



DISCIPLINE FOR SPECIAL EDUCATION AND SECTION 504 STUDENTS

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ABBREVIATIONS/ACRONYMS

| | |
|-------------|--|
| BIP | Behavior Intervention Plan |
| BSP | Behavior Support Plan |
| C.C.R. | California Code of Regulations |
| C.F.R. | Code of Federal Regulations |
| EDUC. CODE | California Education Code |
| FAA | Functional Analysis Assessment (California Law) |
| FBA | Functional Behavior Assessment (Federal Law) |
| IAES | Interim Alternative Educational Setting |
| IDEA | Individuals with Disabilities Education Act |
| IDEIA | Individuals with Disabilities Education Improvement Act |
| IDELR | Individuals with Disabilities Education Law Reporter |
| IEP | Individualized Education Program |
| OAH | Office of Administrative Hearings |
| OCR | Office for Civil Rights |
| OSEP | Office of Special Education Programs |
| SECTION 504 | Section 504 of the Federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794(a)) |
| U.S.C. | United States Code |

INTRODUCTION

These materials have been prepared to guide our clients in the discipline of special education students and students who receive modifications and accommodations in their education plans pursuant to Section 504 of the Federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794(a)).

A proper legal analysis of discipline proposed for a special education or Section 504 student is highly fact dependent. Because the information contained in these materials is necessarily general, its application to a particular set of facts and circumstances may vary. For that reason, these materials do not constitute legal advice. We recommend you consult with legal counsel prior to acting on the information contained in these materials.

OVERVIEW OF DISCIPLINE FOR ALL STUDENTS

Conduct Warranting Discipline: The conduct for which a special education student may be suspended or expelled is generally the same as the conduct warranting suspension or expulsion for a general education student.

Education Code Section 48900 enumerates the acts eligible for suspension as:

- “(a)(1) Caused, attempted to cause, or threatened to cause physical injury to another person.
- (2) Willfully used force or violence upon the person of another except in self-defense.
- (b) Possessed, sold, or otherwise furnished a firearm, knife, explosive, or other dangerous object
- (c) Unlawfully possessed, used, sold, or otherwise furnished or been under the influence of, a controlled substance
- (d) Unlawfully offered, arranged, or negotiated to sell a controlled substance . . . alcoholic beverage, or an intoxicant of any kind, and either sold, delivered, or otherwise furnished to a person another liquid, substance, or material and represented the liquid, substance, or material as a controlled substance, alcoholic beverage, or intoxicant.
- (e) Committed or attempted to commit robbery or extortion.
- (f) Cause or attempted to cause damage to school property or private property.
- (g) Stole or attempted to steal school property or private property.
- (h) Possessed or used tobacco, or products containing tobacco or nicotine products
- (i) Committed an obscene act or engaged in habitual profanity or vulgarity.
- (j) Unlawfully possessed or unlawfully offered, arranged, or negotiated to sell drug paraphernalia
- (k) Disrupted school activities or otherwise wilfully defied the valid authority
- (l) Knowingly received stolen school property or private property.
- (m) Possessed an imitation firearm

(n) Committed or attempted to commit a sexual assault . . . or committed a sexual battery

. . . .

(q) Engaged in, or attempted to engage in, hazing

(r) Engaged in an act of bullying

. . . .

(t) A pupil who aids or abets . . . the infliction or attempted infliction of physical injury to another person may be subject to suspension, but not expulsion

. . . .

(v) For a pupil subject to discipline under this section, a superintendent of the school district or principal may use his or her discretion to provide alternatives to suspension or expulsion that are age appropriate and designed to address and correct the pupil's specific misbehavior as specified in Section 48900.5.

Additional acts include those listed in Sections 48900.2 (sexual harassment), 48900.3 (hate violence), 48900.4 (harassment, threats, or intimidation), and 48900.7 (terroristic threats against school officials, school property, or both).

**NEW LEGISLATION EFFECTIVE ON OR BEFORE
JANUARY 1, 2013**

A. AB 1729: AB 1729 emphasizes the importance of employing alternative means of correction before resorting to suspension from school or to a supervised classroom.

Comment: AB 1729 basically provides that (1) the suspension/expulsion process should be used primarily to address pupil misconduct involving criminality, and (2) suspension/expulsion should not be considered for misconduct that does not involve criminality unless a great deal of effort has been made to address the behavior and that effort has been documented.

Discussion: The Legislature has declared that suspensions and expulsions are being overused and also disproportionately imposed on African-American pupils, as well as homosexual/transgender pupils.

With AB 1729, the Legislature is seeking to promote the use of nonpunitive classroom discipline, in-school discipline strategies, and other effective interventions to help offending pupils change problematic behavior.

Prior Law/Suspension (Section 48900.5): Pupils may be suspended from school for misconduct provided it is related to school activity or attendance and when other means of correction have failed to bring about proper conduct.

Pupils may be suspended from school for a first offense only in two circumstances:

1. The offense is a violation of Section 48900(a) - (e):
 - Caused, attempted to cause, threatened to cause physical injury.
 - Willful use of force or violence.
 - Possessed, sold or furnished a firearm, knife, explosives, or dangerous object.
 - Possessed, used, sold, furnished, been under the influence of controlled substance/alcohol/intoxicant.
 - Offered, arranged, negotiated sale of a controlled substance.
 - Robbery/extortion - caused or attempted.

2. Any other Section 48900 offense if the pupil's presence causes a danger to persons or property or threatens to disrupt the instructional process.

Pupils suspended for 48900 or 48900.2 (sexual harassment) offenses may be assigned to a supervised suspension classroom if the pupil does not pose an imminent danger to the campus, pupils, or staff.

The district "may" provide alternatives to suspension and expulsion which are age appropriate and designed to correct the specific misbehavior. (Section 48900(v).)

Prior Law/Expulsion (Section 48915): Pupils may be expelled for misconduct provided it is related to school activity or attendance and only when either: (1) other means of correction are not feasible or have repeatedly failed to bring about proper conduct, or (2) due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others.

