Navigating School Discipline and Juvenile Justice Matters for Children with Disabilities

Ninth Annual National PACER Symposium About Children & Young Adults with Mental Health and Learning Disabilities

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WHO ARE WE?
The past two decades have witnessed a widespread reliance on suspension and expulsion as swift sanctions to disruptive classroom behavior.

Increasingly, punishment is being applied to a broad range of student behavior that was once seen as disorderly or disruptive, even as overall levels of school and youth violence declined.

Who is Most Affected by School Expulsions, Out-of-School Suspensions, and Referrals to the Juvenile Justice System?

- Children with disabilities that impair behavior
- Children of color
- Low-income children
- Children with ineffective or costly educational programs
Students with disabilities are suspended at twice to four times the rate of their non-disabled peers.


*Education Interrupted: The Growing Use of Suspensions in NYC’s Public Schools*, New York Civil Liberties Union (January 2011).

NATIONAL COMPARISON OF RISKS OF BEING SUSPENDED

![Bar chart showing the comparison of risks of being suspended between students with disabilities and students without disabilities.](chart.png)

- Students with Disabilities:
  - Suspended Just Once: 6.6
  - Suspended Two or More Times: 3.9

- Students without Disabilities:
  - Suspended Just Once: 6.5
  - Suspended Two or More Times: 2.7
USE OF OUT-OF-SCHOOL SUSPENSIONS BY RACE AND DISABILITY 2009-10


A student who is suspended or expelled is twice as likely to repeat his or her grade compared to a student with the same characteristics, attending a similar school, who had not been suspended or expelled.

Students who have been suspended are three times more likely to drop out by the 10th grade than students never suspended.


www.tcrecord.org/Content.asp?ContentId=688
Dropping out of school triples the likelihood that a person will be incarcerated.


[www.juvjustice.org/media/resources/resource_122.pdf](http://www.juvjustice.org/media/resources/resource_122.pdf)
Disproportionate Incarceration of Students with Disabilities

- In general population: 10% of youth have disabilities.
- Of incarcerated youth:
  - 30-50% with disabilities
  - 20-50% with ADHD
  - 50% with mental health
  - 25% with fetal alcohol effects
Sixty-eight percent of students ages 12–18 reported in 2009 the presence of security guards or police officers in their schools.

Research has found security strategies, such as the use of security guards and metal detectors, to be consistently ineffective in protecting students and to be associated with more incidents of school crime and disruption and higher levels of disorder in schools.

Research suggests that the presence of school resource officers...has engendered concern that schools are criminalizing student behavior by moving problematic students into the juvenile justice system rather than disciplining them at school.
WHAT DO THE EXPERTS SAY?
...[P]olicies that require suspension or expulsion for certain behaviors put many students with disabilities outside of the education setting, apart from educators who could help address their needs. Further, discipline practices that restrict access to appropriate education often exacerbate the problems of students with disabilities....

The American Psychological Association:

“Legislative initiatives should encourage schools and school districts to provide an array of disciplinary alternatives prior to school suspension and expulsion and, to the extent possible, increase resources to schools for implementing a broader range of alternatives, especially prevention.”
“Although it seems intuitive that removing disruptive students from school will make schools better places for those students who remain, or that severe punishment will improve the behavior of the punished student or of those who witness that punishment, the available evidence consistently flies in the face of these beliefs.”

The increasing use of disciplinary sanctions such as in-school and out-of-school suspensions, expulsions, or referrals to law enforcement authorities creates the potential for significant, negative educational and long-term outcomes, and can contribute to what has been termed the “school to prison pipeline.”

It's time we heed the research and implement non-punitive measures to address student behavioral issues.

Stop the Train While we Repair the Tracks!
INDEPENDENT SCHOOL DISTRICT NO.
284 v. A.C., 258 F.3d 769, 775-76
(8TH CIR. 2001)

“Read naturally and as a whole, the law and the regulations identify a class of children who are disabled only in the sense that their abnormal emotional conditions prevent them from choosing normal responses to normal situations”
“...A child whose disabling condition manifests itself in disruptive conduct is exempted, to a degree, from normal disciplinary procedures.”
“While Education Department regulations do permit children with disabilities to be suspended from school under some circumstances...the Department also instructs schools that suspension or expulsion is not normally appropriate as a first-line response to behavior problems resulting from a student's disability, even if the conduct in question violates school rules.”
“Instead, the student's IEP team should address the behavior in the first instance, using suspension and other disciplinary measures only if appropriate.”
Advocacy Objectives

- Enforce schools’ obligation to address behavioral issues as educational needs.
- Reduce the risk of future school-initiated criminal referrals.
Avoid criminal records that can impair employment, licensing and housing opportunities.

