

Indiana Special Education Law: A Guide for the 23-24 School Year. What SPED Directors Need To Know.

August 29, 2023

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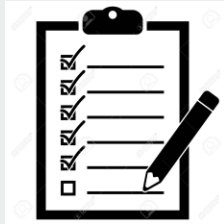
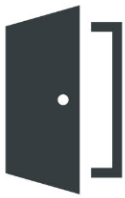
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Open +
Intros

Overview
of Different
Complaints

Disciplining
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Due
Process
Hearings

Bullying

Overview of Different Complaints

IDOE Complaint

Due Process

OCR Complaint

Any alleged violation of federal or state laws that apply to special education programs.

Any matter relating to a proposal or a refusal to start or change the identification, evaluation or educational placement of a child with a disability, or the provision of a free appropriate public education (FAPE) to the child.

Any complaints of discrimination on the basis of race, color, national origin, sex, disability and age in public schools.

The parent(s); any individual; group of individuals; agency; or organization.

Only a parent/guardian of a student or a school district may file a due process complaint.

Anyone can file a complaint against a public school or school district

Must be brought within one year of the alleged violation

Any due process complaint may only consider violations that have occurred in the previous two years.

A complaint must be filed with OCR within 180 calendar days from the date of the incident that you are complaining about.

Complaint investigator reviews all of the information and submitted documentation and issues a complaint investigation report, which may include corrective action if the school is found to be noncompliant with state special education rules.

A due process complaint is like a lawsuit, but at the state agency level. It is a hearing like one would expect in court. An individual who files a due process complaint can present evidence and call witnesses to testify on their behalf. A due process complaint is presented before a hearing officer, not a judge

OCR's role is to be a neutral fact-finder and to promptly resolve complaints. OCR has a variety of options for resolving complaints, including facilitated resolutions and investigations. OCR does not act as an advocate for either party during the process.

A real world example: CP 260-2023

- **Issue:** Whether School ensured CCC convened periodically, but not less than annually, for Student who had previously been determined eligible for special education to revise Student's IEP, as appropriate, to address the Student's anticipated needs following an accident?
- **Facts:**
 - Student's CCC convened on **Sept. 14** for annual case review
 - Student was in an accident on **May 12**
 - Parent provided doctor's note on **May 17** with specific recommendations: no sports, no more than 1 test/day and untimed testing time, all work given in paper format, quiet lunch, and that Student may attempt school but may go home if symptoms worsen.
 - School nurse provided that info to Student's teachers
 - Student's TOR messaged Student's teachers to request they communicate with Parent to develop a plan for Student's missing assignments and exams

CP 260-2023 (cont.)

- **Facts (cont.):**
 - Student's teachers communicated with Parent re: options and offered to provide everything in paper per doctor's rec
 - Guidance counselor confirmed to Parent that teachers were aware of Student's injury and that Student could take finals during summer school and eat lunch in alternative area
 - Student's Parent disagreed with proposed plans re: final exams
 - Parent did not request a case conference
 - Student did not attempt to make up any final exams missed
 - Student's anticipated needs were communicated by nurse and TOR to Student's teachers
- **Conclusion:** No violation. Student's IEP did not need to be revised to address the Student's anticipated needs where the School provided opportunities for the Student consistent with the Student's IEP and doctor's recommendations.

HR-049-2023

(due process complaint)

- **Facts:**

- Student is 11 years old, enrolled in 4th grade and attends general education classes
- Student has been diagnosed with ASD, ADHD, fetal alcohol syndrome, intrauterine drug exposure, and social pragmatic language disorder by independent professionals
- Student was found eligible for services under Autism Spectrum Disorder (ASD) after an educational evaluation and initial CCC
- CCC developed 2 goals for Student: (1) writing conventions + (2) time on task
- Parent attended CCC and agreed with determination of eligibility and implementation of IEP

HR-049-2023 (cont.)

- **Did School provide effective services? Yes. The law requires that students with disabilities receive an appropriate education, but not that they receive an optimal education.**
 - Student met writing goal and progressing towards on-task goal.
 - Student began to experience difficulties in math – School responded by placing her in lower-level class that is slower paced and has more teacher guidance
 - Student began to engage in stealing behaviors and hair pulling – School responded and reduced behaviors, neither of which interfered with Student’s academic and functional performance

HR-049-2023 (cont.)

- **Did School provide proper modifications and accommodations? Yes.**
- Goals were addressed by School and implementers made appropriate adjustments to Student's needs by using a variety of techniques to address time on task:
 - behavioral prompts
 - allowing Student to take breaks and walks
 - use of Velcro strips on her desk to touch
 - sugar-free candy
 - chewing gum
 - not penalizing for incomplete assignments, etc.)
- TOR meets with Student for 30 mins./day to provide instruction

HR-049-2023 (cont.)

- **Did School identify all of the Student's educational needs in the Present Levels of Academic Achievement and Functional Performance (PLAAFP)? Yes.**
- School conducted complete educ. eval. that included required components of 511 IAC 7-31-1(c) of an assessment of current academic achievement, speech and language eval, functional skills, autism rating scale, OT evaluation, gross motor skills assessment by PT, social developmental history, and systematic observations
- Two goals of writing conventions and time on task resulted from the eval and ongoing interventions
- School also attended to Student's struggles with math, although math was not identified as an area requiring special ed services
- = No denial of FAPE

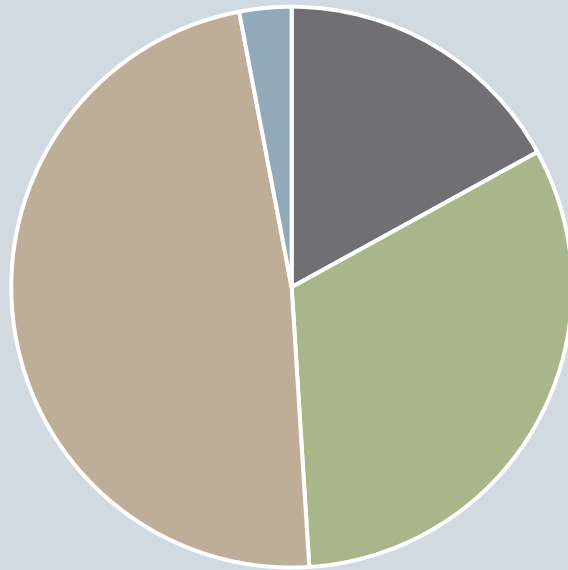
Office of Civil Rights Complaints

- In fiscal year 2022, the Office for Civil Rights received the highest volume of complaints in its history, totaling 18,804 complaints, according to its Annual Report to the President and Secretary of Education on Fiscal Year 2022.
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- FY 2022's high number of complaints exceeded the previous record high by 12 percent, which was in fiscal year 2016, at 16,720 complaints. In FY 2021, OCR received 8,935 complaints, and in FY 2020 received 9,719 complaints.
- In FY 2022, OCR resolved the second-highest number of complaints in its history, 16,515 cases. According to the report, OCR worked to process these complaints with approximately 18 percent fewer investigative staff than it had in 2016.

OCR Complaints by Categories

- Complaints of race, color, or national origin made up 17 percent (3,329) of all complaints in FY 2022.
- Complaints involving discrimination based on disability made up 32 percent (6,467) of all complaints, down from 48 percent in FY 2021
- Sex discrimination complaints comprised 48 percent (9,498) of total complaints, up 17 percent from FY 2021.
- Age discrimination complaints made up 3 percent (666) of the total number of complaints.

OCR Complaints



■ Race, Color or National Origin ■ Disability ■ Sex ■ Age

Single individual files thousands of complaints

In previous years, the majority of complaints have been disability concerns, but in FY 2022, OCR received **7,339 complaints filed by a single individual**, which raised the sex discrimination allegations and altered the ratio of complaint filings.

Website accessibility

In FY 2022, OCR resolved 5,187 Section 504 and Title II complaints, which addressed a broad range of issues. OCR initiated 100 compliance reviews focused on website accessibility.

