

**VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES**



**DISCIPLINE OF
CHILDREN WITH DISABILITIES**

**TECHNICAL ASSISTANCE
RESOURCE DOCUMENT**

**IMPLEMENTING THE REQUIREMENTS
of the
Individuals with Disabilities Education Act
2004 Amendments and Federal Regulations
and the
*Regulations Governing Special Education Programs for
Children with Disabilities in Virginia***

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INTRODUCTION

The *Individuals with Disabilities Education Act (IDEA)*, 2004 Amendments, P.L. 108-446, was signed by President George W. Bush on December 3, 2004. The federal regulations governing special education followed in August 2006 as the *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities: Final Rule* (34 CFR Part 300 and 301) with an implementation date of October 13, 2006. The *Regulations Governing Special Education Programs for Children with Disabilities in Virginia* were issued on July 7, 2009, and re-issued on January 25, 2010.

The Virginia Department of Education (VDOE) developed a Technical Assistance Resource Document on discipline and children with disabilities in 1999. VDOE staff edited the document based on the changes in the federal and state law and regulations governing special education to produce this current resource. This document is consistent with the federal requirements found at §§ 300.530-300.537 and corresponding state requirements found at 8 VAC 20-81-160.

The purpose of this document is to assist school administrators and parents in operationalizing the law and regulations relative to discipline. Our responses are based on the federal law and regulations, guidance provided by the U.S. Department of Education's Office of Special Education Programs (OSEP), and PRACTICE TIPs. Naturally, the amount of authority and degree of deference will vary according to the source. Additionally, school personnel will want to review this document in concert with a review of the school division's policies that may supplement this document's provisions.

The law regarding discipline is based on the premise that decisions regarding disciplinary actions are made through a collaborative process. The safety and welfare of all students in Virginia's public schools is of utmost importance. This document is not intended to offer legal advice. This document is designed to provide guidance and technical assistance to school administrators, parents, and teachers as they make decisions about discipline in accordance with IDEA. Inquiries related to this document should be addressed to VDOE staff in the Office of Dispute Resolution and Administrative Services:

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ACKNOWLEDGEMENT

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GLOSSARY

Behavioral intervention plan (BIP) means a plan that utilizes positive behavioral interventions and supports to address behaviors which interfere with the learning of students with disabilities or with the learning of others or that require disciplinary action.

Business day means Monday through Friday, 12 months of the year, exclusive of federal and state holidays (unless holidays are specifically included in the designation of business days).

Calendar day means consecutive days, inclusive of Saturdays, Sundays, and officially designated holidays at the school division level. Whenever any period of time expires on a Saturday, Sunday, or school holiday, the period of time for taking such action is extended to the next day, not a Saturday, Sunday, or school holiday.

Change of placement or Change in placement: For the purposes of discipline, means:

- a removal of a student from the student's current educational placement is for more than 10 consecutive days; or
- the student is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as:
 - the length of each removal;
 - the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals;
 - the total amount of time the student is removed; or
 - the proximity of the removals to one another.

Controlled substances 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 U.S.C. 812(c)).

Dangerous weapon means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for or is readily capable of, causing death or bodily injury, except that such term does not include a pocket knife with a blade of less than three inches in length.

Free appropriate public education (FAPE) means special education and related services that:

- are provided at public expense, under public supervision and direction, and without charge;
- meet the standards of the Virginia Board of Education;
- include an appropriate preschool, elementary, middle, or secondary school education in Virginia; and
- are provided in conformity with an Individualized Education Program (IEP) that meets the requirements of the federal and state laws and regulations governing special education.

Functional behavioral assessment (FBA) means a process to determine the underlying cause or functions of a child's behavior that impede the learning of the child with a disability or the learning of the child's peers. A functional behavioral assessment may include a review of existing data or new testing data or evaluation as determined by the IEP team.

General curriculum means the curriculum that applies to students who are not disabled. The term further means the curriculum adopted by a school division, schools within the school division, or where applicable, the Virginia Department of Education, for all children from preschool through secondary school. The term relates to content of the curriculum and not to the setting in which it is taught. The term includes career and technical education.

Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or used under any other authority under that Act or under any other provisions of Federal law.

Long-term removal means suspension of a student with a disability to an alternative setting for more than 10 consecutive school days in a school year; or, when the student is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year.

Manifestation determination review (MDR) means a process to review all relevant information and the relationship between the student's disability and the behavior subject to the disciplinary action.

Pattern means separate incidents of removal which cumulate to more than 10 school days in a given school year and constitute a change of placement.

Removal means excluding the student from the student's current educational placement due to inappropriate behavior resulting in disciplinary action.

School day means any day, including a partial day, which children are in attendance at school for instructional purposes. The term has the same meaning for all students in school, including students with and without disabilities.

Separate incidents of misconduct means that the incidents are unrelated.

Serious Bodily Injury means bodily injury that involves 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. (18 USC §1365(h)(3); 34 CFR §300.530(i)(3)).

Short-term removal means suspending a student with a disability to an alternative setting for 10 school days or less in a school year. It also applies to removals when the cumulative amount is 10 school days, but not consecutive and does not constitute a pattern or change of placement.

Weapon means "dangerous weapon." See previous definition.

PREFACE

This document contains the following components:

- **KEY PROVISIONS.** These sections summarize the major requirements under the federal and state regulations governing special education. Corresponding citations are included.
- **QUESTIONS and ANSWERS.** These sections provide explanations regarding regulatory requirements and guidance from the U.S. Department of Education's Office of Special Education Programs (OSEP). OSEP's comments accompany the federal regulations (71 Fed. Reg. 2006) in its "Analysis of Comments and Changes." Matters related to discipline are found at "Discipline Procedures," pages 46713 – 46730. In this discipline technical assistance document, the OSEP's comments will be referenced as "Analysis" with the corresponding page number.
- **PRACTICE TIPS.** These sections offer suggestions on how to implement the regulation and address issues not referred to in the regulations. These tips are suggestions and not requirements.
- **CASE SCENARIOS.** These scenarios explore the application of the regulations.

Special Terminology (consistent with federal terminology)

Analysis: refers to OSEP's "Analysis of Comments and Changes"

BIP: behavioral intervention plan

FBA: functional behavioral assessment

IDEA: *Individuals with Disabilities Education Act*

IEP: individualized education program

LEA: local educational agency/school division

MDR: manifestation determination review

OSEP: U.S. Department of Education's Office of Special Education Programs

VDOE: Virginia Department of Education

Virginia Regulations: *Regulations Governing Special Education Programs for Children with Disabilities in Virginia*

PART ONE: BASIC DISCIPLINE PROVISIONS

- Themes Regarding Discipline and Students with Disabilities

Key Provisions Regarding Discipline

<h3>Themes Regarding Discipline and Students with Disabilities</h3>
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There are five themes in the federal and state regulations that guide the discipline requirements:

- All children, including children with disabilities, deserve safe, well-disciplined schools and orderly learning environments;
- Teachers and school administrators should have the tools they need to assist them in preventing misconduct and discipline problems and to address these problems, if they arise;
- There must be a balanced approach to the issue of discipline of children with disabilities that reflects the need for orderly and safe schools and the need to protect the rights of children with disabilities to a free appropriate public education;
- Appropriately developed IEPs with well-developed behavior intervention strategies decrease school discipline problems; and
- School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement is appropriate for a student with a disability who violates a code of student conduct.

Also threaded throughout the federal and state law and regulations is the governing principle that students with disabilities are entitled to the same constitutional rights as students without disabilities. These fundamental due process rights include, in part, meaningful notice of an alleged violation of law or school division's code of conduct, the opportunity for the student to give the student's account of the incident, and the opportunity to appeal the disciplinary action, which is imposed on the student. While students with disabilities also have additional protections under the IDEA, school personnel must not overlook or dismiss the student's fundamental due process rights in any administrative disciplinary action taken with the student.

Key Provisions Regarding Discipline

The following are key provisions found in the IDEA 2004, the implementing federal regulations 2006, and the Virginia Regulations 2010 impacting discipline and students with disabilities.

1. Authority for school personnel.

The IDEA 2004 and its implementing regulations added an important requirement that school personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct. [34 CFR §300.530(a); corresponding Virginia Regulations at 8 VAC 20-81-160 A.3]. The Virginia Regulations added a provision to the federal requirements to remind school personnel and parents of the importance of the IEP team addressing a child's behavioral challenges before an incident arises, leading to a disciplinary infraction. This Virginia Regulation reinforces the requirement that in the event the child's behavior impedes the child's learning or that of others, the IEP team must consider the use of positive behavioral interventions, strategies, and supports to address the behavior. The IEP team must consider either:

- developing goals and services specific to the child's behavioral needs; or
- conducting a functional behavioral assessment and determining the need for a behavioral intervention plan to address the child's behavioral needs.
[8 VAC 20-81-160 A.2]

The Virginia Regulations also added language to reinforce the understanding that in considering the unique circumstances on a case-by-case basis, school personnel may:

- review the child's IEP and any BIP, and/or consult with the child's teacher(s) to provide further guidance in considering any unique circumstances related to the incident, and/or
- convene an IEP team for this purpose.

