



CHILDREN'S LAW CENTER
OF MASSACHUSETTS

PROTECTIONS FOR
STUDENTS WITH DISABILITIES WHO ARE
BEING
DISCIPLINED BY SCHOOL OFFICIALS



WHY IS SPECIAL EDUCATION IMPORTANT IF A CHILD IS SUSPENDED OR EXPELLED?

The Individuals with Disabilities Education Act (“IDEA”), found at 20 U.S.C. §1400 et seq., is a federal law that gives students with disabilities a legal right to a **Free, Appropriate Public Education** (“FAPE”) in the **Least Restrictive Environment** (meaning an educational placement assuring children with disabilities are educated with children who are not disabled to the maximum extent possible), and provides procedural protections in school discipline matters. IDEA also requires schools to provide services that address behavioral issues of students with disabilities including behavior that violates the school discipline code.

WHO IS A STUDENT WITH A DISABILITY?

According to the IDEA, a student with a disability is a child who receives special education *and* related services as part of an Individualized Education Program (“IEP”). Specific disabilities that would make a student eligible for special education and related services can be found at 20 U.S.C. §1401 (federal classifications) and 603 CMR 28.02(7) (Massachusetts classifications). (Please see our guide entitled “*Special Education in Massachusetts*” for a summary of a student’s right to special education services.)

A student also may be considered to have a disability even if the school has not tested or identified the child as such. If the school “knew or should have known” of the child’s disability, the student may still be protected by special education law (see below).

WHY DO STUDENTS WITH DISABILITIES RECEIVE MORE PROTECTIONS IN DISCIPLINE MATTERS?

By giving students with disabilities added protections, Congress is trying to strike a balance between maintaining safe schools and safeguarding the education of students with behavioral, developmental, learning, and other disabilities. There are strict procedures that must be followed before a school district can remove a special education student from school. The law also tries to ensure that a child is not disciplined for conduct related to a disability.

CAN A CHILD WITH A DISABILITY BE SUSPENDED OR EXPELLED?

A child with a disability can be disciplined in the same way as students without disabilities for up to 10 days in a single school year when school personnel finds the student to have violated the code of school conduct (20 U.S.C. §1415(k)(1)(B)). An expulsion, suspension or other removal from school for more than 10 days is considered a “change in educational placement” for which the IDEA provides increased protection. As a result, when a child is removed from school for more than 10 days either cumulatively (for example, a child is suspended for three school days on four separate occasions) or all at once, students are entitled to certain procedural protections, including the right to a manifestation determination (see below and 20 U.S.C. §1415 more generally).

If the misconduct which led to the disciplinary action was a “manifestation” of the child’s disability, the child should be returned to their placement, unless the team agrees to a new placement. Misconduct is considered a “manifestation” of the child’s disability if it was caused by, or had a direct and substantial relationship to the child’s disability or was the direct result of the district’s failure to implement the IEP. Most importantly, even if a student with a disability is suspended or expelled, they are still entitled to alternative school services during the period of removal from school (for example, home tutoring, alternative placement, Saturday School and/or online learning).

WHAT IF A CHILD WITH A DISABILITY WAS SUSPENDED FOR LESS THAN 10 DAYS?

A school may apply disciplinary measures for fewer than 10 days to a student with a disability in the same manner it would to students without disabilities (for example, order a suspension or remove a child with a disability from their current placement to “an appropriate interim alternative educational setting”). However, if the suspension is for less than 10 days, but the student has been suspended for a *total* of 10 days or more in the school year for a “pattern” of behavior, then the student is entitled to the IDEA’s increased protection (20 U.S.C. §1415).

IF A CHILD IS NOT RECEIVING SPECIAL EDUCATION SERVICES IS S/HE ENTITLED TO THESE IDEA PROTECTIONS?

Maybe. Some students who have not been identified as having a disability should be treated like students who receive special education services for purposes of discipline.

Even after being subject to discipline, a child may argue that he or she has a disability and is entitled to protection under the IDEA. The child will be given IDEA protection (and the right to a free and appropriate public education) if the school *knew or had reason to know* that the child had a disability before the child was involved in the alleged incident. Under the law, a school district knew or should have known that the child had a disability if, before the conduct occurred:

- The parent of the child wrote to the child’s teacher or to supervisory or administrative personnel of the school district, expressing concern that the child was in need of special education and related services;
- The child’s parent requested an evaluation of the child; or
- The child’s teachers or other school personnel have expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the special education director or other supervisory school personnel (20 U.S.C. §1415(k)(5)(B(i-iii))).

