

Information Update Bulletin 06.02



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TO: District Administrators, CESA Administrators, CCDEB Administrators, Directors of Special Education and Pupil Services, and Other Interested Parties

FROM: Carolyn Stanford Taylor, Assistant Superintendent
Division for Learning Support: Equity and Advocacy

SUBJECT: Legal Requirements Relating to Disciplining Children with Disabilities
(Replaces Bulletins 94.10, 95.07, 96.02, 97.06 and 00.02)

The Individuals with Disabilities Education Improvement Act (IDEA) 2004 continues to encourage the use of proactive measures to prevent discipline problems. If a child's behavior impedes his or her learning or the learning of others, the child's individualized education program (IEP) team must consider the use of positive behavioral interventions and supports to address the behavior. If school personnel believe that a child's program and placement are inappropriate, they can work with the parents through the IEP team process to develop an appropriate program and placement that will meet the child's needs and ensure a safe and appropriate learning environment for all. This bulletin discusses the balance struck by IDEA permitting school officials to maintain a safe learning environment for all, while also including protections to prevent the inappropriate exclusion of children with disabilities.

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1. How should a local educational agency (LEA) address inappropriate behavior by a child with a disability?

The agency should consider holding an IEP team meeting to review the child's IEP and placement to determine whether they continue to be appropriate. The IEP team participants should determine whether the child's behavior is impeding his or her learning or the learning of others. If so, the team must consider positive behavioral interventions, strategies and

supports to address the behavior. The team may consider whether functional behavioral assessment is appropriate to assist in the development of such strategies. They should consider whether re-evaluation of the child by an IEP team may be needed to determine whether the child has other impairments or educational needs. It is important to remember, however, that a child with any type of disability may present behavior that impedes learning and requires positive behavioral interventions, strategies and supports.

2. May a teacher remove a student from a particular class without a school official suspending the child from school?

Yes, under §118.164, Wis. Stats., a teacher may remove a pupil from the teacher's class if the pupil violates the code of classroom conduct adopted by the school board under §120.13(1)(a). The teacher may also remove the child from the classroom if the pupil is dangerous, unruly or disruptive or exhibits behavior that interferes with the ability of a teacher to teach effectively, as specified in the code of classroom conduct.

A teacher, school board, school district administrator or their designee is not prohibited from further disciplining a pupil because the pupil has been removed from class using this procedure. If a child's IEP addresses the behavior that violates the classroom code of conduct, it generally would be inappropriate to use a response to that behavior other than the response called for by the IEP.

3. When a student is removed from class by a teacher under §118.164, Wis. Stats., where is the child placed?

The principal or his or her designee may select one of the following four options for the child:

- An alternative education program under §115.28(7)(e)1., Wis. Stats. An alternative program is an instructional program, approved by the school board, that uses successful alternative or adaptive school structures and teaching techniques in existing traditional classrooms or regularly scheduled curricular programs or that is offered in place of these programs. It does not include a private school or home schooling by the parent;
- Another class in the school or another appropriate place in the school, as determined by the principal or his designee;
- Another instructional setting; or
- The classroom from which the child was removed if, after weighing the interests of the removed pupil, the other pupils in the class and the teacher, the school principal or his or her designee determines that re-admission to the class is the best or only alternative.

4. What is a school district's general authority under state law to suspend a pupil from school?

The authority of a school district to suspend a pupil is found at §120.13(1)(b), Wis. Stats. State law permits a school district administrator or any principal or teacher designated by the school district administrator to suspend a pupil for:

- noncompliance with school rules; or
- knowingly conveying any threat or false information concerning an attempt or alleged attempt being made or to be made to destroy any school property by means of explosives;
- conduct by the pupil while at school or while under the supervision of a school authority which endangers the property, health or safety of others; or
- conduct while not at school or while not under the supervision of a school authority which endangers the property, health or safety of others at school or under the supervision of a school authority or endangers the property, health or safety of any employee or school board member of the school district in which the pupil is enrolled.

Conduct that endangers a person or property includes making a threat to the health or safety of a person or making a threat to damage property.

Prior to the suspension, the pupil must be advised of the reason for the proposed suspension. If the pupil denies the accusation, the school must explain the information it has and permit the pupil to provide his or her version. The pupil's parent must be given prompt notice of the suspension and the reason for the suspension.

5. For how many consecutive school days may a student be suspended from school?

The general authority under State law permits suspensions from school for up to five consecutive school days and for up to 15 consecutive school days when a notice of expulsion hearing has been sent. Additional requirements apply to children with disabilities. A child with a disability may only be suspended for more than ten consecutive school days if the conduct is not a manifestation, as described in this bulletin, of the child's disability.

