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Disciplining Students with Disabilities: Legal and Practical Considerations

New York Association of School Psychologists
2016 Conference

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Agenda

- General Disciplinary Issues
- Disciplining Students with Disabilities
- Functional Behavioral Assessments and Behavior Intervention Plans

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GENERAL DISCIPLINARY ISSUES

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Classroom Removal

- Teachers have the power and authority to remove a disruptive pupil from his/her classroom consistent with the District's Code of Conduct.
- School authorities must establish policies and procedures to ensure that the educational programming and activities for students removed from the classroom continues.



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Classroom Removal (cont.)

- The teachers must inform the student and the principal of the reasons for removal.
- Does the student's continued presence pose a continuing danger to persons or property or an ongoing threat of disruption to the academic process?
 - If yes, the teacher must explain the basis for the removal to the student and provide an informal opportunity to be heard **within 24 hours** of the student's removal.
 - If no, the teacher must explain the basis for the removal to the student and allow the student to informally present his/her version of the incident **prior to** removing the student.



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Classroom Removal (cont.)

- The principal must inform the student's parents or person in parental relation of the removal and the basis for it within 24 hours.
 - Student and his/her parent shall, upon request, be given an opportunity for an informal conference with the principal to discuss the reasons for the removal.
 - If the student denies the charges, the principal will explain the basis for the removal and allow the student and his/her parent an opportunity to present the student's version of the incidents.
 - Informal hearing must be held within 48 hours of the student's removal.

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Classroom Removal (cont.)

- The principal will not set aside the discipline imposed by the teacher unless he/she finds that the charges against the student are not supported by substantial evidence, that the student's removal violates the law or that the conduct warrants suspension from school (suspension will then be imposed).
 - Principal's determination must be made by the close of business on the day succeeding the 48-hour period for an informal hearing.
- Student may return to the classroom after the principal determines whether to set aside the removal or the period of removal expires, whichever is less.
- The principal may, in his/her discretion, designate a school district administrator to carry out these functions.

Types of Disciplinary Penalties

- Verbal or written warning;
- Written notification to parents or guardians;
- Probation;
- Reprimand;
- Detention;
- Suspension from transportation, athletic events, extracurricular activities, or other privileges;
- In-school suspension;
- Short-term out of school suspensions; and
- Long-term out of school suspensions.

In-School Suspensions

- An in-school suspension is the temporary removal of a student from the classroom to a placement in another area of the school building where the student will receive substantially equivalent alternative instruction.

Procedures for In-School Suspensions

- ISS can be imposed by someone other than the building principal or superintendent.
- The student and parent must be provided a reasonable opportunity for an informal conference with the person who imposed the suspension, to discuss the conduct and penalty.
- The other procedural requirements for out-of-school suspensions do not apply.

Who can be suspended out-of-school?

- Under Education Law §3214 a student can be suspended for:
 - Insubordination
 - Disorderly behavior
 - Violent behavior
 - Disruptive behavior
 - Behavior that endangers the safety, morals, health or welfare of others

*** A student *cannot* be suspended for truancy.

Two Kinds of Out-of-School Suspensions

SHORT-TERM

- 5 days or less
- Does not require a Superintendent's Hearing
- Only a Principal or Acting Principal may impose a short term suspension
 - Also Superintendent, District Superintendent or BOE
- An Assistant Principal has **no** authority to suspend a student

LONG-TERM

- More than 5 days
- Requires a Superintendent's Hearing
- May *only* be imposed by a Superintendent, District Superintendent, or BOE following a Hearing



Short-Term Suspension Procedures

1) Notice to Student

- “Suspending authority” must provide student with oral notice of charged misconduct.
- If the student denies the misconduct, the student must be provided an explanation of the basis for suspension.

Short-Term Suspension Procedures (cont.)

2) Written Notice to Parent

- **Immediate** notification to the parent(s) **in writing** that the student **may be** suspended from school.
- Notice of Proposed Suspension must indicate the number of days (**up to 5**) that the student will be suspended from school.
- Notice must contain a “description of the incident”
 - Be specific! Who, What, When, Where
 - Don't just repeat statutory categories of misconduct
 - Avoid terms such as “*assaulted*” or “*sexually harassed*”

Short-Term Suspension Procedures (cont.)

