



Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973

**U.S. Department of Education
Office for Civil Rights**

July 2022



400 MARYLAND AVE. S.W.
WASHINGTON, DC 20202-1100
www.ed.gov

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Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student
Discipline Under Section 504 of the Rehabilitation Act of 1973

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**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

THE ASSISTANT SECRETARY

July 19, 2022

Dear Colleague:

I write to share information for schools, school districts, State officials, parents and guardians, and students about how Section 504 of the Rehabilitation Act of 1973 (Section 504), a Federal civil rights law that prohibits discrimination based on disability, applies to the use of student discipline.¹

This guidance² describes schools' responsibilities under Section 504 to ensure nondiscrimination against students based on disability when imposing student discipline.³ Specifically, the guidance explains how compliance with Section 504's requirement to provide a free appropriate public education (FAPE) to students with disabilities can assist schools in effectively supporting and responding to behavior that is based on a student's disability and that could lead to student discipline. By using Section 504's procedures to identify and meet the behavioral, social, emotional, and academic needs of students with disabilities as required for FAPE, schools can help prevent or reduce behaviors that might otherwise result in discipline. As the guidance explains, when schools do choose to administer discipline for students with disabilities, they must do so in a nondiscriminatory manner.

Schools need not choose between keeping their school community—including students and school staff—safe or complying with the law. Schools are required not to discriminate against students with disabilities on the basis of disability, a responsibility that extends to the conduct of everyone with whom the school has a contractual or other arrangement, such as school district

¹ 29 U.S.C. § 794; 34 C.F.R. pt. 104. The Office for Civil Rights (OCR) enforces Section 504 for all programs and activities that receive Federal financial assistance from the U.S. Department of Education (Department), including those of public elementary and secondary schools, local educational agencies, State educational agencies, preschools, and private schools that receive such assistance.

² The Department has determined that this Dear Colleague Letter is significant guidance under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), <https://www.federalregister.gov/documents/2007/01/25/E7-1066/final-bulletin-for-agency-good-guidance-practices>. If you are interested in commenting on this guidance, please email us your comment at OCR@ed.gov or write to us at the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202. For further information about the Department's guidance processes, please visit <https://www2.ed.gov/policy/gen/guid/significant-guidance.html>.

³ This guidance is issued to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that the Department enforces. The Department's legal authority is based on those laws. Except for the underlying statutory or regulatory requirements referenced in this Dear Colleague Letter, this significant guidance is nonbinding and does not create or impose new legal requirements. Instead, it provides information and examples to inform recipients about how the Department evaluates whether covered entities are complying with their legal obligations.

police officers or school resource officers. Nothing in Section 504, however, prohibits a school from responding to emergency circumstances or from taking appropriate, nondiscriminatory steps to maintain safety while supporting students learning how to be accountable for the impact of their actions on others. As the guidance explains, when a student's behavior is based on disability, including when the behavior significantly impairs other students' education or threatens the safety of the student or others, the student's Section 504 team is responsible for considering the impacts of the behavior on others when determining the appropriate placement for the student. This consideration could result in a change to the educational setting for the student with a disability or in a change to the student's services or supports to more effectively address the behavior and ensure safety. Furthermore, Section 504 FAPE requirements do not interfere with a school's ability to address extraordinary situations in which a student's behavior, including disability-based behavior, is an immediate threat to their own or others' safety, such as by contacting crisis intervention specialists or law enforcement. Complying with Section 504's general nondiscrimination and FAPE requirements helps to ensure an educational environment that is nondiscriminatory, supportive, positive, inclusive, productive, and safe for all.

OCR appreciates schools' many efforts to support and respond to students' behavioral needs in order to prevent the use of student discipline, and, when discipline is used, to implement disciplinary policies, practices, and procedures fairly and consistent with all Federal civil rights laws.⁴ Nonetheless, OCR's continued enforcement experience reflects that many students with disabilities face discipline because they are not receiving the support, services, interventions, strategies, and modifications to school or district policies that they need to manage their disability-based behavior. Additionally, many students with disabilities are subjected to discrimination based on their disability when being disciplined, such as when students with disabilities are unnecessarily disciplined more severely than students without disabilities for the same or similar behavior.

OCR is committed to ensuring equal access to education for all students and to promoting educational excellence at the nation's schools through the vigorous enforcement of students' civil rights. An important part of our mission is to ensure that students are not denied equal educational opportunity or subjected to discrimination based on their disabilities, including through the improper use of discipline.

I look forward to working with you to achieve this shared goal.

Sincerely,

/s/

Catherine E. Lhamon
Assistant Secretary for Civil Rights

⁴ In addition to Section 504, OCR enforces other Federal laws that prohibit discrimination based on disability, race, color, national origin, sex, and age. For OCR guidance on topics under these laws, please visit <http://www.ed.gov/ocr>.

TABLE OF CONTENTS

I.	Introduction: Setting the Foundation	1
	A. The Scope of Section 504’s Coverage	2
	B. Section 504 and the IDEA	3
II.	Providing FAPE to Students with Disability-Based Behavior	4
	A. General Overview of FAPE in the Context of Students with Behavioral Needs	6
	B. FAPE Requirements Applicable to Student Discipline.....	13
III.	Reasonable Modifications to Disciplinary Policies for Students with Disabilities	24
IV.	Section 504’s General Prohibition of Disability Discrimination in Student Discipline – Different Treatment and Discriminatory Effects	27
	A. Unnecessary Different Treatment	27
	B. Discriminatory Effects of a School’s Disciplinary Criterion, Policy, Practice, or Procedure	30
V.	Multiple Bases of Discrimination and Intersectional Discrimination.....	32
VI.	Conclusion	32

Appendix: Glossary of Key Terms and Acronyms Used in this Guidance

I. INTRODUCTION: SETTING THE FOUNDATION

This guidance focuses on schools' obligations to meet the needs of students with [disability-based behavior](#) as required by Section 504 and on other steps schools must take to avoid discrimination on the basis of disability when disciplining students.¹ The hypothetical examples in this guidance are intended to be illustrative of selected principles, and not an exhaustive discussion of principles that may affect the outcome of any OCR case. The examples in this guidance do not determine the outcome of any particular set of facts, as OCR assesses the facts of each case individually and applies the law to those facts.

- ❖ Section I explains the scope of Section 504's coverage and the relationship between Section 504 and Part B of the [Individuals with Disabilities Education Act](#) (IDEA).
- ❖ Section II explains the responsibility of public elementary and secondary schools² to provide a [free appropriate public education](#) (FAPE),³ and how doing so may help prevent or reduce the need for discipline of students with disabilities who have behavioral needs.
- ❖ Section III explains schools' responsibility to provide reasonable modifications⁴ to their policies, practices, or procedures necessary to avoid disability discrimination.
- ❖ Section IV discusses schools' responsibility to avoid discrimination in the context of discipline, including discrimination based on stereotypes, generalizations, or assumptions about an individual's disability.⁵
- ❖ Section V explains that students with disabilities may experience discrimination on multiple bases or intersectional discrimination.

¹ 29 U.S.C. § 794; 34 C.F.R. pt. 104. While the focus of this guidance is on schools' duties under Federal law, some practices mentioned in this guidance—such as corporal punishment, seclusion, and some forms of restraint—may be prohibited under State laws, and this guidance should not be viewed as authorizing their use in violation of law.

² This guidance uses the terms *school* and *school district* as shorthand for ease of reading, but the requirements discussed in this guidance apply to the programs and activities of all public elementary and secondary schools, school districts, and State educational agencies that receive Federal financial assistance from the Department of Education (Department). 34 C.F.R. §§ 104.1, 104.2, 104.4, 104.32-104.36. Preschools may not exclude qualified persons with disabilities and must consider the needs of qualified persons with disabilities when determining the aid, benefits, or services provided. 34 C.F.R. § 104.38. Private elementary and secondary schools that receive Federal financial assistance are subject to the requirements of 34 C.F.R. § 104.39. Some statutes administered by the Department require State and public school district recipients to provide what are known as "equitable services" to students placed by their parents in private school. *See, e.g.*, 34 C.F.R. §§ 300.132, 300.137, 300.138. Such recipients may not assist private schools that discriminate based on disability against beneficiaries of the recipient's programs. 34 C.F.R. § 104.4(b)(1)(v); *see* 34 C.F.R. pt. 104, App. A, ¶ 1. However, the Department does not consider the provision of equitable services to students and their families to be Federal financial assistance to the private school that would otherwise make the private school a recipient subject to Section 504. *Id.*

³ *See* 34 C.F.R. § 104.33(a), (b)(1).

⁴ 34 C.F.R. § 104.4. OCR notes that the Department of Justice (DOJ) interprets requirements under Section 504 consistently with those under Title II of the Americans with Disabilities Act (Title II). *See* 28 C.F.R. § 35.130(b)(7) (Title II regulation requiring reasonable modifications where necessary to avoid disability discrimination).

⁵ 34 C.F.R. §§ 104.4; 104.33(a), (b); 104.34(a)-(c); 104.35(a)-(c). *See Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 134 (D. Mass. 1997) (" . . . Section 504 specifically prohibit[s] discrimination . . . based on thoughtlessness, apathy and stereotypes about disabled persons.").

- ❖ The Appendix includes a [Glossary](#) of common terms and acronyms used in this guidance.⁶

As discussed throughout the guidance, nothing in Section 504 prohibits schools from responding to emergency circumstances or from taking appropriate, nondiscriminatory steps to maintain school safety while supporting students learning how to be accountable for the impact of their actions on others.

A. The Scope of Section 504's Coverage

Section 504 applies to elementary and secondary public schools (including public charter schools and State-operated schools), public school districts, State educational agencies (SEAs), and private schools and juvenile justice residential facilities⁷ that receive Federal financial assistance⁸ from the Department, referred to in this guidance as [recipients](#), whether they receive the Federal financial assistance directly from the Department or indirectly through another recipient.⁹ Section 504 prohibits recipients from discriminating against a “qualified [person with a disability](#)”¹⁰ on the basis of disability in the recipients’ Federally assisted [programs or activities](#).¹¹ For instance, a recipient SEA must ensure that public schools and districts in the State do not discriminate based on disability.¹² Thus, recipients may not discriminate against a [qualified student with a disability](#) in their programs and activities, including in connection with policies, procedures, and practices related to student discipline.¹³ Additionally, a school’s inappropriate use of [mechanical](#), [physical](#), or other restraints (referred to collectively in this guidance as

⁶ As noted in the Glossary, except where terms are directly from a statute or regulation that OCR enforces, or OCR’s Civil Rights Data Collection (CRDC) definitions, the terms and acronyms in the Glossary are offered to assist the reader only for purposes of clarity in this guidance, are not intended to apply more broadly, and are not binding in any way. The CRDC collects data on leading civil rights indicators related to access and barriers to educational opportunity from preschool through 12th grade.

⁷ For more information about the civil rights responsibilities of juvenile justice facilities, please refer to U.S. Dep’t of Just. & U.S. Dep’t of Educ., *Dear Colleague Letter: Civil Rights in Juvenile Justice Residential Facilities* (Dec. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-residential-facilities-201412.pdf>.

⁸ Another Federal law, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134, and DOJ’s implementing regulations for Title II, 28 C.F.R. pt. 35, prohibit disability discrimination by State and local governments, regardless of whether they receive Federal funds. OCR shares with DOJ responsibility for enforcing Title II with regard to public educational institutions. 28 C.F.R. § 35.190(b)(2); 28 C.F.R. §§ 35.172–35.174. This guidance focuses on Section 504’s requirements; for more information about Title II, see DOJ’s [ADA.gov](#) website.

⁹ 34 C.F.R. §§ 104.2, 104.3(f), (h). Recipients include entities to which Federal financial assistance from the Department is extended directly or through another recipient. 34 C.F.R. § 104.3(f). Other entities, such as postsecondary education institutions and organizations that provide before- or after-school programming, that receive Federal financial assistance from the Department are subject to Section 504, including its general nondiscrimination requirements; this document does not focus on the Section 504 responsibilities of those other recipients.

¹⁰ 29 U.S.C. § 794(a); 34 C.F.R. pt. 104.

¹¹ 34 C.F.R. § 104.3(k)(1)-(4). OCR also enforces the following laws that apply to the programs and activities of recipients of Federal financial assistance: Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., 34 C.F.R. pt. 100 (Title VI); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., 34 C.F.R. pt. 106 (Title IX); and the Age Discrimination Act, 42 U.S.C. § 6101 et seq., 34 C.F.R. pt. 110.

