenuated association, such as low self-esteem, to the child’s disability.”*

Joint Conference Committee Report, p 225

### Failure to Implement IEP?

Two part question:

- Were IEP programs and services fully implemented?
- If not, did failure to implement the IEP as written directly result in the behavior in question?

### MDR Practice Tips

- Requires “robust” discussion
- Avoid predetermination of answers
- Attempt to reach consensus, don’t vote; if consensus can’t be reached, school makes final decision and provides notice
- Document all MDR considerations

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### Who Decides?

*“If the parents, the district, and the relevant members of the student’s IEP team cannot reach consensus...the public agency must make the determination and provide the parent with prior written notice....”*

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### Answering the MDR Questions

If answer to either question is “yes”

- Behavior is a manifestation
- Student returns to prior placement unless
  - parent and district agree to placement change
  - special circumstances offense
    - drugs
    - weapons
    - serious bodily injury
  - injunction or hearing officer decision
- FBA/BIP unless one exists
- Fix IEP implementation deficiencies

### **Answering the MDR Questions**

If answer to each question is “no”

- Behavior is not a manifestation
- General disciplinary procedures apply
- Student entitled to appropriate educational services determined by IEP Team
- Consider need for FBA/BIP

### **MDR Summary**

- MDRs required for students subject to disciplinary COP
- Must be held within 10 school days
- Involves parent and relevant IEP team members who review relevant information to determine:
  - Was the conduct in question caused by, or did it have a direct and substantial relationship to, the student’s disability?
  - Was the conduct in question the direct result of the district’s failure to implement the student’s IEP?

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### **Educational Services**

- Provide to enable student to continue to participate in general education curriculum, although in another setting, and progress on IEP goals
- Setting and services determined by student’s IEP team

### **USDOE Guidance on Ed Services 52 IDELR 231 (OSERS, 2009)**

- May not limit educational options to home-based instruction
- Must consider students’ unique needs
- Need not provide all services from IEP

### **“Individualized” Services**

- Not “one size fits all”
- Services determined by
  - length of removal,
  - extent of past removals,
  - student’s needs, and
  - IEP goals
- Homebound rule does NOT apply

### **Additional Considerations**

- Address core curriculum requirements
- Provide credit for work successfully completed
- Include student in state/district assessments
- Need not replicate all services student would receive in classroom/school



### COP Summary

- Focus is on disciplinary COP
- Change in placement:
  - Removals for more than 10 consecutive days or
  - Pattern of removals totaling more than 10 school days
- On date of removal that constitutes COP, provide notice and procedural safeguards
- Within 10 days of removal, do MDR
- Educational services - determined by IEP team if removal constitutes COP

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### Parent Agreement

*"[T]here is no need to make a change of placement removal under the discipline provisions if there is agreement between school personnel and a child's parents regarding a change in educational placement when the child has violated the school's code of conduct. In short, the placement may be changed."*

*Q and A on Discipline Procedures  
47 IDELR 227 (OSEP 2007)*

### Removal of Dangerous Student

- District may request expedited hearing to seek IAES for up to 45 **school** days if keeping student in current placement is "substantially likely to result in injury to the student or others."
- District has burden of proof
- Procedure may be repeated as needed
- Court order to remove student is another option

### Referral to Law Enforcement

- IDEA does **not** prohibit referral of student who allegedly commits a crime
- School officials must ensure transmittal of special education records to law enforcement comply with FERPA