

CHAPTER 13

SUSPENSION AND EXPULSION OF CHILDREN WITH DISABILITIES FOR DISCIPLINARY VIOLATIONS

(CODE OF STUDENT CONDUCT, AND DRUGS, WEAPONS, OR SERIOUS BODILY INJURY OPTION)

INTRODUCTION

The discipline provisions for children with disabilities established by the 1997 amendments to the Individuals with Disabilities Education Act (IDEA-97) were new, complex, and detailed. Before 1997, constraints for suspension and expulsion of children with disabilities were not addressed in the IDEA. Federal direction came from case law, letters of guidance from the US Department of Education, and the anti-discrimination provisions of Section 504 of the Rehabilitation Act of 1973. The 1997 amendments codified many of these concepts, but also made some changes to those past practices.

There were several changes in IDEA 2004 related to the discipline requirements and most specifically to the procedures for manifestation determinations, stay put, and children committing violations related to weapons, drugs, or serious bodily injury. For each specific situation, the required disciplinary procedures may be different. Therefore, it is extremely important to examine each disciplinary situation as unique, carefully analyzing the behavior subject to discipline, in order to understand the school's responsibilities.

This chapter examines issues related to disciplinary actions for code of conduct violations including the option for violations related to weapons, drugs, serious bodily injury and behavior substantially likely to result in injury to the child or others. **Section E specifically addresses violations related to weapons, drugs, and serious bodily injury.**

Schools may use customary disciplinary techniques for all children, including those with disabilities. The school's focus should be on prevention; that is, methods used to prevent future occurrences of behavior problems. Schools may use a school wide multi-tiered system of positive behavior interventions and supports (MTSS-PBIS) for all children in the school. For children with disabilities, traditional forms of discipline such as in-school suspension, detention, time-out, study carrels, or the restriction of privileges can also be used so long as these forms of discipline are also used with nondisabled children and do not violate the provisions of a child's Individualized Education Program (IEP or the child's right to a free appropriate public education (FAPE).

Most legal problems arise when a school proposes to suspend or expel a child with a disability. When the issue is suspension or expulsion, the law has special provisions which sometimes require schools to treat children with disabilities differently than other children. (See Section D of this chapter.)

The Kansas special education laws and regulations contain provisions that parallel Federal suspension and expulsion requirements. Other State laws regarding suspension and expulsion which apply to all children are also cited within the chapter. Figure 13-1 at the beginning of this chapter provides a chart that will be helpful in understanding some of the most important federal and state requirements for disciplinary removal procedures. Under Kansas special education law and regulations students with giftedness are not covered by the discipline requirements.

This chapter includes a discussion of the following topics:

- A. Local School District Responsibilities
- B. Code of Conduct Violations
- C. Short-Term Removals (Not A Change of Placement)

- D. Subsequent Short-Term Removals (Not a Change in Placement)
- E. Long-Term Removals (A Change of Placement)
- F. 45 School Day Interim Alternative Educational Setting (Weapons, Drugs, or Serious Bodily Injury)
- G. Appeals through an expedited due process hearing
- H. Children Not Yet Eligible for Special Education
- I. Reporting A Crime

A. LOCAL SCHOOL DISTRICT RESPONSIBILITIES

School-wide policies and discipline plans help foster a safe and caring child culture. Curricula aimed at teaching children pro-social skills are based on the belief that violent behavior is learned through modeling and reinforcement and that these same processes can be used to teach children nonviolent behavior patterns. Most programs teach children to empathize and cooperate with others, as well as to see others' points of view. In addition, all programs teach a process to help peers settle differences peacefully.

Research shows that schools with low levels of behavior problems are distinguished from those with high levels by the presence of a positive school climate where nurturing, being inclusive, and a feeling of community are evident. Children who feel valued by at least one adult at school will be less likely to act out in the school environment.

Requirements for imposing disciplinary removals of children with disabilities (not gifted) are found in numerous Federal and State laws and regulations. Some of these apply to all children in public schools. It is important for local school districts to examine their current policies to ensure that they comply with all requirements. Additionally, school districts may wish to consult with their attorney to consider what other policies might be needed. It is advisable for school districts to develop clear definitions and inform children and parents of the school district's expectations in terms of behavior and conduct.

IDEA encourages school districts to establish preventive measures and approaches, such as the use of positive behavioral interventions, supports and strategies. School districts are also advised to provide sufficient staff development activities to ensure that both new employees and experienced staff are knowledgeable about Federal and State requirements. Both special and general education administrators need to know what to do immediately when serious situations arise.

School districts must carefully consider the personnel involved when disciplinary situations result in a hearing. There are two kinds of hearing officers. One is a school administrator, employee, or committee authorized by the local school board as the **school's disciplinary hearing officer** (K.S.A. 72-8902(f)). The second kind of hearing officer is a **special education due process hearing officer**, who addresses any special education issue that arises as a result of an appeal regarding special education actions related to suspension and expulsion (i.e., change of placement, manifestation determination, etc.). The special education due process hearing officer is assigned by the State and is not from the school district. It is important that school districts understand when each kind of hearing officer is required. The terms "school's disciplinary hearing officer" and "special education due process hearing officer" will be used throughout this chapter to differentiate the two types of hearing officers.

The IDEA allows traditional disciplinary methods such as time-out and detention. School officials may also use in-school or out-of-school suspension so long as it does not constitute a change of placement. The law does not set an absolute limit on the number of cumulative school days needed to constitute a change of placement, but requires a case-by-case examination of specific factors and requires that services be provided after the 10th school day of suspension in a school year.

School districts are required to document incidences of suspension and expulsion of all students, including students with disabilities, in the Kansas Discipline Incident System (KAN-DIS) web application and submit it to the Kansas State Department of Education annually.

Kansas regulations clarify that children identified as gifted are subject to suspension or expulsion from school the same as a child without a disability. While a child identified as gifted is suspended or expelled from school, the school is not required to provide special education or any other educational services to the child (K.A.R. 91-40-34(c)).

B. CODE OF CONDUCT VIOLATIONS

When a child with a disability violates a school's code of conduct, that behavior could result in suspension or expulsion. Such removals from school are subject to the disciplinary provisions of special education law. Therefore, school district officials must consider suspension and expulsion for children with disabilities very carefully. The initial questions for administrators to answer are:

INITIAL QUESTIONS FOR ADMINISTRATORS

1. Is the child a child with a disability (not gifted only)?
 - If yes, continue with these questions.
 - If no, could the school be deemed to have knowledge that the child, although not identified, is a child with a disability? See Section G of this chapter.
 - If the child is identified as gifted (and does not have a disability), the school's usual disciplinary policies should be followed, because IDEA disciplinary provisions do not apply to children who do not have a disability.
2. Does the anticipated disciplinary action involve suspension or expulsion?
 - If yes, continue with these questions.
 - If no, this chapter does not apply to your situation.
3. How many cumulative school days has the child been suspended during the current school year? (It is important to monitor the number of school days of suspension.)

NOTE: Any part of a school day counts as a full school day.

 - If the number is 10 or less, school officials may suspend the student without educational services, but should be addressing the behavior that results in suspensions. See Section C of this chapter.
 - If this suspension will result in the 11th cumulative school day of suspension, school officials or the IEP team must determine what services are needed. See Section D of this chapter,
 - If this removal result in a pattern of removals that constitutes a change of placement see Section D of this Chapter.
4. Was the behavior subject to discipline a code of conduct violation involving weapons, drugs, serious bodily injury or behavior substantially likely to result in injury to the child or others?
 - If your situation is a code of conduct violation not involving weapons, drugs, serious bodily injury or behavior substantially likely to result in injury to the child or others, see Section C and D of this chapter.
 - If your situation did involve weapons, drugs, serious bodily injury or behavior substantially likely to result in injury to the child or others, see Section E of this chapter.

