

64<sup>TH</sup> CONFERENCE ON EXCEPTIONAL CHILDREN



**WORKING TOGETHER  
TO ACHIEVE STUDENT SUCCESS**

**Manifestation Determinations:  
How Solid Are Yours?**

November 3-5, 2014

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PUBLIC SCHOOLS OF NORTH CAROLINA  
North Carolina Department of Public Instruction

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**Polling the Audience:**

- Superintendent or Assistant Superintendent?
- Central Office Personnel?
- School Administrator?
- Teacher?

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**Polling the Audience (cont.):**

- Disciplined a special education student?
- Participated in a Manifestation Determination Review (“MDR”) meeting?
- Participated in a manifestation determination hearing?
- Participated in a special education due process hearing?

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**By the time a parent files a due process petition:**

- All the facts and decisions are already there.
- All the documentation already exists (or doesn't exist).
- Any misunderstandings about the law are no excuse.
- These mistakes are expensive, but . . .
- **AVOIDABLE!**

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**The Basics**

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LEA Representative  
Through Day 10  
Day 11 and beyond

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**LEA Representative:**

- What is the role of the LEA Representative on the IEP Team?
- What are the disadvantages to delegating this responsibility?
- How can delegating this responsibility affect an administrator?

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**General Discipline Documentation Tips:**

- Keep accurate attendance logs.
- Code suspensions as suspensions.
- Sign in and sign out sheets may become evidence.

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**Groups of students entitled to discipline protections:**

- EC students;
- 504 students; and
- Students not yet identified but the school system “knows” the child is a child with a disability.

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**For each identified student, the LEA representative should know:**

- The student’s disability;
- If the school has done a Functional Behavior Analysis (“FBA”); If the student has a Behavior Intervention Plan (“BIP”); and
- If the student’s teachers are aware of the BIP and if it is being implemented consistently.

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**Rule 1:**

Students receive no special protections for disciplinary removals totaling 10 days or less in a school year.

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**What constitutes a “removal”?:**

- Bus suspensions?
- Alternative school?
- Half days?
- In-school suspension?
- Out of school suspension?
- Parent signed student out “in lieu of” suspension?

- Make sure the suspensions are properly coded and sign in/ sign out logs are accurate.
- Attendance records, sign in/out logs, etc., may be entered as evidence in a due process hearing or judicial procedure.

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**Day 11 and beyond. . .**

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**Rule 2:**

On the 11<sup>th</sup> day of removal, what a child is entitled to depends on whether a removal is “change in placement.”

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**What is a “change in placement”?:**

- Single “removal” (e.g., suspension) for more than ten (10) days;
- OR
- A “Pattern” of shorter removals totaling more than ten (10) days.

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**“Pattern”:**

Removals were due to similar types of behavior.

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**Other “various factors” must be considered:**

- Total amount of time that student has been removed;
- How close the removals are to one another; and
- The length of each removal.

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**First things first:**

- If no change in placement, “FAPE lite” (services decided on by an administrator and a teacher).
- If change in placement, FAPE as decided by the IEP Team.

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**Test Yourself:**

- Suspended for 5 days in September for walking the hallways and disrespect toward staff +
- Suspended for 4 days in November for being out of class and walking in the hallways +
- Suspended for 4 days in January for being disorderly in the girls’ locker room +
- Suspended for 5 days in February for disobedience and walking in the hallways.

= Pattern?

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**Test Yourself (cont.):**

- 4.5 days in October for theft +
- 3 days in early December for theft +
- 8 days in late December for weapon possession

= Pattern?

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**Test Yourself (cont.):**

- 1 day ISS +
- 9 days OSS +
- 9 days of bus suspension
- All suspensions were for “physical or verbal altercations and/or name calling”
- 14 of the 19 suspensions were in April and May

= Pattern?

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**Who Makes the Decision as to Whether There Has Been a Change in Placement?**

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## By Federal Law - Administrator




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## So be sure your principals:

- Know and understand the law;
- Have accurate knowledge of the number of suspensions;
- Understand the actual reason for each suspension;
- Gather ALL the information they need BEFORE making a decision.

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## Best Practices:

- Identify which administrator will make the decision at each school.
- Offer professional development for these identified administrators.
- Provide a “cheat sheet” for the administrators making the decision that outlines what they must consider at each step and what evidence they need.
- Establish a process for checking with the EC Director (or other designated central office administrator) before decision is finalized.