2. New standard for manifestation determinations.

The IDEA and its implementing regulations narrowed the standard for IEP teams to apply in making manifestation determinations. In summary, the mandate now requires that the IEP team must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was:

- caused by, or had a direct and substantial relationship to, the child's disability; or
- the direct result of the LEA's failure to implement the IEP.
[34 CFR §300.530(e); corresponding Virginia Regulations at 8 VAC 20-81-160 D]

3. New provision for when a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) are required.

Previous regulations required that a FBA be conducted following a student's short-term removal of up to 10 days in a school year, regardless of whether or not the disciplinary action involved another short-term removal or long-term removal. School divisions may do FBAs at any time that it becomes necessary to address a child's behavioral challenges; however, the regulations now require that a FBA be done when the IEP team determines that a behavior was a manifestation of the child's disability. In this instance, the IEP team must either:

- conduct a FBA, unless the school division had conducted this assessment before the behavior that resulted in the long-term removal occurred, and implement a BIP for the child; or
- if a BIP already has been developed, review this plan, and modify it, as necessary, to address the behavior.

[34 CFR 300.530(f)(1); corresponding Virginia Regulations at 8 VAC 20-81-160 D.6]

4. New standard for initiating long-term removal of a child for special circumstances.

The IDEA and its implementing regulations added another standard to "special circumstances" for when school personnel may remove a student to an interim alternative educational setting for not more than 45 school days. In addition to "weapons" and "drugs," the other "special circumstance" relates to "serious bodily injury." Specifically, the regulations mandate that school personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child . . . has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a SEA or LEA.

[34 CFR §300.530(g); corresponding Virginia Regulations at 8 VAC 20-81-160 C.5]

5. Definition for "serious bodily injury."

The term "serious bodily injury" is defined in Section 1365(h)(3) of Title 18, U.S. Code, to mean a bodily injury that involves 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.

[34 CFR §300.530(i)(3); corresponding Virginia Regulations at 8 VAC 20-81-10]

6. Timelines for an expedited due process hearing.

When an expedited hearing is requested, the hearing must occur within 20 school days of the date the hearing is requested, and the hearing officer must render the decision within 10 school days after the hearing.

[34 CFR §300.532(c); corresponding Virginia Regulations at 8 VAC 20-81-160 R.1]

7. Revised standard for a basis of knowledge for children not yet eligible for special education and related services.

A LEA is deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred:

- The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
- The parent of the child has requested an evaluation of the child pursuant to requirements for evaluations; or
- The teacher of the child, or other personnel of the LEA, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.
[34 CFR §300.534; corresponding Virginia Regulations at 8 VAC 20-81-160 H.2]

8. Exception to the “basis of knowledge” standard.

A LEA is not deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to the requirements for evaluation or has refused services under the IDEA or the child has been evaluated and it was determined that the child was not a child with a disability under IDEA.

[34 CFR 300.534; corresponding Virginia Regulations at 8 VAC 20-81-160 H.3]

9. New 45-day timeline.

The IDEA and its implementing regulations changed the 45-day timeline for long-term removals related to weapons, drugs, or serious bodily injury from calendar days to school days. (See Glossary for definition of “school day.”)

[34 CFR § 300.530 g; corresponding Virginia Regulations at 8 VAC 20-81-160 C.5]

10. Inclusion in Virginia state assessment program.

Virginia Regulations now state that for short-term removals that do not constitute a pattern and for long-term removals, the school division must ensure that students with disabilities are included in the Virginia Department of Education and divisionwide assessment programs in accordance with the provisions in #4 of 8 VAC 20-81-20 (the VDOE’s responsibilities relative to ensuring that students with disabilities are included in state testing programs).

PART TWO: SHORT-TERM REMOVALS

- Patterns of removal
- In-school suspensions
- Portions of a school day
- Bus suspensions
- Services during short-term removals

PATTERNS OF REMOVAL

[The specific regulations for the following provisions are at 34 CFR §300.530 et seq.; corresponding Virginia Regulations at 8 VAC 20-81-160 et seq.]

KEY PROVISIONS

- School personnel may short-term remove a child with a disability from the child's current educational setting to an appropriate interim alternative educational setting, another setting, or suspension, to the extent those alternatives are applied to a child without disabilities.
- Additional short-term removals may apply in a school year for separate incidents of misconduct as long as the removals do not constitute a pattern.
- The LEA determines when isolated, short-term removals for unrelated instances of misconduct are considered a pattern. These removals only constitute a change in placement if the LEA determines there is a pattern.
- The LEA makes the determination, on a case-by-case basis, whether a pattern of removals constitutes a change in placement.
- School personnel may consider any unique circumstances on a case-by-case basis when deciding removal of the student for disciplinary reasons.

Q. Who determines whether or not a pattern of removal exists?

A. The LEA determines, on a case-by-case basis, whether a pattern of removals constitutes a change in placement.

In making the determination on a case-by-case basis, the Virginia Regulations stress that school personnel may wish to do this in the context of the IEP team. School personnel and the team may then review the student's IEP and any behavioral intervention plan (BIP), or consult with the child's teacher(s) to provide further guidance in considering any unique circumstances related to the incident. If the student does not have a BIP, then this may be the appropriate time to conduct a functional behavioral assessment (FBA) and develop a BIP, as necessary.

PRACTICE TIP

Input from others who are knowledgeable about the student such as the IEP team will provide a valuable resource to school administrators making these decisions. Some Virginia school divisions have adopted policies, which treat any removal for more than 10 school days as a change of placement, whether consecutive or cumulative, and whether or not a pattern exists. This means that the IEP team conducts a manifestation review which will be discussed later in this document.

- Q. How do school personnel consider “any unique circumstances” when determining removals of students with disabilities for disciplinary reasons?
- A. While not restricting or limiting what those “unique circumstances” might be, OSEP suggests that those factors might include: a student's disciplinary history, ability to understand consequences, and expression of remorse, as well as supports provided to the student prior to the violation.
[Analysis, pp. 46714-46715]
- Q. How do school personnel determine whether or not a series of short-term removals constitutes a pattern of removal equating to a change of placement?
- A. In defining a change of placement, i.e., whether a pattern exists, the regulations refer to the following factors:
- the length of the removals total more than 10 days in a school year ;
 - the student has been subjected to a series of removals that constitute a pattern—
 - because the series of removals total more than 10 school days in a school year;
 - because the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals; and
 - because additional factors such as length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another.

The school division determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.

PRACTICE TIP

In reviewing if the student's behavior is substantially similar to the student's behavior in previous incidents, school personnel are encouraged to consider "cause" (behaviors that resulted in the disciplinary removals). In reviewing "cause," school personnel may determine the relationship to the infraction to the reasons for the infraction [where the incident occurred (environment); interactions with other people; requirements of a task; or events that may have triggered these infractions]. Therefore, if the infraction, albeit individual and distinct, shares similarities (common elements) then it could be relevant in determining if a pattern exists.

School personnel should be aware that the frequency and total time of removals, even if proper, may be indicative of substantial deficiencies in the IEP warranting an IEP team meeting to review the student's IEP. In some instances, multiple short-term removals may not address or modify the student's inappropriate behavior and may, in fact, be reinforcing it.

PRACTICE TIP

As OSEP further notes, the regulations and statute do not impose "absolute limits" on the number of days that a student can be removed from the student's current placement in a school year. [Analysis, p. 46718] However, school personnel are cautioned that if the school division does not have a definition of pattern or a process to determine whether a pattern exists, it may leave the school division vulnerable to due process actions or litigation. Therefore, the safest course of action is to convene an IEP team and determine the need for conducting a manifestation determination, conducting a functional behavioral assessment (if one has not been done), and developing or reviewing a behavioral intervention plan prior to a series of short-term removals accruing unreasonably. These proactive measures will document preventive steps for processing short-term removals.

As a proactive measure, during the annual review of a student's IEP, consideration could be given to the development or reviewing of behavior intervention strategies and interventions, as appropriate. Be cautious in determining the length of time for each infraction to be removed for close to or up to 10 school days for infractions that may not warrant such time frames. Such time frames may be excessive especially if such disciplinary action is not applied consistently or not to students without disabilities.

- Q. What documentation is recommended to determine whether or not a series of short-term removals constitutes a pattern of removal equating to a change of placement (long-term removal)?
- A. It is recommended that documentation include a review of disciplinary records, who was consulted in making the decision, a review of the student's IEP which includes any BIP developed, and other educational records, and input from any other relevant sources.

PRACTICE TIP

In order to promote a truly collaborative approach to reviewing the issue of pattern, parents should be consulted in the process and informed of the decision immediately.

Q. If a pattern of removal does not exist, what services are to be provided the student with a disability starting on the 11th school day of removal?

