

# The Process of Disciplining the Disabled Student

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## INTRODUCTION

The importance and value of proper order and discipline in a school cannot be overstated. It is imperative that schools maintain and enforce effective, reasonable, and nondiscriminatory student discipline policies and codes of conduct. However, this concern must be counterbalanced by the special consideration warranted for students with disabilities when their violation of disciplinary policies is substantially related to their disabilities. In such cases, relying on student discipline, by itself, is unlikely to reduce the likelihood such undesirable behavior will recur. When putative misconduct is substantially related to a student's disability, we can only reduce the likelihood that such misconduct will happen again by identifying its root causes and implementing strategies to address them.

Accordingly, the Individuals with Disabilities Act (20 U.S.C. § 1400, et seq.) ("IDEA") and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794; 34 C.F.R. Part 104) ("Section 504")<sup>1</sup> prohibit public schools from imposing an out-of-school suspension on a student with disabilities for more than 10 consecutive school days, or 10 cumulative school days where the suspensions constitute a pattern, without first determining whether the putative misconduct has a substantial nexus to the student's disability. If the school determines that undesirable behavior did have a substantial nexus to a student's disability, the disciplinary process must terminate and the student's placement and program must be modified as necessary to minimize the recurrence of such behavior. This paper will examine the requirements of IDEA and Section 504 and how to ensure compliance with them.

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<sup>1</sup> IDEA applies only to public schools, but Section 504 applies to any school receiving federal financial assistance. Thus, private schools assistance through the National School Lunch program, the E-Rate program, and similar federal programs are subject to Section 504. However, the Regulations of the U. S. Department of Education do not require private schools to conduct evaluations or provide due process and only require private schools to educate students with disabilities to the extent they can receive an appropriate education with only "minor adjustments" to the private school's programs. (34 C.F.R. § 104.39.)

## **THE PROCESS OF DISCIPLINING THE DISABLED STUDENT**

### **A. Origins and History of the “Manifestation Review” Process**

The Education for All Handicap Children Act (“EAHCA”) was the precursor to IDEA. It was found to have several shortcomings, including its failure to address the discipline of students with disabilities for putative misconduct that arose out of their disability, rather than a volitional choice to disrupt the educational process. Federal courts tried to fill this void by developing rules restraining how schools discipline students with disabilities, based on the statute’s language and history.

The U.S. Supreme Court set the table for this issue with its decision in *Goss v. Lopez*.<sup>2</sup> In this decision, the Court ruled that because all 50 States had provided residents a right to a free public education, they could not take them of this right without first providing a requisite level of due process. The Court held that a public school could not remove a student from school for more than 10 days, unless it first provided the student with a hearing, at which the student and his/her parents could challenge the charges and present their side of the story.

Based on this precedent, federal courts decided that, under the EAHCA, public schools could not remove student with disabilities from school for conduct that was substantially related to the student’s disability.<sup>3</sup> If the putative misconduct had no substantial relationship to the student’s disabling condition, a school could discipline the student for the behavior to the same extent it would discipline a nondisabled student for such behavior. However, when misconduct was substantially related to a student’s disability, public schools had to address the issue through special education and related services – not the student discipline process. The federal courts

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<sup>2</sup> *Goss v. Lopez*, 419 U.S. 565, 576-579 (1975).

<sup>3</sup> *See, e.g., Doe v. Koger*, 480 F. Supp. 225, 229 (N.D. IN 1979), *aff’d* 710 F.2d 1209 (7th Cir. 1983).

held public schools had to use the procedures required by the EAHCA to change the placement of a student with disabilities determine whether particular behavior was substantially related to the student's disability, which had to be conducted by a "multidisciplinary team."<sup>4</sup>

In 1988, the U.S. Supreme Court issued a landmark decision in *Honig v. Doe*,<sup>5</sup> ruling that the suspension of a student with disabilities for more than 10 days constituted a significant change in the student's placement, triggering IDEA's procedural protections and IDEA's stay-put provision also applied to a disciplinary change in placement.