Pupils must be expelled from the district for a "zero tolerance" offense. Zero tolerance offenses are (1) possession, selling or furnishing a firearm, (2) brandishing a knife at another person (blade longer than 3½ inches, fixed blade, locking blade), (3) sale of illegal drugs, (4) sexual assault/attempted sexual assault/sexual battery, or (5) possession of explosives.

Effect of New Legislation/Suspension: Suspensions from school or suspensions served in a supervised classroom may only be imposed when alternative means of correction have failed to bring about proper conduct. The alternative methods of correction must be documented. Alternative means of correction "may" include:

1. A conference between school personnel, the pupil's parent/guardian, and the pupil.
2. Referrals to the school counselor, psychologist, social worker, child welfare attendance personnel, or other school support service personnel for case management and counseling.
3. Study teams, guidance teams, resource panel teams, or other intervention-related teams that assess the behavior and develop and implement individualized plans to address the behavior in partnership with the pupil and pupil's parents.
4. Referral for a comprehensive psychosocial or psychoeducational assessment, including for purposes of creating an IEP, or a plan adopted pursuant to Section 504.
5. Enrollment in a program teaching prosocial behavior or anger management.
6. Participation in a restorative justice program.
7. A positive behavior support approach with tiered behavioral interventions that occur during the school day on campus.
8. After-school programs that address specific behavioral issues or expose pupils to positive activities and behaviors, including but not limited to those operated in collaboration with local parent and community groups.
9. Community service, such as outdoor beautification, campus betterment, peer or youth assistance programs.

The only two circumstances in which a pupil may be suspended for a first offense are:

1. The offense is a violation of Section 48900(a) - (e) (see above: physical injury, use of force, possession/use of weapons, possession, use, or sale of alcohol or drugs, robbery or extortion); and
2. Any other misconduct if the pupil's presence causes a danger to others.

Effect of New Legislation/Expulsion: Although there are no technical changes, it is the Legislature's intent that only students who commit serious crimes at school should be expelled.

B. AB 1732: AB 1732 describes the offense of cyberbullying in more detail. It specifies that "burn" pages (i.e., an Internet website designed to harass or intimidate a pupil), faux Facebook pages, and impersonations are misconduct.

Following the suicide death of Seth Walsh late in 2010, two pieces of anti-bullying legislation were enacted:

1. AB 9 (Seth's Law) requires school districts to adopt policies which (a) expressly prohibit harassment/bullying based on disability, nationality, race or ethnicity, religion, agnosticism, atheism, sexual orientation, gender, gender identity, or gender expression; and (b) set out a clear process for receiving and investigating complaints of harassment/ bullying;
2. AB 1156 revised Section 48900(r) to create the offense of bullying and bullying by an electronic act.

Effect of New Legislation: The new legislation further defines the concept of bullying by an electronic act. AB 1732 specifies that cyberbullying includes: (1) posting to or creating a burn page; (2) knowingly creating a credible impersonation of another pupil without his or her permission for the purpose of bullying the pupil; and (3) creating a false profile of a pupil and posting it on a social network Internet website.

To be an offense, the conduct described above must have the actual or reasonably predicted effect of either:

- Placing the pupil in fear of harm;
- Causing a substantial detrimental effect on a pupil's physical or mental health;
- Causing a substantial interference with a pupil's academic performance; or
- Causing a substantial interference with a pupil's ability to participate in or benefit from the services, activities, or privileges provided by the school.

In addition, the new legislation specifies certain alternatives to suspension/expulsion which should be considered, including counseling and anger management programs. (Section 48900(v).)

Comment: Note that bullying another pupil may be an offense; however, the offense does not apply to a circumstance where a staff member is bullied.

C. AB 2537: AB 2537 contains miscellaneous modifications to pupil suspension and expulsion regulations:

1. **Imitation Firearms.** Prior law provided that possession of a firearm at school is a mandatory expulsion offense whereas possession of an imitation firearm is simply an offense for which suspension/expulsion was optional.

Effect of New Legislation: The new legislation specifies that possessing an imitation firearm is not an offense for which suspension or expulsion is mandatory. This legislation did not change the prior law in any way.

2. **Mandatory Expulsion Recommendations:** Unless expulsion was "inappropriate due to the particular circumstances," prior law required a recommendation for expulsion for the following misconduct:

- Serious physical injury to another except in self-defense;
- Possession of a knife or other dangerous object;
- Possession of illegal drugs, except first offense possession of one ounce or less of marijuana;
- Robbery or extortion;
- Assault or battery upon a school employee.

Effect of New Legislation: The new legislation requires an expulsion recommendation for the above offenses unless expulsion "should not be recommended under the circumstances" or "an alternative means of correction would address the conduct."

3. **Law Enforcement Notification:** Prior law required law enforcement notification in cases of pupil misconduct consisting of:

- Assault with a deadly weapon or other instrument;
- Assault by means of force likely to produce serious bodily injury;
- Use, possession, or sale of drugs and alcohol;
- Arranging for the sale of a substance represented to be drugs or alcohol;
- Possession of a firearm within a school zone;
- Possession of other weapons such as dirks or daggers at school; and
- Possession or furnishing a firearm or an explosive at school.

Under prior law, a failure to make the report was an infraction punishable by a \$500 fine.

Effect of New Legislation: The new legislation eliminates the infraction and fine verbiage associated with a failure to notify law enforcement; however, the notification requirement remains.

4. **Possession of Prescription or Over-the-Counter Medications:** Prior law required an expulsion recommendation in cases of unlawful possession of a

controlled substance, except for first offenses involving possession of one ounce or less of marijuana.

Effect of New Legislation: The new legislation specifies that expulsion does not have to be recommended in cases involving either possession of over-the-counter medication (possessed by the student for his/her own medical purposes) or medication prescribed for the student by a physician. This revision is more in the nature of a clarification than a change in the law.