Written Notice to Parent MUST:

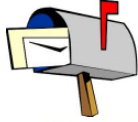
- Inform parent of the right to request an informal conference with principal
- Inform parent of the right of pupil and parent to present the pupil's version of events and question complaining witnesses at this informal conference

Appeal of R. Y., Decision No. 16,046 (2010): “The purpose of the written notice requirement is to make parents, or persons in parental relation, aware of their right under Education Law §3214(3)(b)(1) to **question a complaining witness** in the presence of the principal who imposed the suspension and who also has the authority to dismiss or reduce the suspension.”

Short-Term Suspension Procedures (cont.)

Written Notice to Parent MUST be delivered:

- By personal delivery, express mail or an equivalent means reasonably calculated to ensure receipt **within 24 hours** of the decision to propose suspension
- Where possible, notification shall also be provided by telephone, where the school has been provided with a telephone number
- Regular mail/certified mail is insufficient
- Oral communication alone is insufficient
- Other options:
 - Email/Fax?
 - ****Hand-deliver to parent****



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Short-Term Suspension Procedures (cont.)

- The notice and informal conference must be in the parent's dominant language or mode of communication. *Appeal of S.C.*, 44 Ed. Dept. Rep. 164 (2004).



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Short-Term Suspension Procedures (cont.)

3) Informal Conference

- Since Project SAVE (*Chapter 181 of the Laws of 2000; effective November 1, 2000*), the notice and opportunity for informal conference shall take place **before** the proposed suspension **UNLESS** the student's presence poses:
 - (1) A continuing danger to persons or property, OR
 - (2) An ongoing threat of disruption to the academic process.

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Short-Term Suspension Procedures (cont.)

Informal Conference

- **Principal** must be present at the informal conference.
- Student and parents have the right to present the student's version of the events and ask questions of **complaining witnesses** *in the presence of the principal*.
- Affords the principal the opportunity to decide whether his or her original decision to suspend was correct or should be modified.

Short-Term Suspension Procedures (cont.)

- Who is the “**complaining witness**”?
 - *Appeal of C.M.*, 52 Ed Dept Rep, Decision No. 16,439 (Dec. 24, 2012)
 - *Application of the Vestal School District v. King*, (Supreme Court, Albany County, September 25, 2013)
 - *Appeal of C.M.*, 53 Ed Dept Rep, Decision No. 16,583 (Jan 3, 2014)
- “*But Assistant Principals are responsible for disciplining students in our High School...*”
 - *Appeal of E.R.*, 40 Ed Dept Rep 559, Decision No. 14,565 (2001)
 - *Appeal of A.L., Jr.*, 42 Ed Dept Rep 368, Decision No. 14,883 (2003)

Long-Term Suspension Procedures

- 1) Notice of Superintendent's Hearing and Charges
 - DON'T use “legal” terms, or terms from Penal Law
 - “*Sally assaulted another student*”
 - DO include specific details
 - “*On or about August 5, 2015, Sally Brown, while at Millennium High School, grabbed another student and hit her in the face, causing her glasses to break and cutting her cheekbone.*”
 - DON'T merely repeat statutory categories of misconduct
 - “*Sally endangered the health, safety, morals and welfare of others – violent and disorderly conduct.*”
 - DO indicate the pertinent section of Code of Conduct
 - “*Sally's conduct is a violation of Section ### of the District Code of Conduct.*”

Long-Term Suspension Procedures (cont.)

Notice of Superintendent's Hearing and Charges

- **Reasonable Notice**
 - Charges must give a student and the student's parent **sufficient information** to advise the student and the parents of the activities or incidents which have given rise to the proceeding and will form the basis for the suspension hearing. Must provide the student and his/her counsel with enough information to prepare and present an adequate defense. See *Bd. of Educ. of Monticello Cent. Sch. Dist. v. Comm'r of Educ.*, 91 NY2d 133 (1997).
 - One day's notice is insufficient. See *Appeal of Eisenhauser*, 33 Ed Dept Rep 604 (1994).
 - Three days notice has been found to be acceptable. See *Appeal of Lago*, 38 Ed Dept Rep 723, Decision No. 14,126 (1999).

Long-Term Suspension Procedures (cont.)

- 2) The Hearing
- Typically, the Hearing Officer makes findings of fact on the charges and recommends an appropriate penalty.
 - The Superintendent considers the recommendation and makes the final determination of the penalty.
 - Due Process Rights:
 - Right of representation by counsel
 - Right to question witnesses against the student
 - Right to present witnesses and evidence on his or her behalf
 - A recording of the hearing must be made.



