

Chapter 11

SUSPENSION AND EXPULSION

What This Chapter Is About

Schools have authority and discretion to suspend or expel students. The consequences differ if the act falls under the state “zero tolerance” law. All students have basic due process rights to notice and an opportunity to be heard when accused of misbehavior.

Students with disabilities have additional rights. A student with disabilities cannot be expelled or suspended for more than 10 days without a “manifestation determination review” (MDR) to see if the conduct was caused by the child’s disability or the school’s failure to implement the Individualized Educational Program (IEP). The burden of proof in this process rests with the parent.

Parents may challenge the MDR’s findings through a hearing. Schools may place students in alternative settings during an appeal, or in situations involving weapons, drugs, or serious physical assault. Students in special education are entitled to receive services still even if they are expelled.

Although schools may report crimes, they cannot shift their responsibility to provide services to students to family court unless they have exhausted all other possibilities.

Advocacy Hints in Chapter 11

- ◆ Pay attention to what part of the law the school is using as a basis for discipline - it can affect your child’s rights in the future (Page 5).
- ◆ If your child is charged with bringing a weapon to school, make sure the “weapon” fits within the legal definition - many don’t (Page 5).
- ◆ Demand formal procedures if your child is placed on “indefinite suspension” (Page 6).
- ◆ Get the school’s Code of Conduct and Board Policies to make sure they are following their own rules in deciding on and handing out punishment (Page 7).
- ◆ Review your child’s IEPs and evaluations and hold the school responsible for addressing problems left unsolved in these documents before agreeing to disciplinary action (Page 8).
- ◆ Ask to meet before 10 days have expired in any suspension or expulsion; even short

suspensions may signal bigger problems ahead (Page 8).

- ◆ Don't rely on what the school calls a removal (Page 9).
- ◆ Look to why your child is being suspended rather than limiting the number of days the school can suspend (Page 10).
- ◆ If your child is suspended from the bus, ask for a related services assessment or alternative transportation (Page 10).
- ◆ You must connect your child's disability to the specific behavior that is the subject of the disciplinary action so you can see if it is being addressed properly by the school (Page 11).
- ◆ If your child is facing discipline, there may be other special education programs or related services which can augment the IEP and stop the offending behavior (Page 11).
- ◆ Use the complaint process if the school is not implementing your child's IEP and causing behavior problems and potential discipline (Page 11).
- ◆ Make sure the manifestation review team is using up-to-date information about your child and request new evaluations if necessary (Page 11).
- ◆ If you disagree with the school's functional behavioral assessment, use the independent educational evaluation (IEE) process to get a second opinion (Page 12).
- ◆ Section 504 also offers some protections in disciplinary removal (Page 12).
- ◆ Know the difference between weapons under state and federal law, and how each law provides for special treatment of students who use weapons (Page 12).
- ◆ Sign in disagreement to the manifestation review IEP if you don't agree; if you leave it unsigned, you are not protecting your rights (Page 14).
- ◆ Use the stay-put provision to negotiate a more appropriate place for your child (Page 15).
- ◆ Always consider developing a behavior plan to prevent behavior issues (Page 15).
- ◆ IDEA protects students who should be in special education (Page 16).
- ◆ Post-expulsion services must be appropriate to the student's needs (Page 17).
- ◆ Use post-expulsion services to negotiate an appropriate alternative setting (Page 17).

- ◆ If your child is referred to the criminal justice system by the school, send a letter to the court stating this is a school matter that should be handled by the school (Page 17).

Discipline of students with disabilities is very complicated. Although there are many forms of “discipline,” this chapter will focus on suspension and expulsion – in particular, on the legal requirements when a student with a disability is suspended from school for more than 10 days or expelled. This chapter will talk about:

- ◆ the school’s power to suspend or expel students from school;
- ◆ the rights of all students to notice of suspension or expulsion and a right to be heard; and,
- ◆ the specific rights of students with disabilities to stay in school when their conduct is related to their disability and to receive appropriate services in all situations.

School’s Power to Suspend or Expel Students

The Michigan Revised School Code defines “suspension” as exclusion from school for disciplinary reasons for fewer than 60 school days. “Expulsion” is exclusion from school for disciplinary reasons for 60 or more school days. **MCL 380.1310d(5).**

A school board, superintendent, principal or other designated school official may suspend or expel any student from school for “gross misdemeanor or persistent disobedience.” The school **has broad discretion** to suspend or expel students when, in its own judgment, “the interest of the school is served” by such an action. **MCL 380.1311(1).**

Schools also have discretion regarding a student who possesses a dangerous weapon, commits arson, or commits criminal sexual conduct in a school building or on school grounds. State law gives schools discretion to expel such students permanently after considering a number of factors (see below). The student can petition for reinstatement after 180 school days (150 days for elementary school students). Such an expulsion extends beyond the student’s district to include all schools in the state except alternative schools or strict discipline academies. The student can escape expulsion for possessing a weapon if the student proves that (a) the “weapon” was not intended for use as a weapon, (b) the student did not know he or she had a weapon, (c) the student did not know the weapon was dangerous, or (d) school personnel or the police encouraged or allowed him or her to keep the weapon. **MCL 380.1311(2).**

Further, state law gives schools the option to permanently expel any student enrolled in grade 6 or above who commits a physical assault *against a school employee or volunteer*, after considering a number of factors (see below). **MCL 380.1311a(1).** The law defines “physical assault” as “intentionally causing or attempting to cause physical harm to another through force or violence.” **MCL 380.1311a(12)(b).** As with the weapons law, the student may petition for reinstatement after 180 school days. Such an expulsion extends beyond the student’s district to include all schools in the state except alternative schools or strict discipline academies.

Another section allows expulsion for physical assaults *against other students*, after considering a number of factors (see below). If a student in grade 6 or above commits a physical assault against another student, the school board “shall expel the pupil from the school district for *up to* 180 days.” **MCL 380.1310(1)**. Unlike the State expulsion laws on weapons and assaults on staff, an expulsion for an assault against another student does not expel the student from all school districts in the State.

Finally, state law authorizes expulsion for up to 180 school days if a student in grade 6 or above commits a “verbal assault, as defined by school board policy” against an employee or volunteer of the school or if the student “makes a bomb threat or similar threat directed at a school building, other school property, or a school-related event.” **MCL 380.1311a(2)**. This provision, like the assault-against-student law discussed above, gives the local school discretion as to the length of the expulsion, and requires consideration of the same factors (below), prior to taking any action. A Federal court decision found this provision to be an unconstitutional violation of the First Amendment’s freedom of speech. **Smith v. Mt. Pleasant Public Schools, 285 F.Supp.2d 987 (E.D.Mich. 2003)**.

2016 Changes to Mandatory Expulsion Law: The Michigan Legislature made significant changes to the mandatory expulsion law in 2016. These changes are in effect beginning with the 2017-18 school year.

- ◆ Mandatory expulsion is no longer mandatory. Schools now have discretion to suspend or expel students even for violations of the mandatory expulsion sections of the Revised School Code. **MCL 380.1310d(1)**.
- ◆ Under new **Section 380.1310d**, a school must consider a student’s age, history, disability, seriousness of violation, threat to safety, use of restorative practices, and use of less drastic interventions before suspending or expelling a student. Under the same section, the school faces a rebuttable presumption in favor of keeping a child in school if the school wants to suspend or expel the student for more than 10 days, except when firearms are involved.
- ◆ Under **Section 380.1310c** of the Revised School Code, a school must consider the possible use of balanced and restorative justice (BARJ) before suspending or expelling a student. According to the Michigan Department of Education website, “restorative justice ... assumes that misconduct and conflict injure those directly involved (victims and offenders) as well as the broader community to which they belong. Rather than relying on punishment, restorative justice expects those who cause injuries to make things right with those they have harmed and with their community.”
http://www.michigan.gov/mde/0,4615,7-140-74638_72831_72833-361320--,00.html#one

► **Advocacy Hint: The numbers matter.** Pay attention to what part of the law the school is using as a basis for discipline – it can affect your child’s rights in the future. Even though the mandatory elements of expulsion have been relaxed, a student fares much better under a voluntary expulsion than under a mandatory expulsion because the scope of the expulsion order is narrower under a voluntary expulsion.

Note: The federal Gun-Free Schools Act, **20 USC 7961**, still requires schools to expel for at least 180 school days students who bring weapons to school.

► **Advocacy Hint: Is it a weapon?** A “dangerous weapon” is defined specifically in **MCL 380.1313**. A student should not be expelled automatically for using something that is not a weapon under that law. For example, most small pocket knives with blades shorter than three inches are not “weapons” under the law, so the school is not required to expel someone for having such a knife. Remember, though, that the school has the *discretion* to expel a child in such cases if it serves the interest of the school.

The Individuals with Disabilities Education Act (IDEA) also has special provision for weapons offenses (see below), and the federal definition of “weapon” is broader than Michigan’s. For example, a student who uses any dangerous instrument – not just knives or guns – can be placed in a 45-day alternative setting at the school’s discretion.

Due Process for All Students

In no case can the school suspend or expel a student without due process. Due process is defined in the Federal and State Constitutions to require adequate **notice** of the charges pending against a student, and an **opportunity to be heard** and to refute the charges.

The school must give a student who has been suspended ten days or less oral, or written notice of the charges and, if the student denies the charges, a chance to explain his or her side of the story. This informal “notice and opportunity to be heard” can be granted within minutes of alleged misconduct by the person making the suspension and can consist of an “informal give and take” between the student and the school official. For example:

Principal Smith accuses John of disobeying Teacher Jones and asks, “Did you do it?” John says no. Principal Smith says, “I don’t believe you. You’re suspended for three days.” This conversation satisfies the minimal due process for short-term suspension.

