



IDEA '97 FINAL REGULATIONS Discipline for Children with Disabilities

Some Key Changes in the Regulations Regarding Discipline for Children with Disabilities

One of the major areas of concern in public comment on the NPRM was the issue of discipline for children with disabilities under the Act. The previous list of major changes briefly describes the major changes from the NPRM that are reflected in these final regulations regarding discipline under §§300.121(d), and 300.519-529. These changes reflect very serious consideration of the concerns of school administrators and teachers regarding preserving school safety and order without unduly burdensome requirements, while helping schools respond appropriately to a child's behavior, promoting the use of appropriate behavioral interventions, and increasing the likelihood of success in school and school completion for some of our most at-risk students.

The comments also revealed some confusion about several of the provisions of the Act and the NPRM regarding discipline. Limitations in the statute and regulations about the amount of time that a child can be removed from his or her current placement only come into play when schools are not able to work out an appropriate placement with the parents of a child who has violated a school code of conduct. In many, many cases involving discipline for children with disabilities, schools and parents are able to reach an agreement about how to respond to the child's behavior. In addition, neither the statute or the proposed or final regulations impose absolute limits on the number of days that a child can be removed from his or her current placement in a school year. As was the case in the past, school personnel have the ability to remove a child for short periods of time as long as the removal does not constitute a change of placement. To help make this point, the regulations include a new provision (§300.519) that reflects the Department's longstanding definition of what constitutes a "change of placement" in the disciplinary context. In this regulation, a disciplinary "change of placement" occurs when a child is removed for more than 10 consecutive school days or when the child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of the removal, the total amount of time the child is removed, and the proximity of the removals to one another. (§300.519). Changes also have been made to §300.520(a)(1) to make clear that multiple short-term removals (i.e., 10 consecutive days or less) for separate incidents of misconduct are permitted, to the extent removals would be applied to children without disabilities as long as those removals do not constitute a change of placement, as defined in §300.519.

Instead of requiring that services begin on the eleventh day in a school year that a child is removed from his or her current educational placement, as was proposed in the NPRM, the regulations take a

more flexible approach. If the removal is pursuant to school personnel's authority to remove for not more than 10 consecutive days (§300.520(a)(1)) or for behavior that is not a manifestation of the child's disability, consistent with §300.524 services must be provided to the extent necessary to enable the child to continue to appropriately progress in the general curriculum and appropriately advance toward the goals in his or her IEP. (§300.121(d)).

If the removal is by school personnel under their authority to remove for not more than 10 school days at a time (§300.520(a)(1)), school personnel, in consultation with the child's special education teacher, make the determination regarding the extent to which services are necessary to meet this standard. (§300.121(d)(3)(i)).

On the other hand, if the removal constitutes a change in placement, the child's IEP team must be involved. If the removal is pursuant to the authority to discipline a child with a disability to the same extent as a nondisabled child for behavior that has been determined to not be a manifestation of the child's disability (§300.524), the child's IEP team makes the determination regarding the extent to which services are necessary to meet this standard. (§300.121(d)(3)(ii)). If the child is being placed in an interim alternative educational setting for up to 45 days because of certain weapon or drug offenses (§300.520(a)(2)) or because a hearing officer has determined that there is a substantial likelihood of injury to the child or others if the child remains in his or her current placement (§300.521), the services to be provided to the child are determined based on §300.522. In these cases, the interim alternative educational setting must be selected so as to enable the child to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP and include services and modifications to address the behavior. (§§300.121(d)(2)(ii) and 300.522).

Under these regulations, IEP team meetings regarding functional behavioral assessments and behavioral intervention plans will only be required within 10 business days of

1. when the child is first removed for more than 10 school days in a school year, and
2. whenever the child is subjected to a disciplinary change of placement. (§300.520(b)(1)). In other subsequent removals in a school year of a child who already has a functional behavioral assessment and behavioral intervention plan, the IEP team members can review the behavioral intervention plan and its implementation in light of the child's behavior, without a meeting, and only meet if one or more of the team members believe that the plan or its implementation need modification. (§300.520(c)).

These final regulations also provide that manifestation determinations, and the IEP team meetings to make these determinations, are only required when a child is subjected to a disciplinary change of placement. (§300.523(a)). These changes should eliminate the need for unnecessary, repetitive IEP team meetings. The discussion of comments regarding the disciplinary sections of the regulations in Attachment 1 provides a fuller explanation of the regulatory provisions regarding discipline.

Answers to Some Commonly Asked Questions about Discipline under IDEA

Prior to the amendments to the Education of the Handicapped Act (EHA) in 1975, (the EHA is

today known as IDEA), the special educational needs of children with disabilities were not being met. More than half of the children with disabilities in the United States did not receive appropriate educational services, and a million children with disabilities were excluded entirely from the public school system. All too often, school officials used disciplinary measures to exclude children with disabilities from education simply because they were different or more difficult to educate than nondisabled children.

