

## **Disciplinary Exclusions of Students Who Are Eligible for Special Education**

### **22 Pa. Code Section 14.143 and 22 Pa. Code 711.61**

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**REPLACES:** Disciplinary Exclusions of Students Who Are Eligible for Special Education, BEC 22 Pa. Code Section 14.35, issued July 1, 1999

**(Note: Local educational agencies (LEA) that place a special education student into an alternative education for disruptive youth program must adhere to the provisions of 24 PS 19-1901-C, 1902-C, and 1903-C and the basic education circular entitled Alternative Education for Disruptive Youth.)**

### **PURPOSE**

On August 14, 2006, the United States Department of Education's Office of Special Education Programs (OSEP) released the federal regulations pursuant to the *Individuals with Disabilities Education Improvement Act 2004* (IDEA). This Basic Education Circular (BEC) provides written guidance regarding disciplinary exclusions.

### **PROCEDURES**

Changes to federal law do not necessarily require or allow changes in practice in Pennsylvania in every instance. Therefore, this BEC constitutes written guidance regarding disciplinary exclusions of students eligible for special education under 22 Pa. Code Chapters 14 and 711. In any event, when considering the overlap of federal and state statutes and regulations, Local Educational Agencies (herein referred to as LEAs) must obey whichever requirement provides the greater protection to special education students.

### **Applicability of Chapter 12 and the Public School Code of 1949**

All students in the commonwealth subject to disciplinary exclusions are protected by due process procedures in 22 Pa. Code Chapter 12. In addition, LEAs must first determine, when contemplating a disciplinary exclusion of any student, whether the student is eligible for services under 22 Pa. Code Chapter 14 or 711. If the student is eligible for special education, LEAs must determine whether the disciplinary exclusion being contemplated is a change in educational placement, as described in 22 Pa. Code § 14.143 or § 711.61.

### **Applicability of Chapter 14, Chapter 711 and IDEA 2004**

According to 22 Pa. Code §§ 14.143 & 711.61, an intended disciplinary exclusion of a student eligible for special education is a change in educational placement in any of these three situations:

1. The disciplinary exclusion is for more than 10 consecutive school days;
2. The disciplinary exclusion, when cumulated with other disciplinary exclusions in a single school year, exceeds 15 school days; or
3. The disciplinary exclusion (for any length of time) involves a student with an intellectual disability.

### **Manifestation Determination**

The LEA must first conduct and document a manifestation determination for a disciplinary change in educational placement. An eligible student may be removed to a 45-school-day

interim alternative educational setting without the required manifestation determination if the student: 1) Carries a weapon or possesses a weapon at school, on school premises, or at a school function; 2) 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; or 3) Inflicts serious bodily injury upon another person while at school, on school premises, or at a school function. 34 C.F.R. § 300.530(g).

IDEA 2004 requires the LEA, parent, and relevant members of the student's Individualized Education Program (IEP) team (as determined by the LEA and parent) to determine whether conduct is a manifestation of a student's disability. Federal regulation requires that a manifestation determination be conducted within 10 school days of any decision to change the educational placement of a student with a disability because of a violation of a code of student conduct.

The regulations at 34 C.F.R. § 300.530(f)(1) require that if the LEA, parent, and relevant members of the IEP team determine that the conduct was a manifestation of the student'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 educational placement occurred, and implement a behavioral intervention plan for the student; or if a behavioral intervention plan already has been developed, the IEP team must review the behavioral intervention plan and modify it, as necessary, to address the behavior.

If a LEA determines that a student's behavior was not a manifestation of the student's disability, then the LEA may proceed with the disciplinary exclusion via the procedures for changing educational placement. IDEA 2004 provides that parents may dispute the manifestation determination by requesting a due process hearing, thereby invoking pendency. Such hearings, as well as parent-requested hearings regarding disciplinary exclusions which are changes in educational placement, must be expedited.

34 C.F.R. § 300.530(e)(1)(ii) states that if during the manifestation determination, the LEA determines that the conduct was the direct result of a failure to implement the IEP, the LEA must take immediate steps to remedy the deficiencies. For children placed in a 45-school-day interim alternative educational setting under 34 C.F.R. § 300.530(g), there is no requirement for a manifestation determination.

