

SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES

Chapter 8

Information on Discipline of Students with Disabilities

From a 13-Chapter Manual

Available by Chapter and in Manual Form

Written by:

Community Alliance for Special Education (CASE)

and

Protection and Advocacy, Inc. (PAI)

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Federal special education law was significantly amended by Congress in 1997 and further clarified by regulations from the U.S. Department of Education in March 1999. The California Education Code has been amended to reflect some of the federal law changes but not all. In October 1999, Governor Davis vetoed a significant piece of state legislation which would have further amended California law to be consistent with federal law. Therefore, in certain circumstances where it provides greater protections or entitlements, California law will continue to control special education pupils' rights unless it is amended to completely conform to federal law.

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Chapter 8

Information on Discipline of Students with Disabilities

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SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES

Chapter 8

Information on Discipline of Students with Disabilities

- 1. SUPERSEDED. SEE ONLY CHAPTER 1, QUESTIONS AND ANSWERS 37 THROUGH 37(B). ~~Under what circumstances can a school district suspend or expel a student with disabilities?~~**

~~Students with disabilities generally are treated the same as their nondisabled peers in suspension cases. Both state and federal law severely restrict a school district's ability to expel special education students. A description of these restrictions is set forth in the subsequent sections of this chapter. Even if a special education student meets the legal criteria for expulsion, the law requires that the student continue to receive a Free Appropriate Public Education while expelled or suspended for a period in excess of ten school days, which accumulate during a school year. [20 United States Code (U.S.C.) Secs. 1412(a)(1)(A) and 1415(k); 34 Code of Federal Regulations (C.F.R.) Sec. 300.520.] Thus, unlike a regular education student, a special education student does not suffer a cessation of educational services during a suspension or expulsion in excess of the ten-day limit, but he will suffer a change of placement to an alternative setting. (For the specific requirements of the alternative setting see Questions 3 and 4.)~~

- 2. For what reasons can a school district suspend or expel my child?**

The grounds for suspension or a recommendation of expulsion are the same for children with and without disabilities. The permissible grounds for taking disciplinary action under Cal. Ed. Code Sec. 48900 are:

- (1) Causing or threatening physical danger to another;
- (2) Possessing a knife, gun, or other dangerous object without school authorities' permission, or furnishing such an object;

- (3) Unlawfully possessing, using, or furnishing a controlled substance or alcoholic beverage, or being under the influence of such a substance or beverage;
- (4) Offering or furnishing a substance misrepresented to be a controlled substance or alcoholic beverage;
- (5) Committing robbery or extortion;
- (6) Damaging or attempting to damage school or private property;
- (7) Stealing or attempting to steal school or private property;
- (8) Possessing or using tobacco in an unauthorized manner;
- (9) Committing an obscene act or engaging in habitual profanity or vulgarity;
- (10) Dealing in drug paraphernalia;
- (11) Disrupting school activities or otherwise willfully defying school authorities;
- (12) Knowingly receiving stolen school or private property;
- (13) Possession of an imitation firearm that appears to be real;
- (14) Commission or attempt to commit a sexual assault, commission of a sexual battery;
- (15) Harassment, threat, or intimidation of a pupil who is a witness in a school disciplinary proceeding;
- (16) Engaging in sexual harassment which a reasonable person of the same gender as the victim would consider sufficiently severe or pervasive as to have a negative impact on such a victim's academic performance or to create an intimidating, hostile, or offensive educational environment; [See Cal. Ed. Code Sec. 48900.2.]
- (17) Causing, attempting to cause, threatening to cause, or participating in acts of hate violence, which is defined as injuring or interfering with a person's exercise of any constitutional or other legal rights because of the person's or a perception of the person's, race, color, religion, ancestry, national origin, disability, gender, or sexual orientation; [Cal. Ed. Code Sec. 48900.3, Cal. Penal Code Sec. 422.6.]
- (18) Intentionally engaging in harassment, threats, or intimidation, directed against a pupil or group of pupils that is sufficiently severe to disrupt classwork, create substantial disorder, and invade the rights of the pupil or group by creating an intimidating or hostile educational environment; [Cal. Ed. Code Sec. 48900.4.]

- (19) Making terrorist threats against school officials or school property. This includes any oral or written statement threatening to commit a crime which will result in death, great bodily injury, or property damage in excess of \$1000. [Cal. Ed. Code Secs. 48900 and 48900.1.]

Suspension or expulsion for any of these acts must be related to school activity or attendance. This includes misconduct which occurs on school grounds, while going to or coming from school, during lunch (whether on or off campus), during a school sponsored activity, or while going to or coming from a school sponsored activity. [Cal. Ed. Code Sec. 48900(p).]

School districts should use alternatives to suspension or expulsion to address problems of truancy, tardiness, and other absences from school activities. [Cal. Ed. Code Sec. 48900(q).]

Suspension is appropriate only after other means of correction fail to bring about proper conduct. [Cal. Ed. Code Sec. 48900.5.] A student may be suspended on a first offense only for reasons (1) through (5) above, or because her presence causes a danger to persons or property, or threatens to disrupt the educational process. [Id.]

Expulsion is appropriate only if the student:

- ◆ Committed the offenses listed in (1) through (5) above **or**
- ◆ Committed the offenses listed in (6) through (12) above **and either:**
 - Other means of correction are not feasible or have failed repeatedly; or
 - The student's presence causes a continuing danger to the physical safety of the student or others.

[Cal. Ed. Code Sec. 48915.]

The Cal. Ed. Code at Sec. 48915(a) requires that a principal or superintendent recommend expulsion if the student commits any of the following acts (unless he finds that expulsion is inappropriate due to the particular circumstance):

- (1) Causing serious physical injury to another, except in self-defense;
- (2) Possession of any knife, explosive, or other dangerous object of no reasonable use;
- (3) Unlawful possession of a controlled substance;
- (4) Robbery or extortion; or

- (5) Assault or battery.

