
#583

Are you keeping up with special education discipline? Part One

By Eric R. Herlan

Student discipline in schools is difficult enough these days, what with the importance of maintaining good order in the school while at the same time having to deal with insufficient support from parents at home to the disciplinary approaches that may be used. These difficulties can be compounded by an overlay of special education discipline rules, which often seem to establish a disciplinary double standard for children with disabilities. As difficult as this is, there have been a number of changes in the special education discipline rules that are fairly recent and seem intended to provide school administrators with greater flexibility in addressing issues that may arise.

We are going to address a couple of the more important changes in the next two issues of the *School Law Advisory*. In this issue, we first address the truly significant reduction in the number of circumstances in which the school unit is required to schedule IEP Team meetings to do manifestation determinations. In our next issue, we will address the interesting expansion of the circumstances available to school units for imposing a 45 school-day removal in response to disciplinary infractions.

Manifestation meetings

Readers all know how important the Manifestation Determination is for special education discipline. For students who are facing significant disciplinary removals, the Manifestation Determination establishes whether you can use regular disciplinary interventions on the child or are instead required to address the misconduct primarily through the IEP Team process. The Manifestation Determination always takes place at the IEP Team meeting, and the participants at the meeting ask two questions. First, was the misconduct “caused by, or had a direct and substantial relationship to, the child’s disability?” Second, was the misconduct “the direct result of the [school’s] failure to implement the IEP?”¹ The answer must be no to each of those questions for the Team to conclude that the misconduct is not a manifestation of the child’s disability, thereby permitting the school unit to move ahead with a disciplinary approach comparable to that used with non-disabled children.

Obviously, the necessity for doing a Manifestation Determination can both complicate and slow down full implementation of a disciplinary intervention. And as it has often been remarked, “justice delayed is justice denied”! So the question becomes, when are schools required to have a manifestation meeting before finalizing the disciplinary decision?

The new time frame for meetings

In the old days, we all answered this question primarily by reference to the number of days that the child had been removed. Count the days and you know the answer. And in most circumstances, the requirement for the team meeting arose as soon as the number of disciplinary removal days exceeded 10 cumulative days in the school year. Once exceeding 10 cumulative days of disciplinary removal in the school year, the team would have to meet within 10 school days to undertake that manifestation determination.

This has now changed. Instead of focusing on the number of removal days alone, the focus is now on the number of days removed for similar types of behaviors. So the requirement now is that if a certain type of behavior has become troublesome enough to result in excessive disciplinary removals, then the Team must meet to do a manifestation determination for that type of behavior. You have a problem behavior, the Team should manifest that behavior to see if it is caused by the disability. If it is, address that problem behavior through the Team/IEP process. If not, you can address it through the regular discipline process.

Here is how the new system works. Schools have to have a manifestation meeting anytime there is a disciplinary “change of placement.” But the definition of that term has now changed. Now, there is a change of placement in two circumstances.² First, there is a “change of placement” anytime that a child receives a disciplinary removal for more than 10 *consecutive* school days. Of course in Maine, this is almost always when the school is planning on an expulsion, because school administrators themselves do not have authority under 20-A M.R.S.A. § 1001(9) to suspend any child for more than 10 consecutive school days. Thus, if there is a type of behavior that by itself has been severe enough to cause school officials to pursue an extended removal for that behavior (usually an expulsion proceeding), then there must be a manifestation determination for that behavior.