Restore students to a school community in which they feel they belong and will be supported and successful.
Sources of Legal Rights

United States Constitution

• 14th Amendment
• 8th Amendment
Federal Laws

- The Individual with Disabilities Education Act
- Section 504 of the Rehabilitation Act of 1973
- The Americans with Disabilities Act
STATE LAWS

• Special Education Laws
• Human Rights Laws
• Corporal Punishment Laws
• Involuntary Transfer Laws
The 14th Amendment of the United States Constitution protects against deprivation of life, liberty or property without due process of law.
○ Students have a property interest in their public education.

○ Students have a liberty interest in their good reputation.
A public school district may take neither a student’s property interest in her public education nor her liberty interest in her good reputation without due process of law.

Even a brief suspension from public school invokes the requirement of due process.
Dwight Lopez (and 75 other students) were suspended 10 days for a lunchtime anti-war protest.

Ohio law allowed principals to suspend for up to 10 days without a hearing.
“Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.” (emphasis added).
However, the Court did not “put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.”
The 8th Amendment of the United States Constitution

Excessive Fines Clause protects against excessive and disproportionate deprivation of a property interest.
The purpose of the Eighth Amendment was, in part, to limit the government's power to punish.

The Excessive Fines Clause of the Eighth Amendment limits the government's power to extract payments, whether in cash or in kind, as punishment for an offense.
When a school district suspends or expels a student for a minor offense, such a disproportionate penalty can violate the 8th Amendment.
Federal Laws

- *Individuals with Disabilities Education Act* guarantees a free appropriate public education in the least restrictive environment.

- Provides the clearest, most express protections against inappropriate discipline.
Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in education and guarantees equal access to programs and benefits.

Protections in discipline are implied, but not express.
The Americans with Disabilities Act is similar to Section 504.

No express discipline protections, though reasonable accommodations of a disability is a right.
How Does the IDEA Protect a Student with a Disability in Disciplinary Matters?
IDEA

Six Major Principles

- Timely and fair evaluation
- Free appropriate public education
○ Least restrictive environment

○ Individualized education program

○ Cooperative Team process

○ Procedural safeguards
1. EVALUATIONS

School districts must identify and appropriately evaluate any student within the district known to or suspected of having a disability and who needs special education and related services.

20 U.S.C. §1412(a)(3)
Evaluation must be full and individual and sufficiently comprehensive to determine disabilities and needs.

20 U.S.C. § 1414(a-b)
Pre-Identified Students

Students not yet identified as eligible can assert *any* of the protections of the IDEA under certain circumstances.

20 U.S.C. § 1415(k)(5)
If a student violates a school rule, and

If the school has “knowledge” of the disability before the violation occurred.
What Provides a Basis of Knowledge?

- A Parent expressed concern in writing to teacher or administrator about the need for special education.
The parent requested special education evaluation.

A teacher or other personnel “expressed specific concerns about a pattern of behavior” directly to supervisory personnel.
Exceptions

No knowledge if:

- The parent has refused an evaluation or services, or
- If the child has been evaluated and determined ineligible.
The child may be subject to standard disciplinary measures consistent with right to an expedited evaluation and special education if eligible, but in the disciplinary placement.
Critically important under IDEA: The right to stay put in the current educational placement.
RIGHT TO STAY PUT

During pendency of due process proceedings (and appeals) the child remains in the current educational placement unless parents agree otherwise.

20 U.S.C. § 1415(j)
Exceptions

- Under circumstances where an expedited hearing must be provided.
- When parent challenges short-term (< 10 school days) removal.
When a parent challenges a manifestation determination.

When parent challenges long-term (>10 school days) removal and behavior is not a manifestation of disability.
When drugs, weapons or serious bodily injury are involved.

However, stay-put provision prohibits schools from unilateral exclusions of students with disabilities even for many kinds of dangerous or disruptive conduct.
SCHOOLS ARE NOT HAMSTRUNG

They can use “normal procedures” like study carrels, timeouts, detention, the restriction of privileges, and short-term (<10 school days) suspensions.
Take-Away

- Assert protections of pre-identified students to stay-put while an expedited special education evaluation is provided.

- Best source of “basis of knowledge” evidence is disciplinary records of administrator.
2. **FREE APPROPRIATE PUBLIC EDUCATION**

- Special education and related services at public expense.
- Meets State education standards.
- Includes an appropriate preschool, elementary, or secondary program.
- Provided in conformity with proper IEP.

20 U.S.C. § 1401 (9)
GENERAL RULE

A free appropriate public education is available to all students with disabilities including those “who have been suspended or expelled from school.”

