

**IDEA and Discipline of Students with
Disabilities
Nov. 20, 2014**

Jennifer Honig, Esq.

Mental Health Legal Advisors Committee
of the Commonwealth of Massachusetts

IDEA

- The federal Individuals with Disabilities Education Act (IDEA) gives students with disabilities a right to a free appropriate public education (FAPE) in the least restrictive environment.
- IDEA provides procedural protections against school discipline that results in a change of placement.
- IDEA also requires schools to address behavioral issues of disabled students.

Who is a “child with a disability”?

The term “child with a disability” means a child—

- with intellectual disabilities, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; AND
- who, by reason thereof, needs special education and related services.

20 USC 1401 (3) (i) & (ii); 34 CFR 300.8.

What about children with disabilities who aren't yet special ed eligible?

A child not yet determined to be special ed eligible may assert any of these protections if the district had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. 20 USC 1415(k)(5)(A); 34 CFR 300.534(a).

When does a school district have knowledge of a student's disability?

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

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

CASES: Greater Lowell Tech., BSEA # 06-2895 (expulsion for illegal drugs -- although school personnel may have been aware of student's ADD and teachers had concerns re attention, that's not enough as IDEA is explicit; however, should have finished 504 process as school said it would when rejected for special ed); Monson, BSEA # 02-3525 (illegal drugs/paraphernalia – no record of behavior issue and consent to eval only signed on day of expulsion hearing).

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

- Parent doesn't allow evaluation.
- Parent refuses special ed services.
- Student was evaluated and found not eligible.

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

How may a district discipline students with disabilities?

School personnel may consider any unique circumstances on a **case-by-case** basis when determining whether to order a change in placement for a child with a disability who violates a student code of conduct.

20 USC 1415(k)(1)(A); 34 CFR 300.530(a).

For how many days may a district exclude a student with disabilities without an obligation to provide FAPE?

If the removal is for less than **10 consecutive school days** and removals total **10 cumulative days or less** in the school year, the district needn't provide FAPE unless the district provides services for students without disabilities who are similarly removed. 34 CFR 300.530(d)(3); see 20 USC 1415(k)(1)(B).

What is an allowable “removal”?

- Removal includes:
 - suspension, OR
 - placement in other setting, OR
 - assignment to an interim alternative educational setting (IAES)for no longer than 10 consecutive school days. 20 USC 1415(k)(1)(B); 34 CFR 300.530(b).
- An “in-house” suspension may be considered a removal. (DESE, Discipline of Special Ed Students Under IDEA 2004, Dec. 2007, “In-house suspension may be considered a change of placement.”)

What must occur when removal is for up to 10 consecutive days?

- If a removal is for up to 10 consecutive days (and it is not a change in placement), school personnel must consult with at least one of student's teachers to determine FAPE services to enable participation in general education curriculum and progress toward IEP goals. 34 CFR 300.530(d)(4).

May a district do multiple removals in a school year?

- A district may do multiple removals in one school year if each removal is no more than 10 consecutive school days, **but only if those removals don't constitute a change of placement.** 34 CFR 300.530(b).

What constitutes a change of placement?

- Removal for more than 10 consecutive school days, 34 CFR 300.536(a)(1), OR
- Series of removals that constitute a pattern, as identified by
 - more than 10 cumulative days, AND
 - behavior substantially similar to behavior in previous incidents that resulted in removals, AND
 - additional factors like length of each removal, total time of removals and proximity of removals to one another. 34 CFR 300.536(a).
- Public agency determines a change of placement on a case-by-case basis. 34 CFR 300.536(b)(1).
- Decision as to whether there has been a change of placement is subject to due process and judicial review. 20 USC 1415(K)(3)(A); 34 CFR 300.536(b)(2).

What are the procedural rights when a school determines that a removal constitutes a change of placement?