Long-Term Suspension Procedures (cont.)

The Hearing

- Introduction and identification of those present
- Reading of the charge(s) on the record
- Plea by the accused student
 - If GUILTY plea - Not necessary to take formal testimony. The District will provide a brief description of the incident that led to the charge(s). The student and/or student's parents may be given an opportunity to respond to the District's description or make statements of their own.
 - If NOT GUILTY plea - The District puts forth its case and presents evidence to prove what is alleged in the charge(s).
- The District bears the burden of proof, needs **competent and substantial** evidence of misconduct.

Long-Term Suspension Procedures (cont.)

The Hearing

- The formal rules of evidence applicable in court do not apply to a 3214 hearing.
- The Hearing Officer is free to receive any evidence believed to be relevant or necessary to the proceeding.
- Hearsay evidence (“someone told me something”) is admissible, but should not be solely relied upon to prove the essential elements of the charge(s).



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Long-Term Suspension Procedures (cont.)

The Hearing

- The Hearing Officer makes findings of fact as to the student’s guilt or innocence on the charge(s).
- If the student is found guilty, the Hearing Officer will ask for the District’s recommendation as to a further period of out-of-school suspension.
- Anecdotal record can be offered in support of the requested penalty.
- Attendance, grades or progress reports cannot be considered by the Hearing Officer as a factor in determining the recommended penalty.

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Long-Term Suspension Procedures (cont.)

The Hearing – The Penalty

- “Permanent suspension” is extremely rare, but could be imposed for serious acts.
- Ensure consistency within the school building, and within the District.
- Hearing Officer **cannot** impose
 - “Transfer” of a student
 - Community service
 - Counseling
 - Drug or alcohol abuse assessments
 - Psychiatric or psychological evaluations
 - Anger management
 - Corporal punishment or public apology

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Long-Term Suspension Procedures (cont.)

The Hearing – The Penalty

- Education Law § 3214(3)(e): A school board may now condition a student's early return from suspension on the student's voluntary participation in counseling or specialized classes, including anger management or dispute resolution, where applicable.
- School district may enter into "contract of conduct" or "probation agreement" with student, in which student agrees not to engage in further conduct which violates Code of Conduct, in exchange for early return to school.

Long-Term Suspension Procedures (cont.)

The Hearing – After the Hearing

- Hearing Officer will provide written Hearing Report to District, containing findings and recommendation
 - Generally, "outcome" will be out-of-school suspension for a particular duration.
- Recommendation is "advisory only"
 - Superintendent may accept all or any part, and then provides written notice of his/her decision to the parent.
- Right to appeal to Board of Education

Long-Term Suspension Procedures (cont.)

3) Alternative Instruction

- After suspending a student, school districts must provide alternative instruction pursuant to Education Law § 3214(3)(e).
- "Immediate steps"
- Not required if student is beyond compulsory education age
- Must be **substantially equivalent**:
 - Two hours per day is sufficient
 - Assignment to study hall is insufficient

Suspensions Imposed by Prior School District

- A school district may not automatically enforce a suspension imposed on a transfer student by the student's prior district. *Appeal of a Student with a Disability*, 49 Ed Dept Rep 204 (2009).
- The new school district must conduct its own superintendent's hearing to determine whether the misconduct violates its code of conduct.
 - The new district may impose an appropriate penalty under its own code.

DISCIPLINING STUDENTS WITH DISABILITIES

What is a Disciplinary Change in Placement?

- Suspension/Removal for more than ten consecutive school days.
OR
- Suspension/Removal for a few consecutive school days (less than 10 consecutive school days) BUT there have been prior suspensions/removals in the current school year
AND
The new proposed suspension/removal will result in 11 or more total days for the current school year
AND
All these suspensions/removals constitute a "pattern."
 - A "pattern" is...

“Pattern” Determinations

- When do you care whether there is a pattern?
 - ONLY if you are proposing a suspension/removal of 10 days or less
 - BUT
 - The proposed suspension will result in 11 days or more total for the whole school year.
 - The reason a pattern may be significant is to determine whether or not you must conduct a pattern determination.

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“Pattern” Determinations (cont.)

- What constitutes a pattern?
 - Case-by-case analysis.
 - The criteria are extremely vague.
 - Misconduct is similar; length of suspension/removal (is similar?); total amount of time of suspension/removal; time proximity of the suspensions/removals.