If assistance is needed in answering these questions, please consult with your special education director, school attorney, or the Kansas State Department of Education.

Several terms used throughout this chapter are defined as follows:

a. Change in Placement for Disciplinary Reasons

Change in Placement for Disciplinary Reasons (long-term removal) means that school officials or a special education due process hearing officer has ordered any of the following changes in placement of a child with a disability:

1. The child is suspended or expelled from school for more than 10 consecutive school days.
2. The child is subjected to a series of short-term suspensions that constitute a pattern because all of the following have occurred:
 - a. they cumulate to more than 10 school days in a school year,
 - b. each incident of misconduct involves substantially the same behavior, and
 - c. because of other factors such as the length of each suspension, the total amount of time the child is suspended, and the proximity of the suspensions to one another.
3. The child is placed in an interim alternative educational setting. (K.A.R. 91-40-33(a)(1))

b. School Day

School day means any day, including a partial day, that all children, including children with disabilities, are in attendance at school for instructional purposes (34 C.F.R. 300.11(c) and K.A.R. 91-40-1(eee)). Given this definition, if a child is suspended for part of a school day, the partial day counts as a full day for purposes of determining if a change of placement has occurred, or if educational services are required during the period of suspension.

c. School Official

School official means (1) A regular education administrator; (2) the director of special education or the director's designee or designees; and (3) a special education teacher of the child with a disability (K.A.R. 91-40-33(b)).

d. Short-Term Suspension

Short-term suspension means removal for a short term not exceeding 10 school days (or a series of removals not constituting a change in placement) (K.S.A. 72-8902(a)).

e. Controlled Substance

Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 USC 812(c)). (34 C.F.R. 300.520(d)(1)).

f. Illegal Drug

Illegal drug means a controlled substance; but does not include a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law (34 C.F.R. 300.520(d)(2)). NOTE: Alcohol and tobacco are not included in this definition.

g. Weapon

Weapon means any 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 2½ inches in length (K.S.A. 72-991(g)(3)).

h. Serious Bodily Injury

Serious bodily injury means a bodily injury that involves one or more of the following: 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 (K.S.A. 72-991(g)(h)).

i. Bodily Injury

Bodily injury includes: a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; any other injury to the body, no matter how temporary (18 U.S.C. 1365(h)(4)).

Additionally, in this chapter, the term “*dangerous behavior*” may be used interchangeably with the phrase “*substantially likely to result in injury to the child or others*”.

PROCEDURES FOR DISCIPLINARY VIOLATIONS FOR CODE OF STUDENT CONDUCT INCLUDING WEAPONS, DRUGS, SERIOUS BODILY INJURY

LENGTH OF REMOVAL	SERVICES REQUIRED	IEP MEETING REQUIRED	SERVICES DETERMINED BY WHOM	IF CHALLENGED, STAY PUT
1. Short term removals, not exceeding 10 consecutive school days, and not cumulating to more than 10 school days. 300.530(b)	None 300.530(d)(3)	No	N/A	N/A
2. All short term removals which include or are subsequent to the 11 th cumulative day (but do not constitute a change of placement)	Beginning on the 11 th cumulative day, services necessary to enable the child to: 1) Participate in the general education curriculum (although in another setting); and 2) Progress toward meeting the goals in the IEP 300.530(d)(4)	No. No manifestation determination is required. 300.530(e) – Also see row 3 if long term suspension/expulsion is anticipated.	School officials, (General. Ed. Administrator, Director. of Sp. Ed. and the child's Sp. Ed teacher).300.530(d)(4). 91-40-33(b) 91-40-36(a)	N/A
3. 1) A removal for more than 10 consecutive days, or 2) another removal that cumulates to more than 10 school days, and shows a pattern of removal constituting a change of placement. 300.536(a)(1)(2); 300.530(c)	Same as above except that services begin immediately. 300.530(d)(5)	Yes, to: 1) Make a manifestation determination (Notice of action and Parent Rights immediately, and meeting within 10 school days. 300.530(e), 300.530(h); and 2) If the behavior is a manifestation of the disability, (a) develop a FBA and BIP, or review existing BIP, and make any changes needed to address behavior and (b) return student to IEP placement unless parent and school agree otherwise. 300.530(f)	IEP Team determines services and place where the services will be provided. 300.530(d)(5) 300.531 Parental consent is not required for this change in placement. 91-40-27(a)(3)	Disciplinary Placement. 300.533
4. 45 school day alternative educational setting (IAES) (weapons, drugs, serious bodily injury)	Same as above, but services begin immediately. 300.350(d)(1)	Yes to: 1) Make manifestation determination; 2) Determine IAES setting and services, regardless of manifestation determination; 3) Determine if FBA and BIP are appropriate; 4) Provide notice of action and parents' rights to parents. 300.530(d)(1) and (d)(5), 300.531	Same as above	Disciplinary placement 300.533
5. 45 school day alternative educational setting (IAES) ordered by H.O. (dangerous behavior) 300.532(a) and (b)	Same as above.	Yes to: 1) Propose IAES services (91-40-36(d)(l)), and 2) Determine if FBA and BIP are appropriate.	Services determined by the hearing officer. 91-40-36(d)(2)	Disciplinary placement 300.533

The chart on the previous page illustrates the most important requirements for the legal course of action for school personnel to follow when removing a student and the disciplinary reasons. The chart may be used for disciplinary removals involving code of conduct violations and for violations relating to weapons, drugs, serious bodily injury or behavior substantially likely to result in injury to the child or others.

C. SHORT TERM REMOVALS (NOT A CHANGE OF PLACEMENT)

(ROW 1 ON DISCIPLINE CHART)

School officials may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct, as long as those removals do not constitute a change of placement. The school need not provide educational services during the first 10 days of removal in a school year, unless it provides educational services to a child without disabilities who is similarly removed.

When proposing a short-term suspension for a child with a disability, school officials must also consider the provisions of the Kansas Pupil Suspension and Expulsion Act, K.S.A. 72-8901 et seq. This State law sets forth due process requirements that apply to all children in implementing a suspension. This law requires (1) providing notice, and (2) the opportunity for an informal hearing before a child is removed from school.

K.S.A. 72-991

(a) School personnel may order a change in the placement of a child with a disability:

(1) To an appropriate interim alternative educational setting or other setting, or the short-term suspension of the child...

K.S.A. 72-8902.

(a) A suspension may be for a short term not exceeding 10 school days, or for an extended term not exceeding 90 school days. An expulsion may be for a term not exceeding 186 school days. If a suspension or expulsion is for a term exceeding the number of school days remaining in the school year, any remaining part of the term of the suspension or expulsion may be applied to the succeeding school year.

(f) A formal hearing on a suspension or expulsion may be conducted by any person or committee of persons authorized by the board of education to conduct the hearing.

D. SUBSEQUENT SHORT-TERM REMOVALS (NOT A CHANGE IN PLACEMENT)

(ROW 2 ON DISCIPLINE CHART)

When a child with a disability has more than a single suspension in a school year, school officials should carefully monitor the cumulative number of school days of suspension and make decisions about the effect of imposing additional short-term suspensions. If school officials order two or more short-term suspensions of a child with a disability during a school year, these suspensions are not a change in placement for disciplinary reasons if the suspensions do not constitute a pattern of removals.

School officials as defined in K.A.R. 91-40-33(b), means a regular education administrator; the Director of special education or director designee; and a special education teacher of the child with a disability.

To determine if a change of placement has occurred, school officials must consider whether the series of suspensions constitutes a pattern of removals. School officials may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements, is appropriate for a child with a disability who violates a code of student conduct. (34 C.F.R. 300.530(a))

When a series of suspensions/removals total more than 10 school days in a school year, school officials should determine whether a pattern of removals has developed by considering:

- Whether the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals
- Other factors such as:
 - The length of each removal;
 - The total amount of time the child has been removed; and
 - The proximity of the removals to one another.