- Look at the OCR guidance documents and do your own audit of your website.

Takeaways from the FY2022 Annual Report

- Check policies and forms to ensure that they don't contain outdated language or a narrow definition when it comes to eligibility under Section 504 to avoid a systemic violation.
- Take time to go through the OCR's report and take a look at your forms, training and what OCR is highlighting

Type and Number of 504, Title II Complaint Allegations	
Type of 504, Title II complaint allegations	Total number of complaints
Academic adjustments	1,028
Accessibility (programs and facilities)	335
Accessibility (technology)	21
Admissions	27
Designation of responsible employee	10
Different treatment, exclusion, denial of benefits	1,856
Disability harassment	580
Direct threat (Title II)	5
Discipline	239
Communications (Title II)	41
Employment	148
Free appropriate public education	3,363
Grievance procedures	52
Housing	30
Modifications of policies and procedures (Title II)	115
Non-academic services	116
Resource equity and comparability	22
Restraint and seclusion	97
Retaliation	1,708
Service animals	84
Testing	24
Treatment of post-secondary students	102
Other	77

Settlement Trends

- Cost of settling cases increasing
- Parent attorney fees are increasing, dragging out settlement as long as possible
- Insurance presses for settling anything less than \$35,000-50,000 (avg. cost of hearing)
- Average cost of settlement?



Avoidance Beats the Alternative

Careful attention to tips from today can help minimize the chance you will be involved in a Request for Due Process.

A Request for Due Process pulls time and energy and creates stress that could last weeks, if not months.

Article 7 requires that the Independent Hearing Officer (IHO), court reporter and hosting the hearing come from the local public school.

A school corporation could pay between \$30-50k to conduct the hearing.

The time involved is immeasurable and irreplaceable!

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Trends in Special Education

“Educational” Placement

Courts saying private placement must be educational and not medical/for mental health purposes!

- Placement was a mental health facility focused on students with reactive attachment disorder. *See Ft. Bend Ind. Sch. Dist. v. Douglas A.*, 65 IDELR 1 (5th Cir. 2015).
 - But note that mental health services doesn't automatically turn a residential school into medical placement if the program's supports qualify as related services under the IDEA and relate to the student's educational needs. *See Edmonds Sch. Dist. V. A.T.*, 119 LRP 26888 (9th Cir. 2019).
- Parochial school that offered more “encouragement and support” to bullied teen not appropriate. *See John M. v. Brentwood Union Free Sch. Dist.*, 66 IDELR 129 (E.D.N.Y. 2015).

Tips for Writing an IEP

- Avoid Same Language
- Make sure it is not Ambiguous
- Overly heavy in terms of too much to implement

Hypothetical Scenario

Student has Crohn's disease and is eligible under OHI. When she goes to class, she participates well in discussions and stays on task. However, she struggles to attend all her classes because she is anxious about what will happen if her pain returns. Despite being able to get a pass if needed to go to the restroom, she often fails to show up to school at all. IEP team meets and discusses her need to improve her attendance. The Team notes that when she feels well, she attends class about 50% of time. Otherwise, she calls her mom to pick her up early.

The team writes a goal: *By the end of the year, Student will call her mom to pick her up when she feels anxious % of the time. Her teachers will track she makes calls and share her progress on a monthly basis.*

Hypothetical (cont.)

Is this IEP goal sufficient? No.

- An IEP goal must be designed to meet the needs that result from a student's disability to be involved in and make progress in the general education curriculum. 34 CFR 300.320(a)(2)
- This goal will only exacerbate her anxiety and enable her absences. It will make it more difficult to progress in her classes.
- **A better goal:** *By the end of the year, Student will go to class 80% of the time, despite feeling anxious by using appropriate coping skills. This will be measured by teacher observation and recorded on data sheets. Her teachers will share her progress with her parents on a bi-weekly basis.*

Rise in Eligibility Cases (especially OHI)

Always consider OHI as eligibility category.

- For a student's ADHD to fall under the OHI definition, it must adversely affect the child's educational performance. 34 CFR 300.8(c)(9).
 - *See In re: Student with a Disability*, 119 LRP 18518 (SEA MO 2019) (finding that because the student's behavior was typical of kindergarteners and did not impact his educational performance, the district correctly found the student was ineligible under the IDEA).
- Even if a student's ADHD qualifies as OHI, for the student to be eligible based on OHI, the condition must result in a need for special education and related services. 34 CFR. 300.8(c)(9).
 - *See G.M. v. Martirano*, 78 IDELR 68 (D. Md. 2021) (finding that because a 9-year-old with dyslexia and ADHD made appropriate progress in general education with redirection, prompting, and repetition, he did not require special education under the IDEA).

Compensatory Education East Allegheny Sch. Dist., (SEA PA April 18, 2023)

- A Pennsylvania school district's programming for a teen with specific learning disability was deficient in violation of the IDEA.
- IHO awarded the teen 400 hours of compensatory education.
- IHO found that the district's poorly written IEPs denied the teen FAPE over more than two school years and significantly impeded the parents' opportunity to participate in developing the teen's program and placement.

East Allegheny Sch. Dist., (SEA PA April 18, 2023) (cont.)

What it Means:

An IEP must pass the "stranger test," meaning that it must not be vague and can be understood by parents and someone who is not a member of the IEP team. It must be calculated to enable the student to make progress. In this case, a teen's IEP was flawed as it contained poorly written reading goals and failed to explain to parents or staff how to measure and report progress in an understandable way. The IEP goals, at the very least, should have included a grade level for the baselines or goal-progress.

North Thurston Sch. Dist. **(SEA WA April 28, 2023)**

- A Washington school district short-changed a second-grader with a developmental delay service minutes when it substantively changed his IEP to combine speech and occupational therapy services, the Washington Department of Education found.
- The DOE ordered the district to provide 135 minutes of speech therapy and 135 minutes of occupational therapy non-concurrently and on a one-to-one basis.
- Required the district to convene the IEP team to clarify the child's toileting needs and whether his toileting assistance plan needed to be revised.
- The DOE recommended the district revisit its procedures for identifying available substitute paraeducators.

North Thurston Sch. Dist. (SEA WA April 28, 2023) (cont.)

What it means:

If a district provides fewer service minutes than are prescribed under a student's IEP, it fails to implement the IEP. Staff unilaterally changed how services were delivered, combining related services that were written to be provided non-concurrently, outside of an IEP meeting and without the parent. If the child's IEP needed to be revised, the change should've been made following communication between IEP team members and an IEP meeting. Otherwise, the implementation failure is material and denies the parent an opportunity to meaningfully participate in the development of the child's IEP.

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Least Restrictive Environment

LRE under Article 7

- Placement is determined by the CCC based on the IEP and reviewed annually
- Services provided are based on the student's goals/objectives
- Continuum of services available
- LRE mandate applies to extracurricular activities and nonacademic services


LRE under Article 7

To maximum extent appropriate, students with disabilities should be educated with non-disabled peers;

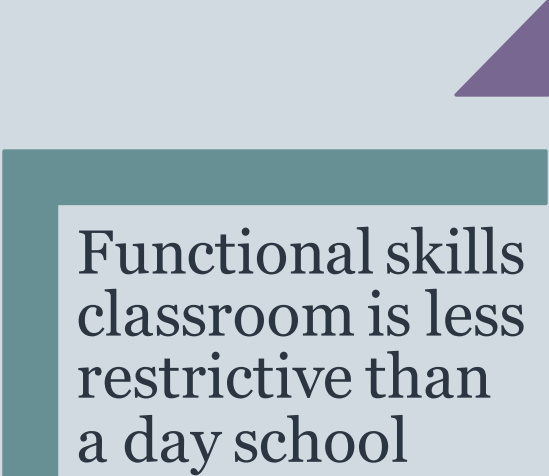
May remove from general education classroom when it is documented that aids and services cannot achieve/are not achieving progress;

Unless IEP requires differently, as close to home as possible

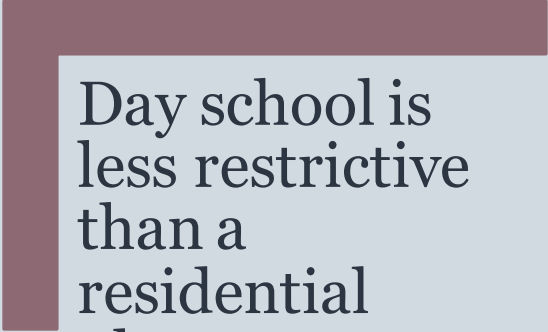
LRE Continuum of Services



General education classroom is less restrictive than a functional skills classroom



Functional skills classroom is less restrictive than a day school



Day school is less restrictive than a residential placement

So where does virtual learning fall on the LRE continuum?

