

of an action plan that includes mutual responsibility for implementation, evaluation, modification, and accountability for outcomes. The membership of this collaborative team will vary based on the school and student needs. Input from the student's parents and general education teachers is important. The general educator needs to share with all team members the behavioral expectations of the school and classroom as well as provide suggestions as to how the classroom environment and general education curriculum can be modified to support the student.

11. What is included in a BIP?

A BIP for a student should be based upon the FBA that addressed the student's behavior and at a minimum should include:

- An objective, specific description of the behavior;
- Specific hypotheses as to why the behavior occurs; and
- Interventions to be employed to address the behavior.

To teach a student appropriate replacement behaviors, the BIP needs to draw upon known student strengths and positive reinforcers that are important to the student. The focus of the BIP should not be correction of the inappropriate behavior. Rather, it should focus on how to plan for and provide the student with opportunities to replace the behavior by learning new behaviors across environments. This may include how to modify the context in which the behavior has been known to occur so events associated with the behavior are removed or changed. The student should be provided opportunities for planned practice and modeling the replacement behavior. The BIP should include how individuals are to give the student positive recognition of an appropriate replacement behavior that focuses on the behavioral function for the student. The chosen interventions also need to specify how all persons are expected to implement the strategies consistently across environments, document the implementation and response, and how frequently the team is to review the results.

12. When should a program of individualized positive behavioral strategies and interventions be implemented?

It is recommended that an assessment of a student's behavior and the development of a plan for behavioral interventions to address a student's behavior should be initiated wherever a student's behavior is of concern. School personnel are encouraged to intercede on behaviors of concern as early as possible. The purpose of a BIP is to improve our understanding of behavior and the context in which it is observed and guide personnel in the consistent implementation of appropriate replacement and natural supports.

For students with disabilities under the IDEA, at a minimum, a student's IEP must include positive behavioral interventions whenever the IEP team determines that a student's behavior is interfering with the student's learning and/or the learning of others. An FBA and BIP is required when the student's behavior has resulted in a removal or series of removals that are equivalent to 10 school days.

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Appendix F: OSEP RESOURCES

- Discipline Topical Brief
- Discipline Procedures Questions & Answers

IDEA Regulations

DISCIPLINE Topical Brief**(See also Procedural Safeguards: Resolution Meetings and Due Process Hearings)**

The reauthorized Individuals with Disabilities Education Act (IDEA) was signed into law on Dec. 3, 2004, by President George W. Bush. The provisions of the act became effective on July 1, 2005, with the exception of some of the elements pertaining to the definition of a “highly qualified teacher” that took effect upon the signing of the act. The final regulations were published on Aug. 14, 2006. This is one in a series of documents, prepared by the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education, which covers a variety of high-interest topics and brings together the statutory language related to those topics to support constituents in preparing to implement the new requirements.¹ This document addresses significant changes from preexisting regulations to the final regulatory requirements regarding discipline procedures.

IDEA Regulations

- 1. Add a new authority for school personnel to consider unique circumstances.**
School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of 34 CFR 300.530, is appropriate for a child with a disability who violates a code of student conduct.
[34 CFR 300.530(a)] [20 U.S.C. 1415(k)(1)(A)]
- 2. Expand removal authority for special circumstances related to serious bodily injury.**
School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child’s disability, if the child: carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of a State educational agency (SEA) or a local educational agency (LEA); knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA; or, has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.
[34 CFR 300.530(g)(1)-(3)] [20 U.S.C. 1415(k)(1)(G)(i)-(iii)]

¹ Topics in this series include: Alignment With the *No Child Left Behind (NCLB) Act*; Changes in Initial Evaluation and Reevaluation; Children Enrolled by Their Parents in Private Schools; Discipline; Disproportionality and Overidentification; Early Intervening Services; Highly Qualified Teachers; Identification of Specific Learning Disabilities; Individualized Education Program (IEP) Team Meetings and Changes to the IEP; Individualized Education Program (IEP); Local Funding; Monitoring, Technical Assistance and Enforcement; *National Instructional Materials Accessibility Standard (NIMAS)*; Part C Amendments in *IDEA 2004*; Part C Option: Age 3 to Kindergarten Age; Procedural Safeguards: Surrogates, Notice and Consent; Procedural Safeguards: Mediation; Procedural Safeguards: Resolution Meetings and Due Process Hearings; Secondary Transition; State Complaint Procedures; State Funding; and Statewide and Districtwide Assessments. Documents are available on the *IDEA* Web site at: <http://IDEA.ed.gov>.

