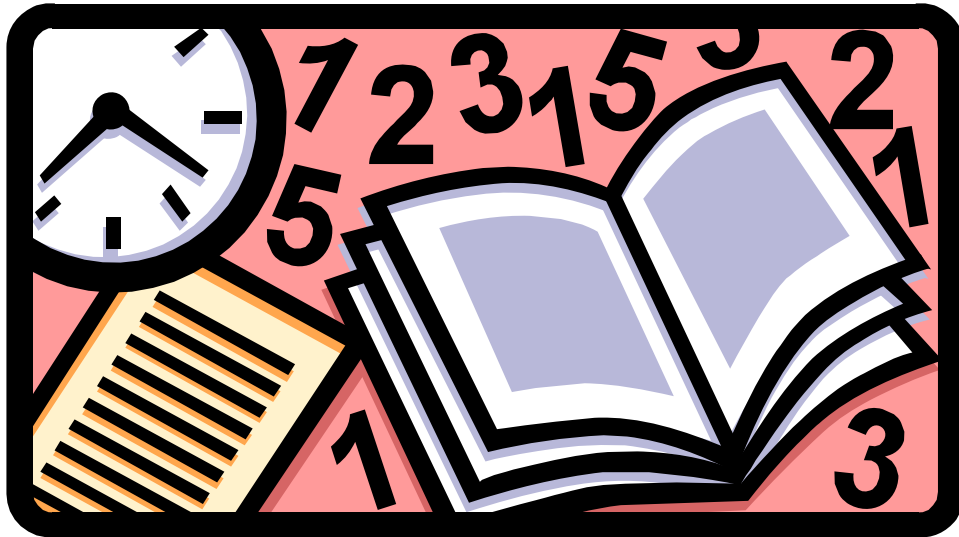


STUDENT DISCIPLINE

A Technical Assistance Manual
For Students with Disabilities



New Mexico Public Education Department
300 Don Gaspar
Santa Fe, New Mexico 87501-2786

www.ped.state.nm.us

April 2008

The State of New Mexico

Technical Assistance Manual: Student Discipline *For Students with Disabilities* April 2008

Governor
Bill Richardson

Office of the Secretary of Education
Dr. Veronica Garcia, Secretary of Education
Denise Koscielniak, State Director of Special Education
Sue Gronewold, Deputy Director of Special Education

New Mexico Public Education Commission
Eugene E. Gant, Las Cruces *Millie Pogna*, Albuquerque
Aileen Garcia, Santa Fe *Dennis J. Roch*, Tucumcari
M. Andrew Garrison, Albuquerque *Catherine M. Smith*, Mimbres
Mavis B. Price, Thoreau
Kathryn Krivitzky, Los Ranchos de Albuquerque

The Office of the Secretary of Education would like to acknowledge the following individuals for their assistance in this project:

Elizabeth J. Church, Esq., Author

John Copenhaver and Staff, Mountain Plains Regional Resource Center, an affiliate of the Center for Persons with Disabilities, a University Affiliated Program at Utah State University.

The contents of this document were developed under a grant from the U.S. Department of Education. However, the contents do not necessarily represent the policy of the U.S. Department of Education, and the reader should not assume endorsement by the Federal Government.

TABLE OF CONTENTS

<u>TOPIC</u>	<u>PAGE</u>
Overview	1
Introduction	3
<ul style="list-style-type: none">▪ <i>Are students with disabilities exempt from discipline?</i>▪ <i>Why are students who qualify for receipt of special education services treated differently when it comes to discipline?</i>▪ <i>What are some key terms used in the laws governing discipline?</i>▪ <i>How are students with disabilities disciplined differently?</i>▪ <i>What do these different legal requirements mean to administrators, teachers, parents, and students?</i>▪ <i>Who is involved in the discipline of students with disabilities?</i>▪ <i>When do various individuals become involved and how is problematic behavior addressed?</i>▪ <i>Where may a student with disabilities be placed for disciplinary purposes?</i>	
Putting the Puzzle Together—Application of the Law	10
<ul style="list-style-type: none">▪ <i>Where are applicable state and federal requirements found?</i>▪ <i>What kinds of conduct are covered?</i>▪ <i>What are the key concepts behind applicable laws?</i>▪ <i>What about students who have 504 plans?</i>	
Step-by-Step Application of the Law	12
<ul style="list-style-type: none">▪ <i>Determine Whether or Not the Student Qualifies for Receipt of Special Education Services</i>▪ <i>Check the IEP</i>▪ <i>Conduct an Informal Administrative Conference</i>▪ <i>Determine Whether Disciplinary Action is Warranted and, if so, What Disciplinary Action will be Taken</i>▪ <i>Notify the Parents</i>▪ <i>When Parents Request an Expedited Evaluation For a Student Who Has Not Yet Been Identified as a Student with a Disability</i>▪ <i>Determine Whether or Not the IEP Team Needs to Meet</i>	

Step-by-Step Application of the Law (*continued*)**17**

- *Count the Days—The "10-Day Rule"*
- *Short-Term Suspensions*
- *Determine What Educational Services will be Provided to the Student*
- *When a Student has been Removed for More than 10 Cumulative School Days in a School Year—Provide Educational Services*
- *Watch for a "Change of Placement"*
- *When a Removal of More than 10 Days DOES NOT Qualify as a "Change of Placement"—Provide Services*
- *When a Removal of More than 10 Days DOES Qualify as a Change of Placement: Provide the Parents with Notice and Prepare for a Manifestation Determination Review (MDR)*
- *Conduct a Manifestation Determination Review*
- *Parent Notice At the Conclusion of the Manifestation Determination Review*
- *When the Team Determines that the Behavior IS a Manifestation of the Student's Disability*
- *When the Team Determines that the Behavior IS NOT a Manifestation of the Student's Disability—Apply Disciplinary Measure(s), Conduct IEP Team Meeting to Determine Services, and Provide FAPE*
- *When Parents Challenge the Disciplinary Decision and/or Manifestation Determination Review*
- *Initiation of Long-Term Suspension or Expulsion Proceedings*
- *Provide Services as Determined by the IEP Team when the Student is on Long-Term Suspension or Expulsion*
- *As Appropriate, Provide the Student with an FBA and Behavioral Intervention Services/Modifications*
- *The Student Returns to School After Suspension is Complete and the IEP Team Meets*
- *Exceptions to the Rule—Special Circumstances: Drugs, Weapons, Serious Bodily Injury, and Dangerousness*
 - A. *Weapons*
 - B. *Drugs*
 - C. *Serious Bodily Injury*

TOPIC

PAGE

D. <i>Procedures for Special Circumstances Removals</i>	
E. <i>Dangerousness (Substantial Likelihood of Injury to Self or Others)</i>	
▪ <i>When the 45-Day IAES Placement Ends and the Student Continues to be Dangerous</i>	
▪ <i>Involving Law Enforcement Authorities</i>	
Appendix A	55
▪ <i>Definitions of Terms</i>	
▪ <i>Resources</i>	
Appendix B—Forms	61
▪ <i>Discipline Removal Log</i>	
▪ <i>Manifestation Determination Review</i>	
▪ <i>Parent Notice (Short-Term Suspension)</i>	
▪ <i>Parent Notice (Long-Term Suspension/Expulsion)</i>	
Appendix C—Checklists	72
▪ <i>Discipline Checklist – A (General Misconduct and Alcohol-Related Offenses)</i>	
▪ <i>Discipline Checklist – B (Special Circumstances: Drug, Weapon, or Serious Bodily Injury)</i>	
▪ <i>Discipline Checklist – C (Removal for Dangerousness)</i>	
Appendix D—Flowcharts	84
➤ <i>Discipline Flowchart – A (General Misconduct and Alcohol-Related Offenses)</i>	
➤ <i>Discipline Flowchart – B (Special Circumstances: Drugs, Weapons, or Serious Bodily Injury)</i>	
➤ <i>Discipline Flowchart – C (Removal for Dangerousness)</i>	

Student Discipline *For Students with Disabilities*

Overview

The process of disciplining a student who receives special education services involves the intersection of two areas of a school:

- The **administrator** who is responsible for discipline. New Mexico rules refer to this person as the “administrative authority.”¹ School districts assign different administrators this responsibility, and the term can include school security officers, to the extent their authority is established by local school board policies. Most often, the assistant principal or principal is charged with maintaining order and determining discipline. Throughout this manual, administrators responsible for school discipline are referred to as “school official(s).”
- The **special education department**, including teachers and administrators who have been assigned specific responsibilities within the special education curriculum. Individualized Education Program (IEP) teams have numerous responsibilities with regard to the discipline of students who receive special education services. IEP teams are composed of teachers, the student, the parents, some administrators, and related service providers such as counselors and social workers, physical therapists, speech and occupational therapists.

Special educators are familiar with different behavioral considerations, including how some disabilities may impact a student’s ability to adhere to a school’s discipline policies. Special educators are also knowledgeable about alternative means of behavioral management, and they typically seek to implement these techniques with their students. Administrators, on the other hand, do not usually have direct knowledge of behavior management concepts as they are applied in the context of special education. The laws that apply to the discipline of students with disabilities assign each group—special educators and administrators—specific responsibilities, and require that the two groups work together.

Every year, the Special Education Bureau of the New Mexico Public Education Department (NMPED) receives state-level complaints and requests for due process hearings based upon allegations that school districts (including charter schools) have not properly applied or implemented laws governing the discipline of students with disabilities. These complaints highlight the need for increased awareness on the part of all school personnel, students and parents, of the practical steps for implementation of federal and state laws.

Furthermore, in 2004 Congress made changes to the **Individuals with Disabilities Education Act (IDEA)**. That law, which became effective July 1, 2005, altered some procedures applicable to the discipline of students with disabilities. The NMPED

¹ See Subsection A of 6.11.2.7 NMAC (2007)—Definitions, “Administrative authority.”

continues to receive complaints that indicate some schools have not yet revised their discipline forms to include required changes.

Revised **federal regulations**, which provide additional details concerning the law applicable to discipline matters for students with disabilities became effective October 13, 2006.

The State of New Mexico publishes an Administrative Code that includes **state regulations (or rules)** governing the provision of educational and related services to students with disabilities, including applicable discipline procedures. The State Rules were revised to comply with the new federal requirements, and they are found in the New Mexico Administrative Code (NMAC) at sections 6.31.2.1 through 6.31.2.14 and 6.11.2.1 through 6.11.2.12. The new state rules became effective June 29, 2007.

For more information about where to find IDEA, the federal regulations, and the state rules, see the section below entitled *“Where are applicable state and federal requirements found?”*

! The federal Office of Special Education Programs (OSEP) finalized a set of federal regulations that provide needed clarification concerning how the IDEA 2004 should be implemented. These regulations (often referred to as “implementing regulations”), are found at 34 CFR Sections 300.1 through 300.718 and became effective October 13, 2006.

The regulations include extensive **“Analysis and Comment”** from OSEP. OSEP’s comments can provide helpful additional information concerning some of the practical aspects of applying the regulations. The comments also often expand on concepts included in the regulatory language, thus providing readers with additional clues concerning interpretation of the regulations.

In summary, educators, administrators, and parents should look to the following laws and regulations/rules for assistance in learning how to proceed with discipline of students with disabilities:

- The IDEA 2004 (20 USC Section 1415, Procedural Safeguards)
- The federal Department of Education’s regulations, 34 CFR Part 300 (2006)
- The New Mexico state rules (New Mexico Administrative Code, Sections 6.11.2.1 through 6.11.2.12 and 6.31.2.1 to 6.31.2.14)

For more discussion of applicable laws, see the section below entitled *“Application of the Law in General.”*



STEP BY STEP: This manual is designed to provide a clear description of relevant laws, changes in the law, and a **step-by-step application** of those laws. Footnotes provide the reader with citation to applicable federal and state regulations

and to other sources of authority or guidance. Appendices include practical tools such as forms for parent notification, manifestation determination reviews, a removal log, flowcharts, checklists, definitions of relevant terms, and a compendium of resources.

Introduction

Are students with disabilities exempt from discipline?

Students with disabilities are not immune from school disciplinary processes, nor are they entitled to remain in a particular educational program when their behavior substantially impairs the education of other students in the program.² What discipline process may be applied to a student with a disability depends upon whether or not the behavior in question is a weapon or drug offense, whether the student has inflicted serious bodily harm on another person, whether maintaining the student in his or her placement is substantially likely to result in injury to the student or others, and whether or not the behavior in question is a manifestation of the student's disability.

With the exception of some short-term suspensions, students with disabilities are disciplined differently from students without disabilities in that:

- after 10 cumulative school days of removal from school in a school year, students with disabilities must continue to receive educational services even while on suspension or expulsion,³ and
- for long-term suspensions and expulsions, the IEP team determines what services the student will receive while on suspension.⁴

Why are students who qualify for receipt of special education services treated differently when it comes to discipline?

In 1975, when Congress enacted the predecessor to the IDEA, more than one-half of the students with disabilities in the United States did not receive appropriate educational services.⁵ One million children with disabilities were completely excluded from public education, and disciplinary measures were often misused to exclude these students. In 1988, the United States Supreme Court decided that a student with a disability could not be unilaterally removed from school for more than 10 school days for misconduct that arose from the student's disability.⁶ Laws governing the discipline

² Subsection G of 6.11.2.10 NMAC (2007)—Enforcing rules of conduct, Discipline of students with disabilities.

³IDEA 2004, 20 USC Sec. 1415(k)(1)(D)—Placement in alternative educational setting, Services; and 34 CFR Sec. 300.530(d)(4) (2006)—Authority of school personnel, Services.

⁴ IDEA 2004, 20 USC Sec. 1415(k)(2)—Placement in alternative educational setting, Determination of setting; 34 CFR Sec. 300.531 (2006)—Determination of setting; and Subsection F of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Determination of setting.

⁵ See, for example, *Letter to Hayworth*, 102 LRP 9208 (OSEP 2000).

⁶See *Honig v. Doe*, 484 U.S. 305 (1988).

of students with disabilities are designed to protect students' rights to receipt of a Free Appropriate Public Education (FAPE), while at the same time providing school officials with the means to discipline students and maintain a safe school environment for all students and staff.

One of the reasons Congress modified IDEA in 2004 was to provide for a uniform and fair way of disciplining all students—those with and those without disabilities.⁷ Congress sought to permit school officials the authority to preserve order and safety while at the same time clarifying the IEP team's role in the process.

What are some key terms used in the laws governing discipline?

Appendix A includes definitions of relevant terms. While other terms are discussed later in the context of the disciplinary process, some vital concepts are defined at this juncture:

- **Free Appropriate Public Education (FAPE):** special education and related services that are provided at public expense and without charge, under public supervision and direction, that are provided in conformity with an IEP, and which meet all applicable state rules and standards.⁸ In the context of disciplinary placements, services must enable the student to:
 - participate in the general curriculum, although in another setting, AND
 - progress toward meeting the goals set out in his or her IEPAs appropriate, the student must also receive a functional behavioral assessment and behavioral intervention services and modifications designed to address the behavior so that it does not recur.⁹
- **In-School Suspension (ISS):** suspension of a student from one or more regular classes while at the same time requiring the student to spend that class time in a designated area at the same school or elsewhere¹⁰
- **Short-term suspension:** any term of suspension that falls short of the definition of a "long-term suspension." The state rules also define a "temporary suspension" as the removal of a student from school for a specified period of 10 school days or less, after a rudimentary hearing.¹¹
- **Long-term suspension:** removal of a student from school for a specified time exceeding either 10 school days or any lesser period as defined by a local school board¹²

⁷ See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at pages 46714-46715.

⁸ See 34 CFR Secs. 300.17, 300.101 (2006)—Free appropriate public education; and Subsection B (6) of 6.31.2.7 NMAC (2007)—Definitions.

⁹See IDEA 2004, 20 USC Sec. 1415(k)(1)(D)(ii)—Placement in alternative educational setting, Services; and 34 CFR Sec. 300.530(d)(1)(ii) (2006)—Authority of school personnel, Services.

¹⁰See Subsection K of 6.11.2.7 NMAC (2007)—Definitions.

¹¹Subsection V of 6.11.2.7 NMAC (2007)—Definitions.

¹² See Subsection M of 6.11.2.7 NMAC (2007)—Definitions.

- **Expulsion:** removal of a student from school either permanently or for an indefinite time exceeding 10 school days or a locally established lesser period¹³
- **Interim Alternative Educational Setting (IAES):** a setting determined by the IEP team and one which is selected so as to enable the student to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in the student’s IEP. As appropriate, the IAES must include a functional behavioral assessment and behavioral services and modifications designed to address the problem behavior so that it does not recur.¹⁴
- **Functional Behavioral Assessment (FBA):** use of a variety of techniques and strategies to diagnose the causes of and identify interventions likely to be effective in addressing problem behaviors¹⁵
- **Behavioral Intervention Plan (BIP):** a written plan that includes positive behavioral interventions, strategies and supports to be used in addressing behavior that impedes a student’s learning or that of others. If appropriate, BIPs are designed by the IEP team after an FBA has been conducted.¹⁶
- **Manifestation Determination Review (MDR):** an evaluation of the relationship, if any, between the student’s misconduct and his or her disability. The MDR is conducted by the district, the student’s parents, and relevant members of the IEP team.¹⁷

Throughout this manual, the individuals designated by the school as the primary persons responsible for maintenance of order and school discipline—the persons on the front line when it comes to discipline and reports of misconduct—are referred to as “school official(s).”

How are students with disabilities disciplined differently?

Regulations provide specific procedural protections to students who receive special education services. For example, laws limit the number of school days a student may be removed from school without consideration of the relationship, if any, between a student’s behavior and his or her disability. With limited exception, school districts must provide students with disabilities who have been removed from school with some

¹³ See Subsection G of 6.11.2.7 NMAC (2007)—Definitions.

¹⁴ See IDEA 2004, 20 USC Sec. 1415(k)(1)(D)—Placement in alternative educational setting, Services; and 34 CFR Sec. 300.530(d)—Authority of school personnel, Services.

¹⁵For more information on FBAs, see the NMPED *Technical Assistance Manual: Addressing Student Behavior, A Guide for Educators*. The publication is available on the NMPED’s Web site, located at www.ped.state.nm.us.

¹⁶For more information on BIPs, see the NMPED *Technical Assistance Manual: Addressing Student Behavior, A Guide for Educators*. The publication is available on the NMPED’s Web site, located at www.ped.state.nm.us.

¹⁷See IDEA 2004, 20 USC Sec. 1415(k)(1)(E)—Placement in alternative educational setting, Manifestation determination; 34 CFR Sec. 300.530(e) (2006)—Authority of school personnel, Manifestation determination; Subsection C of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Manifestation determination.

level of educational services. The student's IEP team works hand in hand with the administration in the discipline of the student, and careful consideration is given to whether or not the student's behavior has been properly addressed or whether additional measures, short of suspension from school, must first be employed.

What do these different legal requirements mean to administrators, teachers, parents and students?

These additional legal requirements mean that staff and families have the opportunity to address behavior before it reaches the point where suspension or expulsion is considered the only option. Regulations require that IEP teams carefully consider behavior and its impact on the student's learning and that of his or her classmates; IEP teams must discuss what interventions might prove helpful in modifying undesirable behavior. Procedural protections included in the regulations ensure that all staff, including administrative staff not typically involved in addressing disabilities and their behavioral implications, give careful consideration to how effectively an IEP or BIP has been designed, and if an IEP or BIP has been adequately implemented and regularly reviewed. Procedural protections also ensure that a student with a disability who has been removed from school on more than a short-term basis continues to receive educational services as determined by the IEP team.

Who is involved in the discipline of students with disabilities?

Individuals who may be involved at different stages in the process include:

- the school official responsible for discipline
- the student
- the student's parent(s)
- the student's IEP team
- the student's MDR team
- law enforcement
- attorneys or advocates for the school district, the student, and his or her parent(s)

When do various individuals become involved and how is problematic behavior addressed?

Ideally, a **student's IEP team**, including the student and parent(s), is involved long before any disciplinary action is contemplated or necessary. Before misconduct is called to the attention of school officials, the team should be aware of any change in the student's behavior that impedes learning, including, for example, excessive absences or declining grades. Appropriate, positive interventions designed by staff with the necessary knowledge and expertise may diminish or completely eliminate the need for disciplinary measures.

Preferred methods for addressing problem behavior include FBAs and BIPs. If those interventions prove ineffective, the IEP team should consider re-evaluating and revising the BIP, incorporating more supports and services in the student's placement. It is always preferable to address problem behaviors through educational rather than disciplinary measures. The team should consider a more restrictive placement only

when behavior continues to impede learning and when efforts to address the behavior through less restrictive measures have failed.