- It depends! IDEA does not mention virtual instruction.
- A variety of factors can make an online program **more or less** restrictive:

How the student will receive instruction (*i.e.*, *synchronous vs. asynchronous lectures*)

Whether the student will interact with her peers

Whether other students will participate in the same virtual program (*i.e.*, *whether the student is in an online class by herself*)

7th Circuit

- *Beth B. v. Van Clay*, 282 F.3d 493 (7th Cir. 2002)
- **Primary Inquiry:** When it is necessary to provide education in the regular classroom?
- Court rejects parents' position that student should be educated in regular education classroom so long as she is receiving "any" educational benefit – saying it must go beyond a modicum into "some" educational benefit, which grants more flexibility to educators

Beth B. continued

- School had provided student with aides, communication devices, computerized books, and an individual curriculum, but she was receiving very little benefit from her time in the regular classroom.

Beth B. continued

- The “catch”
- To make the argument that the student’s LRE was not the regular classroom, the school officials “**relied on years of evidence** that Beth was not receiving a satisfactory education in the regular education classroom.”

Evidence to show progress

Data
Collection

Charts

Notes

Emails

Drafting Potential Harmful Effects

Why this LRE? Why not another LRE?

Every placement is going to have *some* potential harmful effect

DO NOT write “no harmful effects”

Examples:

- not participating in extracurricular activities
- not interacting with general education peers
- the student’s response to more/less restrictive environments in the past

Conferences & Documentation



Perspective Can Make All the Difference

- Give parents a strategic seat at the table where they will feel most comfortable providing input
- Provide the agenda so parents understand the purpose of the meeting and the issues the team must address
- Be sure parents know who is seated at the table
- LISTEN to the parents
- Make the meeting a group effort so parents feel involved

Responding to Parents

NEVER SAY

- “We can’t do that.”
- “We don’t do that in this school / district.”
- “No other kid with ADHD needs that.”
- “We have 600 kids here... we don’t have time for that.”

INSTEAD, SAY

- “Why do you think Scott needs that?”
- “Which of Scott’s goals do you think that will help achieve?”
- “What do you think about [this alternative]?”


Taking Notes in Case Conferences

Detail, Detail, Detail!


- Document all parent proposals and points of disagreement
- If agreement, get it in writing and coach the parents
- Clearly identify who made statements
- If the parent was contacted and failed to attend or provide input, document the multiple attempts to contact the parent and the parent's response.



Detail & Rationale are Your Friends



“Mr. Smith suggested student participate in after school tutoring. Parent disagreed.”



Mr. Smith suggested student participate in School’s tutoring program after school 3 days per week, 45 min after school day (2:00-2:45 pm), with special education teacher present for direct instruction. Parent agreed with after-school tutoring but wants 4 days per week and suggested a highly qualified teacher in math should provide direct instruction.”

Documentation Can Show School Compliance

- School's audio recording of the IEP meeting proved parents unilaterally decided to provide the student home instruction and the district was not required to implement home instruction as the student's official placement. *Forest Hills Local Schs.*, 71 IDELR 25 (SEA OH 2017).
- Documentation refuted argument that parents weren't present at a case conference where an IEP was created. *Fort Wayne Cmty. Schs.*, 80 IDELR 177 (SEA IN 2021)



Absence of Documentation Can Be Detrimental

An IHO is likely to interpret the absence of documentation as the absence of an agreement, even if the parent participated in the meeting during which a change to the student's placement was made.

See In re: Student with a Disability, 120 LRP 482 (SEA IN 2019) (finding that a parent's mere presence at a student's IEP meetings after a determination that the student's conduct was disability-related wasn't enough to show the parent agreed to the student spending less time in a general education classroom).

Notice Before Change in Identification or Educational Placement

- Before a school proposes or refuses to initiate or change the identification or educational placement of a student or the provision of FAPE, the school must provide written notice to parents.
- The notice may be provided to the parent at the conclusion of the CCC meeting or mailed to the parent at a later date.
- If mailed, the written notice must be received by the parent no later than 10 business days after the date of the CCC meeting. 511 I.A.C. § 7-42-7(e)

Unif. Sch. Dist. #290 (SEA KS April 7, 2023)

- The Kansas Department of Education found insufficient evidence that a school district violated the IDEA by failing to provide prior written notice to the parent of a student with a specific learning disability when it cancelled an IEP team meeting.
- The DOE denied the parent relief
- The DOE rejected claims that the district failed to implement the student's movement breaks, revise the student's IEP goals, or provide parent access to the student's education records.

Unif. Sch. Dist. #290 (SEA KS April 7, 2023) (cont.)

What it Means:

The IDEA doesn't require a district to provide a parent PWN when it cancels an IEP meeting. However, it is prudent to explain the reason for the cancellation and what steps are being taken to reschedule. The special education director emailed the parent the day prior to an IEP meeting to tell her it was cancelled. The director didn't explain why the meeting was cancelled. To facilitate district-parent communication and avoid provoking parent distrust, it would have been prudent to notify the parent of the reason for the cancellation and explain the steps the district would take to reschedule.

Progress Monitoring: Hypo

IEP Challenge: Is this team properly gauging student's progress in handling transitions?

A missed jump at a trampoline park left Zuri with a moderate traumatic brain injury. Since her injury, the 4-year-old has shown difficulty with self-regulation, impulsivity, and executive functioning skills. She is especially struggling with transitioning from one activity to another. When it is time for Zuri to leave recess to return to learning inside, she has a temper tantrum. She also refuses to get up and get ready to leave at the end of the school day.

Hypothetical (Cont.)

The team discusses Zuri's present levels of academic achievement and functional performance. It devises measurable goals, including this one related to improving her ability to make routine transitions: *By the end of the year, Zuri will transition from one activity to another within 15 seconds of receiving verbal and visual prompts in 4 out of 5 opportunities.*

The team agrees to use this method to monitor Zuri's progress:

PLAN: Zuri's teachers will share her progress with her parents every two months based on data collected on a tracking sheet.

Is this plan for progress monitoring sufficient?

An IEP must include how you will measure a student's progress toward meeting his annual goals and when you will provide periodic reports on the progress he makes toward meeting his annual goals. [34 CFR 300.320 \(a\)\(3\)](#).

The hypothetical plan mentioned above for Zuri doesn't take into account that she has a TBI, the symptoms of which can change rapidly as she heals.

A more appropriate description might be:

Zuri's teachers will share her progress with her parents every two weeks based on data collected on a tracking sheet.

This sample plan is one way to ensure Zuri's parents stay informed of her incremental growth at school.

Parent Request for Staff: Highlight staffers' training to alleviate concerns.

Some parents may request that a particular educator, aide, or individual work with their children during the school day. Although school districts have the discretion to assign the staff who will provide IEP services to a student, it should consider taking steps to ease the parents' concerns by highlighting the assigned staffers' credentials and training. For example: if a parent wants their child to directly receive interventions from a Board Certified Behavior Analyst, but the district assigns the student a one-to-one aide instead, the district can inform the parents how many hours of training the aide received from the BCBA.