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### What about the parents?



The slide features four photographs: top-left shows a woman with a concerned expression on a mobile phone; top-right shows a man shouting into a mobile phone; bottom-left shows three people in a meeting setting; bottom-right shows a woman smiling while on a mobile phone.

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### Duty to inform?

If the principal decides that the suspension is NOT a change in placement, then ... the principal has NO duty to conduct a Manifestation Determination Review (“MDR”) meeting or notify the parents of his/her decision.

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### When Must a Manifestation Determination Review Be Conducted?

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**When the removal is a change in placement (i.e., more than 10 days, pattern of removals, etc.):**

1. The principal **MUST** inform the parents of the decision;
2. Schedule a MDR meeting; and
3. Hold the MDR meeting within 10 school days from the date the principal decides to change the placement of the student.

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**What about LEA practice to always conduct a MDR meeting on Day 11:**

- Pros/Cons.
- If the LEA representative (i.e., Principal) doesn't believe the suspension is a change in placement, then say so at the beginning of the meeting.
  - Be sure this is reflected in the minutes.

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**Manifestation Determination Review Meeting**

**Who?**  
**When?**  
**What?**

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### Who comprises the MDR Committee?

- LEA Representative.
- Parent.
- *Relevant* members of the IEP Team.
- Per 4<sup>th</sup> Circuit decision: the LEA Representative determines the school system's members of the MDR Committee and the parents may determine who they wish to invite.

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### When is the MDR meeting held?

- Within 10 school days of the decision.
- For example:
  - The principal decides to suspend the student on October 10, 2013.
  - The MDR meeting must be held by October 24, 2013.

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### What happens at the MDR meeting?

- The MDR Committee reviews:
  - A history of the student's disability;
  - The student's IEP, BIP, etc.;
  - Formal test results;
  - Disciplinary history;
  - Behavior in class;
  - Reports from teachers;
  - Additional information from parents;
  - **Finally**, the student's involvement in the specific incident in question.

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**What an MDR meeting is**

**NOT:**

- The time to investigate the incident.
- The time to discuss whether the penalty is too harsh.

Remember:

- The decision as to whether or not the student violated the code of conduct should be made in the same way that it is made for non-disabled students.

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**What is decided at the MDR meeting?**

1. Is the conduct that the student is being disciplined for caused by or does it have a direct and substantial relationship to the student's disability?
2. Is the conduct in question the direct result of the LEA's failure to implement the IEP?

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**When does a disability "cause" a student to misbehave?**

Look at the disability → behavior:

- Student identified as:
  - disabled in speech with an articulation disorder
  - hits a teacher.

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**When does a disability “cause” a student to misbehave? (cont.):**  
 Look at the disability → behavior:

- Student identified as:
  - Autistic.
  - screams in the cafeteria.
- Student identified as:
  - Other Health Impaired due to her ADHD.
  - Disrupts class by interrupting teacher.

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**A little harder to decide:**

- Student identified as:
  - Autistic.
  - hits another student who is sitting at the lunch table eating.
- Student identified as:
  - specific learning disabled but has a diagnosis of Oppositional Defiant Disorder in his file.
  - refuses to comply with the directives of the teacher.
- Student identified as:
  - severely emotionally disabled.
  - initiates a fight in the bathroom.

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**Failure to implement the IEP:**

- Did the LEA fail to implement the IEP?
- Also, was the conduct in question the direct result of that failure?

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# The Lasting Effects of the Decision Made at the MDR Meeting

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**Conduct IS a manifestation of the disability:**

- LEA must conduct an FBA and implement a BIP or review and/or modify an existing BIP.

AND

- Student is returned to most recent placement prior to removal.

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**Conduct is NOT a manifestation of the disability:**

- Student is disciplined as if the student is not disabled.
- Student continues to receive FAPE.
- IEP Team determines the appropriate services for the student.

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**Exception 1:**

- Regardless of whether the conduct is a manifestation of the student's disability, if the conduct involves weapons, drugs, or infliction or serious bodily injury =

Removal for 45 school days.

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**Exception 2:**

If the parents and the school agree to the change of placement (e.g., to the alternative school) after a violation of the student code of conduct, then there is no disciplinary "removal" and no manifestation determination is needed.

