



Selected Issues in Discipline of Students with Disabilities Under IDEA

Presented by

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Policy Underpinnings

- First, federal courts started finding that expulsion of students with disabilities from school for behaviors related to disability was inherently discriminatory and in violation of IDEA.

See, e.g., *Stuart v. Nappi*, 443 F.Supp. 1235 (D.Conn. 1978); *Doe v. Koger*, 551 IDELR 515 (N.D.Ind. 1979); *S-I v. Turlington*, 552 IDELR 267 (5th Cir. 1981); *Kaelin v. Grubbs*, 554 IDELR 115 (6th Cir. 1982); *School Bd. of Prince William v. Malone*, 556 IDELR 406 (4th Cir. 1985); *Doe v. Maher*, 557 IDELR 353 (9th Cir. 1986).

- USDOE went on to adopt that position (see *OCR Staff Memorandum*, 16 IDELR 491 (OCR 1989)).



Policy Underpinnings

- Then, OCR issued guidance under §504 indicating a series of short-term removals (each ≤ 10 consecutive school days) that exceeds 10 total school days could create a “pattern” that collectively amounts to a disciplinary change in placement.

OCR Policy Memorandum: 00168 (October 28, 1988)(setting forth factors to be considered in determining whether there is a “pattern of exclusions”—(1) length of each removal, (2) proximity to one another, and (3) total amount of exclusion); see also *OCR Memorandum, 307 IDELR 07* (OCR 1989).



Policy Underpinnings

- The guidance limiting accumulations of short-term removals was necessary to prevent schools from engaging in excessive use of short-term removals, which can compromise a student’s ability to receive FAPE.

Still echoing that policy priority, USDOE’s commentary to the 2006 IDEA regulations stated that “discipline must not be used as a means of disconnecting the child with a disability from education.” 71 Fed. Reg. 46715 (August 14, 2006)



Policy Underpinnings

- Thus, the early cases and guidance identified the following initial policy concerns with respect to discipline of students with disabilities:
 1. Long-term disciplinary removals (>10 consecutive school days) for behavior related to disability violate IDEA (and constitute impermissible disability-based discrimination); and
 2. Excessive short-term disciplinary removals jeopardize a student's right to a FAPE.



Key Modern Doctrines

- **Accumulation of Short-Term Removals—** Schools have authority to engage in up to 10 total school days of short-term disciplinary removals in a school year

No requirement of manifestation determination review (MDR), IDEA notices, or IDEA safeguards, as long as the removal is not discriminatory. 34 C.F.R. §300.530(b)(1).

No educational services required, unless students without disabilities who are similarly removed receive educational services in the LEA. 34 C.F.R. §300.530(d)(3).



Key Modern Doctrines

- **Too Many Short-Term Removals?**—Beyond a total of 10 short-term removal days in a year, a series of removals may create a “pattern” that constitutes a disciplinary change in placement

Factors: (1) the similarity of the behaviors, (2) length of each removal, (3) total amount of removal time, and (4) proximity of the removals to one another. 34 C.F.R. §300.536(a)(2).

Requirements—Disciplinary changes in placement on the basis of short-term removals would require prior MDR, prior written notice, notice of decision and IDEA safeguards, and educational services for days of removal beyond a 10-day total. 34 C.F.R. §§300.530(c), 300.503(a)(1), 300.530(h), 300.530(b)(2), 300.530(d).



Key Modern Doctrines

- **In-school suspension (ISS)**—Can be a removal that is not counted in the short-term removal limitation, under certain circumstances:

“It has been the Department’s long term policy that an in-school suspension would not be considered a part of the days of suspension addressed in §300.530 as long as the **child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified in the child’s IEP, and continue to participate with nondisabled children to the extent they would have in their current placement.**” 71 Fed. Reg. 46715 (August 14, 2006); see also *Dear Colleague Letter*, 68 IDELR 76 fn. 29 (OSEP 2016).



Key Modern Doctrines

- **Policy underpinning**—Use of ISS with participation in curriculum avoids the disconnection to education that concerns USDOE with short-term home suspensions.

In fact, court cases have held that short-term ISS with participation in education does not implicate substantive due process concerns. See, e.g. *Wise v. Pea Ridge Sch. Dist.*, 107 LRP 64097 (8th Cir. 1988); *Laney v. Farley*, 107 LRP 50017 (6th Cir. 2007) (“An ISS could, but does not necessarily, deprive a student of educational opportunities in the same way that an out-of-school suspension would.”)



