A Simplified Method for Understanding the Disciplinary Removal Rules of IDEA and Section 504

by
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Elements of the "User-Friendly" Method

1. Learn to identify a short-term disciplinary removal under IDEA.

A short-term removal occurs when a campus administrator removes a child from his normal setting for less than 10 consecutive school days for disciplinary purposes. The most common example is a suspension to the home. In-school suspension (ISS) should be considered a short-term removal, unless the "smart ISS" criteria discussed below is met, in which case the removal days might not "count."

2. Learn to identify a long-term disciplinary removal under IDEA.

A long-term removal is one of over 10 consecutive school days, usually in the form of a removal to a disciplinary alternative education program (AEP) or expulsion.

3. Do not mix up the rules for long-term and short-term removals.

It's easy to get confused if you try to learn and apply the separate rules for long and short-term removals as simultaneous concepts. Rather, learn and apply these rules as two separate sets of rules. This eliminates a lot of mixed-up IDEA discipline questions, such as "is it 10 cumulative or 10

consecutive days?" There are really two sets of 10-day rules, but trying to learn them simultaneously frequently causes confusion.

4. For short-term removals, apply "free days" analysis, and don't push your luck after reaching 10 total removal days in a school year.

At the start of the school year, imagine the school is given 10 "free" removal days for each IDEA student. These days are "free" under IDEA because they can be used without an IEP team meeting, without a functional behavioral assessment (FBA), without a manifestation determination, without educational services, and basically, without worrying about any IDEA procedure or safeguard. They can be imposed as they would in the case of a nondisabled student who commits the same offenses. *See* 34 C.F.R. §300.530(b).

But, after the "free" days are used up with short-term removals, they will "cost" you in compliance with IDEA procedures and additional requirements. *See* 34 C.F.R. §300.530(b)(2), (d)(4). For any short-term removal after the 10th, educational services must be provided to the student. And, the IEP team should, by that point, probably conduct an FBA and develop a BIP (behavior intervention plan), or revise an existing BIP. *See* 34 C.F.R. §300.324(a)(2)((i). Moreover, at a certain point, accumulations of too many short-term removals will become a "pattern of exclusion" (in Department of Education lingo), which consists of an overall long-term removal that requires compliance with the long-term removal IDEA rules discussed below. *See* 34 C.F.R. §300.536(a)(2). Additionally, even the most rule-conscientious campuses are subject, after too many removals, to a finding that the excessive short-term removals are in fact a sign that the IEP is simply not working. These situations can thus evolve from pure discipline matters into actual denial-of-FAPE claims. Generally, it's good advice for schools to limit forays into the over-10-total-school-days danger zone. Obviously, the higher the number of short-term removals after the 10-day total is reached, the more precarious the legal position.

More on accumulations of short-term removals—Under the 2006 regulations at section 300.536, a change of placement on the basis of accumulated short-term removals occurs if—

(1) the removal is for more than 10 consecutive school days; or

(2) the child has been subjected to a series of removals that constitute a pattern—

(i) because the series of removals total more than 10 school days in a school year;
(ii) because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
(iii) 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.

Thus, in addition to the familiar factors in §300.536(a)(2)(iii), the 2006 provision requires analysis of the similarity of the behaviors that have led to the series of removals. And, it appears that all the criteria in §300,536(a)(2) must be simultaneously present in order to support a finding that a series of removals amounts to a "pattern of exclusion" change in placement. In other words, a finding of a "pattern of exclusion" change in placement requires that (1) the series of removals total over 10 school days, (2) the behaviors in the series be substantially similar, and (3) the old factors (length of removals, total removal, and proximity of removals) are indicative of a pattern. The 2006 regulation is also cleaner and clearer in language. *See* 71 Fed. Reg. 46,729 (August 2006).

