
U.S. Department of Education Releases Guidance on Disciplining Students with Disabilities

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The U.S. Department of Education's Office for Civil Rights (OCR) issued [guidance](#) reinforcing the obligations of public elementary and secondary schools to provide the services, supports, interventions, strategies, and modifications to policies, all to address disability-based behavior of students with disabilities, including behavior that could lead to discipline. Considering the significant challenges students with disabilities have faced and will continue to face due to the COVID-19 pandemic, the OCR's guidance addresses strategies by which schools can and should avoid the discriminatory use of discipline of students with disabilities. This article outlines the areas of concern highlighted by the OCR's guidance.

The Disparate Discipline of Students with Disabilities

There is no question that school districts have an obligation to respond to emergencies and support students in learning how to be accountable for the impact of their actions on others. Students with disabilities are not exempt from the rules of student conduct; however, the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibit a school from discriminating against students on the basis of their disability.

By law, school districts are required to accurately track and report data regarding their use of behavior restraints and seclusion, and are required to separate these incidents based on student race, ethnicity, gender, and disability. School districts must also ensure that any private schools or institutions they contract with are also tracking this information. Data collected under the OCR's Civil Rights Data Collection (CRDC) program continues to highlight the notable disparities in the use of school discipline for children with disabilities compared to their non-disabled peers and for children of color with disabilities compared to all other students with disabilities. For example, the data showed that for the 2017-2018 school year, while students with disabilities made up only 13.2% of total enrolled students in public schools, they comprised 80.2% of the students subjected to physical restraint and 77.3% of students subjected to seclusion. Additionally, during the 2019-2020 school year, Black children with disabilities made up 17.2% of students with disabilities ages 3-21, yet they accounted for 43.5% of all students with disabilities ages 3-21 who were expelled or suspended for more than 10 school days. Recent audits have shown that many school districts have underreported and misreported restraint and seclusion data, suggesting that the number of disciplinary removals of students with disabilities may be even higher.

Changes in Placement and the Manifestation Determination

In order to protect students with disabilities from discriminatory punishment, a student's Individualized Education Plan (IEP) or Section 504 team must evaluate whether the behavior for which the student is being disciplined is a result of their disability or a result of the school's failure to implement the student's IEP or 504 plan. This "manifestation determination" review process must take place before a school may implement a disciplinary removal of the student from their current placement, either through expulsion or a suspension of over 10 school days. If, after reviewing all the information, the team concludes that the student's behavior for which they are being disciplined was a manifestation of their disability, the school may not carry out any disciplinary action that would significantly change the student's placement. Instead, the team must determine whether additional or different services, such as behavioral supports, or a change in the educational setting are needed in order to ensure the student is receiving a free appropriate public education (FAPE) and that their behaviors no longer interfere with their ability to learn. If, however, the team finds that the student's behavior was not a manifestation of their disability, the school may discipline the student so long as it does so in the same manner as students without disabilities.

Informal Removals May Also Qualify as a Disciplinary Change in Placement

Disciplinary changes in placement may also be triggered with more informal removals from school, such as shortened school days, in-school suspensions, or bus suspensions. Actions such as these that are taken as disciplinary measures could be considered a denial of FAPE unless the student: 1) is afforded the opportunity to continue to appropriately participate in the general curriculum; 2) continues to receive the services specified in their IEP or 504 plan; and 3) continues to participate with nondisabled students to the same extent as in the student's current placement.

A Child's Right to FAPE During a Threat or Risk Assessment Process

If a school chooses to conduct a risk or threat assessment of the student, it should ensure that any personnel involved in the screening are also made aware that the student has a disability and that there is an obligation to ensure the student receives a FAPE. These disciplinary procedures also apply to children ages 3-5 who receive a FAPE in a preschool setting.

Takeaways

The COVID-19 pandemic has resulted in several student-related challenges, including mental health issues and learning loss. Despite these challenges, it remains a school district's responsibility to ensure that students with disabilities continue to receive a FAPE. The OCR's new guidance urges school districts to identify ways to better prepare and develop educators—including administrators, teachers, and service providers—to implement effective, preventative, and responsive practices in place of exclusionary discipline

and to utilize strategies to ensure students with disabilities receive a FAPE. IEP and Section 504 teams should take a proactive approach in addressing a student's behavioral needs and not wait until the manifestation determination review process to determine whether changes in the student's services, supports, or placement are required to ensure the student receives a FAPE.

Client News Brief

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