

DISCIPLINE OF THE §504 STUDENT

Change of Placement Rule:

A §504 child's removal from the normal placement for more than ten (10) days constitutes a change in placement, which generally is defined as a material and significant alteration in the services provided the child, or in the setting where they are provided.

Pattern of Exclusion Rule:

A child may be removed from his placement for more than ten (10) days over a school if each removal is ten (10) days or less, and if the removals do not indicate a pattern of exclusions.

At some point after a series of removals in a school year totals 10 days, prior to any additional removal the §504 Committee must meet, undertake a §504 evaluation, and determine whether the behavior giving rise to the new disciplinary removal is related to the child's handicapping condition or an inappropriate placement. Should the Committee determine that a link is present, the removal cannot occur. This process is repeated for each proposed removal after the pattern of exclusion has been reached.

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A Simplified Method for Understanding Discipline and Manifestation Determination under §504

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1. Learn to identify a short-term disciplinary removal under §504.

A short-term removal occurs when a campus administrator removes a child from his normal setting for less than 10 consecutive school days for disciplinary purposes. The most common example is a suspension to the home (in Texas, limited to 3 school days per offense). In-school suspension (ISS) should be considered a short-term removal, unless the “smart ISS” criteria discussed below is met, in which case the removal days may not “count” as disciplinary removal days.

2. Learn to identify a long-term disciplinary removal under §504.

A long-term removal is one of over 10 consecutive school days, usually in the form of a removal to a disciplinary alternative education program (AEP) or expulsion.

3. Do not mix up the rules for long-term and short-term removals – learn and apply the rules separately.

It’s easy to get confused if you try to learn and apply the separate rules for long and short-term removals as simultaneous concepts. Rather, learn and apply these rules as two separate sets of rules. This eliminates a lot of mixed-up §504 discipline questions, such as “is it 10 cumulative or 10 consecutive days?” There are really two sets of rules that involve a 10-day timeline, and trying to learn them simultaneously frequently causes confusion.

4. For short-term removals involving §504 students, campuses start the year with 10 “free” removal days at their disposal.

At the start of the school year, imagine the school is given 10 “free” removal days for each §504-eligible student. These days are “free” under §504 because they can be used without the need to convene a §504 committee meetings, without a manifestation determination, and generally, without worrying about any §504 procedure or safeguard. They can be imposed as they would be in the case of a nondisabled student who commits the same disciplinary offenses.

5. Although schools may go over the 10-day total, at a certain point the accumulated removals will constitute a “pattern of exclusion,” which triggers the manifestation requirement.

At a certain point, accumulations of too many short-term removals will become a “pattern of exclusion” (in Office for Civil Rights (OCR) lingo), which is considered an overall long-term removal that first requires a manifestation determination. OCR developed this rule over time, and it was also exported into the IDEA discipline regulations. Whether accumulations of short-term removals after the 10-day mark constitute a “pattern of exclusion” depends on how long each removal is, how close they are to each other, and how many they add up to overall. The rule might be designed vaguely in order to promote caution among school administrators who are considered disciplinary removals.

Generally, it’s good advice for schools to limit forays into the over-10-total-school-days danger zone. And, obviously, the higher the number of removals after the 10-day total is reached, the more precarious the school’s legal position becomes.

6. Before short-term removals add up to 10 total school days, have a §504 meeting to address behavior.

The best preventive measure in §504 disciplinary matters is to convene a §504 meeting *before* short-term removals add up to 10 total days. The §504 committee can decide to develop a BIP, provide regular counseling, evaluate the student further, or make other adjustments to the student’s §504 plan. The idea is to take action before a disciplinary issue becomes a major problem.

7. For long-term removals, proceed to a manifestation determination §504 meeting as soon as you can, and before the removal reaches 10 consecutive school days.

As soon as possible after the campus initiates a long-term disciplinary removal, an §504 committee meeting must be convened to determine if the student’s alleged offense was directly related to their disability. This is called the manifestation determination. In addition, the rule also requires the §504 committee to determine whether the behavior is related to an inappropriate §504 program. The meeting must definitely take place before the long-term removal reaches its 10th consecutive day. The right to a manifestation determination in instances of threat of long-term removal is **the** primordial safeguard of §504 disciplinary procedures. It is a doctrine that was first developed in federal court cases starting in the late-70’s, and later adopted by the Department of Education as policy in the 80’s.

The manifestation determination essentially decides whether the student can be subjected to long-term removal or not. If the §504 committee properly determines that the behavior in question is not related to disability, then the student can be subjected to regular

disciplinary procedures, as in the case of similarly-situated nondisabled student. If the §504 committee determines that the behavior is related to disability, then a long-term removal cannot take place. This, the quality of the manifestation determination is crucial to the long-term removal; §504 members are well-advised to prepare and pre-staff for manifestation determinations.

OTHER MANIFESTATION DETERMINATION ISSUES

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- **The “impulsivity” argument**

A popular manifestation determination argument, especially in cases of students with ADHD or other behavioral disorders, is that the student’s behavior was related to their disability because the offense was impulsive. In these situations it is crucial to have detailed information about the offense, particularly the timeframe for the behavior and the degree of planning that was involved. The longer the timeframe of the behavior, and the higher the degree to planning that must be involved, the less likely that the behavior was impulsive, or without thought.

- **Foreseeability**

In manifestation determinations, an important question is whether the existing evaluation data would lead one to predict that a certain behavior might be exhibited. If from the evaluation data, a reasonable person would conclude that the behavior is likely to take place, the §504 committee should find that the behavior is related to disability.