RELEVANT STATUTES THAT AFFECT SPECIAL EDUCATION STUDENTS

Federal law takes precedence over state law governing the same subject and therefore governs discipline of special education students. The following **federal laws** may affect the discipline of students with disabilities:

- The IDEA/IEA (20 U.S.C., Section 1400, et seq.) sets forth statutory protections for public preschool, elementary, and secondary students with disabilities. The IDEA applies to all recipients of federal financial assistance from the United States Department of Education, including the state of California. The implementing regulations for IDEA are found at 34 C.F.R. 300.
- Title II of the Americans with Disabilities Act of 1990 (42 U.S.C., Section 12101, et seq.) prohibits discrimination based on disability by state and local governments in their policies, procedures, programs, and activities. Title II applies to state and local governments regardless of whether they receive federal financial assistance. Student discipline (“policies, procedures, programs, and activities”) is covered by Title II. Title II is enforced by the federal Office for Civil Rights and the Office of Equal Opportunity of the California Department of Education.

A. Disciplinary Procedural Protections for Special Education Students: State and federal law require special **PROCEDURAL PROTECTIONS** for special education students facing suspension or expulsion and each of these protections must be provided or the suspension or expulsion may be set aside as unlawful. (Educ. Code 48915.5.) These special protections significantly alter the disciplinary procedures followed for general education students.

B. Major Provisions:

1. **The 10 Consecutive-Day Suspension Rule.** Suspensions are limited to 10 consecutive school days in any school year. **This includes the period while expulsion proceedings are pending.** (34 C.F.R. 300.530 and 300.536.)
2. **The District Has a Duty to Provide Educational Services on the 11th Day of a Student’s Disciplinary Absence from School.** After the 10th cumulative day of disciplinary absence (suspension), a district must begin to provide continuing educational services to special education students on the 11th day in an interim alternative educational setting (IAES).

Discussion: General education students are limited to 20 days of suspension during a school year with another 10 days allowed if the student is transferred to another regular school, opportunity class/school, or continuance school. The cap on the number of days of suspension does not apply where a student is being processed for expulsion.

Situations in which a special education student has had several short-term suspensions and then receives a five-day suspension during which expulsion is recommended can be problematic. On occasion, special education personnel are not notified of a student's status until after the 11th day and the student has been without services for several weeks or even months. The district is required to provide continuing educational services on the 11th day of suspension, regardless of other factors.

3. **45-Day Removals.** Federal law allows for disciplinary removal for 45 school days for some offenses relating to drugs, weapons, and serious bodily injury. (20 U.S.C. 1415(k).)

Discussion: A student may be removed to an IAES for up to 45 school days whenever a child with a disability commits a serious offense involving weapons, drugs, or serious bodily injury, whether or not the behavior is a manifestation of the student's disability. (C.F.R. 500.530 (g)(1-3).)

4. **Manifestation Determination.** Within 10 school days of any decision to change a student's placement for a disciplinary reason, the district must convene an IEP team meeting to determine whether the misconduct is a manifestation of the child's disability. A child may not be disciplined for conduct that is a manifestation of disability. (20 U.S.C. 1415(k)(1)(E).)

If the behavior that gave rise to violation of the school code is determined not to be a manifestation of the child's disability, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities. However, once the child is removed from his/her current placement, he/she must continue to receive educational services to enable the child to continue to participate in the general education curriculum, although in another setting, and progress toward meeting the goals set out in the child's IEP. As appropriate, the child must also receive a functional behavior assessment (FBA) or a behavior support plan (BSP), or have an exiting BSP modified. This new placement is called an interim alternative educational setting (IAES).

Discussion: The California Department of Education found a district out of compliance for scheduling a manifestation determination IEP meeting at day seven and failing to reschedule by day 10 when a parent could not make the first meeting date. In these cases, every opportunity to extend the meeting until the last day should be made for the parent; however, the meeting is required to be held within the timelines regardless of difficulties in assembling the IEP team. If attendance is a problem for the parent, telephonic participation should be offered and documentation of all attempts to ensure parental participation at the meeting should be maintained.

5. **Districts Can Unilaterally Place a Child in an IAES.** If a student's behavior is NOT a manifestation of the student's disabilities, the district may apply the same disciplinary procedures to disabled children as general education children. However, after the 10th day of suspension, the district must provide educational services to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP, receive an FBA or BSP, or if one exists, have the BSP modified.

Discussion: Whenever a removal constitutes a change of placement, the determination of which IAES is made by an IEP team (C.F.R. 500.530(d)(5)), usually at a manifestation determination IEP meeting. When a student has exceeded 10 days of suspension and receives a subsequent suspension, which does not constitute a change in placement, then school personnel, in consultation with at least one of the student's teachers, determine the extent to which services are needed to enable the child to continue to participate in the general education curriculum, although in another setting, and progress toward meeting the child's IEP goals

6. **Behavior Plan.** A school district has a duty to provide a behavior plan to address the misconduct of a special education student.

Discussion: Under federal law, a student with a disability is entitled to an FBA and behavior plan (if appropriate) whenever the IEP team finds that the behavior is a manifestation of the student's disability (34 C.F.R. 300.530 (f)(1)). When subject to removal from his placement for more than 10 days, the student is entitled to receive, as appropriate, an FBA and behavioral services and modifications designed to address the behavioral violation so it does not recur (34 C.F.R. 300.530 (d)(ii)). The IEP team must consider the use of positive behavioral interventions and supports whenever a child's behavior impedes his own learning or the learning of others (34 C.F.R. 300.324 (a)(2)(I).)

Under state law, a student is entitled to a Functional Analysis Assessment (FAA) and potential Behavior Intervention Plan (BIP) when the IEP team determines the student has displayed a serious behavior problem which is self-injurious or assaultive, causes serious property damage, or is severe, pervasive, and maladaptive and for which instructional/behavioral approaches specified in the IEP are found to be ineffective. (5 C.C.R.3001(a-b).)