School officials have the authority to make the determination of whether a series of short-term suspensions of a child with a disability constitute a change in placement for disciplinary reasons. This determination is subject to review through due process proceedings. (K.A.R. 91-40-33(a)) **Note that partial days count as full school days.**

School officials should be addressing the issues of the suspensions prior to reaching the 11th day. By addressing accumulated days of suspension early, the school may be able to avoid the need for a suspension that would result in a disciplinary change in placement. Suspensions should be carefully monitored so that school personnel will be aware of whether another removal will constitute a change of placement.

Schools must provide FAPE to all children with disabilities, including those who are suspended or expelled from school. Nevertheless, children with disabilities like students without disabilities may be given short-term suspensions. As stated previously, the school is not required to provide educational services to children with disabilities during the first 10 cumulative days of suspension in a school year. However, when the total number of school days of suspension in a school year reaches 11, and the current removal is for not more than 10 consecutive school days and is not a change of placement, the school must begin providing educational services. School officials must determine the extent to which special education and related services must be provided to the child beginning on the 11th school day of suspension. This is known as the "11th day rule." In this situation, school officials means a general education administrator, special education director or designee(s), and the child's special education teacher, as specified in K.A.R. 91-40-33(b). Beginning on the 11th school day of suspension in a school year, and each school day of suspension thereafter, special education and related services needed for the child must be provided to enable the child to:

- participate in the general education curriculum, although in another setting; and
- to progress toward meeting the goals set out in the child's IEP.

If the short-term suspension includes the 11th cumulative school day of suspension in a school year, necessary services identified by the school officials must be provided. The 11th day rule applies, whether or not the 11th school day of suspension results in a pattern of removal that constitutes a change of placement.

Additionally, if the child has not had a functional behavioral assessment and the district has not implemented a behavioral intervention plan for the child, school officials may (but are not required to) determine that the child needs a functional behavioral assessment to address the behavior that resulted in the suspension and to develop a behavioral intervention plan if the assessment suggests such a plan is necessary for the child (See Functional Behavior Assessment information at the Project STAY website, http://projectstay.com/resources_and_tools.shtml.)

The comments to the federal regulations clarify that the services to be provided to the child on the 11th day do not have to "replicate every aspect of the services that a child would receive if in his or her normal classroom." (Federal Register, 2006, p. 46716) "The act modified the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP." "An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same settings as they were receiving prior to the imposition of discipline." It is important, however, that the child continue to progress toward meeting graduation requirements.

Federal regulations (34 C.F.R. 300.530(b)(1)(2), (d)(1)(3)(4)) address these requirements, as do Kansas State regulations:

K.A.R. 91-40-33. Change in placement for disciplinary reasons; definitions. As used in K.A.R. 91-40-33 through 91-40-38, the following terms shall have the meanings specified in this regulation:

(a) (1) The phrase "change in placement for disciplinary reasons" means that school personnel or a special education due process hearing officer has ordered any of the following changes in placement of a child with a disability:

(A) The child is suspended or expelled from school for more than 10 consecutive school days.

(B) The child is subjected to a series of short-term suspensions constituting a pattern that meets all of the following criteria:

(i) The suspensions cumulate to more than 10 school days in a school year,

(ii) Each incident of misconduct resulting in a suspension involved substantially the same behavior.

- (iii) The length of each suspension, the total amount of time the child is suspended, and the proximity of the suspensions to one another indicate a pattern.
- (C) The child is placed in an interim alternative educational setting.
- (2) (A) If school personnel order two or more short-term suspensions of a child with a disability during a school year, these suspensions shall not constitute a change in placement for disciplinary reasons if the suspensions do not constitute a pattern as described in paragraph (a)(1)(B)
- (B) School officials shall have the authority to make the determination of whether a series of short-term suspensions of a child with a disability constitutes a change in placement for disciplinary reasons. This determination shall be subject to review through due process proceedings.
- (b) "School officials" means the following:
- (1) A regular education administrator;
 - (2) the director of special education or the director's designee or designees; and
 - (3) a special education teacher of the child with a disability.
- (c) "Short-term suspension" means a suspension as authorized by K.S.A. 72-8902(a) and amendments thereto.
- K.A.R. 91-40-35. Services required during suspensions or interim alternative educational placements. (a) An agency shall not be required to provide special education or related services to a child with a disability who has been suspended from school for 10 or fewer school days during any school year, if the agency does not provide educational services to nondisabled children who are suspended from school.
- (b) (1) A child with a disability shall be entitled to continue to receive special education and related services if the child is suspended from school under either of the following circumstances:
- (A) For more than 10 cumulative school days in any school year, but with these suspensions not resulting in a change of placement for disciplinary reasons; or
 - (B) for more than 10 consecutive school days in any school year for behavior that has been determined not to be a manifestation of the child's disability.
- (2) If a child with a disability is suspended from school under either of the circumstances stated in paragraph (b)(1), the agency that suspended the child shall provide, commencing on the 11th day of suspension and during any subsequent day or days of suspension, special education and related services that are needed to enable the child to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the child's IEP.
- (c) If a child with a disability is placed in an interim alternative educational setting in accordance with K.S.A. 72-991a and amendments thereto, the agency shall provide special education and related services to the child that meet the following requirements:
- (1) The services provided shall enable the child to continue both of the following:
 - (A) To progress in the general curriculum, although in another setting; and
 - (B) to receive those services and modifications, including those described in the child's IEP, that will enable the child to meet the goals set out in the IEP.
 - (2) The services shall include services and modifications that address the child's misbehavior and that are designed to prevent the misbehavior from recurring.

E. LONG-TERM REMOVALS (CHANGE OF PLACEMENT)

(ROW 3 ON DISCIPLINE CHART)

To determine if a change of placement has occurred, school officials must consider whether the series of short-term removals (less than 10 consecutive school days) constitutes a pattern of removals. School officials may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements, is appropriate for a child with a disability who violates a code of student conduct. (34 C.F.R. 300.530(a))

A removal of a child with a disability is a change of placement when:

- the removal is for more than 10 consecutive school days;
- the removal is one of a series of short-term removals that constitutes a pattern of removals.

Note that partial days count as full school days. In each case, determining if a pattern has occurred will rest on the unique facts.

There are specific steps to follow when school officials consider either a long-term suspension for more than 10 consecutive school days, an expulsion, or another short-term suspension that cumulates to more than 10 school days and shows a pattern constituting a change of placement (34 C.F.R. 300.530(d)(5),(e)).

- On the date the decision is made to make a removal that constitutes a change of placement of a child with a disability the school must notify the parents of that decision, and provide the parents with a copy of the Parent Rights notice (K.S.A. 72-991a(d)(1)).

- On the 11th school day of removal, the school must begin providing appropriate special education and related services. Note that the determination of services needed as a result of a disciplinary change of placement is not made by the school officials as in the previous situations. Instead, the IEP team decides on these services and where they will be provided.
- The school, the parent and relevant members of the child’s IEP team (as determined by the parent and the school) must determine if the child’s violation of the school’s code of student conduct was a manifestation of his or her disability.
- The school must provide parents with prior written notice of meeting before convening meetings regarding the manifestation determination and the services to be provided during disciplinary removals (K.A.R. 91-40-25). However, the school is required to give only 24 hours prior (written) notice of a meeting to the child’s parents (K.A.R. 91-40-38(d)).

When a disciplinary change of placement occurs, the IEP team, including the parent, determines the special education and related services to be provided during the removal. However, parental consent for the disciplinary change in placement is not required.