The Cal. Ed. Code, at Sec. 48915(c) and (d), requires that a principal or superintendent must immediately suspend, and a school board must expel a student if any of the following acts have been committed:

- (1) Possessing, selling or furnishing a firearm;
- (2) Brandishing a knife at another person;
- (3) Selling a controlled substance; or
- (4) Committing or attempting a sexual assault or committing a sexual battery.

However, this mandatory expulsion provision is not enforceable against a special education student unless the student has been afforded all of the procedural and substantive safeguards set forth in this chapter and, after application of those safeguards, has been found eligible for expulsion.

3. SUPERSEDED. SEE ONLY CHAPTER 1, QUESTIONS AND ANSWERS 37 THROUGH 37(B). ~~Are there any limitations on suspension of students with disabilities?~~

~~Students with disabilities are subject to the same suspension rules as nondisabled students, except with regard to the length of suspension. Under certain circumstances, a nondisabled student can be suspended for a period in excess of 30 days cumulatively per school year. However, a special education student may not be suspended for more than ten consecutive school days without parental consent or a court order. [Cal. Ed. Code Sec. 48915.5(b); 34 C.F.R. Sec. 300.519(a).]~~

~~A student can suffer multiple suspensions for separate offenses that accumulate to more than ten school days in a school year so long as no single suspension exceeds ten school days. However, for all days of suspension in excess of ten in a school year; the student must receive FAPE, although in an alternative setting, which must provide services to the extent necessary to allow the child to progress appropriately in the general curriculum and in achieving his IEP goals. [34 C.F.R. Secs. 300.520(a)(ii); and 300.121(d).] The comments to the federal regulations published by OSERS (Office of Special Education and Rehabilitative Services, U.S. Department of Education) indicate that the alternative setting need not provide all services set forth in the IEP, due to the short-term nature of the suspension (up to ten days). School personnel, in consultation with the student's special education teacher, (not an IEP team) determine the setting. [34 C.F.R. Sec. 300.121(d)(3)(i).]~~

~~The federal regulations do provide an appeal from the determination of the alternative setting described above. However, since such a placement would never exceed ten days, the placement would be terminated before any appeal could be concluded.~~

~~A series of suspensions that accumulate to more than ten days per school year may constitute a change of placement without an IEP. If they represent a pattern because of such factors as the length of each removal, the total amount of time the student is removed, and the proximity of the removals to one another, the series of suspensions would be in violation of 34 C.F.R. Sec. 300.519(b). If this is the case, the student must be returned to his pre-suspension school placement with full IEP services. While this matter does involve compliance issues that could be addressed by a compliance complaint, it is best addressed through a due process hearing, which is quicker and better suited to resolving the factual issues that may be involved. It also places the student back in school immediately pending resolution of the matter. (See Question 11.)~~

~~There are general rules and procedures that apply to both special and regular education students. Suspensions may range in length from:~~

- ~~(1) Two consecutive days when ordered by a teacher. [Cal. Ed. Code Sec. 48910(a)];~~
 - ~~1. Up to five consecutive days when ordered by a principal or superintendent. [Cal. Ed. Code Sec. 48911(a)];~~
 - ~~2. Up to ten consecutive days when ordered by the governing board of a school district. [Cal. Ed. Code Sec. 48912(a).]~~

~~An informal, pre-suspension conference with the student must precede suspensions by a principal, principal's designee, or by a superintendent. At the pre-suspension conference, the student must be told why he is being suspended. He must also have an opportunity to present his version of the events and evidence in his defense. The student's parents need not be invited to the pre-suspension conference with the student. [Cal. Ed. Code Sec. 48911(b).]~~

~~The pre-suspension conference need not take place if the principal or designee or superintendent believes that an "emergency situation" exists. An "emergency situation" is one where it is believed that the student presents a clear and present danger to the lives, safety, or health of students or school personnel. In this situation, the student may be suspended without a conference; but the student and his parents must be notified of the student's right to a conference within two school~~

~~days and of the student's right to return to the campus to attend the conference. [Cal. Ed. Code Sec. 48911(e).]~~

~~At the time of any suspension, a school employee must make reasonable efforts to contact the student's parents or guardian in person or by telephone. The parents or guardian must receive a written notice of the suspension. [Cal. Ed. Code Sec. 48911(d).] Parents must respond without delay to any request from school officials that they attend a conference regarding their child's misconduct. [Cal. Ed. Code Sec. 48911(f).]~~

4. ~~SUPERSEDED. SEE ONLY CHAPTER 1, QUESTIONS AND ANSWERS 37 THROUGH 37(B). Are there any limitations on a school district's right to expel a student with disabilities from school?~~

~~Beginning in 2003, California law regarding the discipline of special education students has been changed. California repealed all of the previous state laws regarding the discipline procedures for special education students and adopted the federal special education student discipline rules. [Cal. Ed. Code Sec. 48915.5(a); 34 C.F.R. Sec. 300.519-300.529.]~~

~~If a school decided to expel a student (or make any change of placement, meaning any removal of the child from school for more than 10 consecutive days), then before, or no later than 10 business days after the change in placement is made (including a 45-day change in placement for weapons or drugs offenses), the school has certain responsibilities. If the school did not conduct a functional behavioral assessment and implement a behavior intervention plan before the behavior that led to the change in placement, the school must convene an IEP meeting to develop an assessment plan. After assessment results are available, the IEP team must meet to develop appropriate behavior interventions. If the child already has a behavior intervention plan, the IEP team must meet to review that plan and its implementation and modify the plan or its implementation as necessary to address the behavior. [34 C.F.R. Sec. 300.520(b).] If, after that, a child with a behavior intervention plan, who has previously experienced a change of placement during that school year, is suspended again for a period less than 10 days, the IEP team must review the plan and its implementation again to determine if modifications are needed. [34 C.F.R. Sec. 300.520(c)(1).] If one or more of the team members (the IEP team includes the parent) believes that modifications are needed, the IEP team must meet to modify the plan and its implementation to the extent the team determines necessary. [34 C.F.R. Sec. 300.520(c)(2).]~~