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“Pattern” Determinations (cont.)

- Who makes the Pattern Determination?
 - “The School District” per 8 NYCRR Section 201.2(e).
 - “School Personnel” per Section 201.7(d).
 - Choices:
 - The Principal if suspending for 5 days or less?
 - The Superintendent if suspending for more than 5 days (but less than 11 consecutive days)?
 - CSE in all cases?
 - Director of Special Education or CSE Chair in all cases?

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“Pattern” Determinations (cont.)

- **Do NOT do a Manifestation Determination if one is not required!!!**

- If you do, you are forcing yourself into procedures and possibly results that do **NOT** apply.
 - You might find a pattern.
 - If so, you must conduct a Manifestation Determination.
 - If you conduct a Manifestation Determination, you might find manifestation.
 - If so, except in limited circumstances, you cannot impose any suspension for this misconduct. *How can you argue that you did not have to do this so you should be able to suspend anyhow?*

“Pattern” Determinations (cont.)

- **Important Distinction:** You can always hold a CSE meeting to review what is going on with a student and possibly modify program and/or placement. But this is NOT a Pattern Determination or a Manifestation Determination

AND

Do **NOT** call such a CSE meeting either a Pattern or Manifestation Determination!

Manifestation Determinations

- **Do NOT conduct one unless it is required.**

- Remember that you can always conduct a CSE meeting to review a student's situation, but that is different from a Manifestation Determination.

Manifestation Determinations (cont.)

■ When is a Manifestation Determination required?

- Suspension for 11 or more consecutive school days.
- Suspension for less than 11 consecutive school days, but there are prior suspensions in the current school year and this new proposed suspension would take the total for the current school year to 11 or more days **if there is a pattern.**
- Must conduct a Manifestation Determination even if suspending for serious bodily injury, weapons or drugs – even though you can suspend (technically, change to an IAES) regardless of the result of the Manifestation Determination.
- Must conduct even if IHO orders change to an IAES for "dangerous student" per Section 201.8.

Manifestation Determinations (cont.)

■ Who conducts the Manifestation Determination?

- "Manifestation Team:" school district representative (probably the CSE chair), the parent(s), "relevant" members of the CSE (parent(s) and district decide who is relevant).

Manifestation Determinations (cont.)

■ When must the Manifestation Determination be conducted?

- "Immediately if possible."
- No later than 10 school days after the decision to suspend/change to an IAES is made.
- Actually, if there is a Superintendent's hearing (suspending now for more than 5 days), the Manifestation Determination is to be conducted after the "guilt phase" if guilt is found and before any "penalty phase." 8 NYCRR Section 201.9(c).
- Note that in some situations a suspension might be served in its entirety before the Manifestation Determination is conducted.

Manifestation Determinations (cont.)

▪ What is the test for determining whether the misconduct of the student is a manifestation of the student's disability?

- Misconduct caused by the disability or direct and substantial relationship to the disability (looking at the student's disability in broad terms).

OR

- Misconduct is the direct result of a failure to fully implement the student's IEP.
 - A failure to implement part of an IEP will usually NOT directly result in the misconduct.

Manifestation Determinations (cont.)

▪ Impacts of the Manifestation Determination.

- If find manifestation, you cannot suspend/change to an IAES – except for serious bodily injury, weapons or drugs.
 - IHO can also enter a 201.8 change to an IAES for a dangerous student even if you find manifestation.
 - **If find manifestation, must do or update FBA/BIP per 8 NYCRR Section 201.3.**
- If find no manifestation, can discipline/suspend as any other student.

Parental Challenges to Manifestation Determinations

The parents of a student with a disability may challenge the findings of the MDR team by requesting an impartial due process hearing. In general, the rules that govern impartial due process hearings also apply to MDR-related due process hearings. There are, however, several rules that only apply to manifestation-determination-related due process hearings, including:

Parental Challenges to Manifestation Determinations (cont.)

- The hearing shall be expedited.
 - A resolution session shall occur within seven days of the district's receipt of the hearing request. (The standard rule is 15 days.)
 - The hearing may proceed unless the parties resolve the dispute within 15 days of the district's receipt of the hearing request. (The standard rule is 30 days.)

Parental Challenges to Manifestation Determinations (cont.)