A. School personnel determine the necessary services, if any, by consulting with the student's special education teacher and determining the extent to what services are necessary for the student to:

- continue to participate in the general education curriculum, and
- progress toward meeting the goals set out in the student's IEP.

PRACTICE TIP

Document, document, document!! Documentation assists in preventing misunderstandings. Include a written summary of the basis for the decision and information used to arrive at this decision. A sample form includes the suggested provisions:

DISCIPLINE RECORD SHORT-TERM REMOVAL	
Student's Name: John Doe	DOB: 10-13-97
School: J.M. Smith Middle School	Grade: 8
Disability: LD	
Incident: Used vulgar language in math class	Date of Incident: 1-15-10
Factors reviewed:	
___ total number of previous	___ discipline records
___ suspensions to date: <u>3</u> (total 10 days)	___ current IEP
___ BIP	___ other educational records:
Persons consulted: <u>guidance counselor; special educ. teacher; math, science, and language arts teachers where incidents have occurred ; basketball coach; John's mother</u>	
Disciplinary action: 3 days out-of-school suspension	
Summary of decision: No pattern exists; no relationship between the three previous, separate infractions. The previous infractions involved tardiness, refusal to follow the bus driver's direction, and flicking a pencil at another student. There is no relationship between these infractions which have occurred over a space of 5 school months. Mr. Jones, guidance counselor, and Ms. Smith, special education teacher, will monitor John's current enrollment in the conflict resolution skills program suggested by the basketball coach.	

PRACTICE TIP

In each instance of short-term removal, consideration should be given to providing the student the opportunity to stay current with classes during the removal. The "how to" is determined on

a case-by-case basis. This consideration helps the student not to “fall behind” in classes, which could create more problems. School personnel may also wish to consult with the regular education teacher in determining the necessary services and extent to what services are necessary for the student in this instance.

Reminder: Recall that students with disabilities must be treated consistently with students without disabilities; i.e., if a student without a disability is allowed to make up class work/assignments during the removal, the student with a disability must be permitted the same opportunity.

CASE SCENARIO

From the end of September 2009 through January 2010, Peter, who is 12 years old and has a learning disability, emotional disability, and ADHD, received 5 suspensions totaling 22 days. Specifically, at the end of September, he was suspended two days for excessive demerits; late October, six days for uncontrollable behavior and throwing things at the teacher; mid-November, for five days for using profanity with the teacher; early December, for four days for profanity, destruction of a light switch, and classroom disruption; and finally, mid-January for five days for profanity, running from the teacher, and leaving school without permission.

In addition, Peter received two in-school suspensions totaling six days during that time period. Four IEP meetings were held during the period from October to February. Manifestation was not considered and no changes were made in Peter’s IEP. The principal believes that these disciplinary incidents are unrelated and thus, do not constitute a pattern. Do you agree?

GUIDANCE

In considering whether a pattern exists in Peter’s case, a review of his disciplinary record needs to be conducted. The following table shows a visual display of his disciplinary record.

Peter’s Disciplinary Record

Date	# of days suspended	Type of suspension	Reason	Wks. since last action
09/21/09	2	Out of school	Excessive demerits	
10/05/09	(3)	(In-school)	Refusal to follow teacher directions	2 wks
10/26/09	6	Out of school	Uncontrollable behavior Throwing things at teacher	3 wks
11/09/09	(3)	(In-school)	Breaking a peer’s pencils & tearing apart the peer’s notebook	2 wks

11/16/09	5	Out of school	Profanity directed at teacher	1 wk
12/07/09	4	Out of school	Profanity Destruction of a light switch Classroom disruption	3 wks
01/11/10	5	Out of school	Profanity Running from teacher Leaving school without permission	5 wks

A close look at the disciplinary record to determine whether a pattern exists shows the following:

1. Length of each removal - The length of the removals shows a range of 2 days to 6 days for any particular removal. By itself, this would not appear to constitute a pattern.
2. Total amount of time the student is removed - The total amount of time Peter has been removed from school has been 22 days. This appears to be a significant amount of time. (During the six additional days which Peter spent in in-school suspension (ISS), he was allowed to continue participation in the special education services according to his IEP, while being assigned to ISS for all other portions of the day to continue the assigned work in his general education classes, and to join his nondisabled peers for lunch, music, and physical education.)

In addition, this particular school division has an attendance policy, which does not allow a student to pass his/her classes with unexcused absences in excess of 10 days. Since days of suspension are considered unexcused absences, it appears that Peter, even though he had been provided the opportunity to continue his classwork, will not be permitted to pass his classes. By the attendance policy standards, Peter has been removed from school for a significant amount of time.

3. Proximity of removals to one another - Peter has been suspended seven times in the first five months of school. Beginning with his first suspension in September through December, Peter has received either an in-school or out-of-school suspension about every two to three weeks, accounting for 17 days out of school. This may be considered significant.
4. Reasons for removals - The disciplinary record suggests that Peter's behaviors are oppositional (refusing to follow teacher direction, running from the teacher, leaving school without permission, class disruption) and aggressive (directing profanity at the teacher, throwing things at the teacher, breaking a peer's pencils, tearing apart a notebook, destroying a light switch). Although there are differences in the specific behaviors, the incidents do not appear to be separate, isolated incidents, but appear to be repeated oppositional and aggressive acts of misconduct.

5. Other possible factors to consider in determining a pattern:

Days of behavioral infractions - A careful review of the dates of the disciplinary actions shows that six out of the seven incidents of misconduct occurred on a Monday. Only one incident occurred on a day other than a Monday.

Location - Peter's misconduct occurred in different locations.

Time of day - The behavioral infractions occurred at different times of the day.

6. Functional behavioral assessment and behavioral intervention plan:

Although the IEP team met four times during this time period, there is no evidence that a functional behavioral assessment was conducted and that a behavioral intervention plan was developed to address the problematic behaviors. In addition, no changes were made in Peter's IEP during this time. If the IEP team had conducted the behavioral assessment, they might have recognized that Peter's misbehaviors occurred primarily on Mondays. They could have implemented a plan in an effort to be preventive, i.e., to help Peter learn replacement behaviors for some of his oppositional or aggressive behaviors, which were occurring after a weekend, with positive behaviors at the beginning of the week. In addition, given the frequency of the misconduct, changes in his IEP (e.g., changes in his schedule, adding behavior goals addressing replacement behaviors, etc.) should have been put into place in an effort to prevent further behavioral infractions.

CONCLUSION

It appears in Peter's case that a pattern can be established in the series of removals from school. Factors, which support a pattern in this case, are 1) total amount of time, 2) proximity of the removals to one another, 3) reasons for the removals, and 4) the days of the infractions. In addition, the IEP team had not considered the need for a functional behavioral assessment and behavioral intervention plan, or alternatively, developing behavioral strategies in Peter's IEP in an effort to prevent Peter's removal from school.

Rather than focusing on whether a pattern exists which constitutes a change of placement, it is essential for school personnel to remember that the requirements of the IDEA regulations support that a student's IEP be designed to assist the student to successfully gain access to education. If behavior is a barrier to the student's successful participation in school programs, then it is incumbent upon the IEP team to determine what goals or services or strategies can be provided to address the behavior and to assist the student to eliminate the behavior as much as possible. If it becomes necessary for a hearing officer or judge to decide whether or not a pattern existed, it would be appropriate to first consider the efforts on the part of the IEP team to reasonably calculate the needed services, strategies, and/or IEP goals to help the student change inappropriate behaviors into appropriate behaviors.

IN-SCHOOL SUSPENSIONS

Q. How should in-school suspensions (ISS) be counted?

A. The regulations are silent regarding ISS. However, OSEP advises that ISS would not count in the days of suspension as long as the student:

- is afforded the opportunity to continue to appropriately participate in the general educational curriculum;
- continues to receive the services specified on the student's IEP; and
- continues to participate with nondisabled children to the extent the student would have in the current placement. [Analysis, p. 46715]

PRACTICE TIP

If ISS, as an alternative in-school instructional setting, is provided in the student's IEP as a behavioral intervention strategy, presumably based on the student's educational needs and not on administrative reasons, then ISS would not count as a suspension day.

If a student's IEP includes behavioral strategies to address a particular behavior, the appropriate response to that behavior almost always would be to use the behavioral strategy in the IEP rather than to implement a disciplinary suspension. We caution LEAs, however, that if short suspensions included in the IEP are implemented in a manner that denies the student "access to the ability to participate in the general educational program," the student would be denied FAPE. This would also be true for ISS.

CASE SCENARIO

Dahriva is 16 years old with a specific learning disability and hearing impairment. She receives 2 hours of instruction from the teacher of learning disabilities for language arts each day and 1 hour of speech therapy each week. Dahriva has previously been suspended for up to 10 school days during this school year. The assistant principal has directed Dahriva to ISS for three days because of class disruption. The ISS paraprofessional directs Dahriva to do her homework and complete her assigned classwork. Dahriva never leaves ISS. Two other students with disabilities are also assigned to ISS that week. As per school policy, lunch is brought to the ISS room. Dahriva's mother complains that Dahriva is not receiving FAPE, has been disciplined improperly, and threatens to sue the assistant principal. Do the three days in ISS count as days of removal? Has Dahriva been receiving FAPE in the ISS?