1. Manifestation Determination

As soon as practical, but not later than 10 school days after the date on which the decision is made to change the placement of a child with a disability because of a violation of a student code of conduct, the representative of the school, the parent and other relevant members of the child’s IEP team, as determined by the parent and the school, must meet to review:

- all of the relevant information in the child’s file,
- the child’s IEP,
- any teacher observations, and
- any relevant information provided by the parent.

Based on its review of all the relevant information, the group must determine if the conduct in question was:

- a. caused by, or had a direct and substantial relationship to the child’s disability; or
- b. the direct result of the school’s failure to implement the child’s IEP. (K.S.A. 72-991a(d)(2),(e)(1); 34 C.F.R.300.530(e)(1)).

If it is determined by the group that the conduct of a child was a result of either “a” or “b” above, then the conduct must be determined to be a manifestation of the child’s disability. (See Manifestation Determination Form at: <http://www.ksde.org/Default.aspx?tabid=544>.)

2. Determination Behavior WAS a Manifestation of the Disability

If the school, the parent and other relevant members of the child’s IEP team determine that the student’s behavior was the direct result of the school’s failure to implement the IEP, the school district must take immediate action to remedy those deficiencies.

If the school, the parent and other relevant members of the IEP team determine that the child’s behavior was a manifestation of the disability, the IEP team must:

- a. Return the child to the placement from which the child was removed, unless the parent and the school agree to a change of placement as part of the modification of the behavioral intervention plan; and
- b. Either:
 - i. Conduct a functional behavioral assessment, unless the school had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
 - ii. If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior. (See Functional Behavior Assessment information at the Project STAY website, http://projectstay.com/resources_and_tools.shtml.)

If it is determined that the child's behavior is a manifestation of the child's disability the child cannot be subject to a long-term removal for the behavior. However, the school and the parents could agree to another setting. Also, even when the behavior is a manifestation of the child's disability the school could request a special education due process hearing officer to order a 45 school-day interim alternative educational setting if the school district can show that maintaining the current placement is substantially likely to result in injury to the child or others (See Letter to Huefner, OSEP, October 3, 2006 (47 IDELR 228) and 34 C.F.R. 300.532

<http://www.ksde.org/Default.aspx?tabid=614>).

Requirements for the manifestation determination review, as stated above, are found in Federal regulations (34 C.F.R. 300.530(e)) and the State Statute (K.S.A. 72-991a(e)).

K.S.A. 72-991a

- (d) If a disciplinary action is contemplated as described in subsection (a)(2) or (a)(3):
- (1) Not later than the date on which the decision to take that action is made, the agency shall notify the parents of that decision and of all procedural safeguards afforded under section 18, and amendments thereto; and
 - (2) Within 10 school days of the date on which the decision to take disciplinary action is made, a review shall be conducted to determine the relationship between the child's disability and the conduct that is subject to disciplinary action.
- (e) (1) The review described in subsection (d)(2) shall be conducted by the agency, the parent, and relevant members of the child's IEP team as determined by the parent and the agency. In carrying out the review, that group shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parent.
- (2) Based upon its review of all the relevant information, the group shall determine if the conduct in question:
- (A) Was caused by, or had a direct and substantial relationship to, the child's disability; or
 - (B) Was the direct result of the agency's failure to implement the child's IEP.
- (3) If it is determined that the conduct of the student is described in either paragraph (2)(A) or (2)(B) of this subsection, then the conduct shall be determined to be a manifestation of the child's disability.
- (f) If it is determined that the conduct of a child was a manifestation of the child's disability, the IEP team shall:
- (1) Conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the agency has not conducted such an assessment prior to the behavior that resulted in a change in placement;
 - (2) If the child already had a behavioral intervention plan, review and modify it, as necessary, to address the behavior; and
 - (3) Except as provided in paragraph (a)(2), return the child to the placement from which the child was removed, unless the parent and the agency agree to a change of placement as part of the modification of the behavioral intervention plan.

K.A.R. 91-40-38. Manifestation determination; appeal.

- (a) If an agency proposes to make a change in educational placement for disciplinary reasons, the agency shall implement the provisions of K.S.A. 72-991a and amendments thereto.
- (b) An agency may conduct the manifestation determination at the same IEP team meeting that is held in regard to developing or reviewing a behavioral intervention plan under K.S.A. 72-991a and amendments thereto.
- (c) If, in making a manifestation determination, deficiencies are identified in the child's IEP or placement or in the provision of services to the child, the IEP team shall make any changes it deems appropriate, and the agency shall implement those changes.
- (d) An agency shall convene meetings under this regulation as expeditiously as possible and shall be required to give only 24 hours' prior notice of a meeting to the child's parent.
- (e) (1) If a parent files a due process complaint concerning the manifestation determination, a resolution meeting between the parties shall be held within seven days of the filing of the complaint, unless the parties agree, in writing, to waive the resolution meeting or to engage in mediation.
- (2) If the matter has not been resolved to the satisfaction of both parties within 15 days of the filing of the due process complaint, the due process hearing may proceed.

3. Determination Behavior was NOT a Manifestation of the Disability

If the IEP team determines the behavior was NOT a manifestation of the child's disability, the district may proceed with suspension and expulsion proceedings under K.S.A. 72-8901 et seq. Using these proceedings, school officials may order a change in placement of a child with a disability to an appropriate interim alternative educational placement for not more than 186 school days if it is determined that:

- a. the conduct of the child violated the code of student conduct;
- b. the behavior was not a manifestation of the child's disability; and
- c. if the relevant disciplinary procedures applicable to children without disabilities are applied in the same manner and the discipline is for the same duration as would be applied to a child without disabilities (K.S.A. 72-991a(a)(3)).

Parental consent for this disciplinary change in placement is not required; however, a child with a disability must continue to receive educational services during the period of a long-term disciplinary removal. The services that must be provided during the long-term removal are the services that the IEP team determines are needed to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. If the IEP team determines it is appropriate, the child must receive a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur (K.S.A. 72-991a(a)(3); 34 C.F.R. 300.530(d)(1)) (See Functional Behavior Assessment information at the Project STAY website, http://projectstay.com/resources_and_tools.shtml.)

If the violation of the code of student conduct is not a manifestation of the child's disability, the district may transmit the special education and disciplinary records of the child to the school's disciplinary hearing officer for consideration in making the final determination in the disciplinary action. [Note: 34 C.F.R. 300.535 only requires transmittal of special education records to appropriate authorities when a crime has been reported.] Even if the school's disciplinary hearing officer determines that the child should be suspended or expelled, the district must continue to provide a free appropriate public education (FAPE) for the child. Federal regulations (34 C.F.R. 300.530(d)(1)) address this topic, as does State Statute:

K.S.A. 72-991

- (a) School personnel may order a change in the placement of a child with a disability:
- (3) To an appropriate interim alternative educational placement for not more than 186 school days, if it is determined that the conduct of the child violated the code of student conduct and was not a manifestation of the child's disability, if the relevant disciplinary procedures applicable to children without disabilities are applied in the same manner and the discipline is for the same duration as would be applied to a child without disabilities, except that services must continue to be provided to the child during the period of disciplinary action.
- (b) Any child with a disability whose placement is changed under subsection (a)(2) or (a)(3) shall:
- (1) Continue to receive educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting and to progress toward meeting the goals set out in the child's IEP; and
 - (2) Receive, as appropriate, a functional behavioral assessment, behavioral intervention services, and modifications that are designed to address the inappropriate behavior so that it does not recur.
- (c) The alternative educational setting described in subsections (a)(2) and (a)(3) shall be determined by the IEP team.