**DOCUMENT this conversation!**

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**IDEA v. 504**

**What Is the Difference?**

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**Section 504 - Changes In Placement:**  
 A district's ability to discipline a disabled student is significantly limited if it would constitute a "significant change" in the child's placement.

"It is OCR policy that, when the exclusion of a student with a disability is permanent (expulsion), or for more than ten consecutive school days, the exclusion constitutes a **significant change in placement.**" *Greenville County Sch. Dist.*, 34 IDELR 188 (S.C. 2000).

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**Section 504 - Changes In Placement (cont.):**  
 A series of suspensions may create a **pattern** that constitutes a significant change in placement.

A change in physical location (school) is not necessarily a change in placement if there is no change in the student's educational program. *AW by Wilson v. Fairfax County School Bd.*, 372 F.3d 674 (4th Cir. 2004).

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**Section 504 - Changes In Placement (cont.):**  
 A change in placement is determined on a case-by-case basis.  
 Factors include:

- Proximity of the suspensions to one another; and
- Total amount of time excluded from school.

If a student's placement remains unchanged, a school may utilize the same disciplinary measures as for any other student.

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## Section 504 - Manifestation Determinations:

According to OCR, and similar to the IDEA, Section 504 requires a district to conduct a manifestation determination if a disciplinary action constitutes a "significant change" in a disabled child's placement. *OCR Memorandum Re: Suspension of Students with Disabilities*, 16 EHLR 491 (1989).

The requirement of a manifestation determination is not expressly stated in the Section 504 statute or regulations. OCR supports its interpretation using 34 C.F.R. § 104.35, which requires a reevaluation before any "significant change in placement."

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## Section 504 - Manifestation Determinations (cont.):

Unlike the IDEA, the Section 504 regulations do not explicitly provide procedures or requirements for conducting a manifestation determination hearing. It is clear that compliance with the IDEA regulations regarding manifestation determinations will satisfy Section 504.

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## Section 504 - Manifestation Determinations (cont.):

If it is determined that the disabled child's misconduct **is** a manifestation of the child's disability:

- the child's placement and 504 plan should be reviewed and revised as appropriate; and
- according to OCR, the child may **not** be excluded from school for more than ten (10) days.

If it is determined that the misconduct **is not** a manifestation of the child's disability, the child may be excluded from school in the same manner as similarly situated non-disabled children are excluded.

**NO SERVICES REQUIRED**

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## What if parents disagree with the decisions?

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## Parents can:

- File an OCR complaint.
- File a state complaint.
- Institute a due process action.

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## Stay Put:

- Under IDEA, if the parent challenges the decision, then the student must "stay put" in the setting decided by the LEA until:
  1. The hearing officer renders his/her decision

OR

2. The timeline for the disciplinary removal naturally expires.



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# Final Thoughts

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## Law Enforcement:

**Nothing** in the IDEA prohibits the LEA from reporting any crime to the appropriate authorities.

**Nothing** in the IDEA prohibits the SRO from intervening when necessary to ensure student safety.

**Nothing** in the IDEA allows the IEP Team to restrict law enforcement's access to disabled students.

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## Parents challenge these decisions!

A LOT!

And not just the parents who usually advocate to their children's rights

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**Timeline:**

- The timeline is expedited (i.e., 7 days).
- Seven days is not long to gather information and prepare for a hearing.
- The school system only has 7 days, but the parent has a year to plan and prepare to file.
- So . . . be prepared and gather your facts and supporting documents BEFORE the MDR meeting.

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**Homebound:**

- Don't use homebound as a way to avoid serving and disciplining disabled students.
- Homebound is appropriate ONLY if it is the least restrictive environment appropriate for that student.
- The IEP Team must meet every 30 days to revisit this same question: Is this the least restrictive appropriate environment for this student?

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**Practical Suggestions:**

- Be sure your administrators are serving as the LEA Representative in IEP meetings.
- Designate administrators in each building to make change of placement decisions.
- Conduct professional development for these administrators.
- Work with your legal counsel to draft a *guiding statement* for your administrators about what constitutes a "pattern" in your district.

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**Be cognizant of the impact of the MDR decision on:**

- Future MDR meetings.
- Administrators.

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**Divider Page**

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