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South Dakota

Discipline in Detail

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 January 2021.

This document is designed as a guide for school administrators, parents, and advocates in South Dakota to use as a resource for discipline procedures for students with disabilities who violate a school district's code of student conduct.

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General Authority of School Personnel

The IDEA and South Dakota regulations address the general authority of school personnel under 34 CFR §300.530(b)(1) and SD 13-32-1.

1. **What constitutes a violation of the school code of conduct?**
   Violations of the school code of conduct are those that occur while students are in school or participating in or attending school sponsored activities, regardless of location. Additionally, violations of the school code of conduct may occur outside of school hours or school activities if the behaviors are aggressive or violent and disrupt school or affect a health or safety factor of the school or its programs.

   Superintendents, principals, supervisors, and teachers have disciplinary authority over students in any of these instances.

2. **Can students with disabilities be suspended?**
   Yes. Students with disabilities can still be suspended if they violate the student code of conduct. However, under IDEA, students with disabilities have disciplinary protections to ensure that their IEP and services are reasonably calculated to support their behavior and continue their access and progression in the general curriculum.

3. **Can a student's IEP team determine that a student cannot be suspended?**
   Yes, the student's IEP team can overrule a district's code of conduct and disciplinary actions. For more information, see the section Manifestation Determinations.

4. **What happens to a student on the 11th cumulative day of removal?**
   On the 11th day of removal, the school system must provide services to the students to the extent required under 34 CFR §300.530(d), which clarifies the child must continue to receive educational services so that he/she can continue to participate in the general education curriculum, although in another setting, and progress toward meeting the goals in his/her IEP.

5. **What if the student is suspended 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 provided that:
   - Additional removals of no 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 34 CFR §300.536 [34 CFR §300.530(b)(1)], and
   - Beginning with the 11th cumulative day in a school year that a student is removed, the school system must provide services to "allow the student to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP," as required in 34 CFR §300.530(d). [34 CFR §300.530(b)(2) and (d)(4)-(5)]

6. What is a Change of Placement?

A change of placement occurs when a student is removed from their regular educational placement or from where their regular educational services are provided. School personnel have the authority to make additional removals of a student with a disability for no 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 34 CFR §300.530(d). [34 CFR §300.530(b)(2) and (d)(4)-(5)]

A change of placement occurs if:

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

7. What constitutes a "pattern of removals"?

IDEA states in 34 CFR § 300.536(a)(2) that a pattern would exist:

- When the series of removals total more than 10 cumulative school days in a school year,
- When the student's behavior is substantially similar to the student'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 student 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.

Counting Days

8. What is a disciplinary removal?

Disciplinary Removal: Any instance in which a child with a disability is removed from his/her educational placement for disciplinary purposes, including in-school suspension, out-of-school suspension, expulsion, removal by school personnel to an interim alternative educational setting for drug or weapon offenses or serious bodily injury, and removal by hearing officer for likely injury to the child or others.

9. What counts as a day of removal?

Under the law and regulations (34 CFR § 300.11(c)), removal for any portion of the school day counts as a day of removal for IDEA disciplinary protections and data collection.

10. Does in-school suspension (ISS) count as a day of removal?

What must the district provide for ISS to not count as a day of removal?

ISS removals do not count towards days of removal only if the student:

- is afforded the opportunity to continue to appropriately participate in the general curriculum,
- continues to receive services specified on his/her IEP, and
- continues to participate with nondisabled peers to the extent they would have in their current placement.

To not count ISS as a day of removal, all three conditions must be met. When considering the requirement that the student continue to participate with nondisabled peers at an equal extent, the entire school day, including lunch and recess and other non-instructional times, must be considered.

11. What is an informal removal?

In July 2022, the U.S. Department of Education's Office of Special Education Programs (OSEP) published guidance on "Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions." In APPENDIX I: Glossary of Key Terms and Acronyms, as Used in This Guidance," OSEP named and defined the term "informal removal" as

Action taken by school personnel in response to a child's behavior that excludes the child for part or all of the school day, or even an indefinite period of time. These exclusions are considered informal because the school removes the child with a disability from class or school without invoking IDEA's disciplinary procedures. Informal removals are subject to IDEA's requirements to the same extent as disciplinary removals by school personnel using the school's disciplinary procedures. Therefore, informal removals should be counted as out of school suspensions.

12. Do informal removals count as a day of removal?

Yes. Regardless of whether or not the school documents the removal within their school disciplinary system, any action taken by school personnel in response to a child's behavior that results in their removal from their educational environment is a day of removal under IDEA protections. Examples of informal removals might include the building principal calling home and informing the student's parents that he/she is having a difficult behavioral day, and asks the parents to come pick him/her up. Another example is, if a student's teacher, following a behavioral incident, sends the student to the office where he/she spends one hour with the principal.

