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Disability, Discipline and Due Process

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ROAD MAP

- ☐ What is Legal Services NYC?
- ☐ History of the Manifestation Determination Review (MDR)
- ☐ Why are MDRs Important for Students, Staff, and School Community?
- ☐ When is an MDR Required?
- ☐ Conducting a Proper MDR
- ☐ Possible MDR Determinations
- ☐ What is a Functional Behavior Assessment and Behavior Intervention Plan?
- ☐ Meeting the Needs of Students with a Disability in an Interim Alternative Education Setting
- ☐ Other Interventions to Address Behaviors

INTRODUCTORY MATTER

This presentation will provide information but is not legal advice. If you are seeking legal advice, please contact your school district for specific advice and policies.

A photograph of a busy New York City street at sunset. The scene is filled with tall, multi-story buildings lining the street. The sun is low on the horizon, creating a warm, golden glow and long shadows. Pedestrians are walking across the street, and cars are visible in the background. The overall atmosphere is one of a bustling urban environment.

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What is Legal Services NYC?

LEGAL SERVICES NYC

- ☐ Not for profit legal services organization
- ☐ Offices across all boroughs
- ☐ Provides free civil legal services to low-income residents of NYC
- ☐ Website: <https://www.legalservicesnyc.org/>
- ☐ Helpline number: 917-661-4500

EDUCATION RIGHTS PROJECT AT LEGAL SERVICES NYC

Our team may be able to help families to:

- ☐ Advocate for students with disabilities
 - Ensure students receive proper evaluations, and services including appropriate 1:1 instruction, and mental health supports
 - Provide support at IEP meetings
 - File impartial hearings
- ☐ Assist students facing exclusionary removals
- ☐ Support improvements to school climate such as healing centered school practices
- ☐ Assist with transfers, school transportation and charter school issues;
- ☐ Ensure NYC DOE staff are providing language access and communicating with families in their primary language

History of the Manifestation Determination Review (MDR)

HISTORICAL BACKGROUND

- ❑ Congress passed the Education for All Handicapped Children Act (EHA) in 1975 and the law did not include MDR provisions.
- ❑ The EHA's “stay put” provisions were read to prohibit expulsion and long term suspension of students with special needs. This was to counteract the prevalence of students with disabilities (SWD) being excluded from their communities and being “warehoused.”
- ❑ In 1980, the U.S. Education Department's Office of Civil Rights adopted the position that suspending a SWD for up to 10 school days is permissible as it did not amount to a “change in placement.”

DISCIPLINARY DUE PROCESS IN THE 1980s



- ❑ In 1980, the U.S. Education Department's Office of Civil Rights adopted the position that suspending a SWD for up to 10 school days is permissible as it did not amount to a "change in placement."
- ❑ The US Supreme Court declined to read a "dangerousness" exception into the "stay put" provision and held that school districts may not unilaterally exclude a SWD for more than ten school days. See Honig v. DOE, 484 U.S. 305 (1988)

DISCIPLINARY DUE PROCESS IN THE 1990s

- ❑ Congress renamed EHA as the Individuals with Disabilities Education Act (IDEA) in 1990.
- ❑ Amendments to the IDEA in 1997 expanded the ability of districts to remove SWD:
 - ❑ Changes made to balance the Local Educational Agency's (LEA) obligation to provide a safe school environment conducive to learning with the LEA's mandate to provide a FAPE and due process for the student.
 - ❑ Created the manifestation determination review (MDR) process for districts to determine when a child's behavior was a manifestation of their disability and then subject to removal.
 - ❑ "Placement in Alternative Educational Setting" 20 U.S.C. § 1415(k) was created.

DISCIPLINARY DUE PROCESS IN THE 2000s

- ❑ Amendments in 2004 narrowed the definition of a disciplinary change of placement and thus, when a MDR must be held.
- ❑ Expanded authority of school districts to remove a SWD to an Interim Alternative Educational Setting (IAES) for up to 45 school days.
 - ❑ LEAs can seek a hearing officer to order a SWD to be placed in an IAES or
 - ❑ LEAs can unilaterally remove a SWD to an IAES for specific types of conduct, *regardless* of whether the conduct is a manifestation of the child's disability.