Disciplining Students with Special Needs

Discipline for Special Education Students

- Students receiving special education and related services receive additional protections before imposing certain discipline
- Applies to students with IEPs or Section 504 plans
- Sometimes applies to students who are not yet eligible for services but the school has knowledge that the child was a student with a disability before the behavior incident.

511 IAC 7-44-9

No intervention

Intervention Level 1

Intervention
Levels 2-3

Section
504

IEP

Trigger
procedural
safeguards

Disciplinary Change of Placement

A removal or series of removals from a student's current educational placement results in a change of placement under this rule when:

1. The removal is for **more than 10** consecutive instructional days, **or**
2. A series of removals constitutes a **pattern** because:
 - (A) Total # of removals exceeds 10 instructional days in a school year;
 - (B) Student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals; **and**
 - (C) Other factors create a pattern:
 - i. length of each removal;
 - ii. cumulative amount of time the student has been removed; and
 - iii. proximity of the removals to one another.

Removals

- Educational services DO NOT have to be provided during the first 10 cumulative instructional days of removal in a school year, as long as services are not provided to similarly situated nondisabled students.
 - Removal = any situation in which a student is removed from their placement for any period of time
 - “Removal” **always includes** detention, out-of school suspension, expulsion
 - “Removal” **sometimes includes** in-school suspension, bus suspension, sitting in principal’s office, etc.

511 IAC 7-44-1

What Counts as a Day of Removal?



In school
suspension?

Parents pick up
student mid-day?

Bus suspension?

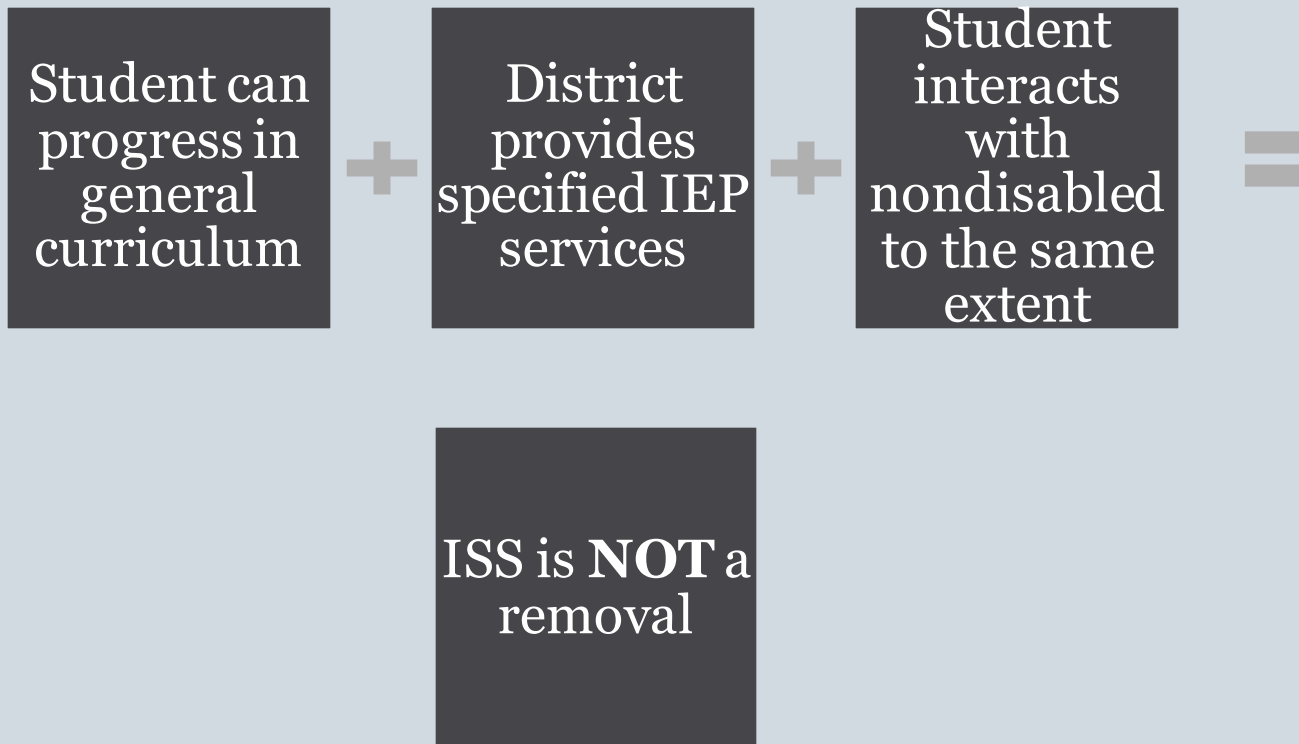
In-School Suspension (ISS)

ISS includes instances in which student is temporarily removed from their regular classroom(s) for disciplinary purposes but remains under direct supervision of school personnel

- **ISS will count towards removal days unless 3 conditions are met for the student:**
 1. continues to have opportunity to progress appropriately in the general curriculum,
 2. continues to receive services specified in the IEP, and
 3. continues to participate with nondisabled students as outlined in current IEP placement.

511 IAC 7-44-1

In-School Suspension



ISS Practice Pointers

Continue to provide appropriate assignments, services, and accommodations during ISS

- Provide ISS teacher with copy of student's IEP. Document TOR consult with ISS teacher re: the Student's IEP and needs.
- Make ISS as similar to classroom as possible – room should be a standard classroom, licensed teacher or substitute teacher, teacher(s) provide assignments to complete, student gets credit for schoolwork
- Duration of ISS should be reasonable in light of such factors as the student's age, emotional status, and the reason for initiating the time-out. *New Mexico State Educ. Dept, 105 LRP 44663 (2005).*

ISS Practice Pointers Cont.

If you notice that ISS is being used excessively or starts to constitute a pattern, call a CCC.

Ensure student w/ disability isn't penalized more harshly than a nondisabled student would be penalized for the same offense – are you resorting to ISS more than usual?



Bus Suspension

- Bus suspension will count as a day of suspension (and thus a removal) if bus transportation is a related service in the student's IEP.
- UNLESS the school provides the student with alternative transportation (moving from general bus to spec ed bus, reimbursement to parents for mileage, 1 on 1 separate transportation)

511 IAC 7-44-1



“Short Term Removal” done the **WRONG** Way

Not realizing short-term removals include:

- Sending student home for ANY part of the day
- Calling parent and asking/expecting the parent to pick up the student for ANY part of the day
- Sending student to office for a portion of the day

Key factor: opportunity to interact with peers

CAUTION against using “short term removal” as discipline method.



“Short Term Removal” done the RIGHT Way

- A CCC can, pursuant to an IEP or BIP, remove a student from his placement on a short-term basis.
- Use separation as an intervention strategy and a way to cool down, not as punishment
- This would not be considered a suspension, but a school **cannot** utilize a Short-Term Removal to circumvent discipline rules.



Short-Term Removal in BIP

Examples:

