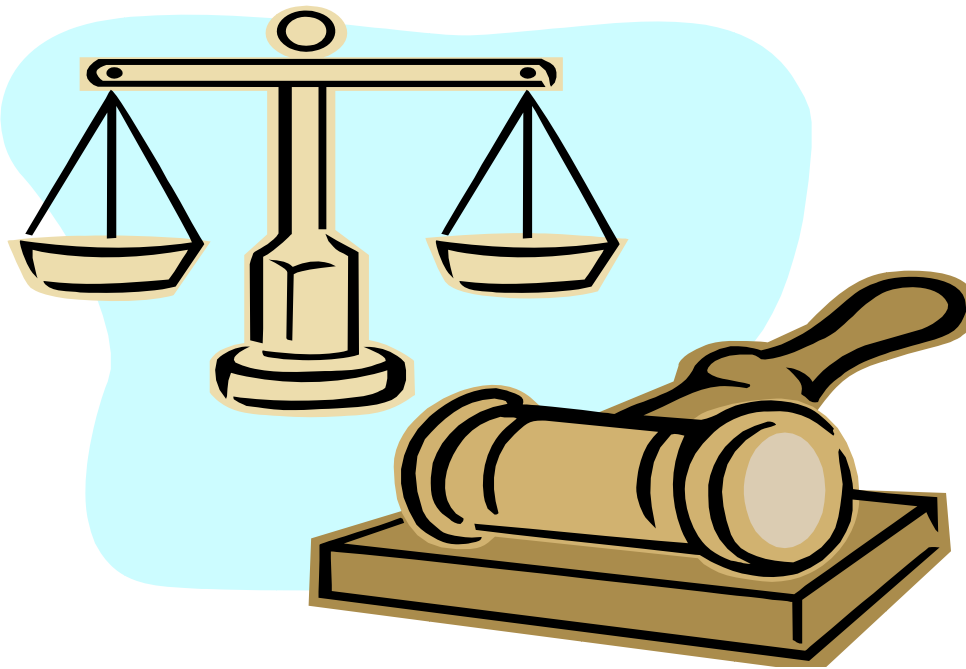


# DISCIPLINE IN DETAIL

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## Information and Thanks

*The following student discipline information is taken from selected South Dakota codified laws and the South Dakota Administrative Rules pertaining to appropriate use of discipline in the public schools as of March 15<sup>th</sup>, 2011.*

*The document is designed as a guide for school administrators, parents and advocates in South Dakota in looking at discipline procedures for students with disabilities who violate a school district's code of student conduct.*

*The South Dakota Department of Education, Special Education Programs would like to thank the National Dissemination Center for Children with Disabilities (NICHCY) for the great information on their website and teaching modules. Most of the information within this document came from the NICHCY website and Module 19 Key Issues in Discipline.*

**Module 19:  
Key Issues in Discipline  
Slides and Discussion**

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*Special thanks also to the Cornbelt Educational Cooperative for allowing the use of their original 2007 document as a template for this updated version.*

*This document can be accessed at <http://www.doe.sd.gov/oess/sped.asp>.*

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## Background

States, schools, and communities are understandably very concerned with school safety these days. Providing safe environments in which children can learn, free of drugs and violence, is one of education's top priorities. In keeping with that concern, it's not surprising that IDEA includes provisions that address the discipline of children with disabilities in school settings and at school functions.

IDEA's discipline provisions were first introduced in the 1997 amendments and have been retained in the 2004 amendments, where they've been streamlined. Even so, they remain complex, spelling out the authority of school personnel to take disciplinary action when the student violating the code of conduct is a student with a disability. Under certain conditions, the actions that schools can take include removing students with disabilities from their current placement, placing them in an interim setting or, if appropriate, suspending or expelling them. This authority may be exercised only in specific circumstances, which will be discussed here.

## Proactively Addressing Behavior Issues

In addition to including discipline procedures as a means of addressing unacceptable behavior of children with disabilities in certain situations, the reauthorized IDEA continues to include several vehicles for proactively addressing the needs of children who exhibit behavior challenges. The most prominent of these is the individualized education program or IEP. For a "child whose behavior impedes the child's learning or that of others," a factor that must be considered in the development of that child's IEP is "the use of positive behavioral interventions and supports, and other strategies, to address that behavior" [§300.324(a)(2)(i)]. Functional behavioral assessments (FBA) and behavioral intervention plans (BIP) are possible tools an IEP Team may consider when determining how to address problem behavior. These elements become mandatory in certain disciplinary situations, as we will see in this document, but they must also be used proactively, if the IEP Team determines that they would be appropriate for the child.

## General Authority of School Personnel

Let us say that a child with a disability has violated a code of student conduct. The question that many school systems, families, and advocates then ask is: What authority do school personnel have to discipline that child? The answer begins with the *general* authority of school personnel under §300.530(b)(1). IDEA says:

### §300.530(b)(1): Authority of School Personnel

(b) **General.** (1) School personnel under this section 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 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 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 §300.536).

This first part of IDEA’s discipline regulations provides the foundational layer for school personnel’s authority to remove a child with a disability from the current setting to another setting for disciplinary infractions. There are so many if-this, then-that variables at play here, it’s hard to understand. Let’s break it down.

## First Time Violation

School personnel may remove a child to an appropriate interim alternative educational setting (IAES), another setting, or suspension for not more than 10 school days in a row—to the extent those alternatives are applied to children without disabilities. To further clarify, here’s a little Q&A, with the A’s in parentheses following the Q’s:

- To where do school personnel have the authority to remove a child? (An appropriate IAES, another setting, or suspension)
- Another setting from what? (The child’s current placement)
- For how long? (Not more than 10 consecutive school days, to the extent those alternatives are applied to children without disabilities)
- Is day 10 counted in that length of time? (Yes)
- How does disciplining children without disabilities relate to this provision? (The alternatives mentioned by IDEA—IAES, another setting, suspension—may only be applied to children with disabilities to the extent those disciplinary actions are applied to children without disabilities.)

The 10-day rule is the first category of disciplinary actions a school district can take. There are three, as we’ll see. **Does the student continue to receive special education services during the time of removal?** Although it’s not stated in the provision above, it’s important to know that schools do not have to provide students with disabilities with special education services during a removal of up to 10 school days in one school year—as long as they also do not provide educational services to children without disabilities who are similarly removed [§300.530(d)(3)].

## Additional Violations

What if the child violates a code of conduct more than one time in the same school year? Can school personnel remove that child again for up to and including 10 school days in a row? Yes—and for each separate incident of student misconduct— with two associated conditions. Those conditions are:

- Additional removals of not more than 10 consecutive school days in a school year from the current educational placement may occur so long as those removals do not constitute a “change of placement” in the disciplinary context under §300.536. [§300.530(b)(1)]
- Beginning with the 11th cumulative day in a school year that a child is removed, the school system must provide services to the extent required in §300.530(d). [§300.530(b)(2) and (d)(4)-(5)]

You may well be wondering what constitutes a “change of placement”? We’ll talk about that in a moment, since it’s a critical issue in IDEA’s discipline procedures. First, though... **What happens to a child on the 11th cumulative day?** Answer: The school system must provide services to the child to the extent required under §300.530(d), which clarifies that the child must continue to receive educational services so that the child can continue to participate in the general education curriculum (although in another setting), and progress toward meeting the goals in his or her IEP.

## Change of Placement

School personnel have the authority to make additional removals of a child with a disability for not more than 10 consecutive school days in the same school year for separate incidents of misconduct—as long as those removals do not constitute a change of placement under §300.536. Section 300.536 provides that a ***change of placement occurs if:***

- The removal is for more than 10 consecutive school days; or
- The child has been subjected to a series of removals that constitute a pattern.

What factors are to be considered in determining whether the series of removals constitutes a pattern? IDEA states in §300.536 that a pattern would exist—

- when the series of removals total more than 10 school days in a school year;
- when the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; and
- when additional factors exist such 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 school system 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. Consider the two illustrations below.

**Case 1.** If Jenna, a child with a disability, is suspended from school for 6 days in November and then another 3 days in February and then 1 day in April, does that constitute a pattern of removals that amount to a change of placement for Jenna? (*No, that’s only 10 school days total. IDEA states at §300.536(a)(2)(i) that a pattern is “a series of removals that total more than 10 school days in a school year.”*)

**Case 2.** How about this situation with a child with a disability named Robert?

1—Two separate incidents of throwing food at children in the cafeteria, each time resulting in a suspension of one day in September and October.

2—Pulling the fire alarm in November. A five-day suspension.

3—Fighting in class in December. Two days removal.

4—Setting off the sprinkler system in the school with a lighter in February. Two days removal.

Could the school system determine that Robert’s removals constitute a pattern and, thus, a change of placement? *Yes. According to §300.536(a)(2)(i), a pattern is “a series of removals that total more than 10 school days in a school year.”* In our case, Robert has been removed from his current placement for a total of 11 days. School systems cannot use repeated short-term removals as a way of avoiding the Act’s change in placement provisions. Therefore, the school system would need to consider whether this series of removals constitutes a pattern and, thus, a change of placement, including considering (a) whether Robert’s behavior was substantially similar to that of previous incidents, and (b) any additional factors or relevant information regarding Robert’s behaviors, including, where appropriate, any information in his IEP.



The Department of Education acknowledged in response to a public comment:

...what constitutes “substantially similar behavior” is a subjective determination. However, we believe that when the child’s behaviors, taken cumulatively, are objectively reviewed in the context of all the criteria in paragraph (a)(2)...for determining whether the series of behaviors constitutes a change in placement, the public agency will be able to make a reasonable determination as to whether a change in placement has occurred. Of course, if the parent disagrees with the determination by the public agency, the parent may request a due process hearing pursuant to §300.532. (71 Fed. Reg. 46729)

## Counting Days

Questions naturally arise about what counts as a day of removal, and we’ll take a moment here to look at two specific circumstances about which commenters asked for clarification from the Department: in-school suspensions and bus suspensions.

***Do in-school suspensions count as days of removal?*** In the Analysis of Comments and Changes, the Department provided clarification about whether to count an in-school suspension as part of the 10-day removal period and whether there was a requirement to provide services to a child with a disability during an in-school suspension. The Department explained:

It has been the Department’s long term policy that an in-school suspension would not be considered a part of the days of suspension addressed in §300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child’s IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. This continues to be our policy. Portions of a school day that a child had been suspended may be considered as a removal in regard to determining whether there is a pattern of removals as defined in §300.536. (71 Fed. Reg. 46715)

***How about a bus suspension?*** Riding the school bus is the primary means by which large numbers of children get to school. A disciplinary violation on a school bus may well result in being suspended from using the bus service for some period of time. So this may be a question many participants in your audience have. In the Analysis of Comments and Changes, the Department addressed this concern as follows:

Whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child’s IEP. If the bus transportation were a part of the child’s IEP, a bus suspension would be treated as a suspension under §300.530 unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where services will be delivered. If the bus transportation is not a part of the child’s IEP, a bus suspension is not a suspension under §300.530. In those cases, the child and the child’s parent have the same obligations to get the child to and from school as a nondisabled child who has been suspended from the bus. However, public agencies should consider whether the behavior on the bus is similar to behavior in a classroom that is addressed in an IEP and whether the child’s behavior on the bus should be addressed in the IEP or a behavioral intervention plan for the child. (*Id.*)

## Case-by-Case Determination

Under a new provision in the reauthorized IDEA, school personnel may consider whether a change in placement *that is otherwise permitted under the disciplinary procedures* is appropriate and should occur. We italicize those words to stress their importance. At first glance, this provision may appear to give school personnel the authority to unilaterally determine a change of placement for a child, but this is not so. School personnel must exercise this new authority on a case-by-case basis, and they can only use this authority if the removal would otherwise be consistent with the other provisions in §§300.530-300.536. *In other words: School authorities may only exercise their discretion on a case-by-case basis to allow removals for unique circumstances if the other disciplinary procedures have been satisfied.* **What are unique circumstances?** If school personnel now have the authority to take any unique circumstances or factors into consideration as part of change-of-placement decision making, what kind of circumstances might they consider? According to the Department:

Factors such as a child's disciplinary history, ability to understand consequences, expression of remorse, and supports provided to a child with a disability prior to the violation of a school code [of student conduct] could all be unique circumstances considered by school personnel when determining whether a disciplinary change in placement is appropriate for a child with a disability. (71 Fed. Reg. 46714)

**Is the IEP team involved in a case-by-case determination?** According to the Department of Education, not officially:

[W]e do not believe it is appropriate to define a role for the IEP Team in this paragraph. There is nothing, however, in the Act or these regulations that would preclude school personnel from involving parents or the IEP Team when making this determination. (71 Fed. Reg. 46714)

**Which school personnel are involved?** IDEA's regulations do not specify the answer to this question. The Department explains that "...such decisions are best made at the local school or district level and based on the circumstances of each disciplinary case." (71 Fed. Reg. 46714)

## Parent Notification

[Parent notification](#) is a very important aspect of implementing IDEA's discipline procedures. On the date when 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 §300.504. [§300.530(h)]

## What Happens Next?

If a decision is made to change the child's placement because of a violation of a code of student conduct, then a manifestation determination must be conducted within 10 school days of that decision [§300.530(e)]. The purpose of the manifestation determination is to determine whether or not the child's violation of the student code of conduct is substantially linked to his or her disability.

## School Authority in Special Circumstances

In addition to the [general authority](#) of school personnel to remove a student with disabilities from his or her current placement in disciplinary situations, **school personnel also have the authority to remove a student with disabilities for what's known as "special circumstances."** These circumstances apply to a child with a disability:

- who carries a **weapon** to or possesses a weapon at school, on school premises, or at a school function;
- who knowingly possesses or uses illegal **drugs**, or sells or solicits the sale of a controlled substance, at school, on school premises, or at a school function; or
- who has inflicted **serious bodily injury** upon another person while at school, on school premises, or at a school function under the jurisdiction of a State educational agency (SEA) or a local educational agency (LEA). [§300.530(g)]

In any of these circumstances, school personnel may remove a student to an interim alternative educational setting (IAES) for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability.

## Definition of Key Terms

"Dangerous weapon" is defined in 18 U.S.C. 930(g)(2) as follows:

[T]he term **dangerous weapon** means 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. (71 Fed. Reg. 46723)

Note that the child doesn't have to use the weapon; he or she may merely possess it. It's also enough for a child with a disability to knowingly possess an illegal drug; he or she doesn't have to be caught using the drug. In contrast, for drug violations involving controlled substances, IDEA means that the child must sell or solicit the sale of a *controlled substance*.

Clearly, there's a difference between *illegal drug* and *controlled substance*. IDEA defines what a controlled substance is and what an illegal drug is at §300.530(i)(1) and (2).

(1) **Controlled substance** means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(2) **Illegal drug** means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

Clear as mud? That's because the definition of controlled substance is "lengthy and frequently changes," according to the Department (71 Fed. Reg. 46723).

If you need the current definition, you can find it by visiting the Controlled Substance Act page of the U.S. Drug Enforcement Administration at the U.S. Department of Justice, at: <http://www.justice.gov/dea/pubs/csa.html>

And what about the definition of *serious bodily injury*? Again, the definition comes from another law, which states that:

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. (71 Fed. Reg. 46723)

## Consequences Involving Special Circumstances

When a student with a disability has committed a weapons or drug violation, or inflicted serious bodily injury on another person, school personnel may remove that child to an interim alternative educational setting—hereafter referred to as an IAES—for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child’s disability. [§300.530(g)]

Other provisions of IDEA’s discipline procedures apply under special circumstances—for example:

- conducting the [manifestation determination](#) under §300.530(e);
- notifying parents under §300.530(h); and
- determining the [extent of services](#) that must be provided to the child under §300.530(d)(1).

