

School Discipline/Safety And Special Education: Understanding The Tensions, Navigating The Legal Requirements, And Problem-Solving



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Case Study

- M.K. is a 17 year old student classified as having an Emotional Disturbance
- M.K. has a history of behavior issues that spans several years
- M.K. violently assaults another student
 - Pushed the student into his locker and punched him repeatedly in the face; student was examined by school nurse who suggested he go to the hospital; before he was taken to the hospital he had a seizure and had to be rushed to the hospital by ambulance; student suffered a concussion, significant bruising and memory loss
- Prior to this incident, M.K. had several other incidents of physical aggression against both students and staff

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Due Process

- Due Process – applicable to all students
 - 14th Amendment requires that schools provide due process (notice and an opportunity to be heard) for any student facing suspension from school
- Next Steps
 - Talk to M.K. to get his side of the story
 - investigate what happened
 - determine proposed disciplinary response
 - provide notice to M.K. of what disciplinary action is being proposed
 - schedule discipline hearing

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Discipline Protections for Students with Disabilities

- IDEA
 - Requires that schools provide students with disabilities a free appropriate public education (“FAPE”)
 - Establishes procedures for identification, evaluation and placement of students with disabilities
 - Establishes procedural safeguards for parents of students with disabilities, which include discipline procedures
- Section 504 of the Rehabilitation Act
 - Prohibits discrimination on the basis of disability

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IDEA Discipline Procedures

34 CFR 300.530 – 536

- Sets limits on authority of schools to take disciplinary action that would amount to a “change in placement”
- Establishes manifestation determination process
- Establishes requirement to provide FAPE (free appropriate public education) in an interim alternative educational setting
- Establishes protections for students not yet identified
- Sets special due process requirements for discipline issues

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LEA Status

LEA status matters...

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School starts expulsion proceedings which triggers the need for a manifestation determination review meeting...

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Manifestation Determination

- Manifestation determination review must occur when disciplinary action is taken/proposed that would result in a change in placement
- The manifestation determination review examines the relationship between the child's disability and misconduct

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When is a manifestation determination review required?

- 10 days is the magic number – suspension becomes a “change in placement” if:
 - The removal is for more than 10 consecutive school days; or
 - The student has been removed for more than 10 school days in the same school year and the removals constitute a pattern
 - Because the series of removals totals more than 10 school days in a school year;
 - Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
 - Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another
- Partial removals count
- ISS does not count towards your 10 days if your ISS meets the following three factors
 - The student is afforded the opportunity to continue to appropriately progress in the general curriculum.
 - The district continues to provide the services specified in the student's IEP
 - The student continues to participate with nondisabled students to the same extent as he does in his current placement

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Manifestation Determination Review

- MDR must occur within 10 school days of the date that the disciplinary action that would result in a “change in placement” is recommended
- The MDR must involve a review of "all the relevant information in the [child's] file, including the child's IEP, any teacher observations, and any relevant information provided by the parents."
- Two questions the IEP team must answer:
 - 1) Did the behavior have a direct or substantial relationship to the student’s disability?
 - 2) Was the behavior a direct result of the school’s failure to implement the IEP (including BIP)?
- If the answer to either of these questions is yes, then the student’s behavior is a manifestation of his/her disability

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Manifestation Determination Review

- Who needs to be at the manifestation determination review meeting?
 - A qualified person who can interpret evaluations (psychologist, speech pathologist, occupational therapist, etc.)
 - Parent
 - General Education Teacher and Special Education Teacher
 - LEA Representative
 - A school representative who is knowledgeable about the incident
 - Behavior Support Service Provider
 - Optional participants: related service providers, administrators, other school staff

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Manifestation Determination Review

- If the behavior is determined to be a manifestation of his/her disability:
 - The student must be allowed to return to her/his regular classes
 - An FBA (functional behavior assessment) needs to be conducted and a BIP (behavior intervention plan) developed
 - Or, if student already has an FBA/BIP, the BIP needs to be reviewed and updated
 - A review of the IEP generally is a best practice

- If the behavior is determined not to be a manifestation of the student's disability, he/she can be subject to the same disciplinary consequences as a child without a disability
 - But, FAPE must be provided
 - Consequences cannot be discriminatory

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Manifestation Determination Review

- What if there is disagreement among the team?
 - The parent does not have veto power; nor does the principal
 - Not all team members have to agree but try to reach a consensus
 - Err on the side of the expert(s)
 - Ultimately, the LEA has the final say

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IEP team meets and determines that M.K.'s behavior was a manifestation of his disability...

What now?

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Manifestation Determination Exceptions

- There are three “special circumstances” that allow schools to suspend a student for up to 45 school days, even when the behavior is a manifestation of a disability:
 - Carries or possesses a weapon in school, on school grounds or to a school function
 - Knowingly possesses or uses illegal drugs, or sells or solicits the sale of drugs at school, on school grounds or at a school function
 - Inflicts serious bodily injury upon a person while at school, on school grounds or at a school function (very high threshold)

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Manifestation Determination Exceptions

- What is a weapon?
 - IDEA borrows the definition from the US criminal code - "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2.5 inches in length."
- What is serious bodily injury?
 - Also borrowed from the US criminal code - bodily injury that involves:
 - A substantial risk of death;
 - Extreme physical pain;
 - Protracted and obvious disfigurement; or
 - Protracted loss or impairment of a bodily member, organ, or mental faculty

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Do any of these exceptions apply to M.K.?

