

Clark Hill

# Special Education Discipline

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## CAUTION

This presentation contains general recommendations and information and should not be relied upon for any specific purpose without consultation with legal counsel and in the context of specific facts and circumstances.

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**NOTABLE HIGHLIGHTS FROM DISCIPLINE GUIDANCE**

- July 19th US Dept Ed released a Dear Colleague Letter and guidance documents addressing discipline under IDEA and 504.
  - Preschool students served under IDEA accounted for 22.7% of total preschool enrollment but 56.9% of preschool students who were expelled.
  - School-age students with disabilities served under IDEA represented 13.2% of total student enrollment but received 20.5% of one or more in-school suspensions and 24.5% of one or more out-of-school suspensions.
  - Students with disabilities served under IDEA made up 80.2% of students subjected to physical restraint and 77.3% of students subjected to seclusion, despite making up only 13.2% of students enrolled in public schools.

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**NOTABLE HIGHLIGHTS FROM DISCIPLINE GUIDANCE**

- Reinforces desire that school districts look to alternatives to exclusionary disciplinary practices, especially for certain disciplinary offenses.
- Reinforces requirement for school districts to adopt, utilize and implement positive behavioral supports as a proactive measure.
- Reinforces need for school districts to ensure that behavior plans are meaningfully informed and stresses the importance of conducting functional behavioral assessments and meaningful data collection.
  - **Note:** OCR guidance indicates that if student has a behavior plan and district is implementing that plan with fidelity and student is still having behavioral challenges, may signal that the student's placement is not appropriate.
- Reinforces requirement for school districts to individually address student's needs and put in place appropriate supports and services to address behavior that interferes with the student's learning and/or the learning of others.

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**NOTABLE HIGHLIGHTS FROM DISCIPLINE GUIDANCE**

- Reinforces requirement that "removals" extend beyond suspensions. Must consider informal removals as well for the purposes of the IDEA and Section 504 disciplinary protections.
- IDEA guidance cautions against placing students on home based instruction, including virtual learning for the sole purpose of responding to the child's behavior, when appropriate behavioral supports have not been made available throughout the continuum of placements. . . could result in an inappropriately restrictive placement and a denial of FAPE.
- IDEA guidance suggests that may need to conduct an FBA and provide a BIP when conduct of a student is determined not to be manifestation of the student's disability and/or when the student is removed to an IAES for special circumstances.

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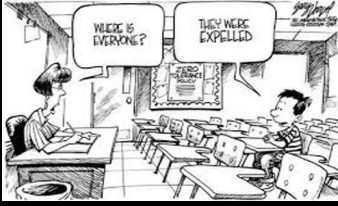
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## Discipline Overview



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### COMMON MISTAKES

- Failing to document behaviors and failing to respond to the documentation;
- Failing to implement IEPs [BIPs common complaint and hearing issue];
- Overusing suspensions and removals;
- Failing to use forms or to document discipline decisions and interventions;
- Failing to monitor for the pattern of exclusion;
- Failing to convene compliant / timely MDRs;
- Failing to offer and implement proper IAES.



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### BIG PICTURE DISCIPLINE

- Give all students equal treatment under the code of conduct.
- The sanction imposed for the special education student must be consistent with the code of conduct and "equal".
- Communication regarding student's IEP, 504 and BIP status is critical.
- Documentation of behavior / investigations should be maintained and analyzed.
- BIPs must be consistently implemented and reviewed for changing behavior and effectiveness of interventions.
- Restraint / Seclusion is a hot topic.



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### REMOVALS



- IEP sets student's placement
- Removal:
  - Disciplinary sanction;
  - If deployed, alters student's placement for a period of time;
- If "enough" removals:
  - special IDEA/Section 504 protections kick in;
  - IDEA FAPE obligations kick in;
- Accurate communication and tracking of removals is critical.



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### GENERAL RULES



- The number of removals dictates procedure and service requirements;
- Removals are **not** limited to suspensions (watch for hidden removals);
- If using ISS, will count as a day of removal unless specific requirements are met;
- Failing to count correctly will result in procedural and substantive errors;
- The MDR decision acts as a "red light" or "green light" for Board action or any change in placement ("CIP");

**Transfer Students** – MDE says that you inherit, both for intra-district and inter district mid-year transfer students.



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### BEWARE OF THE CHANGE IN PLACEMENT ZONE



- Keep track of & minimize "removals"
- More than 10 days in a row is a change in placement.
- Pattern of exclusion is a change in placement.
- No bright line rule for pattern of exclusion. Consider the following factors:
  - Similarity of behaviors;
  - Length of removals;
  - Proximity of removals to one another; and
  - Total time of removals
- 45-day removal for weapons, drugs and serious bodily injury is a change in placement.