24 U.S.C. § 1412(a)(1)(A)
When is a Suspended or Expelled Student with a Disability Entitled to Resume Instruction?

On day 11 of removal from instruction.
Why Day 11?

- Because it is considered a disciplinary change of placement.

- Removals for > 10 consecutive days are always a change of placement.
Pattern of removals for < 10 total days are sometimes a change of placement (partial days count).

Factors to consider include: similarity to prior behavior, length of each removal, total amount of time removed, proximity of removals.
WHAT SERVICES ARE TO BE PROVIDED?

Educational services to enable participation in general education curriculum and progress towards meeting IEP goals.
WHAT ELSE HAPPENS ON DAY 11?

- Manifestation Determination
- Functional Behavior Assessment (FBA)
- Behavior Intervention Plan (BIP)
MANIFESTATION DETERMINATION

WHEN IS IT DONE?

Within 10 days of the disciplinary change of placement decision.

WHO PERFORMS IT?

The parents and relevant members of the IEP Team.
What is involved?

A review of all relevant information in the student’s file, including the IEP, any teacher observations, and parent information.
Why is it done?

- To decide whether the behavior was caused by or had a direct and substantial relationship to the disability, or

- To decide whether the behavior was the direct result of failure to implement the IEP.
IF BEHAVIOR IS a MANIFESTATION OF the STUDENT’S DISABILITY

- A functional behavioral assessment must be conducted.

- A behavioral intervention plan must be implemented or an existing plan must be reviewed and modified as necessary to address the behavior.
The student must be returned to the placement from which removed, except when drugs, weapons, or bodily injury are involved, or parents agree to change of placement.
IF THE BEHAVIOR IS NOT A MANIFESTATION OF THE STUDENT’S DISABILITY

The student is subject to standard discipline but is still entitled to a FAPE, an FBA and a BIP.
FUNCTIONAL BEHAVIORAL ASSESSMENT

- Not defined in IDEA.
- May be defined in state law or rule.
- Process for gathering information to maximize the efficiency of behavioral supports.
Includes a description of the problem behaviors and the identification of events, times, and situations that predict the occurrence and nonoccurrence of the behavior.
Also identifies antecedents, consequences, and reinforcers that maintain the behavior, possible functions of the behavior, and possible alternative behaviors.
Includes a variety of data collection methods and sources that facilitate the development of hypotheses and summary statements regarding behavioral patterns.

Minn. R. 3525.0210, subp. 22
Behavioral Intervention Plan

- Not defined in IDEA.

- Objective is clearly stated: “to address the behavior violation so that it does not recur.”
Take-Away

- Return students to school ASAP.
- Treat suspensions as program failures.
- Fix the underlying problems.
- Bolster the program
- Bring in outside help.
3. Least Restrictive Environment

- Education with non-disabled peers to the maximum extent appropriate.

- Removals from regular education only when nature or severity of the disability prevents satisfactory regular education with supplementary aids and services.

20 U.S.C. § 1412(a)(5)
Out of school without instruction or supervision is the most restrictive and riskiest placement.
When behavior impedes learning, the IEP Team must “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.”

Make sure that the child’s eligibility label is correct.

If the child is having behavioral problems, seek a behavioral label, e.g. ED or OHI.
BUILDING AN IEP DISCIPLINARY SHELTER

Build into the child’s IEP information on current functioning which documents problems with:

- Behavior
- Social skills
- Self-esteem
- Understanding and following rules
- Controlling impulses
- Making appropriate choices

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BUILDING AN IEP DISCIPLINARY SHELTER

- Provide a hierarchy of interventions and disciplinary responses so school has options other than punishment or exclusion.

- Build into the IEP procedures for contact with the parent if there are any serious behavioral problems.

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Building an IEP Disciplinary Shelter

- Request that a parent be present if child is going to be questioned about serious behavioral issues.

- IEP should make all behavioral incident reports promptly available to parents.
Building an IEP Behavioral Shelter

- Write behavioral goals relating to the problem behavior.
- Develop a behavior plan that teaches behavior skill and rewards positive behavior.

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BUILDING AN IEP BEHAVIORAL SHELTER

- Create a review/monitoring component to make sure the plan is working and to adjust it as needed.

- Incorporate in the plan strategies to avoid, as well as those to use.

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BUILDING AN IEP BEHAVIORAL SHELTER

- Identify and incorporate positive interventionists, i.e. individuals who will advocate for your child.

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BUILDING AN IEP BEHAVIORAL SHELTER

- Identify mentors/advocates in school and provide for the ability for child to seek them out.

- Identify and make available ways child can access self-calming strategies or environments.

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Practice Tips

- Create feedback loop to review interventions meant to avoid the need for disciplinary removals.

