



Discipline of Students with Disabilities:
A Review of the Rules and Practical Implications

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As we discussed last year at the CASE Hybrid Conference, to do justice to the very important (and somewhat complicated) topic of discipline, at least a day or a day and ½ for training is probably required. Due to time limitations for this particular session, however, I have chosen to provide 8 practical tips that will serve as reminders and a review for ensuring compliance with the law as it relates to discipline of students with disabilities.

Tip #1: Maintain clear and compliant discipline procedures applicable to students with disabilities (under both IDEA and 504) and adequately train all personnel on these procedures.

First and foremost, school districts should have clear procedures in place to direct school administrators and other disciplinarians on the steps for handling disciplinary infractions committed by students with disabilities. These should be as clear and concise as possible, so that there is not a lot of room for discretion in terms of the actions that are to be taken in the imposition of disciplinary sanctions.

Assuming clear and compliant procedures are in place, school disciplinarians must then be trained on a regular basis with respect to them. The failure to train can not only leave the disciplinarian in potential legal trouble, but has the strong potential for landing the entire school district in legal hot water based upon an illegal “custom, practice or policy” maintained by the district as a whole.

Tip #2: Avoid making unilateral “changes of placement” through the use of suspension or other traditional disciplinary removals for violations of the code of student conduct.

For purposes of discipline, “placement” is defined as those services that are listed on a student’s IEP. A traditional disciplinary removal of those services via the use of suspension or other disciplinary removal for more than ten days at a time or, generally, for more than ten days cumulatively in a school year is considered to be a “change of placement” for a student with a disability that must, therefore, involve the student’s placement/IEP team.

The IDEA requires that prior to changing the placement of a student with a disability through the use of disciplinary action, the following must occur: (1) a manifestation determination must be made by the student’s IEP Team finding that the conduct for which the student is being disciplined is not a manifestation of the student’s disability; (2) the IEP Team must conduct a functional behavior assessment of behavior and then use assessment results to develop a behavioral intervention plan, “if appropriate;” and (3) the IEP Team must determine what services are to be provided to the student for any removal period beyond ten days consecutively or cumulatively in a school year, in order that the student may continue to participate in the general curriculum and advance toward achieving his/her IEP goals.

These procedures must be followed if/when a student is removed for more than ten days at a time or, generally, for more than ten days cumulatively in a school year for disciplinary reasons. If these procedures are not followed and illegal/unilateral “changes of placement” occur, the remedy could include, among other things, compensatory education services or money damages for intentional violations of the law.

Tip #3: Keep in mind that disciplinary action that may not be officially called a “short-term suspension” still might count toward the ten-day, change of placement analysis.

According to the federal government, any unilateral disciplinary removal that occurs outside of the IEP process is a “change of placement” day, whether it is officially called a “suspension” or not. Things like “home time-out,” removal to the principal’s office for the day, or sending a student home for a “cool-off period” are the same as a suspension in the ten-day count and in terms of whether a “change of placement” has occurred that would trigger the “change of placement” procedures under the IDEA. Partial days of disciplinary removal are also counted toward the ten-day change of placement analysis. 71 Fed. Reg. 46715 (2006).

Tip #4: Develop alternatives to suspension that do not constitute a “change of placement.”

Remember, it is the “change of placement” days that will trigger the procedural requirements of the IDEA in the area of discipline. In the commentary to the 2006 IDEA regulations, the federal government reiterated its “long-term policy” that an alternative removal, such as an in-school suspension, would not be considered a part of the days of suspension toward a change of placement “as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child’s IEP, and continue to participate with nondisabled children to the extent they would have in their current placement.” Thus, alternatives to suspension can be created that do not change the current placement of the student and would not count toward the ten-day change of placement count. 71 Fed. Reg. 46715 (2006).

Tip #5: Be careful when considering whether transportation is a “related service” for a student with a disability. It is important in the area of discipline.