Thus, this decision prohibited public schools from suspending a student with disabilities if that student's parents challenged the suspension by filing a due process complaint notice under IDEA. In such cases, the student remained in his/her placement, pending a hearing officer's decision. If a public school could demonstrate that the continuing that placement was "substantially likely to result in injury to either the student or others," the school could seek a court order to change the placement as necessary to protect the student or others.<sup>6</sup>

Based on the Supreme Court's decision in *Honig v. Doe*, federal courts ruled that a nondisabled student could also utilize IDEA's stay-put protection to at least delay a suspension by requesting an evaluation to determine if the student was a student with disabilities. In such cases, a nondisabled student could avoid a suspension – at least until the evaluation was completed and a determination made about whether the student was a student with disabilities. If the student was found to be a student with disabilities, IDEA's protections would apply.<sup>7</sup> These

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<sup>4</sup> See, e.g., *Id.*; *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978); *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982); *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981).

<sup>5</sup> *Honig v. Doe*, 484 U.S. 305 (1988).

<sup>6</sup> *Id.* at 320-322.

<sup>7</sup> See *Hacienda La Puente Sch. Dist. of LA v. Honig*, 976 F.2d 487 (9th Cir. 1992); *Rodriecus L. v. Waukegan School Dist. No. 60*, 90 F.3d 249 (7th Cir. 1996) (unclassified students are entitled to a manifestation review if their school knew or should have known they were disabled).

decisions effectively created a separate disciplinary system for students who had or claimed to have a disability, which was undesirable and sometimes subjected to abuse.

In its 1997 enactment of IDEA, Congress sought to address these issues. IDEA 1997 prohibited public schools from suspending a student with disabilities for more than 10 consecutive school days – or cumulative school days that constitute a pattern – unless the school first had a multidisciplinary team review relevant information about the student’s disabling condition and the circumstances of alleged misconduct to determine if the alleged behavior was a manifestation of the student’s disability, rather than a decision to misbehave.<sup>8</sup> It also authorized public schools to seek a court order to change the placement of a student with disabilities if the student’s placement constituted a danger to the student or others. While these amendments provided better guidance, they failed to satisfactorily address certain issues.

In 2004, Congress reauthorized IDEA, again amending its provisions, including those concerning student discipline.<sup>9</sup> This present form of the statute sets forth current requirements for disciplining students with disabilities who are classified under IDEA, and it includes some very important changes from IDEA 1997.

The application of Section 504 to elementary, secondary, and post-secondary schools is detailed in the regulations of the U.S. Department of Education, which are located at 34 C.F.R. Part 104.<sup>10</sup>

While the regulations of the U.S. Department of Education do not expressly require “manifestation reviews” before suspending students with disabilities, they mandate that schools

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<sup>8</sup> It also required a manifestation review prior to the imposition of a suspension that would comprise more than 10 nonconsecutive days during the school year, to the extent the suspension's cumulatively comprised a pattern because of their close temporal juxtaposition to one another, because they concerned identical or similar behavior, or because of other reasons.

<sup>9</sup> These provisions are set forth at 20 U.S.C. §1415 (k) and 34 C.F.R. 300.530.

<sup>10</sup> The U.S. Department of Agriculture published identical regulations governing educational institutions receiving federal assistance through that agency (*e.g.*, School Lunch Program) at 7 C.F.R. §§ 15b.20 – 15b.35.

reevaluate a student with disabilities condition and placement before substantially changing the student's placement.<sup>11</sup> The Department has opined that this regulation prohibits a public school from removing a student from his or her placement for more than 10 consecutive school days – or 10 cumulative school days that constitute a pattern – without first conducting what is, ostensibly, the manifestation review required by IDEA.<sup>12</sup>

## **B. An Overview of the Manifestation Review.**

IDEA and Section 504 allow public school to suspend a student with disabilities to the same extent and for the same reasons they would suspend a nondisabled student, provided a suspension does not exceed 10 consecutive school days. Additionally, they prohibit removals that suspensions exceeding 10 cumulative days, when the suspensions are part of a pattern that are, for all intents and purposes, the equivalent of a suspension for 10 consecutive school days.<sup>13</sup>

When a public school student with disabilities is charged with misconduct for which the penalty may be a suspension in excess of 10 consecutive school days, the student's school must have a multidisciplinary team conduct a review of relevant information concerning the student's disability and placement in order to determine whether the alleged misconduct arose out of or a substantially related to the student's disability. This review must be completed prior to the imposition of a suspension exceeding 10 consecutive school days or a suspension that is part of a

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<sup>11</sup> 34 C.F.R. § 104.35(a). The DOE Regulations only require public school systems providing education programs in grades kindergarten through 12th grade to conduct evaluations and re-evaluations, provide a free appropriate public education, or to provide procedural safeguards. Accordingly, the requirement to conduct a manifestation review under Section 504 only applies to such school systems. They are categorically referred to below as "school districts."