7. **Parents' Due Process Rights.** Parents/guardians have the right to file for a due process hearing to challenge an IEP team's manifestation determination or the information relied upon by the IEP team. If parents file for a due process hearing prior to an expulsion decision being rendered, no expulsion hearing may be conducted until the due process hearing and appeal are completed. The child must remain in his/her current placement (the child's placement at the time the due process complaint is filed) until the due process hearing decision is rendered.

Discussion: In several instances, a child with a disability has been recommended for expulsion or expelled and the recommendation and/or expulsion rescinded due

to failure to conduct a manifestation determination meeting or failure to conduct a proper manifestation determination meeting.

8. **Special Protections May Apply to Some General Education Students.** In some instances, a general education student facing discipline may be entitled to the special protections afforded to special education students.

9. **District Basis of Knowledge that Student May Have a Disability.** The district will be deemed to have knowledge that a child is a child with a disability if:

- a. The child's parent has expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) to district personnel that the child is in need of special education and related services;
- b. The child's parent has requested an evaluation of the child;
- c. The child's teacher or other district personnel have expressed concern about the child's behavior or performance to the district's director of special education or other personnel in accordance with the district's established child find or special education referral system;
- d. The child's behavior or performance demonstrates the need for these services.

10. **Exception to District Basis of Knowledge that Student May Have a Disability.** The district is not deemed to have knowledge that the child may be a child with a disability if:

- a. The district conducted an evaluation and determined that the child was not a child with a disability and provided written notice of its determination to the child's parents.
- b. The district determined that an evaluation was not necessary and provided written notice of its determination to the child's parents.
- c. Parents provided written revocation of consent to special education and related services.
- d. Parents did not allow an evaluation.
- e. Parents refused services.

DISCIPLINE FOR SECTION 504 STUDENTS

Section 504 regulations do not provide much guidance on disciplining students with a disability and a Section 504 plan. The OCR provides discipline guidance in the form of Dear Colleague Letters and decisions in OCR complaint investigations.

Prohibited Discrimination

Section 504 students may not be disciplined more harshly than non-disabled peers for the same conduct. To do so constitutes prohibited discrimination under 34 C.F.R. 104.4(a).

Examples:

The OCR determined that threatening to tape a disabled student's mouth shut when the student was being disruptive, and other students were not disciplined in the same manner, constituted differential treatment. Such differential treatment was determined prohibited discrimination. Marshall County (KY) Sch. Dist. IDELR 556 (OCR 1993).

The use of a "time out box" in the classroom to punish a student with a disability did not constitute discrimination as the "time out" box was used for similarly situated students in the classroom and was not applied in a discriminatory manner on the basis of disability. Pueblo (CO) Sch. Dist. No. 60, 20 IDELR 1066 (OCR 1993).

Discussion: In disciplining a student with a disability, be certain all benefits afforded to general education students prior to suspension are also provided to Section 504 students, including services to provide other means of correction.

Specified Discipline Measures

A student's Section 504 team may set forth exceptions to the district's discipline code as an accommodation or modification, or may specify certain disciplinary measures be taken for specific behaviors. When a student's Section 504 plan specifies disciplinary measures, those measures preempt the district's discipline code and the student should be disciplined pursuant to his/her Section 504 plan.

Example

Where a school dress code prohibits students from wearing hats or "hoodies" and a student requires the accommodation of wearing a hat or hoodie due to difficulty with temperature regulation, the student should not be disciplined for wearing the hat/hoodie

IDEA Protections Related to Section 504

The OCR has determined the same protections available to students under IDEA are available to students classified as disabled under Section 504, with the exception of students who are disabled solely by virtue of alcoholism or drug addiction. OSEP Memorandum 95-16, 22 IDELR 531 (OSEP 1995).

Stay-Put

Unlike IDEA, Section 504 does not include a specific stay-put provision guaranteeing a student will remain in his current educational placement pending any due process dispute resolution between the parents and the school. However, OCR has stated there is an

implicit stay-put component. OCR noted that districts are required to provide procedural safeguards regarding the identification, evaluation, and placement of students with disabilities, and that regulations require student evaluations prior to initial and subsequent placement changes. OCR stated: "... a fair due process system would encompass the school district waiting for the results of the process before making the change [in placement]." Letter to Zirkel, 22 IDELR 667 (OCR) 1995.

FAPE

Unlike IDEA, Section 504 has no explicit provision requiring districts to provide FAPE to expelled students with disabilities.

Example

The denial of educational services during the expulsion period for a properly expelled student with a disability under Section 504 was not a violation of Section 504. (Florence County (SC) Sch. Dist. 192, 16 IDELR 376 (OCR 1989).

Discussion

If state law mandates provision of continued services to properly expelled students, services must be offered to both disabled and non-disabled students alike. OSEP Memorandum 95-16, 22 IDELR 531 (OSEP 1995).

Manifestation Determination

If a disciplinary action constitutes a change of placement, a student may not be disciplined for misconduct related to his disability. *S-1 v. Turlington*, 635 F.2nd 342.

Although Section 504 regulations do not use the term "manifestation determination," OCR interprets Section 504 to require a manifestation determination meeting for disciplinary actions that amount to a change in placement. Under 34 C.F.R. 104.35, a preplacement evaluation is required before taking action with respect to any significant change in placement. Suspensions exceeding 10 consecutive school days (or a cumulative of 10 days under IDEA) would constitute such a placement change. *Dunkin (MO) R-V Sch. Dist.*, 52 IDELR 138 (OCR 2009).

A student cannot generally be expelled or suspended beyond the 10th day for conduct that is a manifestation of the student's disability. OSEP Memorandum 95-16, *Honig v. Doe*, 484 U.S. 305.

OCR has determined that pursuant to Section 504 and the IDEA, a manifestation determination for "alleged misbehavior" must be conducted before proceeding with an expulsion hearing. *Washington (CA) Unified Sch. Dist.*, 29 IDELR 486 (OCR 1998).

Discussion

It is recommended that a manifestation determination meeting be held for Section 504 students who are suspended for more than 10 school days or are subject to a series of removals that total 10 days cumulatively.

