

Summary of the Discipline & Manifestation Determination Provisions of IDEA 2004 & NJ State Special Education Code

Students with disabilities have three major sources of protection in disciplinary proceedings: the U.S. Supreme Court's decision in Goss v. Lopez, the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), and the NJ Special Education Code. In Goss v. Lopez, the U.S. Supreme Court held that all public school students have a sufficient "interest" in their education to be entitled to at least minimal due process protections for a removal from school of up to ten school days, and more formal due process protections for longer removals.

Removal for Up to Ten Days

The minimal due process protections for a removal for up to ten school days include:

- The right to an informal meeting with the principal *before* suspension, except in an emergency
- The right to notice of the charges and the evidence against the student
- The right to explain his/her side of the story.

If the student with a disability is determined to be "guilty" of the disciplinary infraction through this informal procedure, IDEA allows the student to be suspended in-school or out-of-school for a comparable period of time as a student without a disability would be suspended. S/he has the right to be fair/equal treatment in determination of the consequences. In other words, the student with a disability should not be suspended longer than a student without a disability would be suspended for the same or similar behavior.

For removals of ***up to*** ten consecutive or cumulative days, the student with a disability is ***not*** entitled to:

- A manifestation determination
- An IEP/positive behavior support plan review
- Educational services during the period of exclusion, UNLESS state law, district policy, or the student's IEP explicitly requires services during even short-term exclusions. The IEP may prohibit suspension as a response to student behavior. School personnel may consider "any unique circumstances on a case-by-case basis" to reduce the allowable term of suspension.

If the district plans to suspend a student who has already been suspended *more* than ten cumulative days within the school year, it must first consider whether or not the cumulative days of suspension have amounted to a "change of placement." In making this determination, the district must consider factors such as:

- The length of each removal
- The total amount of time the student is removed, and
- The proximity of the removals to one another.

If the district determines that an additional removal would result in a change of placement using the above criteria, it must follow the procedural requirements for an exclusion of greater than ten consecutive days.

Removal for More than Ten Days

For exclusions longer than ten days¹, students with and without disabilities have the right to a more formal due process hearing to determine their “guilt,” including the right to:

- Notice of the charges and evidence against them
- Question and present witnesses
- Review and present evidence
- Bring an attorney or advocate (at their own expense).

Manifestation Determination

If the student with a disability has been determined to have committed an offense that violates a school rule or the school code of conduct that could result in an exclusion for longer than ten days, the IEP team must conduct a manifestation determination within the first ten days of removal.² The manifestation determination meeting is held with the parent and relevant members of the IEP team. The team reviews all relevant information in the student’s file, the IEP, teacher observations, and any relevant information from the parent(s) and student.

The IEP team must determine that the behavior was a manifestation of the disability if:

- The conduct was caused by, or had a direct and substantial relationship to, the child’s disability, or
- The behavior was a direct result of the district/school’s failure to implement the IEP.

Unless the IEP explicitly requires it, IDEA 2004 no longer requires consideration of whether:

- The IEP, services and placement were appropriate, and appropriately implemented; or
- The disability impaired the child’s ability to understand the impact and consequences of their behavior or to control their behavior.

To conduct a manifestation determination, the parent and the IEP team should:

- Collect and examine the records of behavior of the student over the period of the current IEP, explicitly looking to see if similar behaviors have been occurring;
- Examine the components of the existing positive behavior support plan for their impact in increasing or decreasing behaviors of concern;

¹ In addition, once a student has been removed from school for 10 days either consecutively or cumulatively, they have a right to receive a free, appropriate public education during the period of any additional removal.

² No manifestation determination is required if the student carried or possessed a gun or dangerous weapon, knowingly possessed or used illegal drugs, sold or solicited a controlled substance, or inflicted serious bodily injury on another at school, on school grounds, or at a school function.

- Collect information on the student’s general school performance from school staff;
- Collect information on home behavior concerns from parents;
- Review historical academic and behavior data regarding the student, with a particular eye to whether this type of behavior was one of the original reasons for referral;
- Interview the student, with an emphasis on the student’s current mental health and the student’s understanding of the school policy violation;
- Interview teachers, seeking to identify the extent to which the problem behaviors are “normal” for the student;
- Interview administrators regarding this violation and what their investigation found;
- Review the student’s current program and placement for appropriateness;
- Consider the usual characteristics of individuals with this student’s disability;
- Consider the cognitive, emotional, and behavior status of the student in regard to school policy violations and self-control; and
- Review options for available and appropriate programming.

Functional Behavior Assessment & Positive Behavior Support Plan

In addition, the IEP team must:

- Conduct a functional behavior assessment and implement a positive behavior support plan, unless that has already been done;
- If a positive behavior support plan has been developed, review and modify it as necessary.

