



# NORTH DAKOTA DEPARTMENT OF **PUBLIC INSTRUCTION**

## **Individuals with Disabilities Education Act Discipline Regulations for Students with Disabilities**

**June, 2019**

Kirsten Baesler  
State Superintendent  
Department of Public Instruction  
600 East Boulevard Avenue Dept. 201  
Bismarck, ND 58505-0440  
[www.nd.gov/dpi](http://www.nd.gov/dpi)

The Department of Public Instruction does not discriminate on the basis of race, color, religion, sex, national origin, disability, age, sex (wages) or genetics in its programs and activities. For inquiries regarding nondiscrimination policies, contact Lucy Fredericks, Director of Indian/Multicultural Education, Department of Public Instruction, 600 East Boulevard Avenue, Dept. 201, Bismarck, ND 58505-0440, phone: (701) 328-1718.

## Contents

Introduction.....	3
Important concepts of the IDEA 2004 Amendments.....	4
Change in Placement.....	4
Definition of “days” .....	5
Removal Definitions .....	5
Short-Term Removal (10 days or less) .....	6
Suggested Steps for Students Removed 10 or Less Days.....	6
Long-Term Removal (more than 10 cumulative or consecutive days).....	7
Steps to Follow for Students Removed More Than 10 Days.....	7
Manifestation Determination .....	8
Manifestation Determination Team Members .....	8
Steps to a Manifestation Determination.....	8
Interim Alternative Educational Setting .....	9
Definitions: weapons, drugs, or serious bodily injury .....	10
Referral to Law Enforcement /Transmission of Records .....	10
Appeals / Due Process .....	11
Expedited Due Process Hearing.....	11
Resolution Session and Expedited Due Process Hearings.....	11
Civil Action.....	11
Protections for Children ‘Not Yet Eligible’ for Special Services.....	12
Additional Resources .....	13

## Introduction

This discipline policy paper, based on federal regulations, has been updated to reflect the changes in the Individuals with Disabilities Education Improvement Act 2004 (IDEA 2004). When local discipline policies are developed by each school district, these federal regulations must be incorporated.

### **Holding All Students Accountable for School Rules**

All students, including students with disabilities, deserve safe, well-disciplined schools and supportive learning environments. Teachers and school administrators should have the tools they need to assist them in preventing misconduct and discipline problems, and to address those problems as they arise. There must be a balanced approach to the issue of discipline of students with disabilities that reflects the need for supportive and safe schools and the need to protect the rights of students with disabilities to a free appropriate public education (FAPE). Students have the right to an appropriately developed Individualized Education Program (IEP) with well-designed behavior intervention strategies.

All students need to grow in personal responsibility and be held accountable for their behavior. If the student's disability and the student's behavior are somehow related, a different method may be used to hold the student accountable. If a student with a disability is subject to unfair treatment just because of his or her disability, discrimination has occurred. Thus, school officials need to ensure that discipline is applied in a non-discriminatory manner, in order to meet the student's civil rights.

If the IEP team determines it is appropriate, the same disciplinary procedures may be used with students who do not have disabilities. In such cases, the school's local disciplinary policy should be included in a student's IEP or included in a written plan under Section 504. Under these circumstances, if a student with a disability misbehaves and is disciplined, that disciplinary procedure should not be different from that used with students who do not have disabilities and who are disciplined for similar misbehavior.

When a student has a disability that prevents him or her from understanding or responding appropriately to a school rule or a component of a discipline code, exceptions must be incorporated into the student's IEP or written plan under Section 504. The purpose of this is to meet each of the student's educational needs resulting from the student's disability, including behavioral needs.

This may be documented in a Behavioral Intervention Plan (BIP). Undefined by the IDEA, the term can be generally defined as a component of a child's IEP that describes positive behavioral interventions and other strategies that the district must implement to prevent unacceptable behaviors while supporting and encouraging positive behaviors. A BIP should outline behaviors that are prohibited, behaviors that are expected, positive interventions, strategies and supports to address the behaviors, and the positive and negative consequences for identified behaviors. Such a plan will provide a clear indication of the school's response at the time of the critical behavioral event.

## Important concepts of the IDEA 2004 Amendments

### *Change in Placement*

Current regulations reflect the authority of school personnel to make case-by-case determinations. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement is appropriate for a child with a disability who violates a code of student conduct.