<sup>12</sup> The statutory language of Section 504 is very broad and does not specifically address education. (29 U.S.C. § 794 et seq.) It requires federal agencies distributing federal assistance to publish regulations that implement Section 504 relative to the programs they fund.

<sup>13</sup> *Id.*; see, e.g., *Application of the Bd. of Educ. of the West Seneca Cent. School Dist.*, NY SRO Dec. No. 04-006 (2006). The LEA must determine on a case-by-case basis whether a pattern of removals constitute a change in placement, and that determination is subject to review through the impartial hearing process and judicial review. (34 C.F.R. § 300.536[b][1].)

series of removals which constitute a pattern because: (i) they total more than 10 school days within the same school year; (ii) they arise out of substantially similar conduct; and/or (iii) other factors indicate the removals are a pattern (*e.g.*, 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).<sup>14</sup>

The required “multidisciplinary team” must consist of the parent(s) of the student with disabilities and such other “relevant members” of the IEP Team identified by the school and the parent(s) (“Manifestation Review Team”). The Manifestation Review Team must review and consider all relevant information contained in the student’s file pertaining to the student’s disabling condition, placement, and other relevant information that may pertain to any relationship between the alleged misconduct and the student’s disability. It must determine whether the subject conduct is directly and substantially related to the student’s disability or a failure by the school to implement the student’s Individualized Education Program (“IEP”).

If the Manifestation Review Team determines that either circumstance exists, the alleged misconduct is deemed to be a manifestation of the student’s disability. Such a when such a conclusion is reached, the student disciplinary process must stop. The school must instead perform a functional behavioral assessment of the student (discussed *infra*) to identify the dynamics leading to such behavior and develop a plan to minimize the likelihood of such behavior recurring. Will by contrast, if there is no nexus between the student’s disability and the charged misconduct, the school may discipline the student in the same manner and to the same extent as it would discipline a nondisabled student for the same or similar behavior.<sup>15</sup>

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<sup>14</sup> 300.536(a). According to the DOE regulations implementing IDEA, the public school district or other public agency must determine on a case-by-case basis whether a pattern of removals constitute a change in placement. (34 C.F.R. § 300.536[b][1].)

<sup>15</sup> 34 C.F.R. § 300.530(e).

### **C. Specific Requirements of the Manifestation Review.**

The purpose of the manifestation review is to prevent students from being disciplined because of behavior they cannot fully control. In cases where the charged misconduct is found to be substantially related to the student's disability, both IDEA and Section 504 require a public school to conduct an evaluation designed to identify causes of such behavior and to develop a plan to help the student avoid the behavior in the future.

#### **1. Timeframe to Conduct the Manifestation Review**

IDEA requires school districts to conduct a manifestation review within 10 school days of a decision to change a student's placement (*i.e.*, remove the student for more than 10 consecutive school days or fewer days, where the removal is part of a series of removals that comprise a pattern). However, state law can require a manifestation review be completed in a shorter period of time.<sup>16</sup> Relative to Section 504, the U.S. Department of Education requires a public school to reevaluate a student with disabilities before making a "significant change in placement."<sup>17</sup> Thus, Section 504 requires a manifestation review be completed before a suspension of more than 10 consecutive school days can be imposed.

