



# Ohio School Boards Association Capital Conference and Trade Show

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Greater Columbus Convention Center  
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## Disciplining students with disabilities

**Monday, November 13, 2017**

**9:30 a.m.**

**A 210-212**

Jacqueline Walsh Brickman, attorney, Pepple & Waggoner Ltd.

Dr. Dakota King-White, assistant professor, Cleveland State University

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## OHIO SCHOOL BOARDS ASSOCIATION CAPITAL CONFERENCE 2017

Columbus, Ohio  
November 13, 2017

### “Disciplining Students with Disabilities”

Presented by  
Jacqueline Walsh Brickman, Esq.  
and

Dr. Dakota King-White, Assistant Professor, Cleveland State University

I. Introduction

II. Discipline of Students With Disabilities

A. Free Appropriate Public Education (“FAPE”).

1. Each state must have in effect a plan that provides assurances that FAPE is available to all children with disabilities residing in the state between the ages of 3 and 21, including children with disabilities who have been suspended or expelled. (20 U.S.C. §1412(a)(1)(A); 34 C.F.R. §300.101(a)).

2. However, a public agency need not provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if services are not provided to a child without disabilities who has been similarly removed. (34 C.F.R. §300.530(d)(3)).
3. School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct. (20 U.S.C. §1415(k)(1)(A); 34 C.F.R. §300.530(a)).
4. School personnel may suspend a child with a disability who violates the student code of conduct, or remove the child from his/her current placement to an appropriate interim alternative educational setting, for not more than 10 consecutive school days.
5. A child with a disability may be removed again for not more than 10 consecutive school days in that same school year for separate incidents of misconduct, so long as those subsequent removals do not constitute a change of placement. (20 U.S.C. §1415(k)(1)(B); 34 C.F.R. §300.530(b); O.A.C. 3301-51-05(K)(20)(b)(i)).
6. After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal, the child must:
  - a. Continue to receive educational services to the extent necessary 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; and
  - b. Receive, as appropriate, a functional behavioral assessment ("FBA") and behavioral intervention services and modifications designed to address the behavior violation so it does not recur. (20 U.S.C. §1415(k)(1)(D); 34 C.F.R. §300.530(b)(2) and (d)(1); O.A.C. 3301-51-05(K)(20)(b)(ii) and (d)(i)).
7. Also, note that, as part of the IEP process, in the case of a child whose behavior impedes the child's learning or that of others, the IEP team shall consider the use of positive behavior interventions and supports, and other strategies to address that behavior. (20 U.S.C. §1414(d)(3)(B)(i); 34

C.F.R. §300.324(a)(2)(i)). Focus is on preventing inappropriate behaviors from occurring in the first place.

8. School day is defined as any day, including a partial day, that children are in attendance at school for instructional purposes. (34 C.F.R. §300.11(c)(1)).

a. Days that are counted are days that the child is removed from “the current placement.”

b. Portions of a school day that a child has been suspended would be included in determining whether the child has been removed for more than 10 cumulative school days or subjected to a change of placement.

c. In-school suspension would not be considered a part of the days of suspension so long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on his or her IEP, and continue to participate with nondisabled children to the extent the child would have in his/her current placement. (IDEIA Regulations Discussion, Federal Register (Aug. 14, 2006), p. 46715).

B. What constitutes a change of placement (34 C.F.R. §300.536; O.A.C. 3301-51-05(K)(26)).

1. The removal is for more than 10 consecutive school days; or

2. The child has been subjected to a series of removals that constitute a pattern:

a. Because the series of removals total more than 10 school days in a school year;

b. Because the child’s behavior resulting in the removal is substantially similar to the behavior in the previous incidents that resulted in the series of removals; and

c. Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

3. Whether a pattern of removals constitutes a change of placement will be determined on a case-by-case basis by the public agency and may be subject to review through due process and judicial proceedings.
  4. Multiple short-term removals of 10 consecutive days or less for separate incidents of misconduct are permitted, to the extent removals would be applied to children without disabilities, and so long as those removals do not constitute a change of placement. *Letter to Zirkel*, 31 IDELR 138 (OSEP 1999).
  5. School personnel are not permitted to use repeated disciplinary removals of 10 school days or less as a means of avoiding the normal change of placement protections afforded by the IDEA. (34 C.F.R. §300.536(b); O.A.C. 3301-51-05(K)(26)(b)).
  6. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct:
    - a. The local educational agency, parent, and relevant members of the child's IEP team must conduct manifestation determination. (20 U.S.C. §1415(k)(1)(E); 34 C.F.R. §300.530(e)).
    - b. On the date on which a decision is made to make the removal that constitutes change of placement, the local educational agency must notify parents of the decision and provide the procedural safeguards notice. (34 C.F.R. §300.530(h)).
- C. Manifestation determination (20 U.S.C. §1415(k)(1)(E); 34 C.F.R. §300.530(e); O.A.C. 3301-51-05(K)(20)(e)).
1. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the school district, the parent, and relevant members of the IEP team shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine:
    - a. If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