Two terms that may need to be clarified are the child's current educational placement and change of placement. The **child's current educational placement** is decided by the IEP team at least annually, or whenever the IEP document is reviewed. The decision is based on the Least Restrictive Environment (LRE). This means to the maximum extent appropriate, the child shall be educated with children who are nondisabled. Special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes, with the use of supplementary aids and services, cannot be achieved satisfactorily.

A **change of placement** occurs when the child is taken out of his/her current educational placement for more than 10 cumulative or consecutive school days or if the removals constitute a pattern as described in the previous paragraph of this section.

If the school determines there is a change of placement, the procedures described in long-term removal section of this document must be followed. The long-term removal procedures include discussing the child's current educational placement with the IEP team and whether the placement is the most appropriate for the child.

For purposes of removals of a child with a disability from the child's current educational placement, a change of placement occurs if:

1. The removal is for more than 10 consecutive school days; or
2. The child is 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 is substantially similar to the child's behavior in 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.

Frequent and repeated removals from school for the same or similar offenses can reveal a pattern of exclusion. These patterns of exclusion could suggest that school personnel are indirectly making changes of placement without going through the IEP process if the exclusions meet the criteria described under change in placement (§300.536).

The regulations include a provision (§300.536) that reflects the U.S. Department of Education's longstanding definition of what constitutes a "change of placement" in the disciplinary context. Multiple short-term removals for separate incidents of misconduct are permitted to the extent removals would be applied to children without disabilities, as long as those removals do not

constitute a change of placement (§300.536). If a child is removed for more than **10 consecutive school days in a school year**, this is a change of placement. If the child is removed for more than **10 cumulative school days in a school year**, the removals collectively constitute a change of placement. In either case, procedures for long-term removal must be conducted.

### ***Definition of “days”***

**School Day is defined** as any day, including a partial day, that students attend school for instructional purposes. The term school day has the same meaning for all students in school, including students with and without disabilities.

**Business Day is defined** as Monday through Friday except for federal or state holidays. (§300.11).

Both “cumulative days” and “consecutive days” are used within the discipline regulations when removals of a student are discussed. In the context of removals, **cumulative days are defined as** all days collectively added up within the school year. **Consecutive days are defined as** successive school days or school days in a row (i.e. Monday through Friday and the next week Monday through Friday). If a student transfers schools during the school year, continue counting days from prior school (all days within that school year).

### ***Removal Definitions***

**In-school suspensions** do not need to be counted as removal days for purposes of triggering a Manifestation Determination Review (MDR) **if** the district affords the student the opportunity to continue to:

- 1) Appropriately participate in the general education curriculum.
- 2) Receive the services specified on the child’s IEP.
- 3) Participate with non-disabled peers to the same extent.

*Dear Colleague Letter*, 68 IDELR 76 (OSEP/OSERS 2016); and 71 Fed. Reg. 46, 715 (2006). See also *District of Columbia Pub. Schs.*, 113 LRP 32357 (SEA DC 06/21/13); *Rutherford County (TN) Schs.*, 62 IDELR 271 (OCR 2013); and *Delaware (OH) City Sch. Dist.*, 51 IDELR 257 (OCR 2008).

**Partial school days** may be considered a removal in determining whether there is a pattern of removals according to the U.S. Department of Education. 71 Fed. Reg. 46,715 (2006). However, there is no guidance as to how to calculate a partial day, whether it is to be “rounded up” to a full day. In one administrative decision, a shortened school day that was not a formal suspension required an MDR, according to the Ohio Department of Education. In *Millennium Community School*, 116 LRP 11957 (SEA OH 03/25/16), the Ohio ED stated that cutting a student’s school day in half to resolve his afternoon behavioral incidents triggered an MDR. The student had already been suspended for 10 days. In concluding that the shortened school days counted as additional removals, the state ED emphasized that the decision to reduce the student’s schedule was not made in the context of an IEP team meeting. See also *School Dist. Of the City of Flint*, 66 IDELR 197 (SEA MI 2015) (removals of student who was sent home repeatedly for behavioral reasons, but were not formally recorded as suspensions, should have been counted toward determining whether an MDR was required).

**Transportation suspensions** may count as removal days for purposes of establishing a change in educational placement if a district:

- 1) Has been transporting the student as a related service.
- 2) Suspends the student from the transportation as a disciplinary measure, and
- 3) Provides no other form of transportation (in other words transportation suspension means a suspension from school).

*Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009). See also SmartStart: Transportation – Suspensions from the School Bus.