REMOVAL TO IAES FOR CERTAIN CONDUCT

A district can remove a SWD to an IAES for conduct that occurred at school or school function involving possession or use of weapons or drugs, or inflicting serious bodily injury, regardless if the conduct is a manifestation.

- Weapons are defined as a *dangerous weapon* “...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 2½ inches in length.”
- Drugs are defined as “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.”
- Serious bodily injury is defined as “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...”

Why are MDRs Important for Students, Staff and the School Community?

WHAT IS THE PURPOSE OF SCHOOL REMOVAL?

Commonly accepted that suspensions and expulsions are intended to provide consequences for a student's action in hopes to:

- 1) Deter future action;
- 2) Teach the student accountability, and/or
- 3) Further school safety.

Research shows that discipline (especially long-term suspensions):

- Does not deter but instead may even increase behavior;
- Exacerbates student disengagement/disconnectedness from the school community;
- Force students into disciplinary hearing process that incentivizes students to not admit to behavior or mistakes;
- Does not lead to improved school climate.

* See the American Institutes of Research's report here: <https://www.air.org/project/less-more-effects-suspension-and-suspension-severity-behavioral-and-academic-outcomes>

LOST OPPORTUNITY FROM IMPROPER MDRs

- ☐ School staff are often not trained on how to properly conduct Manifestation Determination Reviews (MDRs) as required by the Individuals with Disabilities Education Act (IDEA).
- ☐ As a result, students with disabilities who are suspended often are denied the opportunity to receive meaningful services to prevent the disability-related behaviors from recurring.
 - ☐ critical special education interventions
 - ☐ supports
 - ☐ related services

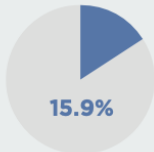
NATIONAL SUSPENSION DATA & DISPROPORTIONALITY

2017-18 OVERVIEW OF STUDENT DISCIPLINE K-GRADE 12

Students with disabilities include students served under the Individuals with Disabilities Education Act (IDEA) and students served only under Section 504 of the Rehabilitation Act of 1973 (Section 504).

50,922,024

OVERALL STUDENT
ENROLLMENT

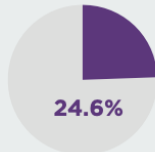


Enrollment
of Students with
Disabilities

N=8,108,190

8,108,190

STUDENTS WITH DISABILITIES,
6,728,046 SERVED UNDER
IDEA AND 1,380,144 SERVED
UNDER SECTION 504

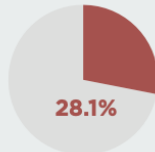


In-School
Suspensions
of Students with
Disabilities

N=645,987

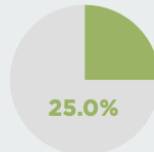
3,145,559

MISSED DAYS OF SCHOOL BY
STUDENTS WITH DISABILITIES
DUE TO OUT-OF-SCHOOL
SUSPENSIONS



Out-of-School
Suspensions
of Students with
Disabilities

N=704,523

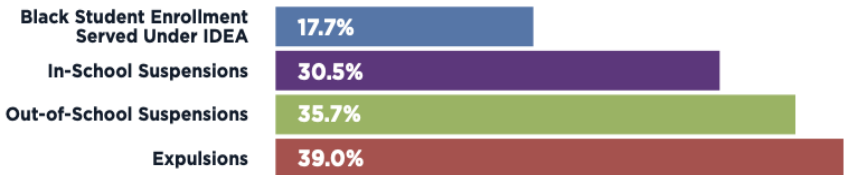


Expulsions
of Students
with Disabilities

N=25,414

STUDENT DISCIPLINE BY DISABILITY & RACE/ETHNICITY

Black students were the only race/ethnicity of students **with disabilities served under IDEA** whose boys and girls were both **disproportionately represented** in suspensions and expulsions.



In addition to Black boys and girls, American Indian or Alaska Native boys and multiracial boys also received suspensions and expulsions that exceeded their share of enrollment among students with disabilities.

*U.S. DOE Office of Civil Rights Suspensions & Expulsions of Students with Disabilities in Public Schools
<https://www.ed.gov/media/document/discipline-of-students-disabilities-part-3pdf-21510.pdf>

IMPORTANCE OF MDRS

- ☐ Historical Context: warehouse and exclusion of students with disabilities.
- ☐ Disproportionate high rates of suspension.
- ☐ Failure to address lack of appropriate services for students leads to behavior continuing.
- ☐ Improperly conducted MDRs can lead to further distrust between the school staff and families.