6. May a parent or a pupil challenge a suspension?

A parent or a pupil may, within five school days following the commencement of a suspension, have a conference with the school district administrator or his or her designee. The designee may not be the principal, an administrator, or a teacher in the child's school. If the school district administrator or his or her designee finds that the child was suspended unfairly or unjustly; or the suspension was inappropriate given the nature of the offense; or the child suffered undue consequences or penalties as a result of the suspension, reference to the child's suspension must be removed from the child's records. The finding must be made within 15 days of the conference. A parent of a child with a disability may also challenge any issue relating to the identification, evaluation, educational placement or the provision of free appropriate public education to the child by requesting a due process hearing.

7. What is the school district's general authority to expel a pupil?

The school district's general authority to expel a pupil is found at §120.13(1)(c), Wis. Stats. Generally, a pupil may be expelled from school if the school board finds the pupil guilty of:

- repeated refusal or neglect to obey the rules;
- threatening to destroy school property by explosion;
- engaging in conduct at school that endangers the property, health or safety of others; or
- engaging in conduct while not at school or under the school's supervision or endangering the property health or safety of any employee or school board member of the district in which the student is enrolled. Conduct that endangers a person or property includes making a threat to the health or safety of a person or making a threat to damage property.

The board must be satisfied that the interest of the school demands the pupil's expulsion. Prior to the expulsion, the school board must hold a hearing. If the child is a child with a disability, the agency also must follow the IDEA requirements described in this bulletin.

8. May a parent or adult pupil appeal the school board's decision to expel a pupil?

Yes. A pupil or, if the pupil is a minor, the pupil's parent or guardian may appeal the expulsion to the State Superintendent of Public Instruction, who must review the board's decision within 60 days after receiving the appeal to determine whether the district has followed required procedures. A parent may also challenge the expulsion of a child with a disability by requesting a due process hearing.

9. Is there a limit on the total number of school days a pupil with a disability may be removed from his or her educational placement during the school year?

No. State and federal law do not establish an absolute limit on the number of cumulative days of removal permitted in a school year. The district must follow the requirements described in this bulletin when a student with a disability is removed more than ten cumulative days in a school year.

10. What constitutes a change in educational placement for a child with a disability?

A change in educational placement for a child with a disability occurs when a child is removed from his or her current educational placement for more than ten consecutive school days. A change of placement also occurs if the child has been subjected to a series of removals that constitute a pattern because:

- the series of removals total more than ten school days in a school year;
- the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
- 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.

Whether the behavior in the incidents that resulted in the series of removals is "substantially similar" should be decided on a case-by-case basis and include consideration of any relevant information regarding the child's behaviors, including, where appropriate, any information in the child's IEP.

11. Who decides whether a series of removals will result in a change of educational placement?

Whether a series of removals constitutes a change in educational placement is determined on a case-by-case basis by the public agency. The department recommends that the principal of the child's school or other administrator and the child's special education teacher consult regarding whether a short-term removal will constitute a change in educational placement. If the parent disagrees with the determination by the public agency, the parent may request a due process hearing.

12. Are "in-school suspensions" or other in-school disciplinary measures considered when determining whether the child has been removed from school for ten cumulative school days

during a school year?

In-school removals from class must be considered a removal unless the child has the opportunity:

- to continue to participate in the general curriculum;
- to receive the services specified in his or her IEP; and
- to participate with nondisabled children to the extent he or she would have in the current placement.

13. Do part-day removals count toward considering whether a child has been removed for more than ten cumulative school days in a school year?

In determining whether the child had been removed for more than ten cumulative school days or subjected to a change in placement, the agency would include portions of a school day that a child had been removed. Sending a child with a disability home during the school day for not following school rules without following the procedures relating to suspension constitutes "de facto" suspension of a child from school. These days must be considered when determining whether a series of removals resulted in a change of educational placement or whether the child had been removed from school for more than ten cumulative days in a school year.

14. Do bus suspensions count toward considering whether a child has been removed for more than ten cumulative school days in a school year?

Yes, if the child does not attend school as a result of the suspension.

15. What must an LEA do when removals exceed a total of ten cumulative school days during the school year, *but will not result in a change in placement?*

When removals exceed ten cumulative school days in a school year, the public agency must determine whether the removal would result in a change of educational placement. If the removal will not result in a change of educational placement, the LEA may remove the child to the extent that a nondisabled child would be removed.

Beginning on the 11th cumulative school day of removal in a school year, and during subsequent removals, the agency must provide services to the extent necessary to enable the child to continue to participate appropriately in the general curriculum, although in another

setting, and appropriately advance toward achieving the IEP goals. The decision about the necessary services is made by school personnel, e.g., the school principal or other administrator in consultation with at least one of the child's teachers. School personnel determine where the services will be provided. The services may vary depending on the needs of the child and the length of the removal.