Serious bodily injury has the meaning given the term “serious bodily injury” under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code².
[34 CFR 300.530(i)(3)] [20 U.S.C. 1415(k)(7)(D)]

3. Retain previous authority for immediate short-term removals.

School personnel under 34 CFR 300.530 may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than ten consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than ten consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under 34 CFR 300.536).

[34 CFR 300.530(b)(1)] [20 U.S.C. 1415(k)(1)(B)]

4. Retain authority for long-term removals for behavior that is not a manifestation of the disability.

For disciplinary changes in placement that would exceed ten consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child’s disability pursuant to 34 CFR 300.530(e), school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in 34 CFR 300.530(d) (services).

[34 CFR 300.530(c)] [20 U.S.C. 1415(k)(1)(C)]

5. Clarify when services are required during disciplinary removals, the provision of such services and who makes the determination regarding services and interim alternative educational settings.

A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for ten school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

[34 CFR 300.530(d)(3)]

After a child with a disability has been removed from his or her current placement for ten school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under 34 CFR 300.530(d) (services).

[34 CFR 300.530(b)(2)]

A child with a disability who is removed from the child’s current placement pursuant to 34 CFR 300.530(c) (a disciplinary change in placement for more than ten consecutive school days where the behavior is determined not to be a manifestation of the disability) or (g) (a removal for special circumstances related to drugs, weapons or serious bodily injury) must:

- Continue to receive education services, as provided in 34 CFR 300.101(a) (free appropriate public education (FAPE) requirements), so as to enable the child to

² 18 U.S.C. 1365(h)(3) states that the term “serious bodily injury” means bodily injury which involves— (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

- Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, which are designed to address the behavior violation so that it does not recur.

[34 CFR 300.530(d)(1)] [20 U.S.C. 1415(k)(1)(D)]

After a child with a disability has been removed from his or her current placement for ten school days in the same school year, if the current removal is for not more than ten consecutive school days and is not a change of placement under 34 CFR 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in 34 CFR 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

[34 CFR 300.530(d)(4)]

If the removal is a change of placement under 34 CFR 300.536, the child's IEP Team determines appropriate services under 34 CFR 300.530(d)(1).

[34 CFR 300.530(d)(5)]

The services required by 34 CFR 300.530 (d)(1), (d)(3), (d)(4), and (d)(5) may be provided in an interim alternative educational setting.

[34 CFR 300.530(d)(2)]

The child's IEP Team determines the interim alternative educational setting for services under 34 CFR 300.530(c) (a disciplinary change in placement for more than ten consecutive school days where the behavior is determined not to be a manifestation of the disability), (d)(5) (a removal that is a change of placement), and (g) (a removal for special circumstances related to drugs, weapons or serious bodily injury).

[34 CFR 300.531] [20 U.S.C. 1415(k)(2)]

6. **Specify when the LEA must give notice.**

On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in 34 CFR 300.504.

[34 CFR 300.530(h)] [20 U.S.C. 1415(k)(1)(H)]

7. **Establish a new standard for manifestation determinations.**

Within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine:

- If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- If the conduct in question was the direct result of the LEA's failure to implement the IEP.

The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either 34 CFR 300.530(e)(1)(i) or (1)(ii) was met.

[34 CFR 300.530(e)(1) and (2)] [20 U.S.C. 1415(k)(1)(E)]

If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in 34 CFR 300.530(e)(1)(ii) was met, the LEA must take immediate steps to remedy those deficiencies.

[34 CFR 300.530(e)(3)]

8. Add a new provision when there is a determination that the behavior was a manifestation of the disability.

If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must either conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child or, if a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and except as provided in 34 CFR 300.530(g), return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

[34 CFR 300.530(f)] [20 U.S.C. 1415(k)(1)(F)]

9. Retain a definition of change of placement and clarify that the public agency makes a case-by-case determination of whether a specific pattern of removals meets the definition.

