



Information UPDATE

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TO: District Administrators, CESA Administrators, CCDEB Administrators, Directors of Special Education and Pupil Services, and Other Interested Parties

FROM: Carolyn Stanford Taylor, Assistant State Superintendent
Division for Learning Support

SUBJECT: Manifestation Determination (Revised 01/2024)

One of the key steps in disciplinary proceedings involving a student with a disability is the manifestation determination. Since this process may not occur on a regular basis in many local educational agencies (LEAs), there are frequent questions about the requirements of the manifestation determination process. For further information on discipline and students with disabilities, and on addressing the behavioral needs of students with disabilities, please refer to Information Update 06.02 and the department's webpage on functional behavioral assessment at sped.dpi.wi.gov/sped_sbfba.

1. What is a manifestation determination?

A manifestation determination is the process used to determine whether the behavior that resulted in the proposed disciplinary change of placement is a manifestation or result of the student's disability. Manifestation determinations are only required when the proposed disciplinary action is to change the student's current placement.

If the behavior is a manifestation of the student's disability, then except under limited circumstances discussed in question 6, the LEA cannot unilaterally proceed with changing the student's placement. The parent and the LEA, however, could agree to a change of placement.

Behavior is determined to be a manifestation of a student's disability if:

- the conduct in question was caused by or had a direct and substantial relationship to the student's disability; **or**
- the conduct in question was a direct result of the LEA's failure to implement the student's individualized education program (IEP).

The behavior is a manifestation of the student's disability if either one of the above conditions apply. This is determined on a case-by-case basis, and the analysis is dependent upon the particular circumstances involved. For example, if as part of the disability, a student has difficulty with impulse control, the team may consider whether the incident involved an impulsive action or whether the actions demonstrated planning and forethought. *See Traverse City Area Public Schools, 45 IDELR 47 (SEA MI 2005).*

2. Who conducts the manifestation determination?

The manifestation determination must be made by a representative of the LEA, parent, and other relevant members of the student's IEP team. The parent and the LEA decide which members of the IEP team are "relevant." For the purposes of this bulletin, the group of people conducting the manifestation determination is referred to as "the team."

While not required by law, Wisconsin LEAs often conduct manifestation determination reviews through the IEP team process because the IEP team is required to make other decisions that are related and may be discussed during the meeting. For example, if the conduct is a manifestation of the student's disability, the IEP team is required to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP), or if one has previously been developed, review and revise it as necessary to address the behavior.

3. When must an LEA conduct a manifestation determination?

A manifestation determination must occur whenever an LEA decides to change the student's placement because of a violation of the code of student conduct. A disciplinary change of placement occurs when the student's removal is for more than 10 **consecutive** school days (10 school days in a row) or when a series of removals constitutes a **pattern**.

When a student has been removed for more than 10 **cumulative** school days during the school year, the LEA must determine whether there is a **pattern of removals** that constitutes a change in placement. A series of removals constitute a pattern when:

- the student has been removed for more than 10 **cumulative** school days in a single year;
- the behavior is substantially similar to previous incidents; **and**
- other additional factors are considered, such as the length of each removal, the total amount of time removed, and the proximity of the removals to one another.

After the student has been removed for more than 10 cumulative school days, the LEA must review each subsequent removal to determine if a pattern of removals exist. The decision as to whether there is a pattern of removals is made on a case-by-case basis by the LEA. If the parent disagrees with the LEA's decision as to whether there is a pattern of removals, then the parent may request a due process hearing, mediation, or file an Individuals with Disabilities Education Act (IDEA) complaint.

In *Rolla 31 School District*, 111 LRP 51355 (SEA MO 2011) a hearing officer in reviewing a LEA's decision, held that 14.6 days of removal over a seven month period did not constitute a pattern of removals. The hearing officer based this decision on findings that the behavior was not substantially similar, as one suspension was for insubordination, others were for leaving the school early, and yet other suspensions were for physical aggression. The hearing officer also found that the removals were not in close proximity to each other and were for a relatively short time. However, in *Lewiston Public Schools*, 110 LRP 17745 (LEA ME 2009), a pattern was found to exist when a student was removed for 58 days during the school year, the removals were in close proximity to each other, and most of the removals were for behavior relating to noncompliance.

The Department of Public Instruction (DPI) recommends if a student is removed for several days, even if a manifestation determination is not required, the IEP team should meet to review the IEP goals, services, and positive interventions, supports, and strategies to determine if they are effective in meeting the student's behavioral needs, and revise the IEP if necessary.