Substantial similarity of behaviors in a series—The commentary emphasizes the importance of determining whether the behaviors underlying a series of removals are substantially similar in nature. "We believe requiring the public agency to carefully review the child's previous behaviors to determine whether the behaviors, taken cumulatively, are substantially similar is an important step in determining whether a series of removals of a child constitutes a change in placement, and is necessary to ensure that public agencies appropriately apply the change in placement provisions." 71 Fed. Reg. 46,729. The Department concedes, however, that the provision requires a "subjective" determination. Id. The commentary includes no examples of an application of this provision to assist in ascertaining the level of specificity required in the analysis.

OCR might not apply the new "substantial similarity" standard in §504 complaints—When a parent of a child with a disability complained to the Office for Civil Rights (OCR) that a Michigan school was excessively removing her child from school, OCR found that the school had removed the student a total of 22 days in seven months within a school year.

Kalamazoo (MI) Pub. Sch. Dist., 50 IDELR 80 (OCR 2007). In this post-reauthorization case, OCR determined that the 22 removal days amounted to a pattern of exclusion, after applying the traditional three-factor analysis: (1) length of each removal, (2) overall total removal days, and (3) proximity of removals to one another. OCR did not examine the similarity of the behaviors, or cite it as an analytical factor. Thus, despite the new analysis of the IDEA regulation, OCR may examine whether a pattern occurred, for purposes of §504, by means of the traditional three-part analysis for multiple removals.

In sum, the IDEA regulations provide a disincentive for schools to engage in excessive short-term removals of IDEA-eligible students. After a school accumulates ten total school days in the form of short-term removals, additional removals run the risk of becoming a pattern of exclusion based on a subjective multiple-factor analysis. Moreover, the analysis, as amended by the addition of the "substantial similarity" factor, is largely untested in the caselaw. Ultimately, the rule may be intended to be fundamentally fuzzy, and thus, approached with caution. Certainly, the limits on short-term removals tend to refocus schools toward implementation of positive behavioral supports and interventions, rather than removal-based responses to misbehavior.

5. Before short-term removals add up to 10 total school days, have an IEP team meeting to address behavior.

The best preventive measure in IDEA disciplinary matters is to convene an IEP team meeting *before* short-term removals add up to 10 total days. The IEP team can decide to conduct an FBA, develop a BIP, add counseling, evaluate the student further, vary other IEP services, change the student's placement, or make other adjustments to the student's program. This requirement is reflected in the IDEA regulation's provision that calls for consideration of positive behavior interventions, supports, and strategies if students exhibit behaviors that impede their learning or that of others. 34 C.F.R. §300.324(a)(2)(i). The idea is to take action before a disciplinary issue becomes a problem that leads to multiple disciplinary removals. Hearing Officers tend to have little patience for schools that take no measures prior to removing the child a total of 10 days, but then seek to defend significant removals after the 10-day mark is reached.

This proactive measure focuses the team on improving key IEP components related to behavior, rather than on exploring some intricate legal argument for engaging in additional disciplinary removals. Persisting on removing the student from school in a situation where

removals are already accumulating risks alienating the student, the parent, and potentially, a hearing officer should the matter end up in a due process hearing. In addition, such a course will not result in positive behavioral change, particularly if the student likes being away from school.

> *Note*—Consistent with the IEP requirement to consider behavior interventions if behaviors impede learning, the USDOE has stated that short-term disciplinary removals of an IDEA student, even if they do not trigger IDEA disciplinary protections, may warrant consideration of FBAs, positive behavioral interventions, positive behavior supports, or other behavior-oriented IEP components and services. *Dear Colleague Letter*, 68 IDELR 76 (OSEP 2016).

6. For long-term removals, proceed to manifestation determination as soon as you can, and before the removal reaches 10 consecutive school days.

As soon as possible after the campus initiates a long-term disciplinary removal, a manifestation determination review must be conducted (preferably by the full IEP team in an IEP team meeting). *See* 34 C.F.R. §300.530(e). The long-term removal will generally consist of a removal to an interim alternative setting, a long-term suspension (since in some states the term "expulsion" is not used), or an expulsion (a form of long-term suspension). The manifestation determination must definitely take place before the long-term removal reaches its 11th consecutive day. The right to a manifestation determination in instances of threat of long-term removal is *the* primordial safeguard of the IDEA disciplinary procedures. It is a doctrine that was first espoused in court cases starting in the late-70's, later adopted by the Department of Education as policy in the 80's, and finally codified into IDEA and its regulations in the late 90's.