For purposes of removals of a child with a disability from the child's current educational placement under 34 CFR 300.530 through 300.535, a change of placement occurs if:

- The removal is for more than ten consecutive school days; or
- The child has been subjected to a series of removals that constitute a pattern:
 - Because the series of removals total more than ten school days in a school year;
 - Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
 - Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement. This determination is subject to review through due process and judicial proceedings.

[34 CFR 300.536]

10. Retain and revise the standard for a public agency's basis of knowledge for children not determined eligible for special education and related services.

A child who has not been determined to be eligible for special education and related services under Part B of the IDEA and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in Part B if the public agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred:

- The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
- The parent of the child requested an evaluation of the child pursuant to 34 CFR 300.300 through 300.311; or
- The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

[34 CFR 300.534(a) and (b)] [20 U.S.C. 1415(k)(5)(A) and (B)]

11. Establish exceptions to the public agency's basis of knowledge for ineligibility, or refusal of consent to evaluation or services.

A public agency would not be deemed to have knowledge under 34 CFR 300.534(b) if the parent of the child has not allowed an evaluation of the child pursuant to 34 CFR 300.300 through 300.311 or has refused services under Part B of the IDEA; or the child has been evaluated in accordance with 34 CFR 300.300 through 300.311 and determined to not be a child with a disability under Part B of the IDEA.

[34 CFR 300.534(c)] [20 U.S.C. 1415(k)(5)(C)]

12. Retain hearing rights related to disciplinary removals.

The parent of a child with a disability who disagrees with any decision regarding placement under 34 CFR 300.530 and 300.531, or the manifestation determination under 34 CFR 300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to 34 CFR 300.507 and 300.508(a) and (b).

[34 CFR 300.532(a)] [20 U.S.C. 1415(k)(3)(A)]

13. Establish the authority of the hearing officer.

A hearing officer under 34 CFR 300.511 (impartial due process hearing) hears, and makes a determination regarding an appeal under 34 CFR 300.532(a) (disagreements regarding disciplinary removals and placement and manifestation determinations are subject to a hearing). In making the determination under 34 CFR 300.532 (b)(1), the hearing officer may:

- Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of 34 CFR 300.530 or that the child's behavior was a manifestation of the child's disability; or
- Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

The procedures under 34 CFR 300.532(a) and (b)(1) and (2) may be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

[34 CFR 300.532(b)] [20 U.S.C. 1415(k)(3)(B)]

14. Establish procedures for an expedited hearing.

Whenever a hearing is requested under 34 CFR 300.532(a) (related to disciplinary removals), the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of 34 CFR 300.507 and 300.508(a) through (c) and 300.510 through 300.514, except as provided in 34 CFR 300.532(c)(2) through (4).

The SEA or LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within ten school days after the hearing. Unless the parents and LEA agree in writing to waive the resolution meeting described in 34 CFR 300.532(c)(3)(i), or agree to use the mediation process described in 34 CFR 300.506:

- A resolution meeting must occur within seven days of receiving notice of the due process complaint; and
- The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.

A State may establish different State-imposed procedural rules for expedited due process hearings conducted under 34 CFR 300.532 than it has established for other due process hearings, but, except for the timelines as modified in 34 CFR 300.532(c)(3), the State must ensure that the requirements in 34 CFR 300.510 through 300.514 are met.

The decisions on expedited due process hearings are appealable consistent with 34 CFR 300.514.

[34 CFR 300.532(c)] [20 U.S.C. 1415(k)(4)(B)]

15. Address the child's placement pending a disciplinary hearing decision.

When an appeal under 34 CFR 300.532 has been made by either the parent or the LEA, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in 34 CFR 300.530(c) or (g), whichever occurs first, unless the parent and the SEA or LEA agree otherwise.

[34 CFR 300.533] [20 U.S.C. 1415(k)(4)(A)]

Discipline Procedures Questions & Answers

Revised June 2009

Regulations for Part B of the Individuals with Disabilities Education Act (IDEA) were published in the Federal Register on August 14, 2006, and became effective on October 13, 2006. Additional regulations were published on December 1, 2008, and became effective on December 31, 2008. Since publication of the regulations, the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education (Department) has received requests for clarification of some of these regulations. This is one of a series of question and answer (Q&A) documents prepared by OSERS to address some of the most important issues raised by requests for clarification on a variety of high-interest topics. Each Q&A document will be updated to add new questions and answers as important issues arise or to amend existing questions and answers as needed.