Behavioral concerns should be addressed, if possible, along a continuum of appropriate instructional and/or related services, including but not limited to:

- Positive Behavior Support (a school-wide system that uses both systemic and individualized strategies and interventions to achieve social and learning success)¹⁸
- verbal reprimands (excluding abusive language or harassment on the basis of disability)
- conflict management
- behavior contracts
- behavior management strategies (FBA, BIP)
- study carrels
- aversives (time-out, physical restraint [therapeutic holding], mechanical restraint)¹⁹
- restriction of privileges
- exclusion from interscholastic athletics²⁰
- in-school suspension
- short- and long-term suspensions
- expulsion

Many schools use **individual discipline plans (IDPs)** to modify a student's obligation to comply with the school's code of conduct. A student may, for example, be exempted from the school-wide discipline rules because he exhibits disruptive behavior as a consequence of his disability. The IEP team may elect to have alternative ways of handling this behavior, including exempting the student from certain provisions of the code of student conduct. These exemptions may be included in the student's IEP

¹⁸ For more information on Positive Behavior Support, see <http://www.ped.state.nm.us/seo/discipline/index.htm>.

¹⁹ See SEB Guidance "Use of Physical Restraint as a Behavioral Intervention for Students with Disabilities," March 14, 2006 (www.ped.state.nm.us).

²⁰Courts are divided as to how much procedural due process must be provided when students are excluded from participation in interscholastic athletics. Some courts have decided that students must receive some minimal form of due process (for example, an opportunity to question "evidence," to present another viewpoint). See *Braesch v. DePasquale*, 265 N.W.2d 842 (Neb. 1978); and *Palmer v. Merluzzi*, 868 F.2d 90 (3rd Cir. 1989). Other courts have determined that removing a student from a sports team for disciplinary reasons does not trigger any procedural protections. See *McFarlin v. Newport Special School District*, 980 F.2d 1208 (8th Cir. 1992); *Davenport v. Randolph County Board of Education*, 730 F.2d 1395 (11th Cir. 1984); *Hebert v. Venteluolo*, 638 F.2d 5 (1st Cir. 1981); and *Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152 (5th Cir. 1980). What procedural protections must be provided to a student may depend upon provisions of state law. In New Mexico, state regulations indicate that local school boards are entitled to regulate "the existence, scope and conditions of availability of student privileges, including extracurricular activities and rules governing participation." See Subsection B(7) of 6.11.2.9 NMAC (2007)—Rules of conduct for New Mexico public schools, Regulated activities.

document or in an IDP that is referenced in the IEP. **IEP teams may not prohibit the initiation of long-term suspension or expulsion.**²¹

IDEA does not refer to IDPs, and there are no state or federal regulations that specifically address IDPs. However, the following distinctions are important:

- BIPs and IDPs are **not** the same thing. A BIP is designed to develop positive behaviors and to change other behaviors. IDPs, on the other hand, simply identify what provisions of the school conduct should not apply to the student, how the code of conduct might be modified for the student, and what consequences should flow from specifically identified student misconduct.
- A student may have both a BIP and an IDP.
- Exemptions from the school-wide discipline code of conduct should be clearly spelled out in the IEP document and/or an IDP so that the student, staff and parents are all informed as to what procedures will or will not apply.

School officials usually become involved when a student's behavior escalates, when the behavior violates the school's code of conduct, or when the student presents a physical threat to staff, him- or herself, or other students. When a weapon, illegal drug, or serious bodily injury is involved, school officials are inevitably brought into the picture.

Clearly, **parents** must be kept informed every step of the way, and their input and insights into the student's behavior can be valuable assets to other IEP team members in determining whether or not the behavior is related to the student's disability, when and why the behavior occurs, and what types of behavior or "warning signals" might precede expression of the behavior.

Regulations govern the length of suspensions, how many days during a school year a student may be suspended before specific procedural protections are triggered, and when teams must meet to consider behavior and consequences for behavior. This manual summarizes deadlines and provides checklists for school personnel who are responsible for keeping track of suspensions and applicable time considerations. Please see the Appendices for flowcharts and forms.

Where may a student with disabilities be placed for disciplinary purposes?

Different rules apply to different offenses. Offenses involving weapons, drugs, and serious bodily injury are governed by different regulations than are offenses that involve, for example, more minor physical altercations. Generally speaking, the student's IEP team, working in concert with school officials, will determine whether the student's educational setting may be changed, whether and for how long he or she may be removed from school, and how services will be provided to the student while he or she is being disciplined.

It is important that readers understand that within the context of special education, the word "**placement**" takes on a very particular meaning. "Placement" is used to designate the **level (intensity, number of hours) and type of specialized**

²¹See Subsection G (3) of 6.11.2.10 NMAC (2007)—Enforcing rules of conduct, Program prescriptions.

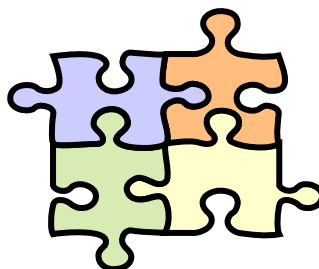
services the student receives, as opposed to the student's physical location.²² This manual will distinguish between the two concepts by using the term **"setting"** to indicate the student's physical location, the setting in which the student receives services. "Placement," on the other hand, will be used to indicate the level and type of services, as determined by the IEP team. See, for example, the "change of placement" analysis below.

Even when school personnel are appropriately trained and are consistently addressing a student's behavior, there may still be instances when a student has to be removed from his or her current setting. Often, there is agreement between staff and the student's parents. Working together, school staff and the parents may determine the appropriate setting and placement for the student. **In the past, the United States Department of Education has indicated that if parents and school officials reach an agreement concerning discipline and a change of placement for the student, the rules concerning the amount of time a student may be removed do not have to be used.**²³ Nothing in the new implementing regulations, or in the Analysis accompanying those regulations, indicates that OSEP has altered its position or forbidden such agreements between school officials and parents.

When agreement is not possible, school officials may still remove a student from his or her regular school placement for up to 10 school days at a time, even over the parents' objections, and as long as the discipline is both appropriate and administered consistently with the disciplinary treatment of students without disabilities.²⁴ Services need not be provided for this 10-day period.

School personnel may implement additional suspensions of up to 10 school days at a time in the same school year for separate incidents of misconduct, as long as educational services are provided and as long as there is no "change of placement."

As indicated above, the phrase "change of placement" has special meaning under the law, and a change of placement automatically triggers certain procedural protections. This manual assists the reader in determining both when a change of placement has occurred and when the law's procedural protections have been activated.



²²See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46588 for a discussion of "placement" versus "location."

²³See Federal Register, Vol. 64, No. 48 (March 12, 1999) at page 12620.

²⁴See IDEA 2004, 20 USC Sec. 1415(k)(1)—Placement in alternative educational setting, Authority of school personnel; and 34 CFR Sec. 300.530(b)(1) (2006)—Authority of school personnel, General.

Putting the Puzzle Together—Application of the Law

Where are applicable state and federal requirements found?

There are several layers of law, both federal and state, that apply to the discipline of students with disabilities. Those responsible for discipline must familiarize themselves with:

- Federal statutory law in the form of IDEA 2004
- Federal regulatory law in the form of implementing regulations
- State regulatory law (or rules) in the form of state rules
- Local school board rules

! In 2004 Congress made changes to the 1997 version of the IDEA. Many facets of the disciplinary process were impacted by the new law, and those changes will be highlighted in the text of this manual by a !.

Federal regulations include specific requirements for the discipline of students with disabilities. References to the federal implementing regulations, which became effective October 13, 2006, are included throughout this manual. When helpful, a comparison between the former regulations (dated 1999) will also be included.

Paper copies of the federal regulations are available at most public libraries. Electronic copies of the IDEA regulations and other helpful information can be accessed through the U.S. Department of Education's Web site (<http://idea.ed.gov>).

New Mexico has also issued regulations (or rules) concerning the conduct of special education. Those rules add another layer of clarification and are found at Title 6, Chapter 31, Part 2 of the New Mexico Administrative Code (NMAC). An electronic version of the NMAC may be accessed at <http://www.nmcpr.state.nm.us/nmac/>.

New Mexico's rules relating to discipline of **all** students are found at Title 6, Chapter 11, Part 2 of NMAC. The disciplinary rules are known as "Student Rights and Responsibilities" and are the fundamental source for school officials' authority and duties. **The specific New Mexico rule governing discipline of students with disabilities is found at 6.11.1.11 NMAC and became effective June 29, 2007.**

Finally, **local school boards** have the authority and responsibility to establish suitable rules of student conduct and appropriate disciplinary processes.²⁵ A local school board may provide students with more (but not less) protection than the minimum established by the state regulations. Local school districts may have written policies, including discipline procedures applied to students without disabilities as well as students with disabilities. Individuals involved in the discipline of students must become familiar with all of these laws so as to ensure that the rights of schools, students, and their families are protected.

²⁵ See Subsection D of 6.11.2.8 NMAC—General provisions (2007).

What kinds of conduct are covered?

State regulations establish that certain activities are absolutely prohibited in New Mexico public schools:

- criminal or delinquent acts
- gang-related activity
- sexual harassment
- disruptive conduct
- refusal to identify self
- refusal to cooperate with school personnel²⁶

Local school boards may add to this list, including, for example, rules concerning school attendance, student dress, use of controlled substances, alcohol and tobacco on school premises, participation in extracurricular activities, and discipline for out-of-school conduct that has a direct and immediate effect on school discipline or the general safety and welfare of the school.²⁷

What are the key concepts behind applicable laws?

Disciplinary systems are modified for students with disabilities in that:

- A student may not be punished for behavior that he or she is unable to control due to his or her disability.
- Educators must maintain a continuity of educational services for the student despite the student's objectionable behavior by:
 - keeping the student in school and addressing behavior through the FBA/BIP approach whenever possible
 - providing educational services after 10 cumulative school days of suspension in any school year
 - adjusting the IEP when objectionable behaviors continue because the school has not correctly identified or addressed a student's individual needs
 - giving modifications to the IEP or BIP a chance to work before resorting to long-term suspension or expulsion

What about students who have 504 plans?

With respect to the educational placement of students who qualify for 504 services, federal regulations require that school districts establish and implement a system of procedural safeguards that includes notice, an opportunity for parents to examine relevant records, and an impartial hearing with an opportunity for parental participation and representation by counsel, and a review procedure.²⁸

²⁶See 6.11.2.7 NMAC (2007)—Definitions; and Subsection A of 6.11.2.9 NMAC (2007)—Rules of conduct for New Mexico public schools, Prohibited activities.

²⁷See Subsection B of 6.11.2.9 NMAC (2007)—Rules of conduct for New Mexico public schools, regulated activities.

²⁸See 34 CFR Sec. 104.36 (2003)—Nondiscrimination on the basis of handicap in programs or activities receiving federal financial assistance, Procedural safeguards.

New Mexico rules specify that the general procedures for detention, suspension and expulsion of students **do not apply** to “long-term suspension or expulsion of students who are disabled pursuant to the IDEA or **Section 504.**”²⁹ Instead, the procedures set out in 6.11.2.11 apply to the disciplinary removals of students with disabilities. **The NMPED has therefore decided that students with 504 plans are entitled to all of the procedures described in this manual and the referenced federal and state laws.**

Step-by-Step Application of the Law

What follows is a step-by-step approach to disciplinary procedures, with references to checklists, flowcharts and forms, all of which are contained in the Appendices. The reader should be aware that, given the limited length of this manual, not all nuances of applicable regulations are covered. Some readers may find the “Analysis of Comments and Changes” preamble to the federal regulations helpful.³⁰ The Analysis is OSEP’s explanation of decisions made by that office concerning the regulations, including OSEP’s responses to comments and suggestions made during the public comment period that preceded issuance of the final version of the regulations. In addition, many authors have dissected this area of the law, and numerous other helpful resources are available. Please refer to Appendix A for more information concerning available resources.



Determine Whether or Not the Student Qualifies for Receipt of Special Education Services

A school official’s first step, following the report of some prohibited activity or behavior that is subject to disciplinary action, is to **determine whether or not the student is a student with a disability.** (See Discipline Checklists and Flowcharts in Appendices C and D.) A “student with a disability” is a student who:

- has been evaluated in accordance with applicable regulations and has been found to have an exceptionality that qualifies him or her for receipt of special education and, possibly, related services AND
- is aged 3 through 21 and has not received a high school diploma or the equivalent.³¹

²⁹ See Subsection B of 6.11.2.12 NMAC (2007)—Procedure for detentions, suspensions and expulsions, Students with disabilities. [Emphasis added.]

³⁰See Analysis and Comments, Federal Register, Vol. 71, No. 156 (August 14, 2006), pages 46540 et seq.

³¹ See 34 CFR Sec. 300.8 (2006)—Child with a disability; Subsection B (2) of 6.31.2.7 NMAC (2007)—Definitions, Child with a disability; and Subsection B of 6.11.2.12 NMAC (2007)—Procedure for

The question is quickly and easily answered in the affirmative if the student has an IEP and is currently receiving special education services pursuant to an IEP. Remember, in New Mexico this also includes students who have Section 504 plans.

There may be special circumstances in which the student has not yet been determined to be, but is suspected of being, a "student with a disability" in need of services.³²

! The IDEA 2004 changed the circumstances under which a regular education student may claim that the district knew or should have known that he or she was a student with a disability, and that the IDEA protections should therefore apply.³³ Under the new law, a district is deemed to have a **basis of knowledge** that a student was a student with a disability if, **prior to the occurrence of the behavior that precipitated the disciplinary action:**

*The parent expressed concern **in writing to supervisory or administrative personnel**, or to a **teacher of the student**, that the student needs special education and related services. **OR**

*The parent requested an evaluation under the IDEA. **OR**

*The teacher or other district personnel expressed specific concerns about a pattern of behavior on the student's part and expressed those concerns **directly to the special education director or to other supervisory personnel.**

The IDEA 2004 also adds an exception to the "basis of knowledge" provision. A district will **not** be deemed to have knowledge that a student is a student with a disability if:

*The parent has not allowed the student to be evaluated or has refused special education and related services.

OR

*The student has been evaluated and it was determined that the student was not a student with a disability.

detentions, suspensions and expulsions, Students with disabilities. A school district may also decide to include children who are developmentally delayed and who as a result of that condition need special education and related services. See Subsection B(2)(c) of 6.31.2.7 NMAC (2007)—Definitions.

³² The IDEA 2004 **eliminated** a fourth possibility found in 34 CFR Sec. 300.527 (1999), which provided that a district would be deemed to have knowledge that the student was a student with a disability if the student's "behavior or performance...demonstrates the need for" special education and related services. Compare to 34 CFR Sec. 300.534 (2006)—Protections for children not determined eligible for special education and related services.

³³34 CFR Sec. 300.534 (2006)—Protections for children not determined eligible for special education and related services; and IDEA 2004, 20 USC Sec. 1415(k)(5)—Protections for children not determined eligible for special education and related services. See also Subsection G(5) of 6.2.11.10 NMAC (2007)—Enforcing rules of conduct, Discipline of students with disabilities. For a discussion of this change in the law, see Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at pages 46726-46728.

If the student is neither suspected of being or already determined not to be a student with a disability, then the school official may proceed to discipline the student as he or she would any student without a disability. The special procedures described in this manual would not then apply.³⁴



Check the IEP

The student's IEP team has the authority to prescribe or prohibit specific disciplinary measures by including appropriate provisions to that effect in the student's IEP, and school officials are required to follow IEP provisions concerning discipline.³⁵ As discussed earlier, the IEP team may indicate that the student is not subject to all or part of the school-wide discipline plan. The student's IEP document should include the IEP team's determination as to the applicability or inapplicability of the school-wide discipline plan. The IEP is not, however, permitted to prohibit the initiation of proceedings for long-term suspension or expulsion.

Remember, the student's file may also include an IDP that provides consequences for specific acts of misconduct and is essentially an alternative to the school's regular disciplinary code.³⁶ A student may have an IEP, a BIP and an IDP, and the school official should review the file to see whether provisions of any of these documents apply to the circumstances.

If the IEP, BIP and IDP do not address the disciplinary issue, then officials should proceed to the next step.



Conduct an Informal Administrative Conference

The purpose of the conference, conducted by the school official, is to:

- interview witnesses, including staff and other students
- allow the student an opportunity to explain the behavior
- determine whether, if there is no IEP, the student should be referred for an evaluation for a suspected disability.

³⁴See instead 6.11.2.10 NMAC (2007)—Enforcing rules of conduct; and 6.11.2.12 NMAC (2007)—Procedures for detentions, suspensions and expulsions.

³⁵See Subsection G (3) of 6.11.2.10 NMAC (2007)—Enforcing rules of conduct, discipline of students with disabilities.

³⁶ See the section above entitled *When do various individuals become involved and how is problematic behavior addressed?*



Determine Whether Disciplinary Action is Warranted and, if so, What Disciplinary Action will be Taken

Following the informal administrative conference, the school official determines, based upon the facts and his or her judgment, what, if any, disciplinary action should be taken.



Notify the Parents

Using one of the Parent Notice Forms found in Appendix B, the school official should notify the parents of:

- the misconduct
- any alternative disciplinary action that will be taken pursuant to provisions included in the student's IEP (or IDP or BIP), and
- the proposed disciplinary action, if any.



When Parents Request an Expedited Evaluation for a Student Who Has Not Yet Been Identified as a Student with a Disability

As discussed above, parents may claim that a student not yet identified as a student with a disability should nevertheless be disciplined as if he or she were disabled, meaning that the student would be entitled to the special procedural protections.³⁷ If, during the time the student is subject to disciplinary measures, the parents request an **evaluation of a student who has not yet been identified as a student with a disability**, the evaluation must be **expedited**.³⁸ Be sure to document the date of the

³⁷See also Subsection G(5) of 6.2.11.10 NMAC (2007)—Enforcing rules of conduct, Discipline of students with disabilities.

³⁸See IDEA 2004, 20 USC Sec. 1415(k)(5)(D)—Protections for children not yet eligible for special education and related services, Conditions that apply if no basis of knowledge.

parent request (which should be in writing) and the date you refer the student for the expedited evaluation.³⁹ Note that:

- There is no requirement that disciplinary action be put on hold pending the outcome of an expedited evaluation, or that the student's parents be involved in placement decisions. **School officials have the authority to determine the student's placement**, and until the evaluation is completed, the student remains in the educational placement determined by the district, which can include suspension or expulsion without educational services.⁴⁰
- The regulations do not include a specific timeline for completion of an expedited evaluation, in part because what may be required for such an evaluation will vary widely, depending upon the nature and extent of a student's suspected disability and the amount and type of information needed for the evaluation.⁴¹ Nevertheless, the evaluation is to be "expedited," which under IDEA 2004 means that it must be conducted in a shorter time than would non-expedited evaluations.⁴² Non-expedited evaluations must be completed within 60 days of the date parental consent to evaluate is received.



Determine Whether or Not the IEP Team Needs to Meet

If the student's problem behavior interferes with his or her learning or the learning of his or her classmates, the IEP team may need to consider whether or not specific strategies, including positive behavioral interventions, strategies, and supports (i.e., a BIP) need to be designed and implemented to address the problem behavior. **An IEP team meeting is not required at this point in the process.** However, the regulations suggest that the team meet to consider behavioral interventions.⁴³ The school official should, in consultation with the student's special education teacher, consider convening an IEP team meeting to review and revise the IEP as necessary.⁴⁴ If an IEP meeting is scheduled, the parents must be provided notice.

³⁹ See Subsection D(c)(iii) of 6.31.2.10 (2007)—Identification, evaluations and eligibility determinations, Procedures for initial evaluation.

⁴⁰See 34 CFR Sec. 300.534(d)(2)(ii) (2006)—Protections for children not determined eligible for special education and related services.

⁴¹ See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46728.

⁴² See 34 CFR Sec. 300.301(c)(1)(i) (2006)—Initial evaluations, Procedures for initial evaluation.

⁴³See 34 CFR Sec. 300.324(a)(2)(i) (2006)—Development, review, and revision of IEP, Development of IEP.

⁴⁴See 34 CFR Sec. 300.324(b) (2006)—Development, review, and revision of IEP, Review and revision of IEPs.

Remember: the law requires that educators address problem behaviors in the least restrictive manner possible, given the context of the misconduct. Students should not be punished for behavior that schools have neither correctly identified nor addressed by means of positive behavioral interventions or supports.



Count the Days—The “10-Day Rule”

Unless the student’s IEP provides otherwise, a student with a disability may be removed for 10 or fewer consecutive school days without any special considerations, just as would any student without disabilities.⁴⁵ The student must be returned to the same educational placement after the temporary or short-term suspension, but for an initial suspension of 10 school days or less the school does not have to provide the student with any services.⁴⁶

Educators often refer to this as the “10-Day Rule.” After the tenth **cumulative** school day of removal in a school year, several requirements come into play. It is therefore important to keep track of suspensions and to count days accurately. A sample Removal Log is included in Appendix B.