¹² See 34 C.F.R. § 104.4(a), (b)(1)(i)-(v), (vii), (b)(4); 34 C.F.R. pt. 104, App. A, ¶ 1; see also 34 C.F.R. § 104.5; OCR, *Assurance of Compliance—Civil Rights Certificate*, <https://www2.ed.gov/about/offices/list/ocr/letters/boy-scouts-assurance-form.pdf>.

¹³ 34 C.F.R. §§ 104.3(l)(2), 104.4.

“restraints”) or use of [seclusion](#) in response to student behaviors could deny the student FAPE or constitute disability discrimination, as explained in prior OCR guidance.¹⁴

Recipients must ensure that their employees and all who participate in providing the recipients’ educational program or activity under a contractual, licensing, or other arrangement do so in a nondiscriminatory manner.¹⁵ Section 504 prohibits a recipient from indirectly engaging in conduct through a contractual, licensing, or other arrangement that would be discrimination if the recipient engaged in the conduct directly.¹⁶ The responsibility not to discriminate includes a duty for recipients to ensure their own policies, practices, and procedures do not directly cause, or indirectly result in, disability discrimination by other entities that participate in the recipient’s educational program or activity through a contractual, licensing, or other arrangement.¹⁷

A school’s responsibility not to discriminate against students with disabilities applies to the conduct of everyone with whom the school has a contractual or other arrangement, such as lunch or recess monitors, cafeteria staff, bus drivers, security staff, private security companies or other contractors, school district police officers, or school resource officers (SROs). Schools cannot divest themselves of their nondiscrimination duty by relying on such personnel when the personnel operate under a contract or other arrangement, such as a memorandum of understanding.¹⁸ Recipients have a responsibility not to discriminate in, among others, the following activities related to student discipline: questioning a student with a disability and investigating allegations of a violation of school rules; issuing tickets, citations, and fines for violations of school rules, such as truancy; using surveillance technologies; conducting searches of students with disabilities and their property; making referrals of students with disabilities to law enforcement, including referrals that result in school-related arrests; and initiating or carrying out threat or risk assessments of students with disabilities.¹⁹

B. Section 504 and the IDEA

Schools have certain overlapping responsibilities under Section 504 and Part B of the IDEA, which is a Federal law that makes special education and related services available to children who are eligible for FAPE as defined by the IDEA.²⁰ The IDEA and its implementing regulations establish

¹⁴ See OCR, *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities* (Dec. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf>.

¹⁵ 34 C.F.R. § 104.4(a), (b)(1) (prohibiting discrimination on the basis of disability, whether “directly or through contractual, licensing, or other arrangements”), (b)(4).

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ To learn more about recipients’ obligations under Section 504 more generally, please refer to OCR’s *Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools*, <https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf> (Section 504 Resource Guide).

²⁰ Part B of the IDEA, which applies to students in preschools, elementary schools, and secondary schools between the ages of 3 and 21, requires schools to provide FAPE, as defined by that law, to IDEA-eligible students. 34 C.F.R. §§ 300.17, 300.101, 300.102. In some instances, the IDEA uses the same terminology as Section 504, but defines the terms differently. See, e.g., 34 C.F.R. §§ 300.15 (IDEA definition of evaluation), 300.17 (IDEA definition of FAPE).

specific requirements related to the discipline of IDEA-eligible children.²¹ Students with disabilities who are eligible under the IDEA also have rights under Section 504, and OCR enforces the Section 504 rights, including the Section 504 FAPE rights, of IDEA-eligible students enrolled in elementary or secondary school. Thus, OCR can investigate allegations that a school district violated the Section 504 rights of students who have an [individualized education program](#) (IEP) under the IDEA. For such students, where noted in this guidance, schools may satisfy their Section 504 FAPE obligations by complying with the IDEA's requirements.²²

Some students have a disability for purposes of Section 504 FAPE, but their disability-based needs do not also make them eligible for FAPE under the IDEA. These students are commonly referred to as "[Section 504-only](#)" students. This guidance addresses the rights and responsibilities concerning FAPE under Section 504 that apply to Section 504-only students,²³ as well as the general nondiscrimination responsibilities under Section 504 that apply to all students with disabilities, including IDEA-eligible students. Throughout this guidance, "FAPE" refers to FAPE under Section 504 unless otherwise stated. The Department's Office of Special Education and Rehabilitative Services (OSERS) has provided, simultaneous with the issuance of this guidance document, information and resources about student discipline for IDEA-eligible students and schools' responsibilities to IDEA-eligible children. For information explaining the IDEA requirements applicable to discipline, including the complaint procedures available under the IDEA, please consult OSERS's *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*.²⁴

II. PROVIDING FAPE TO STUDENTS WITH DISABILITY-BASED BEHAVIOR

Section 504 requires a recipient that operates a public elementary or secondary education program to provide FAPE to each qualified student with a disability, regardless of the nature or severity of the disability.²⁵ To provide FAPE under Section 504, schools must offer regular or special education, and [related aids and services](#), that: (1) are designed to meet the student's

Nothing stated in this guidance is intended to alter existing requirements applicable to IDEA-eligible students or create conflicting requirements with the IDEA.

²¹ See 34 C.F.R. §§ 300.530-536.

²² Under Section 504, implementing an IEP developed in accordance with the IDEA is one way to meet Section 504's FAPE requirement. 34 C.F.R. § 104.33(b)(1)(i), (b)(2).

²³ Some Section 504-only students ultimately may be found to be IDEA-eligible as a result of subsequent evaluations. For example, a school may initially evaluate a student and determine that the student needs related services under Section 504 but does not need specialized instruction making them eligible under the IDEA. If the school has subsequent reason to suspect that the same student does need such special education and related services under the IDEA, the school must evaluate the student again, which could result in the student being found eligible under the IDEA. Although the examples in this guidance describe the rights of students under Section 504, a school under the circumstances of these examples could be required by the IDEA to evaluate or reevaluate the student for eligibility based on their current behavioral needs. For example, due to the COVID-19 pandemic and resulting school closures, some Section 504-only students may have new, reemerging, or worsening disability-based behaviors, such as social anxiety-related behaviors, that interfere with their learning or that of others.

²⁴ OSERS, *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions* (July 19, 2022), <https://sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf> (Questions and Answers).

²⁵ 34 C.F.R. § 104.33(a).

individual educational needs as adequately as the needs of students without disabilities are met, and (2) satisfy Section 504 FAPE requirements for evaluation and placement, educational setting, and procedural safeguards.²⁶

A group of knowledgeable persons, which can include the student's parents or guardians, develops an individualized plan addressing the services the team has identified as necessary to provide the student FAPE.²⁷ This group of knowledgeable persons is often called the student's [Section 504 team](#). Though a written plan is not explicitly required by Section 504's regulations, schools often capture the plan for providing a student FAPE in writing, in an individualized document commonly called a [Section 504 plan](#), in order to ensure consistent understanding and effective implementation of the student's services. Schools must take steps to ensure that any staff responsible for providing a student with the services necessary to receive FAPE understand the student's needs and have the training and skills required to implement the services.²⁸ A school's failure to provide the requisite services is likely to result in a denial of FAPE.²⁹

Section 504 plans generally describe the specific services the student needs, who will provide the services, how they will be provided, and the setting in which the student will receive the services. The Section 504 team uses a variety of information obtained through evaluations to identify the services and supports that a student needs, including those needed to address any disability-based behavior.³⁰ For students with disability-based behavior that interferes with their own or others' ability to learn, their Section 504 plan may identify individualized [behavioral supports](#) for responding to the behavior and supporting the student's behavioral needs, explain how the school will implement the supports, and describe how the team can assess whether the supports are effective.³¹ Providing the needed services and supports can help the student appropriately engage in learning, build and maintain social relationships, and avoid behaviors that otherwise would lead the school to consider disciplinary measures.

The following subsections focus on students with disability-based behaviors, though all qualified students with disabilities are entitled to FAPE.³² The discussion explains the general FAPE requirements in the context of students with behavioral needs and then the FAPE requirements specific to discipline.

²⁶ 34 C.F.R. §§ 104.33(b)(1), 104.34 (educational setting), 104.35 (evaluation and placement), 104.36 (procedural safeguards).

²⁷ 34 C.F.R. §§ 104.33(b)(1), 104.35(a)-(c).

²⁸ *Id.*

²⁹ See 34 C.F.R. § 104.33(b)(1).

³⁰ 34 C.F.R. § 104.35(a)-(c).

³¹ See *infra* pp. 10-11 (discussing behavioral supports); pp. 15-21 (discussing evaluation and placement determinations to address circumstances where a student's disability-based behavior significantly impairs the education of others or poses a safety threat). For additional information, please refer to OSERS's *Supporting Child and Student Social, Emotional, Behavioral, and Mental Health Needs*, <https://www2.ed.gov/documents/students/supporting-child-student-social-emotional-behavioral-mental-health.pdf>.

³² To learn more about FAPE generally, please refer to 34 C.F.R. § 104.33 and OCR's Section 504 Resource Guide, *supra* note 19.

A. General Overview of FAPE in the Context of Students with Behavioral Needs

The discussion below explains the following requirements related to FAPE under Section 504: (1) when schools must identify and evaluate students with behavioral needs to determine if they are a student with a disability; (2) the requirements for evaluations and [placement](#) determinations; (3) how schools identify needed behavioral supports; (4) the schools' responsibility to meet the needs of students with disabilities in an educational setting with students without disabilities, to the maximum extent appropriate for the individualized needs of the student with a disability; and (5) the relevant procedural safeguards for FAPE.

1. Identifying and Evaluating Students with Behavioral Needs

A school must conduct an initial evaluation, at no cost to the student's parents or guardians, when it has reason to believe a student needs special education or related aids and services because of a disability.³³ For example, a student who has not been identified as a student with a disability and who is repeatedly referred for discipline following inappropriate verbal outbursts beyond the expected range of behaviors for students of a similar age may need an evaluation to determine whether the student is a student with a disability entitled to FAPE.³⁴ Section 504 requires that schools have effective procedures in place for referring a student for an evaluation.³⁵ While not a separate requirement, to ensure effective implementation of its evaluation procedures, a school may need to provide training to school personnel on when a student's behaviors, or other factors, indicate the need for an evaluation under Section 504.³⁶

A parent or guardian may, at any time, request an evaluation at public expense.³⁷ Section 504 does not limit the number of evaluations a student may reasonably request or receive.³⁸ The student's parent or guardian is entitled to notice of the school's decision and may challenge a denial of their request under Section 504's procedural safeguards.³⁹ While parents or guardians may request an evaluation, and schools must respond to any such requests, the responsibility to timely identify students who may need an evaluation remains with the school.⁴⁰

Following a student's initial evaluation and identification as a student with a disability, Section 504 requires reevaluations on a periodic basis, in addition to a subsequent evaluation before any significant change in placement.⁴¹ As discussed in Section II, expulsions and certain out-of-school

³³ 34 C.F.R. § 104.35(a).

³⁴ See 34 C.F.R. § 104.35; see also Section 504 Resource Guide, *supra* note 19 at 12.

³⁵ 34 C.F.R. § 104.35(a)-(c).

³⁶ See *id.* To learn more about over-identification of students who do not actually have a disability, under-identification of students who do have a disability and need services, and mis-identification of students as having a different type of disability than the disability they have, please see OCR's *Dear Colleague Letter: Preventing Racial Discrimination in Special Education* (Dec. 12, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf> (Racial Discrimination in Special Education DCL).

³⁷ 34 C.F.R. §§ 104.35(a), 104.33(a)-(b)(1), (c).

³⁸ 34 C.F.R. §§ 104.35(a), 104.33(b)(1), 104.36.

³⁹ 34 C.F.R. § 104.36; see *infra* p. 13.

⁴⁰ 34 C.F.R. §§ 104.32; 104.33(a), (b); 104.35.