#### **2. Notice of the Review and Due Process Rights**

Under IDEA, if a public school has charged a student with disabilities a violation of its code of conduct, for which it may impose an out-of-school suspension exceeding 10 consecutive school days, the school must notify the student's parents of the charges and its obligation to conduct a manifestation review, including the review's date, time, and location. The notice must

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<sup>17</sup> 34 C.F.R. § 104.35(a).

be received by the parents a reasonable time in advance of the scheduled manifestation review. In addition, the school must provide the parents with a copy of its procedural safeguards notice.<sup>18</sup>

Section 504 does not specify what notice must be provided to parents prior to a manifestation review, but parents are an integral part of the evaluation and reevaluation process, and schools should provide a notice similar to that required by IDEA. At the very least, a public school considering charges of misconduct that may result in a student's out-of-school suspension for more than 10 consecutive school days should provide the student's parents with notice of that fact and that the school will conduct a reevaluation of the student, including the student's disability and its relationship, if any, to the alleged misconduct. The notice should invite the parent to present the manifestation review team with any information the parent believes relevant in this regard and include the procedural safeguards provided by the school district's policies, as required by 34 C.F.R. § 104.36.

### **3. Composition of the Manifestation Review Team**

IDEA specifies that the Manifestation Review Team consist of the student's parents and "relevant" members of the student's IEP Team identified by the school district and the student's parents. In most cases, a Manifestation Review Team will include a general education teacher (assuming the student receives general education), a special education teacher (if the student receives special education), and those service providers whose services relate to a condition that is relevant to the conduct in issue.<sup>19</sup>

The regulations under Section 504 do not state who should conduct a reevaluation before a significant change in placement. In general, the Regulations require evaluations and re-

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<sup>18</sup> 34 C.F.R. §§ 300.504 and 300.530(h); *see also* 20 U.S.C. § 1415(d).

<sup>19</sup> By way of example, if a student's inability to clearly communicate significantly contributed to particular conduct, it is appropriate for the student's speech pathologist, or other related service provider, to be on the Manifestation Review Team.

evaluations be conducted by a multidisciplinary team, composed of individuals who are familiar with the student, the student's condition, able to interpret evaluation data, and who have knowledge of placement options.<sup>20</sup> As a general rule, a Manifestation Review Team under Section 504 should generally look much like one constituted under IDEA.<sup>21</sup>

The Section 504 Regulations do not specifically state that the parents of a student with disabilities must be included on an evaluation or reevaluation team. Many would argue, however, that it is – at the least – a best practice to include parents on an evaluation team. However, there may be cases where it may be more productive not to do so. A public school should carefully consider any decision not to include a parent on a reevaluation team constituted under Section 504 and, in any event, they must ensure that a student the parents of a student with disabilities receives a full opportunity to present all information they believe relevant and be permitted to address any information considered by the Manifestation Review Team.

#### **4. Material Considered during the Manifestation Review will**

IDEA and its regulations mandate that the Manifestation Review Team consider all relevant information concerning the student's disability and its potential relationship to his/her disability, including all diagnostic information, evaluations, teacher observations, the student's Individualized Education Plan ("IEP") or accommodation plan, and any other relevant information. Additionally, the student's parents should be permitted to present such information as they believe relevant to the issue and the Manifestation Review Team should consider that information. The Manifestation Review Team members should also share relevant information concerning the dynamics of the student's disability and its influence on his/her conduct. Of

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<sup>20</sup> 34 C.F.R. § 104.35(c)(3).

<sup>21</sup> 34 C.F.R. § 104.35.

course, it is also necessary for the Manifestation Review Team to consider the facts of the particular incident and conduct in question, analyzing the extent of any relationship between the incident/conduct and the student's disability.

The Section 504 regulations require public schools to “draw information from a variety of sources, including aptitude in achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior.”<sup>22</sup> They must establish procedures to ensure all of the information obtained from such sources is documented and carefully considered by “a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options[.]”<sup>23</sup>

Ultimately, the information considered must be sufficient to allow the evaluation team to decide whether the student's conduct was a manifestation of his or her disability rather than unrelated misconduct. So, by way of example, a manifestation will likely exist where an autistic student ended up in a fight with a nonstudent with disabilities because of a misunderstanding that resulted from the student with disabilities' inability to interpret or appropriately respond to social cues. Suspending the student with disabilities in such circumstances would be neither fair nor likely to reduce the likelihood he/she will be embroiled in such an incident in the future. Clearly, the better response is to identify if additional support that can be provided to help the student better appreciate social cues and respond to them more appropriately.

