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Duties of Public Schools to Students with Disabilities & Options when Addressing Behavior Challenges

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Introduction

From the perspective of an attorney representing public schools, public schools are caught in the tension of fulfilling the competing duties of protecting (and keeping) teachers in the classroom, meeting the needs of students with disabilities and forestalling student-brought litigation. The costs of special education litigation for public schools, in terms of human and financial resources are significant; litigation takes teachers and administrators away from educating students and compounds problems by syphoning scarce dollars away from teacher salaries to legal fees.

School district budget deficits, rising behavior challenges and falling enthusiasm for jobs in education make satisfactory solutions almost impossible. At best, schools are challenged to identify their legal obligations to both groups and engage in a less-than satisfactory risk/benefit balancing act that results in day-to-day decisions that are invariably debated, dissected and misunderstood in social media and local news stories.

Schools must provide students with *disability-based* behavior needs, a free appropriate public education (FAPE) pursuant to the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973. Further, as a means of ensuring that schools do not prematurely or incorrectly attribute behavior challenges to disability, schools are called upon to utilize multi-tiered system of supports (MTSS) and Response to Intervention Practices (RtI), each requiring evidence-based practices and interventions to improve student behavior outcomes, before resorting to historically familiar exclusionary practices like suspensions or expulsions.

The schools' ability to meet these obligations usually rests in the hands of the same classroom teachers who face student behavior head-on. This creates a unique challenge for schools: the people who may find the IDEA requirements unsatisfactory in addressing *their* needs to be safe in the classroom are the same people schools look to for meeting the school's legal obligations. In other words, the same teachers who need protection from a student's most severe behaviors are the ones who must do the heavy lifting to demonstrate the student isn't being removed from the classroom merely for the teacher's convenience.

The schools' duties and options

Students with disabilities must be afforded all the protections provided to students without disabilities, in addition to the protections and procedural safeguards afforded students with

disabilities. When determining what disciplinary action(s) may be appropriate for a student with a disability who violates the Student Code of Conduct, three questions should be considered:

(1) Has the misconduct been identified by an administrator as bullying, harassment, or making a "hit list," which require an ARD committee convene *prior to* disciplining a student with a disability; or
(2) does the disciplinary authority of school personnel, which does not require an ARD meeting, apply; and
(3) Does the proposed disciplinary action constitute a disciplinary change of placement, which requires an ARD meeting and relevant procedures?

The school may consider any unique circumstances on a case-by-case basis when determining whether a disciplinary change in placement is appropriate for a student with a disability who violates a code of student conduct.[1] When making a case-by-case determination regarding how to proceed, the school considers factors such as the student's disciplinary history, ability to understand consequences, expression of remorse, and supports provided to a student with a disability prior to the violation of the Student Code of Conduct.[2]

To the extent that schools seek to have "zero tolerance" policies, such policies are not applicable when making a "Disciplinary Change Of Placement" under the IDEA.[3] Moreover, although the Texas Education Code describes some misconduct as requiring a "mandatory" expulsion or placement in a disciplinary alternative education program (DAEP), federal law requires that a manifestation determination be completed for any conduct that results in a disciplinary change of placement, and accordingly conduct that is found to be a manifestation of a student's disability may not be the basis of a disciplinary change of placement, except where "Special Circumstances" exist, as described in IDEA. Federal law requirements prevail over any State law "mandatory" disciplinary requirements.

As part of this case-by-case determination regarding how to proceed, the school may look at whether incidents of student misconduct, classroom disruptions and violations of the Student Code of Conduct, indicate that the student's IEP needs to include behavioral supports. "This is especially true when a pattern of misbehavior is apparent or can be reasonably anticipated based on the [student]'s present levels of performance and needs."[4] If the student's IEP already addresses the student's behavior through positive behavioral interventions and supports and other strategies, upon repeated incidents of student misconduct or classroom disruption, the school may call an ARD committee meeting to review and consider revising the student's behavioral supports or changing the student's educational placement.[5]

[1] 34 C.F.R. § 300.530(a); U.S. Dept. of Education, 71 Fed. Reg. 46714 (August 14, 2006) ("This does not independently authorize school personnel, on a case-by-case basis, to institute a change in placement that would be inconsistent with § 300.530(b) through (i), including the requirement in paragraph (e) of this section regarding manifestation determinations. We are revising § 300.530(a) to clarify that any consideration regarding a change in placement under paragraph (a) of this section must be consistent with all other requirements in § 300.530.")
[2] U.S. Dept. of Education, 71 Fed. Reg. 46714 (August 14, 2006).
[3] U.S. Dept. of Education, 71 Fed. Reg. 46728 (August 14, 2006).
[4] DCL Letter, OSERS (August 2014).
[5] DCL Letter, OSERS (August 2014); *OSERS, Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions,* Q/A A-3 (Revised July 2022).

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