

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

September 19, 1997

CONTACT PERSONS

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MEMORANDUM

OSEP 97-7

TO: Chief State School Officers

FROM: Judith E. Heumann
Assistant Secretary, Office of Special Education and Rehabilitative Services

Thomas Hehir
Director, Office of Special Education Programs

SUBJECT: Initial Disciplinary Guidance Related to Removal of Children with Disabilities from their Current Educational Placement for Ten School Days or Less

INTRODUCTION

The purpose of this memorandum is to provide initial guidance on the requirements of the Individuals with Disabilities Education Act Amendments of 1997 (IDEA '97) as they relate to the removal of children with disabilities from their current educational placement for ten school days or less. The Department has received numerous requests for guidance concerning the discipline provisions of IDEA '97. The Department plans to regulate in each of the areas where clarification is needed.

Four basic themes run throughout the statute concerning discipline:

- (1) All children, including children with disabilities, deserve safe, well-disciplined schools and orderly learning environments;
- (2) Teachers and school administrators should have the tools they need to assist them in preventing misconduct and discipline problems and to address these problems, if they arise;
- (3) There must be a balanced approach to the issue of discipline of children with disabilities that reflects the need for orderly and safe schools and the need to protect the right of children with disabilities to a free appropriate public education (FAPE); and
- (4) Appropriately developed IEPs with well developed behavior intervention strategies decrease school discipline problems.

With regard to discipline for children with disabilities, IDEA '97:

- ❑ Brings together for the first time in the Statute the rules that apply to children with disabilities who are subject to disciplinary action and clarifies for school personnel, parents, students, and others how school disciplinary rules and the obligation to provide FAPE fit together by providing specificity about important issues such as whether educational services can cease for a disabled child; how manifestation determinations are made; what happens to a child with disabilities during parent appeals; and how to treat children not previously identified as disabled.
- ❑ Includes the regular education teacher of a child with a disability in the child's IEP meetings to help ensure that the child receives appropriate accommodations and supports within the regular education classroom, and gives the regular teacher an opportunity to better understand the child's needs and what will be necessary to meet those needs, thus decreasing the likelihood of disciplinary problems.
- ❑ Allows school personnel to move a student with disabilities to an interim alternative educational setting for up to 45 days, if that student has brought a weapon to school or a school function, or knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function.
- ❑ Gives school personnel the option of asking a hearing officer to move children with disabilities to an interim alternative educational setting for up to 45 days, if they are substantially likely to injure themselves or others in their current placement.

INITIAL GUIDANCE REGARDING REMOVAL OF CHILDREN WITH DISABILITIES FROM THEIR CURRENT PLACEMENT

We recognize that the statute is susceptible to a number of interpretations in some areas related to discipline, but the position enunciated below represents what we believe is the better reading of the statute. We are providing this information (in a question and answer format) to assist States and school districts in implementing IDEA '97 prior to publication of Department regulations. To the extent these questions and answers provide information not specifically addressed in the Statute, the information is being provided as non-binding/non regulatory guidance. We will be issuing proposed regulations in the near future that reflect the positions taken in this document.

QUESTION 1: Under IDEA, do public agencies have a responsibility, as part of the IEP process, to consider a child's behavior?

ANSWER: Yes. Section 614(d)(2)(B) requires the IEP team "in the case of a child whose behavior impedes his or her learning or that of others, [to] consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." In addition, school districts should take prompt steps to address misconduct when it first appears. Such steps could, in many instances, eliminate the need to take more drastic measures. These measures also could be facilitated through the individualized education program (IEP) and placement processes required by IDEA. For example, when misconduct appears, a functional behavioral assessment could be conducted, and determinations could be made as to whether the student's current program is appropriate and whether the student could benefit from the provision of more specialized instructional and/or related services, such as counseling, psychological services, or social-work services in schools. In addition, training of the teacher in

effective use of conflict management and/or behavior management strategies also could be extremely effective. In-service training for all personnel who work with the student, and, when appropriate, other students, also can be essential in ensuring the successful implementation of the above interventions.

QUESTION 2: Does the right to a free appropriate public education extend to children with disabilities who are suspended or expelled?

ANSWER: Yes. A free appropriate public education must be made available to all eligible children with disabilities, including children with disabilities who have been suspended or expelled from school. (Section 612(a)(1))

QUESTION 3: What is the meaning of the phrase "children with disabilities who have been suspended or expelled from school"?

ANSWER: The Department believes that the phrase means children with disabilities who have been removed from their current educational placement for more than ten school days in a given school year.

QUESTION 4: Must educational services be continued during the removal of a child with a disability from his or her educational placement for ten school days or less?

ANSWER: No. The Department does not believe that it was the intent of Congress to require that FAPE be provided when a child is removed for ten school days or less during a given school year. However, there is nothing in the IDEA '97 that would prevent the provision of FAPE during this time.

QUESTION 5: Must there be a manifestation determination before a student with disabilities can be removed from his or her current education placement for a period of ten school days or less during a given school year?

ANSWER: No. The Department does not believe that the statute requires a manifestation determination prior to a removal for a period of ten school days or less in a given school year. However, if an action that involves the removal of a child with a disability from his or her current educational placement for more than ten school days in a given school year is contemplated, the Department believes that a manifestation determination would be required, and the manifestation determination must take place as soon as possible but in no case later than ten school days after the decision to take that action is made. (615(k)(4)(A))

QUESTION 6: Must a functional behavioral assessment be conducted prior to a removal of ten school days or less during a given school year?

ANSWER: No. The Department does not believe the statute requires a functional behavioral assessment, if a child with a disability is removed from his or her current educational placement for ten school days or less in a given school year, and no further disciplinary action is contemplated.

QUESTION 7: Are there any specific actions that a school district is required to take during a removal of a child with a disability from his or her educational placement for ten school days or less?

ANSWER: If no further removal is contemplated, the Department does not believe that other specific actions are required during this time period. However, school districts are strongly encouraged to review as soon as possible the circumstances that lead to the child's removal and consider whether the child was being provided services in accordance with the IEP and whether the behavior could be addressed through minor classroom or program adjustments, or whether the IEP team should be reconvened to address possible changes to the IEP.

QUESTION 8: Does IDEA continue to allow a school district to seek a court order to remove a student with a disability from school or otherwise change the student's placement? If so, under what circumstances?

ANSWER: Yes. IDEA continues to allow a school district to seek to obtain a court order to remove any student with a disability from school or to change the student's current educational placement if the school district believes that maintaining the student in the current educational placement is substantially likely to result in injury to the student or to others.¹

In addition, the new statute allows school authorities to ask a hearing officer to move children with disabilities to an interim alternative educational setting for up to 45 days if they are substantially likely to injure themselves or others in their current placement. The hearing officer may move the child to an alternative educational setting if the public agency demonstrates by evidence that is more than a preponderance of the evidence that maintaining the child in the child's current placement is substantially likely to result in injury to the child or others. The hearing officer must consider the appropriateness of the child's placement, whether the school district has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services, and determine that the interim alternative educational setting meets the requirements of section 615(k)(3) of the Act.

cc: State Directors of Special Education
RSA Regional Commissioners
Regional Resource Centers
Federal Resource Center
Special Interest Groups
Parent Training Centers
Independent Living Centers
Protection and Advocacy Agencies

¹Honig v. Doe, 108 S. Ct. 592, 606 (1988).

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