- Notice to parents of decision to change placement and of procedural rights under 34 CFR 300.504. 20 USC 1415(k)(1)(H); 34 CFR 300.530(h).
- The district must hold a meeting to make a **manifestation determination** to review the decision to change placement. 20 USC 1415(k)(1)(E); 34 CFR 300.530(e).

What is a manifestation determination?

- A manifestation determination (MD) is a meeting that must be held after a decision to **change the placement** of a student with a disability because of a violation of a student code of conduct. 20 USC 1415(k)(1)(E)(i);34 CFR 300.530(e)(1).
- At the meeting, participants review the incident that led to the most recent exclusion.

When must the MD be held?

- A MD must be held within 10 school days of the decision to **change the placement**. 20 USC 1415(k)(1)(E)(i); 34 CFR 300.530(e)(1).
- Parents must receive the right to notice of the MD at the same time as decision to suspend is made. 20 USC 1415(k)(1)(H); 34 CFR 300.530(h).
- CASES: Holyoke, BSEA # 08-2892 (fn7 – MD may be b/f or after exclusion hearing); Blue Hills Regional, BSEA # 07-4082 (failure to hold MD cured by subsequent MD that student didn't challenge outcome of); Salem, BSEA # 04-5591 (total failure to hold MD requires student to be returned to school).

Who must attend the MD?

The following entities must attend the MD:

- the local educational agency, AND
- the parent, AND
- relevant members of the IEP Team (as determined by the parent and the local educational agency).

20 USC 1415(k)(1)(E)(i); 34 CFR 300.530(e)(1).

What material should be reviewed at the MD?

- Participants should review all relevant information in the student's file including:
 - IEP;
 - teacher observations;
 - relevant information provided by parent.

20 USC 1415(k)(1)(E)(i); 34 CFR 300.530(e)(1).
- CASES: Barnstable, BSEA # 11-8743 (team should have reviewed evaluation that school had previously received and that contained diagnosis and explained that stress impaired self-control).

Questions for MD

- Was the student's conduct caused by or directly related to his or her disability?
- Was the student's conduct the direct result of the school's failure to implement the IEP?

20 USC 1415(k)(1)(E)(i), (ii); 34 CFR 300.530(e)(1).

If the answer to either question is yes, then the conduct is a manifestation of the child's disability.
34 CFR 300.530(e)(2).

How close must the connection be between disability and conduct?

- The connection must be fairly direct.
- CASES -- conduct unrelated to disability
 - Scituate, BSEA # 07-0521 (student's pulling of principal's tie was deliberate and calculated, and unrelated to disability).
 - Westford, BSEA # 10-6872 (no evidence either that the student "was unable to control his behavior in writing a list of names of people he did not like" or that he "was unable to appreciate the consequences of his behavior" because of his disabilities).
 - Medford, BSEA # 10-6258 (no persuasive evaluations or other evidence that conduct of being in prohibited area, profanity, fighting, smoking, and covering head was related to his executive functioning weaknesses, ADHD, or LD).
- CASES -- conducted related to disability:
 - Swansea, BSEA # 07-3824 (student's threatening and potentially dangerous behavior towards assistant principal was related to disability as confrontation caused Student to lose all ability to self-regulate).

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

- If conduct is due to failure to implement IEP, district must remedy those deficiencies. 34 CFR 300.530(e)((3).
- District must conduct/update a functional behavioral assessment (**FBA**) and implement or modify a behavior intervention plan (**BIP**). 20 USC1415(k)(1)(F); 34 CFR 300.530(f).
- Student has **right to return** to the original educational setting, **unless parent and LEA agree** to change the placement **or special circumstances** exist. 20 USC 1415(k)(1)(F); 34 CFR 300.530(f)(2).
- **No exclusion or other discipline.**

What are special circumstances and what happens when they exist?

- Special circumstances exist when an incident involves
 - possession of weapon, OR
 - possession or use of illegal drugs at school/school sponsored event, OR
 - infliction of serious bodily injury (which 18 U.S.C. 1365(h)(3) defines as substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily part or mental faculty) upon another person while at school/school function.

