

# FREE APPROPRIATE PUBLIC EDUCATION (“FAPE”) FOR EXPELLED STUDENTS

*Presentation by Stacy L. Inman  
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## **I. GENERAL OVERVIEW**

### **A. What Is a Free Appropriate Public Education (FAPE)?**

FAPE means special education and related services that:

- Have been provided at public expense, under public supervision and direction, and without charge;
- Meet the standard of the state education agency (state standards);
- Include an appropriate preschool, elementary or secondary school education in the state involved; and
- Have been provided in conformity with the Individualized Education Program (IEP).

“Special education” is instruction specially designed to meet the unique needs of a child with a disability.

“Related services” means transportation and any developmental, corrective, and other supportive services as are required to enable a child with a disability to benefit from special education. Included are speech-language pathology and audiology services; interpreting services; psychological services; physical and occupational therapy; recreation (including therapeutic recreation); early identification and assessment of disabilities; counseling services (including rehabilitation counseling); orientation and mobility services; and medical services for diagnostic or evaluation purposes. Also included are school health services; school nurse services; social worker services in schools; and parent counseling and training.

“Designated instruction and services” (DIS) is California’s term for related services. It is defined under Education Code section 56353(a) which states that DIS shall be provided “when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program.”

### **B. What Is an Expelled Student?**

1. Mandatory expulsion referral for zero tolerance offenses.

The principal/superintendent must immediately suspend and recommend expulsion of any pupil who engages in certain specified prohibited conduct on or off school grounds at a school activity:

- a. Possession, selling, or furnishing a firearm (does not include an imitation firearm);
- b. Brandishing a knife at another person (blade longer than 3½ inches, fixed blade, locking blade - Education Code section 48915(g));
- c. Unlawful sale of a controlled substance;
- d. Sexual assault/attempted sexual assault/sexual battery; or
- e. Possession of an explosive.

(Ed. Code § 48915(c).)

2. Qualified mandatory referral for certain serious offenses.

***Unless expulsion “should not be recommended under the circumstances” or “an alternate means of correction would address the conduct,”*** the principal/superintendent must immediately suspend and recommend expulsion of any pupil who engages in certain specified prohibited conduct at a school activity on or off school grounds:

- a. Serious physical injury to another except in self-defense;
- b. Possession of a knife or other dangerous object;
- c. Possession of illegal drugs, except first offense possession of marijuana in an amount of one ounce or less (does not include either over-the-counter medication being used for a medical purpose or medication prescribed by a physician for the pupil);
- d. Robbery or extortion; or
- e. Assault or battery upon a school employee.

(Ed. Code § 48915(a).)

3. Possession of a firearm.

The offense of “possessing” a firearm requires that the pupil knowingly and voluntarily has direct control over the firearm.

The offense of possessing a firearm does not include circumstances where the possession is brief and solely for the purpose of disposing of the firearm, such as handing it to school officials.

4. Possession/brandishing a knife.

The offense of “possession/brandishing” a knife requires that the knife be either:

- a. A dirk (a long dagger or small sword);
- b. A dagger (a double-edged knife used for stabbing) with a blade of any length;
- c. Any weapon with a blade fitted primarily for stabbing (a spear or sword);
- d. Any weapon with a blade longer than 3½ inches (kitchen knife or pocketknife);
- e. A folding knife with a blade that locks into place; or
- f. A razor with an unguarded blade.

(Ed Code § 48915(g).)

5. Possession of an explosive.

The term “explosive” in Section 48915 means an explosive, incendiary, or poison gas:

- a. Bomb;
- b. Grenade;
- c. Rocket with a propellant charge of more than four ounces;
- d. Missile with a charge of more than one-quarter ounce;
- e. A mine;
- f. Any device which will or can readily be converted to expel a projectile by the action of an explosive or propellant and has a bore with a barrel greater than one-half inch in diameter; or
- g. A combination of parts that may be readily assembled into an explosive device. (18 USC § 921(a)(4).)