16. What must an LEA do when a removal will result in a change of educational placement?

When a removal will result in a change of educational placement either because the removal exceeds ten consecutive school days or the removal exceeds ten cumulative school days and creates a pattern that results in a change in educational placement, the agency must do the following:

Notice

On the date the decision is made to make a removal that constitutes a change in placement, the child's parents must be notified of the decision and must be provided a procedural safeguards notice (statement of parent and child rights).

Manifestation determination

- Within ten school days after the date on which the decision to change the child's placement is made, the public agency, the parent and relevant members of the IEP team must determine whether the conduct is a manifestation of the child's disability. In making the determination, all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents, must be reviewed.
- The conduct must be determined to be a manifestation of the child's disability if:
 - The conduct was caused by, or had a direct and substantial relationship to, the child's disability; or
 - The conduct was the direct result of the agency's failure to implement the IEP.The LEA must take immediate steps to remedy a failure to implement the IEP. A parent of a child with a disability who disagrees with any decision regarding the manifestation determination may request an expedited due process hearing.
- Except where a student is disciplined for behavior involving weapons, drugs or serious bodily harm, if the behavior is determined to be a manifestation of the child's disability, the IEP team must return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification

of the behavioral intervention plan.

- If the behavior is determined not to be a manifestation of the child's disability, the LEA may remove the child to the same extent it would remove a child who does not have a disability.

Functional Behavioral Assessments (FBAs) and Behavior Intervention Plans (BIPs)

- If the behavior is a manifestation of the child's disability and the child already has a behavioral intervention plan, the IEP team must meet to review the plan and its implementation. The IEP team must modify the plan and its implementation, if necessary, to address the child's behavior. If the child does not have a behavior intervention plan, the IEP team must conduct a functional behavioral assessment and implement a behavioral intervention plan for the child.
- If the behavior is not a manifestation of the child's disability the child must receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.

Services

When the behavior is determined not to be a manifestation of the child's disability, the LEA may proceed with the change in placement. The LEA must provide educational services, as determined by the IEP team, 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. Participation in the general curriculum does not mean that a school or district must replicate every aspect of the services that a child would receive if in his or her normal classroom.

17. What is the LEA's authority if the behavior involves weapons, illegal drugs, controlled substances or serious bodily injury?

LEA personnel may order a change of placement to an appropriate interim alternative educational setting without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child carries a weapon to school or possesses a weapon at school, knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance at school or has inflicted serious bodily injury upon another person while at school. "School" includes any school function under the jurisdiction of an LEA or the Department of Public Instruction. The placement may be for the same amount of time a child without a disability would be disciplined, not to exceed 45 school days. The interim alternative

educational setting must be determined by an IEP team.

For the purpose of the discipline requirements of special education law:

- "Weapon" means 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 ½ inches in length.
- "Controlled substance" means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act [subsection (c) of section 812 of Title 21, United States Code]. Revised schedules are published in the Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs.
- "Illegal drug" means a controlled substance. The term "illegal drug" does not include a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under the Controlled Substances Act. Generally speaking, controlled substances include what we commonly think of as illegal "street drugs" such as marijuana, cocaine, LSD, etc., as well as prescription drugs. Drugs purchased legally over-the-counter are not "controlled substances." "Illegal drugs" are controlled substances unless possessed or used lawfully, e.g., with a prescription. For example, Ritalin is a "controlled substance," but is not an illegal drug if it is possessed or used pursuant to a prescription. Ritalin is an illegal drug if possessed or used without a prescription. For the purposes of the discipline requirements of special education law, alcohol and tobacco are not illegal drugs or controlled substances.
- "Serious bodily injury" means bodily injury that involves: A substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

18. What may an LEA do when the conduct is a manifestation of the child's disability but the LEA believes it would be dangerous to return the child to the previous placement?

If the child's behavior poses a threat of injury to self or others, the agency may request an expedited due process hearing to request a hearing officer to place the child in an interim alternative educational setting. The hearing officer may order the child to an interim

alternative educational setting for up to 45 school days if the hearing officer determines that maintaining the child's current placement is substantially likely to result in injury to the child or to others. As an alternative to a due process hearing, the LEA may apply to a court for an order changing the child's placement.

19. What if a parent disagrees with a manifestation determination or a disciplinary removal from the current educational placement?