- b. If the conduct in question was the direct result of the school district's failure to implement the IEP.
  2. If the school district, the parent, and relevant members of the IEP team determine that either of the above is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.
  3. If the school district, parent, and relevant members of the IEP team determine the conduct was a manifestation of the child's disability, the IEP team must either:
    - a. Initiate a FBA within 10 days of the determination and complete the assessment as soon as practicable, unless the school district already had conducted a FBA before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan (BIP) to address the behaviors leading to the misconduct; or
    - b. If a BIP already has been developed, within 10 days of the determination, review the BIP and its implementation and modify it as necessary to address the behavior;
    - c. Take immediate steps to correct any deficiencies in the IEP; and
    - d. Return the child to the placement from which he/she was removed, unless the parent and school district agree to a change of placement as part of the modification of the BIP. (20 U.S.C. §1415(k)(1)(E) and (F); 34 C.F.R. §300.530 (e) and (f); O.A.C. 3301-51-05(K)(20)(e) and (f)).
  4. If the IEP team finds no manifestation between the misconduct and the disability:
    - a. The student can be removed from his/her current placement for more than 10 school days, and the same disciplinary procedures that apply to students without disabilities are applicable.

- b. During any time of removal and change of placement, the school district must continue to provide the student with educational services that will enable the student to continue to participate in the general education curriculum, although in another setting, and progress toward meeting the goals set out in the student's IEP.
  - c. If appropriate, the IEP team is to conduct an FBA and develop and/or modify a BIP for the student designed to address the behavior that is the subject of the disciplinary violation so that it does not recur. (34 C.F.R. §300.530(c); O.A.C. 3301-51-05(K)(20)(c)).
- D. Disciplinary removals.
- 1. Short-term suspensions beyond 10 consecutive school days that do not constitute a change of placement.
    - a. School personnel may implement short-term disciplinary action even after a student has been removed for 10 school days in a school year.
    - b. However, these removals are permitted only to the extent they are consistent with discipline that is applied to children without disabilities. (34 C.F.R. 300.530(b)(1); O.A.C. 3301-51-05(K)(20)(b)(i)).
    - c. If the current removal is for not more than 10 consecutive school days and is not a change of placement, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed to enable the child to continue to participate in general education curriculum, although in another setting, and to progress toward meeting goals set out in the IEP. (34 C.F.R. §300.530(d)(4); O.A.C. 3301-51-05(K)(20)(d)(iv)).
    - d. If removal is a change of placement, the child's IEP team determines appropriate services. (34 C.F.R. §300.530(d)(5); O.A.C. 3301-51-05(K)(20)(d)(v)).
    - e. Several short term removals could be an indicator that the child's IEP may not appropriately address the child's behavioral needs and could result in a denial of FAPE.

2. Exclusionary disciplinary measures.
  - a. Schools should take care when implementing exclusionary measures that significantly interfere with a child's instruction and participation in other school activities.
  - b. Exclusionary disciplinary measures include:
    - i. Office referrals, extended time excluded from instruction, or extended restrictions in privileges;
    - ii. Sending children out of school on "administrative leave" or a "day off" or other method of sending the child home from school;
    - iii. Sending children out of school with a condition for return, such as a risk assessment or psychological evaluation; and
    - iv. Requiring children to leave the school early and miss instructional time.
  - c. Exclusionary disciplinary measures are not considered disciplinary removals, so long as the student is afforded the opportunity to continue to be involved in and make progress in the general education curriculum and receive the instruction and services specified on their IEPs.
  - d. However, if implemented repeatedly, exclusionary disciplinary measures could constitute a disciplinary removal. *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSEP 2016).
- E. Removal under special circumstances (20 U.S.C. §1415(k)(1)(G); 34 C.F.R. §300.530(g); O.A.C. 3301-51-05(K)(20)(g)).
  1. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days, without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where the child:
    - a. Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the Ohio Department of Education or a school district;

- b. Knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function under the jurisdiction of the Ohio Department of Education or a school district; or
- c. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the Ohio Department of Education or a school district.

2. Definitions.

- a. “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 2.5 inches in length. (18 U.S.C. §930(g)(2); 34 C.F.R. §300.530(i)(4); O.A.C. 3301-51-05(K)(20)(h)(i)(d)).
- b. “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. An illegal drug is a controlled substance, except for a substance legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority. (34 C.F.R. §300.530(i)(1) and (2); O.A.C. 3301-51-05(K)(20)(h)(i)(a) and (b)).
- c. “Serious bodily injury” is defined as bodily injury that involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a body member, organ, or mental faculty.
- d. “Bodily injury” is defined as a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary. (18 U.S.C. §1365(h)(3); 34 C.F.R. §300.530(i)(3); O.A.C. 3301-51-05(K)(20)(h)(i)(c)).

III. Addressing Behaviors

A. Individualized Education Program (“IEP”).

1. The IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address behavior for any child whose behavior impedes the child’s learning or that of others. *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSEP 2016); 20 U.S.C. §1414(d)(3)(B)(i).
2. The IEP team should determine if behavioral supports should be provided in any of the following areas:
  - a. Special education and related services.  
  