In the commentary to the 2006 IDEA regulations, the U.S. Department of Education commented that “[w]hether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child’s IEP. If the bus transportation were a part of the child’s IEP, a bus suspension would be treated as a suspension...unless the public agency provides the bus service in some other way.” The Department went on to note that where the bus transportation is not a part of the child’s IEP, it is not counted as a suspension that would count toward the “change of placement” analysis. “In those cases, the child and the child’s parent have the same obligations to get the child to and from school as a nondisabled child who has been suspended from the bus. However, public agencies should consider whether behavior on the bus is similar to behavior in the classroom that is addressed in an IEP and whether the child’s behavior on the bus should be addressed in the IEP or a behavioral intervention plan for the child.” Thus, whether a day of bus suspension is counted toward the ten-day count would depend upon whether transportation is a related service on the student’s IEP. If it is, to remove transportation services for a day would count as a “change of placement” day. 71 Fed. Reg. 46715 and Letter to Sarzynski, 59 IDELR 141 (OSEP 2012).

Tip #6: Keep appropriate and accurate data with respect to the use of suspension or other disciplinary removals from school for each student with a disability.

For many reasons, keeping appropriate data with respect to the use of suspension with students with disabilities is vital. First, school districts are required to monitor the extent to which suspension is used with students with disabilities to ensure that they are not over-suspending disabled students generally and are not suspending students disproportionately in accordance with disability, race or other discriminatory indicators. That data must be tracked and reported accurately.

Another reason for keeping and tracking appropriate data with respect to the number of suspensions to which a student is subjected is to ensure that illegal “changes of placement” have not occurred. Procedures must be in place for “red-flagging” instances where students are coming close to a “change of placement” due to the use of unilateral suspensions/removals from school for disciplinary reasons.

Tip #7: Remember that there are also special rules of discipline applicable to students who are disabled only under Section 504.

Essentially, the bulk of the IDEA rules for disciplining students with disabilities have their “roots” in Section 504. This is so because Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability. Thus, in terms of discipline, the general notion is that students with disabilities should not be deprived of educational services if the conduct for which they are being disciplined is “based upon” (a/k/a “a manifestation

of”) their disabilities. For the most part, the Office for Civil Rights applies the same rules of discipline for students under Section 504 that exist for those students who are also disabled under the IDEA, particularly the requirement for making manifestation determinations when a disciplinary change of placement occurs.

Tip #8: Where the school knows or clearly has reason to believe that the misconduct of a dangerous or severely disruptive student is a manifestation of the student’s disability, strongly consider using the traditional “change of placement” process through the IEP team rather than attempting to change the current placement using disciplinary removals.

Would it make more sense to just work through a dangerous or disruptive student’s IEP team and propose a long-term or permanent change of placement rather than to invoke the disciplinary provisions of the IDEA and seek to “expel” the student or place the student in an IAES? Maybe so.

In an emergency situation involving one of the “special circumstances,” the school may need to resort to the immediate removal for up to forty-five school days but, even then, should go ahead and convene an IEP team to propose a long-term change of placement for the student. If the parent does not challenge the proposed change of placement after receiving sufficient written notice and notice of procedural safeguards, then the district could proceed with the proposed change of placement after a reasonable period of time. This would take it out of the disciplinary context and would work like any other change of placement to a more restrictive setting. See, e.g., M.M. v. Special Sch. Dist. No. 1, 49 IDELR 61, 512 F.3d 455 (8th Cir. 2008).

The same would hold true for a dangerous student who did not commit one of the “special circumstances” offenses involving a dangerous weapon, illegal drugs or serious bodily injury. Although the emergency forty five-day removal could not occur, the district could convene an emergency IEP team that could work with the parent to effectuate a long-term change of placement (not discipline) to a more restrictive environment, as appropriate, rather than seeking to suspend, expel or otherwise impose traditional disciplinary sanctions. Should the parent disagree with the proposed change of placement and the parent requests a due process hearing to challenge it, the district could then defend its proposed change of placement as appropriate under the IDEA. In this case, however, the student’s current placement would be the “stay-put” placement while the due process hearing was pending, unless the team also determined that the student’s behavior is not a manifestation and proposes an IAES (which is typically unusual when dealing with your chronically dangerous disabled students). Perhaps, at that point, the district would then consider seeking court assistance to remove the dangerous or seriously disruptive student pending the conclusion of the due process hearing proceedings.