#### **D. Actions Based on Manifestation Review.**

As noted above, if misconduct is deemed to have no relationship to a student's disability, a school may discipline a student with disabilities as it would a nondisabled student in similar

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<sup>22</sup> 34 C.F.R. § 104.35(c)(1).

<sup>23</sup> 34 C.F.R. §§ 104.35(c)(2), (3).

circumstances. However, if alleged misconduct is found to have a nexus to – be substantially related to – a student’s disability or a failure to implement the student’s IEP, the student discipline process must end, and the school must, instead, commence an analysis to determine the factors that led to the unwanted behavior and a strategy to minimize the likelihood it will recur. This process must include a functional behavioral assessment, if one has not been previously conducted, which should help identify the dynamics of the student’s disability and other influences that led to the behavior and strategies to reduce the likelihood of its recurrence. That information will then be used to develop a behavioral improvement plan will that will guide the student, staff, and others in helping avoid such behavior in the future.<sup>24</sup>

### **1. Functional Behavioral Assessment**

When a student’s violation of school rules is the manifestation of the student’s disability, a school district’s first order of business is to conduct a functional behavioral assessment, unless one has already been done. This assessment is an evaluative tool, or series of evaluative tools, designed to identify the root causes or motivations of problem behavior. A myriad of such tools are commercially available and some school systems have developed such tools locally.

While school districts are not required, per se, to conduct an additional functional behavioral assessment if one has already been done, it should consider doing so when the prior assessment is more than three years old or did not take into account significant changes in the student’s condition. In assessment that does not include consideration of changes to the student’s condition or placement is of limited value in developing an effective behavior intervention plan.

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<sup>24</sup> 34 C.F.R. § 300.530(f)(1).

A functional behavioral assessment often includes information from direct observation of the student by school personnel, family, and/or providers, diagnostic tests, and other relevant information such as medical records. Its objective is to identify any deficits or influences related to the student's disability that drive or contribute to the problem conduct. Deficits consist of skill deficits, which are the students lack of particular skills (*e.g.*, the ability to correctly interpret social cues), and performance deficits referred to a student's reluctance or refusal to use skills, techniques or strategies in particular cases (*e.g.*, a student with a speech impediment refusing to use techniques that promote more fluid speech). Other relevant factors that the assessment might reveal include particular dynamics of the student's disability, which prompt or increase the likelihood that such behavior will occur, for example, a child with profound sensory issues that agitate or disturb the student. Although the focus of the functional behavioral assessment is on the student and his/her disability, it may also reveal external influences affecting the student's conduct, such as harassment by his/her classmates, other social pressures, or difficulties in the student's home.

By conducting the assessment, the evaluator seeks to identify the dynamics and factors of the student's disability that cause or substantially contribute to the occurrence of the conduct. Ultimately, the evaluator must come to a conclusion – or a hypothesis statement – about what the dynamics of the disability that caused or substantially contributed to the subject behavior. This conclusion will provide the basis for a behavioral intervention plan that sets forth the strategies and techniques to be used to avoid a recurrence of the behavior.

## **2. The Behavioral Intervention Plan**

The functional behavioral assessment should identify any skill deficits, performance deficits, and/or other factors and dynamics that cause or substantially contribute to a student's

problem behavior. Using this information, the IEP Team will prepare a strategy to address these causal issues, including additional education or support, techniques to redirect the student or deescalate problem behavior, incentives to avoid problem conduct, counseling, or other measures that address the factors that led to the behavior. Very often, such plans include a series of progressively restrictive measures to redirect the student without provoking undesirable behavior. Such plans can also include educational components that assist the student in better understanding the interaction between the student's disability and his/her conduct or how the student can compensate for or cope with particular dynamics relative to his/her disability.

Whatever its components, a behavioral intervention plan should be positive in its nature and avoid reliance on strategies that merely suppress undesired conduct. Merely suppressing problem behaviors will generally only mask an underlying need, which will ultimately manifest itself – perhaps more seriously than would have otherwise occurred. If the school district already has a behavioral intervention plan in place, the recurrence of problem behavior suggests that plan is in some respect deficient. Therefore, the district should carefully review it, in light of the behavior's recurrence, and identify and correct any such deficiency.<sup>25</sup>

In any event, a behavioral intervention plan should never have the primary purpose or effect of punishing a student with disabilities. Rather, it should focus on providing the student and/or school personnel with tools and strategies by which to minimize the likelihood of a recurrence of the problem behavior. If it is successful in this regard, the student with disabilities will be better enabled to have a productive and happy educational experience than would have been the case had the student merely been subjected to student discipline. Of course, the behavioral intervention plan is only as good as the functional behavioral assessment is accurate.