Key Modern Doctrines

- **Special Offenses**—With offenses involving drugs/controlled substances, weapons, or serious bodily injury, removals to alternative settings for up to 45 school days are possible even if MDR determines the behavior is related to disability.

If the special offense is not related to disability, regular disciplinary removal under State law or local policy may proceed, as with a similarly situated nondisabled student, subject to the services requirements. 34 C.F.R. §300.530(c), (d).

Definitions of terms of special offenses require cross-referencing to other federal statutes. See 34 C.F.R. §300.5309(i).



Key Modern Doctrines

- **Pre-IDEA Protections**—Students not determined IDEA-eligible may assert the discipline protections of the Act if the school had knowledge that they were disabled.

LEAs are deemed to have such knowledge if (1) parents had expressed in writing to supervisory or administrative personnel, or to the child's teacher, that their child was in need of special education; (2) parents had requested an IDEA evaluation, or (3) staff had expressed concerns about a student's pattern of behavior directly to the sp ed director or other supervisory personnel. 34 C.F.R. §300.534(b).



Key Modern Doctrines

- **Extraordinary Removals**—Student with behavior related to disability creating a danger at school?

If necessary, schools can file due process actions seeking an order removing student to an IAES for up to 45 school days.

School must demonstrate that maintaining the present placement “is substantially likely to result in injury to the child or others.” 34 C.F.R. §300.532(b)(2)(ii).

The action can be repeated, if needed. 34 C.F.R. §300.532(b)(3).

Key Modern Doctrines

- **Criminal Offenses at School?**—IDEA allows schools to report a crime committed by an eligible student and does not prevent law enforcement from exercising their legal responsibilities.

School must transmit copies of suspended and disciplinary records to the appropriate authorities to whom it reported but must do so in a manner that complies with FERPA consent requirements. 34 C.F.R. §300.535(b).

But, school staff should not use police to deal with behavior incidents, unless they constitute a true crime under state law (e.g., drugs, weapons, serious injuries, serious property destruction).

On the Issue of Short-term Removals...

- **What about shortening the school day?**

See ***Letter to Mason*, 72 IDELR 192 (OSEP 2018)**

Decision to shorten a student's school day due to behavior could be construed as repeated disciplinary removals that would trigger the IDEA discipline protections for long-term removal (i.e., MDR, services)

Generally, not advisable for behavior issues (get legal advice first)



Key Modern Doctrines

- **Long-term removals** of longer than 10 consecutive school days are disciplinary changes in placement in all cases

Only allowed to the same extent as for nondisabled students if MDR determines behavior is not related to disability. 34 C.F.R. §§300.530(c), 300.530(e).

FAPE—IEP team determines interim alternative education setting (IAES/DAEP) and the educational services to be provided in the IAES, which must enable the student to continue to participate in the general education curriculum and progress in their IEP goals. 34 C.F.R. §§300.531, 300.530(d)(5), 300.530(d)(1)(i).



Key Modern Doctrines

- Long-term removals of longer than 10 consecutive school days are disciplinary changes in placement in all cases

FBA/BIP Implication—In addition, students that are removed long-term must receive, as appropriate, a functional behavioral assessment (FBA) and behavioral interventions designed to address the behavior so that it does not recur. 34 C.F.R. §300.530.

Key Modern Doctrines

- **What if Behavior is Related?**—Long-term removals of longer than 10 consecutive school days are not possible if the MDR determines the behavior is related to disability (unless a special circumstance offense is involved or parents agree)

In such cases, the student must be returned to his pre-discipline placement, unless parent agrees otherwise. 34 C.F.R. §300.530(f)(2).

Also, IEPT *must* conduct a FBA, unless a BIP was already in place, in which case the team must modify the BIP to address the behavior. 34 C.F.R. §300.530(f)(1).

“User-Friendly” Method for Understanding IDEA Discipline Removals

1. Identify short-term disciplinary removals
2. Identify long-term disciplinary removals
3. Separate the rules for each of above
4. For short-term removals, apply “free days” analysis, don’t push your luck once you reach a total of 10 in a school year
5. *Before* removals reach 10, have IEP meeting
6. For long-term removals, it’s all about the manifestation determination and FAPE, if the student is removed



Identifying Short-term Removals

- Occurs when campus administrator removes student from normal setting for discipline reasons for less than 10 consecutive school days (labeling removal as “mental health” or “safety-related” does not affect the rules)
- Removals to office or halls are a form of short-term removal under IDEA (removes child from setting for behavior)



Identifying Short-term Removals

- Again, in-school suspension is not a true “removal” if classwork and services are provided (individualized and sufficient for student to progress), IEP related services are provided, and a regular ed ISS is used.