~~If a school district decides to expel a special education student, it must notify the parents no later than the day on which it made that decision and inform the parents of all of their special education rights, including those explained in this chapter. [34 C.F.R. Sections 300.523(a)(1) and 300.504.] Immediately, but in no case later than 10 days after it decides to initiate expulsion proceedings against a child, the district must conduct a review of the relationship between the child's disability and the behavior that led to the expulsion decision. [34 C.F.R. Sec. 300.523(a)(2).] This review of the relationship between disability and behavior is called the "manifestation determination." The IEP team determines whether the behavior is a manifestation (a cause or symptom) of the child's disability.~~

~~The manifestation determination review is done by the IEP team, which includes the parent, and any other qualified personnel. [34 C.F.R. Sec. 300.523(b).] The district may only expel the child if the review concludes that the behavior is *not* a manifestation of the child's disability. If the team decides that it is a manifestation or cannot come to a decision one way or the other, the child cannot be expelled. [34 C.F.R. Sec. 300.523(e).]~~

~~The manifestation determination review team must consider all relevant information related to the behavior subject to discipline, including evaluations and diagnostic results and information from the parents, observations of the child, and the child's IEP and placement. Based on that information, the review team must find that *all* of the following three statements are true in order to find that the behavior is not a manifestation of the child's disability:~~

- ~~(1) In relationship to the behavior subject to discipline, the child's IEP and placement were appropriate and the special education, supplementary aids and services, and behavioral intervention strategies were provided consistent with that IEP and placement;~~
- ~~(2) The child's disability did not impair his ability to understand the impact and consequences of the behavior subject to discipline; and~~
- ~~(3) The child's disability did not impair his ability to control the behavior subject to discipline.~~

~~If any of the previous statements is untrue, the behavior is a manifestation of the disability and the child cannot be expelled. [34 C.F.R. Sec. 300.523(d).] If the review team finds the child's IEP or the placement deficient or that either was not implemented, it must take immediate steps to correct those deficiencies. [34 C.F.R. Sec. 300.523(f).] If the team finds the IEP or placement deficient or that there was a failure of implementation, the first statement above would not be true and the child's behavior should be determined to be a manifestation of his disability.~~

~~If the team decides that the behavior of the child is not a manifestation of his disability, it can proceed with expulsion just as if the child had no disability. [34 C.F.R. Sec. 300.524(a).]~~

5. SEE ALSO CHAPTER 1, QUESTION AND ANSWER 37(B), ITEM 3). While the manifestation determination process is going on, does my child have a right to stay in his school?

Yes, but there are some exceptions:

- (1) The school can suspend a child for ten consecutive days. [34 C.F.R. Sec. 300.520(a)(1)(i).]
- (2) The school can go to state or federal court and seek a judge's ordering prohibiting the child from returning to school pending the manifestation determination and related proceedings on the grounds that returning the child to his current placement would be substantially likely to result in injury to the child or someone else. Whether the child goes to school anywhere and what his education consists of while the review meetings and due process hearing are pending will depend on the terms of the judge's order. [*Honig v. Doe*, 484 U.S. 305 (1988); *Gadsden City Bd. of Ed. v. B.P.*, 3 F.Supp.2d 1299 (N.D. Ala. 1998).] You may argue, however, that as a "suspended" student, pursuant to the court's order, the student continues to be eligible for a free appropriate public education during such a period of extended suspension. [20 U.S.C. Sec. 1412(a)(1)(A).] During a long-term suspension (or expulsion), a child is still entitled to a free appropriate public education which enables the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP. [34 C.F.R. Sec. 300.121(d).]
- (3) If your child is alleged to have committed a weapons or drug offense while at school or a school function, the school may place him in an interim alternative educational setting (IAES) for up to 45 days. [34 C.F.R. Sec. 300.520(a)(2).]
- (4) If the school persuades a special education hearing officer that your child's presence in his current placement is likely to result in injury to him or someone else, the hearing officer may place him in an IAES for up to 45 days. [34 C.F.R. Sec. 300.521.]

6. SUPERSEDED. SEE ONLY CHAPTER 1, QUESTIONS AND ANSWERS 37 THROUGH 37(B). ~~What are the rules regarding interim alternative educational setting placements for special education students accused of drug or weapons offenses?~~

~~IAES placements made by schools for weapons and drug offenses must be determined by the IEP team, which includes the parent, and must enable the child to continue to make progress in the general curriculum and continue to receive the services and modifications, including those described in his IEP, that are necessary for the child to meet his IEP goals. [34 C.F.R. Sec. 300.522(a) & (b)(1).] In addition, the IAES must include services and modifications to address the drug or weapon behavior so as to prevent the behavior from recurring. [34 C.F.R. Sec. 300.522(b)(2).]~~

~~A manifestation determination (to determine whether the behavior is due to the child's disability or IEP/placement failures) must take place within ten days of the school's decision to make an IAES placement. [34 C.F.R. Sec. 300.523(a)(2).] The review examines the three questions discussed in Question 4. If the determination is that the behavior was not a manifestation of the child's disability, the district may proceed to discipline the child and change placement just as it could for a child without a disability. [34 C.F.R. Sec. 300.524.] If the determination is that the behavior is a manifestation because of failures in the IEP or placement or services implementation, the district must take steps to remedy those failures. [34 C.F.R. Sec. 300.523(f).] However, when an IEP team determines the behavior to be a manifestation of the disability on, for example, the 10th day of an IAES placement, the law does not specify whether the school must immediately return the child to his previous placement from the IAES.~~

~~If the parent appeals either the manifestation determination or the IAES placement, an expedited hearing (25 days from date of request) will be scheduled. Pending the expedited hearing, the child's stay put placement is the IAES. [34 C.F.R. Sections 300.525 and 300.526.] [As a practical matter, therefore, an appeal of the IAES to an expedited hearing and a request for stay put will have no effect on the IAES placement before the hearing decision is issued approximately 45 days after the hearing request, which is the time the IEAS would have expired anyway.]~~