MDRs CAN FURTHER ACCOUNTABILITY & SAFETY

MDRS when done properly can:

- ☐ Allow for meaningful discussion of the context and cause of the behavior.
- ☐ Allow for review of the student's breadth of disability related behavior and discussion of whether further evaluation is necessary of emerging conditions.
- ☐ Prompt discussion of what services and support will help the student to develop skills to avoid and reduce future behaviors that make for an improved class environment.
 - Ex: OT for building sensory tolerance
 - Ex: Updated plans for reward systems and replacement behaviors
 - Ex: Counseling for emotional regulation and impulse control skills
- ☐ Opportunity for school officials and parent to work together & build rapport to address student's behavior.

When is an MDR Required?

WHO IS ENTITLED TO PROTECTION?

- ❑ Students identified as having disabilities
 - Students who have been referred and found eligible for special education services (IEP) or services under Section 504 of the Rehabilitation Act of 1973.
- ❑ Students suspected of having a disability
 - Parent has expressed concern in *writing* to school official that the student may need special education services.
 - Parent has requested special education evaluations for the student (typically done in *writing*).
 - Teacher or other school personnel expressed concerns in *writing* about the student's behavior to school officials or the CSE

WHEN A SCHOOL DISTRICT IS DEEMED NOT TO KNOW

Students are not entitled to protections if:

- Parent refused to consent to special education evaluations;
- Parent has refused special education services; or
- The IEP team determined the student is not a student with a disability under IDEA or Section 504 of the Rehabilitation Act.



CASE EXAMPLE

- ❑ The student is in middle school. The student previously had an IEP for an emotional disability and was placed in an integrated co-teaching classroom with a general education teacher and special education teacher. At the start of this school year, the parent refused the IEP and asked that his daughter no longer receive services as she was doing very well academically and wanted her in more challenging classes.
 - ❑ This month, she has gotten in trouble for chasing after girls in the hallways after an argument during which she accidentally bumped into a school staff member. The staff member had no injuries. The school suspended her for 10 school days for bumping the school staff member.
 - ❑ The father then requests a new special education evaluation for his daughter in writing. A week later, the student faces suspension again for throwing markers and book after an argument with a student.
- *Does the school district need to hold an MDR?*

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Conducting a Proper MDR

WHEN TO CONDUCT AN MDR

An MDR must be conducted within ten school days of a disciplinary change in placement (DCP). According to the IDEA, a DCP occurs when:

- A student is removed from class for more than ten (10) consecutive school days; OR
- A student is subjected to a series of removals that result in the student being excluded from class for more than ten (10) school days in the school year and removals constitute a “pattern”.

No “pattern” required in NYC public schools if a student is removed 3 or more times in a forty (40) school day period and the removals total more than 10 school days. [*EB v NYC DOE*, 02 CV 5118].

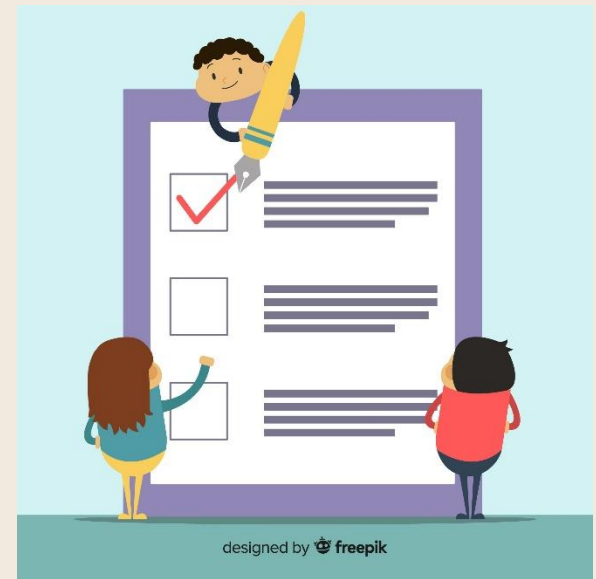
WHAT INFORMATION IS TO BE REVIEWED?