## Conclusion

As we mentioned in [General Authority](#) of School Personnel, IDEA includes three categories of disciplinary actions that a school district can take. The special circumstances described here represent the third category. As the Senate HELP committee explained:

Because of the inherent and immediate dangers connected with this category of cases, school personnel need to retain the ability to take swift action to address these situations, to ensure the safety of all students, teachers, and other such personnel

## Manifestation Determination

At specific times, and for certain violations of the student code of conduct, IDEA’s discipline procedures require school systems to conduct what is known as a “manifestation determination review.”

***The purpose of this review is to determine whether or not the child's behavior that led to the disciplinary infraction is linked to his or her disability.***

Manifestation determinations were first introduced into IDEA with the 1997 amendments. The process has been simplified under IDEA 2004, which now:

- limits the requirement to perform a manifestation determination to removals that constitute a change of placement under IDEA's disciplinary procedures; and
- does not require a manifestation determination for removals for less than 10 consecutive school days that do not constitute a change in placement.

## **When is a Manifestation Determination Review Necessary?**

Under §300.530(e), a manifestation determination must occur within 10 days of any decision to change the child's placement because of a violation of a code of student conduct.

## **Who is Involved?**

The LEA, the parent, and relevant members of the [IEP team](#) (as determined by the parent and the LEA) are involved in conducting the review. Their purpose is to determine:

- (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP. . .  
[§300.530(e)(1)-(2)]

To make these determinations, the group will 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.

The link between the child's conduct violation and his or her disability is important. As the Department notes:

We believe the Act recognizes that a child with a disability may display disruptive behaviors characteristic of the child's disability and the child should not be punished for behaviors that are a result of the child's disability. (71 Fed. Reg. 46720)

The relationship between the child's behavior and disability, however, is not the only factor to be considered in a manifestation determination. A manifestation determination must also consider if the child's conduct was the direct result of the LEA's failure to implement the IEP [§300.530(e)(1)(ii)]. If such a finding is made, the regulations require the LEA to take immediate steps to remedy those deficiencies [§300.530(e)(3)]. This will be discussed further below.

**Here, first, a little review, by way of a little Q&A.**

- Under what circumstances must a manifestation determination be conducted? (***Whenever a decision is made to change the placement of a child with a disability because he or she has violated a code of student conduct.***)
- What's the time frame for conducting a manifestation determination? (***The manifestation determination must occur 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.***)
- Who is involved in conducting a manifestation determination? (***The LEA, parent, and relevant members of the child's IEP Team.***)
- Who decides who's a "relevant member" of the Team? (***The parent and the LEA.***)

## Scope of the Review

IDEA states that the LEA, the parent, and relevant members of the child's IEP team 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" as part of conducting a manifestation determination [§300.530(e)(1)]. This list is not exhaustive, according to the Department. It may include other relevant information in the child's file, including placement appropriateness, supplementary aids and services, and if the behavior intervention strategies were appropriate and consistent with the IEP. (71 Fed. Reg. 46719)

Consider this excerpt from the U.S. House of Representatives Conference Report 108-779. It clarifies both the scope of the manifestation review and the intent behind it.

[T]he Conferees intend to assure that the manifestation determination is done carefully and thoroughly with consideration of any rare or extraordinary circumstances presented." The Conferees further intended that "if a change in placement is proposed, the manifestation determination will analyze the child's behavior as demonstrated across settings and across time when determining whether the conduct in question is a direct result of the disability. (71 Fed. Reg. 46720)

Let's move on and say the group has met, reviewed all relevant information in the child's file, considered the child's conduct in light of his or her disability, considered the LEA's implementation of the IEP, and come to a determination. What happens if that determination is yes—or no? Each answer leads to specific outcomes.

## If the Determination is Yes

There are two scenarios under which the manifestation determination would be "yes." These are when the conduct:

- ***was*** a manifestation of the child's disability, *or*
- the direct result of the LEA's failure to implement the child's IEP.

If either condition is met, the student's conduct must be determined to be a manifestation of his or her disability [§300.530(e)(2)-(3) and (f)]. In other words, the manifestation determination is "yes."

But it matters which of the two conditions was the basis for the determination of "yes."

**“Yes,” for failure to implement the IEP.** If the group determines that the child’s misconduct was the direct result of the LEA’s failure to implement the child’s IEP, the “LEA must take immediate steps to remedy those deficiencies.” As the Department explains, if such a determination is made:

[T]he LEA has an affirmative obligation to take immediate steps to ensure that all services set forth in the child’s IEP are provided, consistent with the child’s needs as identified in the IEP. (71 Fed. Reg. 46721)

**What about placement?** Unless the behavior involved one of the special circumstances—weapons, drugs, or serious bodily injury—the child would be returned to the placement from which he or she was removed as part of the disciplinary action. However, the parent and LEA can agree to a change of placement as part of the modification of the behavioral intervention plan. [§300.530(f)(2)]

**“Yes,” for conduct directly related to disability.** If the group finds that the child’s misconduct had a direct and substantial relationship to his or her disability, then the group must also reach a manifestation determination of “yes.” Such a determination carries with it two immediate considerations:

- Functional behavioral assessment (FBA)—Has the child had one? Does one need to be conducted?
- Behavioral intervention plan (BIP)—Does the child have one? If so, does it need to be reviewed and revised? Or if the child does not have one, does one need to be written? [§300.530(f)]

Thus, 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 immediately conduct a FBA of the child, unless one has already been conducted. According to the Senate HELP committee:

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.

In addition to conducting an FBA (if necessary), the IEP team must also write a BIP for the student, unless one already exists. If the latter is the case, then the IEP team will need to review the plan and modify it, as necessary, to address the behavior.

The IEP team must also address a child’s misbehavior via the IEP process as well. As the Department explains:

When the behavior is related to the child’s disability, proper development of the child’s IEP should include development of strategies, including positive behavioral interventions, supports, and other strategies to address that behavior... When the behavior is determined to be a manifestation of a child’s disability but has not previously been addressed in the child’s IEP, the IEP Team must review and revise the child’s IEP so that the child will receive services appropriate to his or her needs. Implementation of the behavioral strategies identified in a child’s IEP, including strategies designed to correct behavior by imposing disciplinary consequences, is appropriate... even if the behavior is a manifestation of the child’s disability. (71 Fed. Reg. 46720-21)

## What about Placement?

The child must be returned to the placement from which he or she was removed as part of the disciplinary action, with two exceptions:

- if the behavioral infraction involved special circumstances of weapons, drugs, or serious bodily injury; or
- if the parents and LEA agree to change the child's placement as part of the modification of the BIP.

If either of these exceptions applies, then the child need not necessarily return to the same placement.

## If the Determination is No

A manifestation determination of "no" means either that:

- the child's behavior was not caused by or did not have a direct and substantial relationship to the child's disability; or
- the child's behavior was not the direct result of the LEA's failure to implement the IEP.

In either case of "no," school personnel have the authority to apply the relevant disciplinary procedures to the child with disabilities in the same manner and for the same duration as the procedures would be applied to a child without disabilities, except—*and this is very important*—for whatever special education and related services the school system is required to provide the child with disabilities under §300.530(d)

## Are Services Provided During Disciplinary Removals?

After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, the school system must provide services to the student during any subsequent days of removal, to the extent required under §300.530(d).

## Which Services, Under Which Circumstances, and Who Decides?

The services that a school system must provide to a student with a disability under disciplinary removal and the extent to which any services need to be provided will depend on many factors and sometimes a combination of factors, including but not limited to:

- whether the child's behavior infraction was determined to be a manifestation of his or her disability;
- whether educational services are provided to children without disabilities removed for the first 10 days or less in a school year;
- how long the disciplinary removal is supposed to last;
- how many days of removal the child has already been subject to in this school year as part of other disciplinary actions; and
- the nature of the child's infraction (e.g., did it involve a weapon, drugs, or serious bodily injury).



Obviously, the “extent of services” question can have many possible answers. This is reflected in the provisions at §300.530(d), which can be characterized by their “if-this, then-that” nature. Perhaps the easiest way to understand the extent to which services must be provided to a child with a disability under disciplinary removal is by looking at the clear-cut, straightforward cases first. There are three.

## When Removals Total No More Than 10 School Days in a School Year

When the total number of days a child with a disability has been removed from his or her current placement is 10 school days or less in a school year, the school system is only required to provide services to that child if it provides services to children without disabilities who are similarly removed [§300.530(d)(3)].

Note, however, that, once a child’s cumulative days of removal in a school year exceed 10 school days, beginning with the 11th cumulative day and during any subsequent days of removal, the school system must provide services in keeping with §300.530(d).

## For Children Whose Manifestation Determination is “No” & for Violations Involving Special Circumstances

A student with a disability must continue to receive educational services when his or her disciplinary removal is for either:

- behavior determined **not** to be a manifestation of his or her disability, or
- offenses involving weapons, drugs, or serious bodily injury, the child must continue to receive educational services.

This includes children who are either suspended or expelled for behavior determined not to be a [manifestation](#) of their disability, and children who have been placed in an interim alternative educational setting (IAES) because of violations involving “[special circumstances](#)”—drugs, weapons, or serious bodily injury.

Since these removals are a disciplinary change of placement, the **IEP team** determines what services will be provided to the child, if they will be provided in an IAES, and, if so, what that IAES will be [§300.530(d)(1) and (5) and §300.531]. The IEP team must keep in mind that the services are 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 that child’s IEP [§300.530(d)(1)(i)].

Note that the school system is *not* required to replicate in another setting the exact services included in the IEP. (More on this in a moment...)

In addition, a student whose removal corresponds to either circumstance (a “no” manifestation or because of “special circumstances”) must receive, as appropriate, an functional behavioral analysis (FBA) and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. See §300.530(d)(1)(ii).

## When Removal is a Change of Placement

When a child's removal for disciplinary reasons is considered a change of placement under §300.536, the child's **IEP team** determines what services are for the child to receive. Again, these are services to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to progress toward meeting IEP goals [§300.530(d)(5)]. The IEP team also determines if the child will be placed in an IAES to receive those services and what the IAES will be.

## Combining Factors

Arguably, the most complicated circumstance in §300.530(d) is found at (d)(4). This provision combines total number of removals, current removal time, and the qualifier that this removal is not considered a change of placement. It reads:

After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under §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 §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. [§300.530(d)(4)]

Scary confusing! But clearly very important. The provision addresses the extent to which schools must provide services when a child's removal is:

- for a short period of time, and
- not a change in placement.

Services are not always required when a child has accumulated more than 10 removal days in a school year but is now to be removed for just a few days in a row (no more than 10).

**Who determines if the child needs services to be provided during a short removal?** This decision is made by: Appropriate school personnel, in consultation with at least one of the child's teachers.

**On what basis is the determination made?** The Department's comments are quite illuminating:

We believe the extent to which educational services need to be provided and the type of instruction to be provided *would depend on the length of the removal, the extent to which the child has been removed previously, and the child's needs and educational goals.*

For example, a child with a disability who is removed for only a few days and is performing near grade level would not likely need the same level of educational services as a child with a disability who has significant learning difficulties and is performing well below grade level. *The Act is clear that the public agency must provide services to the extent necessary to enable the child to appropriately participate in the general curriculum and appropriately advance toward achieving the goals in the child's IEP.* (71 Fed. Reg. 46717-18)

**Pivotal words.** A pivotal aspect in decision making regarding “extent of services” can be found in the last line of the Department’s discussion and in §300.530(d)(4) itself—*services must be provided to the extent necessary to enable the child to appropriately participate in the general curriculum and appropriately advance toward achieving the goals in the child’s IEP.*

## When Services Are Provided to Children Removed for Disciplinary Reasons

Section 300.530(d) broadly addresses the provision of services to children with disabilities under disciplinary action. **But what types of services are we talking about?** A replica of the special educational program described in a child’s IEP, including all the related services and supplementary aids and supports?

**According to the Department, no.** *The Department states that it would generally not be feasible for a school district to provide a child removed for disciplinary reasons with every aspect of the services that would be received in his or her chemistry or auto mechanics classroom, as “these classes generally are taught using a hands-on component or specialized equipment or facilities” (71 Fed. Reg. 46716).*

The amount of time a child is removed from his or her regular placement for disciplinary reasons may also affect the nature and extent of services provided during the time of removal. For example:

...a child who is removed for a short period of time and who is performing at grade level may not need the same kind and amount of services to meet this standard as a child who is removed from his or her regular placement for 45 days under §300.530(g) or §300.532 and not performing at grade level. (*Id.*).

And what of children who have been suspended or expelled from school? If they are removed for more than 10 school days in a school year for disciplinary reasons, they must continue to receive FAPE—which includes services. However:

An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. *However, the special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child’s IEP.* (71 Fed. Reg. 46716)

## Appeals and Expedited Due Process

Both the LEA and the parent of the child with a disability have the right to file a [due process complaint](#), which is the first step in requesting a [due process hearing](#) to **appeal decisions taken during disciplinary procedures**, although the reasons these parties may do so differ. As §300.532(a) makes clear:

- Parents may appeal decisions regarding placement of their children (under §§300.530 and 300.531);
- Parents may appeal decisions regarding [manifestation determination](#) under §300.530(e); and
- The LEA may appeal a decision to maintain the current placement of the child, if the LEA believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others.

So let's have a look at the appeal process for disciplinary actions and the possibility the law gives for an **expedited due process hearing**.

## Procedures for Filing a Due Process Complaint

A hearing is requested by filing a [due process complaint](#), as described in §300.507 and §300.508(a) and (b). Some points to note about the process include:

- The public agency must inform the parent of any free or low-cost legal or other relevant services in the area. [§300.507(b)] *(In South Dakota parents can contact SD Advocacy Services at 1-800-658-4782 for assistance with advocacy services; SD Dept. of Education at 1-605-773-3678 for information on due process complaints, state complaints or mediation; or SD Parent Connection at 1-800-640-4553 for information on the SD Navigator Program.)*
- The due process complaint must remain confidential. [§300.508(a)(1)]
- The party who files a due process complaint must forward a copy of the complaint to Special Education Programs at *SD DOE, MacKay Building, 800 Governors Dr., Pierre, SD, 57501-2294*. [§300.508(a)(2)]
- The due process complaint must include specific information: name of the child; address of the child's residence; name of the child's school; description of the nature of the problem, including any related facts; and a proposed resolution of the problem (to the extent known and available to the filing party at the time). [§300.508(b)] *(A sample due process hearing form can be found on the SEP website at: [http://doe.sd.gov/oess/sped\\_complaints.asp](http://doe.sd.gov/oess/sped_complaints.asp) )*
- If the child is a homeless child or youth, the complaint must include available contact information for the child and the name of the school he or she is attending. [§300.508(b)(4)]

## Speeding Up The Process: Expedited Hearings

The parent and the LEA have the opportunity for an **expedited** due process hearing on the disciplinary matter about which they are disagreeing. The expedited hearing must comply with IDEA's provisions for due process hearings (including hearing rights, such as a right to counsel, presenting evidence and cross-examining witnesses, and obtaining a written decision), although clearly the timelines for the hearing will be expedited.