Special Note: School officials may remove a student with a disability to an IAES, another setting, or suspension several times during a school year, providing each removal is for less than 10 consecutive school days, without triggering the IDEA protections.⁴⁷

Caution: If the multiple removals constitute a **change of placement**, then the IDEA procedural protections (such as a MDR meeting) **do** come into play. See below for a discussion of what constitutes a **change of placement**.

The Analysis and Comments to the new federal regulations emphasize the Department of Education’s position that it is important for purposes of school safety and order to maintain school officials’ authority to remove a student for a discipline infraction for a short time period, even though the student may already have been removed for more than 10 school days in the school year, as long as the pattern of removals does not constitute a change in placement.

⁴⁵See Subsection (B) of 6.11.2.12 NMAC (2007)—Procedures for detentions, suspensions and expulsions, Students with disabilities.

⁴⁶See 34 CFR Sec. 300.530(b)(2) and (d)(3) (2006)—Authority of school personnel, General and Services.

⁴⁷See 34 CFR Sec. 300.530(b) (2006)—Authority of school personnel, General.

At the same time, the Analysis and Comments note that discipline must not be used as a means of “disconnecting” a student with a disability from education.⁴⁸

Whether in-school suspension or bus suspension counts as a day of suspension under the 10-Day Rule depends upon the unique circumstances of each case. The following considerations apply to counting days:

- **In-School Suspensions (ISS)** do **not** count toward the 10-Day Rule, as long as the services the student receives in ISS provide him or her with FAPE. If the student:
 - has the opportunity to progress appropriately in the general curriculum
 - continues to receive the services specified in his or her IEP (including related services), and
 - is permitted to participate in the curriculum with students without disabilities to the extent he or she would have been in the pre-ISS placement, then the ISS does not need to be tracked or counted.⁴⁹ If even one of these three conditions is not met, however, ISS days count toward the 10-day limit. If a student receives only custodial care in ISS, then ISS counts toward the 10-Day Rule and may constitute a “change of placement.” See the “Change of Placement” analysis, below.
- **Any portion of a school day** during which a student is suspended (outside school suspension, not ISS), **does** count toward the 10-Day Rule.⁵⁰ For example, if a student is suspended from school and sent home at 1:00 p.m., that school day counts toward the 10-Day Rule.
- **Bus suspensions do count toward the 10-Day Rule if transportation is part of the student’s IEP.** However, if transportation is not part of the student’s IEP, then a bus suspension would not count toward the 10-Day Rule, and the student and his or her parents would have the same obligation to arrange for alternative transportation as would any other student who received a bus suspension.⁵¹

Remember: After 10 cumulative school days of removal in a single school year, the district must provide the student with educational services and FAPE.

⁴⁸ See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46715.

⁴⁹ See Analysis and Comments, Federal Register, Vol. 71, No. 156 (August 14, 2006) at page 46715.

⁵⁰ A “school day” is defined as “any day, including a partial day, that children are in attendance at school for instructional purposes.” 34 CFR Sec. 300.11 (2006)—Day; business day; school day.

⁵¹ See Analysis and Comments, Federal Register, Vol. 71, No. 156 (August 14, 2006) at page 46715 and *IDEA Compliance Insider*, “Keep Removal Log to Ensure Compliance with 10-Day Rule,” November 2003, pp. 2-4.



Short-Term Suspensions

School districts are not required to take any specific actions when a student is suspended for 10 school days or less.⁵² School officials can remove a student with a disability from his or her current educational placement for up to 10 cumulative school days in a school year without conducting a behavior assessment or a manifestation determination review and without providing educational services.⁵³ The IEP team does not need to be involved in this process.

The IDEA and its implementing regulations recognize that school officials need a reasonable degree of flexibility when disciplining students with disabilities. The Department of Education takes the position that interrupting a student's participation in education for up to 10 school days over the course of a school year, "when necessary and appropriate to the circumstances, does not impose an unreasonable limitation" on a student's right to FAPE.⁵⁴

At the conclusion of any short-term suspension, the student must be returned to the same, prior educational placement.⁵⁵



Determine What Educational Services will be Provided to the Student

If the student has been suspended for more than 10 cumulative school days in a school year, the school must provide the student with educational services.

- When the suspension is a **short-term suspension**, the school official, in consultation with at least one of the student's teachers, determines what services will be provided to the student.⁵⁶

⁵²See *Initial Disciplinary Guidance Related to Removal of Children with Disabilities from Their Current Educational Placement for Ten School Days or Less*, 26 IDELR 981 (OSEP 1997).

⁵³See 34 CFR Sec. 300.530(b) (2006)—Authority of school personnel, General; and Subsection B of 6.11.2.12 NMAC (2007)—Procedure for detentions, suspensions and expulsions, Students with disabilities.

⁵⁴See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46717.

⁵⁵See Subsection G(2) of 6.11.2.10 NMAC (2007)—Enforcing rules of conduct, Discipline of students with disabilities.

⁵⁶ See 34 CFR Sec. 300.530(d)(4) (2006)—Authority of school personnel, Services.

- When the suspension is a **long-term suspension or expulsion** (see below), the IEP team determines what services will be provided to the student.

Remember: School officials, in consultation with at least one of the student’s teachers, determine the extent to which services are needed so as to allow the student to participate in the general curriculum (although in another setting) and to progress toward meeting his or her IEP goals.⁵⁷ Primarily because these removals are often for only one or two days, the regulations **do not** require that the district conduct an IEP team meeting or include the parent in determining the extent to which services are needed. In addition, the Department of Education has indicated that school officials are in the best position to determine the appropriate teacher with whom to consult with respect to provision of services.⁵⁸ Thus, the school official is not obligated to consult the student’s special education teacher (although, more often than not, that may be the most appropriate teacher when it comes to designing services).



When a Student has been Removed for More than 10 Cumulative School Days in a School Year—Provide Educational Services

Once a student has been removed from school for more than 10 cumulative days in a school year (i.e., the “10-Day Rule” has been met), school officials must ensure that the student is provided with FAPE during his or her removal.

! When it enacted the IDEA 2004, Congress **removed** a requirement that the IEP team meet within 10 days of a disciplinary removal to conduct an FBA or review and modify any existing BIP, regardless of whether or not the behavior in question was a manifestation of the student’s disability.⁵⁹

While there is no longer any **requirement** that the IEP team meet to consider conducting an FBA or designing/modifying a BIP to address the student’s behavior, **best practice** would be for the team to take these steps.⁶⁰ Keep in mind, as well, that the new regulations specify that a student who has met the 10-Day Rule must be provided with services, and that those services may include, “as appropriate,” an FBA and BIP.⁶¹

⁵⁷ See 34 CFR Sec. 300.530(d)(4) (2006)—Authority of school personnel, Services.

⁵⁸ See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46718.

⁵⁹ See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46721.

⁶⁰ See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46721.

⁶¹ See 34 CFR Sec. 300.530(d)(1)(ii) (2006)—Authority of school personnel, Services.



Watch for a Change of Placement

The IDEA 2004 maintains the rule that if disciplinary removals constitute a “change of placement,” certain procedural protections are triggered, including the requirement that the district conduct a Manifestation Determination Review (MDR) meeting.⁶² The school official is responsible for determining whether the disciplinary sanction he or she plans to impose will result in a change of placement.⁶³

There are logical reasons why the law imposes additional requirements when a removal qualifies as a change of placement. A change of placement can indicate several things. It may mean that the student’s behavior needs to be addressed in a more concerted, organized manner—that instances of behavior are no longer haphazard or unrelated. Instead, behavior may be escalating; it may be symptomatic of a larger problem, such as frustration over inability to read, medication adjustments, or an emerging emotional problem that requires more than the imposition of simple disciplinary measures. At this point, the IEP team, with its various areas of expertise and information, becomes more involved in the discipline process.

Federal regulations identify some circumstances in which a series of short-term removals totaling more than 10 school days in a school year are to be considered a change of placement.⁶⁴ A change of placement occurs when:

- the student has been removed for **more than 10 consecutive school days**,
OR
- the [student] has been subjected to a **series of removals that constitute a pattern** because
 - the series of removals totals more than 10 days in a school year (these need not be consecutive days)
 - the student’s behavior is substantially similar to his or her behavior in previous incidents that resulted in the series of removals (this determination may involve a review of information in the student’s IEP),
AND

⁶² See IDEA 2004, 20 USC Sec. 1415(k)(1)(E)—Placement in alternative educational setting, Manifestation determination; and 34 CFR Sec. 300.530(e) (2006)—Authority of school personnel, Manifestation determination.

⁶³ See 34 CFR Sec. 300.536(b)(1) (2006)—Change of placement because of disciplinary removals.

⁶⁴ See 34 CFR Sec. 300.536 (2006)—Change of placement because of disciplinary removals; Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at pages 46728-46730; and see Subsection G of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Change of placement because of disciplinary removals.

- additional factors such as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another argue in favor of a “pattern”

Parents can challenge the school official’s determination as to whether a proposed removal or potential disciplinary action constitutes a change of placement through a due process hearing or judicial proceedings.⁶⁵

! The federal regulations expand upon the what used to be the definition of “change of placement” by **adding** that **a change of placement occurs if the student’s behavior is substantially similar to the student’s behavior in the incidents that resulted in the series of removals.** This is in keeping with the IDEA’s emphasis upon a proactive approach to behaviors that interfere with learning.⁶⁶

Thus, school districts are required to look at the pattern of a student’s behavior and address the behavior, when possible, early and as effectively as possible—so that numerous disciplinary violations and removals might be avoided. When a pattern exists and the behavior is fairly consistent, then the law would seem to require that the student receive the full range of procedural protections, including primarily the MDR process.

To summarize: a school official has received a report that the student may have violated a rule of conduct. The school official then:

- reviews the student’s Removal Log to determine the student’s status with regard to previous disciplinary removals, if any, and
- determines whether the alleged rule violation may subject the student to a possible long-term suspension or expulsion, or whether the contemplated disciplinary action may result in a change of placement



When a Removal of More than 10 Days DOES NOT Qualify as a Change of Placement—Provide Services

Remember: Even if the school official determines that the proposed removal will not constitute a change of placement, once a student has been removed from school for more than 10 cumulative school days in a school year (i.e., the “10-Day Rule” has been met), school officials must ensure that the student is provided with services during his or her removal. Those services may include, “as appropriate,” an FBA and BIP.⁶⁷

⁶⁵ See 34 CFR Sec. 300.536(b)(2) (2006)—Change of placement because of disciplinary removals.

⁶⁶ See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46729.

⁶⁷ See IDEA 2004, 20 USC Sec. 1415(k)(1)(D)(ii)—Placement in alternative educational setting, Services; and 34 CFR Sec. 300.530(d)(1)(ii) (2006)—Authority of school personnel, Services.



When a Removal of More than 10 School Days DOES Qualify as a Change of Placement:
Provide the Parents with Notice and Prepare for a Manifestation Determination Review (MDR)

! The IDEA 2004 explicitly authorizes school officials to consider unique circumstances on a case-by-case basis when deciding whether or not to implement a **change of placement** for a student with a disability who violates a disciplinary code of conduct.⁶⁸

The law emphasizes that school officials should avoid using a “one-size-fits-all” approach to discipline and should instead consider the unique circumstances of individual students and incidents when determining whether or not to **change the placement** of a student with a disability.

If the school official determines that the rule violation and planned disciplinary response will result in a **change of placement** for the student, the school official must prepare for an MDR and provide the parents with notice of the MDR meeting.

Notice must be given to the parents on the date on which the decision is made to impose a removal that constitutes a change of placement.⁶⁹ The district is obligated to conduct the MDR meeting **within 10 school days** of any decision to change the student’s placement.⁷⁰

The following information must be provided to the parents:

- The date and time of the MDR meeting
- A copy of the school’s procedural safeguards notice,⁷¹ including but not limited to:

⁶⁸See IDEA 2004, 20 USC Sec. 1415(k)(1)(A)—Placement in alternative educational setting, Authority of school personnel; and 34 CFR Sec. 300.530(a) (2006)—Authority of school personnel, Case-by-case determination.

⁶⁹ See IDEA 2004, 20 USC Sec. 1415(k)(1)(H)—Placement in alternative educational setting, Notification; 34 CFR Sec. 300.530(h) (2006)—Authority of school personnel, Notification; and Subsection H of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Parental notification.

⁷⁰ See 34 CFR Sec. 300.530(e) (2006)—Authority of school personnel, Manifestation determination; and see Subsection C(1) of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Manifestation determination.

⁷¹ See 34 CFR Sec. 300.504(a)(3) (2006)—Procedural safeguards notice, General.

- Notice that the parents are entitled to invite relevant persons (including members of the student’s IEP team) to serve as members of the MDR team
- A description of the action proposed or refused by the district (including the length of the proposed exclusionary period, and the start date)
- An explanation of why the district proposes or refuses to take the action (this would include a description of the misconduct)
- A description of other options considered and the reasons why those options were rejected (in other words, what other disciplinary sanctions were considered and rejected, and the reasons why were they rejected)
- A description of the parents’ right to challenge decisions by means of the state-level complaint procedures⁷² or a request for due process hearing.

Staff in the district’s special education department will be able to assist responsible persons in providing proper notice, and in particular with regard to providing parents with a copy of the district’s Procedural Safeguards Notice. Please see Appendix B for MDR and Parent Notice forms.

What if the student is age 18 or older?

If a student is age 18 or older and has not been determined incompetent by a court (in other words, no legal guardian has been appointed for the student), then a district must provide notice **both** to the student and the parents.⁷³

May a district provide notice to parents via email?

Parents can choose to receive notices by electronic mail, if a school district makes that option available.⁷⁴ Be sure to document that parents have made this choice, and keep hard copies of email notifications.



Conduct a Manifestation Determination Review

When school officials contemplate a removal that will constitute a change of placement, a Manifestation Determination Review (MDR) must be conducted.⁷⁵ **The MDR must**

⁷² The SEB has published a state-level complaint form online, available at <http://www.ped.state.nm.us/seo/dispute/SPED%20Complaint%20Form.doc>.

⁷³ See IDEA 2004, 20 USC Sec. 1415(m)—Transfer of parental rights at age of majority.

⁷⁴ See IDEA 2004, 20 USC Sec. 1415(n)—Electronic mail.

⁷⁵ See IDEA 2004, 20 USC Sec. 1415(k)(1)(E)(i)—Placement in alternative educational setting, Manifestation determination; and 34 CFR Sec. 300.530(e) (2006)—Authority of school personnel, Manifestation determination.

be conducted before a long-term suspension or expulsion proceeding may be initiated, because a student may not be subjected to a change of placement for behavior that cannot be controlled due to his or her disability.

An MDR is an evaluation of the relationship, if any, between the student's act of misconduct and his or her disability. It answers the question: "Is the behavior in question evidence of the student's disability, or is it wholly unrelated to the disability?" The MDR process is intended to ensure that a student's behavior as demonstrated across settings and across time is analyzed when determining whether or not the conduct in question is a direct result of the student's disability.⁷⁶

! The IDEA 2004 changed some aspects of the MDR process.

The MDR Team

Now, the MDR must be conducted by the district, the parents, and **relevant** members of the IEP team. Under the former law, the MDR was conducted by the entire IEP team and "other qualified personnel." This change means that IEP team members who are not considered relevant to the MDR need not participate.⁷⁷

Who is "relevant"?

The decision as to who is relevant to the MDR decision-making process is made by the district and the parents. If **either** the district or the parents consider a particular person to be relevant, then that person must attend. A determination as to which members of the IEP team are considered relevant will vary, depending upon the student, the circumstances of the case, and the behavior in question.

This manual will refer to the "MDR team" to distinguish it from the "IEP team" and to lend emphasis to the differing responsibilities of each team.

The MDR is **not** about whether the student actually committed the offense or whether the penalty for an offense is too harsh.⁷⁸ Those considerations are addressed further down the line, in a disciplinary hearing.

⁷⁶ See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46720.

⁷⁷ Compare 34 CFR Sec. 300.523(b) (1999)—Manifestation determination review, Individuals to carry out review, to 34 CFR Sec. 300.530(e) (2006)—Authority of school personnel, Manifestation determination.

⁷⁸ See, Walsh, J: "Legally Compliant Manifestation Determinations: Avoiding the Most Common Mistakes," *Individuals with Disabilities Education Law Report, Special Report No. 31*, (LRP Publications, 2003).

Remember: A student with a disability may not be expelled for misconduct that is related to his disability, unless the misconduct involves possession of a dangerous weapon, a drug offense, the student has inflicted serious bodily injury on another person, or unless the student is proven to be dangerous. See relevant sections below concerning weapons, drugs, serious bodily injury, and dangerousness.

The following rules apply to MDRs:

- On the same day on which school officials determine that a proposed removal will result in a change of placement, the district must provide the parents with proper notice. See the section above entitled ***When a Removal of More than 10 School Days DOES Qualify as a Change of Placement: Provide the Parents with Notice and Prepare for a MDR.***
- **Immediately, if possible, but no later than 10 school days** from the date on which the decision to pursue removal is made, the district must conduct a MDR.

! The IDEA 2004 specifies that the MDR team must “review” information.⁷⁹ Although there is no explicit requirement that this “review” take place in an actual meeting, and although the regulations do not provide any additional guidance, the longstanding approach to MDRs would indicate that the MDR team must actually meet (as opposed to, for example, merely circulating a checklist among MDR team members). The manifestation determination is viewed as a “complex decision making” process requiring discussion and collaboration,⁸⁰ and the NMPED takes the position that the MDR team must actually **meet** to make its determination.

In making its determination, the MDR team is required to review “all relevant information” in the student’s file, **including the student’s IEP, any teacher observations, and any relevant information provided by the parents.**⁸¹ The following information should also be available and considered:

- records of behavior over the period of the current IEP
- the BIP (which should be a part of the IEP) and its components, including how effective the plan has been at reducing behaviors of concern (for example, do

⁷⁹See IDEA 2004, 20 USC Sec. 1415(k)(1)(E)(i)—Placement in alternative education setting, Manifestation determination; 34 CFR Sec. 300.530(e) (2006)—Authority of school personnel, Manifestation determination; and Subsection C of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Manifestation determination.

⁸⁰See Federal Register, Vol. 64, No. 48 (March 12, 1999) at page 12625.

⁸¹ See IDEA 2004, 20 USC Sec. 1415(k)(1)(E)(i)—Placement in alternative educational setting, Manifestation determination; 34 CFR Sec. 300.530(e) (2006)—Authority of school personnel, Manifestation determination; Subsection C(1) of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Manifestation determination; and see Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46719.

documented data indicate not only that the BIP has actually been implemented, but also whether or not it is effective?)

- information on the student's school performance in general, including any excessive or unexplained absences and changes in academic performance
- information concerning the student's behavior at home and outside the school environment, including input from the parents
- evaluations and diagnostic results
- historical data, including academic and behavioral information
- interview(s) with the student, emphasizing his or her emotional wellbeing and understanding of the incident, school policy, and rules of conduct
- interview(s) with the student's teachers, including a discussion of the student's misconduct in the context of his or her school experiences and peers
- interview(s) with administrators concerning investigation of the facts surrounding the behavior in question
- information regarding the student's disability, the characteristics of those who have the disability, and the relationship of the behavior, if any, to the disability (For example, should students with the particular disability be expected to conform their behavior in this context?)
- information concerning the cognitive, behavioral and emotional status of the student with regard to the policy violation and his or her ability to maintain self-control in this context, and
- other options available for appropriate programming.

! The IDEA 2004 **changed the criteria** for determining whether or not a student's conduct was a manifestation of his or her disability.⁸² Under former law, the MDR team (then, the entire IEP team) considered three questions. Now, the MDR team is to answer **only these two questions**:

Was the conduct caused by, or did it have a direct and substantial relationship to, the student's disability?

Was the conduct in question the direct result of the district's failure to implement the student's IEP?

If the answer to **either** question is YES, then the MDR team must conclude that the student's behavior **was a manifestation of his or her disability**.⁸³ The MDR process uses a cause-and-effect analysis.

⁸² See IDEA 2004, 20 USC Sec. 1415(k)(1)(E)(i)(I-II)—Placement in alternative educational setting, Manifestation determination; 34 CFR Sec. 300.530(e)(1) (2006)—Authority of school personnel, Manifestation determination; and Subsection C(1)(a-b) NMAC (2007)—Disciplinary removals of students with disabilities, Manifestation determination.

⁸³ See 34 CFR Sec. 300.530(e)(2) (2006)—Authority of school personnel, Manifestation determination; and Subsection C(2) of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Manifestation determination.

The law **no longer requires** that the MDR team consider whether the student's IEP and placement are or were appropriate, prior to the behavior incident.⁸⁴ It is important for school districts to review their MDR forms to be certain that the form reflects the changes in the law. Please see the MDR form provided in Appendix B.