- Build a process into the IEP to reassemble IEP Team when there is a pattern of removals.
**Practice Tips**

- Seek to assign the task of determining disciplinary consequences to the IEP Team, the case manager, or school personnel sensitive to disability-related behaviors and needs.
**Practice Tips**

- Present levels of performance should clearly identify predictable, disability-related behaviors.
PRACTICE TIPS

If suspensions indicate or cause a lack of expected progress towards IEP goals and in the general curriculum, the IEP Team should review and revise the IEP.

5. COOPERATIVE TEAM PROCESS

- Teams plan evaluations.
- Teams determine eligibility.
- Teams develop the IEP.
Teams decide on services.

Teams review and revise the IEP.

Teams decide placement.
Teams decide whether progress is adequate.

Teams make any significant change to the program or placement.

Teams **must** include parents, and parents are integral to the team process.
The IEP creates the foundation for Team authority and flexibility to meet the behavioral needs of the child.
6. PROCEDURAL SAFEGUARDS

- Parents may examine *all* education records.
- Parents participate in meetings.
- Parents participate in *any* placement decisions.
Parents may obtain independent educational evaluations.

Parents must receive written prior notices of proposals or refusals.

Hearings available on any matter regarding identification, evaluation, placement or a FAPE.
Approaches to Challenging Referrals to the Juvenile Justice System

Consider the criminal referral in the context of the school system’s overall response to the student’s behavioral manifestations and needs.

Use the IDEA as the source of an obligation to make an individualized determination that particular behavior is a “crime” before making referrals.
Characterize the resort to police and juvenile court as an impermissible circumvention of IDEA provisions regarding students deemed “dangerous.”
Examine referrals in the context of disability discrimination under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, targeting the manner in which schools exercise judgment in characterizing behavior as a “crime.”
Ensure that calls to the police are for immediate assistance in a bona fide emergency, where child’s behavior presents an immediate, substantial physical danger to self or others that cannot be abated through the individualized crisis prevention and intervention services required under the law.
Best Practices to Avoid Disciplinary Removals and Referrals to the Juvenile Justice System

- Positive behavioral supports and social skills training
- Early intervention
In-school suspension

Adult mentors

Teacher support teams

*Fair and Effective Discipline for All Students: Best Practice Strategies for Educators*, National Association of School Psychologists (2002.)
School-wide positive behavior programs that focus on prevention and positive school climate.

Best Practices to Avoid Disciplinary Removals and Referrals to the Juvenile Justice System
- Positive reinforcement for appropriate behavior and social skills training

- A decision-making framework for discipline that includes a variety of discipline alternatives
Best Practices to Avoid Disciplinary Removals and Referrals to the Juvenile Justice System

- Active involvement of parents and related professionals
- Staff training, especially in the area of classroom management
Positive teacher-student interactions

Engaging instruction
PERRY’S STORY

- 14 year old African-American male
- Special education for 4-5 years
- Eligible as E/BD with ADHD diagnosis
Evaluations and IEP focused on behaviors

Segregated specialty school for students with severe behaviors

Attended largest school district in Minnesota
No progress on academic, social or behavioral skills

12 referrals from school for assault and disorderly conduct

No referrals from the community
- No functional behavior assessment
- No positive behavior intervention plan
- Reading at a second grade level
- Writing at a kindergarten level
Perry’s Excellent Outcome

- Administrative hearing requested

- Motion to continue juvenile delinquency charges granted to get to the source of the problem at the source of the solution.
INDEPENDENT EDUCATIONAL EVALUATION REVEALED:

- Primary disability: a severe developmental language disorder
- Functions of behavior: escape/avoidance and attention
FBA CONCLUDED:

- History of school failure caused a behavioral reaction to school itself.

- Mistaken identification impeded performance at school.

- Use of police interventions to address behavior should be discontinued.
Neuropsychology Evaluation Concluded:

- School program mistakenly focused exclusively on behavior and ignored significant learning disability.
- As the gaps between his skills and his peers’ widened, behavior problems increased.
- Recommended educational services to avoid the need for continued reliance on the juvenile justice system.
The IEE demonstrated that contact with the juvenile justice system was the result of chronically failed special education programming.

Court records confirmed that all contact with police occurred in the school setting.
Since the school improved the IEP and provided more appropriate special education services, there were no further allegations of delinquent behavior.
“In the present case, public safety is ensured by the school district’s providing the appropriate special education services. The forum most competent to address these issues is the administrative process under IDEA, and not juvenile court.”
“Therefore, the court finds that a dismissal of all charges in the interests of justice is appropriate to serve both the interests of the child and the protection of public safety.”
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