- The hearing must occur within 20 school days of the district's receipt of the hearing request.
- The IHO must issue a decision within 10 school days after the hearing takes place. (The standard rule is that the IHO must issue a decision following the conclusion of the 30-day resolution period and the 45-day hearing period.)

Parental Challenges to Manifestation Determinations (cont.)

- No extensions of the hearing timeline may be granted.
- When a parent challenges the MDR team's finding that there was no nexus between the student's disability and misconduct, the student shall remain suspended during the pendency of the hearing.

Interim Alternative Educational Settings

Placement by District Personnel

A superintendent may place a student with a disability in an IAES, in lieu of a suspension, if one of the following three conditions is met:

1. The student was found to have inflicted serious bodily injury upon another person while at school, on school premises or at a school function.
 - The regulations define "serious bodily injury" as "bodily injury which 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."
2. The student was found to have carried or possessed a weapon at school, on school premises or at a school function.
 - The regulations define "weapon" as "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 two and one-half inches in length."

Interim Alternative Educational Settings (cont.)

3. The student was found to have knowingly possessed or used illegal drugs or sold or solicited the sale of a controlled substance while at school, on school premises or at a school function.

- The regulations define "illegal drug" as "a controlled substance, but does not include a controlled substance legally possessed or used under the supervision of a licensed health-care professional or a substance that is otherwise legally possessed or used under the authority of the Controlled Substances Act or under any other provision of Federal law."

See 8 N.Y.C.R.R. § 201.7(e)(1)(i)-(iii)

Interim Alternative Educational Settings (cont.)

Additional Considerations

- An IAES should not be punitive. Instead, it should focus on the behaviors that led to the interim placement.
- While in an IAES, the student shall continue to receive educational services to enable him to continue to participate in the general educational setting, albeit in another setting, and to progress toward meeting his annual IEP goals.

Interim Alternative Educational Settings (cont.)

- Although the superintendent of schools places the student in the IAES, the components of the IAES shall be determined by the CSE.
- While in an IAES, the student shall receive a functional behavioral assessment and behavioral intervention services and modifications designed to address the behavior violation so that it does not recur.
- The maximum duration of an IAES shall be 45 school days.

Interim Alternative Educational Settings (cont.)

- An IAES may not, however, exceed the amount of time that a nondisabled student would have been suspended for the same behavior. This is why the parties must still go forward with the penalty phase of a superintendent's hearing, even when a student with a disability is placed in an IAES.

Interim Alternative Educational Settings (cont.)

Placement by IHO

A District May Place a Student with a Disability in an IAES Outside of a Superintendent's Hearing

But this may only happen under very limited circumstances. If a student with a disability has not exhibited misconduct at school for which he could be suspended, but the district wishes to temporarily remove the student from his regular placement, it may initiate an impartial due process hearing seeking the temporary placement of the student in an IAES.

Interim Alternative Educational Settings (cont.)

- The impartial hearing shall be expedited.
- To prevail, the school district must prove that "maintaining the current placement of the student is substantially likely to result in injury to the student or others."
- As a general rule, the student's placement in this type of IAES shall not exceed 45 school days.
- Upon the completion of this type of IAES placement, the district may repeat these procedures if it believes that returning the student to his regular placement is substantially likely to result in injury to the student or others.

Students Presumed to Have a Disability for Discipline Purpose

A general education student is presumed to have a disability for discipline purposes under the following circumstances:

1. The parent has expressed concern **in writing** to the student's teacher or supervisory or administrative personnel at school that the student needs special education. If the parent does not know how to write or has a disability that prevents him from writing, then his expression of concern may be oral; or

Students Presumed to Have a Disability for Discipline Purpose (cont.)

2. The parent has requested an evaluation to determine if the student is eligible for classification by the CSE or CPSE; or
3. A teacher of the student, or other school personnel, has expressed specific concerns about a pattern of behavior demonstrated by the student, directly to the director of special education or to other supervisory personnel in the district.

A student presumed to have a disability is entitled to all of the procedural safeguards set forth under Part 201 of the Commissioner's Regulations, including the right to the MDR process before undergoing a disciplinary change in placement.

Students Presumed to Have a Disability for Discipline Purpose (cont.)

▪ **Three Exceptions.** A student is not presumed to have a disability for discipline purposes if:

1. The parent previously refused to allow the district to evaluate the student for eligibility by the CSE or CPSE (e.g., refused to provide consent to evaluate); or
2. The parent previously refused special education services from the district (e.g., refused to provide consent for services); or
3. The CSE or CPSE previously found the student ineligible for classification as a student with a disability.