In most cases, informal due process should be provided before the suspension takes effect, but if a student poses a continuing danger or threat of disruption, it can be granted after the student is suspended. **Goss v. Lopez, 419 US 565, 95 S.Ct 729 (1975).**

The Supreme Court in **Goss v. Lopez** suggested that “more formal procedures” would be required for suspensions longer than 10 days. Other courts have found that such “formal procedures” may include a written notice specifying the charges against the student and an opportunity to contest these charges before an impartial decision-maker, such as the school board. **Darby v. School, 544 F. Supp. 428 (W.D.Mi. 1982); Birdsey v. Grand Blanc Community Schools, 130 Mich. App. 718, 344 N.W.2d 342 (1983).**

► **Advocacy Hint: Indefinite suspensions can cross the line.** The 10-day rule is important to keep in mind. Beware of indefinite suspensions as they may result in suspensions beyond 10 days without formal protections. If the student is kept out of school for more than 10 days, this is the trigger for protections, regardless of what the school calls the action. For example, a few school districts make suspensions longer by requiring students to make an appointment to see the district administrative staff or get a clearance from a doctor or therapist before returning to school. This practice often stretches a two-day suspension into a week or more. This becomes illegal if it results in a suspension for more than 10 school days without formal procedures.

Using the Student Code of Conduct. Almost all school districts have developed a Student Code of Conduct based on board policies, which will generally describe the offenses which can lead to suspension or expulsion and sets up notice and hearing requirements. Many Codes of Conduct also attempt to set up special procedures to assure that the statutory rights of students with disabilities are also protected. The Code of Conduct should be consistent with school policies, which are often available for review on the district’s website. Board policies should also be in agreement with the law.

► **Advocacy Hint: Get the Code of Conduct booklet and review board policies.** Anyone dealing with a school suspension or expulsion case **MUST** get a copy of the school district’s Code of Conduct, which is a public record available to anyone under the Freedom of Information Act or informally from the school office or on the district’s website. It is important to study this Code to see if the offense the student is charged with is subject to long-term suspension or expulsion, as well as to find information about the student’s right to a formal hearing. The policies and procedures adopted by the board will provide additional information that can help ensure the student has access to all rights related to due process in removal.

What to expect at a school board hearing. At a school board hearing, the student has the right to present his or her side of the story and to call and cross-examine witnesses. The student must also be permitted the assistance of a lawyer in major disciplinary hearings. **Carey v. Maine School Administrative District No. 17, 754 F. Supp.906 (D. Me. 1990).**

After hearing the evidence, the board will decide whether the offense has been proved and, if it has, what the punishment should be. Often, the specific punishment for such an offense may be listed in the Code of Conduct, and the board may be limited to such a punishment.

Decisions by the school board can be appealed to court, but courts have traditionally given schools much discretion in such matters and may be required to uphold the school's findings if supported by substantial evidence. **Birdsey v. Grand Blanc Community Schools, 130 Mich.App. 718, 344 N.W.2d 342 (1983).**

Petition for reinstatement. If a student is expelled under the mandatory provisions of the School Code, the student may seek reinstatement by filing a petition. **MCL 380.1311(5).** A student who was in or below fifth grade when expelled must wait 60 school days before filing a petition; a student who was above fifth grade when expelled must wait 150 school days before filing one. **MCL 380.1311(5)(a).**

The school must provide a form for filing a petition but need not offer any other assistance. **MCL 380.1311(5)(c).** Within 10 school days after the petition is filed, the school board must convene a committee made up of school board members, a teacher, an administrator, and a parent of another student in the district to review the petition. **MCL 380.1311(5)(d).**

The committee reviews the petition and makes a recommendation, taking into account:

- ◆ the risk of harm to other students if reinstatement occurs;
- ◆ the risk of individual or school district liability;
- ◆ the age and maturity of the student;
- ◆ the student's school record before he or she was expelled;
- ◆ the student's attitude toward the incident that caused the expulsion;
- ◆ the student's behavior since the expulsion; and
- ◆ the degree of cooperation by the student's parents. **MCL 380.1311(5)(e).**

The school board must review the committee's recommendation no later than the next regularly scheduled board meeting and either grant or deny the petition. **MCL 380.1311(5)(f).** If a student is reinstated, the school may require the student and parents to agree in writing to specific conditions for returning, such as a behavior contract, anger management, or counseling. **MCL 380.1311(5)(g).**

Due Process Protections for Students with Disabilities

A school may suspend or expel any student, and in some limited cases must do so. All students are entitled to due process, which includes notice and an opportunity to contest the charges, in different measures depending on the length of the suspension or expulsion.

Students with disabilities have additional due process protections. Why? Prior to 1975, when IDEA was first enacted into law, over a million students with disabilities were excluded from school under

the school's discretionary authority to suspend or expel students when the school's best interest was served. The mass exclusion of such students is in direct conflict with IDEA, which mandates that students with disabilities be allowed to attend school. The additional protections for students with disabilities exist to ensure that IDEA is implemented properly and so students are not excluded because of their disability status.

Before examining the due process protections for students in special education, two points of further introduction may be helpful.

First and foremost, ***schools have a duty to prevent problems which may lead to suspension or expulsion of students in special education.*** The 1997 and 2004 amendments to IDEA repeatedly speak to the need for behavioral support plans (BSPs) to prevent misbehavior which can result in discipline. Any time that a student with a disability is proposed to be expelled or subjected to a long-term suspension from school, ask whether the school district has complied with IDEA and taken adequate steps to prevent the misbehavior from occurring.

► **Advocacy Hint: Hindsight is 20/20.** If a student is facing expulsion, the parent/advocate should examine the student's recent evaluations and IEPs and, if necessary, make the school go back and address the problems it identified (or should have identified) but left alone before using discipline. Was the student demonstrating behavioral problems? If so, were there behavioral goals and objectives in his or her IEP? Were there services such as social work, counseling, and/or a behavior intervention plan provided for to address these goals? Did the behavior intervention plan focus on positive behavior supports, as preferred by the IDEA? Was the behavior intervention plan and/or IEP implemented consistently? Did the team reconvene to address a lack of behavioral progress? It may be clear, in retrospect, that more should have been done. This may serve as a basis of discussion-- both for IEP planning, and in terms of the considerations that are now required.

► **Advocacy Hint: Meet sooner rather than later.** Even though the legal protections are not triggered until the student is out of school for 10 days, a short-term suspension may signal the need to adjust the student's program. A parent can request an IEP Team meeting or a Functional Behavior Assessment to address the issues even if there is no legal requirement to convene a manifestation determination review.

Second, ***short-term suspensions do not trigger special education protections.*** The student's special education rights are not triggered unless the suspension becomes a "change in placement," which the IDEA and courts have defined as a 10-day exclusion from school. Remember, though, that all

students have some basic due process rights – informal notice and an opportunity to be heard – even if they are suspended for fewer than 10 days.

How are the 10 days counted? What if a student is subjected to series of 3 or 5 day suspensions (“serial suspensions”)? What if the student is not formally expelled but is sent home frequently or placed in in-school suspension? The answers to such questions are not always clear, but the law does provide some answers.

Serial Suspensions. With respect to serial suspensions, IDEA procedural protections apply if:

- ◆ The removal is for more than 10 consecutive school days; or
- ◆ The student is subjected to a series of removals that constitute a pattern because they add up to more than 10 school days in a school year, because the student’s behavior is substantially similar during each incident resulting in removal, and because of factors such as the length of each removal, the total time the student is removed, and the proximity of the removals. **34 CFR 300.536.**

For example, a student who is suspended for 5 days in September, 7 days in October, and 5 days in November, is probably entitled to a manifestation review, whereas a student who is suspended for 5 days in November, then 7 days in May is probably not. Another approach is to count the total number of school days which the student has been out of school. If, for example, the student has been out for 42 days, it would be hard to argue that this is not a long-term suspension.

Note: Some educators interpret the law as allowing for an additional 10 days of suspension if a new Individualized Education Program Team (IEP Team) is called. The belief is that the school can suspend freely for up to 10 days during the time a specific IEP is in effect, which may be for less than one school year. Of course, this position is susceptible to abuse, as it would circumvent the law for a school to call repeatedly for new IEPs in order to allow additional days of suspension.

► **Advocacy Hint: A suspension by any other name is still a suspension.** If the decision to remove the child has been made by the school, it doesn’t matter what the school calls it, it counts as a suspension. So, for example, if a parent is called to pick the child up and take him or her home for the remainder of the day, that is not an absence, it is a suspension. Even informal and improperly documented removals must be included in determining when a series of removals becomes a change of placement.

► **Advocacy Hint: Get to the root of the problem.** When parents ask how many days their children may be suspended, they often do so as a way of stopping any future suspensions. Issues often arise when the school must hold an IEP Team meeting rather than addressing how to stop the suspensions from occurring. It may work better to ask *why* the student is being suspended, get appropriate evaluations, and develop a good behavior plan. The structure of schools is such that suspension is the only “punishment” available, and schools will resist efforts to limit their ability to impose it.

Constructive Expulsion. When a student has not been formally suspended or expelled but has still been kept out of school for more than 10 days (including the sum total of in-school suspensions, days the student is sent home or parents are called to pick the student up, and other practices where the student, for one reason or another, is not allowed to attend school), it is helpful to think of such actions as “constructive expulsions.” This means that the student has not been properly expelled but is still not allowed to attend school. See **Darby v Schoo, 544 F. Supp. 428 (W.D.Mich. 1982)**. The comments to the IDEA regulations state that a student is excluded from school whenever s/he is denied FAPE, whether or not s/he is in the school building or out. An in-school suspension, then, counts as a suspension if the student does not receive Free Appropriate Public Education (FAPE) while in school (for example, if the student is confined to a time-out room with an aide). **71 Fed.Reg. 46715 (8/13/06)**.