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<sup>25</sup> 34 C.F.R. § 300.530(f)(1)(i).

Therefore, it is imperative that the assessment be performed with reliable tools that are properly administered by trained personnel and correctly interpreted.

Obviously, the personnel who work with a student with disabilities must know the content of a behavioral intervention plan and understand how to implement it. School district administrators must, therefore, ensure that the plan is provided to faculty and staff who will have to implement it. Likewise, they must ensure faculty and staff understand the plan and how to correctly implement it. Administrators must correct problems in these regards immediately.

### **3. The Student's Return to His/Her Placement**

After conducting and/or reviewing a student's functional behavioral assessment and developing or revising his/her behavioral intervention plan, the school district must return the student to his/her placement, unless it agrees with the parents to an alternative placement for the student or there are circumstances that permit the school district to effect a unilateral 45-day change in the student's placement to an interim alternative educational placement, as discussed below.<sup>26</sup>

In some cases, a functional behavioral assessment or other information may lead to the conclusion that a student's placement is inappropriate to meet the student's particular needs. In that case, the student's IEP Team should consider changing the placement. In such circumstances, the change in placement does not so much arise from the student's violation of school rules, as it does from information that demonstrates that the existing placement is no longer appropriate. If it is clearly needed, a more restrictive placement should not be viewed as a negative development. It is, perhaps, less desirable to subject a student with disabilities to a placement in which he/she cannot succeed, and which fuels behavior that neither the school nor

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<sup>26</sup> 34 C.F.R. § 300.530(f)(2).

the student desires, than to provide a placement that will improve the student's potential for success and his/her enhanced self-esteem.

### **E. Exigent Circumstances Justifying Immediate Removals.**

In the following special circumstances, a school district can unilaterally remove a student with disabilities from his/her placement to an interim alternative educational setting for up to 45 school days, without regard to whether the behavior is a manifestation of the child's disability:<sup>27</sup>

- The student has carried a weapon to or possesses a weapon at school, on school premises, or at a school function, which is under the school district's jurisdiction;
- The student knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance<sup>28</sup>, while at school, on school premises, or at a school function under the school district's jurisdiction;<sup>29</sup> or
- The student inflicted serious bodily injury on another person, which is defined as: a 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.

Such a removal cannot exceed the amount of time that a non-student with disabilities would have been suspended for the misconduct at issue under the school district's discipline policy.

In cases where a district cannot unilaterally change a student's placement, but it believes maintaining the student's placement will likely result in injury to the student or someone else, the school district may request an impartial hearing, which will be conducted on an expedited basis.<sup>30</sup>

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<sup>27</sup> 20 U.S.C. § 1415(k)(1), (7); 34 C.F.R. § 300.530(g)-(i).

<sup>28</sup> A "controlled substance" as "a drug or other substance identified under schedule I, II, III, IV, or V in section 202 (c) of the Controlled Substances Act (21 U.S.C. section 812 (c)).

<sup>29</sup> A weapon is defined to mean "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[.]" 34 C.F.R. § 300.530(h)(i)(4); 20 U.S.C. § 930(g)(2).

<sup>30</sup> 34 C.F.R. § 300.532(a).

## **F. Students Protected by the Manifestation Review Obligation**

Unlike its predecessors, under IDEA 2004, only students classified as students with disabilities at the time of the alleged misconduct are entitled to a manifestation review. Students who are considered non-disabled students at the time of alleged misconduct cannot avoid the imposition of discipline by requesting an evaluation after the conduct has occurred. The Section 504 Regulations, as interpreted by the U.S. Department of Education, also adhere to this rule. However, under IDEA 2004, a student is “presumed to have a disability for discipline purposes” in the following circumstances:<sup>31</sup>