Students Presumed to Have a Disability for Discipline Purpose (cont.)

▪ **Who Determines if the Student is Presumed to Have a Disability?**

- The Commissioner's Regulations expressly authorize the following three individuals to determine whether a student should be presumed to have a disability for discipline purposes:
 - The superintendent of schools;
 - The building principal; or
 - Another school official imposing the suspension or removal.

Special Education and Related Services During a Suspension

▪ **Suspensions for up to 10 School Days in a School Year.** The district shall provide the student with alternative instruction on the same basis as nondisabled students.

▪ **A Series of Short-Term Suspensions That Exceed a Total of 10 School Days but Do Not Constitute a Disciplinary Change in Placement.** School personnel, in consultation with at least one of the student's teachers, shall determine the extent to which services are needed, so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress towards meeting the goals set out in the student's IEP.

Special Education and Related Services During a Suspension (cont.)

- **Disciplinary Change in Placement.** The district's CSE shall determine services for the student necessary to participate in the general education curriculum, to progress towards meeting the goals set out in the student's IEP, and to receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.

Expedited CSE Evaluations for Suspended Students

- It is not uncommon for a suspension from school to trigger a referral to the CSE, by either the student's parent or teacher. There are certain rules for an initial CSE evaluation under these circumstances.
 - The entire evaluation and meeting process shall be expedited.
 - The district must complete the entire evaluation within 15 school days of receipt of parental consent. (The standard rule is within 60 calendar days of receipt of parental consent to evaluate.)

Expedited CSE Evaluations for Suspended Students (cont.)

- The CSE must make a determination of eligibility no later than five school days after completion of the expedited evaluation. (The standard rule is within 60 school days of receipt of parental consent to evaluate.)
- Until the expedited evaluation is completed, the student shall remain in the educational placement determined by the district, which can include being suspended from school.
- If, as a result of the expedited evaluation, the student is found eligible for classification as a student with a disability, the district shall provide special education to the student and the provisions of Part 201 of the Commissioner's Regulations relating to disciplining students with disabilities shall apply.

Suspensions from Extracurricular Activities

▪ What is the Standard of Review for Suspending Nondisabled Students from Extracurricular Activities?

- Students have a privilege, not a right, to participate in extracurricular activities. Suspensions from extracurricular activities do not require a § 3214 hearing.
- The procedure to take away a student's extracurricular privileges must be fair and allow the student and his parent an opportunity to discuss the alleged misconduct with the person or body authorized to impose discipline. This means that the person/body authorized to suspend must permit the student/parent to offer their version of the facts. The suspending authority need not agree with the student/parent and need not offer any other procedural due process prior to the suspension.

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Suspensions from Extracurricular Activities (cont.)

- The board of education has authority to establish reasonable standards of conduct for its interscholastic athletes. The board's determination will be upheld unless it abused its discretion.
- The board of education has the authority to establish reasonable academic standards as a prerequisite for participation in extracurricular activities. Suspension from these activities is an appropriate penalty if the student fails to meet the standards.

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Suspensions from Extracurricular Activities (cont.)

▪ Are There Special Considerations for Students with Disabilities?

- The general standard of review for nondisabled students is the same for students with disabilities, i.e., the suspension of a nondisabled student from extracurricular activities does not require a § 3214 hearing.

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Suspensions from Extracurricular Activities (cont.)

- In determining whether to impose a disciplinary suspension from extracurricular activities on a student with a disability, the following questions should be considered:
 - Does the student's IEP require participation in an extracurricular activity? If yes, the suspension from the activity could be deemed a violation of the IEP.
 - Is the student being treated the same as a nondisabled student would be treated under the same circumstances? If not, the school district could become the subject of disparate treatment or other discrimination claims.

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Suspensions from Extracurricular Activities (cont.)

▪ Do Academic Policies Apply to Students with Disabilities?

- In New York, the SRO has ruled that a special education student may be declared ineligible for an extracurricular activity under an academic eligibility policy (more commonly referred to as a “no pass, no play policy”) if the policy is applied to both general and special education students.

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Suspensions from Extracurricular Activities (cont.)

- Athletic eligibility rules are not necessarily to be waived because of a student's disability. A student with a disability, however, may circumvent these rules if his IEP indicates that participation in interscholastic activities (or a particular activity) is essential to the student's educational program or is necessary for the student to succeed academically or meet his IEP goals and objectives.