- Time out room
- Breaks/walks
- Other activities for re-direction

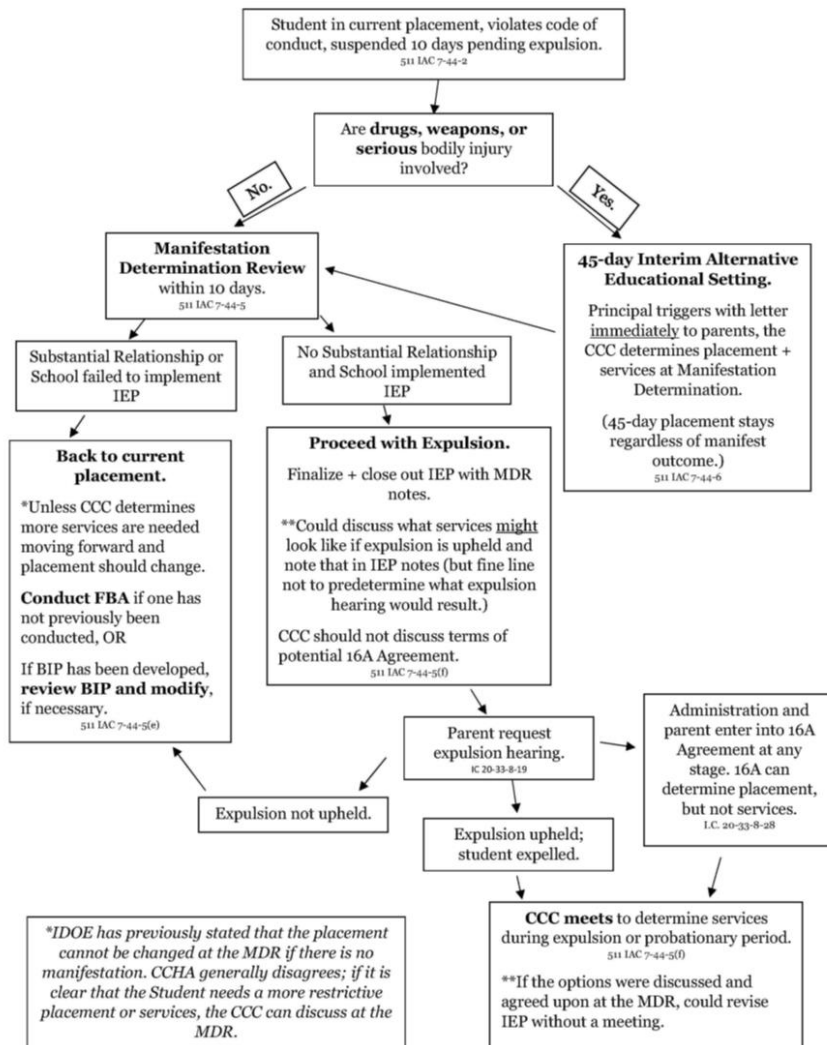
Include expected duration (short means short!) and characterize as intervention rather than discipline.

Interim Alternative Educational Setting

The first question to ask...

Are drugs, weapons, or serious bodily injury involved?

- If yes, 45-day interim alternative educational setting.
- If no, go straight to manifestation determination review.



Interim Alternative Educational Setting

The school may unilaterally remove a student to an IAES for **up to 45 school days** without regard to whether the behavior is determined to be a manifestation of the student's disability, if the student, while at school, on school premises, or at a school function:

- Carries or possess a weapon;
- Possess, uses, or sells illegal drugs or controlled substances; or
- Inflicts serious bodily injury on another person.

The CCC is not involved in the decision to remove the student (only the determination of the setting and services).

Misconduct Triggering Unilateral Removal to IAES

Possession of a Weapon

- A **weapon** is defined as a “device, instrument, material, or substance, animate or inanimate, that is used for or is readily capable of causing death or serious bodily injury.”
- Does not include a pocketknife with a blade of less than 2.5 inches in length

Possession or Use of Illegal Drugs

- A **controlled substance** may include marijuana; cocaine; heroin; amphetamines; opiates; and anabolic steroids.
- An **illegal drug** means “a controlled substance, unless it is legally possessed or used under the supervision of a licensed healthcare professional...”

Serious Bodily Injury

- A **serious bodily injury** means bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or impairment of a bodily function
- Not a broken nose, but maybe a concussion

IAES (cont.)

A manifestation determination review must be conducted by the student's CCC but may maintain student in IAES regardless of MDR outcome. The CCC determines the setting and appropriate services needed to enable the student to:

- Continue to participate in the general education curriculum, although in another setting;
- Progress toward meeting IEP goals; and
- Receive, as appropriate, an FBA and behavioral intervention services and modifications that are designed to address the behavior violation so it does not recur.

Most Common IAES Mistakes

- **Using it too much.** “Serious bodily injury” is a HIGH legal bar. Make fact-specific determinations instead of classifying all injuries inflicted by student as SBI.
- **Making procedural mistakes.** Remember:
 1. Principal invokes IAES with letter + procedural safeguards to parents immediately
 2. CCC determines placement/services within 10 days.
- **Forgetting to conduct an FBA.**

Choosing an IAES placement

The CCC must select an IAES that enables the student to continue participating in the general education curriculum and to progress toward meeting their annual IEP goals.

Options:

- A different setting in the student's current school
- A setting in another school in the district
- Some other setting

Factors:

- The specific programs/services available in the alternative setting
- The appropriateness of virtual instruction. Be wary of offering virtual instruction solely for behavioral reasons. *81 IDELR 138 (OSERS 2022)*
- The student's need for IEP services

Manifestation Determination

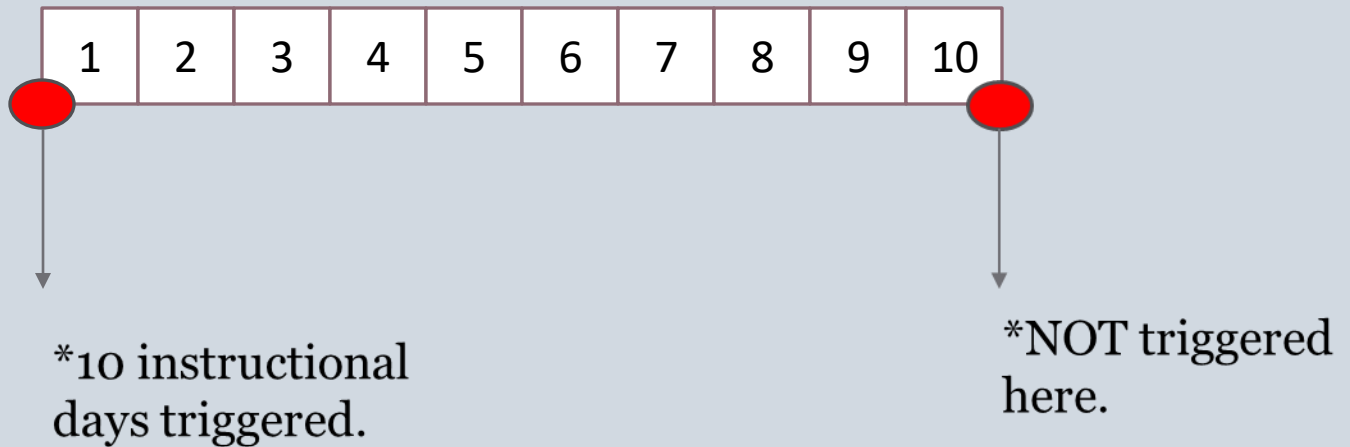
When to hold the Manifest?

- Within 10 instructional days **of any decision to change the placement of a student** with a disability for violating a code of student conduct, the CCC must meet to determine whether the student's behavior is a manifestation of the student's disability.

511 IAC 7-44-5(a)

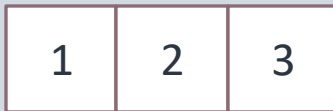
Examples:

Suspension pending Expulsion



Examples:

3 Days OSS



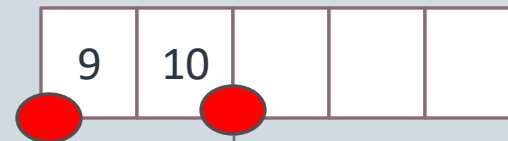
2 Days OSS



3 Days OSS



5 Days OSS



*10 instructional days triggered.



*NOT triggered here.



