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Toll-Free (800) 776-5746*

My Child with a Disability Keeps Getting Suspended or Recommended for Expulsion

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If your special needs child is experiencing behavior problems and/or suspensions and/or being recommended for expulsion by his/her local school district ("District"), there are procedures that the District must follow prior to expelling him/her. Also, state and federal special education laws provide some protections for students with disabilities who are being considered for expulsion.

This publication will provide some basic information regarding your child's rights if he/she is being considered for suspension or expulsion and other related issues.

"Suspension" means removal of a pupil from ongoing instruction for adjustment purposes. And "Expulsion" means removal of a pupil from (1) the immediate supervision and control, or (2) the general supervision, of school personnel.

SUSPENSIONS

A special education student generally may not be suspended or removed from his or her educational placement for more than 10 consecutive school days without parental consent or a court or hearing officer's order. 34 C.F.R. §300.530(b).

This limitation on suspensions may not apply to a special education student who has multiple suspensions for separate offenses that add up or accumulate to more than 10 school days in a school year, as long as no

single suspension exceeds 10 consecutive school days. However, the limitation would apply if the accumulative suspensions together form a pattern which can be considered a change of placement. 34 C.F.R. §300.536(a)(1),(2).

Factors that are considered when determining whether the pattern of suspensions look more like an unlawful change of placement or expulsion include: the length of each removal, the total amount of time the student is removed, the proximity of the removals to one another, and the similarity of the child's behavior over the series of suspensions. 34 C.F.R. §300.536(a)(1),(2)(iii).

If the suspensions seem to be a pattern, then the series of suspensions may constitute a change of placement. 34 C.F.R. § 300.536(a)(2). If the suspensions can be considered a change of placement, then the IEP team must schedule a manifestation determination meeting, and all rights and duties regarding a change of placement apply. 34 C.F.R. § 300.530(e).

A special education student can be suspended from just the school bus. However, if a special education student is excluded from school bus transportation, the student is entitled to be provided with an alternative form of transportation at no cost to the parent or guardian provided that transportation is specified in the student's IEP. Cal. Ed. Code § 48915.5(c).

interim alternative setting

During a suspension, the school or District personnel has the authority to move a special education student from the current placement into another placement on a temporary basis. This is often referred to as an "interim alternative setting." However, the removal cannot be for more than 10 consecutive school days. 34 C.F.R. §300.530(b).

A special education student must receive a free appropriate public education (FAPE) after being suspended for more than 10 cumulative days in a school year even if the suspended student is placed in an interim

alternative placement. 34 C.F.R. §§ 300.530(b)(2) and (d)(4); and § 300.536.

The District must provide services, to the extent necessary, in order to allow the student to progress appropriately in the general curriculum and to make progress toward achieving his/her IEP goals. This means that on the 11th day of suspension in a school year, the District must provide the student with FAPE even though the student may not be in his/her regular placement to receive his/her educational services. The student should also receive, as appropriate, a functional behavioral assessment, behavioral intervention services and behavioral modifications that are designed to address the underlying behavior violation related to the suspension so that it does not recur. 20 U.S.C § 1415 (k)(1)(D).

EXPULSIONS AND MANIFESTATION DETERMINATION REVIEWS

A manifestation determination meeting must be held 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. This meeting is required regardless whether the school or District calls the change in placement either a suspension or an expulsion. 20 U.S.C. §§ 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1).

The purpose of a manifestation determination meeting is for the IEP team to determine whether the behavior that led to the decision to expel was caused by or was directly and substantially related to the child's disability, or was a direct result of the school's failure to implement the IEP. 20 U.S.C. §§ 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1). The manifestation determination meeting is sometimes referred to as a "manifestation determination IEP" or "emergency IEP on expulsion."

Your child has the right to go back to his/her initial classroom placement after the 10 consecutive days of suspension expire even if a manifestation determination meeting is pending. However, there is an exception if the student's conduct or behavior involved weapons, drugs or inflicted serious bodily injury. When this occurred, the school can move

his/her placement to another setting for 45 days. 1415(k)(1)(G); 34 C.F.R. § 300.530(f)(2), 300.530(g).

If Conduct Is A Manifestation of Disability

If the conduct is determined to be a manifestation of the student's disability, the IEP team must complete a functional behavioral assessment and implement a behavioral intervention plan for the student. If the student already has such a plan, the IEP team must review and modify the behavior plan as necessary to address the behavior. 34 C.F.R. § 300.530(f)(1).

The IEP team must also return the child to his/her current placement unless the conduct or behavior involved weapons, drugs or the infliction of serious bodily injury on someone, or unless the school and parent(s) agree otherwise to a different placement. 34 C.F.R. § 300.530(f)(2) and 34 C.F.R. § 300.530(g).

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. 18 U.S.C.A. § 1365(h)(3).

If the conduct is found to be directly related to the District's failure to implement the IEP, then the District must take immediate action to correct the deficiency or problem. 34 C.F.R. § 300.530(e)(3).

If Conduct Is NOT A Manifestation of Disability

When the IEP team determines that the behavior was not a manifestation of the student's disability, the team is saying that (1) the behavior was not caused by, or that the behavior did not have a substantial relationship to the student's disability, and/or (2) the behavior was not as a direct result of the District's failure to implement the student's IEP. If the

behavior was determined not to be a manifestation of the student's disability, the District may continue with the expulsion proceedings.

For any placement change or removal amounting to more than 10 cumulative days in a school year, including suspension removals and expulsions, your child must receive a free appropriate public education (FAPE) even if your child is in an alternative placement. This FAPE requirement means that the District must provide services, to the extent necessary, in order to allow the student to progress appropriately in the general curriculum and to make progress toward achieving his/her IEP goals. 34 C.F.R. §§ 300.530(b)(2) and (d).