Information in the students file (current and past) that help the MDR team understand what are the student's disabling conditions, including:

- ☐ Individualized education programs (IEPs)
- ☐ Teacher observations
- ☐ Evaluation reports
- ☐ Behavior plans
- ☐ Incident reports

Any information provided by the parent such as:

- ☐ Private evaluation reports
- ☐ Medical or therapist opinions (in writing or in-person)



DETERMINING THE BEHAVIOR

- ☐ The IDEA requires a district representative, the parent/caregiver and other relevant members of the IEP team (as determined by the district and the parent) attend the MDR meeting.
- ☐ At the MDR meeting, attendees should only discuss the behaviors that caused the disciplinary change in placement.
- ☐ Attendees at the MDR meeting should not discuss issues that should be appealed through the suspension hearing process.

HOW DOES THE MDR GET DECIDED?

MDR members may discuss the issues in advance as long as they come to the table with an open mind.

- *See* Fitzgerald v. Fairfax County Sch. Bd., 556 F.Supp.2d 543, 558 (E.D.Va. 2008) citing Doyle v. Arlington Co. Sch. Bd., 806 F.Supp. 1253 (E.D.Va. 1992), *aff'd* 39 F.3d 1176 (4th Cir. 1994).

School districts often provide the MDR team with a worksheet to guide them through the meeting and to arrive at a decision. The decision should be based on the MDR team's review of the information at the meeting. Parent has a right to challenge the decision through an expedited due process hearing.

SAMPLE MDR WORKSHEET



MANIFESTATION DETERMINATION REVIEW WORKSHEET

Meeting Date: _____ SOHO Case #: _____
Student Name: _____ Student OSIS: _____
Date of Birth: _____ Current School: _____

Please reference the [Standard Operating Procedures Manual for Special Education Services](#) section on Students with Disabilities Subject to Discipline (SOPM) while completing this Worksheet.

Complete this Worksheet in paper or electronically in SOHO at the MDR meeting. If the Worksheet is completed in paper at the meeting, the contents must be entered into SOHO within 24 hours of the meeting.

Include a response for all questions. Answers to these questions must be determined at the MDR meeting and must include the contributions of all meeting participants, including the parent(s) if present.

MANIFESTATION DETERMINATION REVIEW TEAM

Enter names and other relevant information for all individuals present at the meeting. It is recommended that at least two school staff members attend the MDR meeting. The following people must participate in the MDR in person, unless otherwise indicated:

- A representative of the school district knowledgeable about the student and the interpretation of information about the student's behavior (e.g., school psychologist, social worker, guidance counselor);
- The parent (the parent may participate in person or by phone); and
- Other individuals as determined by the school district and/or the parent (other individuals may participate by phone if necessary).

Name (and Signature)	Title	By Phone (Y,N)
Required member		

MDR WORKSHEETS

NYC Department of Education

<https://www.schools.nyc.gov/docs/default-source/default-document-library/mdr-worksheet.pdf>

Pennsylvania Department of Education

<https://www.pattan.net/assets/PaTTAN/c5/c5d751e7-42e6-47f9-a177-0d6b41434be0.pdf>

Black Hawk Area Special Education District

<https://bhased.org/wp-content/uploads/2017/08/9-B-Manifestation-Determination-Review-Worksheet.pdf>

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Possible MDR Determinations

MDR DETERMINATIONS

- ❑ Positive Determination: Behavior is a manifestation of the student's disability, the suspension ends and student must be returned to his or her placement. A Functional Behavior Assessment (FBA) must be done with Behavioral Intervention Plan (BIP) created or updated.
- ❑ Negative Determination: Behavior is not a manifestation, the student may be suspended in the same manner as a non-disabled student. You can also still request appropriate evaluations for the student.
 - Interim Alternative Educational Setting (IAES) exception – 45 SCHOOL days.

POSITIVE DETERMINATIONS

The MDR team must find behavior is a manifestation if:

- ☐ the behavior that led to the disciplinary change in placement was caused by or had a direct and substantial relationship to the student's disability,
OR
- ☐ the behavior was the direct result of a failure to implement the student's IEP.

Some school districts provide additional protections in addition to the above.