~~If the district proposes to change the child's placement after the IAES expires and the parent appeals that proposal, the child must be returned to his original placement during that proceeding. [34 C.F.R. Sec. 300.526(b).] If the school refuses to take the child back to the original placement because it believes it would~~

be dangerous, it can ask for an expedited hearing. The issues at that expedited hearing will be:

- (1) Whether the school has shown, by substantial evidence (more than a preponderance) that returning the child to the original placement is substantially likely to result in injury to the child or another;
- (2) The appropriateness of the original placement;
- (3) Whether the school has made reasonable efforts to minimize the risk of harm in the original placement through supplementary aids and services; and
- (4) Whether the existing IAES or some new placement proposed by the school is able to ensure: continued progress in the general curriculum, continued provision of the IEP and other necessary services to ensure the child meets IEP goals, and provision of the services necessary to address the weapons or drug offense behaviors so they do not recur.

[34 C.F.R. Sec. 300.526(b) & (c).]

7. SUPERSEDED. SEE ONLY CHAPTER 1, QUESTIONS AND ANSWERS 37 THROUGH 37(B). ~~What are the rules regarding interim alternative educational setting placements made by hearing officers for special education students who the school contends are substantially likely to cause injury to themselves or others in their current placements?~~

A special education hearing officer may order a change in placement to an IAES for up to 45 days after an expedited hearing (25 days from the date of request by the district) if the hearing officer does the following:

- (1) Determines that the school has shown, by substantial evidence (more than a preponderance) that returning the child to the original placement is substantially likely to result in injury to the child or another;
- (2) Considers the appropriateness of the original placement;
- (3) Considers whether the school has made reasonable efforts to minimize the risk of harm in the original placement through supplementary aids and services; and
- (4) Determines that the IAES is able to ensure: continued progress in the general curriculum, continued provision of the IEP and other necessary services to

ensure the child meets IEP goals, and provision of the services necessary to address the dangerous behaviors so they do not recur.

[34 C.F.R. Sections 300.521 and 300.522(b).]

If a school district decides to request an expedited hearing described in this answer, it must notify the parents no later than the day on which it made that decision and inform the parents of all of their special education law rights, which includes all those explained in this chapter. [34 C.F.R. Sections 300.523(a)(1) and 300.504.] Immediately, but in no case later than 10 days after it decides to request the expedited hearing described in this answer, the school must conduct a review of the relationship between the child's disability and the behavior that led to the decision to request the expedited hearing. [34 C.F.R. Sec. 300.523(a)(2).] This review of the relationship between disability and behavior is called the "manifestation determination." The team determines whether the behavior is a manifestation (a cause or symptom) of the child's disability.

The review is done by the IEP team, which includes the parent, and any other qualified personnel. [34 C.F.R. Sec. 300.523(b).] The manifestation determination review team must consider all information related to the behavior subject to discipline, including evaluations and diagnostic results and information from the parents, observations of the child, and the child's IEP and placement. Based on that information, the review team must find that *all* of the following three statements are true in order to find that the behavior is *not* a manifestation of the child's disability:

- (A) In relationship to the behavior subject to discipline, the child's IEP and placement were appropriate and the special education, supplementary aids and services, and behavioral intervention strategies were provided consistent with that IEP and placement;
- (B) The child's disability did not impair his ability to understand the impact and consequences of the behavior subject to discipline; and
- (C) The child's disability did not impair his ability to control the behavior subject to discipline.

If any of the previous statements is untrue, the behavior is a manifestation of the disability. [34 C.F.R. Sec. 300.523(d).] If the review team finds the child's IEP or the placement deficient or that either was not implemented, it must take immediate steps to correct those deficiencies. [34 C.F.R. Sec. 300.523(f).] If the team found the IEP or placement deficient or that there was a failure of implementation, the first statement above would not have been true and the child's behavior should

~~have been determined to be a manifestation of his disability. However, when an IEP team determines the behavior to be a manifestation of the disability on, for example, the 10th day of the hearing officer ordered, 45-day IAES placement, the law does not specify whether the school must immediately return the child to his previous placement from the IAES.~~

~~If the team decides that the behavior of the child was not a manifestation of his disability, it can proceed with change of placement just as if the child had no disability. [34 C.F.R. Sec. 300.524(a).]~~

8. The school changed my child's placement for disciplinary reasons. I have not appealed yet but the school told me that stay put would not apply even if I do appeal because the change was not really a change of placement because my child will be receiving the same basic services he received in his previous placement. Is that true?

Some school districts try to avoid the stay-put rule by making a "disciplinary transfer" of a child to a new school. Schools argue that a change of schools is not a change of placement if the same IEP is offered at the new site. However, hearing office decisions have determined that a change of school site for disciplinary or any other reasons while due process is pending is unlawful, except in the very limited situation where the placement has been eliminated for all students for budgetary reasons. [*Student v. Saddleback Valley Unified Sch. Dist.*, SN 60-94; *Student v. Oxnard Elem. Sch. Dist.*, SN 777-94A.]

9. SUPERSEDED. SEE ONLY CHAPTER 1, QUESTION AND ANSWER 37(A). ~~How do I prepare for the IEP meeting where the relationship between my child's disability and behavior will be reviewed?~~

~~You should prepare yourself to discuss each of the items that must be considered before a school can assert that your child's disability was not the cause of her behavior. All of the items must be satisfied before a school can change a special education pupil's placement. Therefore, you may wish to consider obtaining an independent psychological or counseling professional's opinion as to one or more of the items mentioned in the previous questions and answers, especially on the questions of whether the child understood the consequences of and had the ability to control her behaviors.~~

~~You should bring that professional's report or that professional herself to the meeting. You should consider whether the IEP was appropriate. Were all the services and modifications needed by your child in the IEP? Even if all the necessary services and personnel were in the IEP, were they actually being provided at the time of the behavior in question? Were behavioral problems evident before the behavior in question? If so, was behavioral assessment ever done? Was a behavior intervention plan in place? If a behavior plan was in place, was it being implemented at the time of the behavior? Was the placement appropriate? Did the IEP specify a certain size or type of class or kind of environment, and was your child receiving that at the time of the behavior in question? If the IEP specified certain curriculum or other modifications, were those being made at the time of the behavior in question?~~

10. My child, who is being expelled, has not been made eligible for special education; but I believe he would qualify if the school district assessed him. What will happen with my child's placement while we are waiting for the results of that evaluation?