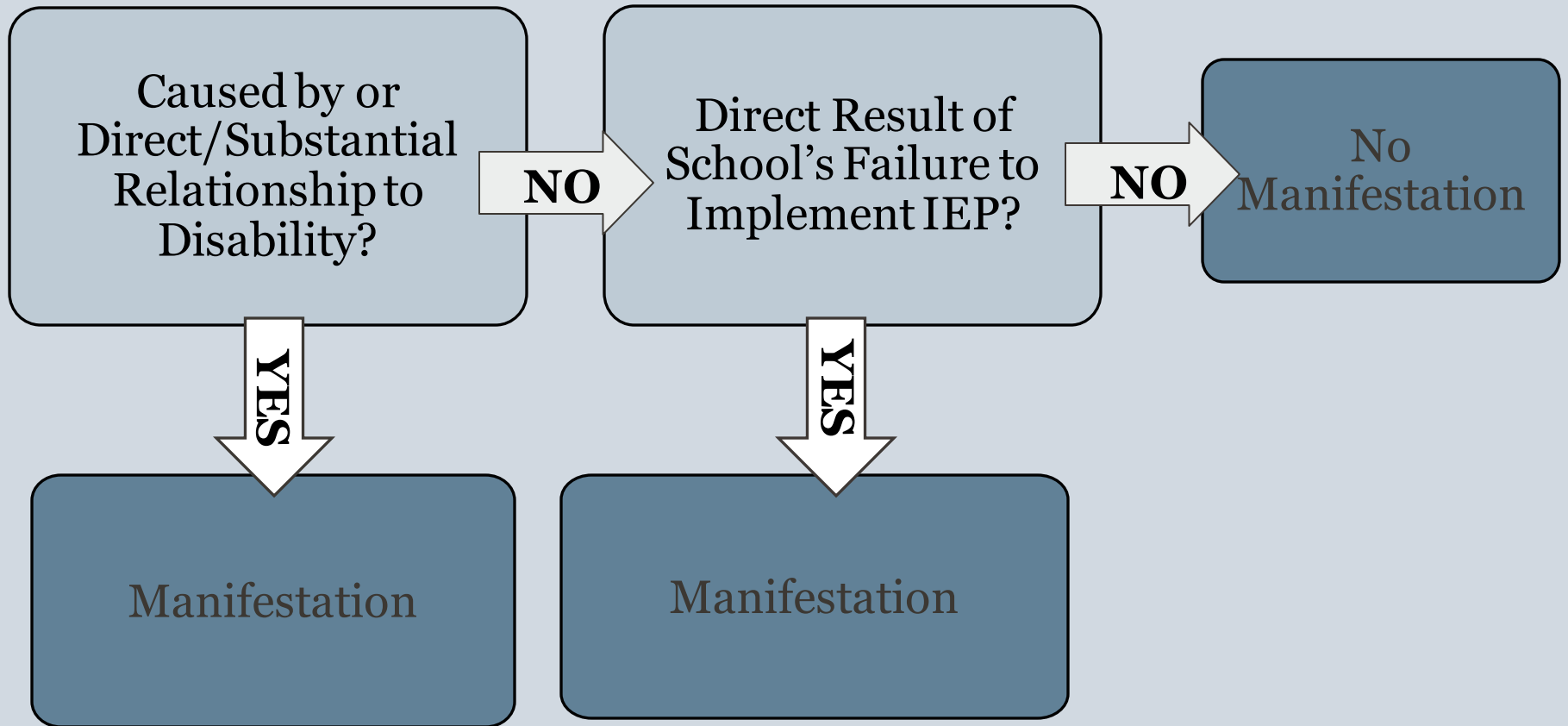
Manifestation Determination

Within 10 instructional days of any decision to change the placement of a student with a disability for violating a code of student conduct, the CCC must meet to determine whether the student's behavior is a manifestation of the student's disability.

All relevant information must be reviewed to determine if the conduct in question was:

1. caused by, or had a direct and substantial relationship to, the student's disability; **or**
2. the direct result of the public agency's failure to implement the student's IEP.

Was the behavior/misconduct . . .

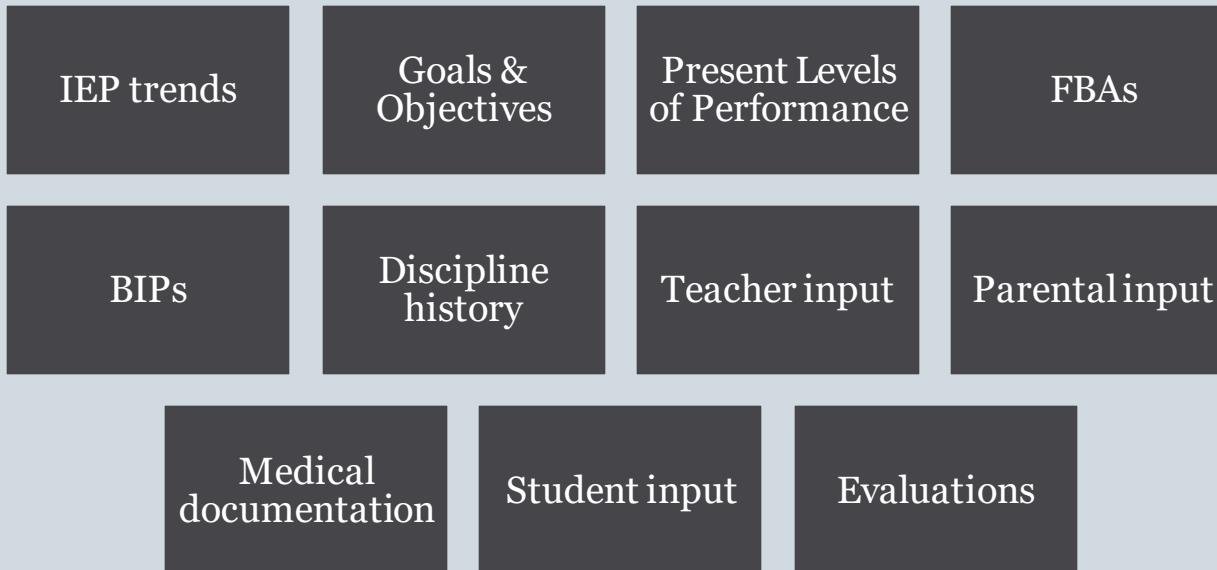


Manifestation Determination

If the conduct was caused by, or had a direct and **substantial relationship** to, the student's disability; or was the direct result of the **school's failure to implement the student's IEP**, the conduct must be determined to be a manifestation of the student's disability. *511 IAC 7-44-5(c)*

If the conduct was the direct result of the school's failure to implement the IEP, the school must take immediate steps to remedy those deficiencies. *511 IAC 7-44-5(d)*

Making the Determination



Conduct NOT Manifestation of Student's Disability

School personnel may apply the relevant disciplinary procedures to the student in same manner and for same duration as procedures would be applied to students without disabilities **except that** the CCC must determine services that will enable the student to:

- (1) continue to receive educational services which allow the student to participate in the gen ed curriculum, although in another setting;
- (2) make progress toward meeting goals in the IEP; **and**
- (3) receive, as appropriate, an FBA and behavioral intervention services and modifications designed to address the behavior violation so that it does not recur.

Conduct is Manifestation of Student's Disability

CCC must:

1. Either:
 - (A) **conduct an FBA**, unless the school had conducted an FBA before behavior that resulted in the change of placement occurred, **and implement a BIP for the student**; or
 - (B) if a BIP already has been developed, review the BIP and modify it, as necessary, to address the behavior; and
2. Except when IAES applies, **return the student to the placement from which the student was removed**, unless the parent and school agree to a change of placement as part of the modification of the BIP.

511 IAC 7-44-5(e)

Common Manifestation Mistakes

- Investigating whether the misconduct did or did not occur (an issue for an expulsion meeting)
- Determining or reviewing whether the recommended discipline is appropriate for the offense (an issue for an expulsion meeting)
- Not having a plan for the 11th day
 - (but be careful, see CP-005-2021)
- Believing your hands are tied if the behavior is a manifestation. You can still change placement IF the CCC agrees. Escalating behaviors, even if related to disability, may call for more restrictive placement.

Common Manifestation Mistakes

- Thinking the clock “restarts” after the 10th day, so now you have another 10 days’ removal (20 days in school year) before another manifestation is required. Wrong!
- Thinking the clock “starts” when a gen ed student is referred for an evaluation. Any days of OSS prior to the referral still “count” towards 10 days’ removal.
- Failing to consider a partial-day or “unofficial” suspension in 10-day count. *See Cleveland Metropolitan Sch. Dist., 115 LRP 5937 (SEA OH 01/22/15)* (A student was sent home for most of the day after a behavioral incident before being officially suspended for 10 days. Because he was actually removed from school for more than 10 days, the district was required to issue a prior written notice to his guardian and provide FAPE during the suspension.)