OSERS issues this Q&A document to provide guidance on discipline policies enacted for school-age students to personnel in State educational agencies (SEAs) and local educational agencies (LEAs), and families. This Q&A document represents the Department's current thinking on this topic. It does not create or confer any rights for or on any person. This guidance does not impose any requirements beyond those required under applicable law and regulations.

This Q&A document supersedes the Department's guidance, entitled *Questions and Answers on Discipline Procedures*, issued January 2007.

The 2004 amendments to section 615(k) of the IDEA were intended to address the needs expressed by school administrators and teachers for flexibility in order to balance school safety issues with the need to ensure that schools respond appropriately to a child's behavior that was caused by, or directly and substantially related to, the child's disability. The reauthorized IDEA and its implementing regulations include provisions that address important disciplinary issues such as: the consideration of unique circumstances when determining the appropriateness of a disciplinary change in placement; expanded authority for removal of a child from his or her current placement for not more than 45 school days for inflicting a serious bodily injury at school or at a school function; the determination on a case-by-case basis as to whether a pattern of removals constitutes a change of placement; and revised standards and procedures related to the manifestation determination.

Generally, the questions, and corresponding answers, presented in this Q&A document required interpretation of the IDEA and its implementing regulations and the answers are not simply a restatement of the statutory or regulatory requirements. The responses presented in this document generally are informal guidance representing the interpretation of the Department of the applicable statutory or regulatory requirements in the context of the specific facts presented and are not legally binding. The Q&As in this document are not intended to be a replacement for careful study of the IDEA and its implementing regulations. The IDEA, its implementing regulations, and other important documents related to the IDEA and the regulations are found at <http://idea.ed.gov>

If you are interested in commenting on this guidance, please email your comments to OSERSguidancecomments@ed.gov and include Discipline in the subject of your email or write us at the following address: Patricia Guard, U.S. Department of Education, Potomac Center Plaza, 550 12th Street, SW, room 4108, Washington, DC 20202.

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determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others?

Authority: The requirements for discipline are found in the regulations at 34 CFR §§300.530 – 300.536.

A. Safeguards

Question A-1: When the parent(s) of a child and the school personnel are in agreement about the child's change of placement after the child has violated a code of student conduct, is it considered to be a removal under the discipline provisions?

Answer: No, if the parent(s) of a child and the school district agree to a specific change in the current educational placement of the child.

Question A-2: When a parent consents to the initial provision of some, but not all, of the proposed special education and related services, do the discipline provisions apply if the child violates the school's code of student conduct?

Answer: Yes. When a parent consents to the initial provision of some, but not all, of the proposed special education and related services listed in a child's initial individualized education program (IEP), the child has been determined eligible for services and is entitled to all the protections of the IDEA.

Question A-3: Do the discipline provisions apply if the child violates the school's code of student conduct after a parent revokes consent for special education and related services under §300.300(b)?

Answer: No. Under §§ 300.9 and 300.300, parents are permitted to unilaterally withdraw their children from further receipt of special education and related services by revoking their consent for the continued provision of special education and related services to their children. When a parent revokes consent for special education and related services under §300.300(b), the parent has refused services as described in §300.534(c)(1)(ii); therefore, the public agency is not deemed to have knowledge that the child is a child with a disability and the child will be subject to the same disciplinary procedures and timelines applicable to general education students and not entitled to IDEA's discipline protections. It is expected that parents will take into account the possible consequences under the discipline procedures before revoking consent for the provision of special education and related services. 73 Federal Register 73012-73013.

Question A-4: In order to receive the protections for disciplinary purposes in 34 CFR §300.534, parents who are concerned that their child may need special education and related services must first **express their concerns in writing**. How are parents informed of this requirement?

Answer: Neither the IDEA nor the regulations specifically address this issue. However, in its child find policies and procedures, a State may choose to include ways to provide information to the public regarding IDEA's protections for disciplinary purposes when a parent has expressed in writing to school personnel concerns regarding the child's need for special education and related services. Examples of ways to provide such information include making the information available on the State's Web site, the LEA's Web site, or in the State's Procedural Safeguards Notice or the school's student handbook.