There is no requirement under Section 504 that a manifestation determination meeting be held prior to disciplining a Section 504 student for illegal drug use. *Appoquinimink (DE) Sch. Dist.*, 40 IDELR 157 (OCR 2003).

Drugs and Alcohol

Current drug users are not considered individuals with disabilities and are specifically excluded from the term "individual with a disability" under Section 504. 29 U.S.C. 705(20)(c)(I).

A Section 504 student currently engaging in the illegal use of drugs loses his right to educational services [under Section 504] even if he is otherwise disabled. OCR Staff Memorandum, 17 IDELR 609 (OCR 1991), Letter to Zirkel, 22 IDELR 667 (OCR 1995).

Districts can discipline Section 504 students who are current drug users to the same extent as non-disabled students for the use or possession of drugs or alcohol pursuant to the district's discipline code. 29 U.S.C. 705(20)(c)(iv). However, an alcohol addicted student may not be subject to discipline constituting a change of placement for misconduct not involving drugs or alcohol without a determination that the conduct was related to the student's disability.

Examples

OCR and parents agreed student's conduct was disability based; however, OCR determined a student currently using alcohol can be disciplined in the same manner as other students, regardless of whether that student is disabled on the basis of alcoholism. Pinellas County (FL) Sch. Dist., 20 IDELR 561 (OCR 1993).

OCR determined a district violated Section 504 when it suspended an alcohol-addicted student due to attendance issues, arguably associated with the student's alcohol addiction disability, without first conducting a manifestation determination meeting and providing procedural protections under Section 504. *In re Stroyer*, 508 IDELR 371 (SEA OR 1987).

STEPS TO TAKE WHEN EXPELLING A SPECIAL EDUCATION STUDENT

1. Student is involved in an incident.
2. Principal or principal's designee decides to recommend student for expulsion.
3. Suspension:
 - Typically, the principal or the principal's designee also suspends the student.
 - General education students can only be suspended for five consecutive days. (Educ. Code 48903.)
 - Special education students can be suspended for 10 consecutive days. (20 U.S.C. 1415.)

However, prior to the 10th **cumulative** day of suspension, the special education student's IEP team must meet for a manifestation determination IEP meeting.

4. An IEP meeting must be held within 10 **cumulative** days of suspension:
 - A. Decisions to be made at the IEP meeting:
 - i. Was the student's conduct caused by, or did it have a direct and substantial relationship to, the child's disability? or
 - ii. Was the student's conduct the direct result of the district's failure to implement the IEP?
 - B. If the answer to either of these questions is yes, the student's conduct is determined to be a manifestation of the student's disability.
 - C. After manifestation finding:
 - i. The IEP team shall –
 - (1) Offer student's parent a consent for an FBA; after an assessment is agreed to, an IEP meeting will be held and a BSP will be offered for the student, provided the district had not conducted such an assessment prior to the manifestation determination IEP meeting (for the same conduct);
 - (2) If a BSP has already been developed, the IEP team must review the BSP and modify it, as necessary, to address the behavior; and

(3) Return the child to the placement from which the child was removed, unless the parent and the district agree to a change of placement in an IEP plan.

D. Completion of the FBA is not necessary prior to a manifestation determination IEP meeting. The district is only required to offer an assessment plan for an FBA to the student's parent after the IEP team makes a finding that the student's conduct is a manifestation of his/her disability.

5. Date, time, and place of the IEP meeting for manifestation determination:

A. The parent has the right to participate in the IEP meeting through actual attendance, representation, or by telephone. However, the parent cannot require the district to hold the IEP meeting beyond the 10th day of suspension. The district must schedule the IEP meeting to be held **prior** to the student having 11 cumulative days of suspension.

B. The meeting shall be held at a time and place **mutually agreeable** to the parent and the district.

C. Each parent is entitled to notice of (1) his/her right to participate in the IEP meeting, (2) that his/her child is being recommended for expulsion, and (3) a manifestation determination decision will occur at the IEP meeting.

D. The IEP meeting notice must be in writing and must indicate the purpose (manifestation determination), date, time, location of the meeting, and who will be in attendance. The notice must also inform parents or guardians of their right to bring others to the meeting who have knowledge or special expertise regarding the child. (The decision regarding who has knowledge or special expertise is based on the discretion of the person inviting that party to the IEP meeting.) A copy of the Procedural Rights and Responsibilities must be included with the notice sent to the parents.

E. The district can hold the IEP meeting without the parent in attendance if it is unable to convince the parent or legal guardian that he or she should attend. In this event, the district must maintain a record of its attempts to arrange a mutually agreed upon time and place as follows:

i. Detailed records of telephone calls made or attempted and the results of those calls;

ii. Copies of correspondence sent to the parent or legal guardian and any response received;

iii. Detailed records of visits made to the home or place of employment of the parent or legal guardian and the results of those visits;

iv. Detailed records of attempts to telephone the parent or legal guardian at the manifestation determination IEP meeting and conference them into the meeting by speaker phone. (Educ. Code 56341.5(g) and (h).)

6. Due Process and Stay Put: During expulsion proceedings, a parent has the right to file for a due process hearing to challenge the IEP team's manifestation determination or the information relied upon by the IEP team. Parents can also file to challenge the district's determination that it had no basis of knowledge that the child had a disability. Once the parent files for due process, no expulsion hearing can be conducted until the due process hearing and appeals have been exhausted. (20 U.S.C. 1415.) However, the child can remain in the IEAS determined by the district at the IEP meeting as long as the district provides educational services to enable the child to continue to participate in the general education curriculum, although in another setting, and progress toward meeting the goals set out in the child's IEP. As appropriate, the child must also receive an FBA or a BSP, or have an exiting BSP modified.

Because California has chosen to extend "all applicable procedural safeguards prescribed by federal and state law" to expulsion proceedings, parents' rights include the right to seek a stay put order through the OAH.