F. 45 SCHOOL DAY INTERIM ALTERNATIVE EDUCATIONAL SETTING

(OPTION FOR BEHAVIOR RELATED TO WEAPONS, DRUGS, SERIOUS BODILY INJURY)
(ROW 4 OF DISCIPLINE CHART)

School officials may remove a child with a disability to an interim alternative educational setting (IAES) up to 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child:

- a. Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the school district or the State Board of Education;
- b. Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of the school district or the State Board of Education (tobacco and alcohol are not illegal drugs under this definition); or
- c. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the school district or the State. (K.S.A. 72-991a(a)(3); 34 C.F.R. 300.530(g))

When a child has been removed to an interim alternative educational setting, the IEP team must determine what special education and related services are needed and where the services will be provided to enable the child to:

- participate in the general education curriculum, although in another setting; and
- to progress toward meeting their goals set out in the child's IEP.

Although removal to a 45 school day interim alternative educational setting pursuant to K.S.A. 72-991(a)(3) is allowed without regard to whether the behavior is determined to be a manifestation of the child's disability, the manifestation determination procedure is still required. If the behavior is determined to be a manifestation of the child's disability or the IEP team determines appropriate, a functional behavioral assessment will be conducted and the IEP team will review and revise any existing behavioral intervention plan or develop one with services and modifications that are designed to address the behavior violation so that it does not recur. (See Functional Behavior Assessment information on the Project STAY website, http://projectstay.com/resources_and_tools.shtml.)

When a child commits a violation related to **weapons, drugs, or serious bodily injury**, the school officials may initially suspend the child for up to 10 school days without educational services (if the suspension includes the 11th cumulative day of suspension in the school year, educational services should begin on the 11th day). When the IEP team meets, it can determine the location of the 45 school day interim alternative educational setting and the services to be provided to the child.

On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a **violation of a code of student conduct (including weapons, drugs or serious bodily injury)** the school **must notify the parents** of that decision, and provide the parents the **Parent Rights Notice** (K.S.A. 72-991a(d)(1)).

Once the child has been placed in an interim alternative educational setting or otherwise removed for disciplinary reasons, if the school believes that returning the child to the setting specified in the child's IEP would be substantially likely to result in injury to the child or others, the school may request an expedited due process hearing to request the hearing officer to order another 45 school day interim alternative educational setting. (See Letter to Huefner, OSEP, October 3, 2006 (47 IDELR 228) <http://www.ksde.org/Default.aspx?tabid=614>.) The burden of proof is on the school to justify an additional removal be ordered by the hearing officer.

K.S.A. 72-991a. Change in placement of child with disability to alternative setting as disciplinary action for certain behavior; duties of IEP team and hearing officer; behavioral assessment and intervention plan; determination and review procedure.

(a) School personnel may order a change in the placement of a child with a disability:

(2) to an appropriate interim alternative educational setting for not more than 45 school days if:

- (A) The child carries or possesses a weapon to, or at, school, on school premises, or to, or at, a school function under the jurisdiction of an agency;
- (B) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function under the jurisdiction of an agency; or
- (C) the child has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an agency;

(b) Any child with a disability whose placement is changed under subsection (a)(2) or (a)(3) shall:

- (1) Continue to receive educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting and to progress toward meeting the goals set out in the child's IEP; and
- (2) receive, as appropriate, a functional behavioral assessment, behavioral intervention services, and modifications that are designed to address the inappropriate behavior so that it does not recur.

(c) The alternative educational setting described in subsections (a)(2) and (a)(3) shall be determined by the IEP team.

(g) For the purposes of this section, the following definitions apply:

- (1) "Controlled substance" means a drug or other substance identified under schedules I, II, III, IV, or V in 21 U.S.C. 812(c);
- (2) "illegal drug" means a controlled substance but does not include such a substance that is legally possessed or used under the supervision of a licensed healthcare professional or that is legally possessed or used under any other authority under any federal or state law;
- (3) "weapon" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length; and
- (4) "serious bodily injury" means an injury as described in subsection (h)(3) of section 1365 of title 18 of the United States Code.

G. APPEALS

If the child's parents disagree with any decision regarding the disciplinary placement or the results of the manifestation determination, the parents may appeal the decision by requesting an expedited due process hearing. Additionally, if the school believes that maintaining the child's current placement is substantially likely to result in injury to the child or others, the school may request an expedited due process hearing. (K.S.A. 72-992a(a); 34 C.F.R. 300.532(a)) (See Letter to Huefner, OSEP, October 3, 2006 (47 IDELR 228) <http://www.ksde.org/Default.aspx?tabid=614>.)

A parental request for a due process hearing does not prevent the school district from seeking judicial relief such as a temporary restraining order or an injunction, when necessary.

1. Resolution Meeting During Expedited Due Process Hearing

A resolution meeting must occur within seven days of the school receiving notice of a parent's due process complaint, unless the parents and school agree in writing to waive the resolution meeting or agree to use the mediation process. The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the school's receipt of the due process complaint (K.A.R. 91-40-38(e)).

K.S.A. 72-992a. Same; parental disagreement with determination; due process hearing and review.

- (a) The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under K.S.A. 72-991a, and amendments thereto, or an agency that believes that maintaining the current placement of a child is substantially likely to result in injury to the child or to others, may request a hearing.
- (b) A hearing officer appointed under this act shall hear, and make the determination regarding, an appeal requested under subsection (a).
- (c) In making the determination under subsection (b), the hearing officer may order a change in placement of the child. In such situations, the hearing officer may:
 - (1) Uphold the manifestation determination;
 - (2) uphold the interim alternative educational placement of the child;
 - (3) return the child to the placement from which the child was removed; or
 - (4) order a change in placement of the child to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

K.A.R. 91-40-38(e)

- (e) (1) If a parent files a due process complaint concerning the manifestation determination, a resolution meeting between the parties shall be held within seven days of the filing of the complaint, unless the parties agree, in writing, to waive the resolution meeting or to engage in mediation.
- (2) If the matter has not been resolved to the satisfaction of both parties within 15 days of the filing of the due process complaint, the due process hearing may proceed.

2. Placement During Expedited Due Process Hearing

When the parent or the school appeal a disciplinary placement or the result of the manifestation determination, the child remains in the interim alternative educational setting determined by the IEP team pending the decision of the hearing officer or until the expiration of the time of the disciplinary removal, whichever occurs first, unless the parent and the school agree otherwise. Federal regulations (34 C.F.R. 300.533) address this issue, as does the State Statute:

K.S.A. 72-993. Same; placement of child during pendency of due process proceedings.

- (a) If a parent or agency requests a hearing under section 18, and amendments thereto, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the forty-five-school-day period described in subsection (a)(2) of section 17, and amendments thereto, whichever occurs first, unless the parent and the agency agree otherwise.
- (b) The agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing. To expedite the hearing, the agency, within three school days of receiving the request for a hearing, shall request the state board to appoint a hearing officer to conduct the hearing.

3. Expedited Due Process Hearings

Expedited due process hearings occur in two instances under the disciplinary provisions:

- a. When a parent challenges the manifestation determination or any placement decision in a disciplinary context; or

- b. When a school district asks a special education due process hearing officer to order an interim alternative educational setting because a child’s behavior is substantially likely to result in injury to the child or to others.

State regulations (K.A.R. 91-40-30) and Statute (K.S.A. 72-992a and 72-993) define the procedures to follow when an expedited hearing is requested.

- Within 3 days of receiving the request for a hearing the school district must notify KSDE of the need for a special education due process hearing officer and provide the parents’ names and addresses. The local list is not provided to the parents before asking KSDE to appoint a special education due process hearing officer.
- KSDE appoints a special education due process hearing officer as soon as possible.
- A resolution meeting must occur within seven days of the school receiving notice of a parent’s due process complaint, unless the parents and school agree in writing to waive the resolution meeting or agree to use the mediation process.
- The parties must exchange exhibits, witness lists, and other required information at least 2 business days (rather than 5 business days) before the hearing.
- The special education due process hearing officer must conduct the expedited due process hearing within 20 school days of receipt the request for an expedited due process hearing and must render a decision in the matter within 10 school days after the close of the hearing.
- The special education due process hearing officer cannot grant extensions of time in an expedited hearing.