### **Short-Term Removal (10 days or less)**

Removal for 10 cumulative or consecutive school days or fewer in a school year:

- Does not require educational services to the child if services are not provided to a child without disabilities who has been similarly removed;
- Does not constitute a change of placement;
- Does not require a manifestation determination; and
- Does not require a functional behavior assessment or a positive behavior intervention plan.

If there is any indication that sometime during the school year the student may be removed beyond a total of 10 school days, look ahead to the next steps that will be necessary. For a student getting close to 10 cumulative school days of removal, the law does not require the following steps. However, a judicious, proactive approach to the situation would be to convene the IEP team to:

- Evaluate the student's academic progress, the appropriateness of the IEP;
- Consider the need to conduct additional evaluation(s);
- Conduct a functional behavioral assessment, if none has been done; and
- Develop or revise the student's behavior intervention plan.

### **Suggested Steps for Students Removed 10 or Less Days**

When removing a student with a disability for 10 days or less, **follow the local school district policy**. In addition, consider following these suggested steps:

1. Conduct investigation of incident(s) subject to disciplinary action. Document information.
2. Examine all information. Review child's file to determine:
  - a. If child is a child with a disability under the IDEA or Section 504 and there is a behavior intervention plan in place. If so, carefully review the plan for information that may help in knowing how to approach the situation; or
  - b. If child may be "a child not yet identified" and the school district had knowledge that the child was a child with a disability, assert the protections provided under the IDEA regulations (§300.534). See the section titled Protections for "Children 'Not Yet' Eligible for Special Services" for details on what constitutes a school district having knowledge.
3. Call parent(s).
4. Inform student and parents of rights, responsibilities, consequences and procedures.
5. Conduct informal hearing as outlined by the local district policy. Explain the incident(s) subject to disciplinary action to the student. If the student denies the incident(s), provide an explanation of the evidence and allow the student an opportunity to respond.

6. If warranted, impose short-term removal of 10 school days or less with appropriate documentation.

### **Long-Term Removal (more than 10 cumulative or consecutive days)**

Legal requirements for long-term removals remain more complex. The U.S. Supreme Court has stated that due process protections must be more rigorous for students with disabilities facing a long-term removal of more than 10 cumulative or consecutive days.

### **Steps to Follow for Students Removed More Than 10 Days**

**The following procedures must be followed** as outlined in the IDEA §§ 300.530-300.536.

1. The school must first determine that the removal of this student constitutes a change in placement (§300.536(b)).
2. On the date that decision is made, the school must notify the parents of that decision and **they must be given *Parental Rights for Public School Students Receiving Special Education Services: Notice of Procedural Safeguards*** (§300.530 (h)).
3. Within 10 school days of any decision to change the placement of a child with a disability, the school, the parent, and relevant members of the child's IEP Team must meet to conduct a manifestation determination. The team must review all relevant information and, consider parent input and concerns. (§300.530 (e)(1)).

#### **Conduct a manifestation determination (See the manifestation determination section for specific steps on conducting one) (§300.530(e)).**

- A. If the **behavior was** caused by, or had a direct and substantial relationship to, the student's disability or was the direct result of the local educational agency's failure to implement the IEP, immediately return the student to his or her current educational placement.

Exceptions would include:

- a. if parent and the district otherwise reach an agreement,
- b. removal to an interim alternative educational setting for drugs/controlled substances, weapons, serious bodily injury, or
- c. removal to an interim alternative educational setting by an impartial hearing officer.

Behavioral supports and consequences must be addressed as part of the positive behavior intervention plan:

- a. Review or develop a functional behavior assessment.
- b. Review or develop a positive behavior intervention plan to address ways to keep the behavior from reoccurring.
- c. Decide on the appropriate interim alternative educational setting, if necessary.

- B. If the **behavior was not** caused by or did not have a direct and substantial relationship to the student's disability or was not the direct result of the local educational agency's failure to implement the IEP, the relevant disciplinary procedures (i.e. suspension or removal) may be applied to the student in the same manner they would be applied to students without disabilities.