Practice Pointers

Document sources of information: The manifestation determination is an evaluation and requires careful consideration and documentation of information from a variety of sources. [34 CFR 104.35](#) (c)(2)

At a minimum, document the following:

- Information the team reviewed and discussed
- Names of the people who participated
- Discussion of the two-part manifestation test and team's reasoning and conclusions for each part
- Parent's input
- Teacher's input

Practice Pointers

Put conduct violations in context:

Rather than simply listing a violation, e.g., fighting, MDR team should put the misbehavior into context. Describe the behavioral incident in detail, the student's behavior before the incident and after the infraction.

Has misbehavior been an ongoing issue with the student? If misbehavior only occurs in one class, it may show the student can control their behavior.

Practice Pointers

Consider student's comprehension of the rules:

Students who generally abide by the school code of conduct may very well understand the meaning of the rules. In other words, a history of behavioral compliance may indicate that she understands the consequences.

In *Sarasota County Sch. Bd.*, 23-1037 EDM (2023), an ALJ ruled a student who pushed a teacher understood his behavior failed to comply with school rules because the student's aggression toward the teacher was an "outlier," unusual, not typical, and not consistent with the student's disabilities.

Practice Pointers

Gauge the student's control of their behavior:

Does the misbehavior constitute a symptom caused by the student's disability? To help answer this question, examine how the student behaves throughout all classes rather than isolated parts of the school day.

In *C.D. by Dougherty v. Atascadero Unified Sch. Dist.*, 83 IDELR 80 (C.D. Cal. 2023), the court ruled a district's MDR correctly found that pushing a staff member into a wall was not caused by the student's ADHD. Evidence showed the student's behaviors were calculated, not impulsive, because he deliberately waited until preferred staff walked away to engage in aggressive behavior.

Documentation,
Documentation,
Documentation.



Hypothetical Scenarios

Hypothetical 1

Student is suspended pending expulsion for dangerous and aggressive behaviors that do not rise to the level of serious bodily injury. CCC concludes behavior a manifest of the disability. The School believes a more restrictive placement would be appropriate but anticipates parents will object.

Options for placement?

Options

Call the CCC

- This brings parents to the table.
- The CCC can determine the student needs more services and placement should change.

Keep suspending + holding manifests

- After 10 days of removals, suspensions can still occur.
- School will have to hold a manifest after each suspension.

More Options

School Seeks Change of Placement

- File a Due Process change of placement.
- 511 IAC 7-44-7 – Substantial Likelihood of Injury to Student or Others

Honig Injunction

- Essentially the same as our emergency motion for change but goes straight to a state or federal court. Very rare.

Even More Options

Mentally or physically unfit

- Under I.C. § 20-33-2-46, a school may exclude a student for being physically or mentally unfit for school.
- Although the law has been on the books for years now, it hasn't been legally tested in the courts so there are a lot of unknown risks.

Hypothetical 2

Student with high functioning autism and very specific right-wing, extremist beliefs, and made a threatening video saying he's going to come in and harm teachers.

He's on homebound right now. Doing a risk assessment. He has access to weapons in home.

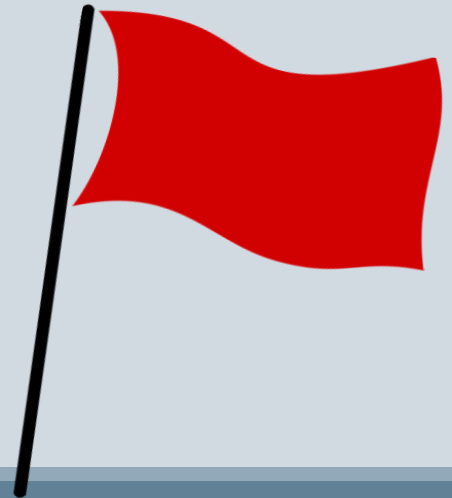
Parents are unstable. The student could implement his firm beliefs in his mind. Is it autism or mental illness, or comorbid? He created the threatening video from homebound and has the ability to enact that scenario.

At the MDR, and we decide it's a manifest, what to do?

School wants to keep him out all next semester.

Another Option: Red Flag Law

Under IC 35-47-14, a law enforcement officer may confiscate a firearm from a dangerous person with or without a warrant. If a firearm is seized without a warrant, the law enforcement officer must submit a sworn statement to the court. The court orders if the firearm should be retained or returned.



Red Flag Law (cont.)

IC 35-47-14-1 defines a dangerous person:

1. An individual who presents an imminent risk of personal injury to the individual or another individual; or
2. An individual who may present a risk of personal injury to the individual or to another individual in the future AND the individual:
 - a. Has a mental illness that can be controlled by medication and has failed to take prescribed medication; OR
 - b. There is documented evidence that would give rise to a reasonable belief that the individual has a propensity of violent or emotionally unstable conduct.

Note a person is not dangerous just because the individual was released from a mental facility or has a mental illness that is currently controlled by medication.



Hypothetical 3

A general education student is suspended pending expulsion for dangerous and aggressive behaviors. During the suspension, but prior to holding the expulsion hearing, parents request an evaluation.

What do we do?

Answer: It depends!

Key Inquiry = Did the School have prior knowledge that the child was a student with a disability before the occurrence of the behavior that precipitated the disciplinary action?

Hypothetical 4



Colville Sch. Dist. (SEA WA May 17, 2023)

- Fifth-grader with an other health impairment made several threats at school to kill himself. Early in the school year, he reportedly threatened to kill a teacher and have her as his first victim. In December, the student threatened to kill himself with a knife and went to get his backpack. Staff found a five-inch kitchen knife in the backpack.
- District sought to remove the student to an interim alternative educational setting for 45 school days. The IEP team convened and decided to place the student in his home with remote instruction via Zoom for the duration of the removal. The parent objected, stating the IAES should be on school property.
- Under the IDEA, if a student carries a weapon to school, personnel may remove the student to an IAES for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the student's disability
- The parent filed a state complaint, alleging that the district's determination of the IAES setting violated the IDEA.

▪

Colville Sch. Dist. (SEA WA May 17, 2023) (cont.)

Noting that the student not only made threats to harm himself and others but took steps toward carrying out the threat of self-harm, the DOE found that placing the student at home was consistent with the student's needs.

Whether a child's home would be an appropriate IAES, the DOE explained, depends on the circumstances, such as the length of the removal, the extent to which the child previously has been removed from his regular placement, and the child's individual needs and educational goals.

"[C]onsidering the potential for physical danger to others based on what happened on December 8, 2022, and the threats made by the Student earlier during the school year, the decision to make the Family's home the IAES and provide remote instruction was reasonable," the DOE wrote.

Knowledge of Students Not Yet Eligible

1. Has the parent previously expressed concern in writing to district personnel that s/he believed the student might need special education and related services?
2. Has the parent or school requested an evaluation?
3. Has the student's teacher or other district personnel expressed specific concerns about the student's pattern of behavior?

34 CFR 300.534 (b)

Knowledge of Students Not Yet Eligible

- *See Mooresville Con Sch. Group, 121 LRP 43016 (SEA IN 2021) (finding that the district conducted an expedited evaluation and had no knowledge that the student had a disability prior to the altercation and OSS pending expulsion because (1) the parent never expressed concern in writing, (2) the parent never requested an evaluation, and staff never expressed concern about a pattern of the student's behavior).*
- *See D.N. v. School Bd. Of Bay County, Fla., 123 LRP 16937 (Fla. 1st Dist. Ct. App. 2023) (finding that a parent's **11th hour request** for an evaluation or IDEA services after a district imposed discipline for her son's involvement in a school riot doesn't create a duty to offer the student disciplinary protections if the school lacked knowledge of a potential disability before the parent's request).*

Knowledge of Students Not Yet Eligible

If the district **knew or should have known** the student had a disability → the student may assert any protections available to IDEA-eligible children with disabilities.