The term “explosive” in Section 48915 excludes:

- a. Any device which is not designed for use as a weapon; or
- b. Any device originally designed for use as a weapon but redesigned for use as a signaling, pyrotechnic, line throwing or safety device. (18 USC § 921(a)(4).)

6. Meaning: “other dangerous object.”

The phrase “other dangerous object” is not expressly defined in the Education Code. For lack of a better alternative, use Title 18, U.S.C. section 930(g)(2), which defines a “dangerous weapon” to mean a device, instrument, material, or substance that is used for or readily capable of being used to cause death or serious bodily injury, except that the term does not include a knife with a blade less than 2½ inches.

7. Meaning: “serious physical injury.”

The phrase “serious physical injury” is not expressly defined in the Education Code. For lack of a better alternative, use Title 18, U.S.C. section 1365, which defines “serious bodily injury” to include: a cut, abrasion, bruise, burn, disfigurement or any other injury to the body, no matter how temporary, which involves either a substantial risk of death,

extreme physical pain, protracted and obvious disfigurement, or the protracted loss or impairment of a function of a bodily member, organ, or mental faculty.

8. Expulsion decision.

Pursuant to Education Code section 48918, when an expulsion hearing is conducted by the governing board before a hearing officer or an administrative panel, final action to expel a pupil shall be taken only by the governing board in a public session. Therefore, only a school district governing board can order a student expelled.

**C. Continuation of FAPE for Properly Suspended and Expelled Student.**

Special Education and Related Services Must be Continued.

a. 34 C.F.R. section 300.530(d) of the Part B regulations requires school districts to provide FAPE to a student with a disability who is removed from his/her current educational placement "so as 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." (34 C.F.R. § 300.530(d)(1)(I).)

b. This means that the student must be taught in a way that they can learn using the general education curriculum and in a way to meet their goals. Typically, this means that in order for progress to be made on the goals, teachers with specialized credentials must teach the students, even though they are expelled. Sometimes students must be taught using specially designed instruction which includes accommodations that address a child's unique needs and ensure access to the general curriculum.

c. Related services are still required to be provided, especially if there are goals in that area of need. Typical related services provided during long-term suspension and expulsion are speech and language services and occupational therapy services.

d. Homework packets are insufficient for services during expulsion.

e. Home instruction is generally insufficient for services during expulsion.

**D. Disciplinary changes in placement that exceed 10 school days:**

Any time disciplinary changes in placement exceed 10 school days, if the behavior that gave rise to the violation of the school code is determined **NOT** to be a manifestation of the child's disability, school personnel may apply the relevant disciplinary process to children with disabilities in the same manner and for the same duration as the procedures applied to children without disabilities, except, when a child is removed from his or her current placement, they must:

1. Continue to receive educational services, as provided in Section 300.101(a), so as 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; and
2. Receive, as appropriate, a functional behavioral assessment and behavioral intervention service and modifications designed to address the behavior violation so it does not recur.

**E. The IEP team must recommend educational services for an expelled child.**

The IEP team is responsible for deciding what services are needed to provide FAPE to a child with a disability who has been expelled from his or her school district for conduct determined not to be a manifestation of his or her disability. (34 C.F.R. § 300.530(d).)

**F. Amount of services to be provided.**

A district is not required to provide the same level of services the child received prior to the disciplinary removal. There is no hard and fast rule as to what specific educational services need to be provided in an alternative setting. Rather, the comments appended to the IDEA's implementing regulations defer to state and local definitions of "general curriculum" for guidance.

**G. The child's IEP team will determine what services will be provided.**

## **II. STATUTORY AND CASE LAW**

Part B of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA" or "IDEA-B") requires state educational agencies to assure the secretary in their state plan that all eligible children are receiving a FAPE, *including continued education services for students with disabilities who are suspended long-term or expelled.*

**A. *Jeremy Magyar v. Tucson Unified School District* (9<sup>th</sup> Circuit 1997)**

Jeremy is a student who qualified for special education services under the IDEA. In September 1995, at age 14, he gave an assault-style knife to another student who put the knife in his own pocket. Jeremy readily admitted ownership and said he did not know why he brought it to school.