Question A-5: Under 34 CFR §300.534(b), a public agency is deemed to have knowledge that a child is a child with a disability if a parent expressed in writing a concern that his or her child needs special education and related services. What happens if a parent is unable to express this concern in writing?

Answer: The requirement that a parent express his or her concern in writing is taken directly from the IDEA. However, there is nothing in the IDEA or the regulations that would prevent a parent from requesting assistance to communicate his or her concerns in writing. The Department funds Parent Training and Information Centers (PTIs) and Community Parent Resource Centers (CPRCs) to assist parents of students with disabilities. Information about the PTIs and CPRCs is found at HU<http://www.taalliance.org/UH>.

Question A-6: If a removal is for 10 consecutive school days or less and occurs after a student has been removed for 10 school days in that same school year, and the public agency determines, under 34 CFR §300.530(d)(4), that the removal **does not constitute a change of placement**, must the agency provide written notice to the parent?

Answer: No. Under Part B, a public agency's determination that a short-term removal **does not constitute a change of placement** is not a proposal or refusal to initiate a change of placement for purposes of determining services under 34 CFR §300.530(d)(4). Therefore, the agency is not required to provide written notice to the parent.

Question A-7: If a teacher or other school personnel has specific concerns that a child may need special education and related services due to a child's pattern

of behavior, must such concerns be submitted in writing to school officials in order for the public agency to be deemed to have knowledge that the child is a child with a disability?

Answer:

No. Under 34 CFR §300.534(b)(3), teachers or other local educational agency (LEA) personnel are not required to submit a **written statement** expressing specific concerns about a pattern of behavior demonstrated by the child in order for the public agency to be deemed to have knowledge that the child is a child with a disability. Although a written statement is not necessary, the teacher of the child or other LEA personnel must express their specific concerns directly to the special education director or other supervisory personnel within the agency. In addition, State child find policies and procedures may provide guidelines regarding how teachers and other LEA personnel should communicate their specific concerns regarding a child's pattern of behavior. If the State's or LEA's child find or referral procedures do not specify how such communication should occur, the State or LEA is encouraged to change its guidelines to provide a method for communicating direct expressions of specific concerns regarding a child's pattern of behavior. 71 Federal Register 46727.

B. Definitions

Question B-1: What options are available for school personnel when a student with a disability commits a serious crime, such as rape, at school or at a school function?

Answer:

Under most State and local laws, school personnel must report certain crimes that occur on school grounds to the appropriate authorities. The IDEA regulations, under 34 CFR §300.535(a), do not prohibit the school or public agency from reporting crimes committed by students with disabilities. In addition, where such crimes constitute a violation of the school's code of student conduct, school authorities may use the relevant discipline provisions related to short-term and long-term removals, including seeking a hearing to remove the student to an interim alternative educational placement if maintaining the current placement is substantially likely to result in injury to the child or others. To the extent that such criminal acts also result in an injury that meets the definition of "serious bodily injury," the removal provisions of 34 CFR §300.530(g) would apply. The definition referenced in 34 CFR §300.530(i)(3) currently reads:

As defined at 18 U.S.C. 1365(h)(3), the term serious bodily injury means bodily injury that involves—

1. A substantial risk of death;
2. Extreme physical pain;
3. Protracted and obvious disfigurement; or
4. Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Certain Federal cases have held that rape met this definition of serious bodily injury because the victim suffered protracted impairment of mental faculties.

The current definition of the term “serious bodily injury” in 18 U.S.C. 1365(h)(3) can be found on the U.S. House of Representatives Web site at <http://uscode.house.gov/download/pls/18C65.txt>

Question B-2: What is the definition of “unique circumstances” as used in 34 CFR §300.530(a), which states that “school personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct?”

Answer: The Department believes that “unique circumstances” are best determined at the local level by school personnel who know the individual child and are familiar with the facts and circumstances regarding a child’s behavior. “Factors such as a child’s disciplinary history, ability to understand consequences, expression of remorse, and supports provided ... prior to the violation of a school code [of student conduct] could be unique circumstances considered by school personnel when determining whether a disciplinary change in placement is appropriate for a child with a disability.” 71 Federal Register 46714.