When a due process hearing is requested to challenge a manifestation determination or a disciplinary exclusion, it must be expedited. Section 300.532(c)(2) requires that a hearing occur within 20 school days of the date the due process complaint requesting the hearing is filed. The Office for Dispute Resolution will assign a hearing officer to review disputes requiring an expedited hearing. A hearing officer, in an expedited due process hearing, may order a change in the placement of a student with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer: 1) Determines that maintaining the current placement of the student is substantially likely to result in injury to the student or to others; 2) Considers the appropriateness of the student's current placement; 3) Considers whether the LEA has made reasonable efforts to minimize the risk of harm in the student's current placement, including the use of supplementary aids and services; and 4) Determines that the interim alternative educational setting that is determined by the IEP team so as to enable the student to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the student's current IEP, that will enable the student to meet the goals set out in that IEP, and includes

services and modifications that are designed to prevent the behavior from recurring (34 CFR 300.530(d)(1)(ii) and (ii).

After meeting all procedural requirements, if the IEP team recommends a disciplinary exclusion which would constitute a change in educational placement, LEAs must follow the notice requirements for changes in educational placement. If the parents dispute the LEA's proposed change in educational placement and request a due process hearing, then the pendency requirements under 34 C.F.R. § 300.533 apply. As mentioned above and further discussed below, however, there are exceptions to pendency.

### **Exceptions to Pendency**

The following exceptions are applicable in Pennsylvania:

*Exception 1.* Immediate or severe discipline problems with students with intellectual disabilities.

If a discipline problem involving a student eligible for special education with an intellectual disability is immediate or so severe as to warrant immediate action, the LEA must first contact the parents to see if they will agree to the change in educational placement. If the parents agree, the LEA issues notice to the parents. If there is no agreement, the LEA may contact the Pennsylvania Department of Education's (PDE) Bureau of Special Education at 717-783-6134 to request permission to impose a disciplinary exclusion which would be a change in educational placement. When the PDE approves the change in educational placement, the LEA must issue notice to the parents. The PDE cannot approve requests for a change in placement which would continue beyond 10 consecutive days.

*Exception 2.* Students eligible for special education who carry a weapon to school.

IDEA 2004 and 34 C.F.R. § 300.530(g)(1) permit LEAs to change the placement of a student eligible for special education for not more than 45-school-days if he/she brings a weapon to school or at a school function to an interim alternative educational setting. Weapon has the meaning given the term "dangerous weapon" and is defined as a weapon, device, instrument, material, or substance, animate or inanimate that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length. 18 U.S.C.A. § 930(g)(2).

The 45-school-day interim alternative educational setting must be determined by the IEP team and must meet the requirements of IDEA 2004. These requirements include the selection of an educational setting that will enable the student eligible for special education to continue to participate in the general curriculum, to receive services and modifications in the current IEP, and which includes the services and modifications designed to address the behavior.

If a student eligible for special education has been placed in an interim alternative educational setting and the parents request a due process hearing to challenge the interim alternative educational setting, then the student must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the 45-school-day time period, whichever occurs first, unless the parents and the LEA agree otherwise. If the LEA proposes to change the student's educational placement after expiration of the interim alternative educational setting, the student must remain in the current placement (that is, return to the placement prior to the interim alternative educational setting) if the parents invoke pendency by requesting a hearing. LEAs may

request an expedited hearing to establish that it is dangerous for the student to return to the prior placement during the pendency of due process proceedings.

*Exception 3.* Students eligible for special education who knowingly possess or use illegal drugs, or sell or solicit the sale of a controlled substance while at school or a school function under the jurisdiction of an LEA.

The same requirements described in Exception 2 above apply to eligible students who knowingly possess or use illegal drugs, or sell or solicit the sale of a controlled substance, while at school, on school premises, or at a school function. 34 C.F.R. § 300.530(g)(2). Illegal drug means a controlled substance (i.e., a drug or other substance identified under schedules I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 812(c)), but does not include a substance that is legally possessed or used under the supervision of a licensed health-care professional, used under any other authority under the Controlled Substances Act, or used under any other provision of federal law.

*Exception 4.* Students eligible for special education who inflict serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an LEA.

“Serious bodily injury” means bodily injury which involves: a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. 18 U.S.C. § 1365(h)(3).

*Exception 5.* Determination by a hearing officer that maintaining the current placement is substantially likely to result in injury to the student or others.

Under 22 Pa. Code §§ 14.162 and 711.62, impartial hearing officers resolve disputes over the identification, evaluation, educational placement, or provision of a free appropriate public education (FAPE) to an eligible student. IDEA 2004 allows hearing officers to order a change in educational placement to an interim alternative educational setting for not more than 45-school-days if the LEA demonstrates that maintaining the current educational placement of the student is substantially likely to result in injury to the student or to others.