Whether the student thinks he or she can or cannot follow rules, and whether the student knows the difference between right and wrong are NOT issues for a MDR. Instead, the new law makes it clear that, for the conduct to be a manifestation of the student's disability, there must either be:

- a close relationship between the conduct and the disability (as opposed to a marginal or attenuated relationship). An example of an attenuated, as opposed to close/direct relationship would be when a student with low self esteem due to a disability misbehaved so as to gain attention from others. **OR**
- a direct cause and effect relationship between any failure on the part of the district to implement the IEP (and BIP) and the student's conduct. For example, there may be no relationship—let alone a direct cause and effect relationship—between misconduct and a failure on the part of the district to implement the portion of a student's IEP that called for provision of a particular form of software as assistive technology.

In summary, if the MDR team answers "yes" to either of the above questions, then the behavior must be considered a manifestation of the student's disability. Thus, if the team determines:

- that the conduct was caused by or had a direct or substantial relationship to the student's disability, then the MDR team **must** conclude that **the behavior was a manifestation of the student's disability, OR**
- that the conduct was a direct result of the district's failure to implement the student's IEP (including any BIP), then the MDR team **must** conclude that **the behavior was a manifestation of the student's disability.**

Only if the team determines that the misconduct is **not** a manifestation of the student's disability may school officials initiate long-term suspension or expulsion proceedings.⁸⁵ A Manifestation Determination Review Form is included in Appendix B.



Parent Notice At the Conclusion of the Manifestation Determination Review Meeting

⁸⁴See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46720.

⁸⁵See IDEA 2004, 20 USC Sec. 1415(k)(1)(C)—Placement in alternative educational setting, Additional authority; and Subsection B of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, When behavior is not a manifestation of disability.

At the close of the MDR meeting (which, again, includes the parents as members of the MDR team), the district must provide the parents with notice. The contents of this notice will be familiar to special educators who are accustomed to providing Prior Written Notice of Actions Proposed (PWN) and Procedural Safeguards notices to parents.

! The IDEA 2004 reduced the number of times per year parents had to be provided with an actual copy of their Procedural Safeguards. Under the new law, school districts are only required to provide parents with a copy of their Procedural Safeguards one time per year. **However**, there are some limited exceptions, and **when disciplinary removals will result in a change of placement is one of those exceptions**. Therefore, the district must be certain that it provides parents with a copy of their Procedural Safeguards at the conclusion of any MDR meeting that results in a change of placement for the student.⁸⁶

At the end of the MDR meeting, the district must include the following information in its notice to the parents:⁸⁷

- a description of the disciplinary action that will be imposed, including starting and ending dates
- an explanation as to why the district proposed the disciplinary action
- a description of the factors relevant to the district's decision concerning the disciplinary action
- a description of each evaluation, assessment, record, or report the district used as a basis for reaching its conclusions concerning the disciplinary action
- a description of other options considered by the MDR team and why those options were rejected
- a statement that the parents have protection under the IDEA's procedural safeguards and that they have the right to challenge the results of the MDR (including both the proposed placement and proposed provision of services in the placement) through an expedited due process hearing⁸⁸
- sources for parents to contact to obtain assistance in understanding their procedural rights and applicable provisions of the IDEA 2004

⁸⁶See 34 CFR Secs. 300.504(a)(3) (2006)—Procedural safeguards notice, General; and 300.530(h) (2006)—Authority of school personnel, Notification.

⁸⁷See IDEA 2004, 20 USC Sec. 1415(k)(1)(H)—Placement in alternative educational setting, Notification; 34 CFR Secs. 300.504(c) and 300.530(h) (2006)—Procedural safeguards notice and Authority of school personnel, Notification; Subsection H of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Notification; and see OSEP Memorandum 95-16, 22 IDELR 531 (OSEP 1995).

⁸⁸See IDEA 2004, 20 USC Sec. 1415(k)(3)(A)— Placement in alternative educational setting, Appeal; 34 CFR Sec. 300.532—Appeal; and Subsection I (4)(a) of 6.31.2.13 NMAC (2007)—Due process hearings, Bases for requesting expedited hearing.

- information concerning due process complaint and State complaint procedures, including procedures and applicable time periods for each process⁸⁹
- other procedures applicable when a student is placed in an IAES⁹⁰

Please see Appendix B for the MDR form, which includes parent notice. In addition, the Department of Education has published a model Procedural Safeguards Notice on its Web site (www.ed.gov/policy/speced/guid/idea/modelform-safeguards.doc).



When the Team Determines that the Behavior IS a Manifestation of the Student's Disability

Remember: The general rule (exceptions for weapons, drugs, and serious bodily injury are described below), is that a student may not be disciplined through a change of placement for behavior that is a manifestation of the student's disability.

The IDEA 2004 provides more information than did the former law concerning what must occur when the MDR team concludes that the behavior in question is a manifestation of the student's disability.⁹¹ When the MDR team reaches that result, the **entire IEP team** (as opposed to just the MDR team) must:⁹²

- If no FBA has been conducted, **conduct an FBA and implement a BIP** for the student.
- AND**
- If a BIP already exists, **review the BIP and modify it**, as necessary, to address the student's behavior.
- AND**
- If the MDR team determined that the conduct in question was the direct result of the district's failure to implement the IEP (including the BIP), then the district (likely through the IEP team) must **take immediate steps to remedy those**

⁸⁹The SEB has published a complaint form available to the public online at <http://www.ped.state.nm.us/seo/dispute/SPED%20Complaint%20Form.doc> and a due process hearing request form at <http://www.ped.state.nm.us/seo/dispute/Due%20Process%20Hearing%20Form%202007%20lock.doc>.

⁹⁰See 34 CFR Sec. 300.504(c)(8) (2006)—Procedural safeguards notice, Contents.

⁹¹See IDEA 2004, 20 USC Sec. 1415(k)(1)(F)—Placement in alternative educational setting, Determination that behavior was a manifestation; 34 CFR Sec. 300.503(f) (2006)—Authority of school personnel, Determination that behavior was a manifestation; and Subsection D of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Determination that behavior is manifestation of disability.

⁹²See 34 CFR Sec. 300.530(f) (2006)—Authority of school personnel, Determination that behavior was a manifestation.

deficiencies (in some instances, this may include providing training for teachers in implementation of the IEP and/or BIP).

AND

- Unless the conduct involves weapons, drugs, or serious bodily injury, **return the student to the placement from which he or she was removed.** The district and the parent(s) may, however, agree to a change of placement as part of the modification of the BIP.⁹³ If such an agreement is reached, it must be documented in writing in the student's IEP or BIP.



When the Team Determines that the Behavior IS NOT a Manifestation of the Student's Disability—Apply Disciplinary Measure(s), Conduct IEP Team Meeting to Determine Services, and Provide FAPE

If the MDR team determines that the student's behavior is **not** a manifestation of his or her disability, then:

- **The IDEA 2004 specifically provides that relevant disciplinary procedures applicable to students without disabilities may be applied to the student in the same manner and for the same duration as they would be applied to students without disabilities.**⁹⁴ This includes long-term suspension and expulsion.
- **The school must still provide the student with FAPE.** This means that, despite the removal or change of placement (which can be to an IAES), the student must be provided with:⁹⁵
 - services necessary to enable the student to participate in the general curriculum
 - services necessary to enable the student to progress toward meeting the goals set out in his or her IEP, **AND**
 - as appropriate, a FBA, behavior intervention services, and modifications (such as a BIP) designed to address the behavior violation so that it does not recur

Because at this point the removal is a change of placement, it is **the IEP team that determines what services are appropriate during the long-term suspension**

⁹³See 34 CFR Sec. 300.530(f)(2) (2006)—Authority of school personnel, Determination that behavior was a manifestation.

⁹⁴See IDEA 2004, 20 USC Sec. 1415(k)(1)(C)—Placement in alternative educational setting, Additional Authority; 34 CFR Sec. 300.530(c) (2006)—Authority of school personnel, Additional authority; and Subsection B of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, When behavior is not a manifestation of disability.

⁹⁵See IDEA 2004, 20 USC Sec. 1415(k)(1)(D)—Placement in alternative educational setting, Services; and 34 CFR Sec. 300.503(d) (2006)—Authority of school personnel, Services.

or expulsion (as opposed to a school official, in consultation with one of the student's teachers).⁹⁶ Therefore, if the MDR team did not include the entire IEP team, then the student's full IEP team must meet within 10 business days after commencing a long-term suspension or expulsion.

- The parents must be notified of the IEP meeting.
- The full IEP team develops an IEP that reflects the alternative educational services and placement, and that includes behavioral services designed to address the behavior violation so that it does not recur. The IEP team may find assistance by consulting the NMPED's *Technical Assistance Manual, Addressing Student Behavior: A Guide for Educators*. Additional information and guidance is also available at www.ped.state.nm.us/seo/discipline/guide.htm.

! The IDEA 2004 **removed the requirement** that districts conduct FBAs and review BIPs of **all** students with disabilities within 10 days of their removal for disciplinary reasons.⁹⁷ Districts are still free to conduct FBAs and design BIPs under these circumstances, **but if the MDR team has concluded that the behavior was NOT a manifestation of the student's disability, the IEP team is NOT required to conduct a FBA or design a BIP.**



When Parents Challenge the Disciplinary Decision and/or Manifestation Determination Review

Parents may file a request for an expedited due process hearing to challenge the disciplinary action and/or results of the MDR.⁹⁸ By means of a due process hearing, parents may challenge one or all of the following:

- the MDR team's determination that the behavior was not a manifestation of the student's disability
- the proposed IAES (including the type of services to be provided to the student, the amount of services to be provided, the setting in which the services are to be provided)

⁹⁶See 34 CFR Secs. 300.530(d)(5) and 300.531 (2006)—Authority of school personnel, Services and Determination of setting; IDEA 2004, 20 USC Sec. 1415(k)(2)—Placement in alternative educational setting, Determination of setting; and *Letter to Zirkel*, 31 IDELR 138 (OSEP Dec. 7, 1999).

⁹⁷Compare 34 CFR Sec. 300.520(b)((1)(i) (1999)—Authority of school personnel, to 34 CFR Sec. 530(d)(ii) (2006)—Authority of school personnel, Services; and Subsection B of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, When behavior is not a manifestation of disability.

⁹⁸See IDEA 2004, 20 USC Sec. 1415(k)(3)—Placement in alternative educational setting, Appeal; 34 CFR Sec. 300.532(a), (c) (2006)—Appeal, General and Expedited due process hearing; and Subsection J of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Appeal.

- any procedural failings of the disciplinary process (for example, parents may claim that a “change of placement” occurred and that the district failed to conduct a MDR).

Parents must file a request for due process hearing (or due process complaint) with the NMPED and provide at the same time a copy of the request/complaint to the district’s superintendent.⁹⁹ The NMPED is responsible for arranging for the appointment of a special education due process hearing officer, who must handle the case in an expedited manner.¹⁰⁰ Under the IDEA 2004, **the hearing must occur within 20 school days of the date of the parents’ request, and the hearing officer must make a decision within 10 school days after the conclusion of the hearing.**¹⁰¹

! The IDEA 2004 made a significant change to the procedures that apply when parents request a due process hearing to challenge the manifestation determination or placement decision. Under former law, the student was entitled to “stay put”—to remain in his or her pre-incident placement, pending the results of the due process hearing.

The IDEA 2004 eliminated the “stay-put” rule in the context of disciplinary matters. Now, when parents challenge the results of the MDR and/or placement decision, **the student must remain in the IAES pending the decision of the special education due process hearing officer or until the expiration of the disciplinary removal, whichever occurs first.**¹⁰²

The only **exception to this provision** is when the parents and district agree that the student’s placement during the hearing process may be something other than IAES. If the district and parents enter into such an agreement, the terms of the agreement should be reduced to writing and included in the student’s IEP (such an agreement results in a placement decision and is thus required to be part of a student’s IEP).¹⁰³

⁹⁹See 34 CFR Sec. 300.507 (2006)—Filing a due process complaint and 300.508—Due process complaint; and Subsection I of 6.31.2.13 NMAC (2007)—Additional rights of parents, students and public agencies, Due process hearings.

¹⁰⁰See IDEA 2004, 20 USC Sec. 1415(k)(4)(B)—Placement in alternative educational setting, Placement during appeals; 34 CFR Sec. 300.532(c)(2) (2006)—Appeal, Expedited due process hearing; and Subsection I(2)(a) of 6.31.2.13 NMAC (2007)—Additional rights of parents, students and public agencies, Due process hearings.

¹⁰¹See preceding footnote.

¹⁰²See IDEA 2004, 20 USC Sec. 1415(k)(4)(A) Placement in alternative educational setting, Placement during appeals; 34 CFR Sec. 300.533 (2006)—Placement during appeals; and Subsection I(27)(a) of 6.31.2.13 NMAC (2007)—Additional rights of parents, students and public agencies, Due process hearings, Child’s status during proceedings.

¹⁰³ See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46685.



Initiation of Long-Term Suspension or Expulsion Proceedings

Remember: a student with a disability may **not** be long-term suspended or expelled for conduct that is a manifestation of his or her disability. The following procedures apply only when the MDR team has found that the misconduct was **not** a manifestation of the student's disability.¹⁰⁴ The MDR meeting must be conducted **before** the initiation of long-term or expulsion proceedings.

! The IDEA 2004 clearly provides for prompt removal of a student with a disability who violates a code of student conduct. School officials may immediately move a student to an appropriate IAES, another setting, or a short-term suspension **for no more than 10 school days**.¹⁰⁵

If school officials believe prompt action to suspend a student is appropriate, the student may be temporarily or short-term suspended, pending completion of long-term suspension/expulsion proceedings.¹⁰⁶

If the MDR team determines that the conduct in question was not a manifestation of the student's disability, the district may initiate long-term suspension or expulsion proceedings. Local school boards are responsible for establishing appropriate procedures for handling long-term suspensions and expulsions within their districts.¹⁰⁷ School officials are required to initiate long-term suspension or expulsion by designating a hearing authority and disciplinarian, scheduling a formal hearing, and preparing and serving proper notice on the parents.¹⁰⁸ This form of parent notice (separate from that provided at the conclusion of the MDR meeting) is not governed by the IDEA and its implementing regulations, but is instead controlled by local school board rules.

¹⁰⁴See IDEA 2004, 20 USC Sec. 1415(k)(1)(C)—Placement in alternative educational setting, Additional authority; 34 CFR Sec.300.530(c) (2006)—Authority of school personnel, Additional authority; and Subsection B of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, When behavior is not a manifestation of disability.

¹⁰⁵See IDEA 2004, 20 USC Sec. 1415(k)(1)(B)—Placement in alternative educational setting, Authority; 34 CFR Sec. 300.530(b) (2006)—Authority of school personnel, General; Subsection G(2) of 6.11.2.10 NMAC (2007)—Enforcing rules of conduct, Discipline of students with disabilities.

¹⁰⁶See Subsection G (2) of 6.11.2.10 NMAC (2007)—Enforcing rules of conduct, Discipline of students with disabilities.

¹⁰⁷See Subsection G (3) of 6.11.2.12 NMAC (2007)—Procedure for detentions, suspensions and expulsions, Long-term suspension and expulsion.

¹⁰⁸ See Subsection G (4)(e) 6.11.2.12 NMAC (2007)—Procedure for detentions, suspensions and expulsions, Long-term suspension and expulsion.

The school official is responsible for ensuring that the student’s special education and disciplinary records are transmitted for consideration by those persons who are responsible for making the final determination regarding the disciplinary action (such as the disciplinary hearing officer).

The details of long-term suspension/expulsion proceedings applicable to students without disabilities and students with disabilities whose behavior has been determined not to be a manifestation of the disability are beyond the scope of this manual. Procedures can be found in local district policy and procedure manuals and at Subsection G (4) of 6.11.2.12 NMAC (2007)—Procedure for detentions, suspensions and expulsions, Long-term suspension and expulsion.

The IDEA 2004 still requires that the NMPED examine data to determine if there are significant discrepancies within and between districts in the rate of long-term suspensions and expulsions of students with disabilities.¹⁰⁹ Data must be disaggregated by race and ethnicity, in keeping with the IDEA’s requirement that states implement policies and procedures designed to prevent the over-identification or disproportionate representation by race and ethnicity of students with disabilities.¹¹⁰ **If the NMPED, following the review of such data, determines that there are significant discrepancies, then the NMPED may direct a school district to revise policies and practices to ensure that IEPs are properly developed and implemented, that positive behavioral interventions and supports are employed, and that procedural safeguards are properly followed.**



Provide Services as Determined by the IEP Team when the Student is on Long-Term Suspension or Expulsion

While the student is on long-term suspension or expelled from school, the school is responsible for providing services **as determined by the IEP team.**¹¹¹ Again, if the 10-day rule has **not** been met, the school is not obligated to provide services until the 11th cumulative school day of removal.

¹⁰⁹See IDEA 2004, 20 USC Sec. 1412(a)(22)—State eligibility, Suspension and expulsion rates; and 34 CFR Sec. 300.170 (2006)—Suspension and expulsion rates.

¹¹⁰See IDEA 2004, 20 USC Sec. 1412(a)(24)—State eligibility, Overidentification [sic] and disproportionality [sic].

¹¹¹See IDEA 2004, 20 USC Sec. 1415(k)(1)(C), (D)—Placement in alternative educational setting, Additional authority and Services; 34 CFR Secs. 300.530(d)(5) (2006)—Authority of school personnel, Services and 300.531—Determination of setting; and Subsection F of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Determination of setting.

Remember: services must be provided to the extent necessary to:

- enable the student to **participate** in the general curriculum, although in another setting, and
- progress toward meeting the goals set out in his or her IEP.¹¹²

If not already accomplished, the student must also receive, **as appropriate**, an FBA and BIP or other behavioral intervention services and modifications designed to address the behavior violation so that it does not recur.¹¹³ (See the next step, below.)

! *What services is a district required to provide to a student who is on long-term suspension or who has been expelled?*

The IDEA 2004 requires that schools provide sufficient services to permit the student “to continue to **participate** in the general curriculum, although in another setting, and to progress toward meeting [the student’s] IEP goals.” The federal regulations fail to provide any additional clarification, particularly with respect to what level of “participation” is required.¹¹⁴

By contrast, the 1999 version of the implementing regulations required that all services be provided that were “necessary to enable the [student] to appropriately **progress** in the general curriculum and appropriately **advance towards achieving** the [student’s IEP] goals.”¹¹⁵

Thus the key change in the law is that a district is no longer required by law to ensure that services are made available to the student so that he or she may **progress** in the general curriculum. Now, the requirement is only that services allow a student to **participate** in the general curriculum. See below for additional discussion.

The law does not require that a district duplicate exactly those services the student would have received, had he or she not been expelled or suspended. The Department of Education has provided the following guidance regarding the extent to which educational services need to be provided, and the type of instruction to be provided:¹¹⁶

- How long is the removal?

¹¹²See preceding footnote.

¹¹³See IDEA 2004, 20 USC Sec. 1415(k)(1)(D)(ii)—Placement in alternative educational setting, Services; 34 CFR Sec. 300.530(d)(1)(ii) (2006)—Authority of school personnel, Services; and Subsection I of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Services.

¹¹⁴See IDEA 2004, 20 USC Sec. 1415(k)(1)(D)(i)—Placement in alternative educational setting, Services; and 34 CFR Sec. 300.530(d)(1) (2006)—Authority of school personnel, Services.

¹¹⁵Compare 34 CFR Sec. 300.121(d)(3)(ii) (1999)—Free appropriate public education, FAPE for children suspended or expelled from school.

¹¹⁶See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46717.

- How often and to what extent has the student previously been removed from school?
- What are the student's needs and education goals?

The Department of Education also provides the following example for comparison: [A student] who is removed for only a few days and is performing near grade level would not likely need the same level of educational services as a [student] who has significant learning difficulties and is performing well below grade level.¹¹⁷

There is no specific guidance concerning the frequency, extent, or type of services that must be provided, and districts (through IEP teams) are faced with the unenviable task of making this determination with little real assistance. Of particular concern may be courses involving equipment or specialized facilities. The Department of Education has provided some guidance:

With regard to classes such as chemistry or auto mechanics that generally are taught using a hands-on component or specialized equipment or facilities...there are a variety of available instructional techniques and program modules that could be used that would enable a child to continue to progress in the general curriculum, although the child is not receiving instruction in the child's normal school or facility.¹¹⁸

Keep in mind that the IDEA 2004 no longer includes the requirement that a student be provided an opportunity to **progress**; instead, the law now reads "**participate**." This may be an important distinction.

Is a student's home a suitable placement setting for IAES?

The IDEA does not require that students with disabilities who are suspended or expelled be educated with students who are not disabled during the period of their removal.¹¹⁹ Similarly, the Department of Education has specified that it does not wish to "tie the hands of school personnel in responding quickly and effectively to serious [student] behaviors and in creating safe classrooms for all [students]."¹²⁰ Whether or not a home-based IAES is appropriate depends on the individual circumstances of the case, including the length of the removal, the extent to which the student has previously been removed from his or her regular placement, and the student's individual needs and educational goals.