Exception: A school is not deemed to have known that the child is a child with a disability if

- The parent of the child has refused to allow a child to be evaluated;
- The parent of the child has refused special education services; or

- The child was previously evaluated and it was determined that the child was ineligible for special education and related services (20 U.S.C. §1415(k)(5)(C)).

If the school is “deemed to have knowledge” of the child’s disability, the child is immediately entitled to IDEA protections, including the right to an education while facing discipline, and, if the parent requests an evaluation to determine the child’s eligibility for special education services, it must be completed in an “expedited” manner (20 U.S.C. §1415(k)(5)(D)(ii)).

After the evaluation is complete, a Team meeting should be held to discuss the results of the evaluation and determine eligibility for special education consistent with the IDEA. If at the TEAM meeting, the child is found eligible for special education, s/he continues to be entitled to the increased protections from suspension or expulsion. While all evaluations and proceedings are being completed the school *must* provide the child with educational services.

WHAT BASIC RIGHTS DO STUDENTS WITH DISABILITIES HAVE WHEN THEY ARE BEING DISCIPLINED?

If a child with a disability’s placement changes because of school discipline for more than 10 consecutive or cumulative days in a school year the child is entitled to:

A Free and Appropriate Public Education: Every child who is identified as a child with a disability or who the school should have known had a disability, is entitled to receive educational services that will meet the child’s unique needs and allow him or her to make progress in the general curriculum (20 U.S.C. §1412(a)(1)(A)).

Notice: The school must provide written notice of the school’s proposed change to the student’s placement *prior to* the change occurring. This notice should include: the reasons for the proposed action; a description of the alternatives the school considered, along with an explanation of why those were rejected; a description of each evaluation procedure, test, record or report the school system used as a basis for its proposal; and an explanation of all the procedural rights the student and the parent have (20 U.S.C. §§1415(c)(1), 1415(k)(1)(H)).

An IEP Meeting: The school must convene an IEP meeting, with full consideration of the child’s needs, evaluation data, current program and placement, and placement options, to determine whether the placement continues to be appropriate. If a child is already identified as a student with a disability, the IEP meeting must be held either before or within 10 days of ordering the suspension or expulsion (20 U.S.C. §1415(b)(1)).

Parental Participation: The school must ensure parental notice of and participation at the IEP meeting (20 U.S.C. §§1414(e), 1415(b)(1)).

Functional Behavioral Assessment: For students who have been suspended for more than 10 school days in a school year or when a child is subject to long-term discipline, a Functional Behavioral Assessment (FBA) must be completed. The purpose of an FBA is to determine what the underlying motivations are for a child’s behavior. An FBA should include: 1) identification of the primary problem behavior, 2) identification of the behavior in concrete terms, 3)

identification of the factors that contribute to the behavior, and 4) a determination of the conditions in which the behavior usually occurs (20 U.S.C. §1415(k)(1)(D)).

Behavior Intervention Plan: After the FBA is completed, the IEP team must reconvene as soon as possible to develop a Behavior Intervention Plan (BIP) aimed at minimizing the problem behavior. The BIP must be implemented as soon as it is developed. If the child already has a BIP, the IEP team must meet to review and change the plan to address the child's problem behavior. If a behavior plan is in place, a review of the plan must take place after *every* new suspension (20 U.S.C. §1415(k)(1)(D)).

Manifestation Determination: A school cannot suspend or expel a student with a disability when the student's behavior was a "manifestation" of his/her disability. A student's behavior is a "manifestation" of the disability when it can be shown that the *disability* caused or contributed to the student's behavior.

Within ten days of any decision to change a child's placement (including by suspension) for more than 10 days in a school year, the school district, parent, and "relevant" members of the IEP Team (as determined by the parent and district) shall meet and hold a Manifestation Determination meeting. At the meeting, the Team shall review all relevant information in the student's file, including the student's IEP, teacher observations, and information provided by the parents to determine:

- If the conduct in question was caused by, or had a direct and substantial relationship to the child's disability; or
- If the conduct in question was a direct result of the school's failure to implement the IEP.

