

RIGHTS OF MASSACHUSETTS SPECIAL EDUCATION STUDENTS REGARDING EXCLUSION FROM SCHOOL

Prepared by the Mental Health Legal Advisors Committee
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DETERMINING IF A STUDENT, BEING DISCIPLINED, IS PROTECTED BY SPECIAL EDUCATION LAW

What protections does a student eligible for special education services have regarding school exclusion?

The federal Individuals with Disabilities Education Act (IDEA) gives a student found eligible for special education services a right to a free appropriate public education (FAPE) in the least restrictive environment.

The IDEA provides protections when these students are excluded from school.

- In addition to IDEA requirements, school districts also must comply with state law regarding school discipline. These rights are discussed in another MHLAC flier available at <http://www.mhlac.org/Library.htm>.

What about a student with a disability who is not yet eligible for special education?

A student not yet determined eligible for special education also has these protections if the district had knowledge that the student was a “child with a disability” before the behavior that led to the discipline occurred.¹

When does a school district have knowledge that the student was a “child with a disability”?

A district is considered to have knowledge if:

- Parent has expressed concern in writing to a teacher or supervisory or administrative personnel of the district that student needs special education and/or related services;
- Parent has requested an evaluation of student for special education needs; or
- Teacher or other school personnel has expressed specific concern about a pattern of behavior demonstrated by student directly to director of special education or to other supervisory personnel in district.²

When is a student, about whom the district has knowledge of a disability, not protected by this provision?

A student is not protected if:

- The parent doesn't allow evaluation;
- The parent refuses special education services; or
- The student was evaluated and found not eligible.³

HOW A DISTRICT MAY DISCIPLINE A STUDENT WITH A DISABILITY

How may a district discipline a student with a disability?

The district may discipline a student with a disability. Discipline may include certain allowable removals from school.

What is an allowable removal?

An allowable removal is:

- in-school suspension
- out of school suspension;⁴
- placement in another setting; or
- assignment to an interim alternative educational setting (IAES).⁵

What is a change of placement?

A change of placement⁶ can exist if there is:

- a removal for more than 10 consecutive school days;⁷ or
- a series of removals that constitutes a pattern, as identified by
 - more than 10 cumulative removal days in the school year,
 - the student's behavior is substantially similar to his/her behavior in previous incidents that resulted in removals, and
 - additional factors like length of each removal, total time of removals and proximity of removals to one another.⁸

The school district determines whether a pattern of removals exists and is therefore a change of placement.⁹

May a district do multiple removals in a school year?

A district may do multiple removals in one school year if each removal is for no more than 10 consecutive school days, if the total is 10 or fewer days and if those removals don't otherwise constitute a change of placement.¹⁰

What if the removal is for fewer than 10 consecutive school days (and 10 or fewer total days in the school year) and is not a change of placement?

- In addition to the requirements of the IDEA, the district must comply with state law regarding school discipline. Under state law, any student serving an in-school or out of school suspension (of any length), or expulsion must be provided an opportunity to earn credits, make up assignments, tests, papers, and other school work as needed to make academic progress during the removal.¹¹

What if removal is for fewer than 10 consecutive days and is not a change in placement but the student has already been removed for more than 10 days in that school year?

School personnel must consult with at least one of the student's teachers to determine the extent to which FAPE services are needed to enable the student to participate in the general education curriculum, although in another setting, and to continue to progress toward meeting the goals set out in the student's IEP.¹²

RIGHTS WHEN THERE HAS BEEN A CHANGE OF PLACEMENT: THE MANIFESTATION DETERMINATION

What if the district determines that a removal is a change of placement?

In these cases, the district must:

- on the day of the district's determination, notify the student's parents/guardian/SESP of the decision to change placement and of the parent/guardian/SESP's procedural rights to have that decision reviewed; and¹³
- schedule a meeting, called a "manifestation determination" to review the decision to change placement.¹⁴

What is a manifestation determination?

A manifestation determination is a meeting that must be held after a decision to change the placement of a student with a disability because of a violation of a student code of conduct.¹⁵

At the meeting, participants review the incident that led to the most recent exclusion to determine

- if the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or

- if the conduct in question was the direct result of the district's failure to implement the student's IEP.¹⁶

If the answer to either question is yes, then the conduct is a manifestation of the student's disability. In such a case, there may be no change in placement unless otherwise agreed by all parties, and no disciplinary measures may be taken against the student.¹⁷

When must a manifestation determination be held?

A manifestation determination must be held within 10 school days of the decision to change the placement.¹⁸

Parents/guardian/SESP must receive notice of the manifestation determination at the same time the decision to change the placement is made.¹⁹

Who attends the manifestation determination?