It is against that backdrop that Pub. L. 94-142 was developed, with one of its primary goals being the elimination of any exclusion of children with disabilities from education. In the IDEA reauthorization of 1997, Congress recognized that in certain instances school districts needed increased flexibility to deal with safety issues while maintaining needed due process protections in the IDEA. The following questions and answers address:

1. the proactive requirements of the IDEA designed to ensure that children with disabilities will be able to adhere to school rules;
2. IDEA provisions regarding removal of students from their current placement when their behavior significantly violates school discipline codes; and
3. the requirement of the IDEA for the continuation of services for children with disabilities who are disciplined.

4. Why are there special rules about discipline for children with disabilities?

The protections in the IDEA regarding discipline are designed to prevent the type of often speculative and subjective decision making by school officials that led to widespread abuses of the rights of children with disabilities to an appropriate education in the past. For example, in Mills v. Board of Education of the District of Columbia (1972) the court recognized that many children were being excluded entirely from education merely because they had been identified as having a behavior disorder. It is important to keep in mind, however, that these protections do not prevent school officials from maintaining a learning environment that is safe and conducive to learning for all children. Well run schools that have good leadership, well-trained teachers and high standards for all students have fewer discipline problems than schools that do not.

It is also extremely important to keep in mind that the provisions of the statute and regulation concerning the amount of time a child with a disability can be removed from his or her regular placement for disciplinary reasons are only called into play if the removal constitutes a change of placement and the parent objects to proposed action by school officials (or objects to a refusal by school officials to take an action) and requests a due process hearing. The discipline rules concerning the amount of time a child can be removed from his or her current placement essentially are exceptions to the generally applicable requirement that a child remains in his or her current placement during the pendency of due process, and subsequent judicial, proceedings. (See, section 615(j) of the Act and §300.514.)

If school officials believe that a child's placement is inappropriate they can work with the child's parent through the IEP and placement processes to come up with an appropriate placement for the child that will meet the needs of the child and result in his or her improved learning and the learning of others and ensure a safe environment. In addition to the other measures discussed in the following questions, the discipline provisions of the IDEA allow responsible and appropriate changes in placement of children with disabilities when their parents do not object.

1. Does IDEA contain provisions that promote proactive up-front measures that will help prevent discipline problems?

Yes. Research has shown that if teachers and other school personnel have the knowledge and expertise to provide appropriate behavioral interventions, future behavior problems can be

greatly diminished if not totally avoided. Appropriate staff development activities and improved pre-service training programs at the university level with emphasis in the area of early identification of reading and behavior problems and appropriate interventions can help to ensure that regular and special education teachers and other school personnel have the needed knowledge and skills. Changes in the IDEA emphasize the need of State and local educational agencies to work to ensure that superintendents, principals, teachers and other school personnel are equipped with the knowledge and skills that will enable them to appropriately address behavior problems when they occur.

In addition, the IDEA includes provisions that focus on individual children. If a child has behavior problems that interfere with his or her learning or the learning of others, the IEP team must consider whether strategies, including positive behavioral interventions, strategies, and supports are needed to address the behavior. If the IEP team determines that such services are needed, they must be added to the IEP and must be provided. The Department has supported a number of activities such as training institutes, conferences, clearinghouses and other technical assistance and research activities on this topic to help school personnel appropriately address behavioral concerns for children with disabilities.

1. Can a child with a disability who is experiencing significant disciplinary problems be removed to another placement?

Yes. Even when school personnel are appropriately trained and are proactively addressing children's behavior issues through positive behavioral intervention supports, interventions, and strategies, there may be instances when a child must be removed from his or her current placement. When there is agreement between school personnel and the child's parents regarding a change in placement (as there frequently is), there will be no need to bring into play the discipline provisions of the law. Even if agreement is not possible, in general, school officials can remove any child with a disability from his or her regular school placement for up to 10 school days at a time, even over the parents' objections, whenever discipline is appropriate and is administered consistent with the treatment of nondisabled children. §300.520(a)(1). However, school officials cannot use this authority to repeatedly remove a child from his or her current placement if that series of removals means the child is removed for more than 10 school days in a school year and factors such as the length of each removal, the total amount of time that the child is removed, and the proximity of the removals to one another lead to the conclusion that there has been a change in placement. §§300.519-300.520(a)(1). There is no specific limit on the number of days in a school year that a child with a disability can be removed from his or her current placement. After a child is removed from his or her current placement for more than 10 cumulative school days in a school year, services must be provided to the extent required under §300.121(d), which concerns the provision of FAPE for children suspended or expelled from school.