► **Advocacy Hint: Suspended from the bus, not from school.** A suspension from the bus for more than 10 days can also be a constructive expulsion if there is no other way for the student to get to school. Suspension from general transportation (such as the school bus with other students without disabilities) may be a sign that the student needs specialized transportation as a related service. Suspension from specialized transportation (provided as a “related service” through a student’s IEP) triggers the school’s duty to find another way to get the student to school. See **71 Fed. Reg. 46715 (8/13/06)**. For more about transportation, see Chapter 2, “Special Education Services and Supports.”

The Manifestation Review

In addition to due process rights afforded all students, students with disabilities are also protected by strong procedural requirements developed under the IDEA and Section 504. The heart of this process is the **manifestation determination review** (often abbreviated as “MDR”).

The manifestation review is a process in which an IEP team decides whether or not the behavior that is the subject of discipline is related to the student’s disability and whether or not the school did what was written in the IEP to keep the behavior from happening. Specifically, the team decides:

- ◆ Whether or not the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or

- ◆ Whether or not the conduct in question was the direct result of the school's failure to implement the IEP. **34 CFR 300.530(e).**

► **Advocacy Hint: Be specific.** You must connect your child's disability to the specific behavior that is the subject of the disciplinary action so you can see if it is being addressed properly by the school. Make sure the behavior leading to disciplinary action is clearly described, rather than simply noting what part of the Code of Conduct has been violated.

► **Advocacy Hint: Look at different services.** Remember, a student in special education is entitled to the full range of services, not just those in his or her disability classification. You also can request related services.

► **Advocacy Hint: Use the complaint process.** Don't forget that if the school is not implementing your child's IEP, you can file a complaint. See Chapter 8, "Problem Solving and Complaints." Behavior plans in particular can be complicated, calling for a variety of responses to a variety of behavioral problems. This can be even more difficult when the Behavior Support Plan (BSP) must be implemented in several classrooms and other settings, as in a departmentalized middle or high school, and are often changing. As a result, there may be instances where a particular staff person fails to implement the specified response to a behavior. Such problems in consistent implementation of the BSP may not only give rise to a complaint, but also may support a finding that the misconduct was a manifestation of the student's disability.

Information to consider. The IEP Team must consider "all relevant information" related to the behavior that is the subject of discipline. That information includes evaluation and diagnostic results, information supplied by the parents, observations, and the current IEP and placement. The manifestation review cannot limit its consideration to only the student's category of eligibility.

► **Advocacy Hint: Update the IEP.** If your child has not been evaluated recently, ask for updated evaluations before the IEP Team conducts the manifestation review. IDEA allows for reevaluation more frequently than every three years if conditions warrant a reevaluation or a parent or teacher requests such. **34 CFR 300.303.** IDEA requires agreement between parent and school to conduct evaluations more than once a year.

► **Advocacy Hint: Challenge the assessment.** Remember, if you do not agree with the functional behavior assessment, you can request an independent educational evaluation (IEE) at public expense. See Chapter 4, “Evaluations,” for more information.

► **Advocacy Hint: Section 504 Rights.** While a student with a Section 504 Plan does not have the same clearly delineated procedures for a manifestation review, he or she is entitled to an evaluation, prior to any significant change in placement. The school district may meet that requirement through holding a manifestation determination review meeting and should provide parents with a copy of the procedural safeguards under Section 504 at that time, as well.

Alternative placement during the manifestation review. During the manifestation review, a student may be placed in an interim alternative educational setting in any one of the following five situations:

- ◆ The school and parents may agree on an alternative placement through the IEP process.
- ◆ School officials may move a student to an appropriate alternative educational setting for up to 45 school days if the student brings a weapon to school, uses, sells or possesses illegal drugs at school, or inflicts serious bodily injury upon another person at school. **34 CFR 300.530(g).** A parent can appeal this placement (see “Challenging Manifestation Reviews” below).
- ◆ During an appeal of a finding that a student’s behavior is not a manifestation of his or her disability, the student may be moved to an interim alternative educational setting. **34 CFR 300.533.**
- ◆ A hearing officer may order that a student be moved to an alternative educational setting for up to 45 school days if the hearing officer finds that keeping the student in the present placement “is substantially likely to result in injury to the child or others.” **34 CFR 300.532(b).**
- ◆ A court may order removal of a student from school if the student poses an imminent danger to self or others.

► **Advocacy Hint: Federal weapons and state weapons are different.** This is one of two school rules related to weapons. Remember, state law urges school districts to expel students (whether in general or special education) in many circumstances when they bring weapons, commit arson, or commit criminal sexual conduct at school. This law is subject to due process protections for all students and additional protections for special education students. State law defines “weapon” to include a firearm, dagger, dirk, stiletto, switchblade, iron bar, brass knuckles, or a pocketknife with a blade 3 inches or longer. **MCL 380.1313.**

Federal law allows school districts to place students in special education into an alternative setting for up to 45 days if they bring a weapon to school, possess, uses or sells drugs at school, or inflicts serious bodily injury on a person at school. Federal law defines “weapon” to include a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, but not including a pocket knife with a blade of less than 2 ½ inches in length. **18 USC 930(g)(2)**.

Interim alternative educational settings must continue to provide services and supports to enable students with disabilities to participate in the general education curriculum and to progress toward meeting IEP goals. **34 CFR 300.530(d)**.

Relationship to prior manifestation reviews. What happens if a manifestation review is the latest in a series of meetings which have failed to address conduct that is the subject of discipline? For example, a student is suspended for 10 days for talking back to a teacher. The IEP Team meets at the end of 10 days and discusses some approaches to solving the problem but makes few changes in the student’s program. Shortly thereafter, the student is suspended again, the team meets again and does the same thing, and on and on.

To address this problem, look to the IEP goals, behavior plan, and services and supports offered to make sure they are appropriate, challenging them when necessary. When addressing behavioral needs, it is important to ensure that a student’s IEP describes the student’s needs, and the services and supports to meet them, as completely and accurately as possible. This review should, if possible, happen early and often, before a discipline problem rises to the level where a manifestation review is necessary.

Assuming that a student’s IEP is complete and accurate, IDEA does not allow schools to expel students with disabilities when the conduct in question is caused by failure to implement the IEP.

In the situation where a student is subjected to constant reviews with little progress, look at IEP implementation as an issue to use in preventing discipline problems from becoming more serious, and as a basis to improve the student’s program if there is behavior which leads to discipline.

Challenging the Manifestation Review

One way to challenge the manifestation review finding indirectly is to request independent educational evaluations (IEEs). You can ask for an IEE if you do not agree with the functional behavioral assessment, or if you request updated evaluations and do not agree with them.

A parent may disagree with any finding made by the school or IEP Team during the manifestation review process by signing in disagreement with the manifestation review and requesting a due process hearing. **20 USC 1415(k)(3); 34 CFR 300.532(a)**. IDEA now requires a person requesting a hearing to file a due process hearing notice in order to start the hearing process.

► **Advocacy Hint: Sign here in disagreement.** Just like with an IEP, refusing to sign a manifestation review has no legal effect; the school can implement the program despite your silence. In order to assert your right to challenge the team’s finding, you have to sign in *disagreement* AND request a hearing by filing a due process hearing notice.

The importance of “stay put.” See Chapter 8, “Problem Solving and Complaints,” for more explanation of the “stay-put” concept, which requires that a student stay in his or her present placement pending the outcome of an appeal. “Stay put” gets complicated when a student is subject to suspension or expulsion.

Generally, a student will remain in the placement last agreed upon by the parents and the school. If the school tries to expel a student and the parent files a hearing request, the student will stay in school pending the outcome of the hearing. During the hearing, the school may move the student to an interim alternative educational setting.

The following scenarios may prove helpful in understanding the importance of stay-put. John, a student in special education, commits misconduct, and the school administration recommends that he be expelled.

- ◆ John can be suspended for up to 10 days, during which time the school must send a due process notice and set up a school board hearing if John denies the misconduct.
- ◆ In the meantime, because of John’s special education status, the school must also set up a manifestation review to determine if John’s misconduct was a manifestation of his disability.

<i>What if...</i>	<i>Then...</i>
The manifestation review team finds that John’s misconduct <i>was</i> a manifestation of his disability.	The school board may not expel John; he must be placed in an appropriate program.
The manifestation review team finds that John’s misconduct <i>was not</i> a manifestation of his disability. John’s parents fail to request a due process hearing.	The stay put provision is not triggered because there is no appeal. The school board may meet and expel John from school.
The manifestation review team decides that John’s misconduct <i>was not</i> a manifestation of his disability, but John’s parents file a due process hearing notice to challenge the decision before the school board meets.	This triggers stay put provision and the school board cannot expel John. Instead, John must return to school, the school may move John to an interim setting, or the school must take further legal action to keep John out of school.

The timing of events can be crucial. In order to remain in school under the stay-put provision, there must be an appeal of the manifestation review team’s decision that the misconduct is not a manifestation of disability *before* the school board acts to finalize the expulsion. If, for example,

John's parents wait until March 10, after John was already expelled on March 9, the school may argue that John's "current placement" for purposes of stay put is expulsion! (**Note:** Even if the parent fails to appeal the manifestation IEP until *after* the expulsion order is issued by the school board, there are sound arguments that stay-put should not consist of the status of the expulsion. The parent may not have had adequate notice about the various proceedings, or the 10 days may have elapsed way before the school board expelled the student. In any event, the student is entitled to receive post-expulsion services which are sufficient to provide a free appropriate public education. See "Right to Post-Expulsion Services," below.