- A parent of the student expressed written concern to supervisory or administrative personnel of the school district or to the student’s teacher about whether the student needed special education; or
- A parent of the student verbally expressed concern the student may need special education and the parent is unable to write or has a disability preventing the parent from making such a written statement; or
- A parent of the student requested the student’s evaluation under IDEA; or
- A teacher of the student, or other district personnel expressed specific concerns about a pattern of behavior demonstrated by the student to the director of special education or to other supervisory personnel.<sup>32</sup>

In any event, a child will not be considered entitled to manifestation review if the child’s parent refuses to consent to the child’s evaluation or to the child’s receipt of services under IDEA. Also, students evaluated and found to be ineligible for services under IDEA are not entitled to a manifestation review.<sup>33</sup>

The Section 504 regulations do not state that nondisabled students are protected by the reevaluation provision. However, the U. S. Department of Education, Office for Civil Rights,

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<sup>31</sup> 34 §300.354 (a).

<sup>32</sup> 34 C.F.R. § 300.534(b).

<sup>33</sup> 34 C.F.R. §300.534 (c).

will not consider a student to be a student with disabilities if the student's parent refused to consent to an evaluation or the receipt of services.

### **G. The Due Process Provisions of IDEA Specific to Disciplinary Changes in Placement**

Under IDEA, a parent can appeal a manifestation review determination and any ensuing change in placement by demanding an impartial hearing, consistent with the provisions of 34 C.F.R. §§ 300.507 or 300.508(a) and (b). However, IDEA's stay-put provision does not apply in such cases, and the student's placement during the hearing is the interim alternative educational placement unless and until the suspension is served or a hearing officer rules otherwise.<sup>34</sup> An impartial hearing in such circumstances must proceed on an expedited basis, beginning within 20 school days of the filing of a due process complaint and a hearing officer issuing a determination within 10 school days after the hearing.<sup>35</sup> A school district and the parents must conduct a resolution conference within seven days of the receipt of the due process complaint notice, and the hearing may proceed unless the matter is resolved to both parties' satisfaction within 15 days of the receipt of the due process complaint.<sup>36</sup>

At the conclusion of such a hearing, the hearing officer may:

- Return the disabled child to the placement from which he/she was removed, assuming the hearing officer determines the removal violated IDEA or the behavior was a manifestation of the child's disability; or
- Order a change of placement and appropriate IDEA's for not more than 45 school days, provided the hearing officer determines that the child's current placement is "substantially likely to result in injury to the child or others."

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<sup>34</sup> 20 U.S.C. § 1415(k)(4)(A); 34 C.F.R. § 300.533.

<sup>35</sup> 34 C.F.R. § 300.532(c)(2).

<sup>36</sup> 20 U.S.C. § 1415(f)(1)(B); 34 C.F.R. §§ 300.510, 300.533(c)(3). IDEA authorizes the states to establish different procedural rules and timelines for expedited due process hearings concerning such matters, but they must at least be as stringent as those set forth in IDEA and 34 C.F.R. § 500.532. (34 C.F.R. § 300.532(c)(4)).

A school district may repeat this process if it believes that returning a disabled child to his/her original placement is substantially likely to result in injury to the child or others.<sup>37</sup>

The DOE regulations concerning Section 504 do not contain such specific time frames for due process hearings. They require public school districts to do the following: (i) prepare and implement a system of procedural safeguards that include notice; (ii) provide parents or a student over the age of 18 with the opportunity to examine relevant educational records; (iii) provide an impartial hearing, including an opportunity for the parents' participation and their representation by counsel; and (iv) an appeal process. Provided a school district's policies are reasonable, it may develop its own procedures and timeframes. This would seem to provide school districts with more flexibility, compared to the specific and exacting time frames imposed by IDEA, and school districts should carefully consider this option and instead of deciding by rote to simply use their policies relative to compliance with IDEA.

In any event, where a student's placement is changed to an alternative educational placement because of disciplinary infractions, and the parents seek to challenge that decision through a hearing, the OCR will expect the hearing to commence and proceed fairly consistent with the timeframes stated in IDEA, and where that cannot be accomplished, the district should be prepared to articulate a nondiscriminatory reason.

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<sup>37</sup> 20 U.S.C. §1415; 34 C.F.R. §300.532(b).

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