## Timeline for Expedited Due Process Hearings

IDEA establishes a timeline within which the expedited due process hearing must be conducted and the hearing officer's determination made. The provision is as follows:

- (2) 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 10 school days after the hearing. [§300.532(c)(2)]

## Can Due Process Be Avoided?

IDEA strongly favors avoiding due process hearings, when possible, by resolving disputes through alternate, less adversarial and more cost-effective means. Mediation is specifically mentioned as an option when a due

process hearing, including when an expedited due process hearing, is requested. Under IDEA, parties can choose to use mediation to resolve a dispute regardless of whether a due process hearing has been requested, and a parent can choose *not* to have a resolution meeting, if the parent and the school district agree instead to use mediation to resolve their differences.

In the context of an expedited due process hearing, parents and the LEA have available to them either the resolution process or the mediation process as vehicles for resolving their differences without having to conduct an expedited due process hearing. They also may choose to waive either option and proceed directly to an expedited due process hearing. [§300.532(c)(3)] Waiving the resolution meeting, however, requires that both parties agree in writing to do so.

## How Expedited Due Process Affects Other Timelines and Issues

Speeding up the timeline within which a due process hearing must occur affects other timelines and due process procedures, like a line of dominos going down. For example, the resolution process requires that a resolution meeting be convened by the LEA within “15 days of receiving notice of the parent’s due process complaint” [§300.510(a)(1)]. When a resolution meeting is held associated with an expedited due process hearing, the timeline is shortened to seven days from receipt of the due process complaint [§300.532(c)(3)(i)]. Further, other provisions governing non-expedited due process hearings do not apply to expedited due process hearings—such as sufficiency of complaint at §300.508(d), which “is not practical to apply to the expedited due process hearing” because of the latter’s “shortened timelines” (71 Fed. Reg. 46725).

The shortened timeline established for the expedited due process hearing is driven by a “need to promptly resolve a disagreement regarding a disciplinary decision.” (*Id.*)

## Authority of the Hearing Officer

If the parents and LEA have not resolved their disagreement via a resolution meeting or mediation, and the due process hearing goes forward, the hearing officer must issue a decision in an expedited due process hearing. In making that decision, the hearing officer may:

- (i) 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 §300.530 or that the child’s behavior was a manifestation of the child’s disability; or
- (ii) 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.

Thus, the hearing officer is given the authority to determine:

- whether a child’s removal violated §300.530 (authority of school personnel);
- whether a child’s behavior was a manifestation of his or her disability; and
- whether maintaining the child’s current placement is substantially likely to result in injury to the child or to others.

## LEA's Recourse to Returning a Student to His or Her Original Placement

Suppose that a hearing officer determines in an expedited due process hearing that a removed student will return to his or her original placement, and the LEA disagrees, believing that doing so is substantially likely to result in injury to the child or others. Does the LEA have any recourse but to return the child to the original placement?

Yes, the LEA does, but it's a limited one: *to appeal the hearing officer's determination through another expedited due process hearing*. As §300.532(b)(3) states:

The procedures under paragraphs (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.

Note that the LEA has the discretion to remove a child with a disability to an IAES for up to 45 school days, if the special circumstances involving weapons, drugs, or serious bodily injury are present. If the special circumstances are not involved, then school officials must seek permission from the hearing officer using the process of appeal just described. (71 Fed. Reg. 46722)

## May The Hearing Officer's Determination Be Appealed?

Yes. ARSD 24:05:30:11 discusses the appealing a hearing officers decision. Any party aggrieved by the decision of the hearing officer under chapter 24:05:30, 24:05:26 and 24:05:26.01 may bring a civil action with respect to a due process complaint notice requesting a due process hearing under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2). A civil action may be filed in either state or federal court without regard to the amount in controversy. The party bringing the action has 90 days from the date of a hearing officer's decision to file a civil action. In any action brought under this section, the court:

(1) Shall review the records of the administrative proceedings;

(2) Shall hear additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, shall grant the relief that the court determines to be appropriate.

Nothing in Part B of the Individuals with Disabilities Education Act restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 as amended to January 2, 2007, Title V of the Rehabilitation Act of 1973 as amended to January 1, 2007, or other federal laws protecting the rights of children with disabilities. However, before the filing of a civil action under these laws, seeking relief that is also available under section 615 of IDEA, the procedures under this chapter for filing a due process complaint must be exhausted to the same extent as would be required had the action been brought under section 615 of IDEA.

## Child's Placement During the Appeal Process

Where will the child be placed until a decision on the appeal is issued—the original placement from which the child was removed during the disciplinary action, the interim alternative educational setting (IAES) to which he or she has been removed, or another setting that the parents and the school system agree to?

**General Answer:** The “default” placement during an appeal is the IAES. IDEA states that the child must remain in the IAES chosen by the IEP team until the hearing officer makes his or her decision on the appeal—or the time period specified in §300.530(c) or (g) expires, whichever comes first, unless the parent and the SEA or LEA agree otherwise.

### To What Time Periods Is IDEA Referring?

It's important to be specific here.

**Time period in §300.530(c).** The circumstances being described are disciplinary changes in placement that would exceed 10 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. In such a case, the time period would be whatever local policy dictates be applied to children without disabilities being disciplined for a similar violation of the code of student conduct as that made by the child with a disability at issue in this disciplinary appeal, **except that** the services provisions in §300.530(d) would apply to the child with a disability. The child must continue to receive [educational services](#) so as to enable him or her 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. The child must also receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.

If the time period expires before the hearing officer makes his or her determination on the appeal, then the child with a disability would be returned to the original placement from which he or she was removed as a result of the violation of the conduct code (unless the parent and the SEA or LEA agree otherwise).

**Time period in §300.530(g).** Here, IDEA is referring to violations involving the [special circumstances](#) (weapons, drugs, or serious bodily injury). In these circumstances, school personnel may remove a child to an IAES for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability.

So, a child subject to a disciplinary removal for misconduct that is not a manifestation of the child's disability but that is a special-circumstances violation may be removed to an IAES for no more than 45 school days. If that time period expires before the hearing officer makes his or her determination on the appeal—which must be decided on an expedited basis, unless the parent and the SEA or LEA agree otherwise—the child with a disability would be returned to the original placement from which he or she was removed as a result of the violation of the conduct code.

### Which Time Period Applies?

We have two time periods to consider. Which applies in the situation of a given child? The answer is—whatever time period is associated with how the child was disciplined. Was the child disciplined under

circumstances pursuant to §300.530(c) (a disciplinary change of placement for misconduct that is determined not to be a manifestation of the child’s disability)—or under circumstances pursuant to §300.530(g) (for weapons or drugs violations, or serious bodily injury)? The answer to that question will help you determine the relevant time period to be applied.

## In Conclusion

Thus, under IDEA, during appeals under §300.532 by either the parent or the LEA (which are subject to the procedures for expedited due process hearings), the child must remain in the IAES pending the decision of the hearing officer or until the expiration of the time period specified in §300.530(c) (for removals of children disciplined for misconduct not related to their disability) or §300.530(g) (for drugs or weapons violations or serious bodily injury), whichever occurs first, unless the parents and the SEA or LEA agree otherwise.

If procedures for appeals under §300.532 are repeated, the procedures for expedited due process hearings apply, and §300.533, as described above, governs the child’s placement during the appeal.

## What is Basis of Knowledge?

Can IDEA’s discipline protections be applied to, or claimed by, children not previously determined to be eligible for special education and related services under IDEA?

Perhaps an example would clarify what this question is really asking. Suppose this situation: A student who has not yet been found to be a “child with a disability” under IDEA has violated a code of student conduct. The school system takes disciplinary action according to its policies—at which time the student asserts that, in fact, he or she is a “[child with a disability](#)” as IDEA defines that term and that the protections under IDEA must guide the discipline policies that are applied. Is this permissible?

**Answer:** Of course the answer is “sometimes” and “under certain circumstances.” The pivot point, without a doubt, is whether or not the school system had knowledge that the child was a “child with a disability” when the child violated the code of student conduct. This is called “**Basis of Knowledge.**”

## Criteria for Basis of Knowledge

And when *would* a school system be deemed to have such knowledge about a given child? IDEA is quite specific about what qualifies as “basis of knowledge.” It states at §300.534(b) that the school system can be deemed to have such knowledge if, before the behavior occurred:

- (1) 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;
- (2) The parent of the child requested an evaluation of the child...or



(3) 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.

## Implications of These Criteria

These criteria have direct relevance to teachers, administrators, and parents alike. Each can play a potential role in the chain of events we've described and whether or not the child in question can legitimately assert the protections of IDEA. Consider the following situations and whether or not an LEA could be deemed to have basis of knowledge.

- The child's parent said something to the child's teacher about the child maybe needing special education. *(No, the parent's concern must be expressed in writing.)*
- The child's teacher was talking to another teacher in the lounge about the child's behavior. *(No, the teacher's concern must be expressed directly to someone filling a supervisory role in the public agency.)*
- An employee of the LEA is worried about a child's behavior and thinks the child needs special education and related services. To whom would the employee express these concerns? *(To the director of special education or to other supervisory personnel at the LEA.)*

## The Child Find Mechanism

These provisions have a presumption that, if involved individuals express concerns to other involved individuals (especially those in supervisory positions within the school system) about a child's behavior or possible need for special education and related services, the school has an affirmative obligation to act upon those concerns and investigate the child's need for special education and related services. As the Department explained:

...the child find and special education referral system is an important function of schools, LEAs, and States. School personnel should refer children for evaluation through the agency's child or special education referral system when the child's behavior or performance indicates that they may have a disability covered under the Act. Having the teacher of a child (or other personnel) express his or her concerns regarding a child in accordance with the agency's established child find or referral system helps ensure that the concerns expressed are specific, rather than casual comments, regarding the behaviors demonstrated by the child and indicate that the child may be a child with a disability under the Act. (71 Fed. Reg. 46727)

However, as the Department also noted, not all child find systems and referral processes in States and LEAs have policies in place that meet the requirements described in IDEA's "basis of knowledge" provisions—specifically, that:

...[a] teacher of the child, or other personnel of the LEA...must express specific concerns about a pattern of behavior demonstrated by the child "directly to the director of special education of such agency or to other supervisory personnel of the agency" ... *(Id.)*

Recognizing that child find and special education referral policies in the States vary, the Department cautioned:

For these reasons, we would encourage those States and LEAs whose child find or referral processes do not permit teachers to express specific concerns directly to the director of special education of such agency or to other supervisory personnel of the agency, to change these processes to meet this requirement. (*Id.*)

In South Dakota, ARSD 24:05:24:01 addresses referral. Referral includes any written request which brings a student to the attention of a school district administrator (building principal, superintendent, or special education director) as a student who may be in need of special education. A referral made by a parent may be submitted verbally, but it must be documented by a district administrator. Other sources of referrals include the following:

- (1) Referral through screening;
- (2) Referral by classroom teacher;
- (3) Referral by other district personnel;
- (4) Referral by other public or private agencies; and
- (5) Referral by private schools, including religious schools.

## Exceptions to Basis of Knowledge

IDEA also includes several exceptions to the “basis of knowledge” criteria, wherein a school system would not be deemed to have the knowledge that a child was a “child with a disability” before the child’s behavior occurred. These provisions appear at §300.534(c) and apply IF:

- (1) The parent of the child—
  - (i) Has not allowed an evaluation of the child pursuant to §§300.300 through 300.311; or
  - (ii) Has refused services under this part; or
- (2) The child has been evaluated in accordance with §§300.300 through 300.311 and determined to not be a child with a disability under this part.

## Children Receiving Coordinated Early Intervening Services

An issue not mentioned in either “basis of knowledge” or the “exception” provisions just discussed is whether or not a school system would be deemed to have “knowledge” if the child in question is receiving **coordinated early intervening services (CEIS)**. (Note that we are not saying “[early intervention services](#)” here—those are for babies and toddlers with disabilities.) **Coordinated early intervening services** are provided to children:

...in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade three) who are not currently identified as needing special education or related services, but who

need additional academic and behavioral support to succeed in a general education environment.  
[§300.226(a)]

So—if a student receiving coordinated early intervening services breaks the student code of conduct, can he or she assert that the school had basis of knowledge beforehand, because it had been worried enough about that student to identify the student as needing early intervening services?

The answer is: No, a school is not considered to have a basis of knowledge merely because a child receives coordinated early intervening services. *However*, if a child’s parent or teacher expresses a concern, in writing, to appropriate school personnel, that the child may need special education and related services, then the school *would* be deemed to have knowledge that the child is a child with a disability under IDEA. (71 Fed. Reg. 46727)

## What Happens if There is No “Basis of Knowledge?”

The final portion of §300.534 describes the conditions that apply if the school is deemed *not* to have a “basis of knowledge” that the child was a “child with a disability” before taking disciplinary action against the child. If this is the case, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors. If an evaluation of the child is requested during the time the child is subjected to these disciplinary measures, the evaluation must be conducted in an expedited manner and, until the evaluation is completed, the child remains in the educational placement determined by school authorities—which can include suspension or expulsion without educational services.

If the child is found to be a “child with a disability,” the school must then provide special education and related services to the child. This includes the requirements of §§300.530 through 300.536—IDEA’s discipline procedures—especially those related to [“extent of services.”](#)

## Reporting Crimes

***Do IDEA’s discipline procedures allow school systems to report crimes that are committed by children with disabilities?***

Yes, they do, and that’s the focus of this next part, which looks at the section of IDEA’s disciplinary procedures called “referral to and action by law enforcement and judicial authorities,” found at §300.535.

## Discussion

IDEA makes clear that schools are **not** prohibited from reporting a crime committed by a child with a disability to appropriate authorities. Similarly, the law does not prevent State law enforcement and judicial authorities from exercising their responsibilities. The agency reporting the crime must ensure that copies of the special education and disciplinary records are transmitted for consideration by the appropriate authorities—however, only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act (FERPA), a Federal law that protects the privacy of children’s education records. As the Department explains:

Under FERPA, personally identifiable information (such as the child’s status as a special education child) can only be released with parental consent, except in certain very limited circumstances. Therefore, the transmission of a child’s special education and disciplinary records... without parental consent is permissible only to the extent that such transmission is permitted under FERPA. (71 Fed. Reg. 46728)

## **Pulling it All Together: Case Studies**

Given the complexity of IDEA’s discipline procedures, you may find it helpful to look at a case study of a student subject to disciplinary action. This example is drawn from NICHCY’s *Building the Legacy* training package on IDEA 2004—specifically, [Module 19](#), *Key Issues in Discipline*.

### **Charlie’s Situation**

Charlie is a 5th grader who receives special education services for a learning disability. Charlie is on grade level in math and two years below grade level in reading. He receives services in a resource setting for one hour each day. Charlie has no history of behavior problems.

Charlie was caught stealing software from the computer lab at his school. His teacher referred him to the assistant principal who issued a three-day suspension and required him to return the stolen materials.

Charlie returned to the classroom to gather his belongings and confronted his teacher. He called her names, threatened to come back to school with a knife to “cut her,” and pretended to swing his fists toward her. Charlie’s teacher called the principal, who, in accordance with the student code of conduct at the school, issued an additional 10-day suspension for Charlie, bringing his total days of suspension to 13.

### **What Happens to Charlie?**

Because the 13-day suspension is more than 10 days, it is considered a change in placement. Therefore, Charlie must be removed to an interim alternative educational setting (IAES) until a [manifestation determination](#) is made. The determination of where the IAES will be is made by Charlie’s IEP team.