A parent or an adult pupil may submit a request for a due process hearing to the LEA and send a copy of the request to the Department of Public Instruction. The LEA must hold a resolution meeting within seven calendar days of receiving notice of the due process complaint, unless the parents and LEA agree in writing to waive the resolution meeting or agree to use the mediation process. The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of the receipt of the due process complaint. An expedited hearing must be conducted within 20 school days of receipt of the hearing request, and a decision must be issued within ten school days following the hearing. The hearing officer's decision is final unless appealed in state circuit court or federal district court.

"Stay put" no longer applies to disciplinary removals. The child remains in the setting to which he was removed until the hearing is completed or until the original removal period expires, unless the parent and the LEA agree otherwise.

20. Do federal and state requirements regarding the expulsion of children who bring firearms to school conflict with expulsion requirements that apply to children with disabilities?

No. While the Gun-Free Schools Act requires an LEA to have a policy in effect requiring the expulsion for a period of not less than one year of any student who brings a firearm to school, the Act does not require a district to expel all such students without exception. The Act allows the district's chief administering officer to modify the expulsion requirement of the Act for a student on a case-by-case basis. The U.S. Department of Education has interpreted this provision to mean that an LEA may comply with both special education law and the Gun-Free Schools Act by focusing on this provision for case-by-case modification of the expulsion policy.

State law includes similar provisions. Sections 120.13(c)2m. and (e)2., Wis. Stats., require a school board to commence a hearing and expel a pupil from school for not less than a year for possessing a firearm at school or while under the supervision of a school authority. Section 120.13(1)(g), provides that a school board may modify this requirement on a case-by-case basis. A school board must modify this requirement if necessary to comply with special education requirements. For example, the school board must modify the expulsion

requirement if the IEP team determines that the conduct subject to expulsion is a manifestation of the child's disability.

21. Does section 120.13(1)(f), Wis. Stats., permit a school district to refuse a special education referral for an expelled child or permit a district to refuse a free appropriate public education to an expelled child with a disability?

No. Section 120.13(1)(f) provides that a school board is not required to enroll a pupil from another school district during the term of his or her expulsion. Therefore, the school board is not required to admit the pupil to the district's schools during the term of his or her expulsion. However, under federal and state law LEAs must locate, identify, evaluate, and provide a free appropriate public education to all children with disabilities, including children who have been expelled from school. A school district cannot refuse an IEP team evaluation because a child has been expelled from another school district. A school district cannot refuse to provide a free appropriate public education to a child with a disability expelled from another school district. However, the school board may provide the services to the child in a setting other than one of the district's schools, as determined by the IEP team.

22. When is a child who is not identified as eligible for special education entitled to the protection of special education law?

A child who had not been determined eligible for special education is entitled to protection of special education law when the public agency had knowledge that the child was a child with a disability prior to the behavior that precipitated the disciplinary action. A public agency must be deemed to have knowledge when:

- The child's parent 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.
- The child's parent requested a special education evaluation of the child.
- The child's teacher, 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 agency supervisory personnel.

A public agency would not be deemed to have knowledge if the child's parent has not allowed an evaluation of the child or has refused services for the child or the child has been evaluated and determined not to be a child with a disability.

If an LEA determines that it had a basis for such knowledge before the behavior, it must provide the child the protection of special education law, including the protections relating to discipline. It must ensure that the child is referred for IEP team evaluation and that the parents are notified of their rights under special education law.

If a public agency does not have knowledge that a child is a child with a disability prior to taking disciplinary measures, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors.

23. Must an LEA evaluate a child referred for an IEP team evaluation during a period of disciplinary removal?

Yes. If the child is referred for an IEP team evaluation during a period of disciplinary removal, the agency must conduct the evaluation in an expedited manner. Until the evaluation is completed, the child remains in the placement determined by school officials, which can include suspension or expulsion without educational services. If the LEA determines that the child is a child with a disability, the agency must provide a free appropriate public education to the child in accordance with the law.

24. May an LEA report a crime committed by a child with a disability to the authorities?

Nothing in state or federal special education law prohibits an LEA from reporting a crime committed by a child with a disability to appropriate authorities or prevents law enforcement authorities and the courts from applying the law to crimes committed by a child with a disability. An LEA reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are sent for consideration by the appropriate authorities to whom it reports the crime. The LEA may transmit copies of these records only to the extent permitted by the Family Educational Rights and Privacy Act (FERPA) and its implementing regulations, 34 CFR Part 99, which in most cases would require parent consent.

Questions regarding this Information Update Bulletin can be addressed to Stephanie Petska, Director, Special Education, Division for Learning Support: Equity and Advocacy, 125 South Webster Street, P.O. Box 7841, Madison, Wisconsin 53707-7841, (608) 266-1781 or TDD (608) 267-2427.