⁴¹ 34 C.F.R. §§ 104.35(a) (evaluation before any subsequent significant change in placement), 104.35(d) (procedures for periodic reevaluation of students who have been provided special education and related services). Reevaluation procedures consistent with the IDEA are one way of meeting Section 504's requirements. *Id.*

suspensions are examples of disciplinary removals that would be considered significant changes in placement.⁴²

There are many potential ways in which a student's behavior may indicate the student has a disability and requires FAPE. For example, depending on the facts and circumstances, the school's duty to evaluate could be triggered by any of the following:

- ❖ Information or records shared during enrollment;⁴³
- ❖ Student behaviors that may harm the student or another person;
- ❖ The observations and data collected by school personnel;
- ❖ Information voluntarily provided by the student's parents or guardians;
- ❖ The school's own disciplinary or other actions indicating that school personnel have concerns about the student's behavior, such as frequent office referrals, demerits, notes to parents or guardians, or use of restraints or seclusion; and
- ❖ Information that a previous response by school personnel to the student's behavior resulted in repeated or extended removals from educational instruction or services, or that a previous response (*e.g.*, a teacher's use of restraints or seclusion)⁴⁴ that traumatized a student resulted in academic or behavioral difficulties.

A student's disability-based behavioral needs are likely to change over time during the course of their education. A change could occur, for instance, because a student's mental health worsens or the environmental conditions at the student's home or school deteriorate, resulting in an adverse emotional or mental effect on the student.⁴⁵ Schools should therefore be aware that additional evaluations may be required if, after the initial evaluation, the school has reason to believe that the student's needs are no longer being met within their current placement. For example, a school may find it necessary to conduct an additional evaluation based on the student developing new or more significant behaviors that impede learning following the loss of a close relative. Similarly, a student may need an additional evaluation if the student's behaviors have improved significantly such that the placement no longer reflects the student's current needs.

In identifying and evaluating students under Section 504, schools must also comply with their responsibilities under other Federal civil rights laws. For example, districts must comply with Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits discrimination based on race, color, or national origin in connection with, but not limited to, any of the following:⁴⁶

- ❖ over-identification of students of color as having disabilities based on age-appropriate

⁴² See *infra* pp. 14-21.

⁴³ Schools and districts may not use this information, or the enrollment or admissions process generally, to screen out or otherwise discriminate against students with disabilities who are eligible to attend the school. See 34 C.F.R. § 104.4(b)(1)(ii), (b)(1)(iv), (b)(4).

⁴⁴ See OCR, *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities* 16-17, *supra* note 14.

⁴⁵ To learn about the impacts of the COVID-19 pandemic on students' well-being and mental health, please see OCR's report, *Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students* (June 9, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>.

⁴⁶ See 34 C.F.R. § 100.3(a), (b) (providing a non-exhaustive list of discriminatory actions prohibited under Title VI). See also *Racial Discrimination in Special Education DCL*, *supra* note 36 at 2; U.S. Dep't of Educ. & U.S. Dep't of Just., *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* 8, 24-29 (Jan. 7, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf> (English Learner DCL).

- behaviors that are unrelated to disability;
- ❖ under-identification of students of color who do have disabilities;
- ❖ unlawful delays in evaluating students of color or English learners for a disability;
- ❖ failure to use valid and reliable assessments, including behavioral assessments, for students who are English learners that appropriately measure the student's achievement or aptitude for the skill being measured, rather than measuring the student's ability to speak English; and
- ❖ failure to consider the language needs of English learners who have a disability.

In addition, schools must provide information in a language the parent or guardian understands regarding Section 504's FAPE requirements, including information about the development of a Section 504 plan, to parents or guardians who have limited English proficiency.⁴⁷ This responsibility includes providing parents or guardians with limited English proficiency a meaningful opportunity to receive timely communications about their child's education in a language the parent or guardian understands and to participate in their child's Section 504 meetings through the use of qualified interpreters with knowledge of any specialized terms or concepts. Similarly, Section 504 requires schools to communicate effectively with parents or guardians who have a disability, including by providing the auxiliary aids and services parents or guardians need in order to participate in their child's Section 504 meetings.⁴⁸

2. Requirements Applicable to Evaluations and Placement Determinations

Under Section 504, evaluations must be conducted by trained personnel and interpreted by a group of knowledgeable persons, and based on relevant information from a variety of sources.⁴⁹ Evaluations need to be conducted in a timely manner in order for a school to meet its FAPE requirements, and OCR uses a reasonableness standard in determining whether an evaluation was conducted in a timely manner.⁵⁰

First, when a school district has reason to believe a student needs special education or related services because of a disability, it cannot unreasonably delay the evaluation and may not ignore evidence indicating the student may be a student with a disability. If the district wishes to simultaneously take other steps to support a student, like conducting an additional study or implementing school-wide supports, it may do so, but it still must complete the evaluation in a timely manner. OCR would likely find it unreasonable for a district to delay a student's evaluation

⁴⁷ 34 C.F.R. §§ 100.3, 300.322(e); 20 U.S.C. §§ 1414(b)(3)(A), 1703(f). *See* English Learner DCL, *supra* note 46 at 10, 25 & n.63, 27, 30 & n.85, 37-40. Title VI requires that all students have equitable access regardless of race, color, or national origin to a timely referral for an evaluation if a district has reason to believe the student has a disability for which special education or related services are needed. 34 C.F.R. §§ 100.3(a), (b)(1)-(2); 104.35. *See* Racial Discrimination in Special Education DCL, *supra* note 36 at 3. Schools must also treat students equitably in the evaluation process, the quality of special education services and supports provided, and determinations regarding educational setting. 34 C.F.R. § 100.3; 20 U.S.C. § 1414(d)(3)(B)(ii), 1415(b)(4); 34 C.F.R. § 300.324(a)(2)(ii). *See* Racial Discrimination in Special Education DCL, *supra* note 36 at 3; English Learner DCL, *supra* note 46 at 24-29. Any training on evaluations under Section 504 may also need to include guidance on how to avoid discrimination based on race, color, national origin, or other protected classes in the identification and evaluation process.

⁴⁸ *See* 34 C.F.R. § 104.4(a), (b).

⁴⁹ *See* 34 C.F.R. § 104.35(a)-(c).

⁵⁰ *See* 34 C.F.R. §§ 104.33(a), (b); 104.35. *See also* Section 504 Resource Guide, *supra* note 19 at 12.

because it does not have sufficient personnel trained to perform the needed assessments and fails to secure private evaluators to meet the need. In addition, the fact that a student is doing well academically does not justify the school denying or delaying an evaluation when the district has reason to believe the student has a disability, including if the student has disability-based behavior resulting in removal from class or other discipline (*e.g.*, afterschool detentions).

Second, evaluations under Section 504 must be administered by trained individuals and interpreted by a group of persons (referred to in this guidance as the Section 504 team) who are knowledgeable about the student, the meaning of the evaluation data, and the placement options.⁵¹ The school must ensure the Section 504 team has relevant information to draw upon from a variety of sources.⁵² The types of individuals who should be involved in administering and interpreting an evaluation for a particular student will depend on the facts and circumstances, but where a student's behavior is a factor in an evaluation, such individuals might include, among others: psychologists, behavior specialists, teachers, social workers, and/or counselors. An appropriate placement will provide the student with a disability the regular or special education and related aids and services necessary to meet the student's individual educational needs.⁵³

Third, the Section 504 regulations identify a non-exhaustive list of sources of information for the Section 504 team to obtain, document, and carefully consider in connection with evaluations and placement decisions, as appropriate based on the facts and circumstances.⁵⁴ These sources of information include: aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.⁵⁵ In addition, information from parents or guardians can be especially valuable, and observations of the student by psychologists or other professionals while the student is in class or during other activities can be useful. As a general principle, school districts must select assessments and other evaluation materials that are tailored to assess specific areas of educational need, administered by trained personnel consistent with the instructions for that assessment or evaluation, and valid for the purpose for which they are used to best ensure the results accurately reflect the factor that the assessment or evaluation is intended to measure.⁵⁶

Although not specifically discussed in Section 504's regulations, schools may be familiar with a [functional behavioral assessment](#) (FBA) from the context of the IDEA. An FBA focuses on identifying the function or purpose behind a child's behavior, and typically examines a wide range of factors specific to the child, including social, affective, and environmental factors.⁵⁷ The goal

⁵¹ 34 C.F.R. § 104.35(b)-(c).

⁵² *Id.*

⁵³ 34 C.F.R. §§ 104.33(b)(1), 104.35.

⁵⁴ 34 C.F.R. § 104.35(b), (c)(1), (c)(2). Though not specifically required for evaluations conducted under Section 504, districts also may find it helpful to look to the IDEA's regulations for the types of information that are reasonable, relevant, and useful in conducting evaluations under Section 504. See 34 C.F.R. § 300.304(b)(1), (b)(3) (requiring districts to use, at a minimum, "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child . . ." and "technically sound instruments" for the assessments).

⁵⁵ 34 C.F.R. § 104.35(c).

⁵⁶ 34 C.F.R. § 104.35(b)(1)-(3).

⁵⁷ The IDEA requires schools to conduct an FBA under certain circumstances in the context of disciplinary removals. See 34 C.F.R. § 300.530; Questions and Answers, *supra* note 24 at 28-29, 52.

of an assessment, whether behavioral or otherwise, is to identify student needs and provide the Section 504 team with the information needed to determine effective services and supports for the student. If there is reason to believe the student's behavior may be based on the student's disability, one purpose of the evaluation is an individualized assessment of the behavior,⁵⁸ and the Section 504 team may determine that an FBA is appropriate for that student. If the school does not assess a student's challenging behaviors during the evaluation process, including disability-based behaviors that pose a threat to the safety of the student or others, the Section 504 team would lack the information needed to design a program that will meet the student's individual educational needs, and the student could be denied FAPE.⁵⁹

3. Identifying Necessary Behavioral Supports, Including Behavioral Intervention Plans

Where a student's evaluation shows that challenging behavior is caused by or directly and substantially related to the student's disability or disabilities, the placement decision by the Section 504 team must identify individualized services, such as behavioral supports, to meet the student's educational needs.⁶⁰ Individualized behavioral supports may include, among other examples: regular group or individual counseling sessions, school social worker services, school-based mental health services, physical activity, and opportunities for the student to leave class on a scheduled or unscheduled basis to visit a counselor or behavioral coach when they need time and space to "cool down" or self-regulate.⁶¹

To support a student's needs, Section 504 teams can consider using information obtained through a behavioral assessment to proactively develop and implement a [behavioral intervention plan](#) (BIP) and incorporate the BIP into the student's Section 504 plan. A BIP identifies behavioral supports to reduce or eliminate, and often replace, those behaviors that interfere with the student's or other students' ability to learn, and it is tailored to the student with a disability's specific behavioral needs. A BIP that is meaningfully informed by a behavioral assessment can help eliminate or reduce disability-based behavior that would lead to violations of a student code of conduct. Through a behavioral assessment, the Section 504 team can learn about the nature of the behavior, the function the behavior serves for the student, factors indicating when the behavior might occur, and the consequences of the behavior.⁶² If a Section 504 team chooses to use a behavioral assessment to develop a BIP, and that assessment identifies specific behavioral supports needed to ensure FAPE, the Section 504 team would need to develop the BIP with such supports, and the school would need to implement it, as part of the student's Section 504 plan

⁵⁸ See 34 C.F.R. §§ 104.33(b)(1), 104.35(a)-(c).

⁵⁹ See 34 C.F.R. § 104.33(b)(1).

⁶⁰ 34 C.F.R. § 104.35. In the case of IDEA-eligible students whose disability-based behavior interferes with the student's learning, or other students' learning, the IEP team is required to consider, and include in the IEP where necessary to provide FAPE, the use of positive behavioral interventions and supports and other strategies to address the disability-based behavior. 20 U.S.C. § 1414(d)(3)(B)(i). 34 C.F.R. §§ 300.324(a)(2)(i), (b)(2); § 300.320(a)(4). See OSERS, *Dear Colleague Letter on the Inclusion of Behavioral Supports in Individualized Education Programs* 1 (Aug. 1, 2016), <https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf>.

⁶¹ This support is distinct from seclusion, which can deny FAPE and result in discrimination. See *supra* note 14.

⁶² See OSERS, *Positive, Proactive Approaches to Supporting Children with Disabilities: A Guide for Stakeholders* 7-9 (July 19, 2022), <https://sites.ed.gov/idea/files/guide-positive-proactive-approaches-to-supporting-children-with-disabilities.pdf>.

for providing FAPE.