As appropriate:

- a. Review or develop a functional behavior assessment.
  - b. Review or develop a positive behavior intervention plan to address ways to keep the behavior from reoccurring.
  - c. Decide on the appropriate interim alternative educational setting if necessary.
4. The IEP team needs to determine what educational services the student will receive to enable the student to continue to participate in the general education curriculum, although they are in another setting. The student also needs to progress toward meeting the goals set out in the student's IEP. The IEP team should also provide, as appropriate, a functional behavioral assessment (FBA) and behavior intervention plan (BIP). An FBA and BIP are designed to address the behavior violation so that it does not recur. For more information on how to complete an FBA and BIP please see the NDDPI [FBA & BIP Guide](#).

## **Manifestation Determination**

Within 10 school days of the decision to remove the student from the current placement, the parent, the school district and relevant members of the IEP team must convene a meeting to make a manifestation determination. A manifestation determination is the process of determining the relationship between a student's disability and conduct. Parents must be given a copy of Procedural Safeguards on the 10<sup>th</sup> day or earlier if a manifestation was held before reaching 10 days.

The purposes of the manifestation determination are:

- To ensure the student is not being suspended or removed for behaviors that are related to his or her disability;
- To determine if a disciplinary action may be imposed to the same extent as for a student without a disability; and
- To ensure the school identifies any deficiencies in the implementation of the student's IEP, FBA, BIP, or placement and takes immediate steps to remedy those deficiencies.

## **Manifestation Determination Team Members**

The manifestation determination review (MDR) should be conducted by the district, the parent, and relevant members of the IEP team (as determined by the parent and the district). 34 CFR 300.530 (e). While parents have the right to invite additional participants to the MDR, they do not have the right to veto a district's choice of team members or the MDR Team's determination that the child's misconduct is unrelated to his disability. (*Fitzgerald v. Fairfax County Sch. Bd.*, 50 IDELR 165 (E.D. Va. 2008)).

## **Steps to a Manifestation Determination**

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 LEA, the parent, and relevant members of the child's IEP team must:

1. Consider, in terms of the behavior subject to disciplinary action, all relevant information including:
  - Evaluation results,
  - Diagnostic results,



- Relevant information supplied by the parents of the child,
  - Observations of the child,
  - The child's IEP (including FBA and BIP),
  - The child's placement; **AND**
2. Determine:
- if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; **OR**
  - if the conduct in question was the direct result of the school district's failure to implement the IEP.

The conduct must be determined to be a manifestation of the child's disability, if the school district, the parents and relevant members of the child's IEP team determine that either of the above conditions was met. (§300.530 (e)).

3. IF YES, the behavior is a manifestation of the disability the team must:
- Review or complete a functional behavior assessment.
  - Review or develop a positive behavior intervention plan. The plan must address ways to keep the behavior from reoccurring. The supports and consequences for the behavior will be determined by the positive behavior intervention plan. The intent of these requirements is to ensure that appropriate supports and strategies are in place to prevent the reoccurrence of the behavior.
  - Return the child to the placement from which the child was removed, unless the incident involved weapons, drugs, serious bodily injury or the parent and the school district agree to a change of placement as part of the modification of the behavioral intervention plan. (§300.530 (f)(2)).
4. IF NO, the behavior is not a manifestation of the disability:
- The child may be disciplined in the same manner as children without a disability,
  - The team must complete, as appropriate, a functional behavioral assessment, and behavioral intervention plan including necessary modifications, that are designed to address the behavior violation so that it does not recur. (§300.530 (d)(1)(ii)),
  - Continue to provide educational services, as provided in §300.101(a), so as 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 (§300.530(d)(1)(i)).
5. IF NO CONSENSUS IS REACHED, the school district makes the final determination if the behavior is a manifestation of the child's behavior. Parents will be given a prior written notice regarding the reasoning behind the district's decision. Should the parent wish to challenge the decision, the parent may file a due process complaint.

### **Interim Alternative Educational Setting**

School personnel may order a change in placement of a child with a disability to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but not more than 45 school days, if:

- The child carries a weapon to school or to a school function under the jurisdiction of the State or a local educational agency; or
- The child knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of the State or a local educational agency, or
- The child has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a SEA or a school district. (§300.530 (g)).

Remember that the safeguards and procedures for long-term removal (more than 10 days) must still be followed.

An interim alternative education placement is a temporary placement. At the end of the removal, the student is returned to his prior placement, unless the parents and LEA agree to a different placement that will meet the student's needs. If the parents and LEA are unable to reach an agreement and school officials believe that the student's return to his prior placement is likely to result in injury to the student or others, they have the authority to ask a hearing officer to extend the interim alternative educational setting placement for an additional 45 school days.