When you have requested an evaluation for special education eligibility after the behavioral episode that led to the expulsion recommendation, the evaluation must be expedited. However, until the results of the evaluation are available, your child will remain in the educational placement determined by school officials. This means that your child can be expelled before the expedited assessment process is completed. [20 U.S.C. Sec. 1415(k)(8)(C); 34 C.F.R. Sec. 300.527.]

11. SUPERSEDED. SEE ONLY CHAPTER 1, QUESTION AND ANSWER 37(C). ~~My child, who is being expelled, has not been made eligible for special education; but I believe she would qualify if the school district assessed her. Is my child protected by any special rules regarding discipline procedures for students with disabilities who have not been officially recognized by the school district?~~

~~Your child is entitled to all the preexpulsion protections that a special education child has if you can establish that the district had knowledge that she had an eligible disability before the behavior that precipitated the disciplinary action~~

occurred. The district is deemed to have such knowledge if, before the behavior in question:

- (1) You had expressed concern in writing to the district that your child was in need of special education (unless, because of illiteracy or disability, you could not comply with this requirement);
- (2) The behavior or performance of your child demonstrates the need for special education;
- (3) You requested special education evaluation by the district; or
- (4) Your child's teacher or other district personnel expressed concern about her behavior or performance to the district special education director or other district personnel. [20 U.S.C. Sec. 1415(k)(8)(A&B); 34 C.F.R. Sec. 300.527.]

You should file for due process and ask for an expedited hearing in order to present these arguments as soon as possible.

12. SUPERSEDED. SEE ONLY CHAPTER 1, QUESTION AND ANSWER 37(C). ~~What if I had concerns about my child needing special education but I never put my concerns in writing to the school?~~

The only exception in that circumstance is for parents who do not know how to write or who have a disability which prevents them from making a written statement. Absent evidence of these exceptions, the requirement of a written expression of concern is likely to be absolute. In addition to putting the concern in writing, Federal Register comments state that parents should include enough information to indicate that their child is in need of special education. [34 C.F.R. Part 300, Attachment 1, Fed. Reg. Vol. 64, No. 48, p. 12628.]

13. SUPERSEDED AND NO LONGER PART OF SPECIAL EDUCATION LAW. ~~How is the second factor (the behavior or performance of the child demonstrates the need for special education services in accordance with having a special education qualifying condition) interpreted and applied?~~

The hearing officers rely on Attachment 1 to the March 12, 1999 federal special education regulations, 34 C.F.R. Part 300, Federal Register, Vol. 64, No. 48, p.12628. In that document, the U.S. Department of Education stated that the

behavior or performance of the child should be tied to characteristics of one of the qualifying disability categories in Section 300.7. The hearing officers, therefore, analyze, much like they would in a special education eligibility case, the facts regarding behavior and performance occurring prior to the behavior giving rise to the expulsion request (but not including that incident) to see if they constitute sufficient evidence for a finding that the child will qualify under one or more categories. [See *Student v. Sacramento City Unified S.D.*, Case No. SN 1278-01.] Factors such as grades, attendance, and relationships with other students and staff will be examined. [*Id.*] For example, where a student had 18 behavioral disciplinary referrals, it was sufficient to raise a factual issue as to whether the district is deemed to have known the child had a qualifying disability because the child's behavior or performance demonstrated the need for services or because the child's teacher had repeatedly expressed concern about the child's behavior or performance to school personnel. [*Student v. Armona Union Elem. Sch. Dist.*, SN 700-00.] Poor academic performance alone is not sufficient to constitute a basis of knowledge by a school that a child needs special education. [*Student v. Sonoma Valley Unified Sch. Dist.*, SN 1116-99.]

All the hearing officer should be looking for in this hearing (especially given the fact that it is an expedited hearing) is sufficient evidence of the fact that the student "might" qualify for special education or was "suspected" of having a qualifying disability prior to the misbehavior, such that the district should have initiated assessment. The basis of knowledge protection applies when "public agency personnel should have acted but failed to do so." [34 C.F.R. Part 300, Federal Register, Vol. 64, No. 48, p. 12628.]

As a practical matter, however, parents and advocates preparing for such an expedited hearing should prepare as they would for a special education eligibility hearing. They should present as much evidence of any qualifying disability or disabilities as they can and of the circumstances demonstrating that the district knew or should have known of the disability prior to the incident leading to the expulsion recommendation. If the student does not ultimately qualify for special education, the expulsion will likely go forward and be sustained.

14. SUPERSEDED AND NO LONGER PART OF SPECIAL EDUCATION LAW. ~~How far back will the hearing officer look for evidence of a qualifying disability in the context of determining whether my child's behavior or performance demonstrated the need for special education due to a qualifying condition?~~

~~The most recent information prior to the behavior leading to the recommendation for expulsion is obviously the most relevant. In addition, one California Special Education Hearing Office decision refused to consider information more than 3 years old, citing the three-year statute of limitations [Cal. Ed. Code 56505(j)] on bringing a due process action. [See *Student v. Alvord Unified S.D.*, 34 IDELR 279, SN 395-01A.]~~

15. What if I requested a special education evaluation for my child but I did not do it in writing?

The regulation does not require that a request for special education evaluation by the parent be in writing. Federal law is silent on that issue. State law requires that special education evaluation go forward even if the request is made orally by the parent and that school staff receiving such an oral request must assist the parent in putting the request in writing. [5 Cal. Code of Regulations § 3021(a).] Assuming it can be proven, an oral request for special education evaluation by the parent, which was not acted upon by the district, is clearly sufficient to show the district had sufficient knowledge for purposes of the protections offered under 34 C.F.R. Sec. 300.527(b).