Question B-3: May a public agency apply its own definition of “serious bodily injury?”

Answer: No. As specifically set out in the IDEA, the term “serious bodily injury” is defined at 18 U.S.C. 1365(h)(3) and cannot be altered by States or local school boards. The definition and a link to the current U.S. Code is included in the answer to question B-1, and also in the *Analysis of Comments and Changes* that accompanied the regulations published on August 14, 2006, and became effective on October 13, 2006. 71 Federal Register 46723.

C. Interim Alternative Educational Setting (IAES)

Question C-1: What constitutes an appropriate IAES?

Answer: What constitutes an appropriate IAES will depend on the circumstances of each individual case. An IAES must be selected so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP. 71 Federal Register 46722.

Question C-2: May a public agency offer “home instruction” as the sole IAES option?

Answer: No. For removals under 34 CFR §300.530(c), (d)(5), and (g), the child’s IEP Team determines the appropriate IAES (34 CFR §300.531). Section 615(k)(1)(D) of the IDEA and 34 CFR §300.530(d) are clear that an appropriate IAES must be selected “so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP.” Therefore, it would be inappropriate for a public agency to limit an IEP Team to only one option when determining the appropriate IAES. As noted in the *Analysis of Comments and Changes* accompanying the regulations published on August 14, 2006, and became effective on October 13, 2006, at 71 Federal Register 46722:

Whether a child’s home would be an appropriate interim alternative educational setting under §300.530 would depend on the particular circumstances of an individual case such as the length of the removal, the extent to which the child previously has been removed from his or her regular placement, and the child’s individual needs and educational goals. In general, though, because removals under §§300.530(g) and 300.532 will be for periods of time up to 45 days, care must be taken to ensure that if home instruction is provided for a child removed under §300.530, the services that are provided will satisfy the requirements for services for a removal under §300.530(d) and section 615(k)(1)(D) of the Act.

Where the removal is for a longer period, such as a 45-day removal under 34 CFR §300.530(g), special care should be taken to ensure that the services required under 34 CFR §300.530(d) can be properly provided if the IEP Team determines that a child’s home is the appropriate IAES.

Question C-3: Do all services in the child’s IEP need to be provided in the IAES for a removal under 34 CFR §300.530(c) or (g)?

Answer: It depends on the needs of the child. The LEA is not required to provide all services in the child’s IEP when a child has been removed to an IAES. In general, the child’s IEP Team will make an individualized decision for each child with a disability regarding the type and intensity of services to be provided in the IAES. 34 CFR §300.530(d)(1) clarifies that a child with a disability who is removed from his or her current placement for disciplinary reasons under 34 CFR §300.530(c) or (g) must continue to receive educational services as provided in 34 CFR §300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting

his or her IEP goals. For removals that constitute a change of placement, the child's IEP Team determines the appropriate services under 34 CFR §300.530(d)(1). See 34 CFR §300.530(d)(5). If a student whose placement has been changed under 34 CFR §300.530(c) or (g) is not progressing toward meeting the IEP goals, then it would be appropriate for the IEP Team to review and revise the determination of services and/or the IAES.

D. Hearings

Question D-1: Must a hearing officer make a sufficiency determination under 34 CFR §300.508(d) for an expedited due process complaint? In other words, does the hearing officer need to determine if the complaint meets the content standards listed in section 615(b)(7)(A) of the IDEA and 34 CFR §300.508(b)?

Answer: No. The sufficiency provision does not apply to expedited due process complaints. See 34 CFR §300.532(a). As noted in the *Analysis of Comments and Changes* accompanying the regulations published on August 14, 2006, and became effective on October 13, 2006 at 71 Federal Register 46725:

In light of the shortened timelines for conducting an expedited due process hearing under §300.532(c), it is not practical to apply to the expedited due process hearing the sufficiency provision in §300.508(d), which requires that the due process complaint must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not include all the necessary content of a complaint as required in §300.508(b).

E. Functional Behavior Assessments (FBAs) and Behavioral Intervention Plans (BIPs)

Question E-1: Was the requirement for a "positive behavioral intervention plan" removed from the discipline regulations?