GUIDANCE

No, Dahriva had not been receiving FAPE in the ISS, and yes, the three days count as three days of removal. Dahriva was not allowed access to the special education services listed in her IEP. She was denied access to the special instruction in language arts and she was not

allowed to attend her speech therapy session. In addition, she was not able to participate with non-disabled peers as listed in her IEP. The only way an in-school suspension (ISS) would not count toward days of removal would be if:

- the student is allowed access to the special education and related services listed in the IEP;
- the student has the opportunity to continue to participate in the general educational curriculum; and
- the student can continue to participate with peers without disabilities to the same extent the student would have in the current placement.

In Dahriva's case, the school could have 1) allowed her to receive 2 hours of special instruction in language arts, either in the setting where she normally would receive it, or in the ISS from the teacher or an aide (only if the aide was under the supervision of the special education teacher); and 2) allowed her to receive the speech therapy services from the speech language pathologist. In addition, if students without disabilities had also been assigned to the ISS (due to misconduct necessitating the assignment) at the same time Dahriva was there, she would be participating with peers without disabilities. As long as the three criteria (see above) are met, Dahriva would have continued to receive FAPE.

PORTIONS OF A SCHOOL DAY

Q. How are portions of a school day counted for purposes of suspension?

A. OSEP states in its analysis and comments to the federal regulations that portions of the day must be counted. Portions of a school day that a child had been suspended may be considered in determining whether there is a pattern of removals as defined in §300.536. [Analysis, p. 46715] (Section 300.536 pertains to determination of pattern.)

PRACTICE TIP

In assisting states with data requirements, OSEP, through "Report of Children with Disabilities Subject to Disciplinary Removal" (Table 5), directs that,

"When calculating cumulative days of in- and out-of-school suspension, States must include all in- and out- of-school suspensions of a half school day in length and longer. States that are unable to record data on half-day basis should report all half-day suspensions as whole day suspensions."¹

We recommend that less than half a day is counted as a half day.

¹ Questions or need for additional assistance in calculating portions of the school day per OSEP's Table 5 should be directed to VDOE's Office of Financial and Data Services.

CASE SCENARIO

Rosa is 16 years old with autism (described in her IEP as high functioning Asperger Syndrome). She attends four classes for students with learning disabilities and three regular education classes. During one of her special education classes, Rosa begins to act out to the point where the special education teacher is not able to get her to calm down. The behavior is unusual for Rosa and the teacher sends her to the guidance counselor. Rosa is with the guidance counselor for an hour. Is this considered an interruption of services, which should count as a removal?

GUIDANCE

In Rosa's case, it appears that this should not be considered a removal (suspension). Rosa has had no behavioral difficulties requiring special education intervention. This type of behavior is unusual for Rosa. She is usually compliant and follows the teacher's directions when she needs to be redirected to task. Based on the teacher's experience in working with Rosa, it appears that she needs time to calm down before she can be redirected to task. It is common practice in this school for teachers to send to the guidance counselor students who appear to be upset about something to the point where they cannot continue to perform satisfactorily in class. This practice generally does not apply to those students who repeatedly disrupt class and require other specific behavioral interventions. The teacher followed the same practice in Rosa's case, which is in place under similar circumstances for any other student in the school.

This situation does not need to be considered a disciplinary removal. This strategy of sending students to the guidance counselor under certain circumstances (one of which is described above) applies to all students in the school, regardless of disability. As such, Rosa is allowed the same opportunity as any other student in the school to meet with the guidance counselor under similar circumstances.

If the situation was different and Rosa had ongoing behavioral problems, with behavioral goals in the IEP, and if the teacher removed Rosa from class because of behaviors addressed in the IEP, then removing her from class might well be considered a disciplinary removal, unless this behavioral strategy was written into her IEP.

BUS SUSPENSIONS

- Q. Should bus suspensions be counted in consideration of short-/long-term removals?
- A. Yes. In Virginia, students with disabilities are entitled to be transported to and from the school/class and home at no cost in order to enable the student to obtain the benefit of educational programs and opportunities. [*Code of Virginia* §22.1-221] If alternative arrangements are not made for the student with a disability who has been suspended from the bus to receive educational services, then that bus suspension counts in the number of removal days. Additionally, OSEP notes that school divisions should consider whether the behavior on the bus should be addressed in the student's IEP. [Analysis, p. 46715]

PRACTICE TIP

If the student has a behavioral intervention plan or behavioral intervention strategies in the IEP, the bus driver and aide need to be advised of any considerations regarding the student's behavior while being transported.

CASE SCENARIO

Philippe is a 13-year-old student with speech language impairment. Philippe has not received any disciplinary action this school year. Philippe and the bus driver exchange words about Philippe's seat on the bus and Philippe calls the bus driver several names. Philippe has not exhibited any of these behaviors in the classroom or any other school environment. On October 1, 2009, Philippe's parents receive a note from the building principal stating that: Philippe is being suspended for 10 school days; that Philippe has been expelled from riding the school bus for the remainder of the school year; and that alternative transportation in the form of special transportation will be provided Philippe at the end of this 10-day suspension for the remainder of the school year.

Philippe's parents state that Philippe's IEP team should convene to do a functional behavioral assessment, develop a behavioral intervention plan, and conduct a manifestation determination review, because expulsion as a change of placement triggers these requirements. Further, they object to Philippe having special transportation. Philippe's IEP indicates that he is to ride the "general education" bus.

GUIDANCE

For OSEP, whether the bus removal would count as a day of removal would depend on whether the bus transportation is part of the student's IEP. Recall that in Virginia, students with disabilities are entitled to transportation to and from the school/class and home at no cost in order to enable the student the benefit of educational programs.

OSEP's guidance on this matter directs that a bus suspension be treated as a suspension under the special education regulations governing discipline unless the school division provides the bus services in some other way. [Analysis, p. 46715] Thus in this case, Philippe is still able to access his educational services and regulations governing change in placement do not apply.

This notwithstanding, Philippe's parents may request that the IEP team convene to review the transportation issue and the parents' concern relative to the mode of transportation. If the issue remains unresolved, the parents may request mediation or a due process hearing to review the matter. Again, following OSEP's previous caution, if the behavior on the bus is similar to behavior in a classroom or other school environment, then the IEP team should review the matter to determine whether or not bus behavior should be addressed in the IEP or behavioral intervention plan for the student.

It also should be noted that the principal created a procedural error under the regulations governing special education when he unilaterally changed Philippe's IEP from "general" to "special" transportation, independent of the IEP team.

Lastly, recall the importance of being cautious in determining the length of time for each infraction. To be removed from riding the school bus for the entire year for a first time disciplinary action appears excessive. While mindful of zero tolerance standards, school administrators and parents will benefit from reviewing the disciplinary situation very carefully.

SERVICES DURING SHORT-TERM REMOVALS
(following the initial 10 school day removal period)

- Q. What services must be provided the student with the disability during any short-term removal that does not constitute a change of placement; i.e., that does not exceed 10 consecutive school days; and, that is not a series of removals that constitute a pattern?
- A. The regulations governing special education hold that during the first 10 school days in a school year a student with a disability is removed from school for disciplinary reasons, services do not have to be provided, unless the school provides educational services to students without disabilities who are so removed. [34 CFR §300.530(d)(2)] However, services may be provided.

A later section in this document addresses functional behavioral assessments and behavioral intervention plans. For our purposes here, it is important to note that during subsequent removals of 10 school days or less, school personnel, in consultation with the student's special education teacher, determine the extent to which services are necessary for the student to:

- continue to participate in the general educational curriculum; and
- progress toward meeting the goals set out in the student's IEP.

PRACTICE TIP

While the law and regulations have expanded the authority of school personnel to protect student and staff safety, school personnel need to be cautious in determining what services will be provided the student during the suspension period. Although the law provides school administrators the option of excluding services during short-term removals, the U.S. Department of Education cautions that eliminating services to students with disabilities is not an effective means of punishment. The federal position holds that there are three benefits to providing educational services in these instances:

- it increases the student's chances of becoming a productive and law abiding member of society;
- it ensures that the student does not fall behind in course work; and
- it offers the opportunity for the student to acquire skills necessary to modify behavior upon return to school.

[Reference: *Letter to Spiropulos*, 30 IDELR 709, OSEP 1998]

The second benefit is of particular importance as it is consistent with the current objective of the Virginia Board of Education and Virginia's public schools to increase student achievement.

A student with a disability who is not provided any services during disciplinary periods may easily fall behind and jeopardize the student's opportunity to meet Virginia's *Standards of Learning*. Recall that students with disabilities must be treated in the same manner as students without disabilities, i.e., if a student without a disability is allowed to make up work during the removal, the student with a disability must be permitted to do the same.