In addition to putting a request for special education in writing, parents need to be specific about their belief that their child requires special education or an evaluation for special education. Where a parent's letter to her child's teacher expressed only her concerns about her child's educational difficulties which she wanted the teacher to address, it was insufficient to establish a basis of knowledge on the part of the school that her child had a qualifying disability. [*Sonoma Valley Unified Sch. Dist.*, SN 1116-99.]

16. What form does the teacher’s or other staff member’s expression of concern about behavior or performance have to take?

The regulation does not require the teacher’s or staff member’s expression of concern to be in writing. But it must be in the context of the district’s child find or special education referral process. In other words, the expression of concern about behavior or performance must be related to the teacher’s or staff member’s suspicion that a child has a qualifying special education condition and should be referred for assessment. [*Student v. Sacramento City Unified S.D.*, SN 1278-01.] Where a district trained its staff to never refer students directly to special education but rather always to the Student Study (or Success) Team (SST) or Student Assistance Team (SAT) meeting, and where no teacher or staff had ever referred the child to the SST, the district was not found to have a basis of knowledge that the child might qualify for special education. [*Student v. Alvord Unified S.D.*, 34 IDELR 279, SN 395-01A.] Arguably, if a teacher had referred a child to the SST, given that the SST in that district was a first step in referring a child to special education, the case should have come out the other way. For example, eighteen behavioral disciplinary referrals by school staff constituted a sufficient expression of concern by school staff about a child’s behavior or performance. [*Student v. Armona Union Elem. Sch. Dist.*, SN 700-00.]

17. The district assessed my child and determined him ineligible (or at least had considered whether to assess him and decided against it). The district told me I had a right to appeal the denial of eligibility (or the refusal to assess) but I didn’t. Does my child have any protection?

Your child’s protections may depend on how the district informed you of your child’s ineligibility determination and how it informed you of your right to appeal. If a district finds a child ineligible after assessment and it hopes to use that determination as a defense to your claim that the district had a basis of knowledge that your child had a qualifying disability, the district must have given you a written notice which fully informed you of the determination, the reason for it, the tests relied on to make the determination, and of your procedural rights, among other things. [34 C.F.R. Sections 300.527(c)(2) and 300.503.] If the district fails to provide this comprehensive notice, the exception for having assessed the child and determined him ineligible may not apply. [*Student v. Bellflower Unified Sch. Dist.*, SN 449-00.]

In one case, a district assessed a child on April 30 and May 4. It held an IEP meeting on May 18 and informed the parent that, based on the April 30 and May 4 assessment, the child was ineligible. However, on May 13, the school had discovered the child's detailed plot to kill numerous students and staff and then himself. The May 13 discovery was not addressed at the May 18 IEP meeting. Because the intent to commit suicide is an indicator of major depression (and major depression may be evidence of an emotional disturbance) and because depression was not addressed in the discussion of the assessment results of April 30 and May 4, the school was found to have a basis of knowledge that the child had a qualifying disability. [*Student v. Poway Unified Sch. Dist.*, SN 906-99.]

Generally, however, if the district does assess, find the child ineligible, and properly notify the parent of the results and of their rights, none of the four deemed-basis-of-knowledge factors will be any defense to the student's expulsion if the district also informed the parent of the right to appeal the district's action or inaction and the parent did not. [34 C.F.R. Sec. 300.527(c).] The exception to this may be when some time has passed since the district evaluated the child or decided against evaluation. In *Student v. Riverside Unified Sch. Dist.*, Case No. SN 01-01693, the hearing officer found that a school had evaluated a child, found him ineligible for special education in March, had given the parents all the required information about their rights to appeal, and that the parents had failed to appeal. But the hearing officer went on to find that after March, and before the student's next major behavioral incident in January, the student's poor academic performance and poor conduct were well documented. In addition, the hearing officer found that poor performance and conduct should have put the district on notice that further evaluation of whether the student needed special education was necessary and the district had failed to further evaluate. The hearing officer found that the district did have a basis of knowledge regarding the child's suspected disability, should have re-evaluated the child, and, therefore, that the child had the discipline protections afforded to special education students.

18. May my child be expelled from just the transportation portion of her school program?

Yes. However, if a special education student is excluded from school bus transportation, and transportation is a part of his IEP, he is still entitled to an alternative form of transportation to and from school at no cost to the student or his parents. [Cal. Ed. Code Sec. 48915.5(c).]

19. What can I do if a teacher or other school staff person hurts my child?

Whether it is in the context of “discipline” or otherwise, a complaint may be filed with the California Department of Education (CDE) under the Uniform Complaint Procedure if: a child or group of children is in immediate physical danger; or the health, safety or welfare of a child or group of children is threatened. The CDE must directly intervene and not refer the complaint for a local investigation. [5 C.C.R. Secs. 4611(a) and 4650(a)(vii)(C).] See questions regarding Compliance Complaints in Chapter 6, *Information on Due Process Hearings/Compliance Complaints*; see also CDE Legal Advisory LO:1-94, January 25, 1993, which states that the Department of Education interprets Section 4650 of Title 5 as applying to physical injury and threats and also to threats that are verbal or emotional.

20. Are there any special rules governing the discipline of students identified as “disabled” under Section 504 of the Rehabilitation Act of 1973?

Section 504 requires that schools evaluate a child believed to have a disability before making an initial placement of the child and before any subsequent, significant change in placement of the child. The permanent exclusion of a child (expulsion), the exclusion of a child for an indefinite period, or the exclusion of the child for more than 10 consecutive days constitute significant changes of placement under Section 504.

A series of suspensions, each of which is 10 or fewer days in duration, but that creates a pattern of exclusions, may also be a significant change in placement. The series of suspensions must create a pattern based on the length of each suspension, the proximity of the suspensions to one another, and the total amount of time the child is excluded from school.