20 USC 1415(k)(1)(G); 34 CFR 300.530(g).

- In such cases, district may move student to an Interim Alternative Education Setting (IAES) for 45 days without a MD. 20 USC 1415(k)(1)(G); 34 CFR 300.530(g).
- The team determines the IAES. 34 CFR 300.531.
- Same right to educational services and assessments as if conduct found not to be a manifestation of disability. 34 CFR 300.530(d)(1).

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

- Student may be **disciplined in same manner** and for same duration that a non-disabled student. 20 USC 1415(k)(1)(C); 34 CFR 300.530(c). Return student to placement after discipline.
- **When removed from current placement, student has a right to FAPE** to enable participation in gen ed curriculum and progress toward meeting IEP goals. 20 USC 1415(k)(1)(D); 34 CFR 300.530(d)(5). This right exists even if student is placed in a different setting. 34 CFR 300.530(d).
- **When removed, district must provide, as appropriate, FBA and behavioral intervention services and modifications**, that are designed to address the behavior so it does not recur. 20 USC 1415(k)(1)(D(ii)); 34 CFR 300.530(d)(ii).

Appealing manifestation determinations

- Student or district may appeal the result of a manifestation determination. 20 USC 1415(k)(3)(A); 34 CFR 300.532(a).
- District may appeal if it believes that maintaining the current placement is **substantially likely to result in injury to the child or others**. 20 USC 1415(3)(A); 34 CMR 300.532(a). CASE: Braintree, BSEA # 08-2415.
- Hearing officer may change placement, either returning student to original placement or ordering an appropriate interim alternative ed setting for not more than 45 school days. 20 USC 1415(3)(B)(ii); 34 CMR 300.532(b)(2). CASE: Boston, BSEA # 01-3375 (violent 8 yr old who punches and kicks may be placed in IAES – at McKinley).
- In Mass., appeal to BSEA w/in standard 2 year SOL on BSEA claims.
- At BSEA, could go to mediation or hearing.

Who has the burden of persuasion at the BSEA?

- Burden of persuasion is the responsibility of persuading the trier of fact that the fact at issue is true. It is part of the burden of proof, the other part being the burden of producing evidence.
- The party seeking relief in an administrative hearing regarding the appropriateness of an IEP has the burden of persuasion. *Schaffer v. Weast*, 546 U.S. 49, 51 (2005); Stoneham, BSEA # 13-00160.
- Similarly, a parent seeking relief of a finding that conduct is not a manifestation of a disability has the burden of persuasion (i.e., parent has obligation to introduce evidence that persuades the hearing officer (HO) that conduct was due to disability). See Scituate, BSEA # 07-0521.
- If the parent doesn't present sufficient evidence, the HO won't find the conduct to be a manifestation of the disability.

What is the standard of proof when seeking to show that conduct was due to a disability?

- The standard of proof is a **preponderance of the evidence**. Westford, BSEA # 10-6872 (2010).
- The parent must persuade the HO that, **more likely than not**, the conduct was connected to the disability.

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

- The request for evaluation should be expedited. 20 USC 1415(k)(5)(D)(ii); 34 CFR 300.534(d)(2)(i).
- Student remains in the placement determined by school. 20 USC 1415(k)(5)(D)(ii); 34 CFR 300.534(d)(2)(ii).
- This placement may include a student being suspended or expelled without educational services. 34 CFR 300.534(d)(2)(ii).

Rights of student on a 504 plan

- Most provisions of Section 504 and IDEA related to discipline are the same. A student may challenge a **change of placement decision** under both Section 504 and IDEA.
- Section 504 allows for termination of services when manifestation determination finds no relation between disability and conduct.
- Differences:
 - Section 504 has no list of specific questions to determine if behavior was a manifestation of a disability. 34 CFR 104.36.
 - Section 504 has no list of who attends the MD (just persons knowledgeable). 34 CFR 104.35(c).
 - Section 504 has no provision for interim alternative placements.
 - If the incident involves illegal drugs/alcohol, student on a 504 plan may be expelled without a MD. 29 USC 705(20)(c)(iv).