To be useful in addressing the behavior, a BIP should include information about: acceptable replacement behaviors,⁶³ who will teach the student to use those behaviors and how, what staff should do to support the student if the behavior of concern recurs, and how the Section 504 team will monitor and measure the BIP's implementation and effectiveness. In identifying acceptable replacement behaviors that are achievable for the student, schools may not rely on stereotypes, generalizations, or assumptions about a student's disability, race, color, national origin, or sex, such as assuming that girls are more capable of sitting still than boys.⁶⁴

If a student continues to have disability-based behavioral challenges that impede learning, despite the student's Section 504 plan being properly implemented, *i.e.*, with fidelity, the student's placement may not be adequately addressing the student's disability-based behavioral needs. Depending on the individual circumstances, the school may reconvene the Section 504 team to determine if additional or different services are necessary.⁶⁵ If an adjustment in services does not adequately address the behavior—including because the disability results in new behaviors or the existing behaviors escalate in severity—an additional evaluation may be necessary to identify the student's current needs and to develop additional or different supports to meet those needs.⁶⁶ An additional evaluation would also be necessary if the school has reason to believe the student may have an additional disability affecting their behavior.⁶⁷

Because the Section 504 FAPE obligation is ongoing, districts may need to reconvene Section 504 teams to: monitor the implementation of the Section 504 plan and effectiveness of a student's placement; determine if additional evaluations are needed; and determine if any adjustment in the placement, including in behavioral supports or the student's [educational environment](#) (discussed below) is needed.⁶⁸

4. Supporting Students with Disability-Based Behavior in Appropriate Educational Settings

Section 504 requires that a school district educate a student with a disability in an academic setting alongside students without disabilities to the maximum extent appropriate for the needs of the student with a disability.⁶⁹ The same is true for the provision of nonacademic services and participation in extracurricular activities.⁷⁰ Thus, a school district must place a student with a

⁶³ Depending on the facts and circumstances, a student's Section 504 team could determine, for example, that teaching the student to remain seated and face the teacher is an acceptable behavior to replace the behavior of running around the classroom, and that the replacement behavior meets the student's individualized needs.

⁶⁴ See 34 C.F.R. §§ 104.33(b), 104.34(a), 104.35(a)-(c), 104.4; § 100.3(a), (b)(1), (b)(5); § 106.31(a), (b).

⁶⁵ Please note, however, that "a full reevaluation is not required every time an adjustment in placement is made." 34 C.F.R. pt. 104, App. A, ¶ 25.

⁶⁶ 34 C.F.R. § 104.35. As noted earlier, *see supra* note 23, some Section 504-only students ultimately may be found to be IDEA-eligible as a result of subsequent evaluations.

⁶⁷ *See id.*

⁶⁸ *See id.* *See infra* pp. 14-21 (discussing the subsequent evaluation required, and applicable procedural safeguards, if a proposed adjustment would significantly change the student's placement).

⁶⁹ 34 C.F.R. § 104.34(a).

⁷⁰ 34 C.F.R. §§ 104.34(b) (meals and recess), 104.37(a)(2) (counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipient,

disability in the regular educational environment—meaning the setting where students without disabilities participate in academic, nonacademic, and extracurricular services and activities—unless the Section 504 team reaches an individualized determination that the student’s needs cannot be met satisfactorily in that environment even with [supplementary aids and services](#).⁷¹ Supplementary aids and services could include, among other examples, preferential seating, counseling services, or the implementation of a BIP. In most cases, if the Section 504 plan has been implemented as designed but still does not adequately address the disability-based behavior, the Section 504 team will be able to identify additional or different services to enable a student with a disability who is in the regular education environment to remain in that setting.

Any decisions about a student’s educational environment must always be individualized. For example, a school district would violate Section 504 if it had a one-size-fits-all policy that required students with a particular disability to attend a separate class, program, or school regardless of educational needs. Similarly, it would violate Section 504 to respond to a student’s disability-based behavior by shortening the length of the student’s school day, thus reducing the minutes or hours the student is in the educational environment, without reconvening the Section 504 team to determine if additional or different services are needed, or if an additional evaluation is necessary. Any decision by the Section 504 team to reduce the amount of time a student is in school or to place the student in a separate setting must be based on an individualized determination about the student’s needs, using information from a variety of sources that is documented and carefully considered, and must be informed by an evaluation whenever the proposed changes would constitute a significant change in placement.⁷²

Schools must identify and provide individualized behavioral supports that a student with a disability needs no matter the educational setting, including when the Section 504 team determines that a more restrictive educational environment is necessary.⁷³ In determining the student’s individualized placement, and reconvening the Section 504 team as needed, schools must place them along with students without disabilities to the maximum extent appropriate to meet the needs of the student with a disability.⁷⁴ The determination of which educational setting among an array of settings is appropriate must be tailored to the student’s individual needs. The Section 504 team also must ensure that the school has in place the individualized services the student needs to support a return to a less restrictive setting.⁷⁵ Note that some Section 504-only students may need an evaluation under the IDEA if their school has reason to believe the student requires special education.⁷⁶

referral to agencies that provide assistance to persons with disabilities, and employment of students, including employment by the school district and assistance in making available outside employment).

⁷¹ 34 C.F.R. § 104.34. See *infra* pp. 15-16, 18-21 (discussing when adjustments to a student’s educational setting may be needed to address an immediate safety threat).

⁷² 34 C.F.R. §§ 104.34(a); 104.35(a), (c)(2).

⁷³ 34 C.F.R. §§ 104.33(a), (b)(1); 104.35(c).

⁷⁴ 34 C.F.R. §§ 104.33(b)(1); 104.34(a), (b); 104.35(c). If placement in the more restrictive educational environment constituted a significant change in placement and there is reason to believe the student needs to return to the less restrictive setting, an evaluation is required under Section 504. 34 C.F.R. § 104.35(a).

⁷⁵ See 34 C.F.R. §§ 104.33(b)(1); 104.34(a), (b); 104.35(c).

⁷⁶ See *supra* note 23.

5. Procedural Safeguards Available Under Section 504 to Parents or Guardians Who Believe Their Child with Disability-Based Behavior Has Been Denied FAPE

Schools are required under Section 504 to develop and implement a system of procedural safeguards to enable parents or guardians to challenge the school's actions regarding the provision of FAPE, including with respect to identification, evaluation, and placement.⁷⁷ The safeguards include:

- ❖ notice of the proposed action, including a proposed disciplinary removal that constitutes a significant change in placement;⁷⁸
- ❖ an opportunity for the parent or guardian to review the student's educational records;
- ❖ an impartial due process hearing, with an opportunity for the parent or guardian to participate and to be represented by an attorney; and
- ❖ a review procedure to appeal the outcome of the hearing.⁷⁹

Compliance with the IDEA's procedural safeguards is one means of meeting this requirement.⁸⁰

Parents or guardians can use these procedures to challenge, among other actions:

- ❖ a denial of the parent's or guardian's request to evaluate the student;
- ❖ the scope of an evaluation, such as where the evaluation failed to include an assessment of the student's disability-based behavior;
- ❖ the findings of an evaluation, including findings related to a determination that behavior for which certain discipline is proposed is not disability-based; and
- ❖ a denial of a request to adjust the student's current services and supports as needed to address a disability-based behavior.

In addition, with certain exceptions, the Family Educational Rights and Privacy Act (FERPA) gives parents or guardians the right to review, seek amendment of, and provide consent for the disclosure of personally identifiable information from their child's education records, including education records created and maintained by a school's law enforcement unit exclusively for non-law enforcement purposes, such as a disciplinary action or proceeding.⁸¹

B. FAPE Requirements Applicable to Student Discipline

In addition to the general requirements for Section 504 FAPE discussed above, the use of student

⁷⁷ 34 C.F.R. § 104.36.

⁷⁸ See *infra* pp. 14-21 (discussing [significant changes in placement due to discipline](#)); 34 C.F.R. §§ 104.35(a), 104.36. In addition to Section 504's requirements, the Supreme Court has explained that the Due Process Clause of the U.S. Constitution 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." *Goss. v. Lopez*, 419 U.S. 565, 581 (1975).

⁷⁹ 34 C.F.R. § 104.36.

⁸⁰ *Id.*

⁸¹ 20 U.S.C. § 1232g; 34 C.F.R. pt. 99. FERPA addresses privacy rights regarding education records, including the right of parents or guardians to inspect and review their child's education records. See 34 C.F.R. §§ 99.3 (defining "education records"), 99.8 (explaining what provisions apply to records of a law enforcement unit). For more information on FERPA and law enforcement, please refer to the Department's guidance on *School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA)*, https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf.

discipline can implicate FAPE in other ways.⁸² This section discusses: (1) when proposed discipline of a student with a disability requires an additional evaluation and the steps schools must take after this evaluation; (2) the application of the FAPE requirements to students with disabilities who are subject to threat or risk assessments; (3) the application of the FAPE requirements to informal disciplinary removals; and (4) Section 504's limited exception concerning the discipline of students with disabilities who currently engage in illegal substance use.

1. Evaluations Prior to a Disciplinary Removal that Significantly Changes the Placement of a Student with a Disability

Section 504 requires school districts to evaluate students with disabilities prior to any significant change in a student's placement.⁸³ In the context of a significant change of placement due to a proposed disciplinary removal, the purpose of the evaluation (referred to in this guidance as a manifestation determination)⁸⁴ is to decide whether the behavior for which discipline is proposed is based on the student's disability, and, if so, whether changes in the student's placement are required to ensure the student receives FAPE. Under Section 504, OCR's longstanding interpretation of a significant change in placement in the context of discipline has been an exclusion of more than 10 consecutive school days or a similar pattern of removal.⁸⁵ Examples include an expulsion or an out-of-school suspension or other disciplinary removal of more than 10 consecutive school days.

OCR considers a series of short-term nonconsecutive removals to also constitute a significant change in placement if combined they total more than 10 school days during the school year and

⁸² For IDEA-eligible students, the IDEA and its regulations provide specific requirements for disciplinary removals. These requirements differ in some respects from Section 504's requirements. See 34 C.F.R. §§ 300.530-537. To learn more, please refer to OSERS's *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Procedures*, *supra* note 24.

⁸³ 34 C.F.R. § 104.35(a) ("A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.").

⁸⁴ The IDEA's regulations use the term "manifestation determination" in connection with determining whether the conduct for which certain discipline is proposed is a manifestation of a student's disability. See 34 C.F.R. § 300.530(e). Section 504's regulations do not use the term "manifestation determination" but require an "evaluation" prior to a significant change in placement. See 34 C.F.R. § 104.35(a). For purposes of this document, this type of evaluation is referred to as a "manifestation determination." Although a manifestation determination under IDEA and Section 504 have the same purpose, different regulatory requirements apply. See *Questions and Answers*, *supra* note 24.

⁸⁵ 34 C.F.R. § 104.35(a); Section 504 Resource Guide, *supra* note 19 at 22 & n.76. The Section 504 Resource Guide cites *Honig v. Doe*, 484 U.S. 305, 325 n.8 (1988). In *Honig*, the Supreme Court found that OSERS adopted OCR's interpretation from 1980 regarding an exclusion of more than 10 school days and applied it to the Education of the Handicapped Act (EHA), which preceded the IDEA; the Court deferred to the Department's interpretation of EHA. *Id.* In doing so, the Court found that the Department "correctly decided that a suspension in excess of 10 days does constitute a prohibited 'change in placement'" for the purposes of the EHA. *Id.* The Court also reaffirmed that a suspension of more than 10 school days triggers the due process protections of the Fourteenth Amendment to the U.S. Constitution. *Id.* (citing *Goss v. Lopez*, 419 U.S. 565, 576 (1975)). A "10-day suspension from school is not *de minimis* . . . and may not be imposed in complete disregard of the Due Process Clause." *Goss*, 419 U.S. at 576. Please see the limited exception, *infra* page 24, for proposed discipline for current use of illegal drugs or alcohol.

create a pattern of removal.⁸⁶ OCR determines whether a series of removals creates a pattern of removal on a case-by-case basis, considering evidence related to, among other factors: the length of each removal, the proximity of the removals to each other, the total amount of time the student is removed from school, and the nature of the behavior underlying each incident and giving rise to the series of removals.⁸⁷ Schools must ensure that they do not violate the rights of a student with a disability by creating a pattern of removals that constitutes a significant change in placement absent a manifestation determination.⁸⁸

A school must provide notice to the parent or guardian of a student with a disability before taking action regarding the student's evaluations or placement, including if it proposes discipline that would constitute a significant change in placement.⁸⁹ Because schools are prohibited from implementing a disciplinary removal of a student with a disability that constitutes a significant change in placement without first conducting the manifestation determination described on the following page, in some instances schools may need to expedite the manifestation determination to avoid violating Section 504 FAPE requirements. If a school removes a student with a disability for more than 10 school days without completing the evaluation required before a significant change in placement, the school would need to correct the failure to comply with Section 504.⁹⁰

During the interim period when the required manifestation determination is being completed and before the school knows if the behavior is based on the student's disability, the school can take other steps if needed to address the potential ongoing impact of the behavior, including any impact on the safety of the student or others. Consider, for example, a school that determined through its normal factfinding process that a student with a disability harassed a classmate, and thus proposed to expel the student with a disability. The school would be required to evaluate to determine if the student's behavior was based on a disability because the expulsion would be a significant change in placement.⁹¹ While the evaluation is being completed, in addition to offering

⁸⁶ See 34 C.F.R. § 104.35(a). In the context of discipline, OCR's interpretation of Section 504's regulation regarding a significant change in placement aligns with the IDEA's requirements regarding a change in placement for a series of disciplinary removals that are 10 consecutive school days or less but total more than 10 school days in a school year. See 34 C.F.R. § 300.536(a)(2).