If the behavior is a manifestation of the student’s disability, the student must be returned to their current placement no later than the 11th day following their removal, unless the parent and IEP team agree otherwise. (A parent and the team can always agree to a change of placement.) If the behavior is not a manifestation, the student may be disciplined, suspended, or expelled to the same extent as a student without a disability. However, s/he must continue to receive a free, appropriate public education during any period of removal of more than ten days.

Pendency Placement

If the parent appeals the decision that the student’s behavior was not a manifestation of their disability, or if the student committed an offense that can lead to placement in an Interim Alternative Educational Setting, the pendency placement during appeal is the IAES. The hearing must be held within 20 school days of the request, with a decision within 10 school days of the hearing.

Removal to an Interim Alternative Educational Setting

A student may be removed unilaterally (without parental consent or permission of an impartial hearing officer) by the school to an Interim Alternative Educational Setting for up to 45 days³ if it is determined that the student, at school, on school premises, or at a school function:

³ Federal law and regulations allow removal for up to 45 school days, but the NJ Special Education Code has limited the removal to 45 calendar days, a much shorter time-frame but still a significant amount of time.

- Carried or possessed a gun or dangerous weapon (as defined by U.S. Criminal Code)
- Knowingly possessed or sold illegal drugs, or sold or solicited a controlled substance
- Inflicted serious bodily injury (bodily injury that involves substantial risk of death, extreme physical pain, protracted or obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty) on another.

Remember that the student is entitled to Goss v. Lopez protections. If the district plans to remove the student for more than 10 school days, it must provide the student with their constitutional due process protections and formally determine that the student has committed the offense with which they have been charged. Further, the offense must be one that would result in long-term removal of a general education student as well as a special education student. Once that determination has been made, the school may unilaterally remove the student.

In addition, an impartial hearing officer may remove a student to an Interim Alternative Educational Setting (IAES) if s/he determines that maintaining the student in the current placement is substantially likely to result in injury to the student or others. The hearing officer no longer must consider appropriateness of the current placement or whether the district made reasonable efforts to minimize the risk of harm in the current placement.

While the student is being educated in the IAES, the instruction and services that the student is receiving must enable them to progress in the general curriculum and make progress toward achieving their annual goals (and short-term objectives/benchmarks, if any). If the parent appeals, the pendency placement remains the IAES.

Functional Behavior Assessment and Positive Behavior Support Plan

The IEP team must conduct a functional behavior assessment and implement a positive behavior support plan, but only if the district had not already conducted an FBA prior to the behavior that resulted in the change of placement to the IAES. The steps of an FBA include:

- Define the behavior in specific, concrete terms, label it according to its seriousness (destructive, disruptive, distracting), and prioritize behaviors to address
- Collect informant and observer data to answer key questions regarding when the behavior is most and least likely to occur, including who is present, what is going on at the time, when, where, how often, and how long per episode, and observe and record antecedents, behaviors, and consequences.
- Develop a hypothesis about the purposes or functions served by the behavior (attention, escape/avoidance, getting something, self-regulation, play, etc.)
- Develop a plan that includes preventing, teaching, and reacting.
- Implement the plan, monitor its impact, and revisit and revise as necessary.

Discipline Procedures and Timelines

Behavior that cannot result in IAES placement, for < 10 day removal

Day 1

- School conducts a minimal Goss v. Lopez proceeding to determine if student engaged in misconduct
- School notifies parent of decision to take disciplinary action
- School notifies parent of procedural safeguards⁴

No later than Day 11

- Student is returned to original placement, unless parent and district have agreed otherwise

Behavior that cannot result in IAES placement, for > 10 day removal

Day 1

- School conducts a minimal Goss v. Lopez proceeding to determine if student engaged in misconduct
- School notifies parent of decision to take disciplinary action
- School notifies parent of procedural safeguards⁵

Within 1st 10 Days of Removal

- Manifestation determination meeting takes place with the parent
- School holds a more formal hearing to determine “guilt” and appropriate penalty
- IEP team and parent review existing FBA or PBS plan, if any; conducts an FBA and develops a PBS, if appropriate

No later than Day 11

- If the behavior is a manifestation, the student is returned to their placement by the 11th day following removal
- If the behavior is not a manifestation, the student may be excluded for a comparable amount of time as a general education student would be excluded, but must receive FAPE

⁴ No manifestation determine or provision of educational services required, unless state law, district policy, or the IEP require otherwise.

⁵ No provision of education or support services is required for the 1st ten days of removal, unless state law, district policy, or the IEP require otherwise. However, once the student has been removed for ten consecutive or cumulative days in a school year, a free, appropriate public education must be provided to the student during any period of removal.