Before changing a Section 504 student’s placement, the school must conduct a re-evaluation of the student to determine whether the misconduct in question is caused by the student’s disability and, if so, whether the student’s current educational placement is appropriate.

As a first step in the re-evaluation, the school must determine whether the misconduct is caused by the child’s disability. This determination may be made by the same group of persons who make initial placement decisions for Section 504 students. The group must have available to it psychological evaluation information

related to behavior, and the information must be recent enough to afford an understanding of the child's current behavior. The determination may not be made by the individuals responsible for the school's regular disciplinary procedures, such as the school principal or school board officials, who lack the necessary expertise and personal knowledge about the child to make such a determination. These individuals, however, may participate as members of the placement decision group.

If it is determined that the misconduct of a Section 504 student is caused by the disability, the evaluation team must continue the evaluation to determine whether the child's current educational placement is appropriate. If it is determined that the misconduct is not caused by the child's disability, the child may be excluded from school in the same manner as are children without disabilities. In such a situation, Section 504 and the ADA would permit all educational services to a solely Section 504 student to cease.

Under the Office for Civil Rights' interpretation of Section 504, therefore, it appears that a child's behavior must be caused by his disability. If not, the appropriateness of the current educational placement is not reviewed. Even when the behavior is caused by the disability and the appropriateness of the current educational placement is reviewed, that review could, presumably, find that the placement is not appropriate and lead to a permanent change in placement anyway.

If you disagree with the determination that the behavior is not related to the child's disability or with the subsequent placement proposal in those cases where the behavior is determined to be caused by the disability, you may request a Section 504 hearing. A Section 504 hearing is facilitated by the school district and the school district obtains a hearing officer to hear and decide the case. The Office for Civil Rights prohibits employees or board members of your school district from serving as the hearing officer and also precludes employees of another school district from serving as the hearing officer if the other school district shares a contractual arrangement with your school district for the provision of services to children with disabilities. [18 IDELR 230 (1991).] **Another important distinction between special education discipline procedures and Section 504 discipline procedures is that "stay put" does not apply to Section 504 students.**

Therefore, a Section 504 student's placement could be changed or he could be expelled while the Section 504 hearing is still pending.

The protections of Section 504 do not apply to students who are currently using illegal drugs when the school acts on the basis of the student's current use of illegal drugs. Schools may take disciplinary action against a Section 504 student who is

currently engaged in the use of alcohol or illegal drugs to the same extent that it takes disciplinary action against persons not having disabilities. Furthermore, the due process procedures discussed above do not apply to disciplinary actions regarding the use or possession of alcohol or illegal drugs by students with disabilities who are currently engaged in the use of alcohol or illegal drugs.

[See: *Discipline Of Students With Disabilities In Elementary And Secondary Schools*, U.S. Dept. Of Educ., Office for Civil Rights, October, 1996, revised 2/25/98.]

21. My child was expelled from school. What are his rights to return to school in the school district that expelled him?

The order expelling your child must specify the date when she may apply for readmission to a school in the district from which she was expelled. That date cannot be later than the last day of the semester following the semester in which the expulsion occurred. The date can be earlier. The order can include a plan of rehabilitation that your child must follow during the period of expulsion. It may also include an assessment at the time of application for readmission. The plan may also include recommendations for counseling, employment, community service, or other rehabilitative programs. [Cal. Ed. Code Sec. 48916.] If any of the reasons for expulsion related to controlled substances, the district may require, as a condition of readmission and with your consent, that your child enroll in a county-supported drug rehabilitation program. [Cal. Ed. Code Sec. 48916.5.]

22. What rules govern the readmission process?

The governing board of a district must adopt local rules and regulations that establish a procedure for filing and processing requests for readmitting expelled students. However, your child's completion of the readmission process does not entitle him to automatic readmission. Actual readmission is discretionary with the school district. [Cal. Ed. Code Sec. 48916.]

In addition, the governing board, after voting to expel your child, may suspend enforcement of the expulsion for a period up to one year. During this period, your child may be assigned to another program for rehabilitation. During this period, he is "on probation." Probation may be revoked and the expulsion enforced if your child commits any act for which he could have been suspended or expelled (see Question 2) or for any violation of the district's student conduct code. [Cal. Ed. Code Sec. 48917.] After one year of successful probation, he must be reinstated.

The district may, but is not required to, expunge your child's records of all information related to the suspended expulsion. [*Id.*]

23. My child was expelled from our school district. What are the rules governing admission of my child to a new school district?

Your child could be admitted to school in another school district only if:

- (1) She established legal residence in the jurisdiction of the new school district;
or
- (2) Her current school district granted him an interdistrict transfer.

[See Cal. Ed. Code Sec. 46600 and following.]

However, an expelled student's rights to be admitted to a school in a new school district during the period of her expulsion depend on the reasons for expulsion from the previous school district.

If your child was expelled for any of the following reasons, she cannot enroll in any other California school district during the period of his expulsion — unless it is a county community school or juvenile court school:

- (1) Causing serious physical injury to another person (except in self-defense);
- (2) Possessing a knife, explosive or other dangerous object of no reasonable use to her at school or at a school activity off campus;
- (3) Possession of a controlled substance;
- (4) Engaging in robbery or extortion,
- (5) Assault or battery;
- (6) Possession or sale of a firearm;
- (7) Brandishing a knife;
- (8) Sale of a controlled substance; or
- (9) Sexual assault

[Cal Ed. Code Sec. 48915.2(a).]

After the period of expulsion (for one of the above reasons) is over, your child may be admitted to the new school district. The admission would only be considered **if**, after a hearing, the new district determines that she does not pose a danger to the students or employees of the new school district. She must also have established residence in the new district or obtained an interdistrict transfer. [Cal. Ed. Code

Sec. 48915.2(b).] The hearing is conducted under the same rules and procedures as regular expulsion hearings. [See Cal. Ed. Code Sec. 48918.]