Does the school have any other options for keeping M.K. out of school beyond these three exceptions?

Even if one of these exceptions apply, what happens after the 45 school days are up?

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Fourth Quasi-Exception

- 500.532 governs due process for IDEA discipline issues
 - An LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others may request that a hearing officer order a change of placement to an appropriate interim alternative educational setting (IAES) for not more than 45 school days
 - The hearing officer may grant such a request if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others
 - This procedure may be repeated if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others

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Fourth Quasi-Exception

Comments to IDEA Regulations (71 Fed. Reg. 46721-22 (Aug. 14, 2016))

Interim alternative educational settings under section 615(k)(1)(G) of the Act and § 300.530(g) are limited to not more than 45 school days, unless extended by the hearing officer under § 300.532(b)(3) because returning the child to his or her original placement would be substantially likely to cause injury to him or herself or to others. The 45-school day placement in an interim alternative educational setting, unless extended by § 300.532(b)(3), is a maximum time limit for a change in placement to an appropriate interim alternative educational setting.

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Stay Put

- What happens to the student when the hearing request is pending?
- IDEA typically has a “stay put” requirement that says the student stays in the last agreed upon placement pending disputes that are being resolved through due process
- IDEA’s discipline procedures have an exception to the stay put requirement

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Stay Put

- § 300.533 Placement during appeals - When an LEA requests a hearing to place the student in an IAES, the child remains in IAES pending the decision of the hearing officer OR until the expiration of the student’s non-manifestation suspension/expiration of 45 day removal pursuant to the three special circumstances, whichever occurs first, unless the parent and the SEA or LEA agree otherwise
- Regulation and statute don’t match
 - Statute only says you have to allow student to return pending the administrative process if his/her non-manifestation suspension has ended

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Stay Put

What do we do if suspension/45 day placement is up and we don't yet have a hearing officer's order authoring an additional 45 days?

- Timing of hearing request important!
- Violate stay put and take our chances?
 - Two part test: (1) pending dispute and (2) change in placement
- File an action in federal court and request a temporary restraining order/preliminary injunction?
- Four part test

(1) Likelihood of success on merits	(2) Irreparable harm
(3) Balance of equities	(4) Public interest

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IEP Team Decision

The IEP team can always agree to change in placement (either long term or interim alternative placement)

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What is FAPE when students are suspended?

- The school must provide services that allow the child to continue to make progress toward their IEP goals and also to continue to access the general education curriculum after 10 days of suspension in a given school year
 - If the length of the removal is for more than 10 days, the IEP team must determine what is required
 - If the length of the removal is for 10 days or less, then school personnel, in consultation with at least one teacher, decide what is required
- Direct instruction is necessary; does not have to be an hour for hour match of the IEP
- For 10 days or less in a given school year, make up work/instruction should be provided to students with disabilities in the same way that it is provided for nondisabled students

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Modified FAPE Standard for Interim Alternative Educational Setting

Comments to IDEA Regulations (71 Fed. Reg. 46,716 (2006))

In other words, while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act *modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP.* An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. However, the special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP.

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What happens when students return from suspension?

- Students should return to their regular classes (pursuant to the IEP), unless the IEP team decides otherwise
- The IEP team can decide on a case by case basis to remove the student to an interim alternative education setting (for up to 45 days) or to a long term change in placement
 - Parent must be in agreement

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What are charter-LEA options for expulsion?

- Even when a student is expelled, the LEA is obligated to provide FAPE in an interim alternative educational setting for at least the remainder of the school year, maybe indefinitely
 - For charter schools that are their own LEA, this can become quite complicated/burdensome
- This obligation may only end if the parent enrolls the student in another school
- Does this obligation extend for the rest of that school year or for following school years as well?

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Protection for students who have not been identified

- IDEA's discipline protections apply to some students even before they are deemed eligible for special education:

- (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
- (2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or
- (3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

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Protection for students who have not been identified

- If any of these circumstances existed BEFORE the behavior at issue occurred, must afford the student these discipline protections
 - Manifestation determination
 - Services in an interim alternative educational setting
- Unless...
 - The parent has not allowed an evaluation
 - The parent has refused services
 - The child has been evaluated and determined ineligible
- If parent requests an evaluation AFTER the behavior occurs, evaluation must be expedited (no stay put protection)

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Protection for students who have not been identified

If child is found eligible after expedited evaluation, the LEA must provide special education services in accordance with discipline regulations...

What does this mean for expelled students?

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Dispute Resolution

- Parents may challenge a manifestation determination or appropriateness of the services provided in an interim alternative educational setting through due process
- Appeals brought by the parent or LEA are subject to an expedited hearing timeline
 - Hearing must occur within 20 school days of the hearing request
 - Resolution meeting must be held within 7 days
- Special stay put provision applies – if parent challenges manifestation determination or appropriateness of services, student stays in IAES unless his/her suspension ends or they serve the full 45 days that the MDR exceptions allow for

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