### **What Services are Provided to Charlie During his Removal to an IAES?**

Charlie’s IEP team must determine appropriate services. He must continue to receive educational services as provided in FAPE requirements so as to enable him to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in his IEP.

### **Who Needs to be Contacted?**

Charlie’s parents must be [notified](#) that he has been removed from the classroom and that this action constitutes a change in placement. The LEA is responsible for notifying Charlie’s parents and providing them

with the [procedural safeguards notice](#) on the date that the LEA decides to make this removal that constitutes a change of placement.

## **Now Add This to the Picture**

As required by IDEA, a [manifestation determination](#) review is held for Charlie, and it's determined that his behavior was **not** a manifestation of his disability. The next set of decisions can now be made.

## **What Disciplinary Actions are Permissible?**

Since the behavior is not a manifestation of his disability, Charlie can be disciplined in the same manner and for the same amount of time as a child who does not have a disability. That decision is left up to the LEA.

## **What Services will be Provided to Charlie During the Duration of his Disciplinary Action?**

Charlie must continue to receive educational services as provided under FAPE requirements, so as to enable him to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in his IEP.

## **What Happens if Charlie's Parents Appeal the Manifestation Determination?**

If a hearing is requested, the SEA or LEA is responsible for arranging an [expedited due process hearing](#), which must occur within 20 school days of the date the due process complaint was filed.

The hearing officer must make a determination within 10 school days after the hearing.

If this happens, Charlie will remain in the IAES pending the decision of the hearing officer.

## **Case Study #2: Edward**

Edward is a 10th grader who receives special education services for a behavior disability and under other health impairment, due to his AD/HD.

Because Edward has trouble concentrating and tends to act out, he is failing most of his academic subjects. He receives services in an inclusion setting at his high school. Edward's record includes an FBA and a BIP, in addition to his IEP.

Edward's high school has a zero-tolerance policy for weapons and drugs. Edward brought a gun to school, which he showed to a friend between classes and made a threat about using it to shoot another child. A teacher discovered the gun and reported Edward to the administration.

The school had Edward immediately removed for 45 school days to an IAES.

## **What services, if any, are provided to Edward during this time?**

Edward must continue to receive educational services as provided under FAPE requirements, to enable him to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in his IEP.

## **Who needs to be contacted?**

Edward's parents must be notified that he has been removed from the classroom and that this action constitutes a change in placement. The LEA is responsible for notifying his parents and providing them with the procedural safeguards notice on the date that the LEA decides to make this removal that constitutes a change of placement.

*Now add this information into the picture:*

A manifestation determination review is held for Edward, It is determined that his behavior was not a manifestation of his disability. Edward's parents appeal this decision.

## **In what setting will Edward be placed during the appeal?**

He will remain in the IAES that was determined by his IEP Team, pending the decision of the hearing officer, until the expiration of the time period for him to remain in the IAES, whichever occurs first, unless the parents and the LEA agree otherwise.

## **What, if any, services will be provided to him?**

Edward must continue to receive educational services as provided under FAPE requirements so as to enable him to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in his IEP.

## **What is the role of the LEA?**

The SEA is responsible for arranging the expedited due process hearing. The LEA must also continue to provide appropriate educational services as specified in the Edward's IEP while he is placed in the IAES.

## **What is the role of the hearing officer?**

The hearing officer hears and makes a determination regarding an appeal in an impartial due process hearing. In making the determination the hearing officer may:

- Return the child with a disability (in this case, Edward) to the placement from which the child was removed if the hearing officer determines that the removal was a violation of §300.530 or that the child's behavior was a manifestation of the child's disability; or

- Order a change in placement of the child with a disability to an appropriate IAES 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 others.

## **What is the timeline for the due process hearing?**

The hearing must occur within 20 school days of the date the complaint requesting the hearing is filed. Unless the parents and LEA agree in writing to waive the resolution meeting or agree to use the mediation process: 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.

## **Case Study #3: Liz**

Liz is a 7th grader who receives special education services for an emotional disability. She has poor impulse control and has been removed from her home on more than one occasion for abuse. Liz spends 50% of her day in a self-contained special education class. She has a BIP that was written last year, based on an FBA conducted while she was in 5th grade.

In the cafeteria, two other girls began teasing Liz about her clothing and about her family. The girls came right up to Liz and provoked her. She began to fight with them. This was the third fight Liz had been involved in during the past three weeks.

She was referred to the principal who gave her a 12-day suspension and a removal to an IAES

## **What services, if any, are provided to Liz during this time of removal?**

Liz must continue to receive educational services as provided under FAPE requirements so as to enable her to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in her IEP.

## **Who needs to be contacted?**

Liz's parents must be notified that she has been removed from the classroom and that it constitutes a change in placement. The LEA is responsible for notifying her parents and providing them with the procedural safeguards notice on the date that the LEA decides to make this removal that constitute a change in placement.

*Now add this information in the picture:*

A manifestation determination review is held for Liz, and it is determined that Liz's behavior was a manifestation of her emotional disability.

## **What will happen to Liz immediately?**

She will return to the placement from which she was removed, unless the parent and LEA agree to a change of placement as part of the modification of the BIP.

## **What are the next steps for the LEA?**

The LEA, along with the parent and relevant members of the IEP Team, must conduct an FBA unless the LEA had conducted an FBA before the behavior that resulted in the change of placement occurred (as is the case with Liz).

This group of individuals must also develop a BIP for the child or, if a BIP has already been developed (as is the case with Liz), review the BIP and modify it as necessary to address the behavior.



# South Dakota Laws

## S.D. LAW CHAPTER 13-32

### “SUPERVISION OF STUDENTS AND CONDUCT OF SCHOOL”

- 13-32-1** Disciplinary authority over students on school premises.
- 13-32-2** Physical force authorized when reasonable and necessary--Attendance at school functions away from premises--Authority of bus drivers.
- 13-32-3** Reference for psychiatric treatment prohibited without parents' consent.
- 13-32-4** School board to assist in discipline--Suspension and expulsion of pupils--Report to local authorities--Hearings--Alternative settings.
  - 13-32-4.1** Attendance policy--Adoption by school board--Suspension and expulsion power unaffected.
  - 13-32-4.2** Procedure for suspension--Appeal--Hearing
  - 13-32-4.3** Effect of student's suspension or expulsion on enrollment.
  - 13-32-4.4** Early reinstatement of expelled student.
  - 13-32-4.5** Conditions for early reinstatement.
  - 13-32-4.6** Return to school upon fulfillment of conditions – Revocation of early reinstatement.
  - 13-32-4.7** Due process procedures – Promulgation of early reinstatement rules.
- 13-32-5** Injury to school property as ground for suspension or expulsion.
- 13-32-6** Disturbance of school as misdemeanor.
- 13-32-7** Possession of firearms on elementary or secondary school premises or vehicle as misdemeanor--Exceptions.
- 13-32-8** School safety patrols--Insurance coverage.

**13-32-9** Suspension from extracurricular activities for controlled substance violation--Notice to South Dakota High School Activities Association.

**13-32-10** Definition of terms regarding self-administration of medication.

**13-32-11** Student self-administration of prescription asthma and anaphylaxis medication.

**13-32-12** Disciplinary action regarding self-administration of medication.

**13-32-13** Applicability of provisions regarding self-administration of medication.

**13-32-1. Disciplinary authority over students on school premises.** Superintendents, principals, supervisors, and teachers have disciplinary authority over all students while the students are in school or participating in or attending school sponsored activities whether on or off school premises. Superintendents and principals may also discipline students for aggressive or violent behavior that disrupts school or that affects a health or safety factor of the school or its programs.

**Source:** SL 1955, ch 41, ch 12, § 20; SL 1959, ch 79; SDC Supp 1960, § 15.3020; SL **1996**, ch 121.

**13-32-2. Physical force authorized when reasonable and necessary**--Attendance at school functions away from premises--Authority of bus drivers. Superintendents, principals, supervisors, and teachers and their aids and assistants, have the authority, to use the physical force that is reasonable and necessary for supervisory control over students. Like authority over students is given any person delegated to supervise children who have been authorized to attend a school function away from their school premises and to school bus drivers while students are riding, boarding, or leaving the buses.

**Source:** SL 1955, ch 41, ch 12, § 20; SL 1959, ch 79; SDC Supp 1960, § 15.3020; SL **1990**, ch 128, § 1.

**13-32-3. Reference for psychiatric treatment prohibited without parents' consent.** No public school administrator or teacher shall refer a student for psychiatric treatment within or outside the school without the prior written consent of such student's parent or guardian.

**Source:** SL **1961**, ch 91.

**13-32-4. School board to assist in discipline--Suspension and expulsion of pupils--Report to local authorities--Hearings--Alternative settings.** The school board of every school district shall assist and cooperate with the administration and teachers in the government and discipline of the schools. The board may suspend or expel from school any student for violation of rules or policies or for insubordination or misconduct, and the superintendent or principal in charge of the school may temporarily suspend any student in accordance with § 13-32-4.2. The rules or policies may include prohibiting the following:

- (1) The consumption or possession of beer or alcoholic beverages on the school premises or at school activities;
- (2) The use or possession of a controlled substance, without a valid prescription, on the school premises or at school activities; and

- (3) The use or possession of a firearm, as provided in § 13-32-7, on or in any elementary or secondary school premises, vehicle, or building or any premises, vehicle, or building used or leased for elementary or secondary school functions or activities.

In addition to administrative and school board disciplinary action, any violation of § 13-32-7 shall be reported to local law enforcement authorities.

The period of expulsion may extend beyond the semester in which the violation, insubordination, or misconduct occurred. Any expulsion for consumption or possession of beer or alcoholic beverages may not extend beyond ninety school days. If a student has intentionally brought a firearm onto school premises, the expulsion may not be for less than twelve months.

However, the superintendent or chief administering officer of each local school district or system may increase or decrease the length of a firearm-related expulsion on a case-by-case basis. The South Dakota Board of Education shall promulgate rules pursuant to chapter 1-26 to establish administrative due process procedures for the protection of a student's rights. The administrative due process procedures shall include a requirement that the school give notice of a student's due process rights to the parent or guardian of the student at the time of suspension or expulsion. Each school district board shall provide a procedural due process hearing, if requested, for a student in accordance with such rules if the suspension or expulsion of the student extends into the eleventh school day.

This section does not preclude other forms of discipline which may include suspension or expulsion from a class or activity.

This section does not prohibit a local school district from providing educational services to an expelled student in an alternative setting.

**Source:** SDC 1939, § 15.3008; SL 1955, ch 41, ch 12, § 18; SDC Supp 1960, § 15.3018; SL 1973, ch 99; SL 1975, ch 128, § 209; SL 1981, ch 145, § 1; SL 1993, ch 141, § 1; SL 1995, ch 99; SL 1996, ch 122; SL 1999, ch 88, § 1.

**13-32-4.1. Attendance policy--Adoption by school board--Suspension and expulsion power unaffected.** The school board of every school district may adopt an attendance policy in accordance with procedural due process rules established by the South Dakota Board of Education pursuant to § 13-32-4. Any attendance policy adopted pursuant to this section is not to be construed as limiting the powers of the school board of a school district to suspend or expel students pursuant to § 13-32- 4.

**Source:** SL 1981, ch 145, § 2.

**13-32-4.2. Procedure for suspension--Appeal--Hearing.** The school board in any district may authorize the summary suspension of pupils by principals of schools for not more than ten school days and by the superintendent of schools for not more than ninety school days. In case of a suspension by the superintendent for more than ten school days, the pupil or his parents or others having his custodial care may appeal the decision of the superintendent to the Board of Education. Any suspension by a principal shall be immediately reported to the superintendent who may revoke the suspension at any time. In event of an appeal to the board, the superintendent shall promptly transmit to the board a full report in writing of the facts relating to the suspension, the action taken by him and the reasons for such action; and the board, upon request, shall grant a hearing to the appealing party. No pupil may be suspended unless:

- (1) The pupil is given oral or written notice of the charges against him;

- (2) The pupil is given an oral or written explanation of the facts that form the basis of the proposed suspension; and
- (3) The pupil is given an opportunity to present his version of the incident.

In the event of a suspension for more than ten school days, if the pupil gives notice that he wishes to appeal the suspension to the board, the suspension shall be stayed until the board renders its decision, unless in the judgment of the superintendent of schools, the pupil's presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process, in which case the pupil may be immediately removed from school, and the notice and hearing shall follow as soon as practicable.

**Source:** SL 1993, ch 141, § 2.

**13-32-4.3. Effect of student's suspension or expulsion on enrollment.** If any student is under suspension or expulsion in a school district, the student may not enroll in any school district until the suspension or expulsion has expired. The superintendent or school administrator of any school district may prohibit a student from enrolling in that school district if the student is under suspension or expulsion in a school in another state or in a nonpublic school in this state. Upon receiving a request for a student's permanent school records from the receiving district, the sending school shall provide the receiving district with written notice of any suspension or expulsion.

**Source:** SL 1996, ch 120, § 2; SL 2000, ch 50, § 4.

**13-32-4.4. Early reinstatement of expelled student.** If a student is expelled from school as provided in § 13-32-4, the school board may grant the student an early reinstatement allowing the student to return to school before the end of the period of expulsion.

**Source:** SL 2010, ch 89, § 1.

**13-32-4.5. Conditions for early reinstatement.** Any early reinstatement granted by a school board pursuant to § 13-32-4.4 may include one or more specific conditions established by the school board that the expelled student must meet, either prior to the granting of the early reinstatement or after the early reinstatement is granted and before the end of the period of expulsion. Any early reinstatement conditions established by the school board for an expelled student shall pertain to the reasons why the student was expelled, and the board shall provide notice of any early reinstatement conditions to the student's parent or guardian or to the student, if the student is at least eighteen years of age or is an emancipated minor, at the time the student is expelled.

**Source:** SL 2010, ch 89, § 2.

**13-32-4.6. Return to school upon fulfillment of conditions--Revocation of early reinstatement.** If the superintendent of a school district determines that an expelled student has met the early reinstatement conditions established pursuant to § 13-32-4.5 that the student is required to meet before the student may be granted early reinstatement, the superintendent may grant the student early reinstatement and allow the student to return to school.

If a student violates an early reinstatement condition that the student was required to meet after the student's early reinstatement, but before the end of the expulsion period, the superintendent of the school

district may revoke the student's early reinstatement. Within five days after revoking an early reinstatement, the superintendent shall provide written notice of the revocation including any early reinstatement condition that was violated by the student to the student's parent or guardian or to the student, if the student is at least eighteen years of age or an emancipated minor.

If a student's early reinstatement is revoked, the student's expulsion shall continue until the end of the original period of expulsion unless the student's expulsion is firearm-related and the original period of expulsion is modified by the superintendent pursuant to § 13-32-4.

**Source:** SL 2010, ch 89, § 3.

**13-32-4.7. Due process procedures--Promulgation of early reinstatement rules.** The administrative due process procedures established in ARSD 24:07:04 for the protection of students' rights in an expulsion procedure apply to the early reinstatement process established in §§ 13-32-4.4 to 13-32-4.6, inclusive, and the South Dakota Board of Education may promulgate rules pursuant to chapter 1-26 to establish additional procedures for the early reinstatement process, including the development of early reinstatement conditions by school boards.

**Source:** SL 2010, ch 89, § 4.

**13-32-5. Injury to school property as ground for suspension or expulsion.** Any student, who cuts, defaces, or otherwise injures any schoolhouse, equipment, or outbuilding thereof, is liable to suspension or expulsion.