Behavior that can result in Unilateral IAES Placement

Day 1

- School conducts a minimal Goss v. Lopez proceeding to determine if student engaged in misconduct
- School notifies parent of decision to take disciplinary action
- School notifies parent of date of meeting to determine the IAES
- School notifies parent of procedural safeguards⁶

Within 1st 10 Days of Removal

- School holds a more formal hearing to determine “guilt” and appropriate penalty
- IEP team meets with parent to determine appropriate IAES and length of removal up to 45 calendar days⁷
- IEP team and parent conduct an FBA and develop a PBS, if district had not already done so

Day 46

- Student returns to original placement unless parent and district agree otherwise.

Behavior that can result in IAES Placement by Hearing Officer

Day 1

- School conducts a minimal Goss v. Lopez proceeding to determine student “guilt”
- School notifies parent of decision to take disciplinary action and of request for hearing
- School notifies parent of procedural safeguards⁸

Within 1st 10 Days of Removal

- School holds a more formal hearing to determine “guilt” and appropriate penalty
- Due process hearing is held and Hearing Officer makes determination
- IEP team meets with parent to determine appropriate IAES⁹
- IEP team and parent conduct an FBA and develop a PBS, if district had not already done so

Day 46

- Student returns to original placement unless parent and district agree otherwise.

⁶ No provision of education or support services is required for the 1st ten days of removal, unless state law, district policy, or the IEP require otherwise.

⁷ The IAES must ensure continued provision of FAPE, involvement in the general education curriculum, and continued progress toward goals

⁸ No provision of education or support services is required for the 1st ten days of removal, unless state law, district policy, or the IEP require otherwise.

⁹ The IAES must ensure continued provision of FAPE, involvement in the general education curriculum, and continued progress toward goals

Manifestation Determination Worksheet

Student's Name _____ Date: _____

Eligible for IDEA services?

- If YES, list qualifying disability: _____
- If NO, list Section 504 impairment: _____
- If NO, did district know, or should district have known, that the student was a child with a disability?¹⁰

Name and Role of Team Members:

| | |
|-------|-------|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

Sources of information:

- _____ Assessments/evaluations (attach assessments and summaries)
- _____ Diagnostic information (attach results)
- _____ Interviews conducted (attach summaries)
- _____ Direct observations (attach summaries)

Description of act(s) of misconduct (include all relevant details, including whether behavior was destructive, disruptive, or distracting):

Describe the proposed disciplinary action: _____

Does the proposed disciplinary action constitute a change of placement (e.g., more than 10 consecutive days, or more than 10 cumulative days when a pattern has been established)

If NO, proceed with disciplinary action.

If YES, determine whether the conduct was caused by, or had a direct and substantial relationship to, the child's disability, or was a direct result of the district/school's failure to implement the IEP. Consider the following factors in making a manifestation determination:

¹⁰ A district knew, or should have known, if the parent had expressed concerns in writing to supervisory or administrative personnel of the appropriate educational agency or their child's teacher; the child's teacher or other district personnel expressed specific concerns about a pattern of behavior demonstrated by the child directly to the special education director or other district supervisory personnel. There is no longer an exception when the parent is illiterate or has a disability. The district will not be found to know or should have known if the parent has not allowed the child to be evaluated or has refused services for the child, or if the child had been evaluated and found ineligible.

Nature of the Disability

1. What is the student's disability, including its behavioral characteristics and severity?
2. What major life functions are impacted? Include a description of how the disability impedes academic and/or social performance.
3. To what extent are those major life activities impacted? Include a description of the child's strengths, deficits, and coping/compensating strategies.
4. To what extent if any does the child's disability cause the student to engage in inappropriate behavior (through lack of knowledge, understanding, motivation, or skill)?

Review of Disciplinary Records

1. What is the behavioral history of the student? (Include severity, setting, frequency)
2. What is the history of behavioral interventions? Include a description of how long the behavior has been occurring without intervention, settings where interventions have been implemented, and results of the behavioral interventions used to date.
3. Did the student exhibit similar behavior in the past that was attributable to the disability? Provide the approximate dates, specific behavior, and resulting intervention and discipline.

Review of IEP Implementation

1. Has the district fully implemented the IEP? If not, to what extent if any has the district's failure to implement the IEP resulted in the inappropriate behavior? Specify the services that have not been implemented and how they contributed to the student's inappropriate behavior.

Based on the above, is the student's behavior a manifestation of their disability?

If NO, discipline the student using procedures applicable to all students (except continue to provide FAPE)

If YES, return the student to their current placement. Revisit FBA, PBS plan, and IEP.