The manifestation determination essentially decides whether the student can be subjected to long-term removal or not. If the IEP team properly determines that the behavior in question is **not** related to disability, then the student can be subjected to regular disciplinary procedures and regular removals, as in the case of a similarly-situated nondisabled student. *See* 34 C.F.R. §300.530(c). If the IEP team determines that the behavior is related to disability, then a long-removal cannot take place. *See* 34 C.F.R. §300.530(f)(2). Thus, the quality of the manifestation determination is crucial to a long-term removal. IEP team members are well-advised to prepare and pre-staff for manifestation determinations. In cases of emotionally disturbed or behavior-disordered students, it's also

wise to consult with the evaluating psychologist about the determination before the meeting.

The modern manifestation determination inquiry—In 2004, Congress tightened the language and structure of the manifestation determination standard. If a school decides to change a student's placement (i.e., recommends a long-term removal) due to a disciplinary offense, "the local educational agency, the parent, and relevant members of the IEP team (as determined by the parent and the local educational agency), shall 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—

> if the conduct in question was *caused by, or had a direct and substantial relationship to*, the child's disability; or
>
> if the conduct in question was the *direct result* of the local educational agency's failure to implement the IEP." 20 U.S.C. §1415(k)(1)(E)(i).

If the manifestation decision-makers determine that a child's behavior was related to their disability, the IEP team is to "return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan." 20 U.S.C. §1415(k)(1)(F)(iii). If the determination is that the behavior in question is not related to disability, then the school may implement its regular disciplinary procedures and removals, as with any similarly situated nondisabled student. 20 U.S.C. §1415(k)(1)(c).

Functional Behavior Assessment (FBA) requirement—Under the regulations, if a behavior is determined to be related to the student's disabilities, the IEP team must either conduct a FBA and implement a behavior intervention plan (BIP), or, if a BIP was already in place, review and revise the plan to address the behavior in question. 34 C.F.R. §300.530(f)(1). Moreover, even if the team determines that the behavior was not related to the student's disabilities, the regulations nevertheless require a FBA and behavior interventions "designed to address the behavior violation so that it does not recur." 34 C.F.R. §300.530(d)(1)(ii).

ADDITIONAL IMPORTANT DISCIPLINE DOCTRINES

- **Under Section 504, if the offense involves drugs or alcohol, and the student is a "current user," the MDR protection does not apply.**

The rules applicable to disciplinary removals and disciplinary changes in placement under §504 are similar to those under IDEA. In fact, the IDEA discipline rules originated with U.S. Department of Education guidance on discipline under §504, most of which was incorporated into IDEA in its 1997 reauthorization. Thus, the IDEA's limitations on short-term removals, the MDR requirement for long-term removals and other disciplinary changes in placement, the FAPE requirement during long-term removals to alternative settings, and the doctrine of in-school suspension are applicable under §504. An important difference in the two laws, however, is the treatment of drug and alcohol offenses under §504, as seen below.

Students eligible under §504 lose the right to a manifestation determination and due process hearing if they violate drug or alcohol rules and are determined to be "current users." *See* 29 U.S.C. §706(8)(B)(iv). Thus, if there is evidence that the student is a current drug or alcohol user, the §504 committee can skip the manifestation determination, and the student is subject to the regular disciplinary process that would take place in the case of a drug or alcohol offense by a nondisabled student. See *Letter to Zirkel*, 22 IDELR 667 (OCR 1995). If the committee does not believe that the student is a current user, it must proceed to make the manifestation determination. OCR has determined that mere possession is not itself evidence of current use of drugs or alcohol. See, e.g., *OCR Staff Memorandum*, 17 EHLR 609, 611 (OCR 1991).