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**CHANGE IN PLACEMENT ZONE**

- On date the decision is made to make a removal, which constitutes a change in placement, you must
  - Provide Notice to the Parent; and,
  - Provide Procedural Safeguards.
- Within 10 school days of the date of the removal, you must conduct an MDR under the IDEA. Depending on the length of the removal, USDOE cautions against waiting to hold MDR until 10<sup>th</sup> school day.



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**CHANGE IN PLACEMENT ZONE**

- Preserve documentation regarding notice and provision of procedural safeguards in the student's file.
- Don't forget about duty to put FAPE on the table.
  - **Note:** Duty to provide FAPE services is not just limited to removals that constitute a "change in placement." **Must provide FAPE services following 10<sup>th</sup> cumulative day of removal in a school year under the IDEA.**
  - Per July 19, 2022 OCR guidance, must provide FAPE to students removed from school following a threat or risk assessment and also must ensure that the student is afforded any applicable procedural rights, including, as needed, notifying and consulting with the student's Section 504 Team.



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**SPECIFIC COUNTING RULES**

- **Partial Days** count as full days (old guidance – new guidance from MDE suggests you count days as you would attendance)
  - Begins when directed to go home for rest of the day
  - Be careful that you have clean hands in "parent removals"
- Watch for the **Hidden Suspension / Removal**
  - "Can't come back without a parent meeting."
    - Suspension runs until parent meeting
  - "Can't come back unless you get an evaluation demonstrating you are safe to attend."
    - Suspension continues until the evaluation occurs and may be construed as an IDEA (and 504) violation because the evaluation obligation may belong to the school.



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### MDE Guidance on Partial Days

#### How are Partial Days of Disciplinary Removal Counted?

"School day" has the same meaning for all students in school, including students with and without disabilities. 34 CFR § 300.11(c)(1)(2)

Counting partial days of disciplinary removal must be consistent with the district's attendance procedure. For example, when attendance is counted in half days, disciplinary removals should also be counted in half days. Alternatively, when attendance is counted for each period, disciplinary removals should also be counted for each period. A full day would be the accumulation of the total number of periods of disciplinary removal.

Imposing in-school discipline in small increments, and for less than what is considered an absence, may not constitute a disciplinary removal; however, the overall impact must be considered when it limits the student's access to a free appropriate public education (FAPE).



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### TRANSPORTATION SUSPENSIONS

#### • Special Transportation

- Any day of school missed because of suspension from special education transportation included in the IEP counts as a removal
- If student does not come through district-arranged alternative, it counts as a removal

#### • Regular Transportation

- Parent responsibility get student to school
- If student misses school, counts as an absence
- Not a blank check. If reoccurring behavior, may be prudent to see whether additional support is needed to address bus behaviors



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### IN-SCHOOL SUSPENSIONS

#### • In-school suspensions count **unless**

- ✓ Student is afforded opportunity to appropriately participate in general education curriculum;
- ✓ Student receives services specified in IEP;
- ✓ Student can participate with non-disabled peers to the same extent would in the IEP.
- Calling ISS something else will not avoid having to meet these criteria if you don't want to count it as suspension
- Doesn't mean you can't use ISS, but you must count as a day of removal if you don't meet the criteria above.



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### BEHAVIOR PLAN REMOVALS

- MDE says they count;
- MDE and OCR expect to be logged and monitored;
- The location of the removal, the length of the removal; access to peers and services; the frequency of the removal and the effectiveness of the removal will be factors; and,
- **If it re-enforces the negative behavior or if it isn't working, stop doing it.**

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### NOT YET ELIGIBLE STUDENT?

- **BEFORE** the behavior:
  - Parent expressed written concern that child needs special education and/or related services to supervisory, administrative or teaching personnel;
  - Parent requested an evaluation of child;
  - Teacher or other district personnel expressed concern about a pattern of behavior to the director or "child find" / referral personnel
- **EXCEPTIONS**
  - Parent refused evaluation;
  - Parent refused services under Part B; or,
  - District evaluated and student determined not eligible.

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### PROCESS FOR NOT YET ELIGIBLE STUDENT

- Do a record review immediately;
- Evaluation must be expedited;
- Depending on the behavior, the student may be brought back to the prior placement;
- Difficult to evaluate when student not in school;
- May need to provide access to curriculum and supports while evaluating;
- Manifestation must be done within 10 school days of a change in placement or decision to change placement; and,
- Be careful about adjourning the MDR until evaluations are completed. Guidance from USDOE discusses timing of MDR and process for NYE students.

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### TIMING OF THE MDR

- 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...



