



# To Be or Not To Be a Manifestation.....That is the Question!

Special Education & Discipline  
Student Intervention Services Forum #3  
January 9, 2014



## KEY FACTS:

#1 IDEA charges *relevant members* of a student’s IEP team to examine the relationship between a student’s disability and the alleged misconduct. If the team determines the misconduct was related to the student’s disability, the student must be returned to the current placement, unless the parent and the school agree to a change of placement. If the team determines that the misconduct was not related to the disability, the district may proceed with the proposed discipline sanction.

Exception: The sanction can be imposed without regard for whether the behavior is a manifestation of the disability for weapons, drugs or infliction of serious bodily injury.

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 2-1/2 inches (18 USC 930).

Controlled substance means a drug or other substance that cannot be distributed without a prescription, identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 USC 812(c)).

Illegal drug means a controlled substance but does not include a drug controlled, possessed, or used under the supervision of a licensed health-care professional or one legally possessed or used under the Controlled Substances Act or under any other provision of Federal law (21 USC 812).

Serious bodily injury means bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty (18 USC 1365). Serious bodily injury does not include a cut, abrasion, bruise, burn, disfigurement, physical pain, illness, or impairment of the function of a bodily member, organ or mental faculty that is temporary (20 USC 1365).

#2 The regulations require that a manifestation determination be made within 10 school days of any decision to change the placement of a child with a disability.



#3 The *relevant members* of the student’s IEP team are determined by the parent and the LEA.

#4 The team must review all relevant information in the student’s file, including the IEP, any teacher observations, and any relevant information provided by the parent. The purpose of this review is to determine:

- If the conduct in question was the direct result of the school’s failure to implement the IEP; or
- If the conduct in question was caused by, or had a direct and substantial relationship to the student’s disability.



#5 The conduct must be determined to be a manifestation of the student’s disability if the LEA, the parent, and relevant members of the student’s IEP team determine that 1) the misconduct was caused by or had a direct and substantial relationship to the student’s disability, or 2) was the direct result of the LEA’s failure to implement the IEP.

If the LEA, the parent and relevant members of the student's IEP team determine that the misconduct was the direct result of the LEA's failure to implement the IEP, the *LEA must take immediate steps to remedy those deficiencies* (e.g., implement services identified, revise the IEP, develop a FUBA/BIP, etc.)

#6 If the LEA, the parent, and relevant members of the IEP team make the determination that the conduct was a manifestation of the student's disability, the IEP team must:

- Conduct a functional behavioral assessment (FUBA) and
- Implement a behavioral intervention plan (BIP) for the student

Yes No

If a behavioral intervention plan has already been developed, the team must review the behavioral intervention plan and modify it, as necessary, to address the behavior

#7 Unless the misconduct falls under the definition of special circumstances, the *student must be returned to the placement from which the student was removed*, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

#8 *Special circumstances*: School personnel may remove a student to an interim alternative educational setting for not more than forty-five (45) school days without regard to whether the behavior is determined to be a manifestation of the student's disability, if the student:

- Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an LEA;
- 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 an LEA, or
- Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an LEA.

#9 A *change of placement* occurs if removal is for *more than 10 consecutive school days* or if the student has been subjected to a series of removals that constitute a pattern. A change of placement triggers the requirement to make a manifestation determination and also invokes other procedural safeguards (district must notify the parents of that decision and provide them with the procedural safeguards. Etc.).

#10 Know that there is a *FAPE-Free Zone*. This means that the school can take disciplinary action that has the effect of denying services for the student for a cumulative total of 10 school days during the course of the school year without adverse legal consequences. It does not matter if the violation of the rules is related to the disability. However....

**Advice from Jim Walsh (Special Education Attorney):**

*"The FAPE-Free Zone is like Christmas, it only comes once a year!"*

*"Only 10 days. Don't use your days for minor things."*

**CAUTIONS & RECOMMENDATIONS**



"Be careful"

1. When it comes to special education students, it is strongly recommended that teams start home/hospital services as soon as possible (especially when you are nearing 10 days of out of school suspension or looking at multiple days of suspension). Home/hospital

services do not necessarily meet the requirement of providing FAPE (i.e., continued participation in the general education curriculum and progress on IEP goals).

The amount of home/hospital time will depend on the services identified on the IEP and the level of services the student is currently receiving. Teams should contact the special education department to help determine the amount of service to be provided for a given student.

2. Be aware that if parents disagree with the manifestation determination or discipline action, they may appeal the decision by filing a due process hearing complaint. If this is done, the student maintains the current educational placement unless the decision has been made to place the student in an interim alternative educational setting (IAES) as part of the disciplinary action. The interim alternative educational setting becomes the “stay-put” disciplinary setting pending the hearing officer decision, unless the parent and district agree otherwise.

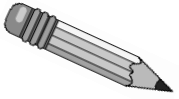


There can be disagreement amongst team members in answering questions about the appropriateness of the IEP or in establishing the relationship of the behavior to the student’s disability and/or in making the final manifestation determination. When this occurs, teams may note that there was not agreement in the section to which it applies. However, the final decision lies with the LEA, who must then provide written prior notice to the parent. Remember that parents have the right to appeal a manifestation determination.

3. Be aware of the following:
  - If the student is removed from school, the time will still count as days of suspension even if you have applied some euphemism to the action such as, "cooling off time", "mental health day," or we "just needed to have the parents come and pick student up"
  - Portions of school days would be included in determining whether the child had been removed for more than 10 cumulative school days.
  - An in-school suspension would NOT be considered as part of the days of suspension...as long as the child is afforded the opportunity to appropriately progress in the general curriculum, continues to receive the services specified in the IEP and continues to participate with non-disabled children to the extent they would have in their current placement.
4. Use good judgment when you are sitting down with a parent to complete a manifestation determination. Suspension can be an emotional issue for parents and staff. We may get less cooperation and less accurate information when teams are asked to address manifestation determination questions in the "heat of the moment".
5. Teams sometimes respond that the current placement is not appropriate believing that the district will then have responsibility to change the student's placement. Remember that there is a difference between “location” and “placement” in IDEA terms. "Placement" refers to a constellation of services identified on the IEP. Those services can be implemented in multiple school "locations". If you are wanting a school change, you are really requesting a change of "location" NOT "placement". If you believe the "placement" (i.e., level of services) is not appropriate, it is the school team's responsibility to go through the least restrictive environment (LRE) review process.



6. It is problematic when teams check that the behavior was NOT a manifestation of the student's disability without regard for how they have responded to the previous two sections (i.e, Appropriateness of Program and Conduct Directly/Substantially Related to Or Caused by Disability). Each of the sections on the form reflects the standards that have been identified in the federal statute and discipline caselaw for making the determination. If the team determines that standards were not met in either of the two areas, the behavior must be considered a manifestation of the student's disability.



Bottomline: Make sure you are looking at the responses to your questions and answering the summary statement(s) *without* consideration for the actions you want to take.

7. A student who has *not* been determined to be eligible for special education and who has engaged in behavior that violated a code of student conduct may assert the protections provided by IDEA *if the LEA had knowledge* that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred.



- Parent of the student had expressed concern in writing to supervisory or administrative personnel or a teacher of the student, that the student was in need of special education and related services
- Parent of the student had requested an evaluation
- Teacher of the student (or other LEA personnel) expressed specific concerns about behavior demonstrated by the student directly to the director of special education or to other supervisory LEA personnel

The LEA would *not* be deemed to have knowledge that a student is a student with a disability if:

- Parent has not allowed an evaluation of the student
- Parent has refused services
- Student has been evaluated and determined to be not eligible as a student with a disability