The following parties must attend the manifestation determination:

- the school district;
- the parent/guardian/SESP; and
- all relevant members of the IEP Team (as determined by the parent and school).²⁰

The director of special education, or designee, will preside. The designee may be any staff trained by the director in conducting such hearings, such as a principal, assistant principal or school psychologist.

What is the procedure at the manifestation determination meeting?

The principal or designee will describe student's alleged misconduct.

- The principal or designee will complete a manifestation determination report.
- After input from the participants, the special education director or designee will make a manifestation determination.
- The special education director or designee will give a copy of the manifestation determination report to the parents.²¹

What material should be reviewed at the manifestation determination?

Participants should review all relevant information in the student's file including:

- the student's IEP;
- teacher observations;
- relevant information provided by the parent/guardian/SESP.²²

How close must the connection be between disability and conduct?

Hearing decisions suggest that parents should try to articulate a fairly close connection.

What if behavior is a manifestation of student's disability?

If the conduct is due to failure to implement an IEP, the district must remedy those deficiencies.²³ To do so, the district must conduct/update a functional behavioral assessment (FBA) and implement or modify a behavior intervention plan (BIP).²⁴

The student has the right to return to the original educational setting, unless the parent/guardian/SESP and the school agree to change the placement or special circumstances exist.²⁵

There may be no exclusion or other discipline.

What are "special circumstances"?

Special circumstances exist when an incident at school or a school function involves:

- the possession of weapon;
- the possession or use of illegal drugs; or
- infliction of serious bodily injury²⁶ upon another person.²⁷

What happens when special circumstances exist?

The district may move a student to an Interim Alternative Education Setting (IAES) for up to 45 days without regard to whether the behavior is determined to be a manifestation of the student's disability.²⁸

The team determines the IAES.²⁹

The student has the same right to educational services and assessments as if the student's conduct was found not to be a manifestation of disability.³⁰

What if the behavior was not a manifestation of the disability?

The student may be disciplined in same manner and for same duration as a non-disabled student.³¹ The student may return to the previous placement after the discipline.

When removed from his/her current placement, a student has a right to FAPE to enable participation in general education curriculum and progress toward meeting the goals set out in the student's IEP.³² This right exists even if the student is placed in a different setting.³³

When removed, the district must provide, as appropriate, a functional behavior assessment and behavioral intervention services and modifications, designed to address the behavior so it does not recur.³⁴

- In addition to these requirements of the IDEA, the district must also comply with state law regarding school discipline. Under state law, a student serving a suspension for over 10 consecutive school days or an expulsion, whether in school or out of school, shall have an opportunity to receive education services and to make academic progress toward meeting state and local requirements, through a school-wide education service plan. Education services shall be based on, and be provided in a manner consistent with, the academic standards and curriculum frameworks established for all students.³⁵

APPEALING A MANIFESTATION DETERMINATION

Can one appeal a manifestation determination?

A student or a district may appeal the result of a manifestation determination.³⁶

The district may only appeal if it believes that maintaining the current placement is substantially likely to result in injury to the child or others.³⁷

Appeal is to the Massachusetts Bureau of Special Education Appeals (BSEA). The BSEA has both mediation and hearing processes.

What happens if an appeal goes to hearing?

A parent challenging a finding that conduct is not a manifestation of a disability has the “burden of persuasion” (i.e., the parent has the obligation to produce evidence and witnesses that persuade the hearing officer that conduct was due to disability).

A BSEA hearing officer may

- order an interim alternative education setting for up to 45 school days if it is determined that maintaining the current placement is likely to result in injury to the student or to others; or
- return the student to his/her original placement if it is determined that the behavior was a manifestation of the student’s disability.³⁸

OTHER RIGHTS

What if one requests a special education evaluation while a disciplinary action is pending?

The request for evaluation must be expedited.³⁹

Student remains in the placement determined by school.⁴⁰

This placement may include a student being suspended or expelled without educational services.⁴¹

Rights of a student on a 504 Plan

Most provisions of Section 504 of the Rehabilitation Act and IDEA related to discipline are the same. A student has the right to a manifest determination when there is a change of placement decision under both Section 504 and IDEA.

➤ In addition, state laws on school discipline apply to all students in Massachusetts.

Section 504 provides that a school district cannot discipline a student with a disability for behavior that is a manifestation of his disability if the disciplinary action is a significant change in placement. However, if the manifestation determination finds no relationship between disability and conduct, the discipline resulting in change of placement may occur.⁴²

Section 504 is different from IDEA in several ways. Unlike the IDEA, Section 504:

- has no list of specific questions to determine if behavior was a manifestation of a disability.⁴³
- has no list of who attends the manifestation determination (just persons knowledgeable).⁴⁴
- has no provision for interim alternative placements.