MISAPPLICATION OF THE STANDARD FOR THE MDR

- ❑ Did the team allow other factors to determine the outcome?
- ❑ MDR teams often misapply the standard by focusing exclusively on:
 - The child's classification. (e.g.: is the classification “Emotionally Disturbed”).
 - Whether the child knows right from wrong.
 - Whether the act was pre-meditated.
 - Whether the child could have predicted the consequences of their actions.
 - Whether the child has exhibited the same behavior in the past.
 - Whether the child shows remorse.
 - Whether the child “needs to learn a lesson.”
 - Whether the child's reality testing is intact.

CHARTER SCHOOLS

- ❑ Charter schools must have discipline procedures that are consistent with due process and the discipline procedures contained in IDEA and federal regulations.
- ❑ In NYS, child's school district of residence is the LEA for purposes of IDEA compliance. (NYC LEA is NYCDOE)
- ❑ Charter schools must notify the school district's Committee on Special Education (CSE) of any removals that trigger the right to an MDR. (In NYC, the CSE where Charter School is located conducts the MDR).
- ❑ The charter school may request the LEA initiate a due process hearing to obtain an order changing the placement of a child to an IAES where continuing the current placement is substantially likely to result in injury to the child or others.

See 34 C.F.R. §§ 300.2 and 300.209; NY Educ. Law § 2851(2)(h).

STATE APPROVED NON-PUBLIC SCHOOLS

NY State approved non-public schools must comply with Part 201 of the NY State Regulations, which include the right to a manifestation determination review when a child is subject to a disciplinary change in placement.



See 8 NYC.R.R. § 200.7(b)(3).

What is a Functional Behavior Assessment and Behavior Intervention Plan

FUNCTIONAL BEHAVIOR ASSESSMENT (FBA)

- ❑ An FBA is the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment.
- ❑ Assists IEP team to identify positive interventions to modify the behavior to incorporate for a meaningful behavior intervention plan (BIP).

FBA PROCESS

- ❑ Process involves direct (student observations) and indirect (interviews) assessments of the child's behavior.

- A – Antecedents:

What happens before the behavior that may trigger the behavior?

- B – Behaviors Identified:

When does the behavior happen? For how long? What exact behavior occurs?

- C – Consequences:

What reinforces behavior to become a pattern in the classroom? What response stops the behavior?

BEHAVIOR INTERVENTION PLAN (BIP)

- ❑ A BIP is a plan that is based on the results of an FBA and, at a minimum, includes
 - a description of the problem behavior,
 - hypotheses as to why the problem behavior occurs and
 - intervention strategies to address the behavior.
- ❑ Typically involves prevention strategies and replacement behaviors to modify the target behavior.
- ❑ BIP becomes part of the student's IEP.
- ❑ BIP must be followed consistently to ensure effectiveness.

EXAMPLES OF BIP OR IEP INTERVENTIONS

Overall, you can think creatively of what both works well for the student and your school resources.

For behaviors related to task avoidance:

- Assessing for underlying learning disabilities (Ex: dyslexia or reading disabilities)
- Behavioral momentum strategies, prompts to encourage student repeating their strengths, reminders of why they are asked to do the tasks.

For behaviors related to seeking attention:

- Scheduled check-ins and/or breaks, update of reward systems, & seating of students.

Meeting the Needs of Students with a Disability in an Interim Alternative Education Setting

EDUCATIONAL PLACEMENT ISSUES

- ☐ During first 10 schools days of exclusion the student must be provided with continuing educational programming or alternative instruction to the same extent as non-disabled students.
- ☐ Beginning on the 11th day of exclusion, student must be provided educational services that enable him/her to appropriately progress in the general education curriculum and advance towards the goals set out in the IEP.
- ☐ Your district may require creating a “Suspension Plan”
- ☐ If a student has been excluded for more than 10 days in the school year before the MDR is completed, the student must be reinstated while the MDR is pending.
[Chancellor’s Regulation A-443 § II.C]

Other Interventions to Address Behaviors

PEER CONFLICT & BULLYING

- ☐ Consideration of whether a bullying or harassment investigation is needed.
- ☐ Assessing whether intervention is needed between students to address conflict.
 - If students are open to speaking with each other, consider mediation or restorative circles.
 - If not, is a safety plan needed including consideration of seating or grouping.
 - Counseling in a group format to address social emotional skills. (e.g.: Practicing social situations and possible alternative actions they can take).
 - Encouragement of extra curricular activities.
- ☐ If occurring outside of school, is the student facing safety concerns? Is transportation assistance needed?

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Thank you!

Any Questions?