If either of the above is found to be true, then the student's conduct is deemed to be a manifestation of his or her disability. In that case, the school shall conduct a functional behavioral assessment; implement a behavior plan; and, unless otherwise agreed upon by the parents and district, return the child to the placement from which s/he was removed.

If the Team finds that the behavior was caused by the student's disability, then the child cannot be suspended, expelled or otherwise disciplined. Except in cases involving drugs, weapons, or serious bodily harm (see below) the child should return to his original educational placement. The manifestation review can be held at the same meeting that the Behavior Intervention Plan is developed. Parents must be notified of the right to a manifestation determination by the date that the decision to suspend is made (20 U.S.C. §1415(k)(5)(E-F)).

Appeal: A parent can appeal the results of the Manifestation Determination, decisions about special education eligibility, or placement by requesting a hearing at the Bureau of Special Education Appeals. All evaluations and other information to be used at the hearing should be given to the parent prior to the hearing. We recommend that you obtain legal assistance for such a hearing (20 U.S.C. §1415(k)(3)(A)).

DURING A DISPUTE OR APPEAL WHAT EDUCATIONAL SERVICES WILL A CHILD RECEIVE?

Generally, a school cannot change a child's educational placement without notice to and consent of a parent. However, school personnel may remove the child from school for disciplinary incidents in limited circumstances and for limited periods. School personnel may:

- Consider any unique circumstances of the child when determining whether to change a placement for a child with a disability (20 U.S.C. §1415(k)(1)(A)).
- If the conduct that is a violation of the school discipline code is not determined to be a manifestation of the child's disability, the child can be disciplined in the same way as children without disabilities would, except that the child must still receive a free and appropriate public education (a program with services that meet his educational goals in the least restrictive setting) (20 U.S.C. §1415(k)(1)(C)).

ARE THERE ANY SITUATIONS IN WHICH A SCHOOL CAN CHANGE A CHILD'S PLACEMENT WITHOUT NOTICE TO OR CONSENT OF THE CHILD'S PARENTS?

Yes. School personnel may:

- 1) Suspend a student with a disability for violation of the school discipline code for *up to 10 days* in a school year (Note: the child must be given due process and a right to be heard consistent with the requirements of state and federal constitutional due process.)
- 2) Remove a student to an interim alternative educational setting for not more than 45 school days if the child:
 - Carries or possesses a weapon to or at school, on school premises, or at a school function; or
 - Knowingly possesses or uses illegal drugs, sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function; or
 - Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function (20 U.S.C. §1415(k)(1)(G)).

If the school district believes that maintaining the child's placement is substantially likely to result in injury to the child or others, it may request a hearing before the BSEA.

WHAT SERVICES MUST A CHILD WITH A DISABILITY RECEIVE DURING THE PERIOD S/HE IS REMOVED FROM HIS OR HER CURRENT EDUCATIONAL PLACEMENT?

The child must continue to receive a **Free and Appropriate Public Education**. This means that the child shall:

- Continue to receive educational services described in his or her IEP so that the child will be able to continue to participate in the general education curriculum, although in

another setting, and make progress toward meeting the goals set out in the child's IEP.

- Receive a functional behavioral assessment, behavioral intervention services, and modifications that are designed to address the conduct so that it does not recur.
- Continue to participate in the general curriculum, although in another setting.

If a child is placed in an interim alternative educational setting, then after 45 school days, if there has been no accepted change in the child's IEP, the child is entitled to return to the placement listed in his or her last accepted IEP.

CAN THE PARENT APPEAL ANY DISCIPLINARY DETERMINATIONS?

Yes. Among other things, a parent may appeal the results of 1) the manifestation determination and 2) the appropriateness of an interim alternative setting (i.e. its failure to provide FAPE and/or to meet the provisions of the student's IEP) (20 U.S.C. §1415(k)(3)(A)).

During these appeals, the child must remain in the interim alternative setting for 45 school days or until the hearing officer decides otherwise, whichever occurs first.

*** See pamphlets "*School Suspension and Expulsion*", regarding school discipline, and "*Special Education in Massachusetts*" regarding student rights to special education. ***

For more information call:
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Phone Assistance is available during business hours. Please call 1-800-KIDLAW8 and request to speak with an intake worker.

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