**Source:** SDC 1939, § 15.3009; SL 1955, ch 41, ch 12, § 19; SDC Supp 1960, § 15.3019; SL 1975, ch 128, § 210.

**13-32-6. Disturbance of school as misdemeanor.** A person, whether pupil or not, who intentionally disturbs a public or nonpublic school when in session or who intentionally interferes with or interrupts the proper order or management of a public or nonpublic school by acts of violence, boisterous conduct, or threatening language, so as to prevent the teacher or any pupil from performing his duty, is guilty of a Class 2 misdemeanor.

**Source:** SDC 1939, § 15.9911; SL 1955, ch 41, ch 17, § 11; SL 1957, ch 74; SL 1975, ch 128, § 211; SL 1982, ch 86, § 144.

**13-32-7. Possession of firearms on elementary or secondary school premises or vehicle as misdemeanor--**  
**Exceptions.** Any person, other than a law enforcement officer, who intentionally carries, has in his possession, stores, keeps, leaves, places, or puts into the possession of another person, any firearm, or air gun, whether or not the firearm or air gun is designed, adapted, used, or intended primarily for imitative or noisemaking purposes, or any dangerous weapon, on or in any elementary or secondary school premises, vehicle, or building or any premises, vehicle, or building used or leased for elementary or secondary school functions, whether or not any person is endangered by such actions, is guilty of a Class 1 misdemeanor. This section does not apply to starting guns while in use at athletic events, firearms, or air guns at firing ranges, gun shows, and supervised schools or sessions for training in the use of firearms. This section does not apply to the ceremonial presence of unloaded weapons at color guard ceremonies.

**Source:** SL 1961, ch 49; SL 1979, ch 120; SL 1982, ch 86, § 145; SL 1990, ch 129; SL 1991, ch 147, § 1; SL 1993, ch 142; SL **2002**, ch 90, § 1.

**13-32-8. School safety patrols--Insurance coverage.** Any school board may establish a school safety patrol to supervise students in the directing of other students crossing public streets on their way to and from school. The board of each school district may purchase health, accident, and liability insurance to cover all adult and student safety patrol members in the operation of such safety patrol.

**Source:** SL **1976**, ch 119.

**13-32-9. Suspension from extracurricular activities for controlled substances violation--Unified Judicial System to give certain notices.** Any person adjudicated, convicted, the subject of an informal adjustment or court-approved diversion program, or the subject of a suspended imposition of sentence or suspended adjudication of delinquency for possession, use, or distribution of controlled drugs or substances or marijuana as defined in chapter 22-42, or for ingesting, inhaling, or otherwise taking into the body any substances as prohibited by § 22-42-15, is ineligible to participate in any extracurricular activity at any secondary school accredited by the Department of Education for one calendar year from the date of adjudication, conviction, diversion, or suspended imposition of sentence. The one-year suspension may be reduced to sixty school days if the person participates in an assessment with a certified chemical dependency counselor or completes an accredited intensive prevention or treatment program. If the assessment indicates the need for a higher level of care, the student is required to complete the prescribed program before becoming eligible to participate in extracurricular activities. Upon a subsequent adjudication, conviction, diversion, or suspended imposition of sentence for possession, use, or distribution of controlled drugs or substances or marijuana as defined in chapter 22-42, or for ingesting, inhaling, or otherwise taking into the body any substances as prohibited by § 22-42-15, by a court of competent jurisdiction, that person is ineligible to participate in any extracurricular activity at any secondary school accredited by the Department of Education. Upon such a determination in any juvenile court proceeding the Unified Judicial System shall give notice of that determination to the South Dakota High School Activities Association and the chief administrator of the school in which the person is participating in any extracurricular activity. The Unified Judicial System shall give notice to the chief administrators of secondary schools accredited by the Department of Education for any such determination in a court proceeding for any person eighteen to twenty-one years of age without regard to current status in school or involvement in extracurricular activities. The notice shall include name, date of birth, city of residence, and offense. The chief administrator shall give notice to the South Dakota High School Activities Association if any such person is participating in extracurricular activities.

Upon placement of the person in an informal adjustment or court-approved diversion program, the state's attorney who placed the person in that program shall give notice of that placement to the South Dakota High School Activities Association and chief administrator of the school in which the person is participating in any extracurricular activity.

As used in this section, the term, extracurricular activity, means any activity sanctioned by the South Dakota High School Activities Association.

**Source:** SL 1997, ch 102, §§ 1, 4; SL 2003, ch 272, § 63; SL 2006, ch 82, § 1; SL **2010**, ch 92, § 1.

**13-32-10. Definition of terms regarding self-administration of medication.** Terms used in this section and §§13-32-11 to 13-32-13, inclusive, mean:

- (1) "Medication," inhaled bronchodilator or auto-injectable epinephrine, or both;
- (2) "Parent," any person standing in parental relation;
- (3) "School," any public or nonpublic school;
- (4) "Self-administration of prescription medication," a student's discretionary use of prescription asthma or anaphylaxis medication, or both.

**Source:** SL **2010**, ch 93, § 1.

**13-32-11. Student self-administration of prescription asthma and anaphylaxis medication.** Any student with asthma or anaphylaxis may possess and self-administer prescription medication while on school property or at a school-related event or activity if:

- (1) The prescription medication has been prescribed for that student as indicated by the prescription label on the medication;
- (2) The self-administration is done in compliance with the prescription or written instructions from the student's physician or other licensed health care provider; and
- (3) A parent of the student provides to the school:
  - (a) Written authorization, signed by the parent, for the student to self-administer prescription medication while on school property or at a school-related event or activity;
  - (b) A written statement, signed by the parent, in which the parent releases the school district and its employees and agents from liability for an injury arising from the student's self-administration of prescription medication while on school property or at a school-related event or activity unless in cases of wanton or willful misconduct;
  - (c) A written statement from the student's physician or other licensed health care provider, signed by the physician or provider, that states:
    - (i) The student has asthma or anaphylaxis or both, and is capable of self-administering the prescription medication
    - (ii) The name and purpose of the medication;
    - (iii) The prescribed dosage for the medication;
    - (iv) The times at which or circumstances under which the medication may be administered; and
  - (v) The period for which the medication is prescribed.

The physician's or provider's statement must be kept on file in the office of the school nurse of the school the student attends or, if there is not a school nurse, in the office of the principal of the school the student attends.

**Source:** SL 2010, ch 93, § 2.

**13-32-12. Disciplinary action regarding self-administration of medication.** If any student uses the medication in a manner other than prescribed, the student may be subject to disciplinary action by the school. However, the disciplinary action may not limit or restrict the student's immediate access to the medication.

**Source:** SL 2010, ch 93, § 3.

**13-32-13. Applicability of provisions regarding self-administration of medication.** The provisions of §§ 13-32-10 to 13-32-12, inclusive, do not apply to any of the following group living environments:

- (1) A facility operated by the Department of Corrections;
- (2) A facility operated by the Department of Human Services;
- (3) A group care or residential treatment facility licensed by the Department of Social Services;
- (4) A residential treatment facility accredited by the Department of Human Services;
- (5) A community support provider as defined in § 27B-1-17;
- (6) An intermediate care facility for the mentally retarded;
- (7) A juvenile detention center or holding facility operated by a county; or
- (8) A hospital or health care facility as defined in § 34-12-1.1.

**Source:** SL 2010, ch 93, § 4.



# SOUTH DAKOTA ADMINISTRATIVE RULES

## ARTICLE 24:07

### “STUDENT DUE PROCESS”

#### Chapter

<u>24:07:01</u>	General provisions.
<u>24:07:02</u>	Short-term suspension procedure.
<u>24:07:03</u>	Long-term suspension procedure.
<u>24:07:04</u>	Expulsion procedure.

#### CHAPTER 24:07:01

### “GENERAL PROVISIONS”

#### 24:07:01:01. Definitions. Terms used in this article mean:

- (1) "Expulsion," the action of the school board that terminates a pupil's membership in school for not more than 12 consecutive months;
- (2) "Long-term suspension," the exclusion of a pupil by the superintendent or school board from a class or classes or from school for more than 10 but not more than 90 school days;
- (3) "Parent," a parent, guardian, or person in charge of a pupil;
- (4) "Policy," a rule, regulation, or standard enacted by a school district board;
- (5) "Short-term suspension," the exclusion of a pupil by a principal or superintendent from a class or from school for not more than 10 school days.

**Source:** 1 SDR 24, effective September 5, 1974; 8 SDR 15, effective August 19, 1981; 11 SDR 96, 11 SDR 112, effective July 1, 1985; 20 SDR 223, effective July 7, 1994; 23 SDR 63, effective **November 4, 1996**.

**General Authority:** SDCL 13-32-4.

**Law Implemented:** SDCL 13-32-4, 13-32-4.2.

## CHAPTER 24:07:02

### “SHORT-TERM SUSPENSION PROCEDURE”

#### Section

##### **24:07:02:01. Short-term suspension procedure.**

If a short-term suspension from a class, classes, or school is anticipated because of a pupil's violation of a policy, the principal or superintendent shall give oral or written notice to the pupil as soon as possible after discovery of the alleged violation, stating the facts that form the basis for the suspension. The pupil must be given the opportunity to answer the charges. If a pupil is suspended, the principal or superintendent shall give the parent oral notice, if possible, and shall send the parent or a pupil who is 18 years of age or older or an emancipated minor a written notice which provides information regarding the pupil's due process rights. A pupil who is an un-emancipated minor may not be removed from the school premises before the end of the school day without contacting a parent unless the pupil's presence poses a continuing threat or danger, in which case the pupil may be immediately removed from the school and transferred into the custody of a parent or law enforcement.

**Source:** 1 SDR 24, effective September 5, 1974; 8 SDR 15, effective August 19, 1981; 11 SDR 96, 11 SDR 112, effective July 1, 1985; 20 SDR 223, effective July 7, 1994; 23 SDR 63, effective **November 4, 1996.**

**General Authority:** SDCL 13-32-4.

**Law Implemented:** SDCL 13-32-4, 13-32-4.2.

## CHAPTER 24:07:03

### “LONG-TERM SUSPENSION PROCEDURE”

#### Section

- 24:07:03:01** Written report required.
- 24:07:03:02** Right to request hearing -- Notice of hearing.
- 24:07:03:03** Right of waiver.
- 24:07:03:04** Hearing procedure.
- 24:07:03:05** Repealed.
- 24:07:03:06** Right of appeal.
- 24:07:03:07** Attendance policies.
- 24:07:03:08** Referral to placement committee of pupils in need of special education.

**24:07:03:01. Written report required.** The superintendent must file a sealed, written report with the school board by the end of the fifth school day following the first day of the long-term suspension and may request that a hearing be held before the school board. The report must include the facts of the situation, the action taken, the reasons for the action, and the superintendent's decision or recommendation. The report must remain in the possession of the school board secretary or business manager, sealed and unavailable for review

by individual school board members, until the time set for a hearing. The superintendent must send a copy of the report to the pupil's parent or to the pupil if the pupil is 18 years of age or older or an emancipated minor at the same time the report is filed with the school board's secretary or business manager.

**Source:** 1 SDR 24, effective September 5, 1974; 8 SDR 15, effective August 19, 1981; 11 SDR 96, 11 SDR 112, effective July 1, 1985; 20 SDR 223, effective July 7, 1994; 23 SDR 63, effective **November 4, 1996.**

**General Authority:** SDCL 13-32-4.

**Law Implemented:** SDCL 13-32-4, 13-32-4.2.

**24:07:03:02. Right to request hearing -- Notice of hearing.** If the superintendent finds grounds for a long-term suspension from a class or classes, the superintendent may exclude the pupil from a class or classes by using the short-term suspension procedure in § 24:07:02:01. The superintendent shall give a written notice to the pupil's parent or to a pupil who is 18 years of age or older or an emancipated minor and may schedule a hearing. The notice shall contain the following minimum information:

- (1) The policy allegedly violated;
- (2) The reason for the disciplinary proceedings;
- (3) Notice of the right to request a hearing or waive the right to a hearing.
- (4) A description of the hearing procedure;
- (5) A statement that the pupil's records are available at the school for examination by the pupil's parent or authorized representative; and
- (6) A statement that the pupil may present witnesses.

If a hearing is requested, the superintendent shall give notice to each school board member of an appeal to the board for a hearing. The superintendent shall set the date, time, and place for the hearing and send notice by first class mail to each school board member and by certified mail, return receipt requested, to the pupil's parent or to a pupil who is 18 years of age or older or an emancipated minor.

If no hearing is requested or the hearing is waived, the action of the superintendent is final.

**Source:** 1 SDR 24, effective September 5, 1974; 8 SDR 15, effective August 19, 1981; 11 SDR 96, 11 SDR 112, effective July 1, 1985; 20 SDR 223, effective July 7, 1994; 23 SDR 63, effective **November 4, 1996.**

**General Authority:** SDCL 13-32-4.

**Law Implemented:** SDCL 13-32-4, 13-32-4.2.

**24:07:03:03. Right of waiver.** The pupil, if of the age of majority or emancipated, or the pupil's parent may waive the right to a hearing in writing to the superintendent. If the hearing is not waived, the hearing shall be held on the date, time, and place set in the notice unless a different date, time, and place are agreed to by the parties.

**Source:** 1 SDR 24, effective September 5, 1974; 8 SDR 15, effective August 19, 1981; 11 SDR 96, 11 SDR 112, effective **July 1, 1985.**

**General Authority:** SDCL 13-32-4.

**Law Implemented:** SDCL 13-32-4.

**24:07:03:04. Hearing procedure.** The school board is the hearing board and shall conduct the hearing in the following manner:

- (1) The school board shall appoint a school board member or a person who is not an employee of the school district as the hearing officer;
- (2) Each party may make an opening statement;
- (3) Each party may introduce evidence, present witnesses, and examine and cross-examine witnesses;
- (4) Each party may be represented by an attorney;
- (5) The school administration shall present its case first;
- (6) The hearing is closed to the public. A verbatim record of the hearing will be made and will be sealed pending court order;
- (7) Witnesses may be present only when testifying. All witnesses must take an oath or affirmation administered by the school board president or business manager;
- (8) Each party may raise objections; however, objections are limited to relevancy and scope of the question;
- (9) All relevant evidence must be admitted; however, unproductive or repetitious evidence may be limited by the hearing officer;
- (10) The hearing officer may ask questions of witnesses and may allow other school board members to interrogate witnesses;
- (11) Each party may make a closing statement;
- (12) After the hearing, the school board shall continue to meet in executive session for deliberation. No one other than the hearing officer may meet with the school board during deliberation. The school board may seek advice during deliberation from an attorney. Consultation with any other person during deliberation may occur only if a representative of the pupil is present; and
- (13) The decision of the school board must be based solely on the evidence presented at the hearing and must be formalized by a motion made in open meeting. The motion must omit the name of the pupil and must state the reason for the board's action. The school board shall notify the pupil or the pupil's parents in writing of the decision. The notice must state the length of the suspension or expulsion.

**Source:** 1 SDR 24, effective September 5, 1974; 8 SDR 15, effective August 19, 1981; 11 SDR 96, 11 SDR 112, effective July 1, 1985; 20 SDR 223, effective **July 7, 1994.**

**General Authority:** SDCL 13-32-4.

**Law Implemented:** SDCL 13-32-4, 13-32-4.2.

**24:07:03:05. Decision must be based on evidence.** Repealed.

**24:07:03:06. Right of appeal.** The student may appeal an adverse decision by the school board to the circuit court.

**Source:** 1 SDR 24, effective September 5, 1974; 11 SDR 96, 11 SDR 112, effective July 1, 1985; 20 SDR 223, effective **July 7, 1994.**

**General Authority:** SDCL 13-32-4.

**Law Implemented:** SDCL 13-32-4, 13-32-4.2.

**24:07:03:07. Attendance policies.** The attendance policy of a school district may not exclude a pupil from a class or from school for more than ten days without providing due process procedures pursuant to this chapter.