If the district had **no basis of knowledge** of the student's disability → the school can proceed with the proposed discipline.

- But if the parents request an evaluation, the evaluation must be conducted in an expedited manner. 34 CFR 300.534 (d)(2)(i).
- **Until the evaluation is complete, the child must remain in the educational placement determined by school authorities,** which can include suspension or expulsion without educational services. 34 CFR 300.534 (d)(2)(ii). *See Spring Branch Indep. Sch. Dis. V. O.W.*, 76 IDELR 234 (5th Cir. 2020).

Proactive Strategies for Behavior Issues

ANY discipline of ANY special education student should initiate questions about the student's behavior

Functional Behavioral Assessment (FBA)– data-driven process used to identify patterns and determine purpose of behavior

- Generally requires written parental consent (evaluation)

FBA informs development of a Behavior Intervention Plan (BIP)

Best practice for any student with behavior issues is to have an FBA/BIP. In certain situations, FBA/BIP are required by Article 7.

Behavioral Intervention Plan

Plan agreed upon by the CCC and incorporated into the IEP that describes:

- Pattern of behavior impeding the student's learning or the learning of others
- Purpose or function of behavior as found in FBA
- *Positive interventions, supports, strategies to address behavior and maximize consistency of implementation across all people and settings in which student involved

If applicable, the skills will be taught and monitored in an effort to change a specific pattern of behavior.

Volusia County Sch. Bd. (SEA FL June 7, 2023)

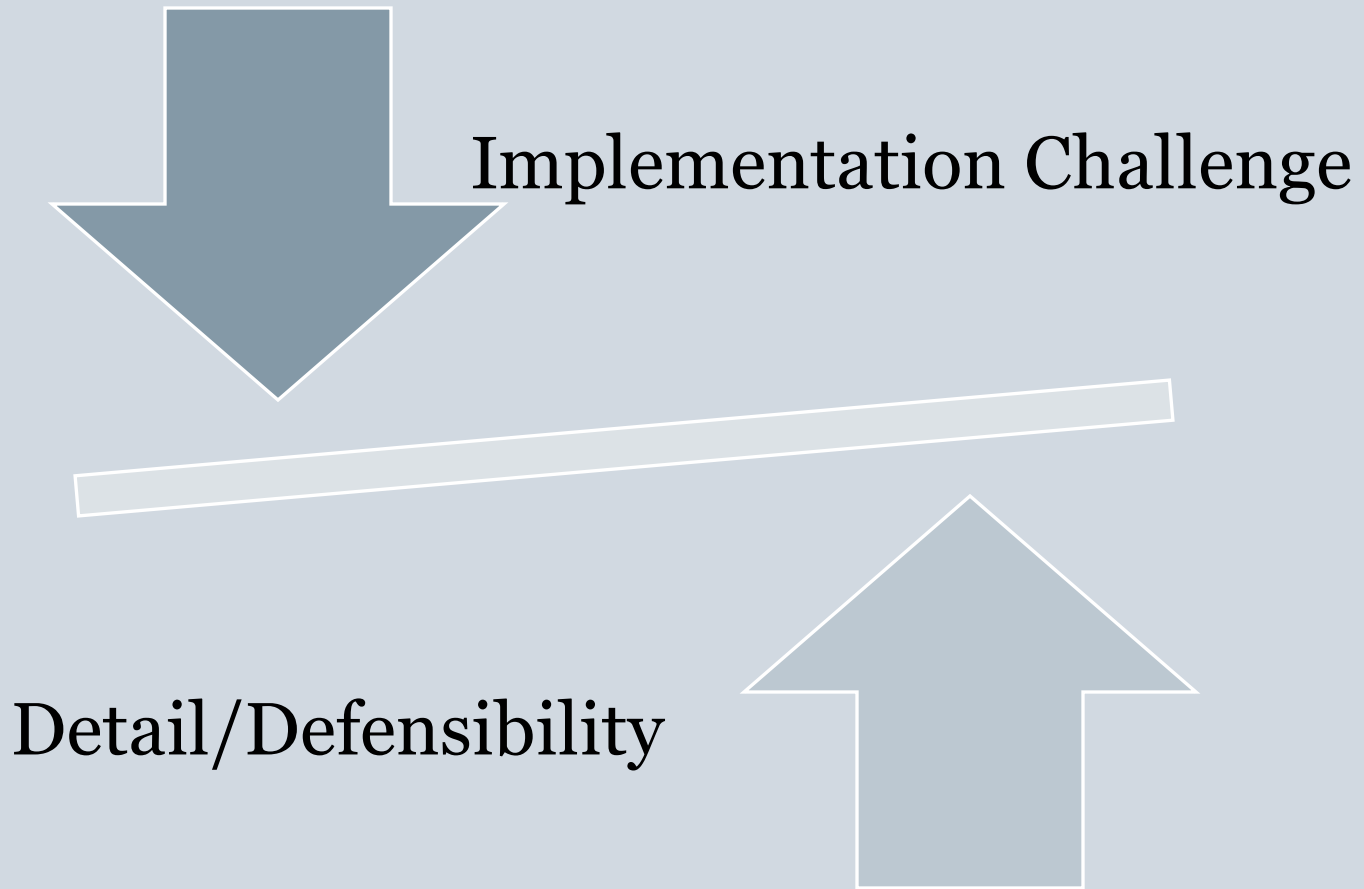
- Florida school district established that it conducted an appropriate functional behavioral assessment for a student with autism, an other health impairment, and a speech language impairment.
- An administrative law judge concluded that the student's parent was not entitled to an FBA at public expense.

Volusia County Sch. Bd. (SEA FL 06/07/23) (cont.)

What it means:

When conducting an FBA, districts generally should apply the same IDEA rules that apply to other IDEA evaluations. One of those rules requires the evaluator to use a variety of assessment tools and strategies to gather information about the student. The evaluator relied on daily classroom charts, scatter plots, targeted behavior, reinforcing charts, observations and notes from the parents and teachers, and the FBA referral form to gather data. This helped demonstrate that the information the evaluator relied was obtained using a sufficient breadth of tools and methods.

Behavioral Intervention Plan



Violent/Aggressive Behavior

- Act proactively
- Document strategies used before resorting to more extreme strategies/placement
- Do as much as possible through BIP first
- Request parental consent (and document request) to share information w/ any outside mental health providers

Bullying Reports

Bullying Definition

- Indiana law defines bullying– IC 20-33-8-0.2
- IDOE issued a memorandum expounding on the statutory definition:
 - Bullying involves a **real or perceived power imbalance**, which involves the use of physical strength, or popularity to access embarrassing information to control or harm others.
 - Bullying is repetitive or **has the potential to be repeated**.

Bullying (cont.)

- In determining if a student's behavior qualifies as "bullying," IDOE recommends that schools consider the following factors:
 - History
 - Power differential
 - Repetition (including *potential* for repetition)
 - Gang Affiliation
- Also keep in mind cyberbullying, defined in IC 20-19-3-11.5:
 - Bullying that occurs by use of data or computer software accessed through a computer; computer system; computer network; or cellular telephone or other wireless or cellular communications device

Bullying



Whether an incident rises to the legal definition of “bullying” is only for the Investigator to ultimately determine after a thorough investigation



School employees should **NOT** analyze the legal definition to determine if an incident counts as “bullying” before reporting it



REPORT
REPORT
REPORT



INVESTIGATE
INVESTIGATE
INVESTIGATE

DO NOT...

- Discount any complaint of bullying or harassment
 - What if the student/parent makes complaints all the time?
 - What if it's just a rumor without a direct complaint?
 - What if it all happened online and not in the school building?
- Think “kids will be kids” (especially for protected classes)
- Move or otherwise alter victim's education without clear consent and choice (don't blame the victim!)



church church hittle + antrim
ATTORNEYS AT LAW

Questions?
Thank You.

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