Q. If the student with a disability is achieving academically and the disciplinary period is a short interruption (e.g., for one school day), are services required to be provided the student to (1) continue to participate in the general educational curriculum; and/or (2) progress toward meeting the student's IEP goals and objectives? At what point does exclusion from educational services constitute a denial of FAPE?

A. The situation has to be reviewed on a case-by-case basis.

(1) Beginning on the eleventh cumulative day in a school year that a child with a disability is removed from the child's current placement, and for any subsequent removals, educational services must be provided to the extent required in §300.530(d) [Analysis, p. 46717]

(2) Since determining the provision of IEP services requires a different level of decision making (school personnel in consult with the student's special education teacher), as different from an IEP team, school personnel should assess the student's progress and the impact of the interruption.

PRACTICE TIP

The longer the disciplinary period, the higher the probability of school personnel increasing their vulnerability if no services are provided the student.

Q. May home-based instruction be considered an alternative setting for a short-term removal?

A. As part of the continuum of services, home-based instruction may be an alternative educational setting where services are delivered in the home setting for either short-term or long-term removal.

PART THREE: LONG-TERM REMOVALS

- General provisions
- Special circumstances – 45 days
- Other long-term removal considerations
- Notice requirements

- Functional Behavioral Assessment/Behavioral Intervention Plan
- Manifestation determination review
- Protections for students not eligible for special education and related services who violate the school’s code of conduct [Basis of knowledge]
- Expedited due process hearings
- Referral and action by law enforcement and judicial authorities

GENERAL PROVISIONS

The purpose of long-term removal as a disciplinary measure is to ensure that schools are safe and conducive to learning for all persons and to give school personnel and parents the opportunity to determine what is appropriate for the student. The referenced regulatory requirements noted in the following segments are based on the federal regulations at 34 CFR §300.530 et seq.; corresponding Virginia Regulations at 8 VAC 20-81-160 et seq.

KEY PROVISIONS

- Long-term removals constitute a change of placement when there are more than 10 consecutive school days or cumulative school days which constitute a pattern.
- School personnel may place a student with a disability in an interim alternative educational setting for 45 school days for situations involving the student at school, on school premises, or at school functions under the jurisdiction of the school division or the Virginia Department of Education for the following special circumstances:

Weapons: carrying or possessing a weapon.

Drugs: knowingly possessing or using illegal drugs, or selling or soliciting the sale of a controlled substance.

Serious Bodily Injury: if the student inflicted serious bodily injury upon another person.

- The federal regulations, and consequently the Virginia Regulations, changed the 45-day removal from “calendar” to “school” days.
- A change of placement requires a manifestation review.

- If the team determines that there is a manifestation, the school division must conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP), unless one already exists. If a BIP already has been developed, the plan must be reviewed and modified, as necessary.
- An expedited due process hearing may be requested to resolve any dispute relative to special education disciplinary situations involving a change of placement or manifestation determination; e.g., if the parent and school personnel disagree over the decision to remove the student for more than 10 consecutive school days or regarding the issue of whether or not a pattern exists for cumulative removals).
- No later than the decision date in which school personnel contemplate that there will be a long-term suspension, notice of this decision and procedural safeguards must be provided the parents.

**SPECIAL CIRCUMSTANCES
45 DAY REMOVALS**

(involving weapons, drugs, and/or serious bodily injury)

- Q. In disciplinary situations involving weapons, drugs, and/or serious bodily injury, may school personnel assign the student with a disability to an interim alternative education setting for any period of time before the IEP team convenes?
- A. In situations involving weapons, drugs, and/or serious bodily injury, school personnel may assign the student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the student’s disability.

PRACTICE TIP

Document consultation with the student’s special education case manager or lead teacher as to the appropriate educational setting for the student. The special education teacher has direct, day-to-day interaction with the student and is in a good position to offer insight and recommendations.

- Q. What recourse does the school division have if the parent disagrees with the school that the student poses a safety risk, and weapons or drugs are not involved?
- A. The school division has two options to resolve the dispute. The LEA may request an expedited hearing or seek a court ordered injunction. [Note: A later section in this document contains information on expedited due process hearings. Additionally, both OSEP and the courts have allowed school divisions to go directly to court on this issue and by-pass the special education due process hearing system.]

If the matter is resolved through an expedited due process hearing:

- A hearing officer may order a change of placement to an appropriate interim alternative education setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the student is substantially likely to result in injury to the student or others.
- A hearing officer may return the student to the placement from which the student was removed if the hearing officer determines that the removal was a violation of the regulations, or that the student's behavior was a manifestation of the student's disability.
- If safety remains a concern of the school personnel after the 45 school day period, the school division may seek an expedited hearing to obtain additional days based upon an alleged danger, unless the parent and school division agree otherwise through the IEP process, or a court order extends the interim alternative educational setting. School divisions are permitted to request such hearings as many times as deemed necessary.

Q. What recourse do parents have if they disagree with the school's decision to place the student in an interim alternative educational setting, and/or the services in that setting?

A. The parent has the right to request a due process hearing. Mediation is also available to parent and school divisions to resolve discipline disputes.

PRACTICE TIP

Recall that expedited hearings or court injunctions are options necessary only if the parent disagrees with the disciplinary action. If the parent agrees with the disciplinary action, a request for an expedited hearing or court injunction is unnecessary.

Q. Is it required for the 45 day removal that manifestation determination be proven?

A. No. The regulations require that manifestation determination be conducted, but the "behavior-to-disability" link is not required for determination of the 45 day removal.

Q. Is the school division required to return a student to the student's current placement from an interim alternative educational setting before the expiration of the 45 days if the IEP team determines the student's behavior was a manifestation of the student's disability?

A. No, the LEA is not required to do so, although they have the option of returning the student before the expiration of the 45 days.

PRACTICE TIP

The school division's consulting with its school board attorney might be appropriate to determine whether court action is recommended when the safety of the students and staff are in jeopardy.

OTHER LONG-TERM REMOVAL CONSIDERATIONS

- Q. What services need to be provided the student during long-term removals?
- A. The IEP team determines the services needed for a student who has been long-termed removed, so as to enable the student to:
- continue to participate in the general educational curriculum, although in another setting;
 - continue to receive services and modifications described in the student's current IEP which will enable the student to progress toward meeting the IEP goals; and
 - receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.
- Q. What does it mean to continue to participate in the general educational curriculum?
- A. The extent and type of instructional services to be provided would depend on:
- the length of the removal
 - the extent to which the student has been removed previously
 - the student's educational needs and goals

In order to serve the student during a long-term removal, alternative instructional techniques, program modules, TV links (including distance learning), could be used to enable the student to participate in the general educational curriculum. To enable the student to progress in the general curriculum, school personnel must ensure that the student will have the opportunity to avoid falling behind.

- Q. What does it mean to continue to progress toward meeting the IEP goals?
- A. The same factors under "continue to participate in the general educational curriculum" apply to this provision as well:
- the length of removal;
 - the extent of previous removals; and,
 - the student's educational needs and goals

For example, a student with learning disabilities, who is receiving extensive special education services and who is placed in a 45-day interim alternative educational setting, will likely need far more services than a student with LD who is receiving minimal resource assistance and is performing on grade level.

Q. What does it mean to address the behavior violation so that it does not recur?

A. On the surface, the regulatory language appears absolute. To date, OSEP has not elaborated on this point. However, the legal challenges to alternative placements indicate that hearing officers are focusing on behavior and the school division's efforts to address the student's behavioral problems.² These decisions suggest that the school division is obligated to document its efforts or attempts to prevent the inappropriate behavior from recurring. Appropriate services that may be considered include, for example:

- counseling
- social skills training
- adaptive behavior technique training (i.e., teaching of replacement skills designed not to have the behavior recur)
- conflict management skills
- peer mediation skills

NOTICE REQUIREMENTS

Q. What notice requirements must be followed by school personnel to inform parents of disciplinary action relative to long-term removals?

A. When a student with a disability is suspended for an incident for which long-term removal will be recommended, the following must be provided to the parent:

- Written notification that a long-term removal may/or will be contemplated/recommended. This "notice" may simply be the principal's notification form listing the infraction, the type of suspension, and advising the parent that additional action relative to the long-term removal may be considered, for example, by the school board.³
- A copy of the procedural safeguards.
- The regulation also states that this notice must be issued not later than the date of the decision to suspend that may trigger a long-term removal. Again, the notification form principals use to advise parents of the disciplinary infraction and action would meet this requirement.
- Parents must also receive notice of the IEP team meeting that will conduct a manifestation determination review. The IEP notice requirements may be folded into the above referenced notice.

² Early legal challenges include such due process hearing decisions from other states: Freeport Public Schools, 26 IDELR 1251, SEA ME 1997; Oregon City School District, 28 IDELR 96, SEA OR 1998. More current cases include a due process decision and two court cases: In re: Student with a Disability, 54 IDELR 209, SEA Wisconsin 2010; Shelton v. Maya Angelou Public Charter School, U.S. District Court of Columbia, 51 IDELR 31, 2008; Neosho R-V Sch. Dis. v. Clark, U.S. Court of Appeals, 8th Circuit, 38 IDELR 61, 2003.

