

A Simplified Method for Understanding the Disciplinary Removal Rules of IDEA and Section 504

Presented by

Jose Martín, Attorney

Richards Lindsay & Martín, LLP

Austin, Texas

Copyright © 2017 Richards Lindsay & Martín, L.L.P.

Elements of “User-Friendly” Method

1. Identify short-term disciplinary removals
2. Identify long-term disciplinary removals
3. Separate the rules for each of above
4. For short-term removals, apply “free days” analysis, don’t push your luck once you reach a total of 10 in a school year
5. *Before* removals reach 10, have meeting
6. For long-term removals, it’s all about the manifestation determination

Identifying Short-term Removals

- Occurs when campus administrator removes student from normal setting for discipline reasons for less than 10 consecutive school days
- ISS is not a true “removal” if services are provided (sufficient for student to progress)—more on this later

Identifying Long-term Removals

- Disciplinary removals of over 10 consecutive school days
- Usually, alternative disciplinary placements (DAEP) and expulsions for serious offenses
- Always require manifestation determination (and finding of no manifestation)
- Always require FAPE during removal

“Free Days” Analysis for Short-term Removals

- Schools allowed 10 “free” removal days per year for each student
- No manifestation, FAPE, services, or other IDEA procedures required
- Meant to limit suspensions, and their negative effects on students (and to emphasize BIP interventions instead)
- Does **not** mean interventions should not be tried until 10 days of removal have taken place

More on Short-Term Removals

- Exceeding 10 total removal days “costs” (in legal risk... **and** services)
- And, excessive ST removals can amount to a disciplinary change in placement
- **Good old OCR factors**—proximity, total days, length of each
- **2006 added factor**—“similarity” of behaviors in the series

More on Short-Term Removals

- How do you apply all those factors? Is it an “I’ll know it when I see it” analysis?
- Best for schools to avoid this highly subjective and slippery analysis by avoiding more than 10 total short-term removal days
- In §504 complaints, OCR may not even apply the new factor...

Preventative IEP Team Meetings

- Best advice is to have a meeting ***before*** short-term removals reach 10 in a year (*see* 34 CFR 300.324(a)(2)(i))
- Ideas: FBA, BIP, BIP revision, sp. ed. counseling, psychological evaluation, class change, placement change, etc.
- Point: Get stakeholder input, have plan, use resources (consider steps *other* than more removal...)

Long-Term Removals and Manifestation Determinations

- With serious removals, it's all about the manifestation determination
- Must take place before LT removal takes place (by 10th consecutive day)
- **Primary rule: LT removal can't take place if behavior is related to disability (except for "special offenses")**

More on MDRs

- The modern MDR inquiry (as of 2005) sets a “**higher bar**” for students
- Behavior is a manifestation only if:
 - Caused by, or directly and substantially related to, the disability**
 - Or, the **direct result** of failure to implement IEP

More on MDRs

- If behavior is manifestation, student must return to original placement (unless parents agree otherwise)
- If behavior is not manifestation, regular local disciplinary procedures may proceed as with a similarly situated nondisabled student
- Although parents often make the “impulsivity” argument, ask whether the facts are consistent with impulsive behavior

More on MDRs

- If behavior is manifestation, FBA and BIP are required
- If behavior is not manifestation, FBA and behavior interventions to address violation are also required
- Remember that generally, if the student is engaging in recurring behaviors that impede learning, FBA and consideration of BIP should be undertaken

Drugs, Weapons, Serious Bodily Injury (the Special Offenses)

- 45-school-day removal OK, *even if behavior is related to disability*
- If behavior not related, regular local code of conduct applies (may mean longer removal)
- Serious bodily injury defined very strictly
- Commonly misunderstood provision

The Special Offenses

- MDR still required (as with “mandatory” DAEP offenses)
- Can begin the removal, if MDR is held quickly (within days)
- Usually, these situations also involve resort to law enforcement (since offenses are crimes)

§504 and Drugs/Alcohol

- If 504 student commits a drug or alcohol offense, and there is evidence that student is a “current user,” no need for manifestation determination
- Committee should meet and determine if there is evidence of current use
- If in doubt, conduct manifestation determination

Reporting Criminal Behavior to Law Enforcement

- Schools free to report potential criminal offenses that occur at school
- Schools should study what offenses merit reporting (after dialogue with police)
- **Not** a behavior intervention
- Clear cases: serious assaults, drugs, weapons
- Imprudent use can lead to litigation
- SROs should not handle behavior incidents

Suspected IDEA Students

- Students not eligible under IDEA may get IDEA discipline protections
- There must be a basis for suspicion of eligibility—(1) parent concerns, (2) staff concerns, (3) parent referral
- Pending referral means discipline protections apply
- Referral request during discipline does not necessarily stop discipline process

“Smart ISS” as alternative to suspension

- If services in ISS are sufficient to provide opportunity to progress in regular and sp. ed. Curriculum, then not a “removal”
- A “deal” from USDOE to schools
- Must continue all IEP related services
- Must have system to provide work in ISS
- Determine how to provide instruction
- Document arrangement

More on “Smart ISS”

- “Deal” only applies if student stays on campus
- Provision on LRE is intended to prohibit separate sp. ed. ISS settings—use of regular ISS settings is fine
- **Watch for overuse**—meet if ISS is being used frequently (because TEA tracks use of ISS)

Planning for FAPE in Removal Setting

- If student will be removed long-term, IEPT must plan for FAPE in removal setting
- Exact replication of services is not required (a “modified” FAPE requirement)
- IEP should be modified to address the behavior problem so that it does not recur (FBA, BIP, counseling)
- Dropping key services is a big red flag

Partial-Day Suspensions

- *They “count”*—Can’t be ignored
- Accurate account must be kept at the campus
- Watch office referrals

Bus Suspensions

- USDOE clarification—they count as removals if transportation is on IEP (i.e., special transportation)
- Thus, suspensions from regular bus may take place under regular policies
- But, USDOE cautions schools to make use of FBA/BIP process to address bus behavior problems