4. When there is a pattern of removals, is a manifestation determination required before proceeding with a suspension?

Yes. If the student has been already removed for 10 cumulative school days within the school year, prior to proceeding with the suspension, the LEA must first determine whether there is a pattern of removals that constitutes a disciplinary change of placement. See question 3. If the LEA determines there is a pattern of removal, the student must remain in their current placement until the LEA, the parent, and relevant members of the child's IEP Team hold the manifestation determination review. If the IEP team determines the student's behavior is a manifestation of the student's disability, the LEA cannot move forward with the suspension.

5. What is the timeline for completing the manifestation determination?

A manifestation determination must be completed **within 10 school days** of any decision to change the student's placement because of a violation of the student code of conduct.

"School days" is defined as any day, including a partial day, that children are attending school for instructional purposes. Days during which summer school programs are operating are counted toward school days. However, days during which only extended school year (ESY) services are being provided do not count as a "school day." See *Letter to Cox, Office of Special Education and Rehabilitative Services*, June 22, 2012.

The date of the decision would be:

- when the LEA decides to remove the student from the student's current placement due to disciplinary reasons for more than 10 consecutive school days; or
- when the LEA determines the pattern of disciplinary removals constitutes a change in placement.

For example, if a student violated a code of student conduct on October 7, 2014, and on that date, the LEA decides to move toward expulsion and sends out a notice of expulsion, the date the LEA decided to "remove the student from the student's current placement" would be October 7, 2014. It would not be the date of the expulsion hearing.

6. What if the parent is not available or refuses to attend the manifestation determination within 10 school days?

The 10 school day timeline may not be extended. The LEA must schedule the meeting at a mutually agreeable time and place. If a parent is unable to attend the meeting in person, the LEA must take steps to allow the parent to participate in alternate ways. For example, the LEA could arrange for parent participation via a conference telephone call or other alternative means.

If the LEA is unable to secure parent participation, the LEA must move forward and still conduct the manifestation determination within the 10 school day time frame. The LEA must document at least three reasonable attempts to schedule a meeting at a mutually agreeable time and place.

7. May the LEA direct the IEP team to change the student's placement?

No, the LEA cannot direct the IEP team to change the student's placement because of a disciplinary infraction. The requirement to conduct a manifestation determination cannot be circumvented. Any time a student's placement is changed because of a violation of a code of conduct, a manifestation determination

must be conducted. If it is determined that the behavior is a result of the student's disability, then the student must be returned to the student's placement prior to removal unless one of the exceptions applies. An exception would be if the incident involves a weapon, drugs, or serious bodily injury, if the parent and LEA agree to a change of placement through the IEP team process, or if ordered by a hearing officer.

8. Can a student's placement ever be changed if it is determined that the behavior was a manifestation of the student's disability?

Yes, under limited circumstances. As discussed above, a parent and the LEA can agree to a change of placement.

Additionally, an LEA may unilaterally remove the student to an Interim Alternative Educational Setting (IAES) for:

- carrying or possessing a weapon at school, on school premises, to or at a school function;
- knowingly possessing or using illegal drugs while at school, on school premises, or at a school function;
- selling or soliciting the sale of a controlled substance, while at school, on school premises, or at a school function; or
- inflicting serious bodily injury upon another person while at school, on school premises, or at a school function.

The removal to an IAES cannot be for more than 45 **school** days, unless the LEA, through a due process hearing, requests an extension because returning the student is substantially likely to result in injury to the student or to others.

If the incident does not involve weapons, drugs or serious bodily injury but school officials believe that maintaining the current placement is substantially likely to result in injury to the student or others, the LEA may request a change of placement through a due process hearing. When a due process hearing has been requested, the student remains in the IAES pending the decision of the hearing officer, or until the time specified for the disciplinary change of placement ends, whichever comes first. The hearing must be expedited.

Finally, nothing under special education law prohibits a LEA from reporting a crime committed by a student with a disability, or prevents state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to the crimes committed.

9. How are weapons, drugs, or serious bodily injury defined?

"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 two and one half inches in length. Metal awls used in leatherworking and sharp adult-sized scissors have been identified as weapons under this definition, whereas children's scissors with dull blades, paper clips, and pencils have not been considered weapons because they are not readily capable of causing death or serious bodily injury.