7. Superior Court Orders: Districts should consult with counsel about the availability of Superior Court orders to keep a special education student away from their last agreed upon educational placement.

[DRAFT - TO BE FINALIZED ON DISTRICT LETTERHEAD]

**[Must be in the primary language of the student's parent/guardian;
to be mailed on the day of suspension]**

[Date]

[Name and Address]

Re: **[Student]**

Dear **[Parent]**:

This letter constitutes written notice that your child, **[name of student]**, is suspended from school, effective immediately, and will not be allowed to return to school for the next ____ consecutive school days. This is also written notice that your child may be expelled pending the outcome of an Individualized Education Program (IEP) meeting. An expulsion hearing has already been set as detailed in the enclosed Notice of Expulsion Hearing.

The reason for your child's disciplinary removal from school is because he/she did the following:

**[SET FORTH FACTS LEADING TO
DISCIPLINE DECISION AND THE STATUTORY VIOLATION]**

The law requires that an IEP team meeting be convened before the 11th school day for which a student is removed from school due to disciplinary reasons. The IEP meeting is set to determine whether a child's misconduct is a manifestation of his/her disability. By law, your child can be expelled only if the misconduct is not a manifestation of his/her disability. If the IEP team determines that your child's misconduct is a manifestation of his/her disability, the expulsion hearing described above will be cancelled.

As set forth in the enclosed IEP Meeting Notice, the meeting has been set for **[date and time]** at **[location]**. The law also requires that the IEP meeting be held at a mutually agreeable time and location; however, the meeting must occur within 10 school days of the recommendation to expel your child. If you wish to change the meeting date, time, or location, please contact _____ and we will work with you to arrive at a mutually agreeable date, time, and location; however, the IEP meeting must be held within the next ____ school days. If you do not contact _____ to request a change, the IEP meeting will be held on the date and time and at the location detailed in the enclosed IEP Meeting Notice.

You have the right to attend the IEP meeting through actual attendance, by representation, or by telephone.

At the IEP meeting, the IEP team will make the following decisions:

- (1) Was the conduct caused by, or did it have a direct and substantial relationship to, **[Student's]** disability? or
- (2) Was the conduct the direct result of the district's failure to implement the IEP?

If the IEP team determines that the misconduct was not a manifestation of **[Student's]** disability, the conduct will be reviewed by the district's Board of Trustees to determine if **[Student]** should be expelled. The date, time, and location for the expulsion hearing is detailed in the enclosed Notice of Expulsion Hearing.

A full explanation of your due process rights is also enclosed.

Very truly yours,

[Appropriate Administrator]

Enclosures:

- Notice of Expulsion Hearing
- IEP Meeting Notice
- Procedural Rights and Responsibilities

REPORT OF IEP TEAM MANIFESTATION DETERMINATION MEETING

Expulsion proceedings are pending against:

Student: _____

Date of Birth: _____

This is a report of a manifestation determination IEP meeting held by the IEP team:

Date: _____

Time: _____

Location: _____

The scribe for this meeting was _____.

The IEP team chair for this meeting was _____.

Those attending this meeting were:

| Name | Title |
|-------|-------|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

1. Notification:

Written notification of this IEP team meeting was provided to Student's parent(s) or guardian(s) by:

- _____ Deposited in U.S. Mail (certified) by _____ on _____.
- _____ Personal delivery by _____ on _____.
- _____ Other (specify): _____

2. Procedural Rights & Safeguards:

Parent(s)/Guardian(s) hereby acknowledge that they received a copy of the procedural rights and safeguards.

Parent/Guardian Signature(s): _____

Signature of Administrator
providing copy of rights: _____

3. Expulsion Hearing Information:

____ An expulsion hearing has not yet been set
____ An expulsion hearing has been set as follows:
Date: _____
Time: _____
Place: _____

4. School Identification Information:

Prior to disciplinary proceedings, Student attended school at

____ Student is still attending his/her most recent educational placement.

____ Since (date) _____, Student is now attending school at

____ Student is not attending school because:

____ Home study since _____
____ Hospitalized since _____
at _____
____ Other (specify): _____

5. Description of Student's Disability:

(YES)(NO) Has Student previously been identified as having a disability or disabilities?

If yes,

- On what date was the last eligibility assessment completed?

- What is Student's disability/disabilities?

If no, did the district have knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred based on any of the following?

(YES)(NO) (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the LEA, or a teacher of the child, that the child was in need of special education and related services;

(YES)(NO) (2) The parent of the child requested an evaluation of the child pursuant to Section 300.300 through Section 300.311; or

(YES)(NO) (3) The child's teacher, or other district personnel, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the district's director of special education or to other district supervisory personnel.

- If the answer to (1), (2), or (3) is yes, what is the suspected disability/disabilities?

6. Manifestation Determination:

A. In terms of the behavior that is the subject of disciplinary action, the IEP team must consider all relevant information including the following:

(1) Behavior that is the subject of disciplinary proceedings, summarized as follows:

(YES)(NO) Copies of available police reports and school reports describing the behavior were reviewed by each IEP team member at this meeting.

(YES)(NO) An oral report describing the behavior was provided to each IEP team member at this meeting by the person making the expulsion recommendation or his or her designee. Person giving report:

(YES)(NO) Other written or oral reports describing the behavior were provided to each IEP team member as follows:

(specify): _____

- (2) Any evaluation or diagnostic results, including the results or other relevant information supplied by the child's parents.
- (3) Teacher observations of Student as follows: _____

- (4) Information supplied by parents or guardians as follows:

- (5) Student's prior disciplinary record.
- (6) Student's relevant grade or progress reports.
- (7) Student's relevant attendance record.
- (8) Student's last agreed upon annual IEP (with any agreed upon addenda) and placement.
- (9) Past IEPs that document similar behavior by Student.
- (10) Student's health records.
- (11) Any Behavioral Support or Behavior Intervention Plan in effect at the time the behavior at issue occurred.
- (12) The nature and extent of Student's disability.
- (13) Other (specify): _____

b. The IEP team must consider whether Student's behavior was caused by, or a direct manifestation of, Student's identified disability, and make the following determinations:

- (1) Was Student's conduct caused by, or did it have a direct and substantial relationship to, the child's disability? or
- (2) Was Student's conduct the direct result of the district's failure to implement the IEP?