¹¹⁷See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46717.

¹¹⁸See Federal Register, Vol. 64, No. 48 (March 12, 1999) at page 12623; and see Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46716.

¹¹⁹ See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46586.

¹²⁰ See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46586.

However, because these are long-term removals care must be taken to ensure that if home instruction is provided it meets the requirements of the law. The Department of Education has not specifically excluded home instruction as an option for IAES—it instead indicates that the IEP team must have the flexibility it needs to make the setting determination based upon the student’s needs and the circumstances of each individual case.¹²¹ The NMPED, as well, has not prohibited home-based IAES, but it does encourage IEP teams to be certain that decisions concerning IAES are made on an individualized basis, not a school-wide, “this is what we always do” basis.



As Appropriate, Provide the Student with an FBA and Behavioral Intervention Services/Modifications

Remember: Under the IDEA 2004, in addition to the educational services discussed in the previous step, the district is also responsible for providing a student who has been long-term suspended or expelled with, **as appropriate**, a FBA and behavioral intervention services (for example, a BIP) designed to address the behavior violation so that it does not recur.¹²²

The IEP team is responsible for this step in the discipline process, and behavior problems—including those determined not to be a manifestation of the student’s disability—should be addressed in the student’s IEP.¹²³ If for any reason the IEP team determines that such services are not “appropriate,” it should document its decision (and the bases for the decision) in the PWN section of the IEP.



**The Student Returns to School After Suspension is Complete
and
The IEP Team Meets**

Once the student completes the period of suspension, he or she should be permitted to return to school in accordance with any applicable provisions of his or her IEP. **It is likely that the IEP team will need to meet so as to change the student’s IEP to reflect his or her new circumstances.**

¹²¹ See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46722.

¹²²See IDEA 2004, 20 USC Sec. 1415(k)(1)(D)(ii)—Placement in alternative educational setting, Services; and 34 CFR Sec. 300.530(d)(1)(ii) (2006)—Authority of school personnel, Services.

¹²³See 34 CFR Sec. 300.531 (2006)—Determination of setting.

A student with a disability who has been expelled has no greater right to readmission than a student without disabilities under controlling state law. Returning students with disabilities may be required to comply with any district post-expulsion readmission procedures.¹²⁴



Exceptions to the Rule: Special Circumstances
Drugs, Weapons, Serious Bodily Injury, and Dangerousness

Remember: The general rule is that a student with a disability may not be disciplined by means of a change of placement for behavior that is a manifestation of his or her disability. **Exceptions to this rule are made when drugs, weapons, and/or serious bodily injury are involved.**

! The IDEA 2004 made a significant change to the law: Now, under **three** (rather than two) specific scenarios, school officials are permitted to **unilaterally remove** a student with a disability to an IAES for the same amount of time as a student without a disability might be removed, **regardless of whether or not the behavior is determined to be a manifestation of the student's disability.** Such removals, which may not extend beyond 45 school days, are authorized for the following "special circumstances":

DRUGS
WEAPONS
SERIOUS BODILY INJURY

Former law permitted these unilateral removals in the case of drugs and weapons. Congress added the third circumstance—serious bodily injury—when it adopted the IDEA 2004. See below for a discussion of what the law means by "serious bodily injury."

The other important change made by the IDEA 2004 in the context of special circumstances is that removals are permitted for not more than 45 **school** days. Under former law, these types of removals were limited to 45 **calendar** days.¹²⁵

¹²⁴See Federal Register, Vol. 64, No. 48 (March 12, 1999) at page 12626.

¹²⁵See IDEA 2004, 20 USC Sec. 1415(k)(1)(G)—Placement in alternative educational setting, Special circumstances; 34 CFR Sec. 300.530(g) (2006)—Authority of school personnel, Special circumstances; and Subsection E of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Special circumstances.

A. Weapons

If a student with a disability carries or possesses a weapon on school premises, to or at school, or to a school function under the jurisdiction of a state or a local educational agency:

- School officials may **unilaterally** change the student's placement to an appropriate IAES.
- The IAES placement may be imposed for the same amount of time that a student without disabilities would be subject to discipline, but not for more than 45 **school** days.
- *See below for applicable procedures.*

! The IDEA 2004 slightly expands the circumstances of a weapons violation by clarifying that a student may simply possess (hold) a weapon on school premises for the weapons exception to apply.¹²⁶

In New Mexico, a "weapon" is defined as:

- any **firearm** that is designed to, may readily be converted to, or will expel a projectile by the action of an explosion
- any destructive device that is an **explosive or incendiary device, bomb, grenade, rocket** having a propellant charge of more than four ounces, **missile** having an explosive or incendiary charge of more than one-quarter ounce, **mine or similar device.**¹²⁷

A school district may define "weapon" in a way that encompasses more than does this definition, so it is important that school officials familiarize themselves with their local definition. The federal regulations incorporate a more expansive definition of "dangerous weapon":

A weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length¹²⁸

¹²⁶See IDEA 2004, 20 USC Sec. 1415(k)(1)(G)(i)—Placement in alternative educational setting, Special circumstances; 34 CFR Sec. 300.530(g)(1) (2006)—Authority of school personnel, Special circumstances.

¹²⁷See Subsection W of 6.11.2.7 NMAC (2007)—Definitions, Weapon. This definition is similar to the one found in the Gun-Free Schools Act, 20 U.S.C. Sec. 7151(b)(3). See also IDEA 2004, 20 USC Sec. 1415(k)(7)(C)—Placement in alternative educational setting, Definitions; and 34 CFR Sec. 300.530(i)(4) (2006)—Authority of school personnel, Definitions.

¹²⁸See 34 CFR Sec. 300.530(i)(4) (2006)—Authority of school personnel, Definitions; 18 U.S.C. Sec. 930(g)(2) [establishing criminal penalties for persons who possess firearms or dangerous weapons in federal facilities]; and Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46723.

Under this definition, even an object not typically seen as a weapon may be a dangerous weapon. For example, a rock used in an attack qualifies as a dangerous weapon under this broad definition. In one case, a hearing officer determined that an air pellet gun manufactured to look like a real gun constituted a dangerous weapon.¹²⁹

B. Drugs

When a student with a disability **knowingly** possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function under the jurisdiction of a state or local educational agency:

- School officials may **unilaterally change** the student's placement to an appropriate IAES for the same amount of time that a student without disabilities would be subject to discipline, but **not for more than 45 school days**.¹³⁰
- *See below for applicable procedures.*

! **Special Note:** As in the case of a weapons violation, the IDEA 2004 adds key phrases, somewhat expanding the authority of school officials: "on school premises" and "45 school days" (versus **calendar** days).

Alcohol is not considered a controlled substance or illegal drug, although the IDEA does permit school officials to discipline a student with a disability for use or possession of alcohol in violation of the school's disciplinary code. For alcohol-related offenses, school officials should follow the usual disciplinary procedures. Alcohol-related offenses are **not** included within the special circumstances exceptions afforded drug and weapon offenses or serious bodily injury.

The IDEA 2004 defines a "**controlled substance**" as a drug or other substance identified under Schedules I, II, III, IV, or V of the federal Controlled Substances Act.¹³¹ Many prescription medications are controlled substances and should be possessed only by persons for whom they have been prescribed by a physician.

An "**illegal drug**," on the other hand, is a subset of the controlled substance category. An illegal drug is a controlled substance, but it does not include a drug legally possessed or used under the supervision of a licensed health-care professional or under

¹²⁹See *Bethel Park School District*, 106 LRP 30221 (SEA PA 2006). In this case, the student's parent bought the gun and supported the student's taking it to school to confront another student accused of bullying the first student. The student shot off the gun in the school bus and held the gun to another student's neck. The parent unsuccessfully challenged the student's disciplinary removal, claiming that the pellet gun did not meet the definition of a "dangerous weapon."

¹³⁰See IDEA 2004, 20 Sec. 1415(k)(1)(G)(ii)—Placement in alternative educational setting, Special circumstances; 34 CFR Sec. 300.530(g)(2) (2006)—Authority of school personnel, Special circumstances; and Subsection E of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Special circumstances.

¹³¹See IDEA 2004, 20 USC Sec. 1415(k)(7)(A)—Placement in alternative educational setting, Definitions; 34 CFR Sec. 300.530(i)(1) (2006)—Authority of school personnel, Definitions; and 21 U.S.C. Sec. 812(c).

any other legitimate authorization.¹³² Examples of illegal drugs, typically known as “street drugs,” include marijuana, cocaine, and methamphetamine.

! Special Note: The IDEA 2004 specifically permits a disciplinary removal not just for possession of, but also for the **solicitation of the sale of illegal drugs**.

Off-campus drug use: Students with disabilities may not be placed in IAES for off-campus drug use, unless the infraction occurs during a school function. New Mexico law provides that school officials and employees who are responsible for the supervision of students have authority to maintain order and discipline “whenever students are lawfully subject to the schools’ control, regardless of place.”¹³³ In one administrative decision a district was permitted to discipline a student for use of marijuana off campus **during lunch**; the special education due process hearing officer did not discuss but apparently interpreted “at school” to include lunch, even if lunch was taken off campus.¹³⁴

C. Serious Bodily Injury

! Under former law, a school official could unilaterally remove a student **only** for drug and weapon offenses. The IDEA 2004 provides a third category of “special circumstances” in which a school official may unilaterally remove a student to an IAES for no more than 45 school days, even if the behavior is determined to be a manifestation of the student’s disability. That category is **serious bodily injury**.¹³⁵

“Serious bodily injury” is defined under the IDEA 2004 as **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 faculty¹³⁶

¹³²See IDEA 2004, 20 USC Sec. 1415(k)(7)(B)—Placement in alternative educational setting, Definitions; 34 CFR Sec. 300.530(i)(2) (2006)—Authority of school personnel, Definitions.

¹³³ See Subsection A of 6.11.2.8 NMAC (2007)—General provisions, Jurisdiction over students.

¹³⁴See *William S. Hart Union High School District*, 26 IDELR 1258 (SEA CA 1997).

¹³⁵See IDEA 2004, 20 USC Sec. 1415(k)(1)(G)(iii)—Placement in alternative educational setting, Special circumstances; 34 CFR Sec. 300.530(g)(3) (2006)—Authority of school personnel, Special circumstances; and Subsection E of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Special circumstances.

¹³⁶See IDEA 2004, 20 USC Sec. 1415(k)(7)(D)—Placement in alternative educational setting, Definitions; 34 CFR Sec. 300.530(i)(3) (2006)—Authority of school personnel, Definitions; and Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46723.

The law permits a school official to unilaterally remove a student to an IAES for no more than 45 school days if the student has inflicted a serious bodily injury on another person **while at school, on school premises, or at a school function under the jurisdiction of the state or a local educational agency.** *See below for the applicable procedures.*

Obviously, not all assaults will meet this definition, but this particular special circumstance will allow for the removal of a student who has committed a serious assault without using a weapon. Keep in mind that for an injury to qualify as a “serious bodily injury” there must be more than a cut, some pain, or a bruise, for example.¹³⁷ Although this high standard of injury has been criticized as being too narrow in scope, the Department of Education has made it clear that it is powerless to expand the definition of “serious bodily injury” to include less serious assaults or dangerous activities.¹³⁸ In the case of a less serious assault or dangerous activity, school officials may consider using the “dangerousness” provision of the law (see step below).

D. Procedures for Special Circumstances Removals

When a student with a disability engages in prohibited activity involving a weapon, drugs, or serious bodily injury:

- School officials should investigate the allegations, including conducting any necessary interviews.
 - **Remember:** The IDEA 2004 permits school officials to consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a student with a disability who violates a code of student conduct.¹³⁹
- If the 10-Day Rule has not been met, the student may be suspended without services up until the 11th cumulative day of removal.
- School officials may immediately place the student in an IAES for not more than 45 school days.
- The IEP team determines the IAES setting at an IEP team meeting to which the parents are invited.¹⁴⁰ An IEP is developed to reflect both placement and setting.
- The IAES setting must provide the student with FAPE and must be individually designed to meet the student’s unique learning needs. Services

¹³⁷Compare “serious bodily injury” to “bodily injury” as found in 18 USC Sec. 1365(h).

¹³⁸See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46722.

¹³⁹See IDEA 2004, 20 USC Sec. 1415(k)(1)(A)—Placement in alternative educational setting, Authority of school personnel, Case-by-case determination; 34 CFR Sec. 300.530(a) (2006)—Authority of school personnel, Case-by-case determination; and Subsection G of 6.11.2.10 NMAC (2007)—Enforcing rules of conduct, Discipline of students with disabilities [“Public personnel may consider any unique circumstances on a case-by-case basis when determining whether a change of placement...is appropriate for a student with a disability who violates a code of conduct].

¹⁴⁰See 34 CFR Sec. 300.531 (2006)—Determination of setting; and Subsection F of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Determination of setting.

may be provided in the home, in an alternative school, or in another setting and must:

- be provided to the extent necessary to enable the student to participate in the general curriculum
- enable the student to appropriately advance towards achieving the goals set out in the student's IEP, and
- **as appropriate**, include a FBA and behavioral intervention services and modifications (such as a BIP) designed to address the problem behavior and to prevent the behavior from recurring.¹⁴¹

Remember: The use of **home-based instruction** must be evaluated on a case-by-case basis, and a district that removes a student to home-based instruction for IAES should be prepared to justify why a less restrictive IAES (permitting greater participation in the general curriculum) was not appropriate.¹⁴² Placement at home must meet the criteria listed above for FAPE.

- Parental consent to the IAES setting is not required.
- The district must still conduct an MDR, as the removal constitutes a "change of placement." See the section above entitled *Conduct a Manifestation Determination Review* for details concerning the timing of the MDR meeting, who should be on the MDR team, and what matters must be considered by the MDR team.
- Provide the parents with proper notice. See the section above entitled *Parent Notice at the Conclusion of the Manifestation Determination Review Meeting* for additional information concerning the content of required notice to parents.
- If the MDR team determines that the weapon or drug behavior, or the act resulting in serious bodily injury was **not** a manifestation of the student's disability, school officials may initiate long-term suspension or expulsion proceedings.
- If the MDR team determines that the weapon or drug behavior, or the act resulting in serious bodily injury **was a manifestation** of the student's disability, the student **may not be long-term suspended or expelled, but he or she may still be placed in an IAES for up to 45 school days.**

¹⁴¹ See IDEA 2004, 20 USC Sec. 1415(k)(1)(D)(i), (ii)—Placement in alternative educational setting, Services; and 34 CFR Sec. 300.530(d) (2006)—Authority of school personnel, Services.

¹⁴² See Federal Register, Vol. 64, No. 48 (March 12, 1999) at page 12624; and Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46722.

Remember: *No matter what the result of the MDR* (that the behavior either was or was not a manifestation of the student’s disability), if the student has engaged in behavior that qualifies as a special circumstance (drugs, weapons, serious bodily injury), **the law authorizes school officials to remove the student to an IAES for not more than 45 school days.**¹⁴³

While in the IAES, the student must receive, as appropriate, behavioral intervention services and modifications (such as a BIP) designed to address the behavior violation so that it does not recur.¹⁴⁴ **This includes review and modification of any existing BIP or IEP behavioral goals/modifications.**

- The parents have the right to request an expedited due process hearing to challenge the results of the MDR and/or IAES placement, and the district must notify them of this right. This information will be included in the notice (including a copy of the Procedural Safeguards) provided to the parents at the conclusion of the MDR. See the MDR and Parent Notice Forms in Appendix B and, for a more detailed description of the expedited due process hearing process, see the step above entitled *When Parents Challenge the Disciplinary Decision and/or the Manifestation Determination Review*.
- During any expedited due process hearing, the student must remain in the IAES until the expiration of the 45-school-day period or until the special education due process hearing officer renders a decision, whichever occurs first.¹⁴⁵ Parents and school officials are permitted to agree to some alternative placement, pending resolution of the case.¹⁴⁶ Any such agreement should be memorialized in writing.

Under former state rules, local school boards were required to adopt policies stating whether a student would receive grades and/or credit during a long-term suspension or expulsion.¹⁴⁷ This rule no longer exists, although local school boards would still be permitted to enact a policy addressing this issue. School officials should familiarize themselves with local board policy to learn whether or not the district has a policy that addresses this matter.

¹⁴³See Subsection E of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Special circumstances.

¹⁴⁴See 34 CFR Sec. 300.530(d)(1)(ii) (2006)—Authority of school personnel, Services.

¹⁴⁵See 34 CFR Sec. 300.533 (2006)—Placement during appeals; and Subsection J(3) of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Appeal.

¹⁴⁶See 34 CFR Sec. 300.533 (2006)—Placement during appeals.

¹⁴⁷Compare Subsection F (3) of 6.11.2.11 NMAC (8-15-97 and 11-30-00)—Procedures for long-term suspension or expulsion of students with disabilities to 6.11.2.11 NMAC (2007)—Disciplinary removal of students with disabilities.

- The IEP team determines whether, once the disciplinary period is completed (on the 46th school day or sooner), the student will return to his or her previous placement or whether there should be a change in placement.

What happens if the school year ends prior to the completion of a 45-school day removal?

The Department of Education indicates that there is nothing in the IDEA or the new federal regulations that precludes a school district from requiring a student to fulfill the remainder of the 45-school day placement when a new school year begins.¹⁴⁸



E. Dangerousness (“Substantially Likely to Result in Injury”)

If school officials believe that maintaining the current placement of a student with a disability is **substantially likely to result in injury to the student or others** (in other words, that the student is “dangerous”), then a school district may request that a special education due process hearing officer order a change of placement for the student.¹⁴⁹

The law permits a school district to seek an order allowing removal based on dangerousness—even if the dangerous behavior is a manifestation of a **student’s disability**—because lawmakers recognize that a safe school environment must be maintained so that a school may function properly and so that learning may take place for all students.¹⁵⁰ These types of hearings are **expedited**, which means they must take place quickly, and a decision must be issued quickly.

¹⁴⁸See Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46722.

¹⁴⁹See 34 CFR Sec. 300.532(a) (2006)—Appeal, General; and Subsection J(1) of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Appeal.

¹⁵⁰See *Letter to Hayworth*, 102 LRP 9208 (OSEP 2000) [“In addition, school officials may seek to obtain a court order to remove the student from school or from the current placement if they believe that maintaining the student in the current placement is substantially likely to result in injury to the student or to others. *Honig v. Doe*, 484 U.S. 343; 108 S.Ct. 592 (1988). This authority can be used regardless of whether the student’s behavior is determined to be a manifestation of his or her disability.”]

! The IDEA 2004 created changes to the law applicable when a district seeks to remove a student with a disability whom the district considers to be “dangerous.”¹⁵¹ The new law deletes the four factors a special education due process hearing officer used to consider before ordering a removal based upon dangerousness. **Please pay particular attention to the procedures outlined in this section.**

A school district may still ask that a special education due process hearing officer (or court) remove a student who is dangerous and place that student in an IAES.¹⁵² **However, unlike cases involving special circumstances (see above—weapons, drugs, serious bodily injury), a school official may not unilaterally place a student in an IAES for dangerousness.** Only a court or special education due process hearing officer has the authority to change the student’s placement to an IAES when dangerousness is alleged, and that may be for no more than 45 school days.

The special education due process hearing officer is not the same decision-maker as a disciplinary hearing officer. A special education due process hearing officer obtains his or her authority through federal and state law, rather than local school board policy.¹⁵³

What if school officials believe it is not safe to keep the student in his or her placement until the conclusion of the expedited hearing?

REMEMBER: School officials are permitted to remove a student with a disability to an IAES, another setting, or suspension several times during a school year, providing each removal is for less than 10 consecutive school days, without triggering the IDEA protections.¹⁵⁴ A school district’s attorney may also seek an immediate court order permitting removal.¹⁵⁵

What constitutes a “substantial likelihood” that “maintaining a current placement will result in injury”?

Neither state nor federal regulations define “dangerousness” for these purposes, although the level of injury does not have to be as grave as that required under a removal for “serious bodily injury.” Please see the step above entitled *Exceptions to the Rule: Special Circumstances—Drugs, Weapons, Serious Bodily Injury, and Dangerousness*. The New Mexico regulations define “disruptive conduct” and include

¹⁵¹See IDEA 2004, 20 USC Sec. 1415(k)(3)(B)(ii)—Placement in alternative educational setting, Appeal, Authority of hearing officer.

¹⁵²See IDEA 2004, 20 USC Sec. 1415(k)(3)(B)(ii)—Placement in alternative educational setting, Appeal, Authority of hearing officer; 34 CFR Sec. 300.532(a) and (b)(2)(ii) (2006)—Appeal, General and Authority of hearing officer; and Subsection J of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Appeal.

¹⁵³See Subsections I(4) and I(7) of 6.31.2.13 NMAC (2007)—Additional rights of parents, students and public agencies, Bases for requesting expedited hearing and Duties of the SEB of the department.