Note—Under local codes of conduct, drug and alcohol offenses generally include possession, use, sale, distribution, or being under the influence, whether at school or at school-related events.

Evidence of "current use"?—Current use could be shown by the student being under the influence of drugs or alcohol, or by the nature of the possession offense. For example, possession of a partially burned marijuana cigarette or of a pipe with burned marijuana residue could be evidence of current use. If there is a possession or distribution incident, but no evidence of current use, it is advisable to conduct the MDR.

- **For drugs, weapons, or serious bodily injury offenses, proceed to manifestation determination, but keep in mind that a 45-school-day removal to an alternative discipline setting is available even if the behavior is linked to disability.**

In 1997, Congress decided that even if a drug or weapon offense is related to a special education student's disability, the school can nevertheless remove the student to an alternative setting for a maximum of 45 calendar days. If, however, a student's drug or weapon offense is *not* related to disability, they may be subjected to the school's regular disciplinary procedures, including very long-term removal or expulsion. Schools should not consider this an "automatic" removal, since a manifestation determination is nevertheless necessary, and the IEP team must also plan for serving the student in the disciplinary placement. In the 2004 IDEA reauthorization, Congress decided to add an offense to this list—serious bodily injury, which is reserved for the very most serious of assault offenses. In addition, in 2004 the Congress changed the 45-day period to one of 45 *school* days. Thus, the provision is not a 45-school-day limit to removal for these offenses, unless the behavior is found to be related to disability. If the behavior is not related, regular disciplinary procedures and sanctions would apply, including, for example an expulsion of longer than a year for a gun possession.

> *What about under §504?*—The Office for Civil Rights (OCR), which interprets and enforces §504, has not indicated that the special offenses provision of IDEA with respect to drugs, weapons, or serious bodily injury, applies to §504. Thus, drug offenses under §504 are treated as indicated above (including alcohol offenses), while weapons and serious injury offenses are treated like other serious offenses (i.e., MDR finding of "no manifestation" required prior to long-term disciplinary removal).

- **Report criminal behavior to law enforcement if you would do so for a non-disabled student's behavior under your policies, but make sure you have implemented the BIP.**

IDEA makes clear that schools may report criminal offenses committed by special education students at school. 20 U.S.C. §1415(k)(6); 34 C.F.R. §300.535. But, school administrators must ensure that resort to law enforcement occurs in a non-discriminatory fashion, for nondisabled and disabled students alike. In addition, staff must ensure that the student's BIP, if any, is fully implemented before the police are called, if at all possible. Reports to law enforcement cannot be undertaken *instead* of complying with the requirements of a BIP or IEP. Moreover, administrators would be well-advised to get information from law enforcement authorities about what type of conduct constitutes criminal conduct.

- **Students who are in the IDEA referral process, or who should be, are entitled to the discipline protections of the IDEA.**

  Under the IDEA, non-IDEA students may assert the discipline protections of the IDEA if the school had "knowledge" that the student might be IDEA-eligible prior to the behavior in question. 20 U.S.C. §1415(k)(5); 34 C.F.R. §300.534.

  Aside from a pending referral, the bases for such knowledge or suspicion include (1) parent expression of concerns, (2) parent requests for referral, or (3) staff expression of concerns to the special education director or other supervisory personnel. 34 C.F.R. §300.534(b).

  The protections do not apply if the parent has refused consent for an evaluation or services, or the child has been evaluated and determined not to qualify for special education. 34 C.F.R. §300.534(c), (d).

  If a parent makes a request for evaluation during the disciplinary process, the evaluation must be expedited. Until the evaluation is completed, the student may continue to be placed in the disciplinary setting. 34 C.F.R. §300.534(d)(2).