IF THE ANSWER TO EITHER b.(1) OR b.(2) IS YES, THE BEHAVIOR MUST BE CONSIDERED A MANIFESTATION OF STUDENT'S DISABILITY.

7. Results of the Manifestation Determination by IEP Team:

_____ Student's conduct caused by, or had a direct and substantial relationship to, the child's disability? or

_____ Student's conduct the direct result of the district's failure to implement the IEP?

DECISION:

_____ YES: The incident is a manifestation of Student's disability:
NO EXPULSION HEARING CAN BE HELD.

_____ NO: The incident is not a manifestation of Student's disability:
THE DISTRICT CAN PROCEED TO AN EXPULSION HEARING.

8. IF STUDENT'S BEHAVIOR IS A MANIFESTATION OF STUDENT'S DISABILITY, THE IEP TEAM MUST:

Consider the appropriateness of Student's IEP and placement at the time of occurrence of the behavior that is the subject of disciplinary proceedings and make the following determinations:

(1) Was an IEP in place when behavior occurred? (YES) (NO)

If yes, what was the date of that annual IEP (any addenda)?

(2) Was the IEP current? (YES) (NO)

(3) What part of the IEP, if any, was not implemented? (YES)(NO)

(4) Was there a behavior support or intervention plan when the behavior occurred?
(YES) (NO)

If **yes**, the BSP or BIP must be reviewed and modified to address the behavior that is the subject of the manifestation determination meeting.
(_____) Check if done.

If **no**, an FBA must be done and a BSP must be written and implemented to address the behavior that is the subject of the manifestation determination meeting. (_____) Check if done.

NOW THE IEP TEAM MUST TAKE IMMEDIATE STEPS TO REMEDY ANY DEFICIENCIES IN THE IEP PLAN.

The person responsible for coordinating the immediate steps to remedy any deficiency in the IEP, placement or implementation of the IEP, or services is: _____

9. Written notification of the IEP team's decision was provided to Student's parent(s) or guardian(s) by:

_____ Regular U.S. Mail by _____ on _____

_____ Certified U.S. Mail by _____ on _____

_____ Personal delivery by _____ on _____

_____ Other (specify): _____

10. IF STUDENT'S BEHAVIOR IS NOT A MANIFESTATION OF STUDENT'S DISABILITY, THE IEP TEAM MUST:

Consider the extent of educational services necessary during expulsion to enable Student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in Student's IEP, as follows:

- a. At the time the behavior occurred, Student's IEP set forth the following goals and objectives:

___ attached, or
 ___ listed here: _____

- b. At the time the behavior occurred, Student was receiving the following services:

- (1) Regular curriculum courses and electives:

| Subject | Gen. Ed. Course | Spec. Ed. Course | Quantity (Frequency/Duration) |
|---------|-----------------|------------------|-------------------------------|
| _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ |

- (2) Special education services, supplementary aids and services:

| Describe Each Service | Quantity (Frequency/Duration) |
|-----------------------|-------------------------------|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

- c. The IEP team determines that the following services are necessary during expulsion for Student to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP. (The IEP team determines the services that are necessary; if Student is expelled, the expulsion hearing body will determine the site at which services are to be delivered.) The IEP team must also determine and document the positive behavior supports that will be implemented to ensure that the behavior violation does not recur.

| Identify Each Course, Service or Election | Gen. Ed. or Special Ed. | Quantity (Frequency/ Duration) |
|--|----------------------------|--------------------------------------|
| _____ | _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

- d. Where will the services be provided to Student? (This is the interim alternative educational setting.) _____
- (1) The above-described services have already been implemented pending an expulsion hearing. (YES)(NO)
- (2) If not yet fully implemented, the person responsible for coordinating implementation of the above-described services is _____
- e. If appropriate, the IEP team must conduct an FBA and implement behavioral intervention services and modifications designed to address the behavior violation so it does not recur.

=====

Signature Section

=====

REPORT OF 504 TEAM MANIFESTATION DETERMINATION MEETING

Student: _____

Date of Birth: _____

Meeting Date: _____

Meeting Time: _____

Location _____

The scribe for this meeting was _____

The 504 Team chair for this meeting was _____

Those attending this meeting were:

| Name | Title |
|-------|-------|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

1. Notification: Written notification of this 504 Team meeting was provided to Student's parent(s)/guardian(s) by:

____ Certified U.S. Mail by _____ on _____
____ Personal delivery by _____ on _____
____ Other (specify): _____

2. Procedural Rights and Safeguards: Parent(s)/guardian(s) hereby acknowledges receipt of a copy of the procedural rights and safeguards under Section 504.

Parent/Guardian Signature(s): _____

Signature of Administrator
providing copy of rights: _____

3. Expulsion Hearing Information (If Applicable):

____ An expulsion hearing has not yet been set.

___ An expulsion hearing has been set as follows:

Date: _____

Time: _____

Place: _____

4. School Identification Information:

Prior to disciplinary proceedings, Student attended school at:

___ Student is still attending his most recent educational placement.

___ Since (date) _____, Student is now attending school at:

___ Student is not attending school because:

___ Home study since _____

___ Hospitalized since _____

at _____

___ Other (specify): _____

5. Description of Student's Disability:

(YES)(NO) Has Student previously been identified as having a physical or mental impairment that substantially limits a major life activity?

If yes:

■ Date of the last eligibility determination:

■ What is Student's disability(ies)?

6. Manifestation Determination:

a. In terms of the behavior that is the subject of disciplinary action, the 504 Team must consider all relevant information including the following:

- (1) Behavior that is the subject of disciplinary proceedings, summarized as follows:

- (YES)(NO) Copies of available police or school reports describing the behavior were reviewed by each 504 Team member at this meeting.