See Request for Expedited Due Process Hearing for District; and Request for Expedited Due Process Hearing for Parent at <http://www.ksde.org/Default.aspx?tabid=603>.

4. Authority of the Special Education Due Process Hearing Officer

In making a determination in an appeal by the parent or the school, the special education due process hearing officer may:

- a. Return the child with a disability to the placement from which the child was removed if the special education due process hearing officer determines that the removal exceeded the disciplinary authority of school personnel or that the child’s behavior was a manifestation of the child’s disability; or
- b. Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for up to 45 school days if the special education due process hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. The school may also request that a special education due process hearing officer order additional 45 school day interim alternative educational settings if school personnel believe that returning the child to the placement specified in the child’s IEP would be substantially likely to result in injury to the child or to others.

K.S.A.72-993. Same; placement of child during pendency of due process proceedings.

- (a) If a parent or agency requests a hearing under section 18, and amendments thereto, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the forty-five-school-day period described in subsection (a)(2) of section 17, and amendments thereto, whichever occurs first, unless the parent and the agency agree otherwise.
- (b) The agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing. To expedite the hearing, the agency, within three school days of receiving the request for a hearing, shall request the state board to appoint a hearing officer to conduct the hearing.

K.S.A. 72-992a. Same; parental disagreement with determination; due process hearing and review.

- (a) The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under K.S.A. 72-991a, and amendments thereto, or an agency that believes that maintaining the current placement of a child is substantially likely to result in injury to the child or to others, may request a hearing.
- (b) A hearing officer appointed under this act shall hear, and make the determination regarding, an appeal requested under subsection (a).
- (c) In making the determination under subsection (b), the hearing officer may order a change in placement of the child. In such situations, the hearing officer may:
 - (1) Uphold the manifestation determination;

- (2) uphold the interim alternative educational placement of the child;
- (3) return the child to the placement from which the child was removed; or
- (4) order a change in placement of the child to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

K.A.R. 91-40-30. Expedited due process hearings.

- (a) If an expedited due process hearing is requested under the provisions of K.S.A. 72-992 or 72-993 and amendments thereto, the agency responsible for providing the hearing shall immediately notify the state board of the request and the parent's name and address.
- (b) Upon being notified of a request for an expedited due process hearing, the state board shall appoint, from its list of qualified hearing officers, a due process hearing officer and shall notify the parties of the appointment.
- (c) Each of the parties to an expedited due process hearing shall have the rights afforded to them under K.S.A. 72-973 and amendments thereto, except that either party shall have the right to prohibit the presentation of any evidence at the expedited hearing that has not been disclosed by the opposite party at least two business days before the hearing.
- (d) (1) Each hearing officer shall conduct the expedited due process hearing within 20 school days of the agency's receipt of the parent's request for the expedited due process hearing and shall render a decision in the matter within 10 school days after the close of the hearing.
(2) A hearing officer in an expedited due process hearing shall not grant any extensions or otherwise fail to comply with the requirement of paragraph (1) of this subsection.
- (e) Either party to an expedited due process hearing may appeal the decision in accordance with K.S.A. 72-974 and amendments thereto.

H. CHILDREN NOT DETERMINED ELIGIBLE FOR SPECIAL EDUCATION

The discipline requirements address the issue of suspending or expelling children not yet identified as a child with a disability but whose parents allege the school district had knowledge that the child was a child with a disability before disciplinary action was proposed. The IDEA affords protections to children not determined eligible only if a school district had knowledge that a child was a child with a disability before the behavior which precipitated the disciplinary action occurred.

A school district is deemed to have such knowledge if:

- the parents of the child have expressed concern in writing to supervisory or administrative school personnel, or a teacher of the child, that the child is in need of special education and related services;
- the parents of the child have requested an evaluation of the child; or
- the teacher of the child or other school personnel expressed specific concern about a pattern of behavior demonstrated by the child directly to the special education director or other supervisory school personnel.

Although teachers and other school personnel may casually express concerns about the behavior or performance of children in their classrooms, such expression of concern do not create knowledge on the part of the school district. Schools also are not deemed to have knowledge of a disability merely because a child received services under other programs designed to provide compensatory or remedial services or because the child had limited English proficiency.

Also, a school will not be considered to have knowledge of a disability if:

- the parent of the child
 - has not allowed an evaluation of the child;
 - has refused special education and related services; or
- the child has been evaluated and determined not to be a child with a disability.

If it is determined that the school did not have knowledge that the child is a child with a disability, the school may proceed with its proposed disciplinary action, including suspension or expulsion without educational services.

If the child's parents request an evaluation of the child during the period of suspension or expulsion or other disciplinary action, the evaluation must be conducted in an expedited manner. No timeline is specified with regard to an expedited evaluation. However, in this context, the term "expedited" suggests the evaluation should be concluded in a shorter time frame than a normal evaluation.

Pending the results of the evaluation, the child remains in the disciplinary setting determined by school authorities (that may be the out-of-school suspension or expulsion). The school is not required to put disciplinary proceedings on hold until the evaluation is completed. If the child is subsequently determined to be a child with a disability, based on the evaluation and review of information supplied by the parents, the school must provide the child with all of the protections of the IDEA, including the provision of special education and related services during the suspension. If the child is determined to not be a child with a disability, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors.

These provisions are found in Federal regulations (34 C.F.R. 300.534) and State Statute (K.S.A. 72-994):

K.S.A. 72-994

School district knowledge that child is child with disability prior to determination, when deemed; subsection of child to disciplinary action, when; evaluation and placement of child.

- (a) A child who has not been determined to be eligible for special education and related services under this act and who has engaged in behavior that violated any rule or code of conduct of the school district may assert any of the protections provided for in this act if the school district had knowledge, as determined in accordance with this section, that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.
- (b) A school district shall be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred:
 - (1) The parent of the child has expressed concern, in writing, to supervisory or administrative personnel of the appropriate educational agency or to a teacher of the child, that the child is in need of special education and related services;
 - (2) the parent of the child previously has requested an evaluation of the child; or
 - (3) the teacher of the child, or other personnel of the school district, previously has expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of such school district or to other supervisory personnel of the district.
- (c) A school district shall not be deemed to have knowledge that a child is a child with a disability if the parent of the child has not allowed an evaluation of the child or has refused services under this law, or the child has been evaluated but it was determined that the child was not a child with a disability.
- (d) (1) Subject to provision (2) of this subsection, if a school district does not have knowledge that a child is a child with a disability prior to taking disciplinary action against the child, the child may be subjected to the same disciplinary action as is applied to children without disabilities who engage in comparable behaviors.
(2) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary action described by this act, an evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the school district and information provided by the parents, the school district shall provide special education and related services in accordance with the provisions of this act, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities, which may be long-term suspension or expulsion from school.

I. REPORTING A CRIME

School districts are permitted to report a crime that a child with a disability may have committed to appropriate law enforcement authorities. However, under the Family Educational Rights and Privacy Act (FERPA), the district must ask for parent consent to transmit a child's special education records to the authorities. Or, if ordered by a judge or by a subpoena, the district must transmit the records. Otherwise, records are not transmitted in accordance with 34 C.F.R. 300.535. This regulation makes it clear the school can transmit records to appropriate law enforcement and judicial authorities only if FERPA will allow the disclosure. (K.S.A. 72-89b03)

FERPA always allows disclosure if parents consent to the disclosure. State law (K.S.A. 72-995(b)) also addresses this issue. FERPA exceptions to the parent consent requirement may allow for disclosure in other circumstances:

- Child records may be disclosed in compliance with a lawfully issued subpoena. However, parents must be notified in writing that the records have been subpoenaed before they are forwarded, unless the court has ordered that the existence of the subpoena or the contents of the subpoena not be disclosed.
- Child records may be disclosed in emergency situations where the disclosure is necessary to protect the health or safety of the child or others.
- Child records may be disclosed under limited circumstances pursuant to State laws concerning the juvenile justice system.