**Source:** 8 SDR 15, effective August 19, 1981; 11 SDR 96, 11 SDR 112, effective July 1, 1985; 20 SDR 223, effective **July 7, 1994.**

**General Authority:** SDCL 13-32-4.

**Law Implemented:** SDCL 13-32-4, 13-32-4.1, 13-32-4.2.

**24:07:03:08. Referral to placement committee of pupils in need of special education.** If a pupil identified as in need of special education or special education and related services pursuant to SDCL 13-37-1 is expelled or subjected to long-term suspension, the procedure in § 24:05:26:09 applies.

**Source:** 8 SDR 15, effective August 19, 1981; 11 SDR 96, 11 SDR 112, effective July 1, 1985; 20 SDR 223, effective July 7, 1994; 23 SDR 63, effective **November 4, 1996.**

**General Authority:** SDCL 13-32-4.

**Law Implemented:** SDCL 13-32-4, 13-32-4.2.

## CHAPTER 24:07:04

### “EXPULSION PROCEDURE”

#### Section

**24:07:04:01** Written report required.

**24:07:04:02** Notice of hearing.

**24:07:04:03** Right of waiver.

**24:07:04:04** Hearing procedure.

**24:07:04:05** Right of appeal.

**24:07:04:06** Attendance policies.

**24:07:04:07** Referral to placement committee of students in need of special education or special education and related services.

**24:07:04:01. Written report required.** If expulsion is anticipated because of a student's violation of a rule or policy or for insubordination or misconduct, the superintendent must file a sealed written report with the school board no later than the end of the fifth school day following the first day of the student's removal from one or more classes or from school and schedule a hearing before the school board. The report must include the facts of the situation, the action, the reasons for the action and the superintendent's recommendation. The report must remain in the possession of the school board secretary sealed and unavailable for review by individual school board members, until the time set for a hearing.

At the same time that the report is filed with the school board's secretary, the superintendent must send a copy of the report to the student's parent or to the student if the student is 18 years of age or older or is an emancipated minor.

**Source:** 23 SDR 179, effective **April 29, 1997.**

**General Authority:** SDCL 13-32-4.

**Law Implemented:** SDCL 13-32-4, 13-32-4.2.

**24:07:04:02. Notice of hearing.** If the superintendent finds grounds for expulsion from one or more classes or from school, the superintendent may exclude the student immediately by using the short-term suspension procedure in § 24:07:02:01. The superintendent shall give a written notice to one or both of the student's parents or to a student who is 18 years of age or older or an emancipated minor. The notice must contain the following information at a minimum:

- (1) The rule, regulation, or policy allegedly violated;
- (2) The reason for the disciplinary proceedings;
- (3) Notice of the right to request a hearing;
- (4) A description of the hearing procedure;
- (5) A statement that the student's records are available at the school for examination by the student's parent or parents or another authorized representative;
- (6) A statement that the student may present witnesses; and
- (7) A statement that the student may be represented by an attorney.

The superintendent shall set the date, time, and place for the school board hearing. The superintendent shall send notice of the hearing to each school board member by first class mail and to the student's parent or to a student who is 18 years of age or older or an emancipated minor by certified mail, return receipt requested. If the superintendent recommends expulsion, the school board must act on the recommendation before it is implemented.

**Source:** 23 SDR 179, effective **April 29, 1997.**

**General Authority:** SDCL 13-32-4.

**Law Implemented:** SDCL 13-32-4, 13-32-4.2.

**24:07:04:03. Right of waiver.** The student, if of the age of majority or emancipated, or the student's parent may waive the right to a hearing in writing to the superintendent. If the hearing is not waived, the hearing shall be held on the date and at the time and place set in the hearing notice unless a different date, time, and place are agreed to by the parties. If the hearing is waived in writing, the school board may consider the matter at a regular or special meeting without further notice to the student or the student's parents.

**Source:** 23 SDR 179, effective **April 29, 1997.**

**General Authority:** SDCL 13-1-12.1.

**Law Implemented:** SDCL 13-32-1, 13-32-4.

**24:07:04:04. Hearing procedure.** The school board is the hearing board and shall conduct the hearing in the following manner:

- (1) The school board shall appoint a school board member or a person who is not an employee of the school district as the hearing officer;
- (2) Each party may make an opening statement;
- (3) Each party may introduce evidence, present witnesses, and examine and cross-examine witnesses;
- (4) Each party may be represented by an attorney;
- (5) The school administration shall present its case first;
- (6) The hearing is closed to the public. The school board shall make a verbatim record of the hearing by means of an electronic or mechanical device or by court reporter. This record and any exhibits must be sealed and must remain with the hearing officer until the appeal process has been completed;
- (7) Witnesses may be present only when testifying. All witnesses must take an oath or affirmation administered by the school board president, hearing officer or other person authorized by law to take oaths and affirmations;
- (8) Each party may raise any legal objection to evidence;
- (9) The hearing officer shall admit all relevant evidence; however, the hearing officer may limit unproductive or repetitious evidence;
- (10) The hearing officer may ask questions of witnesses and may allow other school board members to interrogate witnesses;
- (11) Each party may make a statement;
- (12) After the hearing, the school board shall continue to meet in executive session for deliberation. No one other than the hearing officer may meet with the school board during deliberation. The school board may seek advice during deliberation from an attorney who has not represented any of the parties to the hearing. Consultation with any other person during deliberation may occur only if a representative of the student is present; and
- (13) The decision of the school board must be based solely on the evidence presented at the hearing and must be formalized by a motion made in open meeting. The motion shall omit the name of the student and shall state the reason for the board's action. The school board shall notify the student's parent or parents or a student who is 18 years of age or older or who is an emancipated minor in writing of the decision. The notice shall state the length of the expulsion.

**Source:** 23 SDR 179, effective **April 29, 1997.**

**General Authority:** SDCL 13-1-12.1.

**Law Implemented:** SDCL 13-32-1, 13-32-4.

**24:07:04:05. Right of appeal.** The student may appeal an adverse decision by the school board to the circuit court.

**Source:** 23 SDR 179, effective **April 29, 1997.**

**General Authority:** SDCL 13-1-12.1.

**Law Implemented:** SDCL 13-32-1, 13-32-4.

**24:07:04:06. Attendance policies.** The attendance policy of a school district may not exclude a student from one or more classes or from a school for more than ten consecutive school days without providing the due process procedures in this chapter or chapter 24:07:03.

**Source:** 23 SDR 179, effective **April 29, 1997.**

**General Authority:** SDCL 13-1-12.1.

**Law Implemented:** SDCL 13-32-1, 13-32-4.

**24:07:04:07. Referral to placement committee of students in need of special education or special education and related services.** If a student identified as in need of special education or special education and related services pursuant to SDCL 13-37-1 is the subject of proposed expulsion, the procedure in § 24:06:26.01:08 applies.

**Source:** 23 SDR 179, effective **April 29, 1997.**

**General Authority:** SDCL 13-32-4, 13-37-1.1.

**Law Implemented:** SDCL 13-32-4, 13-32-4.2.



## CHAPTER 24:05:26 Special Education Rules

### “SUSPENSION OF SPECIAL EDUCATION STUDENTS”

#### Section

<u>24:05:26:01</u>	Suspension from school.
<u>24:05:26:01.01</u>	Suspension from school -- Definitions.
<u>24:05:26:01.02</u>	Case-by-case determination.
<u>24:05:26:02</u>	Short-term suspension procedure.
<u>24:05:26:02.01</u>	Change of placement for disciplinary removals.
<u>24:05:26:02.02</u>	Removals -- Ten school days or less.
<u>24:05:26:02.03</u>	Required services -- No change of placement.
<u>24:05:26:03</u>	Written report required.
<u>24:05:26:04</u>	Right to request hearing -- Notice of hearing.
<u>24:05:26:05</u>	Right of waiver.
<u>24:05:26:06</u>	Hearing procedure.
<u>24:05:26:07</u>	Right of appeal.
<u>24:05:26:08</u>	Attendance policies.
<u>24:05:26:08.01</u>	Authority of school personnel -- Weapons, drugs, and serious bodily injury.
<u>24:05:26:08.02</u>	Authority of hearing officer.
<u>24:05:26:08.03</u>	Parental notification.
<u>24:05:26:09</u>	Referral to IEP team for long-term suspension of pupils.
<u>24:05:26:09.01</u>	Repealed.
<u>24:05:26:09.02</u>	Determination of interim alternative educational setting.
<u>24:05:26:09.03</u>	Manifestation determination review requirement.
<u>24:05:26:09.04</u>	Determination that behavior was a manifestation.
<u>24:05:26:09.05</u>	Determination that behavior was not manifestation of disability -- Additional authority of school personnel.
<u>24:05:26:09.06</u>	Appeal.
<u>24:05:26:09.07</u>	Placement during appeals.
<u>24:05:26:09.08</u>	Expedited hearing -- Procedures.
<u>24:05:26:10 - 13</u>	Repealed.
<u>24:05:26:14</u>	Protections for students not yet eligible.
<u>24:05:26:15</u>	Referral to and action by law enforcement and judicial authorities.

**24:05:26:01. Suspension from school.** The suspension of pupils in need of special education or special education and related services includes the general due process procedures used for all pupils and the

additional steps in the process specified in this chapter that a district must take if the student is receiving special education or special education and related services under an individualized education program.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective November 4, 1996; 26 SDR 150, effective **May 22, 2000**.

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**Cross-Reference:** Student due process, art 24:07.

**24:05:26:01.01. Suspension from school -- Definitions.** Terms used in this chapter and chapter 24:05:26.01 mean:

- (1) "Controlled substance," a drug or other substance identified under SDCL 34-20B-11 to 34-20B-26, inclusive;
- (2) "Dangerous weapon," 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. The term does not include a pocket knife with a blade of less than 2 1/2 inches in length;
- (3) "Illegal drug," a controlled substance, but does not include such a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under SDCL 34-20B-11 to 34-20B-26, inclusive, or under any provision of federal law; and
- (4) "Serious bodily injury," bodily injury that 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.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective **July 5, 2007**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:01.02. Case-by-case determination.** 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 chapter, is appropriate for a student with a disability who violates a code of student conduct.

**Source:** 33 SDR 236, effective **July 5, 2007**.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:02. Short-term suspension procedure.** If a short-term suspension from a class, classes, or school is anticipated because of a pupil's violation of a policy, the procedure in § 24:07:02:01 applies.

**Source:** 16 SDR 41, effective September 7, 1989; 22 SDR 97, effective January 22, 1996; 23 SDR 31, effective **September 8, 1996.**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:02.01. Change of placement for disciplinary removals.** For purposes of removal of a student with a disability from the student's current educational placement under this chapter, a change of placement occurs if:

- (1) The removal is for more than ten consecutive school days; or
- (2) The student is subjected to a series of removals that constitute a pattern because:
  - (a) They cumulate to more than ten school days in a school year;
  - (b) Of factors such as the length of each removal, the total amount of time the student is removed, and the proximity of the removals to one another; and
  - (c) The student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals.

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.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective **July 5, 2007.**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:02.02. Removals -- Ten school days or less.** To the extent removal would be applied to students without disabilities, including alternative settings, school personnel may order the removal of a student with a disability from the student's current placement to an appropriate interim alternative educational setting or another setting, or they may order suspension for not more than ten consecutive school days, for any violation of a code of student conduct. Additional removals of not more than ten consecutive school days in that same school year may be ordered for separate incidents of misconduct if those removals do not constitute a change of placement under § 24:05:26:02.01.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective **July 5, 2007.**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:02.03. Required services -- No change of placement.** A school district need not provide services during periods of removal under § 24:05:26:02.02 to a student with a disability who has been removed from

his or her current placement for ten school days or less in that school year, if services are not provided to a student without disabilities who has been similarly removed. If a student with a disability has been removed from his or her current placement for more than ten school days in that school year, and the removal is not for more than ten consecutive school days and is not a change in placement, the district, for the remainder of the removals, shall provide services to the extent necessary to enable the student to participate in the general curriculum and to progress toward meeting the goals set out in the student's IEP. School personnel, in consultation with at least one of the student's teachers, shall determine the extent to which services are necessary to enable the student to participate in the general curriculum and to progress toward meeting the goals set out in the student's IEP.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:03. Written report required.** If a long-term suspension is anticipated because of a pupil's violation of a policy, the procedure in § 24:07:03:01 applies.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective November 4, 1996.

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**24:05:26:04. Right to request hearing -- Notice of hearing.** If the superintendent finds grounds for a long-term suspension from a class or classes, the procedure in § 24:07:03:02 applies.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective November 4, 1996.

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**24:05:26:05. Right of waiver.** The pupil, if of the age of majority or emancipated, or the pupil's parent may waive the right to a hearing in writing to the superintendent. If the hearing is not waived, the hearing shall be held on the date, time, and place set in the notice unless a different date, time, and place are agreed to by the parties.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective November 4, 1996.

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**24:05:26:06. Hearing procedure.** The school board is the hearing board and shall conduct the hearing in the following manner:

- (1) The school board shall appoint a school board member or a person who is not an employee of the school district as the hearing officer;
- (2) Each party may make an opening statement;
- (3) Each party may introduce evidence, present witnesses, and examine and cross-examine witnesses;
- (4) Each party may be represented by an attorney;
- (5) The school administration shall present its case first;
- (6) The hearing is closed to the public. The school board shall make a verbatim record of the hearing by means of an electronic or mechanical device;
- (7) Witnesses may be present only when testifying. All witnesses must take an oath or affirmation administered by the school board president or business manager;
- (8) Each party may raise objections; however, objections are limited to relevancy and scope of the question;
- (9) The hearing officer shall admit all relevant evidence; however, the hearing officer may limit unproductive or repetitious evidence;
- (10) The hearing officer may ask questions of witnesses and may allow other school board members to interrogate witnesses;
- (11) Each party may make a closing statement;
- (12) After the hearing, the school board shall continue to meet in executive session for deliberation. No one other than the hearing officer may meet with the school board during deliberation. The school board may seek advice during deliberation from an attorney who has not represented any of the parties to the hearing. Consultation with any other person during deliberation may occur only if a representative of the pupil is present; and
- (13) The decision of the school board must be based solely on the evidence presented at the hearing and must be formalized by a motion made in open meeting. The motion shall omit the name of the pupil and shall state the reason for the board's action. The school board shall notify the pupil's parents or a pupil who is 18 years of age or older or an emancipated minor in writing of the decision. The notice shall state the length of the suspension.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective **November 4, 1996.**

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**24:05:26:07. Right of appeal.** The pupil may appeal an adverse decision by the school board to the circuit court.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective **November 4, 1996.**

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**24:05:26:08. Attendance policies.** The attendance policy of a school district may not exclude a pupil from a class or from a school for more than ten days without providing due process pursuant to this chapter.