Finally, if the incident involves illegal drugs or alcohol, a student on a 504 Plan may be expelled without a manifestation determination.⁴⁵

ENDNOTES

¹ 20 USC 1415(k)(5)(A); 34 CFR 300.534(a).

² 20 USC 1415(k)(5)(B); 34 CFR 300.354(b).

³ 20 USC 1415(k)(5)(C); 34 CFR 300.354(c).

⁴ An “in-house” suspension may be considered a removal. DESE, Discipline of Special Ed Students Under IDEA 2004, Dec. 2007, “In-house suspension may be considered a change of placement.”

⁵ 20 USC 1415(k)(1)(B); 34 CFR 300.530(b).

⁶ Some allowable removals constitute a change of placement and some do not. Districts may pursue either type of removal, but there are special protections when a district seeks a change of placement. School personnel must consider any unique circumstances on a **case-by-case** basis when deciding if a change of placement is appropriate. 20 USC 1415(k)(1)(A); 34 CFR 300.530(a).

⁷ 34 CFR 300.536(a)(1)

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- ⁸ 34 CFR 300.536(a).
- ⁹ 34 CFR 300.536(b)(1).
- ¹⁰ 34 CFR 300.530(b). If the removal is for more than 10 consecutive or cumulative school days or a removal is a change of placement, the district may still pursue the discipline, but the student has additional protections.
- ¹¹ M.G.L. c. 76, § 21; 603 CMR 53.13(1).
- ¹² 34 CFR 300.530(d)(4).
- ¹³ 20 USC 1415(k)(1)(H); 34 CFR 300.530(h). These are rights under 34 CFR 300.504.
- ¹⁴ 20 USC 1415(k)(1)(E); 34 CFR 300.530(e).
- ¹⁵ 20 USC 1415(k)(1)(E)(i); 34 CFR 300.530(e)(1).
- ¹⁶ 20 USC 1415(k)(1)(E)(i), (ii); 34 CFR 300.530(e)(1).
- ¹⁷ 34 CFR 300.530(e)(2).
- ¹⁸ 20 USC 1415(k)(1)(E)(i); 34 CFR 300.530(e)(1).
- ¹⁹ 20 USC 1415(k)(1)(H); 34 CFR 300.530(h).
- ²⁰ 20 USC 1415(k)(1)(E)(i); 34 CFR 300.530(e)(1).
- ²¹ Drawn from http://www.specialeducationlawyers.info/iep_manifestation.htm.
- ²² 20 USC 1415(k)(1)(E)(i); 34 CFR 300.530(e)(1).
- ²³ 34 CFR 300.530(e)(3).
- ²⁴ 20 USC 1415(k)(1)(F); 34 CFR 300.530(f).
- ²⁵ 20 USC 1415(k)(1)(F); 34 CFR 300.530(f)(2).
- ²⁶ Serious bodily injury is defined as substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily part or mental faculty. 18 U.S.C. 1365(h)(3).
- ²⁷ 20 USC 1415(k)(1)(G); 34 CFR 300.530(g).
- ²⁸ 20 USC 1415(k)(1)(G); 34 CFR 300.530(g).
- ²⁹ 34 CFR 300.531.
- ³⁰ 34 CFR 300.530(d)(1).
- ³¹ 20 USC 1415(k)(1)(C); 34 CFR 300.530(c).
- ³² 20 USC 1415(k)(1)(D); 34 CFR 300.530(d)(5).
- ³³ 34 CFR 300.530(d).
- ³⁴ 20 USC 1415(k)(1)(D)(ii); 34 CFR 300.530(d)(ii).
- ³⁵ M.G.L. c. 76, § 21; 603 CMR 53.13(2).
- ³⁶ 20 USC 1415(k)(3)(A); 34 CFR 300.532(a).
- ³⁷ 20 USC 1415(3)(A); 34 CMR 300.532(a).
- ³⁸ 20 USC 1415(3)(B)(ii); 34 CMR 300.532(b)(2).
- ³⁹ 20 USC 1415(k)(5)(D)(ii); 34 CFR 300.534(d)(2)(i).
- ⁴⁰ 20 USC 1415(k)(5)(D)(ii); 34 CFR 300.534(d)(2)(ii).
- ⁴¹ 34 CFR 300.534(d)(2)(ii).
- ⁴² *See Springfield School District #186*, 55 IDELR 206 (OCR June 29, 2010).
- ⁴³ 34 CFR 104.36.
- ⁴⁴ 34 CFR 104.35(c).
- ⁴⁵ 29 USC 705(20)(c)(iv).