► **Advocacy Hint: Negotiate.** The stay-put provision gives parents and advocates for students some leverage in negotiating an alternative placement or program for a student who is subject to discipline for behavior in an existing program. An alternative placement may be preferable in such situations because (1) if the student is having behavior problems, the current placement probably is not working, and (2) finding a mutually agreeable alternative improves the chances that school staff will cooperate with the program.

MDRs and Behavior Support Plans (BSPs): IDEA recognizes the need for a behavior support plan (sometimes known as a behavior intervention plan or BIP) in its provisions governing suspension and expulsion. For example, when the IEP Team considers whether a student's misconduct was a manifestation of his or her disability, it must determine whether the conduct was the direct result of the school's failure to implement the IEP. **34 CFR 300.530(e)**. If it is determined that the behavioral strategies were *not* provided consistent with the student's IEP, then the behavior must be considered to be a manifestation of the student's disability, and the student cannot be expelled. In addition, if the behavior is a manifestation of the student's disability, a functional behavior assessment and BSP must be created or modified to address the behavior in question. **34 CFR 300.530(f)**.

► **Advocacy Hint: Connect a behavior plan to the IEP.** *Whenever* behavior interferes with learning, the IEP Team must consider positive behavior supports. The possibility of discipline including removal to an alternative setting makes it extremely important that a comprehensive BSP be developed and included as part of any student's IEP. Then if the school fails to adhere to that BSP and the student engages in behavior because of that failure, the parent/advocate can argue that the behavior was a manifestation of the student's disability and discipline should not be imposed under the school's general discipline policy.

Students Not Yet Identified as Students with Disabilities

Students who have not yet been found eligible for special education are nevertheless protected by the IDEA (including manifestation review, stay-put, etc.) in three distinct circumstances. Specifically, a school shall be deemed to have knowledge that a student is a student with a disability if, before the behavior occurs:

- ◆ the parent of the student has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to supervisory or administrative personnel of the appropriate educational agency, or the student's teacher, that the student is in need of special education and related services;
 - ◆ the parent of the student has requested an evaluation of the student; or
 - ◆ the teacher of the student, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the student directly to the director of special education of such agency or to other supervisory personnel in the agency.
- 34 CFR 300.534(b).**

► **Advocacy Hint: No sweeping problem students under the rug.** This provision is critical to students whose parents or advocates have sought special education services over time without success. Schools can no longer ignore requests for special education services from "troublesome" students.

There are two important exceptions to this. First, schools are not deemed to have knowledge that a student has a disability if parents refuse to consent to evaluations. Second, schools are not deemed to have knowledge that a student has a disability if the school has evaluated the student for services and found him or her ineligible. **34 CFR 300.534(c).**

Right to Post-Expulsion Services

If a student in special education is expelled, the school must still serve him or her. Under IDEA, schools must provide:

A free appropriate public education ... to all students with disabilities ..., including students with disabilities who have been suspended or expelled from school. **20 USC 1412(a)(1)(A).**

Post-expulsion services, like any other program of free appropriate public education, must:

- ◆ Meet the standards of the state educational agency, including the standard for minimum hours and school days. **MCL 380.1284; MCL 388.1606(4)(u).**
- ◆ Include an appropriate school education (not just limited to the hours spent in special education, but including general curriculum instruction); and,
- ◆ Be provided in conformity with the IEP (meaning the IEP Team, not school administration, determines the alternative placement, and parents or students can appeal adverse decisions). **20 USC 1401(9).**

► **Advocacy Hint: Appropriate in all instances.** Although the school may choose the setting in which to educate an expelled special education student, the setting must meet the standards of the state and provide appropriate services in conformance with the IEP.

► **Advocacy Hint: Negotiate again.** Like stay-put, the post-expulsion education provision gives parents and advocates some leverage in negotiating an alternative placement or program for a student who is subject to discipline for behavior in an existing program. An alternative placement may be preferable in such situations because (1) if the student is having behavior problems, the current placement probably is not working, and (2) finding a mutually agreeable alternative improves the chances that school staff will cooperate with the program.

The Role of Family Court

IDEA does not prevent schools from reporting crimes: An agency reporting a crime committed by a student with a disability shall ensure that copies of the special education and disciplinary records of the student are transmitted for consideration by the appropriate authorities to whom it reports the crime. **34 CFR 300.535.**

The school must still comply with confidentiality requirements set forth in the Family Educational Rights and Privacy Act (FERPA) and implementing regulations. **34 CFR 300.535(b)(2).** Furthermore, the authorities to whom the records are disclosed shall certify in writing that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student. **34 CFR 99.38.**

Although the school may report crimes to family court, the school still has a responsibility to provide special education and related services to the student. The school also may not make a referral to juvenile court under the “truancy” provision of state law until it has found that there are no alternative educational programs for the student. **Morgan v. Chris L., 927 F.Supp. 267 (E.D.Tenn. 1994).** A delinquency petition must be preceded by a meeting to reach educational solutions to problem behavior. **MCL 712A.2(a)(4); Flint Board of Education v. Williams, 88 Mich.App. 8, 276 N.W.2d 499 (Mich.App. 1979).**

► **Advocacy Hint: Send a letter to the court.** If your child is referred to the criminal justice system by his or her school, you can send a letter to the judge, prosecuting attorney, and/or court referee assigned to the case to let them know that your child has a disability and that this is a school matter that should be handled by the school, instead of being heard by the court. **See Appendix 13-1** for an example.

Preventing Behavior Problems Before They Occur

The prevention theme is imbedded in every area of special education law, including the evaluation and IEP Team process, the preference for placement in general education, the training of personnel, and the role of other agencies with behavioral expertise or resources. For example, IDEA requires that the IEP Team consider “appropriate strategies, including positive behavioral supports, strategies, and supports,” whenever a student’s behavior “impedes his or her learning or that of others.” **34 CFR 300.324(a)(2)(i)**. Further, IDEA continues to recognize that behavior support planning is a related service, through school social work and school psychologist services, among others. **34 CFR 300.34(c)(10), (c)(14)**. Finally, since 1997, IDEA has interwoven the focus on positive behavioral supports with an increased emphasis on a student’s ability to participate in the general curriculum. Accordingly, any IEP should act to prevent problems before they arise, using positive behavior support and other tools.

A BSP is only as good as the data that supports it. Whenever a student’s behavior has become an issue, data should be collected by school staff through a functional behavior assessment (FBA). A comprehensive FBA by a skilled evaluator identifies the consequences to maintaining behaviors and the contexts in which those behaviors reflect antecedents and setting events. An FBA should be revised as needed. Data that show the effect of a selected support determine the need to revise the BSP.

There are many positive outcomes that can result from IEP teams effectively conducting functional behavior assessments under the appropriate circumstances. These include enabling the student to derive meaningful benefit from the IEP through skill development and reduction in problem behavior, providing staff with positive approaches to short and long term support with the student across circumstances and settings, and more effectively integrating relevant information about the student and contributing factors with problem behavior from a variety of sources.

See **Appendix 11-3** for resources on positive behavior support.

Appendix 11-1

Letter to Court Requesting Dismissal of Criminal Case Against Student

(Be sure to keep a copy for your records)

(Date)

Honorable (Judge's Name)

(Address of court)

RE: (Student's Name) - (Case No.); (Petition No.)

Dear Judge (Judge's Name),

I am the parent of (student's name), who has been charged with (list charges against student) as a result of a behavior incident occurring at (name of school) on (date of incident). I am writing to respectfully explain why the matter before you should be considered a school discipline issue that should be addressed by the school district rather than the juvenile court.

(Student's name) is an (age)-year-old a student with disabilities. (He/She) has been diagnosed with (list student's diagnosed disabilities). (Name of school district) has found (student's name) eligible for special education. As a result of this finding, the school district has specific legal requirements to do further planning to provide support and services for (student's name's) behavior.

(Student's name) is a student who wants to do well in school, but whose behaviors, combined with the school district's lack of appropriate interventions, have held (him/her) back from succeeding. (Explain how school district is failing to support the student, for example: The school district's behavior plan is lacking in effective strategies to reduce or eliminate problem behaviors that are caused by (student's name)'s disability, as evidenced by the incident that led to this proceeding.) This is not a case where the student cannot learn how to behave appropriately, but one where the school district does not know how to teach (him/her).

This is a special education issue that should be addressed by the school district and not placed as a burden upon the court to develop a program of services for (student's name). Pursuant to the Individuals with Disabilities Education Act (IDEA) and the Michigan Administrative Rules for Special Education (MARSE), the school district must adopt its own plan that properly addresses disability-related behavior issues and develops strategies to prevent such behavior from occurring or escalating to the point where the police become involved. The provision of appropriate services through the school system is the most sensible approach for everyone involved and a fairer result than involving (student's name) in the juvenile justice system and the school-to-prison pipeline.

For these reasons, I respectfully request that you dismiss this delinquency proceeding, and thereby shift the obligation back to the school district to fulfill its responsibilities under federal and state law. Alternatively, I ask that you order a continuance in this matter while we attempt to resolve the special education issues described above.

Thank you for your consideration of this important issue.