**Source:** 16 SDR 41, effective September 7, 1989; 22 SDR 97, effective January 22, 1996; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective **November 4, 1996.**

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**24:05:26:08.01. Authority of school personnel --Weapons, drugs, and serious bodily injury.** School personnel may remove a student to an appropriate interim alternative setting for not more than 45 school days, without regard to whether the behavior is determined to be a manifestation of the student's disability, if:

- (1) The student carries a weapon to or possesses a weapon at school, on school premises, or at school or to a school function under the jurisdiction of a state or local education agency;
- (2) The student 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 a state or local educational agency; or
- (3) The student has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the state education agency or a school district.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective **July 5, 2007.**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:08.02. Authority of hearing officer.** A hearing officer under this article hears and makes a determination regarding an appeal under this chapter. In making the determination under this section, the hearing officer may:

- (1) Return the student with a disability to the placement from which the student was removed if the hearing officer determines that the removal was a violation of this chapter or that the student's behavior was a manifestation of the student's disability; or
- (2) Order a change of placement of the student 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 student is substantially likely to result in injury to the student or to others.

The procedures under this section may be repeated if the school district believes that returning the student to the original placement is substantially likely to result in injury to the student or to others.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective **July 5, 2007.**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:08.03. Parental notification.** On the date on which the decision is made to make a removal that constitutes a change of placement of a student with a disability because of a violation of a code of student conduct, the school district shall notify the parents of that decision and provide the parents the procedural safeguards notice described in chapter 24:05:30.

**Source:** 33 SDR 236, effective **July 5, 2007.**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:09. Referral to IEP team for long-term suspension of pupils.** If a pupil identified as in need of special education or special education and related services pursuant to SDCL 13-37-1 is the subject of long-term suspension, a referral shall be made by the superintendent or chief administering officer to the district's IEP team.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective November 4, 1996; 26 SDR 150, effective **May 22, 2000.**

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**24:05:26:09.02. Determination of interim alternative educational setting.** The student's IEP team shall determine the interim alternative educational setting in which a student is placed under §§ 24:05:26:08.01, 24:05:26:02.01, and 24:05:26:09.05.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective **July 5, 2007.**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:09.03. Manifestation determination review requirement.** Within ten school days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the school district, the parent, and relevant members of the student's IEP team, as determined by the parent and the district, shall review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine:

- (1) Whether the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or
- (2) Whether the conduct in question was the direct result of the school district's failure to implement the IEP.

The conduct must be determined to be a manifestation of the student's disability if the district, the parent, and relevant members of the student's IEP team determine that a condition in either subdivision (1) or (2) of this section was met.

If the district, the parent, and relevant members of the student's IEP team determine that the condition described in subdivision (2) of this section was met, the district shall take immediate steps to remedy those deficiencies.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:09.04. Determination that behavior was a manifestation.** If the school district, the parent, and relevant members of the IEP team determine that the conduct was a manifestation of the student's disability, the IEP team shall either:

- (1) Conduct a functional behavioral assessment, unless the district 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 student; or
- (2) If a behavioral intervention plan already has been developed, review the behavioral intervention plan and modify it, as necessary, to address the behavior.

In addition, and except as provided in § 24:05:26:08.01, the IEP team shall return the student to the placement from which the student was removed, unless the parent and the district agree to a change of placement as part of the modification of the behavioral intervention plan.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:09.05. Determination that behavior was not manifestation of disability -- Additional authority of school personnel.** 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 student's disability pursuant to this chapter, school personnel may apply the relevant disciplinary procedures to students with disabilities in the same manner and for the same duration as the procedures would be applied to students without disabilities, except as provided in this section.

A student with a disability who is removed from the student's current placement pursuant to this section or § 24:05:26:08.01 must:

- (1) Continue to receive educational services, as provided in this article, so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP; and
- (2) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:09.06. Appeal.** The parent of a student with a disability who disagrees with any decision regarding placement under this chapter or with the manifestation determination, or a school district that believes that



maintaining the current placement of the student is substantially likely to result in injury to the student or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to this article.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:09.07. Placement during appeals.** If an appeal under this chapter has been made by either the parent or the school district, the student 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 § 24:05:26:08.01 or 24:05:26:09.05, whichever occurs first, unless the parent and the state education agency or school district agree otherwise.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:09.08. Expedited hearing -- Procedures.** If a hearing is requested under this chapter, the parents or the school district involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of this article, except as provided in this section.

The department shall arrange the expedited due process hearing, which must occur within 20 school days of the date of the complaint requesting the hearing is filed. The hearing officer shall make a determination within ten school days after the hearing.

Unless the parents and school district agree in writing to waive the resolution meeting described in this section, or agree to use the mediation process described in chapter 24:05:30:

- (1) A resolution meeting must occur within seven days of receiving notice of the due process complaint; and
- (2) 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.

The decisions on expedited due process hearings are appealable consistent with chapter 24:05:30.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:10 to 20:05:26:13 Repealed.**

**24:05:26:14. Protections for students not yet eligible.** A student who has not been determined to be eligible for special education and related services under this article and who has engaged in behavior that violated any rule or code of conduct of the school district, including any behavior described in this chapter, may assert any

of the protections provided for in this article if the school district had knowledge that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred. A school district is deemed to have knowledge that a student is a student with a disability if:

- (1) The parent of the student has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the student, 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 pursuant to this article; or
- (3) The teacher of the student, or other personnel of the district or other public agency has expressed specific concerns about a pattern of behavior demonstrated by the student directly to the director of special education of the district or to other supervisory personnel of the district.

A district is not deemed to have knowledge that the student is a student with a disability under this section, if the parent of the student has not allowed an evaluation of the student pursuant to this article, or has refused services under this article, or the district conducted an evaluation consistent with this article and determined that the student was not a student with a disability.

If the district does not have knowledge that a student is a student with a disability before taking disciplinary measures against the student, the student may be subjected to the same disciplinary measures as measures applied to students without disabilities who engaged in comparable behaviors consistent with this chapter.

If a request is made for an evaluation of a student during the time period in which the student is subjected to disciplinary measures under this chapter, the evaluation must be conducted in an expedited manner. Until the evaluation is completed, the student shall remain in the educational placement determined by school authorities, which can include suspension or expulsion without educational services. If the student is determined to be a student with a disability taking into consideration information from the evaluation conducted by the district and information provided by the parents, the district shall provide special education and related services in accordance with the provisions of this article including the discipline procedures and free appropriate public education requirements.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1

**24:05:26:15. Referral to and action by law enforcement and judicial authorities.** Nothing in Part B of the Individuals with Disabilities Education Act prohibits a school district or other public agency from reporting a crime committed by a student with a disability 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 a student with a disability.

A school district or other public agency reporting a crime committed by a student with a disability shall ensure that copies of the special education and disciplinary records of the student are transmitted for consideration by the appropriate authorities to whom it reports the crime. A school district reporting a crime under this chapter may transmit copies of the student's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act, as amended to January 8, 2009.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective **December 8, 2009**.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

## CHAPTER 24:05:26.01 Special Education Rules

### “EXPULSION”

#### Section

<u>24:05:26.01:01</u>	Expulsion from school.
<u>24:05:26.01:01.01</u>	Case-by-case determination.
<u>24:05:26.01:02</u>	Written report required.
<u>24:05:26.01:03</u>	Request and notice of hearing.
<u>24:05:26.01:04</u>	Right of waiver.
<u>24:05:26.01:05</u>	Hearing procedure.
<u>24:05:26.01:06</u>	Right of appeal.
<u>24:05:26.01:07</u>	Attendance policies.
<u>24:05:26.01:07.01</u>	Authority of school personnel -- Weapons, drugs, and serious bodily injury.
<u>24:05:26.01:07.02</u>	Authority of hearing officer.
<u>24:05:26.01:07.03</u>	Parental notification.
<u>24:05:26.01:08</u>	Referral to IEP team for expulsion of students.
<u>24:05:26.01:08.01</u>	Applicability of suspension procedures.
<u>24:05:26.01:09 – 12</u>	Repealed.
<u>24:05:26.01:13</u>	Protections for students not yet eligible.
<u>24:05:26.01:14</u>	Referral to and action by law enforcement and judicial authorities.

**24:05:26.01:01. Expulsion from school.** The expulsion of students in need of special education or special education and related services includes the general due process procedures used for all students and the additional steps in the process specified in this chapter that a district must take when the student is receiving special education or special education and related services under an individual education program.

**Source:** 23 SDR 179, effective April 29, 1997; 26 SDR 150, effective **May 22, 2000.**

**General Authority:** SDCL 13-32-1, 13-32-4, 13-37-1.1.

**Law Implemented:** SDCL 13-32-1, 13-32-4, 13-37-1.1.

**Cross-Reference:** Student due process, art 24:07.

**24:05:26.01:01.01. Case-by-case determination.** 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 chapter, is appropriate for a student with a disability who violates a code of student conduct.

**Source:** 33 SDR 236, effective **July 5, 2007.**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26.01:02. Written report required.** If an expulsion is anticipated because of a student's violation of rules or policies or for insubordination or misconduct, the procedure in § 24:07:04:01 applies.

**Source:** 23 SDR 179, effective **April 29, 1997.**

**General Authority:** SDCL 13-32-4, 13-37-1.1.

**Law Implemented:** SDCL 13-32-4, 13-37-1.1.

**24:05:26.01:03. Request and notice of hearing.** If the superintendent finds grounds for expulsion from school, the procedure in § 24:07:04:02 applies.

**Source:** 23 SDR 179, effective **April 29, 1997.**

**General Authority:** SDCL 13-32-4, 13-37-1.1.

**Law Implemented:** SDCL 13-32-4, 13-37-1.1.

**24:05:26.01:04. Right of waiver.** A competent student, if of the age of majority or emancipated, or the student's parent may waive the right to a hearing in writing to the superintendent. If the hearing is not waived, the hearing shall be held on the date and at the time and place set in the hearing notice unless a different date, time, and place are agreed to by the parties. If the hearing is waived in writing, the school board may consider the matter at a regular or special meeting without further notice to the student or the student's parents.

**Source:** 23 SDR 179, effective **April 29, 1997.**

**General Authority:** SDCL 13-1-12.1.

**Law Implemented:** SDCL 13-32-4, 13-37-1.1.

**24:05:26.01:05. Hearing procedure.** The school board is the hearing board and shall conduct the hearing in the following manner:

- (1) The school board shall appoint a school board member or a person who is not an employee of the school district as the hearing officer;
- (2) Each party may make an opening statement;
- (3) Each party may introduce evidence, present witnesses, and examine and cross-examine witnesses;
- (4) Each party may be represented by an attorney;
- (5) The school administration shall present its case first;
- (6) The hearing is closed to the public. The school board shall make a verbatim record of the hearing by means of an electronic or mechanical device or by court reporter. This record and any exhibits must be sealed and must remain with the hearing officer until the appeal process has been completed;
- (7) Witnesses may be present only when testifying. All witnesses must take an oath or affirmation administered by the school board president, hearing officer, or other person authorized by law to take oaths or affirmations;

- (8) Each party may raise any legal objections to evidence;
- (9) The hearing officer shall admit all relevant evidence; however, the hearing officer may limit unproductive or repetitious evidence;
- (10) The hearing officer may ask questions of witnesses and may allow other school board members to interrogate witnesses;
- (11) Each party may make a closing statement;
- (12) After the hearing, the school board shall continue to meet in executive session for deliberation. No one other than the hearing officer may meet with the school board during deliberation. The school board may seek advice during deliberation from an attorney who has not represented any of the parties to the hearing. Consultation with any other person during deliberation may occur only if a representative of the student is present; and
- (13) The decision of the school board must be based solely on the evidence presented at the hearing and must be formalized by a motion made in open meeting. The motion shall omit the name of the student and shall state the reason for the board's action. The school board shall notify the student's parent or parents or a student who is 18 years of age or older or who is an emancipated minor in writing of the decision. The notice shall state the length of the expulsion.

**Source:** 23 SDR 179, effective **April 29, 1997.**

**General Authority:** SDCL 13-32-4, 13-37-1.1.

**Law Implemented:** SDCL 13-32-4, 13-37-1.1.

**24:05:26.01:06. Right of appeal.** The student may appeal an adverse decision by the school board to the circuit court.

**Source:** 23 SDR 179, effective **April 29, 1997.**

**General Authority:** SDCL 13-32-4, 13-37-1.1.

**Law Implemented:** SDCL 13-32-4, 13-37-1.1.

**24:05:26.01:07. Attendance policies.** The attendance policy of a school district may not exclude a student from one or more classes or from a school for more than ten consecutive school days without providing the due process procedures in this chapter or chapter 24:07:03.

**Source:** 23 SDR 179, effective **April 29, 1997.**

**General Authority:** SDCL 13-32-4, 13-37-1.1.

**Law Implemented:** SDCL 13-32-4, 13-37-1.1.

**24:05:26.01:07.01. Authority of school personnel** -- Weapons, drugs, and serious bodily injury. School district personnel shall follow the procedures under § 24:05:26:08.01 if an expulsion is anticipated because of a student's violation of rules or policies pertaining to weapons and drugs.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective **July 5, 2007.**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26.01:07.02. Authority of hearing officer.** The authority of a hearing officer, in an expedited due process hearing, described under § 24:05:26:08.02, applies if an expulsion is anticipated because a student's behavior is substantially likely to result in injury to the student or to others.

**Source:** 26 SDR 150, effective **May 22, 2000.**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26.01:07.03. Parental notification.** On the date on which the decision is made to make a removal that constitutes a change of placement of a student with a disability because of a violation of a code of student conduct, the school district must notify the parents of that decision and provide the parents the procedural safeguards notice described in chapter 24:05:30.

**Source:** 33 SDR 236, effective **July 5, 2007.**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26.01:08. Referral to IEP team for expulsion of students.** If a student identified in need of special education or special education and related services pursuant to SDCL 13-37-1 is the subject of proposed expulsion, the superintendent or chief administering officer shall refer the matter to the IEP team.

**Source:** 23 SDR 179, effective April 29, 1997; 26 SDR 150, effective **May 22, 2000.**

**General Authority:** SDCL 13-32-4, 13-37-1.1.

**Law Implemented:** SDCL 13-32-4, 13-37-1.1.

**24:05:26.01:08.01. Applicability of suspension procedures.** The suspension procedures described in §§ 24:05:26:09.02 to 24:05:26:09.08, inclusive, apply if an expulsion is anticipated.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective **July 5, 2007.**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26.01:09 to 24:05:16.01:12** Repealed.

**24:05:26.01:13. Protections for students not yet eligible.** The procedures under § 24:05:26:14 apply for students who have not been determined eligible for special education or special education and related services if an expulsion is anticipated.

**Source:** 26 SDR 150, effective **May 22, 2000.**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26.01:14. Referral to and action by law enforcement and judicial authorities.** Reporting a crime committed by a student with a disability and the transmission of student records shall be implemented consistent with § 24:05:26:15.

**Source:** 26 SDR 150, effective **May 22, 2000.**

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.