13. Is a bus suspension considered a disciplinary removal and a day of suspension?

Yes, if the bus transportation is a service included within the student's IEP. In this instance, the bus suspension would be treated as a disciplinary removal unless the LEA provides the bus service in some other way, because that transportation is necessary for the student to obtain access to the location where other services will be delivered.

If the bus transportation is not a needed service included within the student's IEP, a suspension from bus transportation would not be considered a disciplinary removal and a day of suspension.

Case-by-Case Determination and Special Circumstances

Under the IDEA (2004) (34 CFR § 300.530(a)), school personnel may consider whether a change in placement that is otherwise permitted under the disciplinary procedures is appropriate and should occur. School personnel must exercise this 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 34 CFR §§ 300.530-300.536.

14. What types of circumstances might school personnel consider during change of placement decision making?

Factors such as the student's disciplinary history, ability to understand consequences, expression of remorse, and supports provided to a child with a disability prior to the violation of the student code of conduct can all be considered by school personnel when determining whether a disciplinary change in placement is appropriate for the specific student.

15. Is the IEP team involved in case-by-case determinations?

They can be. Guidance from OSEP indicates that there is no requirement for parents or the IEP team to be involved in case-by-case disciplinary determinations. However, school personnel should consider the full breadth of factors and may need input from members of the IEP team to do so.

16. Which school personnel are involved in case-by-case determinations?

This is based on the needs and context of the disciplinary situation and is left to the discretion of the local school or district.

17. What behaviors or infractions are included in "special circumstances"?

Special circumstances are instances when a child with a disability:

- Carries a weapon to or possesses a weapon at school, on school premises, or at a school function;
- Knowingly possesses or uses illegal drugs, sells illegal drugs, or solicits the sale of a controlled substance at school, on school premises, or at a school function; or
- Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or LEA. [34 CFR § 300.530(g); 34 CFR § 300.530(i)]

In any of these "special circumstances," school personnel may remove a student to an Interim Alternative Educational Setting (IAES) for no more than 45 school days without regard to whether the behavior is determined to be a manifestation of the student's disability.

Other provisions of IDEA's discipline procedures apply under special circumstances, including:

- Conducting the manifestation determination review (MDR) under 34 CFR § 300.530(e);
- Notifying parents under 34 CFR § 300.530(h); and
- Determining the extent of services that must be provided to the child under 34 CFR § 300.530(d)(1).

18. What is a "dangerous weapon"?

The term "dangerous weapon" is defined in 18 U.S.C. 930(g)(2) as "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2.5 inches in length." (71 Fed. Reg. 46723).

This definition clarifies that not every item used to inflict harm may be considered a weapon. Rather, the item must be capable of causing death or serious bodily injury to meet the definitions threshold. It is also important to note that a student does not have to use the weapon; he or she may merely possess it, so long as it is capable of causing death or serious bodily injury. For more on the definition of "serious bodily injury," see the question "What do the regulations mean by 'serious bodily injury'?"

19. If a student comes to school already under the influence, is this considered "use" of an illegal drug?

Yes. While South Dakota law does not explicitly define "use" in the school context, being under the influence of an illegal drug at school, on school premises, or at a school function constitutes possession of the illegal drug.

20. What do the regulations mean by "serious bodily injury"?

Under the IDEA (34 CFR § 300.530(i)(3)), the term "serious bodily injury" is referenced from its definition in federal criminal law and refers to any bodily injury which involves any of the following:

- A substantial risk of death;
- Extreme physical pain;
- Protracted and obvious disfigurement;
- Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

As you see, the term is not used loosely and refers to instances of extreme or lifelong injury.

21. What is an Interim Alternative Educational Setting (IAES)?

An Interim Alternative Educational Setting is a temporary placement for children with disabilities that allows them to continue receiving educational services, despite a need for removal from their regular IEP placement (e.g., 45 day removal for weapon possession).

It is important to remember that an IAES is not a place itself. Not every child who needs an IAES will attend an alternative school, receive homebound services, or engage in virtual education, for instance. Rather, the IAES is a placement decision that requires the school team to consider the child's specific services, needs, and context to continue receiving FAPE while removed from their educational placement.

22. Can the student's IEP be amended to change placement, rather than removing them to an IAES?

Yes, though it is important to remember the IEP needs to be reasonably calculated to ensure the student benefits from their education and can make progress in the general curriculum. Changing a student's least restrictive environment (LRE) in their IEP should only be done after a full IEP team meeting and review of student data, including behavioral infractions and content, and to ensure the student's placement continues to support their individual needs. (See 34 CFR § 300.116).