Examples: instruction and reinforcement of school expectations, violence prevention programs, anger management groups, counseling for mental health issues, life skills training, social skills instruction.
  - b. Supplementary aids and services.  
  
Examples: meetings with a behavioral coach, social skills instruction, meetings with a counselor.
  - c. Program modifications or supports for school personnel.  
  
Examples: training and coaching for school personnel, tools to appropriately address the behavioral needs of a particular child.
3. A procedural or substantive failure to develop, review, or revise the IEP may occur if:
  - a. The IEP team did not consider the inclusion of positive behavioral interventions and supports in response to behavior that impeded the child’s learning or that of others.
  - b. There are no behavioral supports in the child’s IEP, even when the IEP team determines they are necessary for the child.
  - c. The behavioral supports are inappropriate for the child.

- d. The behavioral supports in the child's IEP are appropriate, but are not being implemented or are not being properly implemented.
  4. Indicators that a student's needs are not being met:
    - a. New or more frequent outbursts;
    - b. An increase in frequency or intensity of behavior;
    - c. A sudden change into withdrawn, non-communicative behavior; or
    - d. A significant rise in missed classes.
- B. Functional Behavioral Assessment ("FBA").
  1. FBA is a systematic process for describing problem behavior; identifying the environmental factors, the setting, and the events that predict problem behavior; and guiding the development of effective and efficient behavioral support plans. This information is used to identify and teach appropriate replacement behavior and reduce the frequency and severity of problem behavior.
  2. The four main outcomes of functional behavior assessment are:
    - a. A definition of problem behavior.
    - b. A description of the conditions under which problem behavior is and is not likely to occur.
    - c. Identification of the cause of problem behavior.
    - d. Direct observation data to support these outcomes.
  3. The general purpose of functional assessment of behavior is to provide the IEP team with additional information, analysis, and strategies for dealing with undesirable behavior, especially when it is interfering with the child's education.

4. If the FBA focuses on the educational and behavioral needs of a specific child, it qualifies as an evaluation or reevaluation and triggers all procedural safeguards. However, if the FBA is used as a widespread intervention tool to improve behavior of all students in school, it is not an evaluation. *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007).
5. Components of the FBA.
  - a. Background and purpose: to assist the school in developing an effective plan to help the student better adjust to the school as a social and academic setting.
  - b. Description of major target behavior: frequency, duration, intensity, immediate ecological antecedents, and possible behavioral antecedents.
  - c. Specific consequences from engaging in the target behavior.
  - d. Description of why the child engages in the target behavior.
  - e. Alternative behavior to encourage which serves the same function as the target behavior or is incompatible with engaging in the target behavior.
  - f. Specific conditions under which alternative behaviors should be taught.
  - g. Recommended modifications in the physical environment.
  - h. Recommended modifications in the social environment.

C. Behavioral Intervention Plan (“BIP”).

1. Required, as appropriate, when the student has been removed from school more than 10 school days during the school year, for more than 10 consecutive school days, and/or “in the case of a child whose behavior impedes the child’s learning or that of others,” and where conduct is determined to be a manifestation of the child’s disability. (34 C.F.R. §300.324(a)(2)(i); 34 C.F.R. §300.530(d)(1)(ii); O.A.C. 3301-51-07(L)(1)(b)(i); O.A.C. 3301-51-05(K)(20)(d)(i)(b)).

2. A BIP is a set of positive behavioral interventions and supports, along with other strategies, designed to assist a student whose behavior impedes his/her own learning or the learning of others.
3. BIP must be written with sufficient specificity and address the student's behavior and possible consequences with consideration of the student's unique needs.
4. Best practices suggest that a BIP should be developed, reviewed, implemented, and documented as part of the IEP process.
5. The BIP must be properly and consistently implemented and reviewed, and modified as appropriate in order to afford the student FAPE.
6. Failure to consider and provide for needed behavioral supports could result in a student not receiving a meaningful educational benefit, or FAPE. *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSEP 2016).

IV. Protections for Children Not Yet Eligible for Special Education and Related Services

- A. A child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violates a code a student conduct may assert any of the protections provided by the IDEA if the school district had knowledge that the child was a child with a disability before the occurrence of behavior that precipitated the disciplinary action.
- B. A school district shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred:
  1. The parent of the child has expressed concern in writing to supervisory or administrative personnel of the school district, or a teacher of the child, that the child is in need of special education and related services;
  2. The parent of the child has requested an evaluation of the child; or
  3. The teacher of the child, or other personnel of the school district, has expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the district, or to other supervisory personnel of the district.

- C. The school district shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation or has refused services, or the child has been evaluated and it was determined that the child was not a child with a disability.

If a school district does not have knowledge, the child may be subjected to the same disciplinary measures applied to children without disabilities.

- D. If an evaluation is requested, it must be conducted in an expedited manner, but the child remains in educational placement determined by school authorities, which can include suspension or expulsion without services.

V. Conclusion