The second situation involves a series of short term removals that add up to more than 10 days. Under the new rules, school officials no longer have to have manifestation meetings anytime that the cumulative number of short term suspensions adds up to more than 10 in the school year. Instead, schools must have a manifestation meeting only in the case of a pattern of short term removals for “substantially similar” misbehaviors, and then only after considering the length of each of the removals, the total removal time, and the proximity of the removals to one another. But in each case, the consideration is only of those short term removals for “substantially similar” misbehaviors, not all short term removals. Interestingly, it is the school unit and not the IEP Team that makes the decision about whether particular disciplinary removals are for substantially similar misbehaviors, although that decision could be challenged through due process.³

As readers should recognize, this new language changes the focus from an exclusive consideration of the number of school day removals, to a focus instead on the types of behaviors that are requiring removal. If a type of behavior is sufficiently disruptive to require an extended removal of more than 10 days in a row, or if “substantially similar” misbehaviors have led to an extensive pattern of removal, then school units must have an IEP Team meeting to manifest that behavior. But teams need not meet to

review misbehaviors that are not substantially similar, even if the cumulative number of removal days is quite extensive.

Even in the case of substantially similar misbehaviors, schools often ask how many short term suspension days in the school year are sufficient to establish a pattern requiring a manifestation meeting. As you see from the above discussion, the law itself avoids a clear cut answer to this question (except in the case of a disciplinary removal for more than 10 consecutive days in a row). For those schools that want a clear cut standard, and one that will always be sufficient under the law, we recommend applying the 10 day rule. Under this rule, anytime a student is removed from school for substantially similar misbehavior for more than 10 school days in the school year, a cautious school unit will then schedule a team meeting to do a manifestation determination on that substantially similar misbehavior. But remember, when counting those days, you are only counting removal days for substantially similar misbehavior, not for all misbehavior.

Further observations

This focus on the type of behaviors when deciding whether to have a manifestation meeting is interesting for a number of reasons. Schools often ask whether they have to keep having manifestation meetings for every disciplinary removal once 10 have been exceeded. That was probably never so, but now it clearly is not a requirement. What is really supposed to occur is more like this. Once a child has had a pattern of disciplinary removals for substantially similar misbehavior, the school has to schedule a team meeting to do the manifestation determination. So, let's say that the child now has 11 cumulative suspension days for talking back to adults in school. The behaviors are substantially similar, and the child has exceeded 10 cumulative days in the school year for those similar misbehaviors (using our conservative 10 cumulative day rule).

If the IEP Team decides that the substantially similar misbehavior is not a manifestation of the disability, regular school discipline standards apply – although never forget that schools will always have to provide services during any special education disciplinary removals beyond 10 cumulative days in length. If the team decides the substantially similar misconduct is a manifestation, the team must then undertake a functional behavior assessment of that misbehavior and in most cases develop a behavior intervention plan for that type of behavior.

The end result of this process is that when a substantially similar misbehavior occurs again, there is now a behavior intervention plan that likely determines just what the school unit should do in response to that behavior, rather than leaving it up to the building administrator to determine for him or herself. But if some other type of misbehavior occurs – a misbehavior that was not “substantially similar” – the school unit would then have to take *that* behavior to a manifestation meeting only when there were more than 10 cumulative days of removal for misbehaviors substantially similar to that misbehavior. Again, the focus here is on the types of behaviors, and meetings are required only for an excessive number of substantially similar misbehaviors. The team then likely determines how to deal with that type of behavior in the future through a behavior plan, and another manifestation meeting would have to occur only in response to a different type of misbehavior leading to excessive removal days. Then that type of behavior is addressed through a behavior plan, and so on.

Schools may shy away from this new approach, and instead continue to hold manifestation meetings anytime that disciplinary removals of any sort exceed 10 school days. Schools that choose this approach may be holding many more manifestation determination meetings than they need. We therefore

recommend that schools refocus in a manner consistent with these new rules. Instead of just counting days, start focusing on substantially similar misbehaviors that have led to excessive removals. ■

Next time, Part Two: New rules for 45 school-day disciplinary removals.

Endnotes

1. See 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1); MUSER XVII(1)(E)((1).
2. See 34 C.F.R. § 300.536; MUSER XVII(7).
3. See Federal Register, Vol. 71, No. 156, at 46729-30 (8/14/2006); 34 C.F.R. § 300.536(b); MUSER XVII(7)(B).