⁸⁷ The factors OCR considers in making the factual determination in its enforcement matters align closely with the IDEA's requirements pertaining to a pattern of removals that constitute a change in placement. See 34 C.F.R. § 300.536(a)(2)(ii), (a)(2)(iii) (IDEA regulations concerning change of placement because of disciplinary removals).

⁸⁸ See *supra* note 85.

⁸⁹ See 34 C.F.R. §§ 104.33(b)(1)(ii) (FAPE requires compliance with regulations on educational setting, evaluation and placement, and procedural safeguards), 104.35(a) (requirements for an evaluation prior to a significant change in placement), 104.36 (requirements for procedural safeguards, including notice, for evaluations and placement decisions); 34 C.F.R. pt. 104, App. A. ¶ 25 (due process procedures must be afforded to parents or guardians before the recipient takes any action regarding evaluation, or placement of a student with a disability).

⁹⁰ See 34 C.F.R. § 104.35(a). If OCR investigates and finds a violation because a recipient did not conduct an evaluation prior to a significant change in placement, OCR would negotiate a remedy to overcome the effects of the discrimination. 34 C.F.R. § 104.6(a). Consistent with its obligation to operate in compliance with Section 504, 34 C.F.R. § 104.5(a), a recipient that corrects its violation on its own is also responsible for correcting any discrimination resulting from its violation, which could include providing compensatory services. For information on compensatory services under Section 504, please refer to OCR's guidance, *Providing Students with Disabilities Free Appropriate Public Education During the COVID-19 Pandemic and Addressing the Need for Compensatory Services Under Section 504* (Feb. 17, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/fape-in-covid-19.pdf>.

⁹¹ See 34 C.F.R. § 104.35(a).

services or supports to the classmate who was harassed, the school could move the student with a disability to a different classroom within their current educational placement, if one is available, from that of the classmate who was harassed.⁹² Moving the student with a disability to a different classroom would not be a significant change in placement if the student could receive the same educational instruction, services, supports, interventions, and modifications to policies in the new classroom, alongside students without disabilities to the same extent.

Section 504 FAPE requirements do not interfere with a school's ability to address those extraordinary situations in which a student's behavior, including disability-based behavior, is an immediate threat to their own or others' safety. For example, nothing in Section 504's FAPE requirements prohibits schools from contacting mental health crisis intervention specialists or law enforcement under such extraordinary circumstances, even if the result is that those professionals remove the student from school. Additionally, OCR recognizes that, in emergency circumstances, based on exigency and safety, a school may seek to impose an immediate short-term disciplinary removal of a student with a disability because the student's behavior presents a serious and immediate threat to the safety of the student or of others that cannot be mitigated by other means. Any OCR investigation would review the specific facts to determine whether the school's conduct was reasonably necessary to ensure safety, including under circumstances where an immediate removal would result in a pattern of removals.

Where a school provides educational instruction and services to students without disabilities during the pendency of disciplinary proceedings or during the period of a disciplinary removal, it also must provide educational instruction and services to similarly situated students with disabilities during the pendency of their evaluation.⁹³ The evaluation, *i.e.*, the manifestation determination, required before the eleventh school day of a disciplinary removal consists of the two-step process described below.

STEP ONE: At the first step, the Section 504 team determines whether the behavior in question was caused by or has a direct and substantial relationship to the student's disability.⁹⁴

The school must provide the Section 504 team with relevant information from a variety of sources sufficient to enable the team to determine if the student's behavior is based on the student's disability; the school must ensure such information is documented and carefully considered.⁹⁵ This information could include, for example:

- ❖ any previous evaluations of the student with respect to disability-based behavior;

⁹² As explained on page 19, the school may be required by Section 504 or other Federal civil rights laws to provide remedies to a student who was harassed to restore or preserve the student's equal access to their education if the harassment created a hostile environment on the basis of race, sex, disability, or other protected classes.

⁹³ 34 C.F.R. § 104.33(b)(1)(i); 104.4(a), (b)(1)(i)-(iv), (vii).

⁹⁴ See 34 C.F.R. § 104.35(a); *supra* note 85. See *S-1 v. Turlington*, 635 F.2d 342, 346-48 (5th Cir. 1981) (explaining that an expulsion for a student with a disability is a change of placement that must be accompanied by a determination of whether the student's conduct "bears a relationship" to or "results from" the disability); see also *Doe v. Maher*, 793 F.2d 1470, 1480 n.8 (9th Cir. 1986), *aff'd sub nom. Honig v. Doe*, 484 U.S. 305 (1988) (treating the phrase "conduct that has a direct and substantial relationship" to the disability as synonymous with "conduct that arises from" the disability, "conduct that is caused by" the disability, "[disability]-related misconduct," and "conduct that is a manifestation of" the disability.).

⁹⁵ See 34 C.F.R. § 104.35(a)-(c).

- ❖ the student's Section 504 plan (including any behavioral supports the student needs), any updates to the plan, and information about whether the current Section 504 plan is being implemented with fidelity;
- ❖ psychological or medical evaluation data related to the behavior at issue;
- ❖ relevant information provided by the student's parents or guardians;
- ❖ academic records;
- ❖ relevant discipline records, including information on whether previous disciplinary actions led to changes in behavior, and incident reports, including any involving SROs or other law enforcement officials, consistent with applicable Federal or State privacy protections; and
- ❖ relevant teacher notes, observations, and data collected about the behavior.

To be useful in determining whether the behavior is based on the student's disability, these materials should be relevant to the behavior at issue and recent enough to provide the Section 504 team an accurate understanding of the student's current behavior.

In reviewing information about the implementation of the student's Section 504 plan as part of this evaluation, the team may find that the school failed to provide behavioral supports and services required by the plan to address the behavior underlying the proposed discipline. In this instance, the behavior would be based on disability because the school failed to meet the student's behavioral needs as required by the Section 504 plan. Depending on the facts, such a failure to implement the Section 504 plan could deny the student FAPE,⁹⁶ and the Section 504 team would need to consider whether, due to the denial of FAPE, the student is entitled to compensatory services. Under these circumstances, any disciplinary removal could compound the school's failure to address the student's disability-based needs by extending the denial of FAPE during the period of removal.⁹⁷

For this evaluation, it is not sufficient for a school to simply use the same procedures it uses for suspensions or expulsions of students without disabilities if those procedures do not meet Section 504's requirements.⁹⁸ For example, Section 504 requires a school's evaluation process to be completed by a group of persons knowledgeable about the student and the meaning of the evaluation data.⁹⁹ If a single person, such as a principal who is in charge of the school's general disciplinary process for all students, alone determined whether a student's behavior was based on the student's disability, such a unilateral decision would not comply with Section 504.

STEP TWO: The school's next step depends on whether the behavior for which the school proposed discipline is determined to be based on disability.

a. When the Student's Behavior is Based on Disability

This subsection explains a school's responsibilities when a student's behavior is determined to

⁹⁶ 34 C.F.R. §§ 104.35(a)-(c), 104.33(b)(1). Failure to implement a student's Section 504 plan can cause a denial of FAPE and violate Section 504. 34 C.F.R. § 104.33(a)-(b).

⁹⁷ See 34 C.F.R. § 104.33(b)(1)(i). See also 34 C.F.R. § 300.530(e)(1)(ii), (2), (3) (requiring remedies under the IDEA if the conduct leading to a removal was the result of a failure to implement the student's IEP).

⁹⁸ See 34 C.F.R. §§ 104.33(b)(1), 104.35(a)-(c), 104.36.

⁹⁹ 34 C.F.R. § 104.35(a), (c); see Section 504 Resource Guide, *supra* note 19 at 15.

be based on disability, including options that a school has when a student's disability-based behavior is disruptive to other students' learning or to school safety.

If, after a full review of the information obtained, the Section 504 team determines that the behavior that violated a school rule is disability-based, the school is prohibited from carrying out any discipline that would exclude the student on the basis of disability.¹⁰⁰ Under this circumstance, the discipline would deny the student equal educational opportunity by excluding the student based on disability, in violation of Section 504.¹⁰¹

A finding that the student engaged in disability-based behavior in violation of a school rule could be one reason to believe that the student's placement may be inappropriate and that the student may need additional or different services, such as behavioral supports, or may need a change in educational setting to ensure FAPE. Accordingly, the Section 504 team must continue the evaluation to determine if the student's current placement is appropriate.¹⁰² The Section 504 team may determine that an additional assessment, which may include a behavioral assessment, is necessary,¹⁰³ in which case the Section 504 team should consider using the information obtained to develop and implement a BIP.

Consider this hypothetical example

A student's initial evaluation found that the student has post-traumatic stress disorder and that the student's disability-based behaviors include irritability with unprovoked outbursts and mood swings. School staff referred the student for evaluation due to behaviors that violated school rules, including physical fighting, verbal altercations, and disorderly conduct. As part of the evaluation, the student's Section 504 team obtained an FBA and developed a Section 504 plan requiring the creation of a BIP within a specified timeframe to address the disability-based behaviors. The school completed and implemented the BIP as specified, yet the student continued to engage in similar conduct violating school rules; after one incident in particular, the school proposed an expulsion. Because an expulsion would constitute a significant change in placement, the school conducted a subsequent evaluation, and the team determined the behavior was based on disability. As a result, the school did not expel the student for the behavior. In considering whether the student's current placement was appropriate, the team realized that the student's FBA relied on outdated information about the student's needs and determined that a new FBA was necessary. Based on the findings of an updated FBA, the team adjusted the student's placement by adding weekly individual counseling sessions to the group counseling sessions included as a behavioral support in the student's BIP.

¹⁰⁰ See 34 C.F.R. §§ 104.4(a); 104.33(a), (b)(1)(i); 104.35(a), (c).

¹⁰¹ See 34 C.F.R. §§ 104.4(a), (b)(1), (b)(2); 104.33(a), (b)(1)(i).

¹⁰² See 34 C.F.R. §§ 104.33(a), 104.35(c). The school could also have a responsibility to evaluate the student to determine if they are eligible for services under the IDEA. See *supra* note 23; see also Questions and Answers, *supra* note 24.

¹⁰³ See 34 C.F.R. § 104.35(a)-(c). For IDEA-eligible students, if the behavior is determined to be a manifestation of a student's disability under the procedures set forth in the IDEA, the IEP team must conduct an FBA, subject to limited exceptions. 34 C.F.R. § 300.530(f)(1)(i)-(ii). For more information about the IDEA's requirements, see Questions and Answers, *supra* note 24.

In determining the appropriate placement for the student with a disability, the impact of the student's disability-based behavior on other students is a relevant factor.¹⁰⁴ Where a student's disability-based behavior significantly impairs the education of others or otherwise threatens the safety of the student or others, the Section 504 team's placement determination could result in a change to the student's services, supports, or educational setting to more effectively address the behavior and attempt to prevent it from recurring. OCR recognizes that, in addition to schools' duties concerning the provision of FAPE, schools may have responsibilities under Section 504 or other Federal civil rights laws (such as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972) to provide remedies to restore or preserve other students' equal access to the school's education programs and activities because, for example, a student's disability-based behavior has created a hostile environment on the basis of race, sex, disability, or other protected classes. Where the FAPE requirements of Section 504 require a school to address a student's disability-based behavior by adjusting the student's placement rather than implementing discipline, the student's Section 504 team is responsible for considering the impacts of the behavior on other students when determining the placement for the student with a disability.