Sincerely,

(Your Name)

(Your Address)

(Your Telephone Number)

Cc: Prosecutor
Court Referee

Appendix 11-2

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

August 1, 2016

Dear Colleague:

The U.S. Department of Education (Department) is committed to ensuring that all children with disabilities have meaningful access to a State's challenging academic content standards that prepare them for college and careers. Consistent with these goals, the Individuals with Disabilities Education Act (IDEA) entitles each eligible child with a disability to a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet the child's unique needs.¹ 20 U.S.C. §§1412(a)(1) and 1400(d)(1)(A). Under the IDEA, the primary vehicle for providing FAPE is through an appropriately developed individualized education program (IEP) that is based on the individual needs of the child. 34 CFR §§300.17 and 300.320-300.324. In the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider –and, when necessary to provide FAPE, include in the IEP –the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 CFR §§300.324(a)(2)(i) and (b)(2); and 300.320(a)(4).

The Department has determined that this letter is significant guidance under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

See www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf.

Significant guidance is non-binding and does not create or impose new legal requirements. The Department is issuing this letter to provide LEAs and other responsible public agencies with information to assist them in meeting their obligations under the IDEA and its implementing regulations.

If you are interested in commenting on this letter, please email us your comment at iepgoals@ed.gov or contact Lisa Pagano at 202-245-7413 or Lisa.Pagano@ed.gov. For further information about the Department's guidance processes, please visit www2.ed.gov/policy/gen/guid/significant-guidance.html.

Recent data on short-term disciplinary removals from the current placement strongly suggest that many children with disabilities may not be receiving appropriate behavioral interventions and supports, and other strategies, in their IEPs.² During the 2013-2014 school

¹While this letter focuses on requirements under the IDEA relating to FAPE in the least restrictive environment, students with disabilities also have rights under two civil rights laws that prohibit discrimination on the basis of disability—Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act (Title II). The Office for Civil Rights (OCR) in the U.S. Department of Education enforces Section 504 in public elementary and secondary schools. Also, in this context, OCR shares in the enforcement of Title II with the U.S. Department of Justice. More information about these laws is available at: www.ed.gov/ocr and www.ada.gov.

² For purposes of this letter, we use “behavioral supports” to generally refer to behavioral interventions and supports, and other strategies to address behavior.

year, 10 percent of all children with disabilities, ages 3 through 21, were subject to a disciplinary removal of 10 school days or less, with children of color with disabilities facing higher rates of removal.³ For instance, nineteen percent of black children with disabilities, ages 3 through 21, were subject to a

removal of 10 school days or less within a single school year.⁴ In light of research about the detrimental impacts of disciplinary removals,⁵ including short-term disciplinary removals, the Department is issuing this guidance to clarify that schools, charter schools, and educational programs in juvenile correctional facilities must provide appropriate behavioral supports to children with disabilities who require such supports in order to receive FAPE and placement in the least restrictive environment (LRE). As a practical matter, providing appropriate behavioral supports helps to ensure that children with disabilities are best able to access and benefit from instruction.

The IDEA authorizes school personnel to implement a short-term disciplinary removal from the current placement, such as an out-of-school suspension, for a child with a disability who violates a code of student conduct. 34 CFR §300.530(b)(1). The Department strongly supports child and school safety, and this letter is not intended to limit the appropriate use of disciplinary removals that are necessary to protect children. Rather, the letter is a part of the Department's broader work to encourage school environments that are safe, supportive, and conducive to teaching and learning, where educators actively prevent the need for short-term disciplinary removals by effectively supporting and responding to behavior.^{6,7} In keeping with this goal, this letter serves to remind school personnel that the authority to implement disciplinary removals does not negate their obligation to consider the implications of the child's behavioral needs, and the effects of the use of suspensions (and other short-term removals) when ensuring the provision of FAPE.⁸

Additionally, this letter provides alternatives to disciplinary removal which schools can apply instead of exclusionary disciplinary measures. We are issuing this guidance to clarify that the failure to consider and provide for needed behavioral supports through the IEP

³ U.S. Department of Education, ED Facts Data Warehouse (EDW), OMB #1875-0240: "IDEA Part B Discipline Collection," 2014.

⁴ Id.

⁵ Council of State Governments Justice Center and the Public Policy Research Institute. (2011). Breaking schools' rules: a statewide study of how school discipline relates to students' success and juvenile justice involvement. Available at https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf

⁶ "The Act and the regulations recognize that school officials need some reasonable degree of flexibility when disciplining children with disabilities who violate a code of student conduct. Interrupting a child's participation in education for up to 10 school days over the course of a school year, when necessary and appropriate to the circumstances, does not impose an unreasonable limitation on a child with a disability's right to FAPE." 71 Fed. Reg. 46717 (Aug. 14, 2006).

⁷ More about the Department's work is available at www.ed.gov/rethinkdiscipline

⁸ This letter does not address the obligations of school personnel following a disciplinary change in placement, including obligations to provide behavioral supports. This letter is intended to supplement the June 2009 Questions and Answers on Discipline Procedures (as revised) from OSERS, which provided guidance on discipline policies for school-age children to personnel in State educational agencies (SEAs) and local educational agencies (LEAs), and parents. Further, as the obligations of school personnel covered in this letter also apply to school personnel serving children with disabilities in juvenile correctional facilities, this letter is also intended to supplement the December 5, 2014 OSERS Dear Colleague Letter on the Individuals with Disabilities Education Act requirements that apply to the education of students with disabilities in correctional facilities. The June 2009 guidance can be found at http://idea.ed.gov/object/fileDownload/model/QaCorner/field/PdfFile/primary_key/7 and the December 5, 2014 letter can be found at <http://www2.ed.gov/policy/gen/guid/correctional-education/index.html>

process is likely to result in a child not receiving a meaningful educational benefit or FAPE. In addition, a failure to make behavioral supports available throughout a continuum of placements, including in a regular education setting, could result in an inappropriately restrictive placement and constitute a denial of placement in the LRE. While such determinations are necessarily individualized, this guidance is

intended to focus attention on the need to consider and include evidence-based behavioral supports in IEPs that, when done with fidelity, often serve as effective alternatives to unnecessary disciplinary removals, increase participation in instruction, and may prevent the need for more restrictive placements.

This letter is organized into five areas:

- IDEA’s procedural requirements regarding evaluations, eligibility determinations, IEPs, and behavioral supports;
- IDEA’s IEP content requirements related to behavioral supports;
- Circumstances that may indicate potential denials of FAPE or of placement in the LRE;
- Implications for short-term disciplinary removals and other exclusionary disciplinary measures;⁹
- Conclusion, including additional information for parents and stakeholders.

I. IDEA Procedural Requirements Regarding Evaluations, Eligibility, IEPs, and Behavioral Supports

The IDEA and its implementing regulations require IEP Teams to follow certain procedures to ensure that IEPs meet the needs, including the behavioral needs, of children with disabilities. See 20 U.S.C. §1414(d) and 34 CFR §§300.320-300.324. Those needs are generally identified during the initial evaluation or reevaluation, which must, among other matters, use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, and assess the child in all areas related to the suspected disability, including, if appropriate, social and emotional status. 34 CFR §§300.304(b) and 300.304(c)(4); see also 34 CFR §§300.304-300.311. Further, the evaluation must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical and developmental factors. 34 CFR §300.304(b)(3). Parents, classroom teachers, and other service providers will also have formal and informal information about an eligible child’s current functional (e.g., behavioral) performance for the IEP Team’s consideration. 34 CFR §§300.321 and 300.324. Once the IEP

⁹ For purposes of this document, we use “exclusionary disciplinary measures” as a descriptive term to discuss the range of actions that school personnel implement –in response to a child’s misbehavior or violation of a code of student conduct –where the child is removed and excluded from their classroom, from school grounds, or school activities either formally (e.g., suspension) or informally (e.g., asking the parent to keep the student at home for a day or more). Additional information regarding exclusionary disciplinary measures may be found in Section IV of this document.

is developed, IEP Teams must: (1) review the child’s IEP periodically, but not less than annually, to determine whether the child’s annual goals are being achieved (34 CFR §300.324(b)(1)(i)), and (2) revise the IEP, as appropriate, to address any lack of expected progress towards the annual goals in the child’s IEP and in the general education curriculum, the child’s anticipated needs, or other matters. 34 CFR §300.324(b)(1)(ii).

There are a number of special factors that IEP Teams must consider in developing, reviewing, or revising a child’s IEP. The IDEA specifically requires IEP Teams to consider the use of positive behavioral interventions and supports, and other strategies, to address behavior for any child with a disability whose

behavior impedes his or her learning or that of others. 20 U.S.C. §1414(d)(3)(B)(i). This requirement applies to all IEP Teams, regardless of the child's specific disability, and to the development, review, and revision of IEPs (34 CFR §300.324(a)(2) and (b)(2)).

Incidents of child misbehavior and classroom disruptions, as well as violations of a code of student conduct, may indicate that the child's IEP needs to include appropriate behavioral supports. This is especially true when a pattern of misbehavior is apparent or can be reasonably anticipated based on the child's present levels of performance and needs. To the extent a child's behavior including its impact and consequences (e.g., violations of a code of student conduct, classroom disruptions, disciplinary removals, and other exclusionary disciplinary measures) impede the child's learning or that of others, the IEP Team must consider when, whether, and what aspects of the child's IEP related to behavior need to be addressed or revised to ensure FAPE. If the child already has behavioral supports, upon repeated incidents of child misbehavior or classroom disruption, the IEP team should meet to consider whether the child's behavioral supports should be changed.