Bringing a knife to school violated Tucson Unified School District's (TUSD) student rights and responsibilities. Jeremy was immediately given a short term suspension of 10 days. There was a manifestation determination meeting and the IEP team determined that Jeremy's misconduct was not related to his handicapping condition.

Thereafter, a disciplinary hearing was held and the hearing officer determined to extend Jeremy's suspension for a total of 175 days and recommended that Jeremy be expelled. ***TUSD did not convene an IEP meeting nor did it provide any educational services to Jeremy during the entire period of his long-term suspension.*** Later, the TUSD Governing Board met and the hearing officer recommended that Jeremy be expelled for the current semester and the next semester of school. The Board ordered that Jeremy comply with all terms of his probation and that he complete an alternative education programs outside of TUSD during the two semesters.

TUSD did not convene an IEP meeting for Jeremy since it was in TUSD's written policy that educational services may be discontinued for children with disabilities who are on long-term suspensions or expelled from the school for conduct unrelated to a disability. TUSD policy stated that if the IEP team determined that the student's behavior was NOT a result of a handicapping condition, educational services may be interrupted and the student can be treated as a non-special education child and, therefore, not receive any educational services from TUSD.

This Federal Appeals Court decision analyzes whether a school district that accepts federal funds is permitted under the IDEA to deny educational services to a child with a disability who has been expelled for misconduct found to be unrelated to his or her handicapping condition. TUSD argued in this case that nothing in the IDEA or the legislative history support such a requirement, because otherwise there would be a "Super" class of disabled students. Also, TUSD asserted that the Federal Office of Special Educational Program's (OSEP) interpretive rules do NOT have the force and effect of law and should not be accorded weight in the adjudicatory process.

The Appellate Court found that the IDEA provides federal funds to assist state and local agencies in educating students with disabilities. The IDEA is conditioned upon a commitment from each participating state that all children with disabilities within its jurisdiction will receive necessary educational services in accordance with the IDEA. An appropriate education for disabled students consists of specialized instruction and related services provided in conformity with each student's individualized education program.

Expulsion constitutes a "Change in Placement" within the meaning of the IDEA. Hence, a school district seeking to impose a long-term suspension or expulsion on a disabled student must comply with the procedures prescribed with the IDEA with the required parental involvement and must provide educational services.

In this case, when TUSD decided to extend Jeremy's suspension for a total of 175 days, it was required to hold an IEP meeting. At that new IEP meeting, individualized services should have been discussed and provided.

Under the IDEA's procedural dictates, a school district may discipline a child in the same manner that it would discipline any other child, including suspension or expulsion from the regular school setting. However, the issue in this case is whether the school district must provide IDEA-qualified specialized educational services during the expulsion period.

TUSD's policies allowed it to terminate all of the educational services for children with disabilities following a determination that the student's conduct was not related to the disabling condition. In this case, the 9<sup>th</sup> Circuit Court of Appeals found that all handicapped students are entitled to individualized educational services when they are long-term suspensions or are expelled from the regular school setting.

The Federal Appellate Court reached this decision based upon Congress' recognition that handicapped children with exceptional needs must be provided with an education if they are to be full participants in society. Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. The Court stated that students who drop out of school are often those who have been suspended or expelled. Dropping out of school is associated with increased criminal activity, drug use, public assistance, unemployment and lower earning capacity. It is well established that getting a high school education is crucial to survival. And when the suspended or expelled children are handicapped, the impact is even greater. Congress recognized the immense social cost of denying an education to children with disabilities. Congress' belief is that with proper educational services, many children with disabilities will be able to become productive citizens, contributing to society instead of being forced to remain burdens.