³ In its 1999 *Analysis*, OSEP said that the notice relative to this disciplinary provision is "...a limited exception to the requirement to provide prior written notice." *Analysis*, p. 12624. OSEP's 2006 *Analysis* does not address this issue; however, VDOE considers the 1999 language as still applicable.

Reminder: Recall also that the *Code of Virginia* provisions regarding proper notice for all students applies also to students with disabilities (§22.1-277 et. seq.). These provisions are consistent with the reminder in the federal special education regulations and statute that fundamental due process rights, including meaningful notice of the violation, must be provided a student with a disability.

FUNCTIONAL BEHAVIORAL ASSESSMENT and BEHAVIORAL INTERVENTION PLANS

VDOE has posted a guidance document on understanding and developing FBAs and BIPs: “Functional Behavioral Assessments, Behavioral Intervention Plans, and Positive Intervention and Supports: An Essential Part of Effective Schoolwide Discipline in Virginia”

http://www.doe.virginia.gov/support/student_conduct/functional_behavioral_assessment.pdf

KEY PROVISIONS

- A functional behavioral assessment (FBA) and behavioral intervention plan (BIP) may be done at any time for a student with a disability if the IEP team determines that the student’s behavior impedes the student’s learning or that of others. The purpose of the FBA is to examine the student’s behavior and determine the need then for a behavioral intervention plan (BIP) that addresses the student’s behavioral needs.
 - A FBA and BIP must be done if the IEP team determines the student’s behavior was a manifestation of the student’s disability, unless the school division had conducted a FBA before the disciplinary incident and implemented a BIP for the student. If the student already has a BIP, then the IEP team must review the BIP and determine if it was implemented and/or needs revision.
 - A FBA may include a review of existing data or new testing data or evaluation as determined by the IEP team.
 - If the IEP team determines that the FBA will include new testing data or evaluation, then the parent is entitled to an independent educational evaluation (IEE) in accordance with the regulations if the parent disagrees with the evaluation or a component of the evaluation obtained by the school division.
- Q. Is there any regulatory language regarding necessary components of the FBA or BIP?
- A. No. VDOE, however, has posted a technical assistance resource document that provides comprehensive information on how to conduct a FBA and develop a BIP: [http://www.doe.virginia.gov/support/student_conduct/functional_behavioral_assessment .pdf](http://www.doe.virginia.gov/support/student_conduct/functional_behavioral_assessment.pdf)
- Q. If the student has not incurred any disciplinary action but the student’s behavior suggests that perhaps the student would benefit from a BIP, can the school conduct the FBA?

- A. Schools are encouraged to initiate proactive measures to address the student's educational needs. The IEP team may develop behavior intervention strategies in the student's IEP, or they may conduct a FBA to determine whether a BIP is necessary.
- Q. If the IEP team determines that the behaviors are interfering with the student's learning, or that of others, must the IEP address the student's behavior?
- A. The regulations governing special education, specifically relating to IEP requirements, mandate that one of the factors that the IEP team must consider in developing the student's IEP is whether the student's behavior impedes the student's learning or that of others, and if so, consider the use of positive behavioral intervention, strategies, and supports to address the behavior. This means that goals, and as necessary, benchmarks or short-term objectives, as well as services, modifications, and accommodations may be included in the student's IEP that specifically provide the student with the necessary support to address the student's behavioral needs. The IEP team may also consider the need to conduct a FBA and develop a BIP for this purpose.

CASE SCENARIO

Cho-Ling is a 14-year-old student who is OHI and receives 3 hours each week of LD resource services for educational deficits in reading and math. Cho-Ling has never exhibited any behavioral issues warranting a FBA and BIP or behavioral intervention strategies in his IEP. The student is involved in a serious incident justifying a long-term removal. The IEP team determines that this is an isolated incident that most likely will never be repeated by Cho-Ling. Cho-Ling's teachers further say that he has no behavioral issues in their classrooms and indeed, has a history of exemplary behavior. The team concludes that the behavior in this incident is not connected to his disability. Is the school required to develop a BIP for Cho-Ling?

GUIDANCE

No. Depending on the specific facts of the behavioral incident, however, the IEP team may identify strategies and supports needed for Cho-Ling for a short-term duration to ensure that he properly understands the effect and consequences of his unwise choices.

- Q. Is parental consent required for the FBA?
- A. If the FBA will involve an evaluation in addition to a review of existing information, then parental consent needs to be obtained. In other cases, the FBA may simply be a review of existing data, in which consent is not required.

PRACTICE TIP

Since FBA is a team problem-solving process that requires the IEP team, it stands to reason that the parent, as part of the IEP team, would be available to give informed and voluntary consent to conduct the FBA.

Q. When is a FBA considered an “evaluation” in accordance with the definition of evaluation in the Virginia Regulations?

A. As noted previously, the FBA process may be a review of existing data, review of the student’s educational record, and input from teachers, student, parents and service providers. The IEP team may move beyond this point and determine the need for an evaluation of the student, requiring new testing data, new data collections. When that “evaluation” stage occurs, additional procedural protections are triggered; such as parent consent for an evaluation(s) and the provisions for an independent educational evaluation (IEE) if the parent disagrees with the school division’s evaluation.

“Evaluation” means procedures used to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs to benefit educationally. (8 VAC 20-81-10). This includes an observation of the child. (8 VAC 20-81-80 d.3).

Q. When a parent asks for an IEE, the school division must ensure that the evaluator is qualified to do the IEE. In the case of a FBA wherein the process includes an evaluation, as noted above, who is qualified to be a FBA evaluator?

A. Recall that the qualifications of the IEE evaluator must be the same as the criteria that the LEA uses when it initiates an evaluation. Therefore, who is “qualified” to do a FBA IEE will depend on the qualifications of the LEA evaluator who conducted the part of the FBA with which the parent disagrees.

Q. Which components are needed for the FBA IEE?

A. The answer is dependent on which FBA component(s) the parent disagrees with. The LEA may ask the parent to identify the FBA component with which the parent disagrees. However, the LEA may not require the parent to explain the reasons for the parent’s objecting to the school division’s evaluation, and the LEA may not unreasonably delay either providing the IEE or initiating a due process hearing to defend its evaluation. (8 VAC 20-81-170 B.2.d). If the parent declines to explain, the LEA must offer an IEE which addresses all components of the LEA’s evaluation. If the school division denies the parent’s request to such an IEE, the LEA must initiate due process hearing to show that its evaluation is appropriate.

Q. When must a BIP be reviewed?

A. The BIP must be reviewed:

- At least annually or sooner, if the student’s parents and/or school personnel are concerned about the student’s behavior; if there has been a life altering event in the student’s life that may impact the student’s behavior; if there has been an evaluation or report from the student’s doctors/counselors/service providers that suggests that the student’s BIP may require revision.
- When the IEP team convenes to consider manifestation determination to ensure that the BIP has been implemented or determine that revisions are needed to the plan.

- Q. Does the IEP team that reviews the BIP include the parent?
- A. Yes, the parent is a member of the IEP team.
- Q. Are general education teachers and other school personnel who work with the student required to know about the student's BIP?
- A. School divisions must ensure that a student's BIP is accessible to each regular education teacher, special education teacher, related service providers, and other service providers who are responsible for the BIP's implementation.
- each teacher and provider must be informed of his/her specific responsibilities related to implementing the student's BIP; and
 - any specific accommodations, modifications, and supports identified in the student's BIP.

Additionally, the regulations direct that it may be appropriate to identify in the IEP support services for personnel to enable them to implement the IEP which could also include the BIP.

- Q. Is it good practice to include other agencies in the development of BIPs?
- A. Individuals other than the immediate IEP team members who have knowledge of the student and/or the student's disability may add significant input to the development, review, or revision of a student's BIP. Persons such as the student's therapist or mental health counselor may have recommendations that prove very valuable to the team. Their addition to the IEP team may be considered under the discretion of the parent or school division personnel as noted for any IEP meeting regarding the IEP team composition.
- Q. Is the BIP a part of the student's IEP?
- A. The regulations that speak to discipline do not state specifically that the BIP must be a part of the student's IEP. However, the regulations addressing IEP requirements state that:
- If . . . , the IEP determines that a child needs a particular device or service, (including intervention, accommodation, or other program modification) in order for the child to receive a free appropriate public education, the IEP team shall include a statement to that effect in the child's IEP. [34 CFR § 300.324(b)(2); corresponding Virginia Regulations at 8 VAC 20-81-110 F.4]

Whenever the issue of BIP is discussed in the regulations or analysis, it is always in the context of the IEP team's responsibility; for example, when the IEP team determines manifestation for a student, the IEP team must conduct a FBA and develop a BIP for the student, or if a BIP already exists, then the team must review it and revise it as necessary. [Analysis, pp. 46719 et seq.] Therefore, it is understandable that the BIP would be attached and considered to be part of the student's IEP.