## CHAPTER 24:05:30 Special Education Rules

### PROCEDURAL SAFEGUARDS

#### Section

- 24:05:30:07.01. Filing a due process complaint
- 24:05:30:07.02. Timeline for filing a due process complaint
- 24:05:30:08. Free or low-cost services to parent
- 24:05:30:08.01. Due process complaint notice
- 24:05:30:08.02. Content of due process complaint notice
- 24:05:30:08.03. Sufficiency of complaint
- 24:05:30:08.04. Decision of sufficiency of complaint
- 24:05:30:08.05. Amendment to due process complaint
- 24:05:30:08.06. District response to due process complaint
- 24:05:30:08.07. Other party response to due process complaint
- 24:05:30:08.08. Model forms
- 24:05:30:08.09. Resolution meeting – Participants
- 24:05:30:08.10. Resolution meeting – Purpose
- 24:05:30:08.11. Resolution meeting -- Waive or mediate
- 24:05:30:08.12. Resolution period – General
- 24:05:30:08.13. Dismissal of complaint or initiation of hearing
- 24:05:30:08.14. Adjustments to 30-day resolution period
- 24:05:30:08.15. Written settlement agreement
- 24:05:30:09.04. Impartial due process hearing
- 24:05:30:09.05. Subject matter of due process hearings
- 24:05:30:09.06. Timeline for requesting a due process hearing
- 24:05:30:10. Impartial hearing officer
- 24:05:30:10.01. Decision of hearing officer
- 24:05:30:11. Appeal of hearing decision -- Civil action
- 24:05:30:14. Child's status during proceedings

**24:05:30:07.01. Filing a due process complaint.** A parent or a school district may file a due process complaint on any matters relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL [13-37-1.1](#).

**Law Implemented:** SDCL [13-37-1.1](#).

**24:05:30:07.02. Timeline for filing a due process complaint.** A due process complaint shall allege a violation that occurred not more than two years before the date the parent or school district knew or should have known about the alleged action that forms the basis of the due process complaint.

The timeline described in this section does not apply to a parent if the parent was prevented from filing a due process complaint due to:

(1) Specific misrepresentations by the district that it had resolved the problem forming the basis of the due process complaint; or

(2) The district's withholding of information from the parent that was required under this chapter to be provided to the parent.

**Source:** 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)

**24:05:30:08. Free or low-cost services to parent.** The school district shall inform the parent of any free or low-cost legal and other relevant services available in the area if the parent or school district files a due process complaint under this chapter or the parent requests the information.

**Source:** 16 SDR 41, effective September 7, 1989; 17 SDR 30, effective August 27, 1990; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)

**24:05:30:08.01. Due process complaint notice.** A school district must have procedures that require either party or the attorney representing a party, to provide to the other party a due process complaint, which must remain confidential. The party filing a due process complaint shall forward a copy to the department.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)

**24:05:30:08.02. Content of due process complaint notice.** The notice required in § 24:05:30:08.01 must include:

(1) The name of the child;

(2) The address of the residence of the child;

(3) The name of the school the child is attending;

(4) In the case of a homeless child or youth, available contact information for the child, and the name of the school the child is attending;

(5) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

(6) A proposed resolution of the problem to the extent known and available to the party at the time.

A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of this section.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, **effective July 5, 2007**; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL [13-37-1.1](#).

**Law Implemented:** SDCL [13-37-1.1](#).

**24:05:30:08.03. Sufficiency of complaint.** The due process complaint required by this chapter is 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 meet the requirements in § 24:05:30:08.02.

**Source:** 33 SDR 236, **effective July 5, 2007**.

**General Authority:** SDCL [13-37-1.1](#).

**Law Implemented:** SDCL [13-37-1.1](#).

**24:05:30:08.04. Decision of sufficiency of complaint.** Within five days of receipt of the notification under § 24:05:30:08.03, the hearing officer shall make a determination on the face of the due process complaint of whether the due process complaint meets the requirements of § 24:05:30:08.02 and shall immediately notify the parties in writing of that determination.

**Source:** 33 SDR 236, **effective July 5, 2007**.

**General Authority:** SDCL [13-37-1.1](#).

**Law Implemented:** SDCL [13-37-1.1](#).

**24:05:30:08.05. Amendment to due process complaint.** A party may amend its due process complaint only if:

(1) The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a resolution meeting held under § 24:05:30:08.09; or

(2) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

If a party files an amended due process complaint, the timelines for the resolution meeting and the time period for resolving the complaint begin again with the filing of the amended due process complaint.

**Source:** 33 SDR 236, **effective July 5, 2007**.

**General Authority:** SDCL [13-37-1.1](#).

**Law Implemented:** SDCL [13-37-1.1](#).

**24:05:30:08.06. District response to due process complaint.** If the district has not sent a prior written notice under this chapter to the parent regarding the subject matter contained in the parent's due process complaint, the district shall, within ten days of receiving the due process complaint, send to the parent a response that includes:

(1) An explanation of why the district proposed or refused to take the action raised in the due process complaint;

(2) A description of other options that the IEP Team considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, assessment, record, or report the district used as the basis for the proposed or refused action; and

(4) A description of the other factors that are relevant to the district's proposed or refused action.

A response by the district under this section does not preclude the district from asserting that the parent's due process complaint was insufficient, if appropriate.

**Source:** 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)

**24:05:30:08.07. Other party response to due process complaint.** Except as provided in § 24:05:30:08.06, the party receiving a due process complaint shall, within ten days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint.

**Source:** 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)

**24:05:30:08.08. Model forms.** The department shall develop model forms to assist parents and school districts in filing a due process complaint in accordance with this chapter and a state complaint under chapter 24:05:15. However, the department or a school district may not require the use of the model forms.

Parents, school districts, and other parties may use the appropriate model forms described in this section, or another form or other document, if the form or document that is used meets, as appropriate, the content requirements in § 24:05:30:08.02 for filing a due process complaint, or the requirements in chapter 24:05:15 for filing a state complaint.

**Source:** 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)

**24:05:30:08.09. Resolution meeting -- Participants.** Within 15 days of receiving notice of the parent's due process complaint, and before the initiation of a due process hearing under this chapter, the district shall convene a meeting with the parent and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the due process complaint. The meeting:

(1) Shall include a representative of the district who has decision-making authority on behalf of the district; and

(2) May not include an attorney of the district unless the parent is accompanied by an attorney.

The parent and district shall determine the relevant members of the IEP team to attend the meeting.

**Source:** 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)

**24:05:30:08.10. Resolution meeting -- Purpose.** The purpose of the resolution meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the district has the opportunity to resolve the dispute that is the basis for the due process complaint.

**Source:** 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)

**24:05:30:08.11. Resolution meeting -- Waive or mediate.** The resolution meeting need not be held if:

(1) The parent and the district agree in writing to waive the meeting; or

(2) The parent and the district agree to use the mediation process described in this chapter.

**Source:** 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)

**24:05:30:08.12. Resolution period -- General.** If the district has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

Except as provided in § 24:05:30:08.14, the timeline for issuing a final decision in a due process hearing begins at the expiration of the 30-day period.

Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding the above two paragraphs, the failure of the parent filing a due process complaint to participate in the resolution meeting delays the timelines for the resolution process and due process hearing until the meeting is held.

**Source:** 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)

**24:05:30:08.13. Dismissal of complaint or initiation of hearing.** If the district is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented using the procedures in § 24:05:25:17, the district may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.

If the district fails to hold the resolution meeting specified in § 24:05:30:08.09 within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.

**Source:** 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)

**24:05:30:08.14. Adjustments to 30-day resolution period.** The 45-day timeline for the due process hearing described in this chapter starts the day after one of the following events:

(1) Both parties agree in writing to waive the resolution meeting;

(2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or

(3) If, after both parties agree in writing to continue the mediation at the end of the 30-day resolution period, the parent or district withdraws from the mediation process.

**Source:** 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)

**24:05:30:08.15. Written settlement agreement.** If a resolution to the dispute is reached at the meeting described in §§ 24:05:30:08.09 and 24:05:30:08.10, the parties shall execute a legally binding agreement that is:

(1) Signed by both the parent and a representative of the district who has the authority to bind the district; and

(2) Enforceable in any state court of competent jurisdiction or in a district court of the United States.

If the parties execute an agreement pursuant to this section, a party may void the agreement within three business days of the agreement's execution.

**Source:** 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)

**24:05:30:09.04. Impartial due process hearing.** If a due process complaint is received under this chapter, chapter 24:05:26, or chapter 24:05:26.01, the parents or the district involved in the dispute shall have an opportunity for an impartial due process hearing, consistent with the procedures in this article.

The department is responsible for ensuring that a due process hearing is held.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL [13-37-1.1](#).

**Law Implemented:** SDCL [13-37-1.1](#).

**24:05:30:09.05. Subject matter of due process hearings.** The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under this chapter, unless the other party agrees otherwise.

A parent may file a separate due process complaint on an issue separate from a due process complaint already filed.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL [13-37-1.1](#).

**Law Implemented:** SDCL [13-37-1.1](#).

**24:05:30:09.06. Timeline for requesting a due process hearing.** A parent or district shall request an impartial hearing on their due process complaint within two years of the date the parent or district knew or should have known about the alleged action that forms the basis of the due process complaint.

The timeline described in this section does not apply to a parent if the exceptions in § 24:05:30:07.02 exist.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL [13-37-1.1](#).

**Law Implemented:** SDCL [13-37-1.1](#).

**24:05:30:10. Impartial hearing officer.** A hearing may not be conducted by a person who is an employee of the department or a school district which is involved in the education or care of the child or by any person having a personal or professional interest that conflicts with the person's objectivity in the hearing.

A hearing officer shall:

(1) Possess knowledge of, and the ability to understand, the provisions of IDEA, federal and state regulations pertaining to IDEA, and legal interpretations of IDEA by federal and state courts;

(2) Possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(3) Possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

An individual who otherwise qualifies to conduct a hearing is not an employee of the department solely because the individual is paid by the department to serve as a hearing officer.

Each school district shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, **effective July 5, 2007**; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL [13-37-1.1](#).

**Law Implemented:** SDCL [13-37-1.1](#).

**24:05:30:10.01. Decision of hearing officer.** Subject to the provisions of this section, a hearing officer's determination of whether a child received FAPE shall be based on substantive grounds.

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies:

(1) Impeded the child's right to a FAPE;

(2) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(3) Caused a deprivation of educational benefit.

Nothing in this section precludes a hearing officer from ordering a district to comply with procedural requirements under this chapter, chapter 24:05:26, and chapter 24:05:26.01.

**Source:** 33 SDR 236, **effective July 5, 2007**.

**General Authority:** SDCL [13-37-1.1](#).

**Law Implemented:** SDCL [13-37-1.1](#).

**24:05:30:11. Appeal of hearing decision -- Civil action.** Any party aggrieved by the decision of the hearing officer under this chapter or chapters 24:05:26 and 24:05:26.01 may bring a civil action with respect to a due process complaint notice requesting a due process hearing under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2). A civil action may be filed in either state or federal court without regard to the amount in controversy. The party bringing the action has 90 days from the date of a hearing officer's decision to file a civil action. In any action brought under this section, the court:

(1) Shall review the records of the administrative proceedings;



(2) Shall hear additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, shall grant the relief that the court determines to be appropriate.

Nothing in Part B of the Individuals with Disabilities Education Act restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 as amended to January 2, 2007, Title V of the Rehabilitation Act of 1973 as amended to January 1, 2007, or other federal laws protecting the rights of children with disabilities. However, before the filing of a civil action under these laws, seeking relief that is also available under section 615 of IDEA, the procedures under this chapter for filing a due process complaint must be exhausted to the same extent as would be required had the action been brought under section 615 of IDEA.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1](#).

**Law Implemented:** SDCL [13-37-1.1](#).

**24:05:30:14. Child's status during proceedings.** Except as provided in chapters 24:05:26 and 24:05:26.01, during the pendency of any administrative hearing or judicial proceeding regarding a due process complaint notice requesting a due process hearing pursuant to this chapter, the child involved must remain in the present educational placement unless the state or school district and the parents agree otherwise. If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

If the complaint involves an application for initial services under this article from a child who is transitioning from Part C of the IDEA to Part B and is no longer eligible for Part C services because the child has turned three, the district is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services, then the district must provide those special education and related services that are not in dispute between the parent and the district.

If the decision of a hearing officer in a due process hearing agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the state and the parents for purposes of pendency.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, **effective July 5, 2007.**

**General Authority:** SDCL [13-37-1.1](#).

**Law Implemented:** SDCL [13-37-1.1](#).

## CHAPTER 24:05:29 Special Education Rules

### CONFIDENTIALITY OF INFORMATION

#### Section

**24:05:29:01** District policies and procedures on confidentiality of information.

**24:05:29:02** Definitions.

**24:05:29:19** Disciplinary information.

**24:05:29:01. District policies and procedures on confidentiality of information.** Each school district shall develop and implement policies and procedures on the confidentiality of information consistent with this chapter.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective **September 8, 1996.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)

**24:05:29:02. Definitions.** Terms used in this chapter mean:

(1) "Act," "FERPA," the Family Educational Rights and Privacy Act of 1974, as amended to January 8, 2009, enacted as section 444 of the General Education Provisions Act, as amended to January 8, 2009;

(2) "Attendance," includes:

(a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and

(b) The period during which a person is working under a work-study program;

(3) "Biometric record," as used in the definition of personally identifiable information, a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting;

(4) "Destruction," physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable;

(5) "Directory information," information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed, such as the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, enrollment status (e.g. full time or part time) participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees, honors, and awards received, and the most recent previous educational agency or institution attended. Directory information does not include a student's social security number or student identification number, except as provided in this subdivision.

Directory information includes a student identification number, user identification number, or other unique personal identifier used by the student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number, password, or other factor known or possessed only by the authorized user;

(6) "Disclosure," to permit access to or the release, transfer, or other communication of education records or the personally identifiable information contained in those records to any party, by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record;

(7) "Education records," records directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. The term does not include the following:

(a) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;

(b) Records of a law enforcement unit of an educational agency or institution, but only if education records maintained by the agency or institution are not disclosed to the unit and the law enforcement records are maintained separately from education records, maintained solely for law enforcement purposes, and disclosed only to law enforcement officials of the same jurisdiction;

(c) Records related to an individual who is employed by an educational agency or institution that are made and maintained in the normal course of business, are related exclusively to the individual in that individual's capacity as an employee, and are not available for use for any other purpose. Records relating to an individual in attendance at the agency or institution who is employed as a result of the individual's status as a student are educational records and not excepted under this subdivision;

(d) Records on a student who is 18 years of age or older or is attending an institution of postsecondary education that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in a professional capacity or assisting in a paraprofessional capacity; made, maintained, or used only in connection with treatment of the student; and disclosed only to individuals providing the treatment. For the purpose of this section, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution;

(e) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student; and

(f) Grades on peer-graded papers before they are collected and recorded by a teacher;

(8) "Eligible student," a student who has reached 18 years of age or is attending an institution of postsecondary education;

(9) "Institution of postsecondary education," an institution that provides education to students beyond the secondary school level;

(10) "Secondary school level," the educational level, not beyond grade twelve, at which secondary education is provided as determined under state law;

(11) "Participating agency," any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the IDEA;

(12) "Personally identifiable information," the term includes:

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates;

(13) "Record," any information recorded in any way, including handwriting, print, video or audio tape, film, microfilm, microfiche, and computer media.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, **effective July 5, 2007**; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL [13-37-1.1](#).

**Law Implemented:** SDCL [13-37-1.1](#).

**24:05:29:19. Disciplinary information.** A local educational agency shall include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit the statement to the same extent that the disciplinary information is included in, and transmitted with, the student records of nondisabled children.

The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child.

Consistent with the above policy, if a child transfers from one school to another, the transmission of any of the child's records shall include both the child's current individualized education program and any statement of current or previous disciplinary action that has been taken against the child.

**Source:** 26 SDR 150, **effective May 22, 2000.**

**General Authority:** SDCL [13-37-1.1.](#)

**Law Implemented:** SDCL [13-37-1.1.](#)