23. Removal by a hearing officer

Those instances in which an impartial hearing officer orders the removal of children with disabilities from their current educational placement to an appropriate alternative educational setting for not more than 45 school days, based on the hearing officer's determination that maintaining the child's current placement is substantially likely to result in injury to the child or others. The IEP team is responsible for determining the interim alternative educational setting.

Manifestation Determinations

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 the manifestation determination review is to determine whether or not the child's behavior that led to the disciplinary consequence is linked to his or her disability.

24. When is a manifestation determination review (MDR) necessary?

Under 34 CFR § 300.530(e), a manifestation determination review meeting must occur within 10 days of any decision to change the student's placement because of a violation of a code of student conduct.

A change of placement occurs when:

- The student's removal is for more than 10 consecutive school days, or
- The student has been subjected to a series of removals that constitute a pattern of removals (e.g., greater than 10 cumulative school days). See Question "What constitutes a 'pattern of removals'?" for more information.

25. How should parents be notified of the removal and the need for the MDR meeting?

Parents must be notified on the same day that the LEA decides to remove the child in such a way that constitutes a change of placement (34 CFR § 300.530(h)). The school should provide written notification to parents that a manifestation determination meeting will occur and when. The notification of the change of placement and need for a meeting should occur the same day the decision is made. While the meeting may not occur on the same day, it should happen as soon as possible and no later than 10 school days after the decision (34 CFR § 300.530(e)(1)).

26. How does the district document parent notifications?

Parent notifications of a change in placement should be documented in writing through a Parent Prior Written Notice (PPWN).

27. How quickly should an MDR occur?

A Manifestation Determination Review (MDR) meeting must occur within 10 school days of a decision to make a change of placement (34 CFR § 300.530(e)(1)) or as soon as possible.

A change of placement occurs when:

- The student's removal is for more than 10 consecutive school days, or
- The student has been subjected to a series of removals (e.g., totaling greater than 10 cumulative days) that constitute a pattern of removals.

28. Who is involved in the MDR meeting?

At minimum, MDRs should be conducted by the LEA representative, the parent, and relevant members of the IEP team (as determined by the parent and the LEA) (34 CFR § 300.530(e)(1)).

29. Who decides which personnel are relevant members of the IEP team?

The LEA and the student's parents determine which members of the IEP team are relevant (34 CFR § 300.530(e)(1)).

30. What if the parents refuse to attend the meeting?

By South Dakota regulations and IDEA, parents are considered a required member of an MDR meeting. If the parent does not attend, the LEA should consider rescheduling the meeting for a mutually agreed upon time.

Document all attempts: Keep a detailed log of every phone call, certified letter, email, and text message sent to schedule the meeting.

Offer alternative formats: Ask if the parents can join via phone, video conferencing (like Zoom), or at an alternate off-site location or time that fits their schedule.

Send written notice: Provide formal, written meeting notices well in advance, detailing the purpose, time, and location, and mail copies if they do not respond digitally.

Hold the meeting if necessary: Under federal regulations (34 CFR § 300.322(d)), a meeting may be conducted without a parent if the public agency is unable to convince them they should attend. You must have a detailed record of your attempts to arrange a mutually agreed-upon time and place.

Send copies of all decisions made: If the MDR is held without the parents, immediately send a copy of the determination, all supporting evaluation/incident data, and Prior Written Notice (PWN) regarding the disciplinary change or findings to their home via certified mail.

31. What must the team consider when conducting an MDR?

The purpose of the MDR is to determine if the student's behavior that led to the disciplinary action was:

- Caused by, or had a direct and substantial relationship to the child's disability, or
- The direct result of the district's failure to implement the child's IEP.

To answer this question, the team must consider all relevant information. This includes the student's IEP, teacher observations, parent input, and any other relevant data or information regarding the student's specific disability presentation and history. Additionally, to address the question of IEP implementation, the team must consider and review data on IEP implementation fidelity, including whether the student received all services and accommodations as designed (34 CFR § 300.530(e)(1)).

32. How does the team determine if the district failed to implement the IEP?

To address the question of IEP implementation, the team must consider and review data on IEP implementation fidelity, including whether the student received all services and accommodations as designed. It is not enough for the district to not uncover a lack of fidelity; rather the LEA should have documentation to support the IEP was carried out as written, including evidence that staff were made aware of all services and accommodations within the IEP and evidence that services were provided at the rate and frequency described.