APPEALING A MANIFESTATION DETERMINATION REVIEW THROUGH AN EXPEDITED DUE PROCESS HEARING

If you disagree with the District's manifestation determination, you have the right to appeal the decision through an expedited special education due process hearing. The expedited hearing must occur within 20 school days of your request for a hearing. You should receive a final decision from the hearing officer within 10 school days after the completion of the hearing. Within 7 days after the request for an expedited hearing is filed, the law requires that the school and parents meet to try to resolve the appeal issues, unless both the parent and the school agree in writing not to do so. 20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. § 300.530(h) and 34 C.F.R. § 300.532(c)(3).

You will need to file for a due process hearing as soon as possible and prior to the date set for the separate expulsion hearing with the District's governing board ("Board"). The reason you want to file for a due process hearing before you have to appear before the Board is so you can ask the hearing officer to order the District not to proceed with the expulsion hearing until your expedited hearing is completed. The hearing officer will need time to process your request and issue an order to the District to postpone the expulsion hearing until after the due process hearing is over and a decision has been issued.

During the pendency of a due process hearing, unless the District and the parents of the student agree otherwise, the student must remain in his or her current educational placement. Cal. Ed. Code § 56505(d); 34 C.F.R. § 300.518. This is generally referred to as “stay-put”.

However, the stay-put can be an “interim alternative educational setting” if:

1) Your child has engaged in a weapon or drug offense or inflicted serious bodily injury on another person. If so, the district may change the placement to an “interim alternative educational setting” for up to 45 days. 34 C.F.R. § 300.530(g); or

2) If the district persuades a hearing officer that your child’s presence in his/her current placement is “substantially likely to result in injury to the student or someone else,” the hearing officer may place the student in an “interim alternative educational setting” for up to 45 days. 34 C.F.R. § 300.532(a) & (b).

An “interim alternative educational setting” must be selected so that the student can continue to participate in the general curriculum and to continue to progress toward meeting the goals set out in his or her IEP. 34 C.F.R. § 300.530(d)(1). Even if your child is placed in an interim alternative placement, your child should remain in the alternative placement until the conclusion of the hearing or until the expiration of the time period fixed for the interim alternative placement, whichever occurs first. If the time period of the alternative placement expires any time before the end of the hearing, then your child should be returned to his/her regular placement, unless you and the District agree otherwise.

If the District did not place your child in an alternative placement as part of the disciplinary action, then your child must remain in his/her regular placement throughout the hearing process. 20 U.S.C. §§ 1415(k)(4)(A); 34 C.F.R. § 300.533.

As a result of the due process hearing, the hearing officer can order a change in the student's placement. The hearing officer could find that the behavior was a manifestation of the child's disability and order that the

school retain the original educational placement. Similarly for student's removed due to alleged offenses involving weapons, drugs or serious bodily injury, a hearing officer could order that a student be returned to the regular placement from which the school officials removed him if the hearing officer finds the behavior did not constitute a weapons, drugs, or serious bodily injury offense. 20 U.S.C. §§ 1415(k)(2) and (3)(B); 34 C.F.R. § 300.532(b).

EXPULSION HEARING BY A SCHOOL GOVERNING BOARD

If the District recommends expulsion, the District will refer you and your child to the District's governing board ("Board") for a hearing to determine whether your son/daughter should be expelled. This hearing with the Board is held within 30 school days after the school principal decides to expel your child. The Board is required to make a decision within 10 school days after the Board hearing, unless you request a postponement of the hearing or decision in writing. Cal. Ed. Code § 48918(a).

If the Board decides to expel your child, you have the right to appeal the Board's decision. You have 30 days following the Board's decision to file an appeal to the County Board of Education. Cal. Ed. Code § 48919.

There are many rules governing expulsions and they can vary from one district to another. You should contact your child's District for a copy of its written rules and policies. More information about the various rules can be found at Cal. Ed. Code §§ 48916– 48927.

EXPULSION OF A STUDENT WHO HAS NOT BEEN MADE ELIGIBLE FOR SPECIAL EDUCATION

If the District has not assessed your child for special education and you feel that he/she would be eligible, your child is entitled to the same pre-expulsion protections that a special education student has if you can establish that the District had knowledge that your child had a disability before the behavior leading up to the disciplinary action occurred. 20 U.S.C. §1415(k)(5); 34 C.F.R. §§ 300.534(a) and (b). A District is deemed

to have knowledge of your child's disability before his misbehavior if, before his misbehavior, one of the following four things occurred:

- 1) You expressed concerns in writing to the teacher or other school officials that your child was in need of special education (exception is made if a parent is illiterate or has a disability that prevents the parent from making concerns known in writing);
- 2) you requested that your child be evaluated for special education; or
- 3) a teacher or other school personnel expressed concerns about the child's behavior or performance to special education officials or supervisory personnel in the school district.

If you believe that the District had knowledge of your child's disability prior to the District's decision to expel, you have the right to file for a due process hearing to present your arguments. You should request an expedited hearing as soon as possible and include any and all written evidence of one or more of the four indicators listed above regarding the school's prior knowledge.

Please be advised that there are important filing deadlines that apply to your appeal of a District's manifestation determination and expulsion proceedings. We recommend that you to seek further legal advice regarding these deadlines as soon as possible. If you wish to file for due process or seek additional assistance or representation, you should contact the Office of Administrative Hearings (OAH). They can answer your general non legal questions and provide a referral list of attorneys and/or advocates that specialize in special education advocacy. The contact information is as follows:

Office of Administrative Hearings
Special Education Division
2349 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833-4231
Phone: 916-263-0880
Fax: 916-376-6319

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