MANIFESTATION DETERMINATION REVIEW

VDOE has a posted guidance document on issues related to manifestation determination review, "Guidance Document on Manifestation Determination, New Requirements" that school personnel and parents may find helpful in understanding the regulatory provisions and what forms to use to document this process.

http://www.doe.virginia.gov/support/student_conduct/manifestation_determination.pdf

KEY PROVISIONS

- Manifestation determination is required if the school division is contemplating a removal that constitutes a change in placement for a student with a disability who has violated a code of student conduct of the school division that applies to all students.
- The school division, the parents, and relevant members of the student's IEP team, as determined by the parent and the school division, are the IEP team to conduct the manifestation determination review.
- The review must be scheduled immediately, but no later than 10 school days after the decision is made to take the action to consider long-term removal.
- The manifestation determination review is a review of the relationship between the student's disability and the behavior in question.

Q. When might a manifestation determination review take place outside the regulatory mandates?

A. A manifestation determination review is not required if the removal is short-term and not considered to be a pattern. However, a school may consider a manifestation determination review for any student who receives any short-term removal but which is not considered a pattern.

OSEP reaffirmed this point in a response to an inquiry involving a student who was removed for 5 days and no pattern of exclusion existed. (*Letter to Owoh*, 110 LRP 17266, OSEP 2009). Therefore, school personnel have the option of initiating manifestation determination at times other than required by the regulations.

Q. Who serves on the IEP team for manifestation determination reviews?

A. The IEP team must be duly composed according to the regulations governing the IEP team composition. This includes the regular education teacher. Manifestation decisions have been overturned when a regular education teacher was not on this IEP team. [see Searcy Public Schools, 30 IDELR 825, SEA AR 1999]

PRACTICE TIP

We recommend that the IEP team consider those persons who may be working directly with the student but perhaps not in the context of providing educational services; for example, a mental health counselor or probation officer. It may include someone with expertise in behavioral strategies and supports, or who has knowledge of one specific area of the student's disability; for example, a specialist in Tourette's Syndrome, deafness or other disability (should this identifier be included in the description of the student's disability), or someone who has a special knowledge of the student in certain environments; for example, the student's/family's church minister.

Q. What is the IEP team required to consider in arriving at its decision regarding manifestation determination?

A. The IEP team is required to use the following process.

- The team must review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parent(s).
- In reviewing whether the conduct is a manifestation of the student's disability, the IEP team must determine:
 - If the conduct in question was caused by, or had a direct and substantial relationship to the student's disability; or
 - If the conduct in question was the direct result of the school division's failure to implement the student's IEP.
- If the team determines that the school division failed to implement the student's IEP, the school division must take immediate steps to remedy those deficiencies.
- If the IEP team determines that the student's behavior was a manifestation of the student's disability:
 - The student returns to the placement from which the student was removed, unless the parent and the school division agree to a change in placement as part of the modification of the BIP. The exception is when the student is removed under the 45-day provisions which in that case, school personnel may keep the student in the interim alternative educational setting until the 45-day time period expires.
 - Conduct a FBA, unless the school division had conducted a FBA before the behavior that resulted in the change in placement occurred, and implement a BIP for the student.
 - If a BIP already has been developed, review this plan, and modify it, as necessary, to address the student's behavior.
- If the IEP team determines that the student's behavior was not a manifestation of the student's disability, school personnel may apply the relevant disciplinary procedures to students with disabilities in the same manner and for the same duration as the procedures would be applied to students without disabilities, except that services as per the student's IEP must be provided to the student.

PRACTICE TIP

Refer to VDOE's posted *Guidance Document on Manifestation Determination, New Requirements*, referenced earlier, for model forms to assist the team in documenting its discussions relative to the above factors.

- Q. How does the IEP team determine if the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability? What considerations should the IEP include in determining if the conduct in question was the direct result of the LEA's failure to implement the IEP?
- A. The following is excerpted from VDOE's posted "Guidance Document on Manifestation Determination, New Requirements." (See earlier reference to the posted site.)

A comprehensive problem-solving review to identify why the misconduct occurred should guide IEP teams to successful manifestation determinations. Factors that should be considered include environmental factors, the child's school program, home factors and the child's mental, physical and developmental challenges. Other important factors IEP teams may consider include the following:

- The child's disciplinary history (total number of suspensions, the proximity of suspensions and the length of each suspension).
- The type of misconduct in relation to the child's discipline history (isolated instance vs. repeated; whether the child's behavior is substantially similar to behavior in previous and current incident).
- The factors contributing to the misconduct such as unique circumstances, information from observers of the incident, environmental factors, educational program, home factors and the child's mental, physical and developmental challenges.
- Was the student code of conduct provided to the family?
- Whether the behavior was dangerous, likely to result in injury or inflicted "serious bodily injury" on another person.
- The effectiveness of current behavioral strategies to prevent similar misbehavior and reinforce desirable behavior in the child's school (schoolwide discipline).
- The effectiveness of the child's Behavioral Intervention Plan (BIP) in relationship to the misconduct and whether the BIP is based on research-based practices.
- In the absence of a BIP, the administration of a Functional Behavioral Assessment.
- Whether more information is needed (FBA or other types of evaluation).
- How the area of the IEP not implemented relates to functional skills, social competency and behavior of the child and the misconduct observed.
- How the area of the IEP not implemented relates to service, goals, positive behavior supports or the BIP.

The IEP team must determine the impact of the failure to implement the student's IEP on the misconduct. It means first determining what was not implemented and then determining its impact on the student's behavior.

Example: A 16-year-old with learning disabilities (LD) brings a gun to school. This student's IEP designates LD services in language arts two hours per week, and one hour of speech therapy once a month. The MDR team learns that the student has not received speech therapy for two months. In this scenario, it is questionable whether the misconduct was the direct result of the LEA's interruption of the speech therapy services. However, take this same student and say that she is receiving counseling 4 hours per week for issues related to self-esteem and impulse control, and the IEP team learns that there has been an interruption of this related service for a month. In this scenario, there is a stronger nexus between the failure to implement the service and the student's behavior. [VDOE *Guidance Document on Manifestation Determination, New Requirements*, pp. 4-6]

Note: OSEP reminds us in their *Analysis* that decisions regarding the manifestation determination must be made on a case-by-case basis, noting that the IDEA recognizes that a student with a disability may display disruptive behaviors characteristic of the student's disability and the student should not be punished for behaviors that are a result of the student's disability. [Analysis, p. 46720]. OSEP further clarifies:

The intent of Congress in developing [the IDEA section on discipline] was that, in determining that a child's conduct was a manifestation of his or her disability, it must be determined that "the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, and was not an attenuated association, such as low self-esteem, to the child's disability," (Note 237-245 of the Conference Report, p. 225).

- Q. If the student's behavior was **not** a manifestation of disability, what is the school division's responsibility?
- A. As noted above, discipline procedures applicable to students without disabilities shall be applied except that the student with a disability is entitled to a free appropriate public education. The IEP team determines the extent to which services are necessary to enable the student to:
- continue to participate in the general educational curriculum, and
 - continue to receive those services and modifications including those described in the student's IEP that will enable the student to progress toward meeting the IEP goals.

PRACTICE TIP

The school should document what special education and disciplinary records have been forwarded to the local school board or superintendent's designees who handle discipline hearings.

School division policies and procedures on discipline would benefit from ensuring that the local school board or superintendent's designees receive the appropriate special education and disciplinary records in a timely fashion.

Written notices to parents regarding long-term removals may contain a provision that the local school board or superintendent's designees have reviewed special education and discipline records prior to rendering a final decision.

School divisions may want to develop a policy for reviewing the school division's code of conduct with students with disabilities in a manner that enables them to understand the requirements.

- Q. If the student's behavior **was** a manifestation of the student's disability, what is the school division's responsibility?
- A. Students with disabilities may not be disciplined for behavior that is a manifestation of their disability if that disciplinary action constitutes a change of placement. However, revisions may be made regarding IEP services and/or placement by the IEP team addressing the behavior. Other disciplinary actions that do not constitute removals and do not affect the provision of FAPE may be imposed, such as loss of school privileges.

PROTECTIONS FOR STUDENTS NOT YET ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES WHO VIOLATE THE SCHOOL'S CODE OF CONDUCT

BASIS OF KNOWLEDGE REQUIREMENTS

KEY PROVISIONS

- A student not yet eligible for special education and related services may assert protections if the school division had knowledge that the student had a disability before the behavior that precipitated the disciplinary action occurred.
- If the request for evaluation is made during the time in which the student is subject to discipline, the evaluation must be conducted in an expedited manner.
- The "basis of knowledge" provisions do not apply if the parent refused to allow the school division to previously evaluate the student, or refused services, or if the student has been evaluated and determined ineligible for special education and related services.