When records are provided to law enforcement or judicial authorities, the disclosure must be on the condition that the record will not be further disclosed without the written consent of the child's parents, or the student if the student is 18 or older.

Although it is easy for a school district to determine to whom the crime should be reported, it is less clear to who copies of special education and disciplinary records should be forwarded. Parent consent to release the records to certain individuals or a subpoena for the records will eliminate the confusion, and should ensure the appropriate parties receive the records. Unless the authority to release the record under FERPA is clear, schools should not forward child records to any law enforcement officer who comes into contact with the child. Federal regulations of IDEA 2004 addressing this issue are found at 34 C.F.R. 300.535, and State Statute. Additionally, Kansas has State Statute, K.S.A. 72-89b03, which requires that schools adopt a policy of reporting misdemeanors and felonies that happen at school to law enforcement.

K.S.A. 72-995

- (a) Nothing in this act shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent state or local law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal, state, or local law to crimes committed by a child with a disability.
- (b) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

K.S.A. 72-89b03. SCHOOL SAFETY AND SECURITY ACT Information regarding identity of specified pupils, disclosure requirements; criminal acts, reports to law enforcement agencies and state board of education; school safety and security policies, availability; civil liability, immunity.

- (a) If a school employee has information that a pupil is a pupil to whom the provisions of this subsection apply, the school employee shall report such information and identify the pupil to the superintendent of schools. The superintendent of schools shall investigate the matter and, upon determining that the identified pupil is a pupil to whom the provisions of this subsection apply, shall provide the reported information and identify the pupil to all school employees who are directly involved or likely to be directly involved in teaching or providing other school related services to the pupil. The provisions of this subsection apply to:
 - (1) Any pupil who has been expelled for the reason provided by subsection (c) of K.S.A. 72-8901, and amendments thereto, for conduct which endangers the safety of others;
 - (2) any pupil who has been expelled for the reason provided by subsection (d) of K.S.A. 72-8901, and amendments thereto;
 - (3) any pupil who has been expelled under a policy adopted pursuant to K.S.A. 72-89a02, and amendments thereto;
 - (4) any pupil who has been adjudged to be a juvenile offender and whose offense, if committed by an adult, would constitute a felony under the laws of Kansas or the state where the offense was committed, except any pupil adjudicated as a juvenile offender for a felony theft offense involving no direct threat to human life; and
 - (5) any pupil who has been tried and convicted as an adult of any felony, except any pupil convicted of a felony theft crime involving no direct threat to human life.A school employee and the superintendent of schools shall not be required to report information concerning a pupil specified in this subsection if the expulsion, adjudication as a juvenile offender or conviction of a felony occurred more than 365 days prior to the school employee's report to the superintendent of schools.
- (b) Each board of education shall adopt a policy that includes:
 - (1) A requirement that an immediate report be made to the appropriate state or local law enforcement agency by or on behalf of any school employee who knows or has reason to believe that an act has been committed at school, on school property, or at a school supervised activity and that the act involved conduct which constitutes the commission of a felony or misdemeanor or which involves the possession, use or disposal of explosives, firearms or other weapons; and
 - (2) the procedures for making such a report.
- (c) School employees shall not be subject to the provisions of subsection (b) of K.S.A. 72-89b04 and amendments thereto if:
 - (1) They follow the procedures from a policy adopted pursuant to the provisions of subsection (b); or
 - (2) their board of education fails to adopt such policy.
- (d) Each board of education shall annually compile and report to the state board of education at least the following information relating to school safety and security: The types and frequency of criminal acts that are required to be reported pursuant to the provisions of subsection (b), disaggregated by occurrences at school, on school property and at school supervised activities. The report shall be incorporated into and become part of the current report required under the quality performance accreditation system.
- (e) Each board of education shall make available to pupils and their parents, to school employees and, upon request, to others, district policies and reports concerning school safety and security, except that the provisions of this subsection shall not apply to reports made by a superintendent of schools and school employees pursuant to subsection (a).
- (f) Nothing in this section shall be construed or operate in any manner so as to prevent any school employee from reporting criminal acts to school officials and to appropriate state and local law enforcement agencies.
- (g) The state board of education shall extract the information relating to school safety and security from the quality performance accreditation report and transmit the information to the governor, the legislature, the attorney general, the secretary of health and environment, the secretary of social and rehabilitation services and the commissioner of juvenile justice.

(h) No board of education, member of any such board, superintendent of schools or school employee shall be liable for damages in a civil action resulting from a person's good faith acts or omissions in complying with the requirements or provisions of the Kansas school safety and security act.

QUESTIONS AND ANSWERS ABOUT SUSPENSION AND EXPULSION FOR CODE OF CONDUCT INCLUDING WEAPONS, DRUGS, OR SERIOUS BODILY INJURY

1. Does in-school suspension count as a day of suspension toward the 11th day rule?

Whether school days of in-school suspension count as school days of suspension for determining if a change of placement has occurred depends on the nature of the in-school suspension environment. Many schools already use in-school suspension for code of conduct violations. Because children frequently are unsupervised and undirected by school personnel if placed on out-of-school suspension, many school districts prefer to use in-school suspension, at least for first-time offenders or less serious offenses. Comments following the Federal regulations indicate that school districts have authority to utilize in-school suspension as a disciplinary tool (Federal Register, August 6, 2006, p. 46715).

Additionally, a school day of in-school suspension should not count as a school day of suspension for services or change of placement purposes if, during the in-school suspension, the child is afforded an opportunity to:

- Continue to appropriately progress in the general curriculum;
- Continue to receive the services specified on his or her IEP; and
- Continue to participate with children without disabilities to the extent they would have in their current placement.

The assumption is that school districts may use in-school suspension for children with disabilities just as they would for children without disabilities. The issue is really whether the school day(s) count toward accumulating the 11th school day of suspension which would require the beginning of educational services or toward the 10 consecutive school days for change of placement or provision of services. The Comments indicate that for children with disabilities, if the in-school suspension approximates the current placement in the areas outlined above, it does not count toward the 10 school days needed for a change of placement or provision of services. On the other hand, if in-school suspension is a place where children are held without opportunities to progress in the general curriculum, receive IEP services, and participate with children without disabilities to the same extent they would have in the current placement, the days do count as school days of suspension for change of placement and provision of services purposes.

2. Does the 10-day written notice requirement for an IEP meeting apply to IEP meetings conducted to consider disciplinary matters?

The school is required to give only 24 hours prior notice of the IEP team meeting to the parents when a student receives a long-term suspension, an expulsion, a short-term suspension that includes the 11th school day of suspension in a school year, or is placed in a 45-day alternative educational setting, and the purpose of the IEP meeting is to develop a functional behavioral assessment or behavior intervention plan (91-40-37(c)), or to determine the special education services needed by the student (91-40-36(d)), or to conduct a manifestation determination (91-40-38(d)).

3. May a student with a disability be suspended from the bus?

Yes, children with disabilities may be suspended from using public school transportation even though they are not suspended from school. However, bus suspension may affect the district's requirement to provide FAPE. If special education services are needed for the child to receive FAPE and the child needs transportation to receive special education services, transportation would be needed and should be addressed by the IEP Team. Guidance to school districts to determine if school days for bus suspension count as school days for change of placement and provision of services purposes:

- The school is always required to provide FAPE. If a child with a disability cannot get to school to benefit from special education, it is likely that the school is required to continue to provide transportation in some manner.
- If transportation is specified as a related service on the IEP, school days of suspension from bus transportation would count in determining if a change of placement occurs and in provision of services unless the school provides transportation some other way.
- If transportation is NOT required as a related service under the IEP, school days of suspension from the bus should NOT count as school days of suspension for change of placement and provision of services purposes. In such cases, the child's parents have the same obligation to get the child to and from school as a child without disabilities who has been suspended from the bus (unless the parents cannot provide the needed transportation). Also, if bus transportation is not included on the IEP, the comments suggest a suspension from transportation privileges may indicate the IEP team should consider whether that behavior on the bus should be addressed within the IEP or a behavioral intervention plan for the child. (Federal Register, August 14, 2006, p. 46715.)