¹⁵⁴See 34 CFR Sec. 300.530(b) (2006)—Authority of school personnel, General.

¹⁵⁵ See footnote 150, above.

“gang-related activity” within the definition of “disruptive conduct.” “Disruptive conduct” is defined as willful conduct that:

- materially and in fact disrupts or interferes with the operation of the public schools or the orderly conduct of any public school activity, including individual classes, OR
- leads an administrative authority reasonably to forecast that such disruption or interference is likely to occur unless preventive action is taken.¹⁵⁶

Some examples of cases in which hearing officers have granted school districts’ requests to change a student’s placement to an IAES based upon allegations of “dangerousness” include:

- A hearing officer found that a school district had successfully demonstrated that a student’s behavior indicated he would cause harm to himself or others, noting that the student had **repeatedly threatened his teachers and the principal and had put his hand through a glass window.**¹⁵⁷
- A hearing officer found in favor of a school district that demonstrated at the hearing that:
 - the parents were **not properly managing the student’s diabetes**, and
 - the student’s **emotional health continued to deteriorate to the extent that she posed a danger to herself and others** and could not effectively access her educational program.¹⁵⁸
- A hearing officer determined that a student with Asperger’s syndrome was dangerous both to himself and others based upon the student’s **threat to assault teachers with a screwdriver, his suicidal threats, significant self-abusive behaviors (banging his head on the floor, hitting himself in the head, thus requiring restraint), and inappropriate sexual behavior.**¹⁵⁹
- A thirteen-year-old student exhibited behaviors such as **biting, hitting, kicking, poking, throwing objects, and turning over furniture.** The district sought to minimize the student's risk of injury through the provision of appropriately certified teaching staff, as well as the extensive training of the staff in the areas of behavior management, inclusion, and crisis prevention and intervention. The parents argued that the student’s behaviors amounted to no more than a nuisance and stressed that the student had only once punctured her teacher’s skin, that no medical treatment by a physician had been required, and that police had never been called to restrain the student. The federal appeals court ruled in favor of the district, stating:

¹⁵⁶See Subsections F and H of 6.11.2.7 NMAC (2007)—Definitions, “Disruptive conduct” and “Gang related activity.”

¹⁵⁷See *West Orange Board of Education*, 105 LRP 2858 (SEA NJ 2004).

¹⁵⁸See *Timberlane Regional School District*, 45 IDELR 139 (SEA NH 2006).

¹⁵⁹See *Pennsauken Township Board of Education*, 42 IDELR 216 (SEA NJ 2004).

As an initial matter, we emphatically reject the contention that an "injury" is inflicted only when blood is drawn or the emergency room visited. Bruises, bite marks, and poked eyes all constitute "injuries" in the context of this analysis. More broadly, we reject the proposition that a child must first inflict serious harm before that child can be deemed substantially likely to cause injury.¹⁶⁰

What are the steps in this process?

Sometimes special educators, general education teachers, or related service providers may report to school officials that a student has, in their opinion, become dangerous to him- or herself and/or others. When a school official believes that maintaining the current placement of a student is **substantially** likely to result in **injury to the student or others**, he or she may seek an order permitting the district to place the student in an IAES for up to 45 school days. Some of the general disciplinary rules apply, even in these circumstances, so the following procedures (including the need to conduct a MDR meeting) must be strictly followed:¹⁶¹

- The school official conducts an **informal administrative conference** to determine if disciplinary action is warranted. That review includes:
 - conducting interviews
 - providing the student with an opportunity to explain the misconduct
 - determining whether the student's IEP contains alternative disciplinary strategies
 - determining whether a referral for formal evaluation should be made if there is no IEP but disability is suspected, and
 - making a determination as to whether the conduct warrants long-term suspension or expulsion.
- **Parents are provided with proper notice.** This includes notice as to when a MDR meeting will be held, and the parents must be given the opportunity to designate those IEP team members they believe are "relevant" and should be part of the MDR team. See Parent Notice forms in Appendix B.
- The **MDR team meets** to determine whether or not the dangerous behavior is a manifestation of the student's disability. See Appendix B for the MDR Form.
- If the dangerous behavior **is NOT a manifestation** of the student's disability, then he or she may be placed in an IAES for the same duration as is imposed on students without disabilities. If the 10-Day Rule has been met, FAPE must be provided (including, if appropriate, behavioral interventions designed to keep the behavior from recurring).
- If the dangerous behavior **IS a manifestation** of the student's disability, the district may seek the parents' consent to place the student in an IAES. If the parents consent, the agreement should be documented in writing in the student's IEP, and the student may be placed in an IAES for up to 45 school days.

¹⁶⁰See *Light v. Parkway C-2 School District*, 41 F.3d 1223, 21 IDELR 933 (8th Cir. 1994).

¹⁶¹ See IDEA 2004, 20 USC Sec. 1415(k)(3)(B)(ii)—Placement in alternative educational setting, Appeal, Authority of hearing officer; 34 CFR Sec. 300.532 (2006)—Appeal; and Subsection J of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Appeal.

- **No matter what the result of the MDR (in other words, whether the behavior IS or IS NOT a manifestation of the student's disability)**, if after the MDR school officials determine that maintaining the student in his or her current placement is substantially likely to result in injury to the student or others (and "others" may include staff and other students), the district is permitted to file a **request for an expedited due process hearing**.¹⁶² The request for hearing is usually filed by the school district's attorney (who also has the option of seeking a court order).
- Whether the parents agree or disagree with the results of the MDR, they must be provided with a copy of their Procedural Rights and proper notice. Please see the MDR Form in Appendix B.
- A special education due process hearing officer will be appointed by the NMPED, and an **expedited hearing will be held within 20 school days of the date the request for hearing is received by the NMPED. An expedited hearing results in a decision within 10 school days of the completion of the hearing.**¹⁶³
- Prior to the hearing, the IEP team must meet to design a proposed plan for IAES services, specifying where those services will be provided if the hearing officer grants the school district's request for an order changing the student's placement. The school district's attorney will present the IEP team's proposed placement plan to the hearing officer during the expedited hearing. The special education due process hearing officer is authorized to modify the IAES placement proposed by school personnel.¹⁶⁴

! Under former law, the special education due process hearing officer considered four factors in making his or her decision. IDEA 2004 changed the law, and now the hearing officer will **only** consider:

- the appropriateness of the proposed IAES (including whether it is designed by the IEP team to provide the student with FAPE), and
- whether keeping the student in his or her current placement is substantially likely to result in injury to the student or another¹⁶⁵

Who has the burden of proof?

¹⁶² See Subsection I (5)(i) of 6.31.2.13 NMAC (2007)—Additional rights of parents, students, and public schools, Due process hearings; and 34 CFR Sec. 300.532(a) (2006)—Appeal.

¹⁶³ See 34 CFR Sec. 300.532(c)(2) (2006)—Appeal; Subsections I(20)(a) of 6.31.2.13 NMAC (2007)—Additional rights of parents, students, and public schools, Due process hearings, Rules for expedited hearings.

¹⁶⁴ See Federal Register, Vol. 64, No. 48 (March 12, 1999) at page 12622.

¹⁶⁵ See IDEA 2004, 20 USC Sec. 1415(k)(3)(B)(ii)—Placement in alternative educational setting, Appeal, Change of placement order; and 34 CFR Sec. 300.532(b)(ii) (2006)—Appeal, Authority of hearing officer.

Although previous law specified that it was the district’s burden to prove by substantial evidence the “substantial likelihood” of injury (in other words, dangerousness), that language is not included in the IDEA 2004 or in the new federal regulations. The Department of Education’s Analysis and Comments to the new regulations indicate that the district will still have the burden of persuading the special education due process hearing officer (or the court) that maintaining the student in his or her current placement is substantially likely to result in injury to the student or others and that the proposed IAES is appropriate.

Both the parents and the school district have the right to appeal the special education due process hearing officer’s decision. Although the parameters applicable to these types of court actions are beyond the scope of this manual, they may be found at 34 CFR Sec. 300.516 (2006)—Civil action.

What happens at the end of the removal period?

On the 46th school day (or less if so provided by the hearing officer’s order), the IEP team determines whether or not the student will return to his or her previous placement and setting. The law permits the school district and the parents to agree that the student should return to his or her prior placement early, prior to the conclusion of the specified removal period.¹⁶⁶ The law also permits parents and districts to agree to extend the removal period. If such an agreement is reached, it should be put into writing as part of the student’s IEP.



When the 45-Day IAES Placement Ends and School Officials Continue to Consider the Student to be Dangerous

The “dangerousness” procedures described in the step above may be repeated, if at the conclusion of the 45-school-day period school district personnel believe that returning the student to his or her original placement is substantially likely to result in injury to the student or others.¹⁶⁷

Therefore, if school officials believe that the student continues to pose a danger to him- or herself or to others (or will do so if he or she is returned to his or her original placement), a school district may file another request for an expedited due process hearing, and the NMPED will again appoint a special education due process hearing officer to determine whether or not the student continues to pose a danger and whether the proposed IAES setting is appropriate.

¹⁶⁶ See Subsection J(3) of 6.11.2.11 NMAC (2007)—Disciplinary removals of students with disabilities, Appeal.

¹⁶⁷ 34 CFR Sec. 300.532(b)(3) (2006)—Appeal.

The law does not seem to place a limit on the number of times a school district might file these types of requests. **However, before any subsequent request for hearing is made, the MDR team must meet and make a new determination based upon the student's current situation and needs, including any progress he or she may have made in the IAES.**



Involving Law Enforcement Authorities

The law does not prohibit a school district from reporting a crime committed by a student with a disability,¹⁶⁸ nor are state law enforcement and judicial authorities prevented from prosecuting students with disabilities for alleged violations of state or federal laws.¹⁶⁹ State law includes school security officers within the definition of "school personnel" for purposes of student discipline laws.¹⁷⁰ Police may be called even if the misconduct is a manifestation of the student's disability, as long as the district does not summon the police with intent to discriminate on the basis of the student's disability (for example, calling the police only when students with disabilities commit crimes).¹⁷¹ Calling the police is not considered a disciplinary measure, and officials may call law enforcement without first conducting a MDR or complying with other procedural safeguards such as notifying the parents.¹⁷²

What about releasing special education records to law enforcement?

When school personnel report a crime committed by a student with a disability:

¹⁶⁸See IDEA 2004, 20 USC Sec. 1415(k)(6)(A)—Placement in alternative educational setting, Referral to and action by law enforcement and judicial authorities; 34 CFR Sec. 300.535 (2006)—Referral to and action by law enforcement and judicial authorities; and Subsection G(6)(a) of 6.11.2.10 NMAC (2007)—Enforcing rules of conduct, Discipline of students with disabilities, Referral to and action by law enforcement and judicial authorities.

¹⁶⁹ See 34 CFR Sec. 300.535(a) (2006)—Referral to and action by law enforcement and judicial authorities.

¹⁷⁰ See Subsection T of 6.11.2.7 NMAC (2007)—Definitions.

¹⁷¹ See Gorn, Susan and Norlin, John W., *"What Do I Do When...The Answer Book on Discipline"* 3:11 (2nd Ed. LRP Publications 2005).

¹⁷² See, *Jonesboro Public Schools*, 26 IDELR 1073 (SEA AR 1997) ("It would be thoroughly appropriate, however, to require that the District relay the nature of the Student's disability, and the fact that the incidents were causally related to them, first and immediately to the prosecuting authority if the charges are still pending and ultimately also to the juvenile court, should the Student be found guilty, prior to or at the time of the dispositional phase."); Federal Register, Vol. 64, No. 48 (March 12, 1999) at page 12631; and *Northside Independent School District*, 28 IDELR 1118 (SEA TX 1998) ("IDEA specifically gives school districts leeway to report suspected crimes to law enforcement, and does not preclude the adjudication of criminal offenses by the judicial system.")

- They must ensure that copies of the special education and disciplinary records are transmitted for consideration by the appropriate authorities to whom the district has reported the crime.¹⁷³ The purpose of this provision is to ensure that law enforcement officials understand that the student’s disability may have impacted his or her ability to comply with the law.
- There is no deadline included in the relevant law, but one hearing officer has determined that records must be transmitted within a reasonable time, in the ordinary course not in excess of 10 consecutive school days.¹⁷⁴
- **However**, copies of the student’s special education and disciplinary records may be transmitted only to the extent that transmission is permitted by the Family Educational Rights and Privacy Act.¹⁷⁵

Parental consent to release copies of education records to law enforcement is **not** required in connection with a health or safety emergency, when knowledge of the information is necessary to protect the health or safety of the student or other individuals.¹⁷⁶ Some experts recommend that the safest route is to obtain parent consent before sending records other than a report of the crime/incident. School districts should consult with an attorney before releasing more than a report of the incident to the police.

It is unclear what records constitute “special education records” for these purposes. However, “special education records” undoubtedly include the student’s IEP, BIP, and records relating to disciplinary actions or proceedings.¹⁷⁷ “Disciplinary actions or proceedings” are “the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students.”¹⁷⁸

¹⁷³See IDEA 2004, 20 USC Sec. 1415(k)(6)(B)—Placement in alternative educational setting, Referral to and action by law enforcement and judicial authorities, Transmittal of records; 34 CFR Sec. 300.535(b) (2006)—Referral to and action by law enforcement and judicial authorities, Transmittal of records; and Subsection G(6)(b) of 6.11.2.10 NMAC (2007)—Enforcing rules of conduct, Discipline of students with disabilities, Referral to and action by law enforcement and judicial authorities, Transmittal of records.

¹⁷⁴See *Northside Independent School District*, 28 IDELR 1118 (SEA TX 1998).

¹⁷⁵See 34 CFR Sec. 99.3; 34 CFR Sec. 300.535(b)(2) (2006)—Referral to and action by law enforcement and judicial authorities; and Subsection G(6)(b)(ii) of 6.11.2.10 NMAC (2007)—Enforcing rules of conduct, Discipline of students with disabilities, Referral to and action by law enforcement and judicial authorities, Transmittal of records.

¹⁷⁶ 34 CFR Sec. 99.36(a) and see Analysis and Comments, Federal Register Vol. 71, No. 156 (August 14, 2006) at page 46728.

¹⁷⁷See 34 CFR Sec. 300.611 (b) (2006)—Definitions, Education records; and Gorn, Susan and Norlin, John W., *What Do I Do When... The Answer Book on Discipline* 3:17 (2nd Ed. LRP Publications 2005).

¹⁷⁸ See 34 CFR Sec. 99.3.

APPENDIX A

Definitions of Terms

administrative authority: the superintendent, principal, or a person authorized by either to act officially in a matter involving school discipline or the maintenance of order. School security officers may be included, but only to the extent authorized by local school board policies. (Subsection A of 6.11.2.7 NMAC [2007]—Definitions.)

Behavioral Intervention Plan (BIP): a written plan that includes positive behavioral interventions, strategies and supports to be used in addressing behavior that impedes a student’s learning or that of others. A “behavior management plan” is another phrase used to describe a BIP; the terms are interchangeable. (Subsection F of 6.31.2.11 NMAC [2007]—Educational services for children with disabilities, Behavioral management and discipline.)

“child [or student] with a disability” means that:

- the student has been evaluated in accordance with applicable regulations and has been found to have an exceptionality that qualifies him or her for receipt of special education and, possibly, related services AND
- the student is aged 3 through 21 and has not received a high school diploma or the equivalent.

Local school boards may also opt to include students aged three through 9 who have been evaluated as being developmentally delayed and who, because of that condition, require special education and related services. (Subsection B[2] of 6.31.2.7 NMAC [2007]—Definitions.)

disciplinarian: a person or group authorized to impose punishment after the facts have been determined by a hearing authority. (Subsection E of 6.11.2.7 NMAC [2007]—Definitions.)

expulsion: removal of a student from school either permanently or for an indefinite time exceeding 10 school days or a locally established lesser period. (Subsection G of 6.11.2.7 NMAC [2007]—Definitions.)

Free Appropriate Public Education (FAPE): special education and related services that are provided at public expense, under public supervision and direction, without charge, that are provided in conformity with an individualized education plan, and which meet all applicable state rules and standards. In the context of disciplinary placements, services must enable the student to:

- continue to participate in the general curriculum, although in another setting
- progress toward meeting the student’s IEP goals, and
- receive, as appropriate, an FBA and behavioral modifications and supports (such as a BIP) designed to address the behavior violation so that it does not recur

(IDEA 2004, 20 USC Sec. 1415[k][1][D]—Placement in alternative educational setting, Services; 34 CFR Secs. 300.17, 300.101, 300.530[d] [2006]; Subsection [B][6] of

6.31.2.7 NMAC [2007]—Definitions; and Subsection F[3] of 6.31.2.11 [2007]—Educational services for children with disabilities.)

Functional Behavioral Assessment (FBA): use of a variety of techniques and strategies to diagnose the causes of and identify interventions likely to be effective in addressing problem behaviors. (Subsection F[1] of 6.31.2.11 NMAC [2007]—Educational services for children with disabilities, Behavioral management and discipline.)

hearing authority: a person or group designated to hear evidence and determine the facts of a case at a required formal hearing. Often, this is the local school board. (Subsection I of 6.11.2.7 NMAC [2007]—Definitions.)

Individual Discipline Plans (IDPs): Written modification of a student with a disability's obligation to comply with the school's code of conduct. The IEP team may elect to have alternative ways of handling a student's behavior, including exempting the student from certain provisions of the code of student conduct. These exemptions may be included in the student's IEP document or in an IDP that is referenced in the IEP. IEP teams may not, however, prohibit the initiation of long-term suspension or expulsion. (Subsection G [3] of 6.11.2.10 NMAC [2007]—Enforcing rules of conduct, Program prescriptions.)

Individualized education program (IEP): a written document for a student with a disability that is developed, reviewed, and revised in accordance with federal regulatory requirements. These documents are often lengthy and will specify whether the student may be exempt from some or all of the school discipline code. IEPs may also include BIPs (see above), Individual Discipline Plans (IDPs), and possibly alternative disciplinary measures applicable to the student. IEP teams, including the parents and student, design these plans in cooperative IEP meetings. (Subsection B[9] of 6.31.2.7 NMSA [2007]—Definitions.)

Interim Alternative Educational Setting (IAES): a setting determined by the IEP team and one which is selected so as to provide the student with FAPE, including, as appropriate, services and modifications designed to prevent the problem behavior from recurring. (34 CFR Secs. 300.530[d] and 300.531 [2006].)

In-School Suspension (ISS): suspending a student from one or more regular classes while requiring the student to spend that class time in a designated area at the same school or elsewhere. (Subsection K of 6.11.2.7 NMAC [2007]—Definitions.)

long-term suspension: removal of a student from school for a specified time exceeding either 10 school days or any lesser period as defined by a local school board. (Subsection M of 6.11.2.7 NMAC [2007]—Definitions.)

Manifestation Determination Review (MDR): this is when the MDR team, composed of the district, the parents, and relevant members of the student's IEP team, meets to evaluate the relationship, if any, between the student's misconduct and his or her disability. The MDR process answers the question: "Is the behavior in question

evidence of the student's disability, or is it wholly unrelated to the disability?" (IDEA 2004, 20 USC Sec. 1415[k][1][E]—Placement in alternative educational setting; 34 CFR Sec. 300.530[e] [2006]—Authority of school personnel; and Subsection C of 6.11.2.11 NMAC [2007]—Disciplinary removals of students with disabilities.)

Prior Written Notice of Actions Proposed (PWN): this is the type of notice that the district must provide to parents whenever the district:

- proposes to initiate or change the identification, evaluation, or educational placement of the student or provision of FAPE to the student, OR
- refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student.

PWN must include:

- a description of the action proposed or refused by the district
- an explanation as to why the district has proposed or refused to take the action
- a description of each evaluation, procedure, assessment, record, or report the district used as a basis for the proposed action or refused action
- a statement that the parents have the protections due them under the procedural safeguards and the means by which parents may obtain copies of the procedural safeguards (if they are not being provided with a copy as required under specific circumstances, such as a change of placement initiated/proposed for disciplinary reasons)
- sources parent may contact to obtain help with understanding their rights
- a description of other options the IEP team (and/or the district) considered and why those options were rejected, AND
- a description of other factors that are relevant to the district's proposal or refusal to act.