- Q. What basis in the law is there for this provision?
- A. This provision as found as early as the IDEA 1997 and carried forward in IDEA 2004 and in the federal regulations reflects the continued position that students who have not been identified under IDEA but assert that they have a disability should have the same protections as students who have been determined eligible for special education and related services. The basic premise is that if the school division had knowledge that the student should have been identified as disabled, the student is entitled to these protections. The regulations more clearly define this provision so that the students simply not seek to use IDEA as a way to circumvent or delay disciplinary actions.

Q. What factors are considered in determining whether or not the school division “had knowledge?”

A. The “basis of knowledge” is established when one or more of the following elements exist:

(1) the parent has expressed concern in writing to supervisory or administrative personnel or a teacher of the student that the student is in need of special education and related services;

(2) the parent has requested an evaluation of the student to be determined eligible for special education and related services; or

(3) the student’s teacher, or school personnel, has expressed specific concerns about a pattern of behavior demonstrated by the student to the special education director of the school division, or to other supervisory personnel.

PRACTICE TIP

If the parent has verbally requested an evaluation of the student to be determined eligible for special education and related services, school personnel should document the parent’s request in writing for both the school division and the parent.

Q. What is meant by “expedited?”

A. The regulations do not define “expedited” or provide timelines. OSEP notes that no specific timeline is included in the regulations because:

What may be required to conduct an evaluation will vary widely depending on the nature and extent of a child’s suspected disability and the amount of additional information that would be necessary to make an eligibility determination. However . . . “expedited,” which means that an evaluation should be conducted in a shorter period of time than a typical evaluation.

[Analysis, p. 46728]

Q. What is considered the student’s placement pending the results of the expedited evaluation?

A. While the evaluation is being conducted, the student remains (i.e., stay-put) in the placement determined by school authorities. Such placement can include suspension or expulsion without educational services.

PRACTICE TIP

Certain situations may clearly support the need for some type of services during completion of the expedited evaluation. Continued educational services in an alternative setting would demonstrate the school division’s good faith effort to address the situation especially if the student is later deemed eligible for special education and related services.

- Q. What happens if there is no “basis of knowledge?”
- A. The student may receive the same disciplinary measures as applied to students without disabilities.
- Q. What steps must be taken if the student is found eligible for special education and related services?
- A. The school division must serve the student appropriately.
- An IEP must be developed and implemented.
 - An IEP team may convene for manifestation determination.
 - If it is determined that the student’s behavior is a manifestation, the student must be returned to an appropriate nondisciplinary educational setting.
 - If no manifestation determination is found, the student may be subject to the same disciplinary actions as applied to nondisabled students, provided FAPE follows the student.
- Q. Would “basis of knowledge” apply to a child receiving early intervening services?
- A. OSEP advises that an LEA is not considered to have a basis of knowledge just because the child is receiving early intervening services. However, if a parent or a teacher of the child receiving early intervening services expresses a concern, as noted above, that a child may need special education and related services, the “basis of knowledge” requirements are triggered. [Analysis, p. 46727].
- Q. Can a parent appeal the “basis of knowledge” decision?
- A. Yes. A parent may request a due process hearing to resolve this matter in addition to seeking mediation as a resolution.

<p>EXPEDITED DUE PROCESS HEARINGS</p>
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KEY PROVISIONS

- If the student’s parent disagrees with the determination that a student’s disability was not a manifestation of the student’s disability or with any discipline decision regarding placement, the parent may request a due process hearing.
- For disciplinary purposes, the hearing is expedited.
- The local school division may seek an expedited due process hearing if it is seeking an interim alternative educational setting based on safety/dangerousness when drugs/weapons are not involved.

- During the pendency of the expedited hearing process, the student remains (“stay put”) in the disciplinary setting until the hearing officer issues the decision or the removal time expires, whichever occurs first, unless the parent and school division agree otherwise.

Q. What does “expedited” mean in this instance?

A. The expedited hearing must occur within 20 school days of the date the request for the hearing is filed with the school division and the Virginia Department of Education. The school division will obtain the name of a special education hearing officer from a list maintained by the Virginia Supreme Court. The hearing officer must issue his or her decision within 10 school days after the hearing.

The regulations also require that the school division convene a resolution meeting with the parent within 7 days of receiving the request for a hearing. The parents and school division may agree in writing to waive the resolution meeting, or agree to use mediation. The due process hearing proceeds unless the matter has been resolved to the satisfaction of both parents and school division within 15 days of the receipt of the request for the hearing.

The Virginia Department of Education has posted a technical assistance document for parents, and other interested consumers, on understanding dispute resolution options, including due process hearings. “Parents’ Guide to Special Education Dispute Resolution”:

http://www.doe.virginia.gov/special_ed/resolving_disputes/parents_guide_dispute_resolution.pdf

Q. What may a hearing officer determine in such a case?

A. In making the determination, the hearing officer may:

- return the student to the placement from which the child was removed if the hearing officer determines that the removal was a violation of regulations, or that the student’s behavior was a manifestation of the student disability; or
- order a change of placement of the student 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 the student is substantially likely to result in injury to the student or others.

Q. Can mediation be used as an option to resolve a discipline dispute?

A. As with other disputes, both parties have the option to consider mediation as an alternative to resolving the dispute.

Mediation is at no cost to the parents or school personnel. VDOE maintains a list of mediators who are trained in mediation and special education. Information regarding VDOE’s mediation services is available at:

http://www.doe.virginia.gov/special_ed/resolving_disputes/mediation/index.shtml

- Q. May parent or school division appeal the hearing officer's decision?
- A. Decisions in expedited due process hearings are appealable following the procedures set forth in the state regulations governing special education.

REFERRAL TO AND ACTION BY LAW ENFORCEMENT AND JUDICIAL AUTHORITIES

KEY PROVISIONS

- A local school division is not prohibited from reporting a crime committed by a student with a disability to appropriate authorities.
 - To prevent state law enforcement and judicial authorities from exercising their responsibilities regarding the application of Federal and State law to crimes committed by a student with a disability.
 - In reporting a crime committed by a student with a disability, the school division must ensure that copies of the special education and disciplinary records are transmitted for consideration by the appropriate authorities to whom it reports the crime.
- Q. Is parental consent required prior to transmission of the student's special education and disciplinary records?
- A. According to the U.S. Department of Education's Family Policy Compliance Office, the Family Education Rights and Privacy Act (FERPA) requires prior written consent of the parent (or student aged 18 or over) before disclosure of the records unless:
- the school division is presented with a lawfully issued subpoena or court order and the school division makes a reasonable attempt to notify the parent of the order/subpoena;
 - the situation involves an emergency and knowledge of the information is necessary to protect the health or safety of the students or other individuals;
 - discipline is pursuant to a state statute concerning the juvenile justice system given certain protections are present related to 34 Code of Federal Regulations 99.31(a)(5) and 99.38.[Analysis, p. 46728]
- Q. Given the large volume of some students' records, is it necessary to transmit the entire special education and disciplinary record?
- A. The statute and regulations are silent as to what would be considered "relevant records" in this instance; however, as guidance, unless a subpoena or court order specifies differently, the school division may wish to transmit a statement of disciplinary action, including a description of:
- the behavior requiring disciplinary action;
 - the disciplinary action taken;

- relevant information regarding the safety of the student or others;
- the student's IEP; and
- a statement that identifies the location of the student's educational records.

Q. To whom should the records be transmitted?

A. School personnel should transmit the records to the agency to whom they report the crime.

Q. What happens if authorities refuse to receive the records?

A. School personnel should document their attempts to transmit the records. School personnel may want to send a letter to the authorities referencing:

- the school division's responsibilities under IDEA;
- a summary of the records being transmitted; and
- the name of the school administrator who serves as a contact person.

School personnel may also want to review with the school board attorney any other steps that could/should be taken in this matter.

Q. May school officials press charges against a student with a disability when the school division has reported a crime by that student?

A. The federal statute and regulations are silent on this issue. School officials will want to be cautious about exercising their responsibilities in a discriminatory manner. However, officials, in their individual capacity or the local school board, are not prohibited from pressing charges in these instances.

PRACTICE TIP

School personnel should also refer to the local school board's policy regarding pressing charges related to all students.

PART FOUR: DISCIPLINE OF STUDENTS WITH DISABILITIES UNDER SECTION 504

For the application of discipline requirements to students with disabilities who are served under a 504 Plan, please refer to Section 504 of the Rehabilitation Act of 1975, as amended. Section 504 regulations parallel several of IDEA's requirements regarding discipline, but the regulations also differ with IDEA in several respects.

Since the purpose of this technical assistance document is to focus on IDEA requirements only, questions and issues related to implementation of 504 requirements should be reviewed with one's legal counsel, and/or with the Office for Civil Rights, Washington, D.C. Metro Office at (202) 208-2545.

The Virginia Department of Education has posted a technical assistance resource document regarding 504 requirements. "Section 504: Keys to Implementation in Virginia's Schools": http://www.doe.virginia.gov/special_ed/tech_asst_prof_dev/section_504_implementation_va.pdf