In general, IEP Team meetings provide parents (who are required members of the team) critical opportunities to participate in the decision-making process, raise questions and concerns regarding their child's behavior, and provide input on the types of behavioral supports their children may need to facilitate their child's involvement and progress in the general education curriculum. 34 CFR §§300.320(a), 300.321(a)(1), and 300.324(a)(1)(ii). Parents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a reasonable request from a parent for an IEP Team meeting.¹⁰ See 20 U.S.C. §1414(d)(4)(A)(i)(III) and 34 CFR §300.324(b)(1)(ii)(C). We believe it would be appropriate for a parent to request an IEP Team meeting following disciplinary removals or changes in the child's behavior that impede the child's learning or that of others, as these likely indicate that the IEP, as written or implemented, may not be properly addressing the child's behavioral needs.¹¹

¹⁰ Assistance to States for the Education of Children with Disabilities and Early Intervention Programs for Infants and Toddlers with Disabilities, Final Rule, 64 Fed. Reg. 12406, 12581 (Mar. 12, 1999) explains, in response to public comment, that "[a] regulatory provision is not necessary to clarify that public agencies will honor 'reasonable' requests by parents for a meeting to review their child's IEP. Public agencies are required under the statute and these final regulations to be responsive to parental requests for such reviews."

¹¹ T.K., S.K., individually and on behalf of L.K. v. New York City Department of Education, Brief of the United States as Amicus Curiae Supporting Appellees (2015). Available at <https://www.justice.gov/sites/default/files/crt/legacy/2015/03/16/tknycdoebrief.pdf> Whenever appropriate, the child with a disability should also be present during IEP Team meetings. 34 CFR §300.321(a)(7).

When an IEP Has Already Been Developed for a School Year

In instances where a child with a disability is subject to a disciplinary removal after the IEP for that school year has been developed and the parents and the relevant school officials agree that the IEP needs to be revised to address the behavior, but circumstances prevent the IEP Team from convening prior to the child's return to school, the IDEA regulations permit the parent and public agency to agree not to convene an IEP Team meeting and instead to develop a written document to amend or modify the current IEP. 34 CFR §300.324(a)(4)(i). This option could be used to provide the child with the necessary behavioral supports upon the child's return to school. However, if changes are made to the child's IEP in this manner, the agency must ensure that the IEP Team is informed of those changes. 34 CFR §300.324(a)(4)(ii).

II. IDEA's IEP Content Requirements Related to Behavioral Supports

Research shows that school-wide, small group, and individual behavioral supports that use proactive and preventative approaches, address the underlying cause of behavior, and reinforce positive behaviors are associated with increases in academic engagement, academic achievement, and fewer suspensions and dropouts.¹² In short, children are more likely to achieve when they are directly taught predictable and contextually relevant school and classroom routines and expectations, acknowledged clearly and consistently for displaying positive academic and social behavior, consistently prompted and corrected when behavior does not meet expectations, and treated by others with respect.¹³

However, when a child with a disability experiences behavioral challenges, including those that result in suspensions or other exclusionary disciplinary measures, appropriate behavioral supports may be necessary to ensure that the child receives FAPE. In the same way that an IEP Team would consider a child's language and communication needs, and include appropriate assistive technology devices or services in the child's IEP (34 CFR §300.324(a)(2)(iv) and (v)) to ensure that the child receives a meaningful educational benefit,

¹² Christle, C. A., Jolivette, K., & Nelson, C. M. (2005). Breaking the school to prison pipeline: identifying school risk and protective factors for youth delinquency. *Exceptionality*, 13(2), 69-88. See also Crone, D. A., & Hawken, L. S. (2010). *Responding to problem behavior in schools: the behavior education program*. Guilford Press. See also Liaupsin, C. J., Umbreit, J., Ferro, J. B., Urso, A., & Upreti, G. (2006). Improving academic engagement through systematic, function-based intervention. *Education and Treatment of Children*, 29, 573-591. See also Luiselli, J. K., Putnam, R. F., Handler, M. W., & Feinberg, A. B. (2005). Whole-school positive behaviour support: effects on child discipline problems and academic performance. *Educational Psychology*, 25(2-3), 183-198. See also Putnam, R., Horner, R. H., & Algozzine, R. (2006). Academic achievement and the implementation of school-wide behavior support. *Positive Behavioral Interventions and Supports Newsletter*, 3(1), 1-6.

¹³ Algozzine, B., Wang, C., & Violette, A. S. (2011). Reexamining the relationship between academic achievement and social behavior. *Journal of Positive Behavioral Interventions*, 13, 3-16. See also McIntosh, K., Chard, D. J., Boland, J. B., & Horner, R. H. (2006). Demonstration of combined efforts in school-wide academic and behavioral systems and incidence of reading and behavior challenges in early elementary grades. *Journal of Positive Behavioral Interventions*, 8, 146-154.

so too must the IEP Team consider and, when determined necessary for ensuring FAPE, include or revise behavioral supports in the IEP of a child with a disability exhibiting behavior that impedes his or her learning or that of others. 34 CFR §§300.320(a)(4) and 300.324(a)(2)(i).

Therefore, as part of the development, review and, as appropriate, revision of the IEP, IEP Teams should determine whether behavioral supports should be provided in any of three areas: (1) special education and related services, (2) supplementary aids and services, and (3) program modifications or supports for school personnel. 34 CFR §300.320(a)(4).

IEPs should contain behavioral supports supported by evidence—IDEA specifically requires that both special education and related services and supplementary aids and services be based on peer-reviewed research to the extent practicable. 34 CFR §300.320(a)(4). As a matter of best practice, we strongly encourage schools to consider how the implementation of behavioral supports within the IEP could be facilitated through a school-wide, multi-tiered behavioral framework, described at greater length below.

Special Education and Related Services

Behavioral supports provided as part of a child's special education and related services may be necessary to ensure that the child's IEP is designed to enable the child to advance appropriately toward attaining the annual goals specified in the IEP, to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities. 34 CFR §§300.320(a)(4)(i) and (ii). Interventions and supports that could assist a child with a disability to benefit from special education may include instruction and reinforcement of school expectations, violence prevention programs, anger management groups, counseling for mental health issues, life skills training, or social skills instruction. Please see the end of this section for additional tools and resources to assist with the implementation of behavioral supports.

Supplementary Aids and Services

Public agencies must comply with the requirement to make available a continuum of alternative placements as required under 34 CFR §§300.114-300.116, which includes the provision of supplementary aids and services (e.g. behavioral supports) throughout the continuum. Under 34 CFR §300.42, supplementary aids and services are defined to include aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with 34 CFR §§300.114-300.116.

Appropriate supplementary aids and services could include those behavioral supports necessary to enable a child with a disability to be educated in regular classes or the setting determined to be the child's appropriate placement in the LRE. Such behavioral supports might include meetings with a behavioral coach, social skills instruction, counselor, or other approaches. In general, placement teams may not place a child with a disability in special classes, separate schooling, or other restrictive settings outside of the regular educational environment solely due to the child's behavior when behavioral supports through the provision of supplementary aids and services could be provided for that child that would be effective in addressing his or her behavior in the regular education setting.¹⁴ 34 CFR §§300.114-300.116. Children with disabilities may only be removed from the regular educational environment when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.114(a)(2)(ii).

Program Modifications or Supports for School Personnel

In addition to the behavioral supports that may be provided directly to children with disabilities, program modifications or supports for school personnel, provided on behalf of the child, may also be necessary to support the child's involvement and progress in the general education curriculum, advancement towards attaining the annual goals specified in the IEP, and participation in extracurricular and other nonacademic activities. 34 CFR §§300.320(a)(4)(i) and (ii). School personnel may need training, coaching, and tools to appropriately address the behavioral needs of a child. Supports for school personnel may be designed, as appropriate, to better implement effective instructional and behavior management strategies and specific behavioral interventions that are included in the child's IEP.

Implementation of a Multi-Tiered Behavioral Framework

Research shows that implementing evidence-based, multi-tiered behavioral frameworks can help improve overall school climate, school safety, and academic achievement for all children, including

children with disabilities.¹⁵ In general, behavioral supports are most effectively organized within a multi-tiered behavioral framework that provides instruction and clear behavioral expectations for all children, targeted intervention for small groups not experiencing success, and individualized supports and services for those needing the most intensive support. In recent years, the Department has disseminated a number of tools and resources to assist schools in the creation of safe and supportive school climates conducive to learning, including the implementation of effective alternatives to disciplinary removal. These resources include:

- *Supporting and Responding to Behavior: Evidence-based Classroom Strategies for Teachers*, a document summarizing evidence-based, proactive, and responsive classroom behavior support and intervention strategies for teachers.¹⁶
- *Positive Behavioral Intervention and Supports: Implementation Blueprint and Self-Assessment*, a guide to develop local capacity for sustainable, culturally and contextually relevant, and high-fidelity implementation of multi-tiered practices and systems of support.¹⁷

¹⁴ We refer to the “placement team,” rather than the IEP Team, as IDEA’s implementing regulations specify that placement decisions must be made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 CFR §300.116(a)(1).

¹⁵ Bradshaw, C., Koth, C.W., Thornton, L.A., & Leaf, P.J., (2009). Altering school climate through school-wide positive behavioral interventions and supports: findings from a group-randomized effectiveness trial. *Prevention Science* 10(2), 100-115.

¹⁶ Available at <https://www.osepideasthatwork.org/evidencebasedclassroomstrategies/>

¹⁷ Available at <http://www.pbis.org/blueprint/implementation-blueprint>

- *2014 School Discipline Guidance Package*, including guidance on how public elementary and secondary schools can meet their legal obligations to administer discipline without discriminating on the basis of race, color or national origin and a set of guiding principles to assist communities in improving school climate and school discipline.¹⁸

These and other resources can be found at www.ed.gov/rethinkdiscipline and <http://ccrs.osepideasthatwork.org>.