33. When conducting an MDR, what is the "behavior in question"?

The behavior in question is the specific incident that led to the change in placement.
If the change in placement occurs from removal of more than 10 consecutive school days, the behavior in question is the specific infraction for which the child is being disciplined.

34. If the change in placement occurs from a series of removals that constitute a pattern (see Question 6), the behavior in question is the most recent behavior that is substantially similar to prior behavior. When would an IEP team determine that the behavior was a manifestation of the student's disability? In what scenario is the answer to the MDR question "yes"?

Two scenarios exist under which the MD would be "yes." These scenarios are when the conduct:

- Had a direct and substantial relationship to the child's disability; or
- Was the direct result of the LEA's failure to implement the child's IEP (34 CFR § 300.530(e)(1)).

If either condition is met, the student's violating conduct must be determined to be a manifestation of his or her disability [34 CFR §300.530(e)(2)-(3)]. In other words, the manifestation determination is "yes."

However, it matters which of the two conditions was the basis for the determination of "yes." If the group determines the child's violating conduct 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." If such a determination is made the 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).

35. If the behavior is a manifestation, what happens with the student's placement?

Unless the behavior involved one of the special circumstances—weapons, drugs, or serious bodily injury (34 CFR § 300.530(g))—the child would be returned to the placement from which he or she was removed as part of the disciplinary action. However, the parent(s) and LEA can agree to a change of placement as part of the modification of the behavioral intervention plan (BIP) [34 CFR § 300.530(f)(2)].

36. What is the team required to do to address the student's behavior and avoid future suspension?

If the group finds 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." The following two pieces of documentation are required whenever the child's violating behavior is determined to be a manifestation of the disability:

- Functional Behavior Assessment (FBA) – Has the child had one? Does one need to be conducted? An FBA focuses on identifying the function or purpose behind a child's violating behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental, etc.). Knowing why a child exhibits a problematic behavior is directly helpful to the IEP Team in developing a BIP that will change the behavior. 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 an FBA of the child unless one has already been conducted.
- Behavior Intervention Plan (BIP) – The BIP is considered part of a child's IEP. Does the child have a BIP? If so, does it need to be reviewed and revised? Or if the child does not have a BIP, does one need to be written? 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, the IEP team will need to review the plan and modify it, as necessary, to address the problem behavior (34 CFR § 300.530(f)).

The team must also address the behavior through other components of the IEP. 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. Proper development of the child's IEP should include development of strategies, including positive behavioral interventions, supports, and other strategies to address that behavior (71 Fed. Reg. 46720-21).

37. If the behavior *is not* a manifestation, what happens with the student's placement?

A MD of "no" means either that:

- The child's violating behavior was not caused by or did not have a direct and substantial relationship to the child's disability; and
- The child's violating 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 a child with a disability in the same manner, and for the same duration, as the procedures would be applied to a child without a disability, except—and this is very important—for whatever special education and related services the school system is required to provide the child with a disability under 34 CFR § 300.530(d).

Providing Services During Removal

38. When do LEAs have a duty to provide services?

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 allow the child to participate in the general curriculum required under 34 CFR § 300.530(d).

39. How does the LEA provide services to a student on the 11th day of removal?

When a child's removal for disciplinary reasons is considered a change of placement under 34 CFR § 300.536, the child's IEP team determines what services the child will receive. These services are to enable the child to continue participating in the general curriculum, although in another setting, and to continue to progress toward meeting IEP goals [34 CFR § 300.530(d)(5)]. The IEP team also determines if the child will be placed in an Interim Alternative Educational Setting (IAES) to receive those services and what the IAES will be. The team must decide which of the student's IEP services will be provided, where they will be provided, who will provide them, and how they will be provided. It's important for this information to be documented and clearly communicated to staff, parents, and the student.

Discipline Protections for Students Not Yet Identified

A student who has not been determined to be eligible for special education and related services under IDEA Part B 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. [34 CFR § 300.534(a)].

40. When is a school district deemed to have knowledge that a student is a student with a disability, even if they are not yet eligible?

A school district is deemed to have knowledge that a student is a student with a disability if:

- 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;
- The parent of the student has requested an evaluation of the student pursuant to this article; or
- 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. [34 CFR § 300.534(b)].

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. [34 CFR § 300.534(c)].

41. What happens if the district does not have knowledge that a student is a student with a disability before the removal occurs?

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 section. [34 CFR § 300.534(d)(1)].

42. What happens if parents request an evaluation following a student's disciplinary removal?

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. [34 CFR § 300.534(d)(2)].

South Dakota Codified Laws
South Dakota Law Chapter 13-32: Supervision of Students and Conduct of School

South Dakota Administrative Rules

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