- **Explore development of a "smart ISS" option on your campus to help minimize suspensions to home.**

  The commentary to both the 1999 and 2006 versions of the final IDEA regulations states that in-school suspension (ISS) would not be considered true removal days as long as the child is given the opportunity to (1) continue to appropriately progress in their curriculum, (2) continue to receive their IEP services, and (3) continue to participate with nondisabled children to the extent they would have in their usual placement (meaning, the student is not placed in some sort of segregated ISS for students with disabilities). The commentary states that "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 on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. This continues to be our policy." 71 Fed. Reg. 46,715 (2006). By this guidance, the feds are obviously providing an incentive for schools to use in-school forms of

suspension rather than out-of-school suspensions, which come without services and might not motivate positive behavioral change.

The higher the degree of continuity of educational services at the ISS facility, the better your chance of successfully arguing that these are not true removal days. The more "traditional" your in-school suspension program (i.e. supervision-only while students allegedly work independently, or minimal services), the more likely a hearing officer will find that removals to your in-school suspension program in fact constitute disciplinary removals that "count" toward the 10-day marker. To assess ISS removals, Hearing Officers focus on whether students are receiving all their regular and sp. ed. work, whether regular teachers are monitoring and dropping by periodically, whether an appropriate degree of special education instruction is provided (for students with inclusion services, resource, or content mastery on their IEP), whether related services and modifications continue to be implemented, and, ultimately, whether the student made progress while at ISS. Of course, the more severe the impact of the student's disabilities on their ability to function academically, the more services that will be required in ISS to afford the student an opportunity to progress.

The USDOE commentary does not specify requirements for staffing or amounts of specialized instruction in a "smart" ISS. Any model of staffing or service delivery is fair game, and can comply with the guidance, as long as the three main criteria are met; particularly the requirements that the student be offered an opportunity to progress in their curriculum and the IEP services continue to be provided.

- **The IEP team must address the plan to provide the student a FAPE during any long-term disciplinary removal.**

Although students whose behaviors are not a manifestation of their disabilities may be removed to disciplinary settings or expelled on a long-term basis, the IEP team must plan for services so that these students must receive a FAPE during their removals. *See* 34 C.F.R. §300.530(d)(1)(i), (d)(5). While the IDEA does not require exact replication of their educational programs in the disciplinary setting, the main components of the IEP must be respected, although changes may be necessary in light of the different nature of the disciplinary setting. *See* 71 Fed. Reg. 46,716 ("We read the Act as modifying the concept of FAPE in circumstances where the child is removed from his or her current placement for disciplinary reasons."). The "modified" FAPE requirement would include all needed related services, including potentially new ones to address the

behavior that led to the removal so that it does not recur. Thus, the IEP team has two fundamental functions in serious disciplinary actions—(1) conduct the manifestation determination review, and (2) plan for services that will provide a FAPE in the disciplinary settings. Providing "cookie-cutter" services, or dropping key related services, can put schools at risk of legal challenges to the services provided during the removals, even if the removal itself was lawful.

- **Partial day suspensions or disciplinary removals "count"**

  As with ISS, USDOE repeats its 1999 position, stating that "portions of a school day that a child had been suspended may be considered as a removal in determining whether there is a pattern of removals as defined in §300.536." 71 Fed. Reg. 46,715. Thus, schools cannot ignore accumulations of partial-day suspensions in counting removals for purposes of the 10-day rule.

- **Bus suspensions are disciplinary removals if transportation is in the IEP as a related service**

  Here again, USDOE restates its longstanding position, noting that "whether 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 under §300.530 unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where services will be delivered. If the bus transportation is not a part of the child's IEP, a bus suspension is not a suspension under §300.530. 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." 71 Fed. Reg. 46,715. Thus, if special transportation, for example, were included as a related service on the IEP, a suspension from the bus would count as a suspension from school, unless the school provides some alternative means of transportation. If the child rides the regular bus, and that service is not a part of the IEP, then a bus suspension does not count as a suspension from school. The Department, however, cautions schools to address misbehavior on the bus as a part of the child's IEP. "Public agencies should consider whether the behavior on the bus is similar to behavior in a 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." 71 Fed. Reg. 46,715.