Additionally, the 9<sup>th</sup> Circuit Court of Appeals acknowledged that the OSEP is the federal agency charged with the administration, interpretation, and enforcement of the IDEA. OSEP's interpretation is that the IDEA requires the continuation of services to students with disabilities following long-term suspension and expulsion. The Court said that they must give deference to this agency. This requires Californians to give deference to this agency. The Court found that the IDEA and Arizona's Constitution did not permit the complete cessation of educational services. The suspended and expelled handicapped students must continue to receive approved educational services in an alternative setting and those services must be provided free of charge.

Therefore, the Court found that TUSD violated Jeremy and his parents' rights when they did not provide educational services during Jeremy's long-term suspension and his expulsion; they violated their rights when Jeremy was expelled without an IEP meeting being held to recommend and implement educational services; that TUSD's policies violated the IDEA; that TUSD and its employees were permanently enjoined from engaging in any actions that would permit the cession of services for children with disabilities during long-term suspension (over 10 days) or expulsion; that Jeremy was entitled to compensatory education; that Jeremy and his parents were entitled to reasonable attorney's fees and costs; and TUSD had 10 days to ensure that Jeremy was receiving appropriate educational services in accordance with the IDEA.

#### **B. *Student v. Upper Lake Union High School District (OAH 2006)***

In this case, a disabled student alleged that the Upper Lake Union High School District (District) failed to follow the required process when disciplining her.

Student was 18 when she first attended a District school. She was eligible for services on the basis of a specific learning disability. She understood that once she turned 18 years old, she was responsible for signing her IEPs and other special education documents.

Student was suspended for five days in October 2005 for smoking marijuana on school grounds. Thereafter, she smoked marijuana again on school grounds in January 2006. In February 2006, Student was expelled for smoking the marijuana on the second occasion. The District's Governing Board suspended the expulsion and placed student on probation as long as she complied with specific conditions. Since Student was on a suspended expulsion, she could have returned to her high school immediately, but the District did not inform her of such until two months after she was expelled.

The Administrative Law Judge (ALJ) found that a school district is required to conduct a manifestation determination when it removed a student from an educational placement for over 10 days. When student was suspended in October 2005 for smoking marijuana, a Manifestation Determination was made that the conduct was not caused by and did not have a direct and substantial relationship to her disability. It was also determined that her conduct was not the direct result of the District's failure to implement her IEP. However, District did not conduct a Manifestation Determination in connection with smoking marijuana in January 2006. The District thought that it was not required to do another Manifestation Determination meeting because it had previously determined in October 2005 that smoking marijuana was not a manifestation of the Student's disability. The ALJ found that the fact that District conducted one manifestation determination in October 2005 did not fulfil the District's obligation to conduct another MD in regard to the smoking of marijuana in January 2006.

The ALJ found that the District failed to provide Student with an interim alternative educational placement and failed to provide her with any educational services during the two months of her expulsion from January to March 2006. Student was denied a FAPE since the District failed to provide educational services to her during her expulsion.

### **C. *Student v. Fresno Unified School District (OAH 2012)***

This student is eligible for special education and related services under the category of other health impairment (OHI) primarily based on a medical diagnosis of ADHD. Student's last educational program was four general education classes and two special education resource specialist classes. Student engaged in conduct that violated school rules. Student took an intellectually disabled male student from the functional life skills class to the bathroom and entered and locked the bathroom stall. Student was accused of unwanted attempted sexual intercourse in the stall. A district teacher found the two students in the locked bathroom stall, partially disrobed. Student was arrested and incarcerated.

Fresno Unified School District (FUSD) initially suspended perpetrator student from school for five school days. The principal then recommended student's expulsion. A Manifestation Determination meeting was held and FUSD members of the IEP team determined that the



behavioral incident in the bathroom was not a manifestation of student's disability. Thereafter, FUSD held an expulsion hearing. The District Governing Board notified parents that they had decided to expel student for one semester of school. The Board stayed the expulsion order so that student could attend a community day school.