The Section 504 team must consider whether additional or different services and supports would enable the student to remain in their current educational setting.¹⁰⁵ For instance, a student's Section 504 team could determine that, in order for a student with a disability who harassed a classmate to safely remain in the regular education program, the student with a disability needs more intensive school-based mental health counseling and an adjustment to their schedule to limit the student's interactions with the classmate subjected to the harassment. In addition to adjusting the student with a disability's services and supports as needed, an appropriate remedy to a hostile environment must be tailored to the circumstances and the requirements of the applicable Federal civil rights laws; for example, a school may be required to offer supportive measures to the student subjected to harassment and provide any individualized services or supports the student needs to access their education.¹⁰⁶

The student's Section 504 team may determine that the individual student's needs cannot be

¹⁰⁴ 34 C.F.R. pt. 104, App. A, ¶ 24 ("Although under § 104.34, the needs of the [student with a disability] are determinative as to proper placement, . . . where a [student with a disability] is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the [student with a disability] cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by § 104.34.")

¹⁰⁵ See 34 C.F.R. § 104.34(a).

¹⁰⁶ See generally 34 C.F.R. §§ 104.4, 104.6, 104.33(a), (b) (Section 504 requirements); see also Section 504 Resource Guide at 32-33, *supra* note 19 (discussing schools' responsibilities under Section 504 to respond to harassment of students with disabilities, which could include providing counseling for the students); §§ 106.3, 106.30(a), 106.31(a), (b), 106.44, 106.45(b)(1)(i) (Title IX requirements); see also OCR, *Questions and Answers on the Title IX Regulations on Sexual Harassment* (July 2021), at 18 (July 20, 2021, updated June 28, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf> (providing examples of supportive measures); §§ 100.3(a), (b), 100.8 (Title VI requirements); see also OCR, *Racial Incidents and Harassment Against Students* (Mar. 10, 1994), <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html> (providing examples of possible appropriate responses to harassment under Title VI, including counseling for victims of racial harassment). To learn more about recipients' responsibility to address harassment under these laws, please visit www.ed.gov/ocr for additional guidance.

met in the regular education environment because, even with supplementary aids and services, the student's disability-based behavior significantly impairs the student's ability to learn or the ability of other students to learn.¹⁰⁷ For a student whose disability-based behavior cannot be addressed in less restrictive settings even with supplementary aids and services, placement in a more restrictive setting could be appropriate until the student's needs can be met in a less restrictive setting. Regardless of a student's educational setting, the student with a disability is entitled to FAPE, including behavioral supports for disability-based behavior.¹⁰⁸ Furthermore, if the team determines that the disability-based behavior cannot be addressed in the regular educational setting even with supplementary aids and services, and the student therefore needs a more restrictive setting, the student must continue to be educated with students without disabilities to the maximum extent appropriate to the needs of the student with a disability.¹⁰⁹

For instance, the Section 504 team may determine that, based on the student's needs, the appropriate placement for a particular student with a disability who has autism is in a separate classroom with staff trained specifically to support students with autism, located in the same school, with individualized behavioral supports and services to enable the student to learn safely and productively in that classroom. The Section 504 team can reconvene as needed to regularly monitor whether the student's behavioral needs have changed such that the student's placement and educational environment should be modified again. Of course, if the team found that, even with properly implemented behavioral supports and supplementary aids and services, the student's disability-based behavior significantly impaired the education of other students in the separate classroom, this would not be an appropriate placement.¹¹⁰

Because any Section 504 FAPE determination must be individualized, schools may not rely on stereotypes, generalizations, or assumptions about individuals with disabilities generally or a student's specific disability in deciding whether a student's needs can be met in a particular educational environment.¹¹¹ For example, Section 504 precludes school staff from making placement decisions based on an assumption that all students who have a conduct disorder

¹⁰⁷ See 34 C.F.R. § 104.34(a). The Section 504 team may also determine that an evaluation to determine the student's eligibility under the IDEA is needed. See *supra* note 23; see also Questions and Answers, *supra* note 24.

¹⁰⁸ 34 C.F.R. §§ 104.33(b)(1)(i), 104.35(c).

¹⁰⁹ 34 C.F.R. §§ 104.35(c), 104.34(a). See *supra* pp. 11-12. Schools must provide appropriate placements for students who cannot be educated in the regular education setting. See 34 C.F.R. pt. 104, App. A, ¶ 23 (explaining that, under 34 C.F.R. § 104.33(b), "[a]n appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions . . ."); 34 C.F.R. § 104.33(c)(3) (discussing residential placements). Under the IDEA, special education includes instruction conducted in the home, in hospitals and institutions, and in other settings, 34 C.F.R. § 300.39(a)(1), and the IDEA requires that school districts have available a continuum of alternative placements to meet the individual educational needs of different children with disabilities who need special education. 34 C.F.R. § 300.115(a), (b)(1).

¹¹⁰ 34 C.F.R. § pt. 104, App. A, ¶ 24. As stated previously, the Section 504 team may also determine that an evaluation to determine the student's eligibility under the IDEA is needed. See *supra* note 23; see also Questions and Answers, *supra* note 24.

¹¹¹ See 34 C.F.R. §§ 104.33(b), 104.34(a), 104.35(a)-(c). See *Guckenberger*, 974 F.Supp. at 134. See also note 64 and accompanying text (explaining that schools may not rely on stereotypes, generalizations, or assumptions about a student's race, color, national origin, or sex in making placement decisions).

cannot be educated in the general education setting.

b. When the Student's Behavior is Not Based on Disability

If the Section 504 team finds that the student's behavior was not based on a disability, Section 504 permits the school to discipline the student as it proposed as long as it does so in the same manner that it disciplines similarly situated students without disabilities, as explained in Section IV.A.¹¹² Under these circumstances, the discipline would not violate Section 504 because the student is not being excluded on the basis of any disability-based behavior and is being treated in the same manner as a student without a disability for substantially the same behavior.¹¹³

In addition, if a school does not provide educational services to students without disabilities who are suspended or expelled, neither Section 504's FAPE requirements nor the nondiscrimination responsibilities discussed in Section IV require the school to continue providing educational services to the student with a disability who is disciplined in the same way for behavior that is not based on their disability.¹¹⁴ Of course, a school may choose to provide all students with continued educational services. For students with disabilities under Section 504 who are also IDEA-eligible, the IDEA requires the school to provide continued educational services in the context of certain disciplinary removals.¹¹⁵

When a student with a disability returns to school from a disciplinary removal, the evaluation and placement requirements explained above continue to apply. If a student's return to school involves a significant change in placement, Section 504 requires the school to which the student is returning to conduct an evaluation and determine the student's appropriate placement, including the individualized behavioral supports needed to address the student's disability-based behavior.¹¹⁶ As outlined above, the evaluation could include an FBA, as appropriate, used to develop a BIP. Even where the student's return would not involve a significant change in placement, convening the Section 504 team to determine if there should be any adjustment in the student's behavioral supports and other services would best allow the school to support the student's needs upon returning to school and may help prevent future behavioral incidents.

2. Application of FAPE Requirements to Students with Disabilities Who May Be Subject to Threat or Risk Assessments

Some schools require students to undergo a "threat assessment" or "risk assessment" in connection with student discipline. These assessments are used to identify students who may pose a threat of physical violence to others at school or at school-sponsored events or to assess the level of risk that a student who previously engaged in serious misbehavior may pose to others in such settings. Under Section 504, schools must avoid any disability discrimination in their use of threat or risk assessments, such as unnecessarily treating students with disabilities differently

¹¹² See 34 C.F.R. §§ 104.33(b)(1)(i); 104.4(a), (b)(1)(i)-(iv), (vii).

¹¹³ 34 C.F.R. § 104.4(a), (b)(1). See *infra* pp. 27-30 (discussing when treating a student with a disability differently is discriminatory).

¹¹⁴ See 34 C.F.R. §§ 104.33(b)(1)(i); 104.4(a), (b)(1)(i)-(iv), (vii).

¹¹⁵ See 34 C.F.R. § 300.530(b)(2), (c), (d), (g) (requiring schools to provide educational services for IDEA-eligible students under certain circumstances); Questions and Answers, *supra* note 24.

¹¹⁶ 34 C.F.R. § 104.35(a)-(c).

from other students,¹¹⁷ and must safeguard a student with a disability's FAPE rights throughout any threat or risk assessment process.¹¹⁸ Schools can do so by ensuring that school personnel who are involved in screening for and conducting threat or risk assessments for a student with a disability are aware that the student has a disability and are sufficiently knowledgeable about the school's FAPE responsibilities so that they can coordinate with the student's Section 504 team. A school district whose threat or risk assessment team does not coordinate with the Section 504 team of a student with a disability could risk violating the student's FAPE rights.¹¹⁹

Coordination with the Section 504 team prior to completing the threat or risk assessment determination could result in additional or different behavioral supports to mitigate or eliminate the threat or risk. For example, the Section 504 team can provide valuable information about: the nature of the student's disability-based behaviors and common triggers; whether the student has been receiving behavioral supports, and, if so, the effectiveness of those supports; and specific supports and services that may be able to mitigate or eliminate the risk of harm without requiring exclusion from school. Even if a student is removed from school following a threat or risk assessment, the school must ensure that the student continues to receive the services required for FAPE and that the student is afforded any applicable procedural rights, including, as needed, by notifying and consulting the student's Section 504 team.¹²⁰

3. Application of FAPE Requirements to Informal Disciplinary Removals

In OCR's enforcement experience, some schools informally issue or propose a disciplinary removal in response to a student's disability-based behavior. Informal exclusions occur for part or all of the school day, and they can sometimes last for an indefinite period of time. These exclusions are considered informal because the school removes the student from class or school without invoking the school's disciplinary procedures.¹²¹

Informal exclusions are subject to the same Section 504 requirements as formal disciplinary removals, including the FAPE requirements discussed above and the nondiscrimination responsibilities discussed in Section IV. As with more formal uses of student discipline, when a

¹¹⁷ See *infra* pp. 27-30 (discussing when treating a student with a disability differently is discriminatory).

¹¹⁸ See 34 C.F.R. §§ 104.4(b)(1), 104.33-104.36. See also *supra* p. 16 (discussing ways schools can comply with Section 504's FAPE requirements under emergency circumstances in which a student with a disability's behavior is an immediate threat to their own or others' safety).

¹¹⁹ Through its enforcement experience, OCR is aware that some law enforcement agencies may instruct school district officials to keep the identity of a student, who is out of school and being investigated, confidential during its investigation. This instruction may include a specific limitation of staff, e.g., superintendent and school principal, who may be informed of the student's identity. In this instance, school records would identify if the student is a student with a disability, and school officials must consult such records to determine if the student is protected by Section 504. See 34 C.F.R. § 104.33(a). If so, the district is responsible for ensuring that its compliance with a confidentiality instruction does not result in the district violating the student's rights under Section 504 or other Federal laws. For example, the district can communicate its obligations under Federal law to the law enforcement agency and work with the agency to permit additional school staff to be informed of the student's identity and out-of-school status on a need-to-know basis to ensure the student's rights under Section 504 are not violated.

¹²⁰ See 34 C.F.R. §§ 104.33, 104.35. See *supra* pp. 14-21 (discussing FAPE requirements for student discipline).

¹²¹ An informal disciplinary exclusion due to a student's disability-based behavior is distinct from a determination, made consistent with the FAPE requirements discussed in Section II, that a child needs to attend classes for only part of the school day due to a disability, such as for health-related reasons.

student is subjected to informal removals that constitute a significant change in placement, the school must comply with the requirements pertaining to evaluation, placement, setting, and procedural safeguards discussed above.¹²² Additionally, a school's lack of appropriate record-keeping regarding informal exclusions may cause the school to violate Section 504's FAPE requirements and procedural safeguards, including the documentation requirement for evaluation and placement decisions and the parent's or guardian's right to review their child's education records.¹²³ Accurate records of the basis for excluding the student and the time during which a particular student was excluded are needed for a school to determine whether and when a proposed exclusion would constitute a significant change in placement, and thus determine when Section 504's notice requirement is triggered, whether the behavior that led to the informal exclusion(s) is a manifestation of the disability, and whether the student's behavioral needs warrant an additional evaluation.¹²⁴

OCR is aware that some schools informally exclude students, or impose unreasonable conditions or limitations on a student's continued school participation, as a result of a student's disability-based behaviors in many ways, such as:

- ❖ Requiring a parent or guardian not to send their child to, or to pick up their child early from, school or a school-sponsored activity, such as a field trip;
- ❖ Placing a student on a shortened school-day schedule without first convening the Section 504 team to determine whether such a schedule is necessary to meet the student's disability-specific needs;
- ❖ Requiring a student to participate in a virtual learning program when other students are receiving in-person instruction;
- ❖ Excluding a student from accessing a virtual learning platform that all other students are using for their instruction;
- ❖ Informing a parent or guardian that the school will formally suspend or expel the student, or refer the student to law enforcement, if the parent or guardian does not: pick up the student from school; agree to transfer the student to another school, which may be an alternative school or part of a residential treatment program; agree to a shortened school day schedule; or agree to the use of restraint or seclusion; and
- ❖ Informing a parent or guardian that the student may not attend school for a specific period of time or indefinitely due to their disability-based behavior unless the parent or guardian is present in the classroom or otherwise helps manage the behavior (e.g., through administering medication to the child).