III. Circumstances that May Indicate Potential Denials of FAPE or of Placement in the LRE

It is incumbent upon IEP Teams to implement IDEA’s procedural and substantive requirements to ensure that children with disabilities receive the behavioral supports they need to enable them to advance appropriately toward attaining the annual goals specified in their IEPs and to be involved in and make progress in the general education curriculum. 20 U.S.C. §§1414(d)(1)(A)(i)(IV); 1414(d)(3)(B)(i) and 1414(d)(3)(C). A failure to implement these procedural requirements or provide needed behavioral supports to a child with a disability could result in the child not receiving a meaningful educational benefit, and therefore constitute a denial of FAPE and/or a denial of placement in the LRE (i.e., an unduly restrictive placement).

A determination of whether there is a denial of FAPE is a fact-based determination, to be made on a case-by-case basis. Factors to consider include: whether the public agency has failed to follow the procedures IDEA requires when developing, reviewing, or revising the child’s IEP, or has failed to consider and/or provide a child with a disability with necessary behavioral supports when the child’s behavior impedes

his or her learning or that of others; or whether the child's IEP is reasonably calculated to provide a meaningful educational benefit in the absence of behavioral supports.

Circumstances that may indicate either a procedural or substantive failure in the development, review, or revision of the IEP include, but are not limited to, the following¹⁹:

- The IEP Team did not consider the inclusion of positive behavioral interventions and supports in response to behavior that impeded the child's learning or that of others;
- School officials failed to schedule an IEP Team meeting to review the IEP to address behavioral concerns after a reasonable parental request;
- The IEP Team failed to discuss the parent's concerns about the child's behavior, and its effects on the child's learning, during an IEP Team meeting;

¹⁸ Available at <http://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html#guidance>

¹⁹ Under 34 CFR §300.513(a), a hearing officer's determination of whether a child received FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies: (1) impeded the child's right to FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or (3) caused a deprivation of educational benefit. 34 CFR §300.513(a)(2)(i)–(iii). Although best viewed as a procedural requirement, a failure to follow 34 CFR §300.324(a)(2)(i) could result in a substantive denial of FAPE if any of the circumstances in 34 CFR §§300.513(a)(2)(i)–(iii) are present. As this is a fact-based determination, Section III provides examples of facts and circumstances that may indicate that a procedural failure has resulted in a denial of FAPE.

- There are no behavioral supports in the child's IEP, even when the IEP Team determines they are necessary for the child;
- The behavioral supports in the IEP are inappropriate for the child (e.g., the frequency, scope or duration of the behavioral supports is insufficient to prevent behaviors that impede the learning of the child or others; or consistent application of the child's behavioral supports has not accomplished positive changes in behavior, but instead has resulted in behavior that continues to impede, or further impedes, learning for the child or others);
- The behavioral supports in the child's IEP are appropriate, but are not being implemented or not being properly implemented (e.g., teachers are not trained in classroom management responses or de-escalation techniques or those techniques are not being consistently implemented); or
- School personnel have implemented behavioral supports not included in the IEP that are not appropriate for the child

Circumstances that may indicate that the child's IEP is not reasonably calculated to provide a meaningful educational benefit include, but are not limited to, the following:

- The child is displaying a pattern of behaviors that impede his or her learning or that of others and is not receiving any behavioral supports;
- The child experiences a series of disciplinary removals from the current placement of 10 days or fewer (which do not constitute a disciplinary change in placement) for separate incidents of misconduct that impede the child's learning or that of others, and the need for behavioral supports is not considered or addressed by the IEP Team;²⁰ or

- The child experiences a lack of expected progress toward the annual goals that is related to his or her disciplinary removals or the lack of behavioral supports, and the child's IEP is neither reviewed nor revised.

A determination of whether there is a denial of placement in the LRE is also a fact-based determination. Factors to consider include whether the child's IEP is designed to enable the child to be educated and participate with nondisabled children in extracurricular and other nonacademic activities in the absence of behavioral supports. Circumstances that may indicate that the child's placement in the LRE may not be appropriate include, but are not limited to, a scenario in which a continuum of placements that provides behavioral supports is not made available (e.g., behavioral supports not provided in the regular educational setting), and, as a result, the IEP inappropriately calls for the child to be placed in special classes, separate schooling, or another restrictive placement outside the regular educational environment (e.g., home instruction, home tutoring program, or online learning program).

²⁰ Under 34 CFR §300.536 a series of disciplinary removals that constitute a pattern is a change in placement. A pattern of removals is a series of removals that total more than 10 school days within a school year, for behavior that is substantially similar to the child's behavior in previous incidents that led to removals, with consideration for additional factors such 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.

IV. Implications for Short-Term Disciplinary Removals and Other Exclusionary Disciplinary Measures

Schools should note that recent research demonstrates that disciplinary measures such as short-term removals from the current placement (e.g., suspension), or other exclusionary disciplinary measures that significantly impede the implementation of the IEP, generally do not help to reduce or eliminate reoccurrence of the misbehavior. In fact, there is a growing awareness that school suspensions produce unintended and undesirable results. Longitudinal studies, for example, have found that suspension from school does not deter misbehavior. These studies found a high rate of repeat offending in out-of-school suspension, ranging from 35% to 42%.²¹ Research also shows that suspension from school is associated with significant adverse consequences for the children suspended.²² Suspensions from school are consistently associated with lower academic performance.²³ As a suspended child's education is interrupted, he or she is more likely to fall behind, to become disengaged from school, and to drop out.²⁴

Removals from the current placement generally do not address the needs of a child with a disability for positive behavioral interventions and supports. Accordingly, we remind States, LEAs, and IEP Teams that while 34 CFR §300.530 explicitly permits school personnel to implement short-term disciplinary removals from the current placement, such removals may indicate a need to review and revise the child's IEP to address his or her behavioral needs. In addition, exclusionary disciplinary measures that do not constitute a removal from the current placement may also indicate the need to review and revise the child's IEP.

Authority of School Personnel under 34 CFR §300.530

Under IDEA and its implementing regulations, school personnel have the authority to remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for up to 10 consecutive school days in a school year, to the extent those alternatives are applied to children without disabilities, and for

additional removals of up to 10 school days in the same school year for separate incidents of misconduct, provided that the additional removals do not constitute a change of placement. 34 CFR §§300.530(b) and 300.536.²⁵

²¹ Skiba, R.J., Shure, L.A., Middelberg, L.V., & Baker, T.L. (2012). Reforming school discipline and reducing disproportionality in suspension and expulsion. In Jimerson, S.R., Nickerson, A.B., Mayer, M.J., & Furlong, M.J. (Eds.) *Handbook of School Violence and School Safety*, 2nd Ed. New York: Routledge.

²² Lee, T., Cornell, D., Gregory, A., & Xitao, F. (2011). High suspension schools and dropout rates for black and white students. *Education & Treatment Of Children*, 34(2), 167-192. See also Brooks, K., Schiraldi, V., & Zeidenberg, J. (2000). *School house hype: two years later*. Washington, DC: Justice Policy Institute / Covington, KY: Children's Law Center. See also Civil Rights Project. (2000). *Opportunities suspended: the devastating consequences of zero tolerance and school discipline policies*. Cambridge, MA.

²³ *Id.*

²⁴ *Id.*

²⁵ Disciplinary removals of more than 10 consecutive school days or a series of removals that cumulate to more than 10 school days in a school year that constitute a pattern are considered a change in placement. 34 CFR §300.536.

While the IDEA and its implementing regulations recognize that school officials need some reasonable degree of flexibility when disciplining children with disabilities who violate a code of student conduct and that school safety is paramount, the Department cautions that the use of short-term disciplinary removals from the current placement may indicate that a child's IEP, or the implementation of the IEP, does not appropriately address his or her behavioral needs. This, in turn, may result in the child not receiving a meaningful educational benefit, which could constitute a denial of FAPE. As noted above, these determinations are highly factual, and would be made on a case-by-case basis. We are concerned, however, that some SEAs and LEAs may have erroneously interpreted the IDEA to provide school personnel with the broad authority to implement short-term removals without restriction and without regard to whether the child's IEP is properly addressing his or her behavioral needs. It has come to the Department's attention that there are a number of legal memos and technical assistance documents which have erroneously characterized the 10-day period as "free days."²⁶

This characterization may discourage school personnel from considering whether behavioral supports are needed to address or improve patterns of behavior that impede learning before, during, or after short-term disciplinary removals are implemented. The Department reminds SEAs and LEAs that, under IDEA, IEP Teams have an obligation to develop appropriate IEPs based on the individual needs of each child. Teachers must also be fully informed about their specific responsibilities related to implementation of the child's IEP, including the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP. 34 CFR §300.323(d).

Further, IDEA requires States and LEAs to ensure that all personnel necessary to carry out the purposes of Part B of IDEA are appropriately and adequately prepared and trained. 34 CFR §§300.156 and 300.207. This responsibility would include appropriately training teachers and other school personnel to provide required behavioral supports to children with disabilities. Therefore, a failure to provide appropriate behavioral supports (because they are not offered or because teachers and other staff are not adequately trained to implement such supports) that results in the child not receiving a meaningful educational benefit may constitute a denial of FAPE.