During a five-month period of time, student alleged that FUSD failed to provide student with any special education services. FUSD alleged that they provided student with weekly homework packets. The IEP team found that student's disciplinary conduct was not a manifestation of his disability. At the IEP meeting, there is a form to write into the IEP which special education services the student will receive during the expulsion process. Eric Nyberg, a Regional Manager, chaired the Manifestation Determination meeting and was responsible for documenting the meeting. According to Mr. Nyberg, FUSD's policy for special education pupils such as student (an RSP student), was to provide weekly homework packets for the students to take home and do themselves. The student's Resource Specialist Math teacher was responsible for collecting the homework assignments.

No one at the IEP meeting discussed how student would receive the specialized instruction that FUSD had previously provided to the student in his RSP Language Arts and Math classes.

Student's RSP teacher picked up the student's homework packets from his teacher. The RSP teacher did not modify the homework to provide specialized instruction to the student. Parents returned the completed homework. Then, the RSP teacher prepared a new homework packet. FUSD provided no explanation as to why it failed to document the special education services that it would provide student while he awaited the expulsion decision. FUSD failed to consider how it would provide special education services because of the policy that students who receive RSP Instruction would only be provided homework packets. FUSD's policy of requiring RSP students pending expulsion to only be provided with homework packets, significantly impeded parents' ability to participate in the decision making process.

FUSD failed to provide student with educational services for the first 10 school days, and then failed to provide him with services for about two weeks. Thereafter, FUSD provided student with adequate educational services for two months.

FUSD failed to provide student a FAPE by failing to provide special education services. FUSD determined at the Manifestation Determination review that his disciplinary conduct was not a manifestation of his disability. FUSD failed to meet student's unique needs because only giving him homework packets failed to ensure that the student made progress on his IEP goals for which he required special education instruction.

**D. *Student v. Mojave Unified School District (2006) Kathleen LaMay Case.***

Student was a 12-year-old sixth grade pupil. He was eligible for special education and related services as a student with a Specific Learning Disability due to his diagnosis of attention deficit hyperactivity disorder (ADHD).

Student was expelled by Mojave Unified School District (MUSD) for sexual harassment. He was placed in an interim alternative educational setting for approximately 10 days and for a brief time at the beginning of the next school year.

Legally, IEPs must be designed to provide for the pupil's unique needs and are reasonably calculated to provide some educational benefit and services must be provided in conformity with the IEP. Expelled students must still receive a FAPE. MUSD did convene an IEP meeting. They drafted goals in student's unique needs and the student agreed that the goals and objectives were appropriate.

Student was offered Red Rock Alternative School (Red Rock). Placement at Red Rock was a small class of five students taught by a regular education teacher and a full-time aide. MUSD also offered special educational services to implement student's reading, writing, math and behavior goals and objectives: (1) 30 minutes of "push in" resource specialist services, five days each week; (2) 30 minutes of consultation services, one time each week; (3) two to four sessions of direct mental health counseling services per week at Red Rock, in the Student's home or in a clinic setting.

Although the teacher did not have a special education credential, she had received special education training in her teacher credentialing program and had substantive experience providing special education services to disabled students using a collaborative model. That collaboration model includes regular consultation with a credentialed special education teacher, as well as a resource specialist. The teacher also had previously implemented goals and objectives in numerous students' IEPs using the collaborative model. Student's previous IEP did not include the services of a full-time special education teacher. He had been mainstreamed for the bulk of his academics. The student's IEP plan also had behavioral goals and objectives for decreasing classroom talking and inappropriate playground behavior. Also, it had a Behavior Support plan to deal with his failure to sit in his seat, his anger and his problems with confrontation. Student was receiving mental health counseling two times a month.

Student wanted a full time Behavior Intervention Case Manager (BICM) five days a week, six hours per day. He did not established his need for a full-time BICM.

Due to the specificity of this student's IEP, even while he was expelled, it was found to have provided the student with FAPE.