See 34 C.F.R. §300.520(b)(1)(short-term removal authority); 71 Fed. Reg. 46,715 (August 14, 2006)(commentary on ISS exception to removal rules)



Identifying Long-term Removals

- Disciplinary removals of over 10 consecutive school days
- Usually, alternative disciplinary placements and expulsions for serious offenses
- Always require manifestation determination review (and finding of no manifestation)
- Always require FAPE during removal

See 34 C.F.R. §§300.530(c), (d), (e), 300.536(a)(1)



“Free Days” Analysis for Short-term Removals

- Schools allowed 10 “free” removal days per year for each student
- No manifestation, FAPE, services, or other IDEA procedures required
- Meant to limit suspensions, and their negative effects on students (and to emphasize early behavior interventions)

34 C.F.R. §300.530(b)(1)



More on Short-Term Removals

- Exceeding 10 total removal days “costs” (services required, legal risks appear...)
- And, excessive ST removals can amount to a disciplinary change in placement
- **Good old OCR factors**—proximity, total days, length of each removal
- **2006 factor**—“similarity” of behaviors in the series (34 CFR 300.536(a)(2)(ii))



More on Short-Term Removals

- Increasingly, the interpretation has been that even an 11th day of cumulative removal in a year creates a “pattern” change in placement.
- **Words of Caution**—Best for schools to avoid this highly subjective and slippery analysis by avoiding more than 10 total true short-term removal days in any school year

See 34 C.F.R. §§300.530(b)(1), (b)(2),
300.536(a)(2)(pattern of removals)



More on Short-Term Removals

- **What if the campus has exhausted its 10 “free” days?**

Additional short-term removals will likely be possible only if team meets, conducts, MDR, and determines behavior not related to disability.

And, the same for any additional removals.

And, after 10 total, regulations require services to be provided.



More on Short-Term Removals

- **Discussion Point**—How can a campus avoid accumulations of more than 10 “true” short-term removal days for IDEA students?

Consistent implementation of BIPs

Conservative use of suspension

Opting for shortest possible suspension

Judicious use of ISS with services

IEP team review and revision of BIPs

Consideration of additional evaluation

Preventative IEP Team Meetings

- Best preventive guidance is to have a meeting *before* short-term removals reach 10 in a year
- **Ideas:** FBA, BIP, BIP revision, sp. ed. counseling, psychological evaluation, class change, placement change, etc.
- **Point:** Get stakeholder input, have plan, use resources (do something *other* than more removal...)

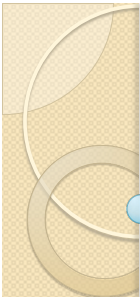
See 34 C.F.R. §300.324(a)(2)(i)(requiring consideration of interventions to address behavior)

Preventative IEP Team Meetings

• 34 C.F.R. §300.324(a)(2)(i)

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

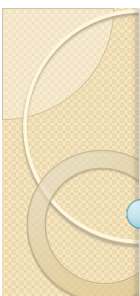
Note—Trigger criteria for IEP team consideration of FBA and BIP



Long-Term Removals and Manifestation Determinations

- With serious removals, key requirement is the **manifestation determination review (MDR)** (34 C.F.R. §300.530(c), (e))
- Must take place before LT removal takes place (by 10th consecutive day)
- ***Primary rule: Long-term removal not possible if behavior is related to disability (unless exception applies)***

34 C.F.R. §300.530(f)(2)



Long-Term Removals and Manifestation Determinations

- When campus decides to recommend a long-term removal that is a disciplinary change in placement (e.g., DAEP > 10 consecutive school days), parent must be provided the following:
 1. Notice of the recommendation, and
 2. Notice of Procedural Safeguards

34 C.F.R. §300.530(h)



Long-Term Removals and Manifestation Determinations

- **Point on Relative Authority:**

Campus administrators determine:

1. Whether student committed offense
2. Whether offense violates Code of Conduct
3. Appropriate disciplinary action (type and length of removal)

IEP Team determines:

1. MDR
2. Provision of FAPE in alternative setting (if student will be removed).



Long-Term Removals and Manifestation Determinations

- **Point on Relative Authority:**

Campus administrators must not intervene in IEP team's functions under the team's authority.