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Transportation Suspensions

▪ **Standard for Nondisabled Students**

A nondisabled student facing a transportation suspension is merely entitled to an opportunity to discuss the reason for the suspension with the “disciplining authority”, such as a principal or superintendent. This applies to both short- and long-term transportation suspensions.

Transportation Suspensions (cont.)

- One caveat, however, is that if a transportation suspension effectively prevents a nondisabled student from attending school because of a lack of public or private transportation, the school district must make “appropriate arrangements” to ensure that the student receives an education.

Transportation Suspensions (cont.)

▪ **Additional Provisions for Students with Disabilities.**

- Transportation listed on IEP as a related service. If a student’s IEP specifically lists transportation as a related service, it is considered to be part of the educational program and removing the student from transportation is akin to removing him or her from any other part of the educational program. See *Letter to Sarzynski*, 59 IDELR 141 (OSEP 2012). As a result, if transportation is listed in an IEP as a related service, then the school district must follow the same procedural rules for a suspension or removal from school.

Transportation Suspensions (cont.)

- Is an MDR Meeting Required?
 - Short-term suspension. A school district may impose a short-term suspension from transportation without triggering IDEA discipline procedures, including the need for an MDR meeting. Short-term suspensions are defined as suspensions lasting 10 consecutive school days or less. A series of suspensions which add up to 10 school days or more throughout the school year can also be considered a short-term suspension so long as the suspensions do not constitute a pattern.

Transportation Suspensions (cont.)

- Long-term suspension. In contrast, a school district must abide by the IDEA discipline procedures for a long-term suspension from transportation. Long-term suspensions are defined as suspensions lasting more than 10 consecutive school days. A series of suspensions which add up to 10 school days or more throughout the school year can be considered a long-term suspension if the suspensions constitute a pattern.

Transportation Suspensions (cont.)

- Transportation not listed on IEP as related service. Regular disciplinary rules apply to students with disabilities who do not have transportation specifically listed as a related service on their IEPs. A school district may therefore suspend these students from transportation without ever conducting an MDR meeting, regardless of the length of the suspension. Coneuch County (AL) Sch. Dist., 35 IDELR 193 (OCR 2001).

Transportation Suspensions (cont.)

- One caveat, however, is that even if the student's IEP does not list transportation as a related service, a suspension of a student with a disability from transportation may also be considered a change to the educational program if the suspension effectively results in the student's inability to receive an education. See Springfield (MA) Pub. Schs., 54 IDELR 102 (OCR 2009). If this occurs, the IDEA discipline procedures should be followed (as described for students who have transportation listed on their IEP as a related service) because the student's placement has effectively changed as a result of being unable to get to school.

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Section 504 Students

OSEP has opined that students classified as disabled under Section 504 may be removed from school for more than ten school days only for misconduct that was not a manifestation of the student's disability. Under this rationale, school districts are required to follow the MDR process before forcing a Section 504 student to undergo a disciplinary change in placement.

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Section 504 Students (cont.)

- Many Section 504 students are classified as disabled based exclusively on a physical disability. Although not impossible, a nexus is less likely to be found for such students in comparison to students with intellectual, emotional or behavioral disabilities.
- Section 504 does not prohibit school officials from disciplining students for using drugs or alcohol. See 29 U.S.C. § 705(20)(C)(iv). As such, a student who is dependent on alcohol or participating in a drug rehabilitation program is not entitled to a nexus finding if ever disciplined at school for alcohol or drug use.

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Functional Behavioral Assessments and Behavior Intervention Plans

What is a Functional Behavioral Assessment?

- An FBA is the process of determining **why** the student engages in behaviors that impede learning and **how** the student's behavior relates to the environment – 8 NYCRR §200.1(r)



Background

- An FBA is an important first step to the development of an individualized BIP
- A BIP is a proactive approach to modifying a student's environment to remediate identified behavior problems by replacing those problems with acceptable behaviors
- An FBA and BIP should be integral components of the Intensive (Tertiary) tier of PBIS

Antecedent-Behavior-Consequence (“ABC”)

- **Antecedent:** Describes the setting in which the behavior occurs and may provide information about what is causing the behavior
- **Behavior:** The targeted behavior(s) being measured by the FBA
- **Consequence:** Response of others that occurs immediately after the behavior. Provides an indication of what is reinforcing the behavior

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New York Law – an FBA must be Conducted when...