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### MANIFESTATION DETERMINATION REVIEWS (“MDRS”)



- A timely and **thorough** investigation is critical to the MDR team process.
- Include dates, times, places and people;
- Describe the conduct concretely;
- Photograph or identify the drugs or weapons;
- Encourage staff to document behavior factually without editorial comments; and,
- Document the behavior and maintain the documentation.



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### MANIFESTATION DETERMINATION REVIEWS

- Get the right people to the meeting
  - ✓ Relevant members of the IEP Team (consider other possible purposes for meeting, e.g., 45 school day IAES, post-expulsion FAPE, where may need actual IEP Team) – **Don't underestimate the importance of the general education teacher at these meetings.**
  - ✓ Know the student
  - ✓ Know the behavior
  - ✓ Know the evaluations and IEP
- Do a thorough record review in preparation
- Teacher observations & parent input



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### MANIFESTATION DETERMINATION REVIEWS

- Ask the right questions!
  - ✓ Was the behavior caused by or directly and substantially related to the student's disability?
  - ✓ Was the behavior caused by the district's failure to implement the IEP (or 504 Plan; also includes BIP)?
- MDR Team **does not** decide discipline.
- MDR Team **does not** decide whether the behavior occurred as reported by administration.

"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



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### Romeo & Juliet

- HS EI/ADHD Student had sex with boyfriend at school
- Alleged that underlying bipolar disorder and impulsivity made her "do it"
- District conducted a thorough investigation
- District able to show pre-planned and multiple decisions along the way – video of incident
- ALJ upheld MDR and found conduct not a manifestation.
- *In re Student with a Disability*, 111 LRP 1818 (SEA MI, 2010).



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### IEE & BIP

- High School ADHD Student assaulted a police officer on campus requiring the response of local police;
- Alleged conduct was a manifestation of underlying depression, anxiety/PTSD, insomnia and/or a speech and language deficit. In addition, alleged failure to implement BIP.
- District conducted thorough investigation. Granted IEE request and reopened IEP and MDR to consider new information.
- District able to show conduct was deliberate disobedience and limit the application of sweeping language contained in the BIP.
- ALJ upheld MDR – not a manifestation.
- *In re Student with a Disability*, (SEA MI, September 2011).



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### IF CONDUCT IS NOT A MANIFESTATION

- May apply relevant disciplinary procedures in the same manner and for the same duration as it would for children without disabilities.
- Have an obligation to provide FAPE.



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### IF CONDUCT IS A MANIFESTATION

- Conduct a functional behavioral assessment ("FBA"), unless one previously done, and/or review/revise a behavior intervention plan ("BIP").
- Student **MUST** return to the placement from which the student was removed, **unless**:
  - The parent and the district agree to a change in placement;
  - Special circumstances exist and district can unilaterally remove student for up to 45 school days;
  - Dangerousness (requires district to seek judicial intervention)



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### Lessons Learned

- Not every inappropriate behavior of a student with a disability is caused by a disability
  - Look for planning activities
  - Assess duration of behavior
  - Assess length of time between antecedent and behavior
- Base determination on identified disabilities, but
  - Make sure no child find violations in past (LD but diagnosed with ADHD and school never evaluated for OHI)
  - If other disabilities alleged
    - o complete MDR, evaluate, reconvene if new disability identified; or,
    - o if you have the time, adjourn MDR, expedite evaluation, convene IEP Team to consider eligibility, and then hold MDR.



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**Manifestation – In re SWD 122 LRP 20812(MISEA Feb 1, 2022)**

- 12 yo eligible under ASD.
- IEP also listed ADHD with violent tendencies, ODD, ASD, Disruptive mood dysregulation disorder and an unspecified insomnia disorder.
- Student requires a 1:1
- Multiple discipline issues for acts of physical and verbal aggression dating back to Kindergarten.
- On Jan. 11, 2021 a Safety Plan was implemented for the Student which identified as "unsafe behavior" as "threatening behavior – by words, gestures or actions threatening staff and/or students with bodily harm."
- The plan provided for 10 steps for staff to follow which included:
  - Attempt to have Student leave room on his own;
  - Evacuate room if unwilling to leave; and,
  - Alert police over phone or walkie-talkie if help is needed.

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**Manifestation – In re SWD 122 LRP 20812(MISEA Feb 1, 2022)**

- On Dec 13, Student became increasingly more agitated after lunch.
- At ~2:30 Student became upset and began swearing at and arguing with staff in a loud voice. Student banged cupboard doors and threatened to punch staff. Student refused to leave the classroom.
- After additional staff arrived, Student became relatively calm and did not yell or use profanity. Staff reported Student was deliberate in his response and was able to talk and answer questions.
- Student then grabbed a pair of safety scissors and threatened to stab staff. He then turned the scissors on himself. After a further exchange, he turned over the scissors.
- Parent was asked to pick the Student up and she took him to the hospital for an evaluation. He was released that evening.