Depending on the facts and circumstances, OCR could find that one or more of these practices violate Section 504. In determining whether the school complied with Section 504, OCR would

¹²² See 34 C.F.R. §§ 104.33(a),(b); 104.35(a)-(c); 104.36. The use of informal exclusions of students with disabilities, like other forms of discipline, can also result in discriminatory different treatment. See *infra* pp. 27-30.

¹²³ 34 C.F.R. §§ 104.35(a), (c)(2); 104.36. See 34 C.F.R. § 100.6(b) ("Each recipient shall keep such records . . . as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part"), incorporated by reference at 34 C.F.R. § 104.61. See *supra* p. 13 (explaining Section 504's procedural safeguards); p. 9 (explaining documentation requirements for the information considered in connection with evaluations and placement determinations).

¹²⁴ *Id.*

consider, among other relevant factors: whether the school sufficiently documented the exclusion to allow the student’s Section 504 team to make informed decisions about FAPE (e.g., by documenting the behavior that led to the exclusion, length of the exclusion, and whether the school provided the services necessary for the student to receive FAPE, which could include implementation of a BIP); the nature and duration of the exclusion, including whether it constituted a significant change in placement; whether the school complied with the applicable requirements regarding evaluation, placement, setting, and procedural safeguards; and whether the school denied the student a “free” public education under Section 504 by substituting the parents’ or guardians’ support for their children for the school’s own responsibility to provide FAPE.¹²⁵

Also, through OCR’s enforcement work, OCR has encountered descriptions of a removal as an “excused absence,” among other terms, that is in fact an informal exclusion. The educational impact on the student, rather than the specific words used to describe the removal, is what matters when determining the school’s compliance with Section 504’s FAPE requirements.

4. Limited Exception Regarding FAPE and Discipline for Current Illegal Substance Use

There is one limited exception in which the above Section 504 FAPE requirements do not apply. Under Section 504, where a school proposes disciplining a student with a disability because of current use of illegal drugs or the use of alcohol, the FAPE requirements discussed above, including those regarding an evaluation before a significant change in placement, do not apply.¹²⁶ Schools may discipline a student with a disability who is currently engaging in the illegal use of drugs or the use of alcohol to the same extent that the school disciplines students without disabilities for this conduct.¹²⁷ In addition, the due process procedures discussed above do not apply to disciplinary actions related to current illegal drug or alcohol use.¹²⁸ This limited exception does not apply to a student who: (1) has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use.¹²⁹

III. REASONABLE MODIFICATIONS TO DISCIPLINARY POLICIES FOR STUDENTS WITH DISABILITIES

While schools lawfully may impose discipline on students with disabilities, they must still avoid discrimination. Under Section 504, schools must make reasonable modifications to their criteria, policies, practices, or procedures when necessary to avoid discrimination on the basis of

¹²⁵ See 34 § C.F.R. 104.33(a), (c).

¹²⁶ 29 U.S.C. §§ 794(a), 705(20)(C)(iv). “Illegal use of drugs” refers to the use of drugs for which possession or distribution is unlawful under the Controlled Substances Act. 21 U.S.C. § 801 et seq.; 29 U.S.C. § 705(10).

¹²⁷ 29 U.S.C. § 705(20)(C)(iv).

¹²⁸ *Id.* See *supra* p. 13.

¹²⁹ 29 U.S.C. § 705(20)(C)(ii)(I)-(ii)(III). Where this limited exception does not apply and a recipient disciplines a student with a disability inconsistent with Section 504’s requirements, the recipient is responsible for correcting any discrimination resulting from its violation, such as providing compensatory services and correcting the student’s educational records. See 34 C.F.R. § 104.6(a); *supra* note 90.

disability.¹³⁰ The modifications may be needed to avoid disability discrimination against an individual student with a disability or a group of students with disabilities. Of course, schools may determine that the modifications made to avoid disability discrimination would also benefit other students, and thus choose to modify a policy on a school-wide basis. Reasonable modifications can also include not applying a policy to students for behaviors that are manifestations of their disability or disabilities. This section provides examples of modifications that might be reasonable in the context of student discipline.

Reasonable modifications can include adapting a policy to support a student's behavioral needs. For instance, a school might have a policy of assigning students to sit on the school bus, during field trips sponsored by an afterschool program, in alphabetical order and requiring all students to remain in their assigned seats while the bus is moving, both to ensure safety and to track student attendance effectively. Students who do not remain in their assigned seats may be prohibited from riding the bus on future trips or face other disciplinary consequences. Under the policy, a student with a disability who has difficulty remaining seated on the bus would be assigned to a seat in the back of the bus based on their last name. In order to support the student in remaining safely seated and avoid rule violations that could result in exclusion from the bus or other consequences, the school could modify its policy of seating students in alphabetical order by assigning the student to sit in the front or by a bus aide who would be responsible for reminding the student to remain seated.

Consider this hypothetical example

A middle school teacher who supervises the afterschool yearbook club may have a rule that students who interrupt others while they are speaking at the club's weekly meetings must miss the following week's meeting if they continue the behavior after three warnings. A student in the club has attention-deficit/hyperactivity disorder (ADHD), and, as their evaluation explains, their ADHD causes them to talk excessively and frequently interrupt conversations. Even if the rule is intended only to make sure all students can focus during the meetings, it could have the effect of discriminating against the student with ADHD and others if the behavior is associated with their disability. (See pages 31-32 to learn about discriminatory effects under Section 504.) The student's parent files a complaint with OCR¹³¹ alleging disability discrimination after the school refused to consider modifying the rule.

In analyzing these facts, if OCR found that the school had failed to consider whether it could make any reasonable modifications to the rule, OCR would likely require the school to consult with the student and their parent, as appropriate, to determine whether the

¹³⁰ 34 C.F.R. § 104.4 (Section 504 regulation prohibiting disability discrimination). Recipient preschools are subject to the requirements of § 104.4 and to the obligation of making reasonable modifications. 34 C.F.R. § 104.4(a), (b). OCR notes that the Department of Justice interprets reasonable modification requirements under Section 504 consistently with those under Title II of the ADA. See 28 C.F.R. § 35.130(b)(7) (Title II regulation requiring reasonable modifications where necessary to avoid disability discrimination).

¹³¹ For information on how OCR investigates and resolves complaints, please refer to OCR's Case Processing Manual (CPM), available at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>. The hypothetical examples in this guidance involving OCR complaints presume the complaint is resolved consistent with the CPM.

school could provide reasonable modifications. For instance, upon such consultation, the school might determine that it would be reasonable for it to: provide individually tailored supports that may reduce the likelihood of the student interrupting meetings, such as incentives that recognize or reward the student for the positive behavior of raising their hand before speaking; instruct the teacher to give the student a private visual signal to ensure the student is aware if they are talking over others; and excuse the student from having to miss the next weekly meeting.

Schools may also need to make reasonable modifications to their policies, practices, or procedures to avoid disability discrimination in interactions between students with disabilities and SROs or other school-based law enforcement personnel who operate under a contractual or other arrangement with the school.¹³² Examples of modifications that may be reasonable, depending on the circumstances, include: using de-escalation strategies; removing distractions and providing time and space to calm the situation when the child poses no significant safety threat; avoiding or minimizing touching a child whose disability makes them sensitive to touch; and waiting for a parent to arrive. It may also be a reasonable modification to have a person other than the school-based law enforcement officer communicate with the child and support them in de-escalating, such as a staff member whom the student trusts. When a school has reason to believe a student's behaviors are related to a mental health crisis, it may be reasonable to involve personnel specially trained in crisis intervention.¹³³

In addition, providing effective training to staff and others who participate in the education program under a contractual, licensing, or other arrangement, including SROs and other school-based law enforcement personnel, on the school's nondiscrimination responsibilities under Section 504 is likely to ensure that these personnel are prepared to make any needed reasonable modifications in their interactions with students with disabilities.¹³⁴ Such training could include, among other topics: instruction on explicit and implicit bias and cultural and linguistic competence; developmentally- and age-appropriate responses to student behaviors, including disability-based behaviors; positive behavioral interventions and supports; parent and student privacy rights; and working collaboratively with school administrators to improve school climate.

Training may also be invaluable to school personnel who are responsible for making threat or risk assessments. Appropriate training could help such individuals distinguish incidents that are best resolved by involving a crisis intervention professional and providing other reasonable modifications to help the student de-escalate from incidents that otherwise could pose a serious and immediate safety threat requiring removal from school. Training for individuals involved in

¹³² See 34 C.F.R. § 104.4; see 28 C.F.R. § 35.130(b)(7); see also *supra* pp. 2-3.

¹³³ See OSERS, *Supporting Child and Student Social, Emotional, Behavioral, and Mental Health Needs*, *supra* note 31.

¹³⁴ See U.S. Dep't of Just., Civil Rights Div., Investigation of the Baltimore City Police Department 81 (Aug. 10, 2016), <https://www.justice.gov/crt/file/883296/download> (finding that training the recipient's police officers "on how to interact with individuals with mental health disabilities is a reasonable modification to policies, practices, and procedures to afford people with mental health disabilities the equal opportunity for a police intervention that is free from unreasonable force.").

making threat and risk assessments could also focus on strategies and procedures to coordinate more effectively with a student's Section 504 team.¹³⁵

IV. SECTION 504'S GENERAL PROHIBITION OF DISABILITY DISCRIMINATION IN STUDENT DISCIPLINE—DIFFERENT TREATMENT AND DISCRIMINATORY EFFECTS

Section 504 protects students with disabilities from disability discrimination in all aspects of student discipline, from the ways that teachers manage classroom behaviors to the use of [exclusionary discipline](#). Disability discrimination means excluding, denying benefits to, or otherwise discriminating against a student based on their disability,¹³⁶ including by denying them equal educational opportunity in the most integrated setting appropriate to their needs.¹³⁷

This section discusses two ways in which a school's use of discipline could discriminate against students with disabilities under Section 504, namely, when: (1) the school subjects a student to **unnecessary different treatment** based on disability, or (2) the school's criteria, policies, practices, or procedures have **unjustified discriminatory effects** on students based on disability.

A. Unnecessary Different Treatment

The focus of this section is on schools' responsibilities when disciplining a student with a disability for behavior that is not based on disability, and, specifically, when different treatment for a student with a disability is unnecessary.

Section 504 prohibits schools from unnecessarily treating a student differently on the basis of disability.¹³⁸ Consider, for example, a school that generally provides all students who receive an out-of-school suspension with a packet of instructional materials to review while they are suspended so that students do not fall behind during the period of suspension. While the school may wish to avoid inconveniencing the teachers of a student with a disability who learns in a separate special education classroom during that student's suspension because the teachers would be required to print out a considerable amount of additional material for the student beyond that provided to students without disabilities, the school may not avoid providing the materials to the student with a disability solely for administrative convenience. Students with disabilities may be provided different or separate aid, benefits, or services only when doing so is necessary for the aid, benefits, or services to be as effective as those provided to students without disabilities.¹³⁹ Therefore, a school violates Section 504 if it unnecessarily treats a student differently based on their disability when administering discipline.

As explained in Section II, it may be necessary for a school in some situations to treat a student with a disability differently when implementing discipline because the behavior giving rise to the violation of a school rule is based on their disability.¹⁴⁰ In these cases, imposing the discipline in

¹³⁵ See *supra* p. 22.

¹³⁶ Disability discrimination also includes discrimination against a person because the person has a record of having a disability or is regarded as having a disability. See 29 U.S.C. § 705(20)(B); 34 C.F.R. § 104.3(j).

¹³⁷ 34 C.F.R. § 104.4(b)(1)(i)-(v), (vii); 28 C.F.R. § 35.130(b)(1)(i)-(v), (vii), (b)(8). Preschools that receive Federal financial assistance are subject to Section 504's prohibition against discrimination. 34 C.F.R. § 104.4(a).