"Illegal drug" means a controlled substance unless the controlled substance is legally possessed and used pursuant to a prescription. For example, Ritalin is a "controlled substance," but is not an illegal drug if it is possessed or used pursuant to a prescription. Ritalin is an illegal drug if possessed or used without a prescription. The term also includes what is commonly thought of as illegal "street drugs" such as marijuana,

cocaine, methadone, heroin, et cetera. Alcohol, tobacco, and over-the-counter medications, are not considered illegal drugs or controlled substances under this definition.

"Serious bodily injury" means bodily injury that involves: a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. Hearing officers require a high threshold to be met in determining whether the injury is serious. Therefore the injury must be more than a cut, limited pain, brief dizziness, or a bruise. A broken nose, a sprain, and a swollen knee have not been considered serious bodily injuries.

Factors used to determine serious bodily injury include the amount and degree of medical care, whether pain medication is required, and the inability to work. For example, it was not considered a serious bodily injury when a staff member, after being hit by a student, was given no pain medication, and returned to work the next day, even though the staff member reported discomfort, disorientation, and rated pain a seven on a scale of one to 10. *See In re Student with a Disability*, 54 IDELR 139 (SEA KS 2010). In contrast, a teacher was considered to have a serious bodily injury when she was hit in the chest. The hearing officer found that the teacher experienced an extreme amount of pain as demonstrated by her conduct after the incident. The teacher quickly sought medical care, was diagnosed with an internal chest contusion, was prescribed two medications that failed to resolve the pain, saw physicians multiple times, and missed a week of work. The teacher also rated her pain as a 10 on a scale of one to 10. *See In re Westminster School District*, 56 IDELR 85 (SEA CA. 2011).

10. Does an LEA have to conduct a manifestation determination when a student is removed to an Interim Alternative Educational Setting (IAES) for a violation involving weapons, drugs, or serious bodily injury?

Yes, the LEA must conduct a manifestation determination. However, when the disciplinary removal is for weapons, drugs, or serious bodily injury, the student may remain in an IAES for not more than 45 school days, even if the behavioral incident was a manifestation of the student's disability. The IEP team determines the services and whether the services will be received. The district may, through a due process hearing, request that the time be extended if returning the student is substantially likely to result in injury to the student or to others.

11. Must the LEA conduct a manifestation determination when the student violates a "deferred expulsion agreement" because of another behavioral incident?

Yes. Sometimes a LEA will agree to defer an expulsion if certain conditions are agreed upon by the student and parent. If a student returns to school and then violates the expulsion agreement, the LEA must conduct a manifestation determination regarding the new incident before reinstating the expulsion. Reinstatement of the expulsion constitutes a disciplinary change of placement.

12. What information must the team consider during a manifestation determination?

To determine whether the conduct is a manifestation of the student's disability, the team must review all relevant information in the student's file including the student's IEP, any teacher observations, and any additional relevant information provided by the parents. This list is not exhaustive and all relevant information must be considered. For example, a hearing officer found that a LEA did not properly conduct a manifestation determination when it failed to consider all pertinent information, including the student's medical diagnoses and medications. *In re Student with a Disability*, 52 IDELR 239 (SEA W.V. 2009).

13. What happens when the team determines the behavior is a manifestation of the student's disability?

If the behavior is found to be a manifestation of the student's disability, the IEP team must conduct a FBA, unless one has been conducted before the behavioral incident, and implement a BIP to address the student's behavioral needs. However, if a BIP has already been developed, then the IEP team must review the BIP and modify, as necessary, to address the behavior.

The student must also be returned to the placement from which he or she was removed unless the parent agrees to a change of placement, the code of conduct violation involves weapons, drugs, or serious bodily injury, or a hearing officer orders a change of placement. *See question 7.*

14. What if the behavior is found not to be a manifestation of the student's disability?

If the behavior is not a manifestation of the student's disability, the student may be disciplined in accordance with the disciplinary procedures followed for non-disabled students under similar circumstances.

The student must continue to receive educational services in order to continue to progress in the general curriculum, although in another setting, and to progress toward meeting his or her IEP goals. The IEP team determines the services and the setting(s) in which the services will be provided. The LEA maintains the responsibility to provide a free appropriate public education (FAPE) to the student.

The student must also receive, as appropriate, a FBA and BIP using positive behavior interventions and supports designed to address the conduct so it does not recur.

15. Are there circumstances where a student has not been identified as a student with a disability but a manifestation determination is required?