(34 CFR Sec. 300.503 [2006]—Prior notice by the public agency; content of notice.)

review authority: a person or group authorized by the local board to review a disciplinarian's final decision to impose a long-term suspension or expulsion. This can be a hearing officer (NOT a special education due process hearing officer) or the local school board. (Subsection R of 6.11.2.7 NMAC [2007]—Definitions.)

short-term (temporary) suspension: any term of suspension that falls short of the definition of a "long-term suspension". A "temporary suspension" (removal of a student from school for a specified period of 10 school days or less after a rudimentary hearing) is the same as a "short-term suspension" in most school districts. (Subsection V of 6.11.2.7 NMAC [2007]—Definitions.)

special education due process hearing officer: an attorney who contracts with the New Mexico Public Education Department (NMPED) and is appointed by the NMPED to hear and decide a request for due process hearing (also called a "complaint" for due process hearing) filed either by the school district or the student's parents. Federal and state laws determine the special education due process hearing officer's authority and provide both the school district and parent with specific rights. Within the context of discipline for students with disabilities, the special education due process hearing officer would be the person who would hear and determine an appeal by parents of an MDR

determination, the student's placement (the services he or she is provided while on disciplinary removal), or a request by a school district to remove a student for dangerousness. The hearing officer who determines long-term suspension for general education students (and sometimes students with disabilities) is a different kind of hearing officer. That kind of hearing officer acts pursuant to authority granted by the local school board. (Subsection I of 6.31.2.13 NMAC [2007]—Additional rights of parents, students and public agencies, Due process hearings.)



RESOURCES

Numerous resources are available to educators who wish to learn more about ways to address student behavior problems and discipline matters. As the World Wide Web grows, Internet references, guides and aides multiply. **Keep in mind, however, that any assistance you may find either on the Internet or in the following resources should be used only in conjunction with applicable New Mexico rules and regulations. Make sure the information you review has been updated since the July 1, 2005 effective date of the IDEA 2004. For current information on the federal implementing regulations, look for a publication date *after* August 14, 2006, the date on which the new regulations were issued.**

- ❖ The Special Education Office of the New Mexico Public Education Department maintains a Web site that includes guidance on particular topics, technical assistance documents and manuals. Go to: www.ped.state.nm.us/seo/index.htm. Some NMPED resources include:
 - *Addressing Student Behavior, A Guide for Educators* (October 2003) (available online)
 - *Developing Quality IEPs* (available online)
 - *Student Assistance Team (SAT)*
 - *Positive Behavioral Interventions and Supports (PBIS) Program*

- ❖ Other online resources:
 - www.specialedconnection.com. The site, which requires a paid subscription, permits research into administrative and court decisions, and OSEP guidance, and includes helpful forms and basic summaries of the law called "Smartstarts."
 - <http://idea.ed.gov/>, a Web site sponsored by the U.S. Department of Education, Office of Special Education Programs. The site permits research, includes links to federal regulations, and contains relevant news items and resources for educators and administrators.
 - The Office of Special Education and Rehabilitative Services (OSERS), in recognition of some confusion regarding districts' responsibilities for discipline under the 2006 version of the federal regulations, published a **Question and Answer** document concerning discipline procedures. That publication is available at 47 IDELR 227, 107 LRP 11724 (January 1, 2007).

❖ Publications:

- *"What Do I Do When...The Answer Book on Discipline"*, Susan Gorn and John W. Norlin, LRP Publications (2nd Ed. 2005)
- *"Legally Compliant Manifestation Determinations: Avoiding the Most Common Mistakes"*, Jim Walsh, LRP Publications (2003, Individuals with Disabilities Education Law Report – Special Report No. 31).
- *IDEA Compliance Insider*, a monthly newsletter published by LRP Publications. www.shoplrp.com/product/p-300530.BN.html.

APPENDIX B – FORMS

DISCIPLINE REMOVAL LOG

Student: _____ School: _____ Grade Level: _____

Behavior Exhibited (description)	Period of Suspension or Removal	Number of Days or <u>Partial</u> Days Removed from School [♦]	Start Date of Removal	End Date of Removal	Total Days Removed for Incident	Cumulative Total of Days Removed ^{♦♦}
<i>Disrupting Class</i>	<i>1 day</i>	<i>1 day</i>	<i>1/13/06</i>	<i>1/13/06</i>	<i>1</i>	<i>1</i>
<i>Kicked Classmate</i>	<i>4 days</i>	<i>4 days</i>	<i>3/6/04</i>	<i>3/10/06</i>	<i>5</i>	<i>6</i>

[♦] ISS does NOT count toward the 10-Day Rule, as long as **the student receives services in ISS that provide him or her with FAPE**. Bus suspensions DO count if transportation is part of the student's IEP. If bus transportation is NOT part of the student's IEP, then bus suspensions do NOT count toward the 10-Day Rule.

^{♦♦} Once cumulative days exceed 10 in a single school year (i.e., beginning on Day 11), the district must begin providing the student with educational services and FAPE. For removals of 10 cumulative days or less, the school does not have to provide the student with educational services.

MANIFESTATION DETERMINATION REVIEW

Student: _____ School: _____ Grade Level: _____ Date: _____

Use Note: *The MDR team (parents, the district, and relevant members of the IEP team) must conduct a manifestation determination review (MDR) for any disciplinary action involving a **change of placement**, including proposed removals based upon **dangerousness** and unilateral IAES placements for **weapons, drugs, and serious bodily injury**. The MDR must be conducted immediately, if possible, but no later than 10 school days after the date on which the decision is made to take the disciplinary action. The MDR must take place **before** long-term suspension or expulsion proceedings are initiated. Parents must be provided with a copy of this form once the MDR is completed.*

1. Parents were notified **on the same day on which school officials determined that a proposed removal would result in a change of placement:**

- a. of the disciplinary decision AND
- b. of their procedural rights.
- c. date of notice to parents and how provided (ex phone, email): _____

2. Describe the behavior/incident subject to discipline:

3. Information considered by the MDR team: (check all that apply)

_____information provided by the parents	_____current IEP and implementation of that IEP
_____evaluations	_____BIP, its components, and implementation data
_____student's school performance, including attendance and grades	_____student's behavior outside of school
_____behavioral history	_____information from the student (including his/her understanding of the incident and school policy)
_____information from student's teachers	_____information from administrators concerning the misconduct/incident
_____information regarding the student's disability (should students with this disability be expected to conform their behavior in this context?)	_____information about the student's cognitive and emotional status (what is his/her ability to maintain self-control in this context?)
_____other options available for appropriate programming	_____other (specify):

4. (yes/no) **Was the conduct caused by, or in direct and substantial relationship to, the student's disability? Why? Why not?**

5. (yes/no) **Was the conduct in question the direct result of the district's failure to implement the IEP (which includes any BIP)? Why? Why not?**

RESULTS OF THE MDR:

- ❖ If the MDR team answers "no" to **BOTH** Questions 4 and 5, then the MDR team may conclude that the behavior is **NOT** a manifestation of the student's disability.
OR
 - ❖ If the MDR team answers "yes" to **EITHER** Question 4 **OR** 5, then the MDR team must conclude that the behavior **IS** a manifestation of the student's disability. Unless the behavior involves drugs, weapons, or serious bodily injury, disciplinary action may proceed no further, because a student with a disability may **NOT** be disciplined through a change of placement for behavior that is a manifestation of the student's disability.
6. Based on the preceding analysis, the MDR team has determined that the student's behavior **IS / IS NOT** (circle one) a manifestation of the student's disability.
 7. When the MDR team concludes that the behavior **IS** a manifestation of the student's disability, the entire IEP team must:
 - Conduct a FBA, if one has not been done, and implement a BIP
 - If a BIP already exists, review the BIP and modify it, as necessary
 - Unless the behavior involves weapons, drugs, or serious bodily injury, return the student to his or her previous placement
 - If the parents agree to a change of placement, document any agreement in writing in the student's IEP or BIP.
 8. When the MDR team concludes that the behavior **IS NOT** a manifestation of the student's disability, then:
 - School officials may proceed with disciplinary action, including, if applicable, long-term suspension or expulsion.
 - The IEP team must meet within 10 business days after commencing the long-term suspension or expulsion to:
 - determine what services are necessary to provide the student with FAPE
 - as appropriate, conduct an FBA and determine what behavioral services/modifications (BIP) should be employed to address the behavior violation so that it does not recur

Use Note: A copy of this entire form must be given to the parents. Following the manifestation determination review, the school district must provide parents with notice. Use only one of the following parent notice sections. Check only the section that applies, and fill in any blanks.

- NOTICE TO PARENTS:** (to be used only if the MDR team determines that the behavior IS a manifestation of the student's disability)

The MDR team has determined that the student's behavior **IS** a manifestation of his/her disability, and the misconduct **does not** involve drugs, weapons, or serious bodily injury. This means that:

- The student will be returned to his/her previous placement.
- The entire IEP team will meet on _____ at _____ o'clock to:
 - o review any existing behavioral intervention plan and modify it, if necessary OR
 - o consider whether the district needs to conduct a functional behavioral analysis and design behavioral supports and interventions to address the problem behavior

- NOTICE TO PARENTS:** (to be used only if the MDR team determines the behavior is NOT a manifestation of the student's disability)

The MDR team has determined that the student's behavior **IS NOT** a manifestation of his/her disability. This means that:

- The school will impose the following disciplinary sanction (describe):
- The district proposes the above disciplinary action for the following reasons:
- The MDR team considered the following alternative disciplinary responses but rejected them for the following reasons:

- The district will be responsible for providing services to the student following the 10th cumulative day of removal during this school year (as of _____[date]). The entire IEP team will meet on _____ at _____ o'clock to determine what services will be provided.

- As appropriate, when it meets the IEP team will also conduct a functional behavioral analysis, design a behavioral intervention plan, and/or provide the student with other behavioral services designed to address the behavior violation so that it does not recur.

- You may obtain a copy of your Procedural Safeguards by contacting:

- _____
- As described in the Procedural Safeguards, you have the right to challenge:
 - the results of the manifestation determination review AND
 - the proposed change of placement AND
 - the proposed provision of services in that placement

You may challenge any of the above by filing with the New Mexico Public Education Department a state-level complaint and/or a request for an expedited due process hearing.

You may contact any of the following sources for assistance in understanding your procedural rights:

- NOTICE TO PARENTS:** (to be used only for drugs, weapons, or serious bodily injury)

EITHER:

- ____The MDR team has determined that the student’s drug/weapon/serious bodily injury conduct **IS a manifestation** of his/her disability. This means that:
 - The student may not be long-term suspended or expelled, but he/she can still be placed in an IAES for ***up to*** 45 school days
 - The student will be placed in IAES for _____school days. Start date:_____ End date:_____
- The district will be responsible for providing services to the student following the 10th cumulative day of removal during this school year (as of _____[date]). The entire IEP team will meet on _____ at _____o’clock to determine what services will be provided and the setting in which those services will be provided.
 - When it meets the IEP team will also conduct a functional behavioral analysis, design a behavioral intervention plan, and/or provide the student with other behavioral services designed to address the behavior violation so that it does not recur. If the student already has a BIP, the team will review the plan and modify it if necessary.
- You may obtain a copy of your Procedural Safeguards from : _____.
- You have the right to challenge:
 - the results of the manifestation determination review AND
 - the proposed change of placement AND
 - the proposed provision of services in that placement

You have the right to challenge the placement and/or services to be provided the student in IAES by filing with the New Mexico Public Education Department a state-level complaint and/or a request for an expedited due process hearing.

You may contact any of the following sources for assistance in understanding your procedural rights:

OR:

- ____The MDR team has determined that the student’s **misconduct IS NOT a manifestation** of his/her disability. This means that:
- The district will impose the following disciplinary sanction (may include long-term suspension or expulsion. Describe the sanction and **include start and end dates**):
- The district will be responsible for providing services to the student following the 10th cumulative day of removal during this school year (as of _____[date]). The entire IEP team will meet on _____ at _____o’clock to determine what services will be provided and the setting in which those services will be provided.
 - As appropriate, when it meets the IEP team will also conduct a functional behavioral analysis, design a behavioral intervention plan, and/or provide the student with other behavioral services designed to address the behavior violation so that it does not recur.
- You may obtain a copy of your Procedural Safeguards from: _____.
- You have the right to challenge:
 - the results of the manifestation determination review AND
 - the proposed change of placement AND
 - the proposed provision of services in that placement

You have the right to challenge the placement and/or services to be provided the student in IAES by filing with the New Mexico Public Education Department a state-level complaint and/or a request for an expedited due process hearing.

You may contact any of the following sources for assistance in understanding your procedural rights:

MEETING PARTICIPANTS:

Signature	Role/Title	Date
	Student	
	Parent/Guardian	
	Parent/Guardian	
	Relevant IEP Team Member	
	Relevant IEP Team Member	
	Relevant IEP Team Member	
	Relevant IEP Team Member	
	Other (specify role/title):	
	Other (specify role/title):	

PARENT NOTICE
Short-Term Suspension

Student: _____ School: _____ Grade: _____

Notice Given By: _____ (name & title) Date Notice Given: _____

Method of Notice: _____ (phone, email, letter)

Use Note: This form is to be used for short-term suspensions. Check only those statements that apply.

DESCRIPTION OF MISCONDUCT:

- On _____ (date), school officials received a report of misconduct on the part of your child. The misconduct consisted of:

THE SCHOOL'S RESPONSE TO THE MISCONDUCT: (check only one)

- School officials have determined that your child's IEP sets forth alternative discipline strategies that are applicable to the misconduct. The school will implement those alternative strategies, which are found in the student's current IEP dated _____ and are described briefly below:

- School officials have determined that the IEP does not contain applicable alternative discipline strategies, and so the following disciplinary action will be taken (describe proposed disciplinary sanction):

EDUCATIONAL SERVICES: (check only one)

1. ___ Because the student has not been suspended during this school year for in excess of 10 cumulative school days, no educational services will be provided while he or she is on suspension. When the student returns to school, he or she will be permitted to return to the same setting and services specified in the student's IEP. **OR**
2. ___ During this removal, the total of days the student has been removed from school this year will exceed 10 cumulative days. The school will begin providing the student with educational services when his or her cumulative total of removal days reaches 10, or on Day 11. School officials, in consultation with the student's special education teacher, have determined that the student will receive the following educational services beginning on Day 11 (date: _____), and continuing while the student is on short-term suspension: **OR**
3. ___ Because the student has been suspended for more than 10 cumulative school days this school year, the student is entitled to receive educational services while the student is on short-term suspension. School officials, in consultation with the student's special education teacher, have determined that the student will receive the following educational services while on short-term suspension:

IEP TEAM MEETING:

- An IEP team meeting will be held at your child's school on _____ at _____ a.m./p.m. for the purpose(s) of (check only those items that apply):
 - ___ Determining what educational services will be provided to the student while he/she is removed from school. The IEP team determines services only when a short-term suspension will result in a "change of placement" (this means that the short-term suspension, combined with earlier removals this school year, total over 10 cumulative days and constitute a pattern of removals). Otherwise, for short-term suspensions, school

officials, in consultation with the student's special education teacher, determine educational services.

- ___ Reviewing and modifying the student's behavioral intervention plan and, if necessary, modifying the behavioral intervention plan to address the problem behavior.
 - ___ Arranging for and/or considering the results of a functional behavioral assessment and determining if any assessments are needed.
 - ___ Developing a behavioral intervention plan.
- Your child's period of suspension will be completed on _____(date). The IEP team will meet on _____(date) at _____a.m./p.m. to determine what services your child will receive when he/she returns to school.

NOTIFICATION OF MANIFESTATION DETERMINATION REVIEW MEETING: (to be used only when the suspension results in a change of placement)

- The school's decision to remove your child constitutes a "change of placement."
 - You may obtain a copy of your Procedural Safeguards by contacting : _____.
 - The school will conduct a "Manifestation Determination Review" (MDR) within 10 days of the date the removal decision is made to evaluate the relationship, in any, between your child's disability and his/her behavior. The MDR team, composed of the district, the student's parents, and relevant IEP team members (determined by the parents and the district), will answer these two questions:
 1. **Was the conduct caused by, or in direct and substantial relationship to, the student's disability?**
 2. **Was the conduct in question the direct result of the district's failure to implement the IEP (which includes any BIP)?**
 - You have the right to invite to the MDR meeting any IEP team members you feel are able to provide relevant information to the MDR team.
 - You have the right to bring to the MDR meeting additional information that you believe would be helpful to the MDR team in making its decision.

PARENT NOTICE
(Long-Term Suspension/Expulsion)

Student: _____ School: _____ Grade: _____

Notice given by: _____ (name & title) Date: _____

Method of Notice: _____ (phone, email, letter)

Use Note: *This form is to be used when the school official determines that he or she will pursue a long-term suspension or expulsion, and/or when drugs, weapons, or serious bodily are involved. The form may be used to impose immediate short-term suspension, followed by a long-term suspension or expulsion. Check only those statements that apply.*

DESCRIPTION OF MISCONDUCT:

- On _____ (date), school officials received a report of misconduct on the part of your child involving weapons/drugs/serious bodily injury meriting long-term suspension or expulsion from school. The misconduct consisted of:

THE SCHOOL'S RESPONSE TO THE MISCONDUCT: (check only one)

1. ____ School officials have determined that your child's IEP sets forth alternative discipline strategies that are applicable to the misconduct. The school will implement those alternatives strategies, which are found in the student's current IEP dated _____ and are described briefly below:

2. ____ School officials have determined that the following disciplinary action will be taken (describe, including whether immediate short-term suspension, placement in IAES, long-term suspension or expulsion is proposed):

EDUCATIONAL SERVICES: (check only one)

1. ____ School officials have determined that the student will immediately be placed on short-term suspension while long-term suspension/expulsion is pursued. Because your child has not been suspended for more than 10 cumulative school days this school year, your child will not be provided with educational services until the 11th cumulative day of removal. School officials, in consultation with the student's special education teacher, have determined that the student will receive the following educational services during the short-term suspension (not more than 10 consecutive days). On Day 11 (date: _____), and continuing while the student is on short-term suspension, the school will provide the following services:

OR

2. ____ School officials have determined that the student will immediately be placed on short-term suspension while long-term suspension/expulsion is pursued. Because the student has been suspended for more than 10 cumulative school days this school year, the student will be provided with educational services as determined by the school official, in consultation with the student's special education teacher. Those services will be as follows (describe services):

OR

3. ____ The student will be long-term suspended or expelled from school. The IEP team will meet to determine the student's educational services while he/she is on long-term suspension or expulsion. **OR**
4. ____ Because this offense involves weapons/drugs/serious bodily injury, school officials have determined that the student will immediately be placed in an interim alternative educational

setting (IAES) for a period of ____ days (up to but not more than 45 school days), beginning _____(date). The IEP team will meet to determine the student's educational services.

IEP TEAM MEETING: (this portion of the notice applies in all circumstances)

- An IEP team meeting will be held at your child's school on _____ at _____ a.m./p.m. for the purposes of:
 - ____Determining what educational services will be provided to the student while he/she is on long-term suspension or expulsion.
 - ____Determining the student's IAES, including the location of IAES and what services will be provided in the IAES. (check this option only if the offense involves weapons/drugs/serious bodily injury)
 - If appropriate, reviewing and modifying the student's behavioral intervention plan and, if necessary, modifying the behavioral intervention plan to address the problem behavior.
 - If appropriate, arranging for and/or considering the results of a functional behavioral assessment and determining if any assessments are needed.
 - If appropriate, developing a behavioral intervention plan.

NOTIFICATION OF MANIFESTATION DETERMINATION REVIEW MEETING: (this portion of the notice applies in all circumstances)

- The school official's decision to pursue long-term suspension or expulsion of your child, or to place him/her in IAES constitutes a "change of placement."
 - You may obtain a copy of your Procedural Safeguards by contacting : _____.
 - The school will conduct a "Manifestation Determination Review" (MDR) (within 10 days of the date the removal decision is made) to evaluate the relationship, in any, between your child's disability and his/her behavior. The date for the MDR meeting is _____ at _____ o'clock. At the meeting, the MDR team, composed of the district, the student's parents, and relevant IEP team members (as determined by the parents and the district) will answer these two questions:
 1. **Was the conduct caused by, or in direct and substantial relationship to, the student's disability?**
 2. **Was the conduct in question the direct result of the district's failure to implement the IEP (which includes any BIP)?**
 - You have the right to invite to the MDR meeting any IEP team members you feel are relevant to the decision-making process.
 - You have the right to bring to the MDR meeting additional information that you believe would be helpful to the team in making its decision.

- Your child's suspension or expulsion will be completed on _____(date). The IEP team will meet on _____(date) at _____ a.m./p.m. to determine what services the student will receive when he/she returns to school.

APPENDIX C—CHECKLISTS

DISCIPLINE CHECKLIST - A

(General Misconduct and Alcohol-Related Offenses)

This checklist may be used for short- or long-term suspensions and for expulsions. Use Discipline Checklist - B when misconduct involves drugs, weapons, or serious bodily injury. Use Discipline Checklist - C for alleged dangerousness.

Instructions for Use: Use this checklist along with the Removal Log, MDR Form, and Parent Notice forms. Proceed through the list in order, placing a checkmark and your initials in the appropriate blank as each step is completed (or N/A if the step does not apply). Note dates as indicated. If you have questions about any step, refer to the Student Discipline Manual and/or the applicable flowchart. Pass the form back and forth between the school officials and the MDR and IEP teams. When all necessary steps have been completed, file this checklist in the student's educational records.