Answer: No. Under 34 CFR §300.324(a)(2)(i), the use of positive behavioral interventions and supports must be considered in the case of a child whose behavior impedes his or her learning or that of others. The requirement in 34 CFR §300.530(f) that a child with a disability receive, as appropriate, an FBA and a BIP and modifications designed to address the child's behavior now only applies to students whose behavior is a manifestation of their disability as determined by the LEA, the parent, and the relevant members of the child's IEP Team under 34 CFR §300.530(e). However, FBAs and BIPs must also be used proactively, if the IEP Team determines that they would be appropriate for the child.

The regulations in 34 CFR §300.530(d) require that school districts provide FBAs and behavior intervention services (and modifications) “as appropriate” to students when the student’s disciplinary change in placement would exceed 10 consecutive school days and the student’s behavior was not a manifestation of his or her disability. See 34 CFR §300.530(c) and (d). Please see question E-2 in this section for more information about the use and development of FBAs and BIPs.

Question E-2: Under what circumstances must an IEP Team use FBAs and BIPs?

Answer: As noted above, pursuant to 34 CFR §300.530(f), FBAs and BIPs are required when the LEA, the parent, and the relevant members of the child’s IEP Team determine that a student’s conduct was a manifestation of his or her disability under 34 CFR §300.530(e). If a child’s misconduct has been found to have a direct and substantial relationship to his or her disability, the IEP Team will need to conduct an FBA of the child, unless one has already been conducted. Similarly, the IEP Team must write a BIP for this child, unless one already exists. If a BIP already exists, then the IEP Team will need to review the plan and modify it, as necessary, to address the behavior.

An FBA focuses on identifying the function or purpose behind a child’s behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP Team in developing a BIP that will reduce or eliminate the misbehavior.

For a child with a disability whose behavior impedes his or her learning or that of others, and for whom the IEP Team has decided that a BIP is appropriate, or for a child with a disability whose violation of the code of student conduct is a manifestation of the child’s disability, the IEP Team must include a BIP in the child’s IEP to address the behavioral needs of the child.

Question E-3: How can an IEP address behavior?

Answer: When a child's behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior (34 CFR §300.324(a)(2)(i)). Additionally, the Team may address the behavior through annual goals in the IEP (34 CFR §300.320(a)(2)(i)). The child's IEP may include modifications in his or her program, support for his or her teachers, and any related services necessary to achieve those behavioral goals (34 CFR §300.320(a)(4)). If the child needs a BIP to improve learning and socialization, the BIP can be included in the IEP and aligned with the goals in the IEP.

Question E-4: Is consent required to do an FBA for a child?

Answer: Yes. An FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability. The FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP. As with other individualized evaluation procedures, and consistent with 34 CFR §300.300(a) and (c), parental consent is required for an FBA to be conducted as part of the initial evaluation or a reevaluation.

Question E-5: If a parent disagrees with the results of an FBA, may the parent obtain an independent educational evaluation (IEE) at public expense?

Answer: Yes. The parent of a child with a disability has the right to request an IEE of the child, under 34 CFR §300.502, if the parent disagrees with an evaluation obtained by the public agency. However, the parent's right to an IEE at public expense is subject to certain conditions, including the LEA's option to request a due process hearing to show that its evaluation is appropriate. See 34 CFR §300.502(b)(2) through (b)(5).

The Department has clarified previously that an FBA that was not identified as an initial evaluation, was not included as part of the required triennial reevaluation, or was not done in response to a disciplinary removal, would nonetheless be considered a reevaluation or part of a reevaluation under Part B because it was an individualized evaluation conducted in order to develop an appropriate IEP for the child. Therefore, a parent who disagrees with an FBA that is conducted in order to develop an appropriate IEP also is entitled to request an IEE. Subject to the conditions in 34 CFR §300.502(b)(2) through (b)(5), the IEE of the child will be at public expense.

F. Manifestation Determinations

Question F-1: What occurs if there is no agreement on whether a child's behavior was or was not a manifestation of his or her disability?