IEP team must not intervene in administrator's functions under their authority.

I.e., IEP team does not decide whether student committed offense or not, and does not entertain parent arguments involving guilt or innocence—that is handled through regular ed due process, not the IEP team.



More on MDRs

- 2004 MDR inquiry sets a higher bar for relation between behavior and disability
- Behavior is a manifestation only if:

Caused by, or directly and substantially related to, the disability

Or, the **direct result** of failure to implement IEP

See 34 C.F.R. §300.530(e)(i), (ii)



More on MDRs

Key Points:

Don't forget to start with review of current evaluations and IEP

Aside from answering the MDR questions, document should include a concise statement of the team's rationale for its MDR decision.

It's a good practice, and it helps ensure a sound MDR decision



More on MDRs

Example:

“ADHD student’s verbal statements to peers that he intended to assault another student after school let out indicated that his assault was planned and not an impulsive act. Moreover, ADHD is not generally associated with assaultive behavior, according to the DSM-V.”



More on MDRs

Example:

“ED student’s significant steps, planning, and organization in possessing and distributing marihuana at school were inconsistent with an impulsive or out-of-control behavior. Pattern of behavior has been mostly disruptive and partially aggressive incidents only, not possession of contraband or prohibited items.”



More on MDRs

- If behavior **is** manifestation, student must return to original placement (unless parents agree otherwise)—34 C.F.R. §300.530(f)(2)

Note—Parent can always voluntarily agree to IAES placement (document carefully)—34 C.F.R. §300.530(f)(2)

- If behavior is **not** a manifestation, regular local disciplinary procedures may proceed as with a similarly situated nondisabled student—34 C.F.R. §300.530(c)



More on MDRs

- **Good MDR Questions:** Does student have a history of similar behavior? Could we have foreseen the behavior knowing the student and his disability?
- **Not-so-good MDR Questions:** Does student know right from wrong? Can he control himself if he wants?



More on MDRs

- **What if IEP or part thereof has not been implemented, such as the BIP?**

A problematic situation—Maybe better to err on side of caution, withdraw the recommendation for long removal, and impose a short-term removal.

Also, team must work on fixing the implementation problem.



More on MDRs

- **What if we think there is another disability that has not been identified?**

Better to err on side of caution, have IEP team offer additional evaluation, postpone MDR until new evaluation completed.



More on MDRs

- **MDR before local disciplinary hearing or vice-versa?**

Either is OK under IDEA—District decides the sequence.



More on MDRs

- **Data Bases for MDR**

IEP team committee must document a review of current evaluation data, information on offense (include relevant details), parent input, staff input, any other relevant data.

This happens before the committee turns to the MDR questions.



More on MDRs

- **Argument that the behavior is caused by impulsivity?**

Is there evidence that the behavior was planned? Lots of steps? Organization? Time to think? Then behavior not consistent with impulsivity

Was behavior an instant response? Then maybe



More on MDRs

- **But, MDRs are not all about impulsivity**

Particularly in cases involving students with ED, where the behavior may involve impaired ability to control behavior, particularly under stressed situations

With ED students' MDRs, always consider the opinion of the evaluating psychologist or expert



More on MDRs

- **More MDR Decision Data:**

Patterns of past behavior—A key consideration for the team in conducting the MDR

Behaviors noted in evaluations

Failures to implement BIP during offense?



More on MDRs

- **Why the conservative cautious approach to MDRs?**

Challenge to MDR is by means of an expedited due process hearing before an IDEA hearing officer.

Frequently, the litigation turns into a 2-trial process, as parents' attorneys add FAPE/IEP issues, which proceed to trial on a non-expedited basis.



Schools Should Conduct FBAs and Develop BIPs Early

- When behavior recurs and impedes learning of student or others, IEP teams should conduct FBA and develop BIP (see 34 CFR 300.324(a)(2)(i))

Does FBA requires prior parental consent? Probably. See *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007)(YES).

Prior written notice? Yes, says *Letter to Addressee*, 112 LRP 23125 (OSEP 2012)



Schools Should Conduct FBAs and Develop BIPs Early

- **Thoughts on BIPs**

Consistency of implementation often more important to effectiveness of BIPs than particular interventions chosen.

Checklist-based BIPs tend to be weak—checklist items are often basic discipline management techniques.