- As part of an **initial evaluation/reevaluation** of a student whose behavior impedes his or her learning or that of others. 200.4(b)(1)(v)
- The **behavior** of a student with a disability places the student or others **at risk of harm or injury**. 200.22(b)(ii)
- The CSE is considering **more restrictive programs or placements** for a student with a disability. 200.22(b)(iii)
- When a **suspension** has been imposed that constitutes a **disciplinary change in placement**, if the student's conduct is found to be a **manifestation of his/her disability**. 201.3(a); 201.4(d)(2)(i)

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FBA's must include, but are not limited to: 200.1(r)

- Identification of the problem behavior
- Definition of the behavior in **concrete terms**
- Identification of **contextual factors** that contribute to the behavior (including cognitive and affective factors); and
- Formulation of **hypothesis** regarding general conditions under which the behavior usually occurs and probable consequences that serve to maintain that behavior.

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The FBA Must:
200.22(a)(2)(3)

- Be based on **multiple sources of data**
- Provide a **baseline** of the student's problem behaviors
- Include sufficient detail to form basis for a **behavioral intervention plan (BIP)**
- Not be based solely on student's history of presenting problem behaviors

Multiple Sources of Data
200.22(a)(2)

- **Indirect assessment**
 - Structured interviews, review of existing evaluation information or rating scales
 - Information from the teacher(s), related service providers, parents
 - Review of available data and information from the student's record
- **Direct assessment**
 - Standardized assessments
 - Checklists
 - Observing and recording situational factors surrounding the behavior

Information to Inform the BIP
200.22(a)(3)

- Antecedent behaviors
- Reinforcing consequences
- Function of the behavior – recommendations for teaching alternative skills or behaviors
- Assessment of preferences for reinforcement

Guidance from SRO

- FBAs should include data on the **frequency, duration, and intensity** of problematic behaviors
- FBAs should adequately describe **antecedents** (i.e., precipitating factors) and **consequences** (i.e., the response) of the behavior
- FBAs must include **hypotheses** regarding how the antecedents and consequences can be manipulated to remediate the targeted behaviors

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When Must a BIP be Developed?

- CSE **must** consider development of a BIP as indicated by the results of the FBA:
 - When the student exhibits persistent behaviors that impede his/her learning or that of others – 200.22(b)(i)
 - When the student's behavior places the student or others at risk of harm or injury – 200.22(b)(ii)
 - When CSE/CPSE is considering a more restrictive program or placement as a result of the student's behavior -200.22(b)(iii) and/or
 - As required by Sections 201.3(b); 201.4(d)(2)(i) – Related to student discipline

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A BIP Must Include: 200.1(mmm) and 200.22(b)

- A **description** of the problem behavior;
- Global and specific **hypotheses** as to why the problem behavior occurs; and
- **Intervention strategies** that include positive behavioral supports and services to address the behavior.

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**The BIP Must Identify:
200.22(b)(4)(i)**

- Baseline measure of problem behavior, including:
 - Frequency;
 - Duration;
 - Intensity; and/or
 - Latency of targeted behaviors.

**The BIP Must Identify:
200.22(b)(4)(ii)**

- Intervention strategies targeting inappropriate behavior to:
 - Alter antecedent events to prevent the occurrence of the behavior
 - Teach individual alternative and adaptive behaviors to the student
 - Provide consequences to the targeted inappropriate behavior; and
 - Reinforce alternative acceptable behaviors.

**The BIP Must Identify:
200.22(b)(4)(iii)**

- Schedule to measure effectiveness of interventions, including:
 - Frequency
 - Duration
 - Intensity
- This must be conducted at scheduled intervals



Progress Monitoring 200.22(b)(5)

- Implementation of BIP must include **progress monitoring** of frequency, duration, and intensity of behavior
 - Done at scheduled intervals as specified in BIP and on student's IEP
 - Results reported to student's parents and to CSE/CPSE
 - Considered in determination to revise a student's BIP or IEP

Connection to IEP

- CSE must consider strategies, including positive behavioral interventions and supports and other strategies to address student's behavior
- IEP goals and information must align with FBA/BIP
- IEP must indicate:
 - Whether particular device or service is needed to address student's behavior
 - Student's need for a BIP

Questions?

Thank you.