Answer: If the parents of a child with a disability, the LEA, and the relevant members of the child's IEP Team cannot reach consensus or agreement on whether the child's behavior was or was not a manifestation of the disability, the public agency must make the determination and provide the parent with prior written notice pursuant to 34 CFR §300.503. The parent of the child with a disability has the right to exercise his or her procedural safeguards by requesting mediation and/or a due process hearing to resolve a disagreement about the manifestation determination. 34 CFR §300.506 and §300.532(a). A parent also has the right to file a State complaint alleging a violation of Part B related to the manifestation determination. See 34 CFR §300.153.

Question F-2: What recourse does a parent have if he or she disagrees with the determination that his or her child's behavior was not a manifestation of the child's disability?

Answer: The regulations, in 34 CFR §300.532(a), provide that the parent of a child with a disability who disagrees with the manifestation determination under 34 CFR §300.530(e) may appeal the decision by requesting a hearing. A parent also has the right to file a State complaint alleging a denial of a free appropriate public education and to request voluntary mediation under 34 CFR §300.506.

Question F-3: Is the IEP Team required to hold a manifestation determination each time that a student is removed for more than 10 consecutive school days or each time that the public agency determines that a series of removals constitutes a change of placement?

Answer: Yes. 34 CFR §300.530(e) requires that "within 10 school days of **any** decision to change the placement of a child with a disability because of a violation of a code of student conduct" the LEA, the parent, and relevant members of the child's IEP Team must conduct a manifestation determination (emphasis added). Under 34 CFR §300.536, a change of placement occurs if the removal is for more than 10 consecutive school days, or if the public agency determines, on a case-by-case basis, that a pattern of removals constitutes a change of placement because the series of removals total more than 10 school days in a school year; the child's behavior is substantially similar to the behavior that resulted in the previous removals; and because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

Question F-4: Does a school need to conduct a manifestation determination when there is a violation under 34 CFR §300.530(g), which refers to a removal for weapons, drugs, or serious bodily injury?

Answer: Yes. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team conduct the manifestation determination. 34 CFR §300.530(e). However, when the removal is for weapons, drugs, or serious bodily injury under §300.530(g), the child may remain in an IAES, as determined by the child's IEP Team, for not more than 45 school days, regardless of whether the violation was a manifestation of his or her disability. This type of removal can occur if the child: carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the State educational agency (SEA) or LEA; 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 the SEA or LEA; or has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the SEA or LEA.

Question F-5: What disciplinary procedures would apply in the case of a child who has been referred for a special education evaluation and is removed for a disciplinary infraction prior to determination of eligibility?

Answer: If a child engages in behavior that violates the code of student conduct prior to a determination of his or her eligibility for special education and related services and the public agency is deemed to have knowledge of the child's disability, the child is entitled to all of the IDEA protections afforded to a child with a disability, unless a specific exception applies. In general, once the student is properly referred for an evaluation under Part B of the IDEA, the public agency would be deemed to have knowledge that the child is a child with a disability for purposes of the IDEA's disciplinary provisions. However, under 34 CFR §300.534(c), the LEA is considered not to have knowledge that a child is a child with a disability if the parent has not allowed the evaluation of the child under Part B of the IDEA, the parent has refused services, or if the child is evaluated and determined not to be a child with a disability under Part B of the IDEA. In these instances, the child would be subject to the same disciplinary measures applicable to children without disabilities.

Question F-6: Is there a conflict between 34 CFR §300.530(c), allowing school personnel, under certain circumstances, to apply the relevant disciplinary procedures to a child with a disability in the same manner and for the same duration as would be applied to children without disabilities, and the provision, in 34 CFR §300.532(b)(2), that the hearing officer may order a

change in placement for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others?

Answer:

No, there is no conflict between the two provisions. In addition to the specific authority set out in 34 CFR §300.532, a hearing officer also has the authority to uphold a disciplinary change of placement made by school personnel under 34 CFR §300.530(c). Where the parent brings a due process hearing to challenge a disciplinary change of placement made by school personnel under 34 CFR §300.530(c) and the hearing officer concludes that the disciplinary requirements of Part B have been met, the hearing officer would properly uphold the disciplinary change of placement. If the hearing officer concludes that the child's behavior was a manifestation of the child's disability, but also determines that returning the child to the prior placement is substantially likely to result in injury to the child or to others, then the hearing officer, under 34 CFR §300.532(b)(2), may change the placement to an appropriate IAES for not more than 45 school days.

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