Additional rights in public or private special ed schools: Termination of services

- No termination, even in emergency circumstances, **until the enrolling public school district is informed and assumes responsibility for the student** (i.e. finds an alternative placement).
- Public school district can ask special ed school to **delay termination for up to two weeks to convene team meeting**. 603 CMR 28.09(12)(b).
- CASES: See Mercy Centre & Brockton, BSEA # 13-04173 and Brockton, BSEA # 13-01082 on obligations of public school districts when students are terminated from private school programs. See Springfield (2008) (administrative un-enrollment is effectively termination).

Additional rights in public or private special ed schools: Suspension

Once a student is suspended for **3 consecutive school days or 5 non-consecutive school days in a school year**, the school, parents, and public school district “shall explore together all possible **program modifications** within the school in an attempt to prevent total suspension” from the program. 603 CMR 18.05(6)(d).

School codes of conduct: best practices for IEPs

- A student's IEP Team should discuss the school code of conduct and determine whether the student is required to follow the code.
- Boston Public Schools IEP form follows this practice.

Impact of Ch. 222 of the Acts of 2013

– hearing with principal prior to exclusions for non-serious offenses

- A student shall have a hearing with the principal regarding the charges prior to the principal reaching a decision regarding suspension or expulsion. M.G.L. c. 71, § 37H $\frac{3}{4}$ (c); 603 CMR 53.08(2)(short-term suspension) & (3)(long-term suspension). Limited exceptions for emergency removal and in-school suspension. 603 CMR 53.06(1).
- The principal shall ensure that the parent is included in the hearing, unless the principal can document reasonable but unsuccessful efforts to include the parent. M.G.L. c. 71, § 37H $\frac{3}{4}$ (c); 603 CMR 53.06(3).

Impact of Chapter 222 – right to make academic progress during exclusion

- A student suspended for 10 or fewer consecutive school days, whether in or out of school, must be provided an opportunity to earn credits, make up assignments, tests, papers, and other school work as needed to make academic progress. M.G.L. c. 76, § 21; 603 CMR 53.13(1).
- A student suspended or expelled for over 10 consecutive school days, whether in school or out of school, shall have an opportunity to receive education services and to make academic progress. M.G.L. c. 76, § 21; 603 CMR 53.13(2).
- These rights are in addition to IDEA right in either circumstance to FAPE to enable participation in gen ed curriculum and progress toward meeting IEP goals.

Impact of Chapter 222 – considerations when deciding disciplinary consequences for non- serious offenses

When deciding on consequences for non-serious offenses (i.e., those that do not involve drugs, weapons, and assaults on school staff, and those that do not involve felony charges filed in court), school officials shall:

- exercise discretion,
- consider ways to re-engage the student in the learning process, and
- avoid using expulsion as a consequence until other remedies and consequences have been employed.

M.G.L. c. 71, § 37H ³/₄ (b); 603 CMR 53.05.

Impact of Chapter 222 – considerations when deciding disciplinary consequences for non- serious offenses for young students

When deciding on consequences for non-serious offenses, the principal shall notify the superintendent of an exclusion of a student in K-3 prior to exclusion, describing the alleged misconduct and reason for exclusion.

M.G.L. c. 71, § 37H ³/₄ (d); 603 CMR 53.08(2)(d), (3)(e).

Thank you to the following individuals and organizations for assistance and materials used in preparation of this presentation!

- Amanda Klemas and Tom Mela, Mass. Advocates for Children
- Marlies Spanjaard, Ed Law Project
- Children's Law Center of Mass.
- Tim Sindelar
- Janie Crecco & Paige Parisi, Federation for Children with Special Needs