Yes. If an LEA is "deemed to know" that a student is a student with a disability, then the disciplinary protections under special education law apply, and a manifestation determination is required, even if the student has not been determined eligible for special education.

The school is deemed to have knowledge that a student is a student with a disability if **before** the behavior occurred:

- The parent expressed concern **in writing** to supervisory or administrative personnel, or a teacher of the student, that the student is in need of special education and related services;
- The parent of the student requested a special education evaluation; or
- A teacher of the student, or another staff member, expressed specific concerns about a pattern of behavior demonstrated by the student directly to the special education director or other supervisory personnel.

Under federal special education law, the "deemed to know" provisions do not apply when:

- The parent did not provide consent for a special education evaluation of the student;
- The parent refused special education and related services for the student;
- The student has been evaluated and determined not to be a student with a disability; or
- The parent revoked consent for special education and related services.

In these instances, the student is subject to the same disciplinary measures applicable to students without disabilities.

16. What if the student was removed for disciplinary reasons and was then referred for special education evaluation?

If a referral is made for a special education evaluation after the incident that prompted the disciplinary removal, the evaluation must be conducted in an expedited manner. Unless the “deemed to know” provisions apply, the student remains in the placement determined by the school district while the evaluation is being completed. This can include serving a suspension or expulsion without receiving educational services.

If the student is determined to be a child with a disability, the school district must then provide educational services so as to enable the student to continue to participate in the general educational curriculum and to progress toward meeting the goals set out in the student’s IEP for the remainder of the removal.

See question 14 for information about the “deemed to know” provisions.

17. What if the parent disagrees with the manifestation determination?

If a parent disagrees with the manifestation determination, the parent may utilize any of the three dispute resolutions options under state and federal special education law: mediation, due process hearing, or IDEA state complaint.

Mediation

Mediation is available at no cost to parents or LEAs, and is voluntary for both parties. If the parties reach an agreement through the mediation process, the agreement will be put in writing, signed by the parties, and a copy of the agreement is given to each party. The agreement is legally binding. A request for mediation services can be submitted by fax or email to the Wisconsin Special Education Mediation System (WSEMS). The request should include a brief description of the dispute and identify both parties. The form to request mediation, and other relevant information, is available online at <http://www.wsems.us/wp-content/uploads/2014/04/requestformmediation14-04-16.pdf>.

Due Process Hearing

A request for a due process hearing must be submitted to the LEA and a copy of the request must be sent to DPI. When the hearing request involves disagreement with a manifestation determination, the hearing must be expedited. The LEA must hold a resolution meeting within seven calendar days of receiving notice of the due process complaint, unless the parents and LEA agree in writing to waive the resolution meeting or agree to use the mediation process. The hearing must be conducted within 20 school days from when the hearing request is filed, and a decision must be issued within 10 school days following the hearing. The hearing officer's decision is final unless appealed in state circuit court or federal district court. A due process hearing request form, and other relevant information, is posted online at http://sped.dpi.wi.gov/sped_dueproc.

"Stay put" does not apply to disciplinary removals. The student remains in the setting to which he or she was removed until the hearing is completed or until the original removal period expires, unless the parent and the LEA agree otherwise.

IDEA State Complaint

The parent may also file an IDEA state complaint with DPI. The manifestation determination must have occurred within one year prior to the date the complaint is received. The party filing the complaint must forward a copy of the complaint to the LEA serving the student at the same time the party files the complaint with DPI. Complaints must be in writing and must be signed. DPI has developed a model form for a complainant to use at http://sped.dpi.wi.gov/sped_complain (click on “model form”). The department must investigate a complaint and issue a written decision within 60 days.

18. Are there similar manifestation determination requirements for students with 504 plans?

Yes. The Office of Civil Rights (OCR) has interpreted Section 504 of the Rehabilitation Act as requiring a manifestation determination when there is a significant disciplinary change of placement. *See Dunkin (MO) R-V Sch. Dist.*, 52 IDELR 138 (OCR 2009).

For further information about Section 504, please contact the Office for Civil Rights, or visit OCR’s website at <http://www2.ed.gov/policy/rights/guid/ocr/disability.html>.

Wisconsin residents are served by the Region V office, located at 500 W. Madison St., Suite 1475, Chicago, Illinois 60661, and available by phone at (312) 730-1560, fax at (312) 730-1576, TDD at (312) 730-1609, or email at ocr.chicago@ed.gov.

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