If your child was not expelled for any of the reasons listed above, you will not have to wait until the period of expulsion is over. Otherwise, the process is much the same. In this case, the new district may request information and/or a recommendation from the previous school district. If you or your child have not informed the new district of her expulsion from the previous district and the district finds out, the fact of nondisclosure must be recorded. This fact may be discussed at the hearing to determine whether your child is a continuing danger. [Cal. Ed. Code Sec. 48915.1(a)–(b).] The hearing is conducted under the same rules and procedures as regular expulsion hearings. [See Cal. Ed. Code Sec. 48918.] If, after the hearing, the district determines that your child does pose a continuing danger, it may deny her request for admission. If the district agrees to admit her anyway, it may condition enrollment on attendance in a specified program. [Cal. Ed. Code Sec. 48915.1(c)–(d).] If the district determines that your child does not pose a continuing danger, it must admit her to one of its schools, provided he has established residence in the new district or has obtained an interdistrict transfer. [Cal. Ed. Code Sec. 48915.1(e).]

24. My child has behavior problems that may put her at risk of suspension and/or expulsion. Are there any special services or protections that apply to her?

In 1990, the California Legislature enacted Assembly Bill 2586 (Hughes). This bill, and especially its accompanying regulations at Title 5, California Code of Regulations (5 C.C.R.) Sections 3001 and 3052 have substantially changed the way school districts must serve *special education students* with serious behavior problems. These regulations do not apply to students who are only identified as “disabled” under Section 504 or to any other students.

If your child is enrolled in special education and exhibits a serious behavior problem, the district must provide a functional analysis assessment by a behavior intervention case manager — who must have training and experience in positive behavior intervention. The behavior intervention case manager must develop a positive behavior intervention plan which:

- (1) Identifies the function of the negative behavior for your child and
- (2) Teaches him positive replacement behaviors that accomplish the same objectives but in a socially appropriate way.

A “serious behavior problem” is a behavior problem which:

- (1) Is self-injurious or assaultive;
- (2) Causes serious property damage; or
- (3) Is severe, pervasive, and maladaptive and for which instructional/behavioral approaches specified in the student’s IEP are found to be ineffective.

[5 C.C.R. Sec. 3001(aa).]

When agreed upon by the IEP team, the positive behavior intervention plan becomes part of your child’s IEP. It must contain goals and objectives specific to the targeted behaviors, and it must describe the services to be provided in order to achieve the goals and objectives. [5 C.C.R. Sec. 3001(f).] The behavior interventions selected by the case manager must be positive. That is, they must respect your child’s dignity and privacy, assure her physical freedom, social interaction, and individual choice, help her learn to interact effectively socially, assure her access to education in the least restrictive environment, and result in lasting positive change. [5 C.C.R. Sec. 3001(d).]

Positive behavior interventions shall be used only to replace specified negative behaviors with acceptable behaviors and shall never be used solely to eliminate maladaptive behaviors. [5 C.C.R. Sec. 3052(a)(2).] In other words, districts should not use techniques that simply contain or suppress maladaptive behaviors — they must simultaneously try to teach appropriate substitute behaviors.

25. Do the new positive behavior intervention regulations specifically prohibit some behavior programming or techniques?

The behavior interventions used by the district cannot involve the infliction of pain or trauma. [5 C.C.R. Sec. 3001(d), 3052(a)(5).] In a behavioral emergency, that is, the demonstration of a behavior that has not been previously observed and addressed or for which no previous intervention has been effective, properly trained school personnel may use prone containment. The regulations contain very specific guidelines on the handling and documentation of emergencies. However, even in emergencies (and in all other behavior services) behavior interventions may not include:

- (1) Release of toxic or unpleasant sprays near the student’s face;
- (2) Denying adequate sleep, food, water, shelter, bedding, comfort, or access to bathroom facilities;

- (3) Subject the student to verbal abuse, ridicule or humiliation or cause emotional trauma;
- (4) Use locked seclusion;
- (5) Impede adequate supervision of the student;
- (6) Deprive the student of one or more of his/her senses; or
- (7) Employ any device, material, or object that simultaneously immobilizes all four extremities (except for prone containment in emergencies).

[5 C.C.R. Sec. 3052(i) and (1).]

26. Do the new positive behavior intervention regulations have any impact on the discipline of special education students?

Yes. If a district wishes to expel a student for a behavior that has been targeted for change under a positive behavior intervention plan, the IEP team would almost certainly have to find that the behavior was related to the student's disability. Thus, expulsion would be prohibited. ~~In California, a special education student cannot be expelled unless the IEP team determines that she was appropriately placed at the time of her misconduct. [Cal. Ed. Code Sec. 48915.5(a)(3).] Thus, if a student did not receive a positive behavior assessment and intervention for a behavior that fit the definition of serious behavior problem (see Question 11), the IEP team should find that she was not appropriately placed at the time of her misconduct. This situation would also preclude expulsion. Under federal law, if behavior interventions were identified in the IEP but not provided consistent with the IEP and placement, there could not be a finding that the behavior was not a manifestation of the child's disability. [34 C.F.R. Sec. 300.523(e)(2)(i).]~~

However, school districts may suspend special education students for misconduct even though the behavior involved is targeted for change in the student's positive behavior intervention plan — subject to the limitations discussed above regarding consecutive and total number of days.

Also, see Question 8, Item C above for a discussion of required behavioral assessments and plans for students for whom expulsion is being considered.

For further information on the positive behavior intervention regulations, see Chapter 5, *Information on Related Services*.

27. I have been unsuccessful in establishing that my child's behavior was a manifestation of his disability or the result of an inappropriate placement, and there will be a regular expulsion hearing. What are the rules for such a hearing and for any appeals of the results?

A full discussion of the rules governing expulsion hearings and for any appeals of the results of those hearings is beyond the scope of this manual. You should consult Cal. Ed. Code Sec. 48918–48926 for more information, as well as ask your local district for any written policies it may have developed for these hearings.

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