The key is really applying the FBA data to individualize the interventions, reinforcers, and consequences.



Schools Should Conduct FBAs and Develop BIPs Early

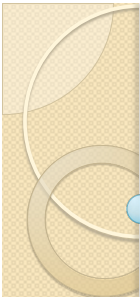
- BIP process is one of implementation, review, monitoring of fidelity,] repeating those steps until behavior improves.
- Create interventions that stress individualized ideas and positive approaches (work best).
- Complex BIPs may require a brief training with implementers.



Suspected IDEA Students

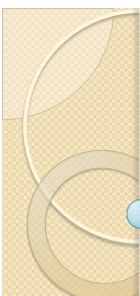
- Students not eligible under IDEA may get IDEA discipline protections
- There must be a basis for suspicion of eligibility—(1) parent concerns, (2) staff concerns, (3) parent referral
- Pending referral means discipline protections apply
- Referral request *after* offense does not necessarily stop discipline process

See 34 C.F.R. §300.534



“Smart ISS” as alternative to suspension

- If services in ISS are sufficient to provide opportunity to progress in regular and sp. ed. curriculum, then not a “removal”
- A “deal” from USDOE to schools (71 Fed. Reg. 46,715 (August 14, 2006))
- Must continue all IEP related services
- Must have system to provide work in ISS
- Determine how to provide instruction
- Document arrangement



More on “Smart ISS”

- “Deal” only applies if student stays on campus
- Provision on LRE is likely intended to prohibit separate sp. ed. ISS settings—use of regular ISS settings is fine.
- **Watch for overuse**—Hold IEP meeting if ISS is being used frequently (might not be an effective strategy).

See Q & A: *Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions*, 81 IDELR 138 (OSEP July 19, 2022), at Question C-1, C-7, fn. 20.

FAPE in Removal Setting

- If student will be removed long-term, IEP team must plan for FAPE in removal setting (34 C.F.R. §300.530(d))
- Exact replication of services is not required (a “modified” FAPE requirement—71 Fed. Reg. 46,716)
- IEP should be modified to address the behavior problem so that it does not recur (FBA, BIP, counseling)—34 C.F.R. §300.530(d)(1)(ii)
- Discipline placement (IAES) may not be able to serve every kind of IDEA student...

Partial-Day Suspensions

- ***They “count”***—Can’t be ignored
- Accurate account must be kept (may not match attendance reporting system strictly)
- Watch office referrals or hall removals where student is unattended for lengthy periods of time

See 71 Fed. Reg. 46,715 (August 14, 2006)



Bus Suspensions

- USDOE clarification—they count as removals if transportation is on IEP (i.e., special transportation)
- Thus, suspensions from regular bus may take place under regular policies
- But, USDOE cautions schools to make use of FBA/BIP process to address bus behavior problems

See 71 Fed. Reg. 46,715 (August 14, 2006)



July 2022 OSEP Discipline Guidance on IDEA

- ***Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions (OCR—July 19, 2022)***

A 55-page update to discipline guidance on IDEA.

Nothing really new, since neither the law nor the regulations have changed since 2006.

Really a compendium of OSEP's positions on discipline under IDEA, updated to the current era.



July 2022 OSEP Discipline Guidance on IDEA

- **Question C-6—Are informal removals, such as shortened school days considered in calculating a change in placement?**

Yes, if the IEP team “does not also consider other options such as additional or different services and supports that could enable a child to remain in school for the full school day.”

E.g., asking parent to pick child up due to behavior, but not documenting it as a suspension...

Note—Shortening a student’s school day due to behavior is generally viewed as an inappropriate way to address the behavior, as it reduces instruction and structured program time.



July 2022 OSEP Discipline Guidance on IDEA

- **Questions E-4 & E-5—Risk Assessments and IDEA**

Noting the modern use of risk/threat assessments in schools, the Guidance simply states that such assessments must be undertaken in a manner that respects the students’ rights under the IDEA with respect to discipline.

Moreover, the risk assessment should be coordinated with the IEP team, to consider whether behavioral supports or other safety measures should be included in the IEP.



July 2022 OSEP Discipline Guidance on IDEA

- ***Questions E-4 & E-5—Risk Assessments and IDEA***

Key point is that actions recommended by any risk assessment or teams must be approved and implemented by the IEP team, if the recommendation impacts placement or provision of FAPE for the action to comply with federal law.