- **Degree of link**

An important federal court decision addresses the issue of the degree of relationship between disability and behavior that is required for a finding that the behavior is related to disability. *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986). In a footnote to that opinion, the court indicated that an essential component to finding that a behavior is linked to handicapping condition is whether the disability “significantly impairs the child’s behavioral controls.” The Court stated that this definition did not “embrace conduct that bears only an attenuated relationship to the child’s handicap,” such as conduct allegedly caused by low self-esteem in turn caused by the handicap.

- **The manifestation determination is an evaluation under §504**

The starting point for undertaking the “link” inquiry is the child’s existing evaluation data. Under §504, the evaluation data might not include formal psychological assessments, but it may include behavioral checklists, teacher observations, anecdotal evidence, disciplinary reports, incident reports, police reports, etc. When a §504 committee gathers, reviews, and interprets data about a disciplinary infraction, together with a review of the child’s existing data, it is conducting a valid §504 evaluation under §504. See 34 C.F.R. §104.35(a). It is on the basis of this evaluation that the committee makes the manifestation determination.

ADDITIONAL IMPORTANT DISCIPLINE ISSUES

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- **For drug offenses, the §504 committee should first determine whether the student is a “current user.”**

Students eligible under §504 lose the right to a manifestation determination and due process hearing if they violate drug or alcohol rules and are determined to be “current users.” See 29 U.S. C. §706(8)(B)(iv). Thus, if there is evidence that the student is a current drug or alcohol user, the §504 committee can skip the manifestation determination, and the student is subject to the regular disciplinary process that would take place in the case of a drug or alcohol offense by a nondisabled student. If the committee does not believe that the student is a current user, it must proceed to make the manifestation determination. OCR has determined that mere possession is not itself evidence of current use of drugs or alcohol. See, e.g., 17 EHLR 609, 611 (OCR 1991).

- **Report criminal behavior to law enforcement if you would do so for a non-disabled student’s behavior under your policies, but make sure you have implemented the BIP, of there is one.**

IDEA makes clear that schools may report criminal offenses committed by special education students at school. This is also the case under §504, as long as school administrators ensure that resort to law enforcement occurs in a non-discriminatory fashion, for nondisabled and disabled students alike. In addition, staff must ensure that the student’s BIP, if any, is fully implemented before the police are called, if at all possible. Reports to law enforcement cannot be undertaken *instead* of complying with the requirements of a BIP or §504 plan. Although in many cases, it is clear that the conduct is also a crime, campus administrators are well-advised to research or get information from law enforcement authorities about what type of conduct constitutes criminal conduct in Texas.

- **Explore development of a “smart ISS” option on your campus to help minimize suspensions to home.**

The commentary to the final IDEA regulations states that in-school suspension (ISS) would not be considered true removal days as long as the child is given the opportunity to continue to appropriately progress in their curriculum, continue to receive their IEP services, and continue to participate with nondisabled children to the extent they would have in their usual placement. DOE commentary to the 1999 IDEA regulations – 64 Fed. Reg. 12619 (March 12, 1999). By this guidance, the feds are obviously creating an

incentive for schools to use in-school forms of suspension rather than out-of-school suspensions, which can have adverse side-effects. A review of recent OCR decisions appears to indicate that this is OCR's position under §504 as well. OCR will probably find that ISS days are not true "removals" under §504 as long as students are provided an equal opportunity to continue progressing in the regular curriculum, and receive their §504 accommodations, in ISS.

The higher the degree of continuity of educational services at the ISS facility, the better your chance of successfully arguing that these are not true removal days. The more "traditional" your in-school suspension program (i.e. supervision-only while students allegedly work independently, or minimal services), the more likely that OCR will find that removals to your in-school suspension program in fact constitute disciplinary removals that "count" toward the 10-day mark. It is important to be able to show that the student received all of the work done in the regular classes, and that the §504 accommodations continued to be implemented in the ISS setting. Even better – have the regular teachers check with the students in ISS to see if they are having problems with the classwork.

- **An §504 should address the need for a behavior intervention plan (BIP) when students' behaviors get to the point that they impede their learning or the learning of others.**

Early development and consistent implementation of a BIP can help both reduce inappropriate behavior and protect the campus legally. §504 committees should act early to develop BIPs to address students' behavior problems. You can't get in trouble for doing one too early, but many schools have suffered the consequences of developing a BIP too late, or not at all. When a BIP is developed, the §504 committee should monitor the implementation and effect of the BIP, and use the information to revise the BIP as needed, especially if behavior problems escalate.

- **There is no duty to provide educational services during an expulsion unless the school normally provides services to nondisabled expelled students.**

Unlike under IDEA, schools in Texas are under no duty to provide educational services to expelled §504 students, unless they normally provide services to nondisabled expelled students. This is due to a federal court decision applicable to Texas schools.

- **Discipline-like expulsions from extracurricular and nonacademic activities**

Although not disciplinary removals from school, a campus' decision to exclude a §504 student from an extracurricular activity, field trip, or other nonacademic activity also

raises potential discrimination issues. Under §504, disabled students must be provided an equal opportunity to participate in extracurricular activities. 34 C.F.R. §104.37(a)(1). Disabled students may try out for an extracurricular activity they desire, but they must generally meet the regular performance standards applied to all students. Although some accommodations may be required of schools in this area, it appears that student must submit to the general behavioral, academic, and performance standards applied to non-disabled students. Clearly, disability does not offer a “free ride” to participate in competitive sports. Some accommodations to non-essential requirements, however, may be required in order for students to have an “equal opportunity to participate.” Schools may not condition the provision of the nonacademic service on the parent’s attendance or provision of a babysitter, exclude disabled students, or charge a higher cost than that charged nondisabled students’ parents.