- (YES)(NO) An oral report describing the behavior was provided to each 504 Team member at this meeting by the person making the expulsion recommendation or his or her designee. Person giving report: _____

- (YES)(NO) Other written or oral reports describing the behavior were provided to each 504 Team member as follows:
(specify): _____

- (2) Any evaluation or diagnostic results, including the results or other relevant information supplied by the parents/guardians of the child;

- (3) Observations of Student, as follows: _____

- (4) Information supplied by parents/guardians as follows: _____

- (5) Student's prior disciplinary record.

- (6) Relevant grade or progress reports.

- (7) Relevant attendance record.

- (8) Student's last agreed upon 504 Accommodation Plan (with any agreed upon amendments) and placement.

- (9) Student's health records.

- (10) Any Behavioral Support Plan (BSP) or Behavior Intervention Plan (BIP) in effect at the time the behavior at issue occurred.

- (11) The nature and extent of Student's disability.

(12) Other (specify): _____

b. The 504 Team must consider whether Student's behavior was caused by, or a direct manifestation of, Student's identified disability, and make the following determinations:

(1) Was Student's conduct caused by, or did it have a direct and substantial relationship to, Student's disability? or

(2) Was Student's conduct the direct result of the district's failure to implement the 504 Accommodation Plan?

IF THE ANSWER IS "YES" TO EITHER b. (1) OR (2), THE BEHAVIOR MUST BE CONSIDERED A MANIFESTATION OF STUDENT'S DISABILITY.

7. Results of the manifestation determination by 504 Team:

____ Student's conduct was caused by, or had a direct and substantial relationship to, Student's disability; or

____ Student's conduct was the direct result of the district's failure to implement the 504 Accommodation Plan; or

____ The behavior at issue is not a manifestation of Student's disability.

DECISION:

____ YES: The incident is a manifestation of Student's disability:
NO EXPULSION HEARING CAN BE HELD.

____ NO: The incident is not a manifestation of Student's disability:
THE DISTRICT CAN PROCEED TO AN EXPULSION HEARING.

8. IF STUDENT'S BEHAVIOR IS A MANIFESTATION OF STUDENT'S DISABILITY, THE 504 TEAM MUST DO THE FOLLOWING:

Consider the appropriateness of Student's 504 Accommodation Plan and placement at the time of occurrence of the behavior that is the subject of disciplinary proceedings and make the following determinations:

(1) Was a 504 Accommodation Plan in place when behavior occurred?
(YES) (NO)

If yes, what was the date of that 504 Accommodation Plan (any amendments)?

(2) Was the 504 Accommodation Plan current? (YES) (NO)

- (3) What part of the 504 Accommodation Plan, if any, was not implemented?
- (4) Was there a BSP or BIP when the behavior occurred?
(YES) (NO)

If yes, what was the date of the BSP or BIP? _____

THE 504 TEAM MUST REVIEW THE BSP OR BIP AND MODIFY IT, AS NECESSARY, TO ADDRESS THE BEHAVIOR.

IF THERE WAS NO BSP OR BIP WHEN THE BEHAVIOR OCCURRED, THE 504 TEAM MUST CONDUCT A FUNCTIONAL BEHAVIORAL ASSESSMENT AND IMPLEMENT A BSP.

THE 504 TEAM MUST TAKE IMMEDIATE STEPS TO REMEDY ANY DEFICIENCIES IN THE 504 ACCOMMODATION PLAN.

The person responsible for coordinating the immediate steps to remedy any deficiency in the 504 Accommodation Plan, placement, or implementation of the 504 Accommodation Plan is:

9. Written notification of the 504 Team's decision was provided to Student's parent(s)/guardian(s) by:

- _____ Regular U.S. Mail by _____ on _____
- _____ Certified U.S. Mail by _____ on _____
- _____ Personal delivery by _____ on _____
- _____ Other (specify): _____

10. IF STUDENT'S BEHAVIOR IS NOT A MANIFESTATION OF STUDENT'S DISABILITY, THE DISTRICT IS NOT REQUIRED TO PROVIDE SERVICES AND/OR ACCOMMODATIONS DURING THE EXPULSION PERIOD.

=====

Signature Section

PRIOR WRITTEN NOTICE

Dated ____/____/____

Provided to parent prior to district initiation or refusal regarding change of identification, evaluation, educational placement, or provision of free appropriate public education

Student Name: _____
 First Middle Last D.O.B.

This notice is to inform the parent(s) of the above named student regarding the school district's:

Proposal to initiate or change the:

Identification **Evaluation** **Educational Placement** **Provision of a free appropriate public education to your child**

This notice includes a description of the proposed action, an explanation of why the district proposed to take this action, a description of any other options that were considered and the reasons why those options were rejected, and other factors that are relevant to this proposal. Your written permission must be given before we assess your child to determine eligibility. You have the right to be familiar with the assessment procedures and types of tests that may be given to your child. After the assessment is completed, you will be notified in writing of a meeting to discuss the results of the evaluation.

Refusal of your request to initiate or change the:

Identification **Evaluation** **Educational Placement** **Provision of a free appropriate public education to your child**

This notice includes a description of the action being refused, an explanation of why the district refused to take this action, a description of any other options that were considered and the reasons why those options were rejected, and other factors that are relevant to this refusal.

| |
|--|
| <u>Description of proposed or refused action:</u> |
| <u>Reason(s) for proposed or refused action:</u> |
| <u>Description of evaluation procedures, tests, records, or reports used in deciding to propose or refuse this action:</u> |
| <u>Description of other options considered and reasons for rejecting them:</u> |
| <u>Other factors relevant to the proposal or refusal:</u> |

You have protection under the procedural safeguards of Part B of the IDEA. A copy of the Procedural Safeguards is enclosed. If you would like further information about your rights or the proposed action and/or referral please contact:

_____ _____ _____ _____
Print Name and District Contact Position Phone E-mail Address