4. Do the discipline provisions of IDEA 2004 extend to children who are gifted and receiving special education services according to the Kansas statute for special education?

No, IDEA-97 discipline provisions only apply to children with disabilities.

5. Do the discipline provisions of IDEA 2004 extend to children who are in the process of being identified as eligible for special education services?

Yes. Federal regulations for IDEA 2004 state that if a school had knowledge that the child is a child with a disability, the child is covered under these provisions. A school is deemed to have knowledge if a teacher or other personnel have expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education or to other supervisory personnel or if the parent of the child requested an evaluation. Therefore, it is very important that screening records be maintained on children under 5 years of age in the child's cumulative folder. Likewise, for children over age 5, records from the general education intervention process should be maintained in the student's cumulative folder. Such data will provide documentation that if there was a suspected disability at some time in the past, the school made the determination whether or not the child should be referred for an initial evaluation to determine eligibility. Therefore, it is important for schools to maintain records on children as such data could be important should a disciplinary proceeding occur later.

6. Are parents entitled to be notified when their child is suspended or expelled for behavior that is subject to these discipline provisions?

Yes. If contemplating a suspension or an expulsion of a child with a disability, school districts must follow the requirements of K.S.A. 72-8902. For long-term suspensions or expulsions, the school district must also provide parents the required notice, under K.S.A. 72-991(d), of the school's decision to make a disciplinary change of placement as well as a copy of the Parent Rights document (34 C.F.R. 300.523(a)(1)).

7. What steps must be completed by the end of the 10th school day for a student to be suspended for a long term, or expelled from school, for behavior not involving weapons, drugs, or serious bodily injury?

In addition to the two notice requirements discussed in Question #6, the school must conduct a manifestation determination. K.S.A. 72-991a(d)(2) requires a manifestation determination within 10 school days from the decision to impose a long-term suspension or an expulsion. School personnel may not order a long-term suspension or expulsion of a child with a disability until a manifestation determination has been completed (K.S.A. 72-8902).

8. Many high schools have a point system for behavioral infractions, with a certain number of points leading to a suspension or other disciplinary actions. The principal has knowledge about a student's total points. Does this constitute the school's having knowledge of a potential disability?

Not necessarily. A student who is frequently violating the school's code of conduct is not necessarily a child with a disability. Such a child should be referred to the building's general education intervention (GEI) or problem-solving team, which would provide a method of addressing the needs of a student who is experiencing behavior problems in school. The problem-solving team may use general education interventions and then make a determination if other evaluations or a referral should be made, as appropriate.

9. Who determines the interim alternative educational setting?

It depends on the behavior and the situation in which the determination is being made. The school can determine the interim alternative educational setting for a short-term removal for 10 consecutive school days or less, or for a short-term removal of more than 10 days that does not constitute a change in placement. When the child is being removed for more than 10 school days and the behavior is not a manifestation of the child's disability, the IEP team will determine the interim alternative educational setting.

For behavior relating to drugs, weapons, or serious bodily injury the decision regarding IF a student is ordered to an interim alternative educational setting is made by designated school officials. However, the decision of WHERE that setting will be is made by the child's IEP Team (K.S.A. 72-991a(c); 34 C.F.R. 300.531). For behavior substantially likely to result in injury to the child or others, the decision regarding an appropriate interim alternative educational setting is made by a special education due process hearing officer (34 C.F.R. 300.532(b)(2)(ii)).

10. The law is specific in defining a pocket knife with a blade of more than 2-1/2 inches in length as being a weapon. What about a scalpel, X-ACTO knife, or box cutter?

These items could very well be considered a weapon under the law, which defines a weapon, in part, as any instrument or material that is used for, or is readily capable of, causing death or serious bodily injury. The exception for a knife having a blade of less than 2-1/2 inches in length applies only to "pocket" knives (K.S.A. 78-8902(a)(3)(C)).

11. May a child be placed in an interim alternative educational setting more than one time each school year?

Yes, however, a school district cannot order a second interim alternative educational setting for the same incident of behavior. A child could be placed in a short term interim alternative educational setting several times if they are not more than 10 consecutive days or if they do not constitute a change in placement. If a child brings a gun to school, the school officials could impose one 45 school day interim alternative educational setting, and if the school believes returning the child to his placement specified in the child's IEP at the end of the 45 school day period is substantially likely to result in injury to the child or others, the school district could ask a special education due process hearing officer to order an additional 45 school day the interim alternative educational setting.

12. If a child without a disability has been disciplined, and during the disciplinary period the child was evaluated and found to be eligible, would the days of discipline prior to eligibility count toward a long term suspension?

No.

13. If a child with a disability is sent home for part of a day is it considered a suspension?

Yes. Any time a child is removed from school as a disciplinary action without educational services this would be considered a suspension. Any part of a day is considered a whole day of suspension.

14. If a child with a disability has a behavior intervention plan (BIP) that calls for a removal from school, is that considered a suspension?

IEP teams should take caution when including a removal from school as part of a BIP. If a child is removed from school without educational services this would be counted toward a long term suspension.

15. If the school has a school wide behavior plan for all students, and a child with a disability reaches the point where he is suspended, what behavior does the team consider during a manifestation determination?

The team must consider all behaviors which led to the suspension.

16. With regard to a manifestation determination, what is meant by conduct that has a "direct and substantial" relationship to a student's disability?

One way that a student's behavior is determined to be a manifestation of the student's disability is when relevant members of the student's IEP team determine that the behavior in question was caused by, or had a "direct and substantial" relationship to the child's disability. The phrase "direct and substantial" has not been specifically defined. The only guidance to what is meant by the phrase "direct and substantial" is a statement in the comments to the federal regulations indicating that a behavior should not be determined to be a manifestation of a student's disability if the relationship of that behavior to the child's disability was merely "an attenuated association, such as low self-esteem." Federal Register, August 14, 2006, pg. 46720.

With so little guidance regarding this question, it is useful to examine the plain meaning of the words themselves. Webster's dictionary defines the term "direct," as the term appears to be used in the context of a manifestation determination, as "proceeding in a straight line or by the shortest course; straight; not oblique; proceeding in an unbroken line of descent." The term "substantial" is defined as "of ample or considerable amount, quantity, size, etc." See, Webster's College Dictionary, Random House (Second Edition 1999). Accordingly, to have both a direct and substantial relationship to a student's disability, the student's behavior must be linked straight to the student's disability without the necessity of examining outside influences or effects and the link of the behavior to the disability must be one of ample or considerable proportion. This is a subjective standard and reasonable minds on the team may disagree. When that happens, the school representative on the team must make the final decision. A parent has a right to challenge the decision of a manifestation team through an expedited due process hearing.

17. Is removal under the 45 School Day Interim Alternative Educational Setting the only option a school district may consider when the student's code of conduct violation involves behavior related to weapons, drugs, or serious bodily injury?

No. If the school seeks to remove the student for more than 45 school days and the manifestation determination review finds that the child's behavior was not a manifestation of the child's disability, then the district may move forward with suspension and expulsion proceedings and order a removal to an IAES of not more than 186 school days pursuant to K.S.A. 72-991(a)(3). Removal to a 45 school day IAES pursuant to K.S.A. 72-991(a)(3) is allowed without regard to whether the behavior is determined to be a manifestation of the child's disability.