### ***Definitions: weapons, drugs, or serious bodily injury***

**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 [21 U.S.C. 812(c)].

**Illegal drug** means a controlled substance; but does not include a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

**Weapon** has the meaning given the term “dangerous weapon” under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code which states: The term “weapon” means a weapon, device, instrument, material or substance animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length.

**Serious Bodily Injury** means substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty 18 U.S.C. §1365 (h)(3).

### **Referral to Law Enforcement /Transmission of Records**

Nothing in the Family Educational Rights and Privacy Act (FERPA) prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law. Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of 34 CFR § 99.30 (FERPA), while in the possession of the law enforcement unit. FERPA

neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records. (34 CFR § 99.8).

### **Appeals / Due Process**

If the parent(s) disagree with any decision regarding the placement of the child as a result of a disciplinary action, the manifestation determination decision, or if the school believes that maintaining the current placement of the child is substantially likely to result in injury to the child, or others, then the parent or the school district may appeal the decision by requesting a due process hearing. The hearing officer may:

- return the child to the placement from which the child was removed; or
- order a change in placement of the child to an appropriate interim alternative educational setting for not more than 45 school days, if the hearing officer believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others.

When an appeal has been made by either the parent or the school, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the timeline determined by the district's disciplinary procedures, whichever occurs first, unless the parent and the district agree otherwise.

### **Expedited Due Process Hearing**

Whenever a due process hearing is requested regarding a dispute over placement, a manifestation determination decision, or because the school believes that maintaining the current placement is substantially likely to result in injury to the child or to others, then the parent(s) and the school must have the opportunity to an expedited due process hearing.

The expedited due process hearing timelines differ from the standard due process hearing timelines in that:

- the hearing must occur within 20 school days of the date the due process complaint is received and;
- the hearing officer must make a determination (final decision) within 10 school days after the conclusion of the hearing.

### **Resolution Session and Expedited Due Process Hearings**

Unless the parents and the school agree in writing to waive the resolution meeting or agree to use the mediation process to resolve the issues in dispute:

- a resolution meeting must occur within 7 calendar days of the State Education Agency receiving the due process complaint notice; and
- the due process hearing may proceed, unless the matter has been resolved to the satisfaction of both parties, within 15 calendar days of the receipt of the due process complaint.

### **Civil Action**

The decisions on expedited due process hearings are appealable through civil action within 90 calendar days from the date of the decision of the hearing officer.

## Protections for Children ‘Not Yet Eligible’ for Special Services

If a child has not been determined to be eligible for special education and related services, but has engaged in behavior that violated a code of student conduct, the child is entitled to the procedural safeguards afforded under the IDEA 2004 if *the school had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred*. A school is considered to have knowledge that a child is a child with a disability if:

- The parent expressed concern in writing to supervisory or administrative personnel of the school, or a teacher of the child, that the child is in need of special education and related services;
- The parent requested an evaluation of the child; or
- The teacher of the child or other school personnel expressed specific concerns directly to the director of special education of the agency or to other supervisory personnel of the school about a pattern of behavior demonstrated by the child. (§300.534).

Exception:

School district would not be deemed to have knowledge if:

- The parent of the child has not allowed an evaluation of the child or has refused services; or
- The child has been evaluated and determined to not be a child with a disability under this section.

Informal conversations about students with potential needs for special education and related services do not constitute knowledge that the student may need services if not currently identified.

If it is deemed that the school district did not have knowledge that the child may have a disability:

- The child may be subjected to the same disciplinary measures applied to children without disabilities who engaged in comparable behaviors. If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures, the evaluation shall be conducted in an expedited manner.

If it is deemed that the school district did have knowledge that the child may have a disability:

- Evaluation of the child shall be conducted by the agency, including information provided by the parents, to determine if the child does have a disability.
- If the child does have a disability, the agency shall provide special education and related services.

## **Additional Resources**

[North Dakota Department of Public Instruction](#)

[www.nd.gov/dpi](http://www.nd.gov/dpi)

[IDEA](#)

<http://idea.ed.gov/explore/home>

[Office for Civil Rights](#)

[www.ed.gov/about/offices/list/ocr/](http://www.ed.gov/about/offices/list/ocr/)

[Council for Exceptional Children](#)

[www.cec.sped.org](http://www.cec.sped.org)

[The OSEP center on Positive Behavioral Interventions and Supports \(PBIS\)](#)

[www.pbis.org](http://www.pbis.org)