THE SCHOOL OFFICIAL:

1. ___ Misconduct is reported to the school official responsible for discipline.
Date of report: _____
2. ___ The school official checks to see if the student has an IEP. (If not, and if no disability is suspected, then the student may be disciplined as would any other student. The remainder of this checklist does not apply.)
3. ___ The same day as the incident, if possible, the school official conducts an informal administrative conference. *Date of informal conference:* _____ At the conference, the official should:
 - ___ interview the student, other students, relevant staff or other witnesses to the incident
 - ___ allow the student to explain the conduct
 - ___ review the student's IEP. Are there provisions in the plan (or the BIP or IDP) that apply to the conduct in question? If so, those provisions must be followed.
 - ___ assess the incident, the reasons behind the incident, and the options available for addressing the behavior
4. ___ Determine if the student might be a student with an as yet unidentified disability. If so:
 - ___ refer the student for an evaluation through the special education department. *Date of referral, if applicable:* _____
 - ___ notify the parents of the referral. *Date of parental notification:* _____
5. ___ Following the informal administrative conference:
 - ___ Determine what, if any, disciplinary action will be taken.
 - ___ Notify the parents of the incident and the proposed disciplinary sanction. *Date and method of notification:* _____

- If the IEP includes applicable alternative discipline strategies, ensure implementation of those strategies by informing the IEP team, and notify the parents. *Date and method of notification:*_____
6. ___If, during the time the student is subject to disciplinary measures, the parents request an evaluation of a student who has not yet been identified as a student with a disability, the evaluation must be expedited. _____*Date of parent request and* _____*date of referral for expedited evaluation.*
- ___Disciplinary action **does not** have to be put on hold, pending the results of the evaluation. Until the evaluation is completed, the student remains in the educational placement determined by school officials, which can include suspension or expulsion without educational services.
7. ___Determine whether the student's behavior interferes with his or her learning or that of classmates. An IEP team meeting is not required at this point, but it may be good practice to convene one to consider conducting an FBA, designing a BIP or revising a BIP. *Date of IEP team meeting, if applicable:*_____ *Date of parental notification of IEP team meeting, if applicable:*_____
8. ___If the school official contemplates removing the student from school, he or she checks the student's Removal Log (or starts one).
9. ___If the Removal Log indicates that the student has been suspended for less than **10 cumulative school days** during the current school year:
- ___The school official may short-term suspend the student without providing any educational services. The IEP team does not need to be involved in this process. *Dates of short-term suspension:*_____
 - ___Indicate dates of suspension on the student's Removal Log.
10. ___If the Removal Log indicates that the **student been suspended for more than 10 cumulative school days or that the contemplated disciplinary action will result in a suspension of a total of 11 school days or more during the school year**, then:
- ___From day 11 on, provide the student with educational services (FAPE).
 - ___In consultation with the student's special education teacher, determine what services are necessary.
 - ___Conduct a "change of placement" analysis. See #13, below.
 - ___Convene an IEP meeting within 10 business days after removing the student for more than 10 days. *Date of IEP meeting:*_____
 - ___Provide parents with proper notice of the IEP meeting. *Date of parental notification:*_____
11. ___If the school official determines an IEP team meeting is required, the school official sends this form on to the IEP team for completion.

THE IEP TEAM:

12. ___ Date of IEP team meeting: _____ At the IEP team meeting, the team must:
- ___ If appropriate, review and modify the student's BIP to address the problem behavior OR
 - ___ If appropriate, schedule an FBA (and/or recommend assessments) if the student does not have a BIP
 - ___ If appropriate, provide parents with proper notice and convene another IEP team meeting as soon as practicable after completion of an FBA and any assessments to develop a BIP. *Date of parental notification: _____ Date of IEP meeting: _____*
 - ___ If appropriate, ensure that the new BIP is implemented.

THE SCHOOL OFFICIAL:

13. ___ **Conduct a change of placement analysis.** If the student's Removal Log indicates that he or she has been removed from school for more than 10 days, determine whether or not the proposed removal will constitute a **change of placement**. See the applicable section of the Discipline Manual.
14. ___ If the proposed removal of more than 10 days **does not constitute a change of placement, send this form on to the IEP team. If the removal will constitute a change of placement, go to #16, below.**

THE IEP TEAM:

15. ___ If the school official has determined that the disciplinary action **does not constitute a change of placement:**
- ___ IEP team members, including parents, may, **but are not required**, to review an existing BIP and its implementation, conduct an FBA, or design a new BIP.

THE SCHOOL OFFICIAL:

16. ___ If the proposed removal of more than 10 days **does constitute a change of placement:**
- ___ Notify parents of the removal decision and provide them with proper notice. See the Discipline Manual for required elements of notice. This must be done on the same day on which the decision to remove the student is made. *Date and method of parental notification: _____*
 - ___ Schedule a Manifestation Determination Review (MDR) meeting immediately, if possible, but no later than 10 school days after the removal decision is made. *Date for MDR: _____*
 - ___ Provide parents with notification of the MDR. *Date of parental notification: _____*

THE IEP and MDR TEAMS:

17. ___ If the school official has determined that the removal will constitute a change of placement, the team must conduct an MDR meeting within 10 school days from the day the removal decision is made. *Date of MDR:* _____

- ___ Determine who will be included in the MDR team. **BOTH** the parents and the district are members of the MDR team and have the right to determine which members of the IEP team are relevant and should be included on the MDR team.
- ___ Gather information for the team's consideration. See the MDR Form.
- ___ Complete the MDR Form.

18. ___ **If the MDR team determines that the student's behavior IS a manifestation of his/her disability**, the student may **not** be disciplined through a change of placement. (Exceptions to this general rule include drugs, weapons, or serious bodily injury, and alleged dangerousness. See Discipline Checklists B & C.)

- ___ The entire IEP team must meet. *Date of meeting and notice to parents:* _____
- Give this form to **the IEP team**, which must:
 - ___ if no FBA has been conducted, conduct a FBA and implement a BIP for the student
 - ___ if a BIP already exists, review the BIP and modify it, as necessary, to address the student's behavior, AND
 - ___ return the student to the placement from which he or she was removed, unless the district and parents agree to a change of placement
 - ___ If a change of placement is agreed to by the parents, document that agreement in writing, in the student's IEP or BIP
- ___ The student's placement may NOT be unilaterally determined by a school official. The student's placement must be determined by the IEP team.

THE SCHOOL OFFICIAL:

19. ___ **If the team determines that the student's behavior IS NOT a manifestation of his/her disability**, the school official may apply disciplinary proceedings applicable to students who are not disabled, including the initiation of long-term suspension or expulsion proceedings.

- ___ Provide parents with proper written notice. See the MDR and Parent Notice Forms. *Date and method of parental notification:* _____

20. ___ If the parents file a request for due process hearing challenging the results of the MDR, the student must remain in the IAES pending the hearing

officer's decision or expiration of the disciplinary removal, whichever comes first. *Date request for due process hearing filed, if applicable:* _____

21. ___ If the parents do not challenge the results of the MDR:
- ___ Transmit the student's special education and disciplinary records for consideration by those persons responsible for making the long-term suspension or expulsion decision. *Date records transferred:* _____
 - ___ Follow your school board's long-term suspension or expulsion procedures.

THE IEP TEAM:

22. ___ The IEP team must meet **within 10 business days after changing the student's placement.** *Date of parental notification of IEP team meeting:* _____ *Date of IEP team meeting (if different from MDR):* _____
- The IEP team:
 - ___ Determines what services will provide the student with FAPE.
 - ___ Develops an IEP that reflects the alternative educational services and placement to be provided during long-term suspension or expulsion.
 - ___ As appropriate, addresses FBA and BIP requirements.
 - ___ Provides parents with notification of their right to challenge the proposed provision of services. *Date of parental notification:* _____
23. ___ Determine whether, following conclusion of the long-term suspension or expulsion proceedings, the IEP team will need to meet to change the student's IEP to reflect his/her new circumstances. If an IEP team meeting is required, provide the parents with notification. *Date of parental notification, if applicable:* _____
24. ___ Provide the student with services as specified in his/her IEP during the period of suspension or expulsion.

THE SCHOOL OFFICIAL:

25. ___ Permit the student to return to school after the suspension period is complete.
- ___ Note any provisions of the IEP that apply to the student's return to school.
26. ___ If the school official reports a crime to law enforcement:
- ___ Ensure that copies of the student's special education and disciplinary records are transmitted to law enforcement for consideration by the appropriate authorities.
 - ___ Transfer copies of the above records within a reasonable time (in the ordinary course, within 10 consecutive school days of reporting the crime).

- ____ Transmit copies of the above records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

DISCIPLINE CHECKLIST - B

(DRUG, WEAPON, or SERIOUS BODILY INJURY—SPECIAL CIRCUMSTANCES)

Use this checklist for offenses involving drugs, weapons, or serious bodily injury. Use Discipline Checklist - A for general misconduct or alcohol-related offenses, or Discipline Checklist - C for alleged dangerousness.

Instructions for Use: *Use this checklist along with the Removal Log, MDR Form, and Parent Notice forms. Proceed through the list in order, placing a checkmark and/or your initials in the appropriate blank as each step is completed (or N/A if the step does not apply). Note dates as indicated. If you have questions about any step, refer to the Student Discipline Manual and/or the applicable flowchart. Pass the form back and forth between the school official and the MDR and IEP teams. When all necessary steps have been completed, file this checklist in the student's educational records.*

THE SCHOOL OFFICIAL:

1. ___ Drug/weapon/serious bodily injury misconduct is reported to the school official responsible for discipline. *Date of incident report:*_____
2. ___ Check to see if the student has an IEP. (If not, and if no disability is suspected, then the student may be disciplined as would any other student. The remainder of this checklist does not apply.)
3. ___ If the misconduct involves a **weapon**, be certain that the object in question qualifies as a "weapon" under New Mexico rules and the definition provided by your local school board.
4. ___ If the misconduct involves **drugs**:
 - ___ note whether the drugs involved are illegal drugs or controlled substances
 - ___ note whether the conduct occurred on or off campus. A student with a disability may NOT be placed in an interim alternative educational setting (IAES) for off-campus drug use, unless the incident occurred at a school function.
5. ___ If the misconduct involves **alcohol**, STOP and use Discipline Checklist - A.
6. ___ The same day as the incident, if possible, conduct an informal administrative conference. *Date of informal conference:*_____
 - ___ interview the student, other students, relevant staff or other witnesses
 - ___ allow the student to explain the conduct. If the misconduct involves drugs, the student must have **knowingly** possessed or sold the drugs or solicited the sale of a controlled substance.

- ___review the student’s IEP. Are there provisions in the plan (or the BIP or IDP) that address the conduct in question? If so, those provisions must be followed
 - ___assess the incident, the reasons behind the incident, and the options available for addressing the behavior
7. ___Following the informal administrative conference:
- ___Notify the parents of the misconduct. *Date and method of notification:_____*
 - ___On the same date as the discipline decision is made, notify the parents of the decision. *Date and method of notification:_____*
 - If the IEP includes applicable alternative discipline strategies, ensure implementation of those strategies and notify the parents. *Date and method of notification:_____*
8. ___The school official may **immediately and unilaterally** place the student in an IAES for not more than 45 school days during the manifestation inquiry. This means that neither the MDR nor the IEP team needs to meet before the school official removes the student from his or her current placement. *Date student removed and placed in IAES:_____ Calculate expiration of 45 school days:_____*
9. ___If, during the time the student is subject to disciplinary measures, the parents request an evaluation of a student who has not yet been identified as a student with a disability, the evaluation must be expedited. _____*Date of parent request and _____date of referral for expedited evaluation.*
- ___until the evaluation is completed, the student remains in the educational placement determined by the school official, which can include suspension or expulsion without educational services.
10. ___Check the student’s Removal Log. If the student has not been removed for more than 10 cumulative days in the current school year (i.e., the 10-Day Rule has not been met), then the school does not have to provide the student with any educational services until the 11th day of his or her removal. *Indicate cumulative number of days student has been removed from school this school year:_____*

THE IEP AND MDR TEAMS:

11. ___Convene an IEP team meeting. *Date of parental notification:_____*
- ___If appropriate, review the BIP and its implementation to determine if modifications are needed. If there is no BIP, consider conducting an FBA and designing a BIP, if appropriate.
 - ___Determine the IAES setting.
 - ___Parental consent to the IAES setting is not required.

12. ___ **Conduct a manifestation determination review (MDR)** immediately, or within 10 school days from the day the removal decision is made. *Date of MDR:* _____
- ___ The MDR may be combined with the IEP team meeting described in Step 11, above.
 - ___ Determine who will be included on the MDR team. BOTH the parents and the district are members of the MDR team and have the right to determine which members of the IEP team are relevant and should be included as members of the MDR team.
 - ___ Gather information for the team's consideration. See the Discipline Manual.
 - ___ Complete the MDR Form.

THE SCHOOL OFFICIAL:

13. ___ **If the team determines that the student's behavior IS a manifestation of his/her disability**, the student may NOT be long-term suspended or expelled, but the student may still be placed in an IAES for up to 45 school days. *Note date of expiration of 45 school days:* _____
- ___ Provide the parents with proper notice. See the MDR Form.
14. ___ **If the team determines that the student's behavior IS NOT a manifestation of his/her disability**, the school official may initiate long-term suspension or expulsion proceedings in accordance with local board policies.
- ___ Provide the parents with proper written notice. See the MDR and Parent Notice Forms. *Date of parental notification:* _____
15. ___ If the school official has initiated long-term suspension or expulsion proceedings in accordance with local board policies (see #14, above), the school official transmits the student's special education and disciplinary records for consideration by those persons responsible for making the long-term suspension or expulsion decision. *Date records transferred:* _____
16. ___ Follow procedures outlined by your local school board for long-term suspension or expulsion of students.
17. ___ During any due process challenge by the parents, the student remains in the IAES setting for the full 45-school-day period, unless the parents and school official agree otherwise, or unless the special education due process hearing officer enters an order.
18. ___ Check local board policies to determine whether or not the student will receive grades and/or credit during a long-term suspension or expulsion.
19. ___ If school officials report to law enforcement that the student has committed a crime:
- ___ Ensure that copies of the student's special education and disciplinary records are transmitted to law enforcement for consideration by the appropriate authorities.

- ___ Transfer copies of the above records within a reasonable time (in the ordinary course, within 10 consecutive school days of reporting the crime).

THE IEP TEAM:

20. ___ Once the disciplinary period is completed (on the 46th school day or sooner), determine whether the student will return to his or her previous placement or whether there should be a change in placement. *Date of parental notification of meeting:* _____ *Date of of IEP team meeting:* _____

DISCIPLINE CHECKLIST - C (REMOVAL FOR DANGEROUSNESS)

Use this checklist when a school seeks to remove a student based upon dangerousness (substantially likely to injure him-/herself or others). Use Discipline Checklist—A for general misconduct or alcohol-related offenses and Discipline Checklist—B when drugs, weapons, or serious bodily injury are involved.

Instructions for Use: *Use this checklist along with the Removal Log, MDR Form, and Parent Notice forms. Proceed through the list in order, placing a checkmark and/or your initials in the appropriate blank as each step is completed (or N/A if the step does not apply). Note dates as indicated. If you have questions about any step, refer to the Student Discipline Manual and/or the applicable flowchart. Pass the form back and forth between the school official and the MDR and IEP teams. When all necessary steps have been completed, file this checklist in the student's educational records.*

THE SCHOOL OFFICIAL:

1. ___ A single incident of dangerous conduct or a pattern of dangerous behavior or conduct is reported to or becomes apparent to the school official.
Date of incident report: _____
2. ___ Check to see if the student has an IEP. (If not, and if no disability is suspected, then the student may be disciplined as would any other student. The remainder of this checklist does not apply.)
3. ___ The same day as the incident or report, if possible, conduct an informal administrative conference. *Date of informal conference:* _____
 - ___ interview the student, other students, relevant staff or other witnesses to the incident(s)
 - ___ allow the student to explain the conduct
 - ___ review the student's IEP. Are there provisions in the plan (or the BIP or IDP) that address the conduct? If so, those provisions must be followed
 - ___ assess the incident(s), the reasons behind the incident(s), and the options available for addressing the behavior
4. ___ Following the informal administrative conference:
 - ___ Notify the parents of the conduct, and on the same date as the discipline decision is made, notify the parents of the decision. See Parent Notice Forms. *Date and method of notification:* _____
 - If the IEP includes applicable alternative discipline strategies, ensure implementation of those strategies and notify the parents. *Date and method of notification:* _____
 - **NOTE:** School officials **are not** permitted unilaterally to place a student suspected of posing a substantial likelihood of harm in an IAES.

5. ___ You have the option of following provisions relating to general misconduct, including immediate short-term suspension (STOP using this checklist and use Discipline Checklist – A)

OR

___ You may determine that you wish to pursue removal of the student based upon dangerousness (CONTINUE using this Checklist). You are permitted to seek to remove a student based upon dangerousness **even if that dangerous behavior is a manifestation of the student’s disability**. The remainder of this Checklist is to be used when the school official has determined that he or she will seek to remove the student based upon dangerousness.

6. ___ If, during the time the student is subject to disciplinary measures, the parents request an evaluation of a student who has not yet been identified as a student with a disability, the evaluation must be expedited. _____ *Date of parent request and _____ date of referral for expedited evaluation.* Until the evaluation is completed, the student remains in the educational placement determined by the school official, which can include suspension or expulsion without educational services.

THE IEP AND MDR TEAMS:

7. ___ The MDR team conducts a Manifestation Determination Review (MDR) immediately, or within 10 school days from the day the removal decision is made. See the MDR form. *Date of MDR: _____*

- ___ Determine who will be included on the MDR team. BOTH the parents and the district are members of the MDR team and have the right to determine which members of the IEP team are relevant and should be included as members of the MDR team.
- ___ Gather information for the team’s consideration. See the Discipline Manual. ___ Complete the MDR Form.
- ___ No matter what the results of the MDR (whether the behavior is or is not a manifestation of the student’s disability), if the district intends to ask a hearing officer for an order placing the student in an IAES setting, the entire IEP team must determine what educational services the school proposes to provide to the student in the IAES setting. The hearing officer will review this proposed plan and either approve it or order that it be altered.
- ___ The IEP team should also consider, if appropriate, whether an FBA should be conducted and a BIP designed or modified.
- ___ Provide the parents with proper notice of any IEP team meeting and prior written notice at the conclusion of the IEP meeting. *Date of notice to parents and date of IEP team meeting: _____*

THE SCHOOL OFFICIAL:

8. ___ Prior to filing a request for due process hearing seeking a hearing officer's order permitting placement of the student in an IAES, the district may seek the parents' consent to place the student in an IAES. If the parents consent to the placement, the student may be placed in an IAES for up to 45 school days, and no hearing officer order is required.
 - ___ Document parental consent in writing, if obtained.
 - ___ Provide the parents with proper notice of their procedural safeguards. See Parent Notice Forms. *Date of parental notification:* _____
 - ___ Ensure that the IEP team has made a determination as to what educational services will be provided in the IAES setting, including, if appropriate, an FBA and BIP.
9. ___ If the parents do not consent to the alternative placement, the school may file a request for an expedited due process hearing **OR** seek an injunction from a court. A request for an expedited hearing will allege that:
 - Keeping the student in his or her current placement is **substantially** likely to result in injury to the student or others.
10. ___ The special education due process hearing officer will conduct a hearing within 20 school days of the request and will and render a decision within 10 school days of the completion of the hearing. The hearing officer will consider:
 - the appropriateness of the proposed IAES, AND
 - whether keeping the student in his or her current placement is substantially likely to result in injury to the student or another
11. ___ Comply with the hearing officer's order.
12. ___ If the school official reports to law enforcement that the student has committed a crime:
 - ___ Ensure that copies of the student's special education and disciplinary records are transmitted to law enforcement for consideration by the appropriate authorities.
 - ___ Transfer copies of the above records within a reasonable time (in the ordinary course, within 10 consecutive school days of reporting the crime).

THE IEP TEAM:

13. ___ On the 46th school day (or less if so provided), the IEP team determines whether or not the student will return to his previous placement or whether there should be a change in placement. *Date of parental notification of meeting:* _____ *Date of IEP team meeting:* _____

THE SCHOOL OFFICIAL:

14. ____ If, after the 45-school-day IAES placement has expired, the district continues to believe the student is dangerous to him- or herself or others, the district may repeat the expedited hearing request process described above.

APPENDIX D—FLOWCHARTS

NOTE: FLOWCHARTS ARE IN SEPARATE ELECTRONIC FILES, WITH THE THOUGHT THAT SCHOOL PERSONNEL COULD POST THE FLOWCHARTS ON OFFICE DOORS, BULLETIN BOARDS AND SUCH.