Use of Exclusionary Disciplinary Measures

Schools should take care when implementing exclusionary disciplinary measures that significantly interfere with a child's instruction and participation in other school activities. In some schools, staff are properly trained to implement and document measures such as the use of study carrels, time outs, and restrictions in privileges, in a manner consistent

²⁶ National Council on Disability. (2015). Breaking the school-to-prison pipeline for students with disabilities. Available at https://www.ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf. This report highlights an excerpt from a legal pamphlet designed for school districts: "Schools have free use of up to 10 school days of short-term removals per school year without IDEA implications. The days can be used in any combination, quickly or slowly, although caution would warrant using the 10 'free' days judiciously over the school year, and avoiding multiple suspension days if at all possible."

with a child's right to FAPE.²⁷ However, in other schools, staff may not be properly trained in the appropriate use of these measures; consequently, their improper use of these measures could rise to the level of a disciplinary removal. These exclusionary disciplinary measures also could include:

- A pattern of office referrals, extended time excluded from instruction (e.g., time out), or extended restrictions in privileges;
- Repeatedly sending children out of school on "administrative leave" or a "day off" or other method of sending the child home from school;
- Repeatedly sending children out of school with a condition for return, such as a risk assessment or psychological evaluation; or
- Regularly requiring children to leave the school early and miss instructional time (e.g., via shortened school days).²⁸

In general, the Department does not consider the use of exclusionary disciplinary measures to be disciplinary removals from the current placement for purposes of 34 CFR §300.530, so long as children with disabilities are afforded the opportunity to continue to be involved in and make progress in the general education curriculum, receive the instruction and services specified on their IEPs, and participate with nondisabled children to the extent they would have in their current placement.²⁹ It is likely that the exclusionary disciplinary measures listed above, if implemented repeatedly, would constitute a disciplinary removal from the current placement. For example, when school personnel regularly require a child with a disability to leave school early and miss instructional time due to their behavior, it is likely that the child's opportunity to be involved in and make progress in the general education curriculum has been significantly impeded; in such circumstances, sending the

²⁷ The Department has previously stated that the use of measures such as study carrels, time outs, or other restrictions in privileges is permissible so long as such measures are not inconsistent with a student's IEP (OSEP Memorandum to Chief State School Officers, Questions and Answers on Disciplining Students with Disabilities, April 1995).

²⁸ We have deliberately omitted from this list of examples any reference to referrals to law enforcement authorities due to our recommendation to schools, described in the Department's *Guiding Principles: A Resource Guide for*

Improving School Climate and Discipline, that school resource officers not be involved in routine disciplinary matters. The Guiding Principles can be found at www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf

²⁹ The Department would apply the same analysis to the use of exclusionary discipline measures that apply to in-school suspensions, for purposes of 34 CFR §300.530. In the Preamble to the August 14, 2006 final Part B regulations, the Department explained: “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 34 CFR §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.” The explanation concludes by indicating that whether an in-school suspension would constitute a day of suspension would depend on the unique facts and circumstances of each case. 71 Fed. Reg. 46715 (Aug. 14, 2006).

child home early would constitute a disciplinary removal from the current placement. To the extent that schools implement exclusionary disciplinary measures in a manner tantamount to a suspension – or other removal from the removals,³⁰ and act within the authority of school personnel provided under 34 CFR §300.530.

Further, as we noted earlier, the use of exclusionary disciplinary measures may indicate that a child’s IEP, or the implementation of the IEP, does not appropriately address his or her behavioral needs. To ensure that each child receives a meaningful educational benefit, IEP Teams must consider the need for positive behavioral interventions and supports for children with disabilities whose behavior impedes their learning or that of others, and, when determined necessary to ensure FAPE, include or revise needed behavioral supports in the child’s IEP. Such behavioral supports also may include supports for school personnel, so that teaching staff are trained in best uses of such behavioral supports.

V. Conclusion

Children with disabilities are at a greater risk of disciplinary removals that significantly interrupt their learning, often unnecessarily. These risks are increased for children of color with disabilities. In many cases, we have reason to believe these removals are due to minor instances of misbehavior that are unrelated to issues of child or school safety and can and should be addressed through supports and guidance.³¹

When behavioral supports are not provided and, as a result, a child with a disability is repeatedly removed from his or her current placement through suspensions for behavior that impedes his or her learning or that of others, a number of options are available to assist parents in challenging the appropriateness of their child’s IEP. First, as noted earlier, parents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a reasonable parental request for an IEP Team meeting. Parents may be particularly interested in making such a request following changes in the child’s behavior that result in disciplinary removals. Further, parents, individuals, and organizations may also pursue child-specific or systemic remedies through the State complaint procedures outlined below.

When conditions persist and a denial of FAPE is suspected, a parent or a public agency may file a due process complaint to request a due process hearing on any matter relating to the

³⁰ IDEA mandates that States provide data each year to the Secretary of Education and the public on the use of long-term suspensions and expulsions (20 U.S.C. §1418(a)(1)(A)(v)(III)) and on the incidence and duration of disciplinary actions, including suspensions of one day or more, by race, ethnicity, limited English proficiency status, gender, and

disability category (20 U.S.C. §1418(a)(1)(D)). Further, States are required to collect and examine data to determine whether significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to the incidence, duration, and type of disciplinary actions, including suspension and expulsions (34 CFR §300.646(d)(1)(C)), and whether significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities among LEAs in the State or compared to the rates for nondisabled children within LEAs (34 CFR §300.170).

³¹ Skiba, R. J., Chung, C. G., Trachok, M., Baker, T., Sheya, A., Hughes, R. L. (2014). Parsing disciplinary disproportionality: Contributions of infraction, student, and school characteristics to out-of-school suspension and expulsion. *American Educational Research Journal*, 51, 640-670.

identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child. 34 CFR §300.507(a). If the dispute cannot be resolved through the resolution process, the parent or public agency must have an opportunity for an impartial due process hearing. 34 CFR §§300.511(a), 300.512, 300.513 and 300.515.

A second important method for resolving disputes available under IDEA is the mediation process described in 34 CFR §300.506. The mediation process, which must be voluntary, offers a less formal opportunity for parents and public agencies to resolve disputes about any matter, including disciplinary removals, under 34 CFR part 300, including matters arising prior to the filing of a due process complaint. 34 CFR §300.506(a).

Lastly, States are also required to establish and implement their own State complaint procedures, separate from their due process procedures, for resolving any complaint that meets the requirements of 34 CFR §300.153. 34 CFR §300.151(a)(1). Any organization or individual, including one from another State, may file a signed written State complaint alleging that a public agency has violated a requirement of either Part B of the Act or the Part B regulations.

Additional information regarding dispute resolution is available at:

- Questions and Answers on IDEA Part B Dispute Resolution Procedures, revised July 2013 (OSEP Memo 13-08) (<http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf>); and
- Dear Colleague Letter on a public agency's Use of Due Process Procedures After a Parent Has Filed a State Complaint, April 2015 (<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/dcl04152015disputeresolution2q2015.pdf>)

The Office of Special Education and Rehabilitative Services (OSERS) is committed to ensuring that children with disabilities have access to learning environments that are safe, supportive, and conducive to learning. In such learning environments, educators have the skills and tools to prevent disciplinary incidents before they happen, use effective behavioral supports, teach behavioral expectations, and implement other behavioral management strategies. In many schools, effective behavioral supports have been implemented within a multi-tiered behavioral framework to organize school efforts to support children with disabilities and their peers. In this way, schools facilitate the provision of FAPE by providing children with disabilities with the behavioral supports they need to prevent, or bring an end to, disciplinary approaches that may unduly interfere with instruction and the implementation of IEPs.

Further, this focus on prevention helps to ensure that educators receive the training, coaching, and other supports they need to help children with disabilities, and their peers, to focus on learning and succeed in school.

To better develop and implement appropriate IEPs for children whose behavior impedes the child's learning or that of others, and to ensure that behavioral supports are available throughout the continuum of placements, including in the regular education setting, OSERS has enclosed with this letter two technical assistance documents that we first released in November 2015 as part of the 40th Anniversary of IDEA:

1) Supporting and Responding to Behavior: Evidence-Based Classroom Strategies for Teachers:

<https://www.osepideasthatwork.org/evidencebasedclassroomstrategies>.

2) Positive Behavioral Interventions and Supports: Implementation Blueprint and Self-Assessment:

<http://www.pbis.org/blueprint/implementation-blueprint>.

These two documents provide additional information on evidenced-based classroom strategies to support and respond to behavior and on organizing practices in an integrated manner in a multi-tiered system of support.

If you have any questions or comments, please contact the Office of Special Education Programs Education Program Specialist, Lisa Pagano at Lisa.Pagano@ed.gov or 202-245-7413.

Thank you for your support and your continued interest in improving education access and opportunity for children with disabilities.

Sincerely,

/s/

Sue Swenson

Acting Assistant Secretary

Special Education and Rehabilitative Services

/s/

Ruth E. Ryder

Acting Director

Office of Special Education Programs

Appendix 11-3

Resources on Positive Behavioral Interventions and Supports

- Supporting and Responding to Behavior: Evidence-Based Classroom Strategies for Teachers, <https://www.osepideasthatwork.org/evidencebasedclassroomstrategies>
- Positive Behavioral Interventions and Supports: Implementation Blueprint and Self-Assessment, <http://www.pbis.org/blueprint/implementation-blueprint>
- Michigan Department of Education, Positive Behavior Intervention and Supports, http://www.michigan.gov/mde/0,4615,7-140-74638_72831_72833-361319--,00.html
- Michigan Integrated Behavior and Learning Support Initiative, <https://miblsi.org>
- AASA/Children's Defense Fund, Positive Behavioral Interventions and Supports: An Introduction, <http://www.childrensdefense.org/library/data/positive-behavioral-supports-1.pdf>