If the child's parents do not agree to a change of placement, school authorities can unilaterally remove a child with a disability from the child's regular placement for up to 45 days at a time if the child has brought a weapon to school or to a school function, or knowingly possessed or used illegal drugs or sold or solicited the sale of controlled substances while at school or a school function. §300.520(a)(2). In addition, if school officials believe that a child with a disability is substantially likely to injure self or others in the child's regular placement, they can ask an impartial hearing officer to order that the child be removed to an interim alternative educational setting for a period of up to 45 days. §300.521. If at the end of an interim alternative educational placement of up to 45 days, school officials believe that it would be

dangerous to return the child to the regular placement because the child would be substantially likely to injure self or others in that placement, they can ask an impartial hearing officer to order that the child remain in an interim alternative educational setting for an additional 45 days. §300.526(c). If necessary, school officials can also request subsequent extensions of these interim alternative educational settings for up to 45 days at a time if school officials continue to believe that the child would be substantially likely to injure self or others if returned to his or her regular placement. §300.526(c)(4).

Additionally, at any time, school officials may seek to obtain a court order to remove a child with a disability from school or to change a child's current educational placement if they believe that maintaining the child in the current educational placement is substantially likely to result in injury to the child or others.

Finally, school officials can report crimes committed by children with disabilities to appropriate law enforcement authorities to the same extent as they do for crimes committed by nondisabled students. §300.529.

1. Do the IDEA regulations mean that a child with a disability cannot be removed from his or her current placement for more than ten school days in a school year?

2.

No. School authorities may unilaterally suspend a child with a disability from the child's regular placement for not more than 10 school days at a time for any violation of school rules if nondisabled children would be subjected to removal for the same offense. They also may implement additional suspensions of up to ten school days at a time in that same school year for separate incidents of misconduct if educational services are provided for the remainder of the removals, to the extent required under §300.121(d). (See the next question regarding the provision of educational services during periods of removal.) However, school authorities may not remove a child in a series of short-term suspensions (up to 10 school days at a time), if these suspensions constitute a pattern that is a change of placement because the removals cumulate to more than 10 school days in a school year and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another. But not all series of removals that cumulate to more than 10 school days in a school year would constitute a pattern under §300.519(b).

Of course, in the case of less serious infractions, schools can address the misconduct through appropriate instructional and/or related services, including conflict management, behavior management strategies, and measures such as study carrels, time-outs, and restrictions in privileges, so long as they are not inconsistent with the child's IEP. If a child's IEP or behavior intervention plan addresses a particular behavior, it generally would be inappropriate to utilize some other response, such as suspension, to that behavior.

1. What must a school district do when removing a child with a disability from his or her current placement for the eleventh cumulative day in a school year?

2.

Beginning on the eleventh cumulative day in a school year that a child with a disability is removed from his or her current placement, the school district must provide those services that school personnel (for example, the school administrator or other appropriate school personnel) in consultation with the child's special education teacher determine to be necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP. School personnel would determine where those services would be provided. This means that for the remainder of the removal that includes the eleventh day, and for any subsequent removals, services must be provided to the extent determined necessary, while the removal continues. §300.121(d)(2) and (3).

Not later than 10 business days after removing a child with a disability for more than 10 school days in a school year, the school district must convene an IEP team meeting to develop a behavioral assessment plan if the district has not already conducted a functional behavioral assessment and implemented a behavioral intervention plan for the child. If a child with a disability who is being removed for the eleventh cumulative school day in a school year already has a behavioral intervention plan, the school district must convene the IEP team (either before or not later than 10 business days after first removing the child for more than 10 school days in a school year) to review the plan and its implementation, and modify the plan and its implementation as necessary to address the behavior. §300.520(b).

A manifestation determination would not be required unless the removal that includes the eleventh cumulative school day of removal in a school year is a change of placement. §300.523(a).

1. Does the IDEA or its regulations mean that a child with a disability can never be suspended for more than 10 school days at a time or expelled for behavior that is not a manifestation of his or her disability?

2.

No. If the IEP team concludes that the child's behavior was not a manifestation of the child's disability, the child can be disciplined in the same manner as nondisabled children, except that appropriate educational services must be provided. §300.524(a). This means that if nondisabled children are long-term suspended or expelled for a particular violation of school

rules, the child with disabilities may also be long-term suspended or expelled. Educational services must be provided to the extent the child's IEP team determines necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward the goals set out in the child's IEP. §300.121(d)(2).

1. Does the statutory language “carries a weapon to school or to a school function” cover instances in which the child acquires a weapon at school?

Yes. Although the statutory language “carries a weapon to school or to a school function” could be viewed as ambiguous on this point, in light of the clear intent of Congress in the Act to expand the authority of school personnel to immediately address school weapons offenses, the Department's opinion is that this language also covers instances in which the child is found to have a weapon that he or she obtained while at school.