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**Manifestation – In re SWD 122 LRP 20812(MISEA Feb 1, 2022)**

- On Dec 21, 2021, a REED was held that noted the Student's 3 yr was due and contemplated forthcoming evaluations from a court evaluation and noted no further testing was required at that time.
- Following the REED, an MDR was held which concluded the conduct was not a manifestation. The MDR Team noted that a "consensus that this has become a learned behavior for [Student] has [sic] he has shown in the past that he can calm himself down. During this incident, he also paused to think about his next steps and continued to threaten staff."
- Under "Additional Comments" it states that "if the court's psychological evaluation was not going to take place, the team would reconvene to consider further evaluation through the school psychologist."

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**Manifestation – In re SWD 122 LRP 20812(MISEA Feb 1, 2022)**

- "Impulsive behavior is limited to that which occurs in a brief interval and usually involves only a single decision. See *Farin v Maine Sch Adm Dist No 59*, 165 F. Supp 2d 37 (D Me 2001), *Ind Sch Dist No 285, St. Louis Park, Minn v S.D.*, 948 F Supp 860, 873 (D Mn 1995). Here, the proofs establish that Student's behavior shows that he was aware of his choices on this occasion and chose to continue with the misconduct."
- "Petitioner argued that Respondent failed to properly implement the Safety Plan, which was part of Student's IEP. Specifically, Petitioner alleges that Respondent's failure to evacuate the classroom of 15 to 30 students after Student refused to leave kept Student from being able to deescalate. While it is clear from the record that Respondent did not immediately evacuate the classroom, the evacuation did take place when Student grabbed for the scissors."

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**Unilateral IAES**

Available if

- Child carries weapon to/possesses weapon at school, school premises, school function.
- Child knowingly possesses or uses illegal drugs or sells or solicits sale of controlled substance while at school, school premises or school function.
- Has inflicted serious bodily injury at school, school premises, school function.

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**IDEA definition of Weapon**

Definition of "weapon" under IDEA borrowed from 18 USC 930(g) – "dangerous weapon"

- Weapon, device, instrument, material or substance
- Animate or inanimate
- That is used for or is readily capable of
- Causing death or serious bodily injury
- Term does **NOT** include a pocket knife with a blade of less than 2 ½ inches

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### IDEA definition of Drugs

- Controlled substance – drug or other substance identified under the Controlled Substances Act.
- Consult your local pharmacist.
- Does not include a controlled substance that is legally possessed or under the authority of a health care professional.
  - What about Medical Marijuana?



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### Serious Bodily Injury

- IDEA adopts the definition of "serious bodily injury" from the U.S. Criminal Code which defines serious bodily injury as bodily injury which involves substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.
- Most student assaults of another student, teacher or administrator will not meet the definition.

<p><b>Not SBI</b></p> <ul style="list-style-type: none"> <li>• Broken nose;</li> <li>• Swollen knee where Principal did not seek medical attention.</li> <li>• Discomfort, disorientation and pain rated at a 7 out of 10 but returned to work the next day.</li> <li>• Contusions</li> </ul>	<p><b>SBI</b></p> <ul style="list-style-type: none"> <li>• Severe concussion, which included intense headaches, nausea and missed work;</li> <li>• Medical treatment where two drugs failed to provide pain relief and characterized as worst in her life</li> </ul>
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### Services

- Services must be provided to the extent necessary to:
  - Enable the student to participate in the general curriculum, although in another setting, and
  - Progress toward meeting the goals set out in his IEP
- Not required to duplicate exact services student would have received had he or she not been expelled or suspended.

"With regard to classes such as chemistry or auto mechanics that generally are taught using a hands-on component or specialized equipment or facilities...there are a variety of available instructional techniques and program modules that could be used that would enable a child to continue to progress in the general curriculum, although the child is not receiving instruction in the child's normal school or facility."

Fed. Reg., Vol 64, No. 48 (March 12, 1999) at p 12623

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### Appropriateness of Services

- Student, OHI (ADHD) and SLD, was expelled for "30 second fighting," a planned consensual fight that occurred regularly at the school
- MDR Team determined conduct was unrelated to disability and proposed 75 minutes of instruction three days per week.
- ALJ upheld not a manifestation, but held IAES inappropriate. "[The Student is not receiving anything near the educational services that his [IEP] determined he needed and that he was receiving before his expulsion."
- *In re Student with a Disability*, 111 LRP 1872 (SEA MI, 2010).



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### QUESTIONS



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## Thank You



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