When applying this provision, hearing officers must consider the appropriateness of the student's current placement, and whether the LEA has made reasonable efforts to minimize the risk of harm in the student's current placement, including the use of supplementary aids and services.

*Exception 6.* Judicial intervention.

Under *Honig v. Doe*, LEAs may seek a court order to remove a student with a disability from school or to change a student's current educational placement, if the LEA believes that maintaining the student in the current educational placement is substantially likely to result in injury to the student or to others.

#### **Note to LEAs Regarding Pennsylvania Act 26 of 1995**

Act 26 of 1995 amended the Public School Code (24 P.S. Section 13-1317.2) to require one-year expulsions of all students who bring weapons to school. However, Act 26 of 1995 provided that LEAs “...shall, in the case of an exceptional student, take all steps necessary to comply with the Individuals with Disabilities Education Act...” In effect, application of

provisions in Act 26 of 1995 to eligible students must conform to the requirements of IDEA 2004 and Chapters 14 and 711 as described in this BEC.

### **Protections for Students Who Are Not Yet Eligible for Special Education**

34 C.F.R. § 300.534, provides that a student who has not been determined to be eligible for special education may assert the protections of IDEA 2004 if the LEA had “knowledge” that the student was an eligible student before the occurrence of the behavior that precipitated a disciplinary action. A LEA has knowledge if: 1) The parent of the student expressed a concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to the LEA that the student is in need of special education and related services; 2) The parent of the student has requested an evaluation of the student; or 3) The teacher of the student, or other personnel of the LEA, expressed a specific concern about the behavior or performance of the student to the director of special education of the LEA or to other supervisory personnel of the LEA.

### **Cessation of FAPE Not Permitted**

IDEA 2004 makes it clear that FAPE must be made available to students eligible for special education, including students who have been suspended or expelled from school. This means that LEAs must maintain the provision of FAPE to a student eligible for special education during all disciplinary exclusions, including those involving 10 consecutive school days or for more than 15 cumulative school days in a school year.

### **Referral to and Action by Law Enforcement and Judicial Authorities**

IDEA 2004 does not prohibit a LEA from reporting a crime committed by a student eligible for special education to appropriate authorities, or to prevent state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by an eligible student. A LEA reporting a crime committed by a student eligible for special education must ensure that copies of the special education and disciplinary records of the student are transmitted, in compliance with the provisions of the Family Education Rights and Privacy Act, for consideration by the appropriate authorities to whom it reports the crime.

### **Summary of Decision Points**

The decision points a LEA should consider before implementing any disciplinary exclusion are as follows:

1. If the student is not eligible for special education services and the LEA does not have knowledge under 34 C.F.R. § 300.534, then the LEA must apply Chapter 12 and the Pennsylvania School Code.
2. If the student is eligible for special education services, then the LEA must decide if the proposed disciplinary exclusion is a change in educational placement.
3. If parents request a due process hearing and thereby invoke pendency, then the LEA can assess whether any of the exceptions discussed in this BEC apply and take the proper steps.

### **Final Note of Caution**

34 C.F.R. § 300.536 defines a change of placement for disciplinary removals as either a removal for more than 10 consecutive school days or a series of removals that cumulate to more than 10 school days in a school year. In addition, consideration of factors such as the length of each removal, the total amount of time that the student is removed and the proximity of the removals to one another, may lead to the conclusion that the student has been excluded from the current placement to such an extent that there has been a change in educational placement. In other words, federal regulations do not necessarily consider a

disciplinary exclusion of more than 10 cumulative days to constitute a change in educational placement. However, in Pennsylvania the 15 day rule protects special education students from disciplinary exclusions totaling more than 15 days in any school year. 22 Pa. Code §§ 14.143(a) and 711.61(e).

PDE is available to answer questions on this subject. Please direct your questions to the special education adviser assigned to your intermediate unit.

#### **REFERENCES:**

##### **Purdon's Statutes**

24 P.S. Section 13-1317.2

##### **State Board of Education Regulations**

[22 Pa. Code Chapter 12](#)

[22 Pa. Code Chapter 14](#)

[22 Pa. Code Chapter 711](#)

##### **United States Code Annotated**

18 U.S.C.A. § 930(g)(2)

18 U.S.C.A. § 1365(h)(3)

##### **Federal Regulations**

34 C.F.R. Part 300

##### **Other**

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

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