¹³⁸ 34 C.F.R. § 104.4(b)(1)(iv).

¹³⁹ *Id.*

¹⁴⁰ See *supra* pp. 14-21.

the same way it applies to other students would deny the student FAPE.¹⁴¹ As Section III explains, it may be necessary for a school in some situations to treat a student with a disability differently because reasonable modifications, for example to a disciplinary policy, are needed to avoid discrimination.

When a student with a disability and a student without a disability exhibit the same or comparable behavior in violation of school policy, the school generally may discipline the students in the same manner. A school may not discipline a student with a disability more severely than students without disabilities for similar behavior unnecessarily, that is unless it has a legitimate, nondiscriminatory reason for doing so and the reason is not a pretext for discrimination.¹⁴² Based on the facts and circumstances of the particular incident, OCR generally considers three questions when investigating a complaint of different treatment in student discipline: (1) whether there is evidence the school treated the student differently based on disability; (2) whether the school stated a legitimate, nondiscriminatory reason for the different treatment; and (3) whether the school's stated reason was pretext for discrimination.

First, OCR determines whether there is evidence that a school has treated the student differently on the basis of disability. Direct evidence may include remarks, testimony, or admissions by school officials revealing discrimination based on disability.¹⁴³ For example, OCR may find direct evidence of different treatment based on disability when school personnel make statements revealing that a decision in response to student behaviors was based on stereotypes, generalizations, or assumptions about the student based on their disability or about individuals with disabilities generally.¹⁴⁴ OCR also investigates whether there is sufficient indirect, circumstantial evidence indicating the student was treated differently based on disability.¹⁴⁵ One such type of evidence occurs when a school disciplines the student with a disability more severely than a similarly situated student or group of students without a disability who engaged in comparable behavior, such as by using [corporal punishment](#) on the student with a disability but not disciplining the student without a disability at all.¹⁴⁶

Statistical evidence can also be circumstantial evidence of different treatment, such as if students with disabilities are underrepresented in the student population but overrepresented among students disciplined for particular conduct. OCR would not find that a recipient had treated a

¹⁴¹ Section 504 protects individuals who have a disability from discrimination based on their disability. Please note that, because FAPE is necessary to ensure students with disabilities receive equal educational opportunity, providing additional or different services to a student with a disability required for FAPE that students without disabilities do not also receive would not constitute prohibited discrimination on the basis of disability.

¹⁴² See 34 C.F.R. § 104.4(b)(1)(i)-(v), (vii).

¹⁴³ Direct evidence is evidence that "if believed, proves the fact of [discriminatory animus] without inference or presumption." *Portis v. First Nat'l. Bank of New Albany, Miss.*, 34 F.3d 325, 328-329 (5th Cir. 1994) (internal citations omitted).

¹⁴⁴ See *id.* at 329; but see *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1329-30 (11th Cir. 1998), *abrogated on other grounds* (remarks by non-decisionmakers or remarks unrelated to the decision at issue are not direct evidence of discrimination).

¹⁴⁵ See generally *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) (method for analyzing discrimination based on circumstantial evidence).

¹⁴⁶ See *Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 522 (7th Cir. 1994) (describing types of indirect evidence).

student differently solely on the basis of statistical evidence, but such statistical evidence, along with other types of evidence, may be used to support a finding of different treatment.¹⁴⁷

Next, if OCR finds evidence of different treatment, OCR investigates whether the school has stated a legitimate, nondiscriminatory reason for treating the student with a disability differently than other students. For example, although two students may have engaged in the same behavior, it might be the first such violation for the student without a disability and the second such violation for the student with a disability under a code of conduct that escalates disciplinary consequences for repeat offenses. Because the code of conduct allows for more severe discipline for students with prior violations, and, for the purposes of this example, the behavior is not based on disability, OCR would likely find that the school has identified a legitimate, nondiscriminatory reason for disciplining the student with a disability more severely.

If a school did not have a legitimate, nondiscriminatory reason for different treatment of a student with a disability, OCR would find that the school violated Section 504.¹⁴⁸ If a school does state a legitimate, nondiscriminatory reason for different treatment of a student with a disability, OCR will investigate whether that reason was in fact the reason the school treated the student with a disability differently, or instead a pretext, or excuse, for disability discrimination. If OCR found that the school's stated reason was pretext for disability discrimination, OCR would conclude that the school violated Section 504.

Consider this hypothetical example

A middle school teacher saw two students—a student who has a mental health disability and a student without a disability—arguing and pushing each other in the back of the teacher's classroom. The teacher referred the student with a disability to the principal for discipline under the school's code of conduct prohibiting physical fighting, which allows a range of consequences from verbal warning to expulsion. The teacher gave the student without a disability a verbal warning but did not refer the student without a disability to the principal's office for further discipline. Neither student has any disciplinary history prior to this incident and, based on these facts, OCR would likely find the two students similarly situated absent information being offered to the contrary. As a result, the teacher's decision to refer the student with a disability for discipline but not refer the similarly situated student without a disability would likely demonstrate initial evidence of different treatment based on disability.

During an OCR investigation, additional information is provided showing that the teacher's reason for referring only the student with a disability for discipline was that the student with a disability started the fight. OCR would likely consider this explanation a nondiscriminatory justification for treating the two students differently but would continue the investigation to determine if the reason given was the actual reason for the different treatment.

¹⁴⁷ *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977) (holding that, "like any other kind of evidence, [statistical evidence] may be rebutted," but "'(s)tatistical analyses have served and will continue to serve an important role' in cases in which the existence of [intentional] discrimination is a disputed issue.").

¹⁴⁸ See 34 C.F.R. § 104.4(b)(1)(i)-(v), (vii).

If OCR found evidence that the stated justification was indeed the reason for the different treatment, OCR would likely find insufficient evidence that the school discriminated against the student with a disability by disciplining the student more severely. On the other hand, OCR would likely find sufficient evidence that the stated reason was not the actual reason for the different treatment if the student without a disability told OCR they had admitted to the teacher right away that they were the one who started the fight. OCR may also learn that the teacher previously told a classroom aide that the teacher refers for discipline all students with mental health disabilities who become involved in a physical fight because the teacher assumes that people with mental health disabilities pose a greater risk of violence to others.¹⁴⁹ OCR would likely find this evidence together sufficient evidence that the stated reason for the different treatment was pretext for disability discrimination. If OCR found discrimination, it could require the school to address the discrimination through individual and systemic remedies as appropriate, such as deleting all references to any discipline imposed by the principal for this incident from the student with a disability's educational records, mandating training for staff who make disciplinary decisions, and changing the school's disciplinary procedures to prevent this type of discrimination from recurring.

Notably, in this example, there are no facts indicating the school had a duty under Section 504 to treat the student with a disability differently to avoid discriminating against the student on the basis of disability. For example, if the school had proposed giving both students an out-of-school suspension of more than 10 school days, the Section 504 requirements for disciplinary removals that would constitute a significant change in placement discussed above¹⁵⁰ would have been triggered for the student with a disability, and, if the student's behavior was based on their disability, Section 504 would have prohibited the school from imposing the suspension on the student on the basis of their disability. Under the facts in this example, however, the student's behavior was not based on their disability. Therefore, under Section 504, the school needed to treat both students the same but failed to do so.

B. Discriminatory Effects of a School's Disciplinary Criterion, Policy, Practice, or Procedure

Disciplinary policies and procedures that result in unjustified discriminatory effects based on a disability, even if unintentionally, violate Section 504.¹⁵¹ Under Section 504's regulations, schools may not use criteria, policies, practices, or procedures that have the effect of: (1) discriminating on the basis of disability, such as by excluding students with disabilities from participating in

¹⁴⁹ See U.S. Dep't of Health and Human Servs., *Mental Health Myths and Facts*, MENTALHEALTH.GOV (Feb. 28, 2022), <https://www.mentalhealth.gov/basics/mental-health-myths-facts> ("Fact: The vast majority of people with mental health problems are no more likely to be violent than anyone else. Most people with mental illness are not violent and only 3%-5% of violent acts can be attributed to individuals living with a serious mental illness.").

¹⁵⁰ See *supra* pp. 14-21.

¹⁵¹ 34 C.F.R. § 104.4(b)(4). See *Alexander v. Choate*, 469 U.S. 287, 295, 299 (1985).

school or denying them the benefits of the school's programs and activities, or (2) defeating or substantially impairing the school's objectives with respect to students with disabilities.¹⁵²

Even when a school criterion, policy, practice, or procedure (referred to collectively below as the school's "policy") is neutral on its face, it may still have the discriminatory effect of denying a student with a disability meaningful access to the school's aid, benefits, or services, or of excluding the student based on disability. A school may impose legitimate safety requirements necessary for the safe operation of the school's services, programs, or activities, but the school must ensure that its safety requirements are based on actual risks, not mere speculation, stereotypes, or generalizations about individuals with disabilities.¹⁵³ The school must provide FAPE to eligible students under Section 504 regardless of the nature or severity of the student's disability.¹⁵⁴

In considering whether a facially neutral discipline policy has the discriminatory effect of denying students meaningful access to the school's aid, benefits, or services, or of excluding them based on disability, OCR would compare the policy's effects on students with and without disabilities.¹⁵⁵ In some cases, evidence of how the policy impacts one or more specific individuals will be enough to show that the policy's disparate impact is based on disability. For example, OCR may receive a complaint on behalf of several students subject to the same school, district, or Statewide policy, and could find evidence of discriminatory effects based on those students' experiences. The policy's discriminatory effect on the basis of disability may also be obvious, such as the effect of a policy that automatically imposes an afterschool detention for any use of profanity on a student whose Tourette's Syndrome sometimes causes the student to curse involuntarily.¹⁵⁶ In other instances, statistical evidence might suggest that students with disabilities are disproportionately disciplined for certain conduct, leading OCR to investigate whether the school's disciplinary practices are resulting in a discriminatory effect on students with disabilities. While statistical evidence alone does not prove discrimination, it can raise a question regarding whether school districts are imposing discipline in discriminatory ways, warranting further investigation.

If OCR finds sufficient evidence that the policy has discriminatory effects based on disability and finds that there is insufficient evidence the policy is necessary for the provision of safe operation of services, programs, or activities, OCR would likely consider the policy to be discriminatory. Evidence that an alternative policy exists that would be comparably effective in providing or

¹⁵² 34 C.F.R. § 104.4(b)(4) (prohibiting recipients of Federal financial assistance from, directly or through contractual or other arrangements, utilizing criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability, or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program). Depending on the specific facts alleged in a complaint filed with OCR about a school criterion, policy, practice, or procedure, OCR may investigate the complaint as a violation of FAPE or a failure to make reasonable modifications.

¹⁵³ See 34 C.F.R. § 104.4(a), (b)(1)(i)-(v), (vii), (b)(4). OCR notes that the Department of Justice interprets requirements under Section 504 consistently with those under Title II of the Americans with Disabilities Act. See 28 C.F.R. § 35.130(h) (Title II legitimate safety regulation).

¹⁵⁴ 34 C.F.R. § 104.33(a).

¹⁵⁵ See 34 C.F.R. § 104.4(b)(4). See *Choate*, 469 U.S. at 291-92, 299-301.

¹⁵⁶ As discussed in Section II of this guidance, a recipient that knows that a student is engaging in disability-based behavior that interferes with their or other students' learning is required under Section 504 to address the behavior to meet the educational needs of the student with disability-based behavior.

safely operating the school's services, programs, or activities may indicate that the school's chosen policy is not necessary. The school would then need to reasonably modify the policy to avoid discrimination on the basis of disability.¹⁵⁷ As explained in Section III, this could include adjusting the terms of the policy for a student with a disability even if the general policy remains in place. If no such change is capable of eliminating the discriminatory effect of the policy, the school may need to revise or eliminate the policy in its entirety.

V. MULTIPLE BASES OF DISCRIMINATION AND INTERSECTIONAL DISCRIMINATION

As noted earlier, OCR is responsible for enforcing several laws that prohibit schools from discriminating based on disability; race, color, or national origin; sex; and age.¹⁵⁸ A student may experience multiple forms of discrimination at once. In addition, a student may experience discrimination due to the *combination* of protected characteristics, a form of discrimination often called intersectional discrimination. Some instances of intersectional discrimination may stem from a decisionmaker acting upon stereotypes that are specific to a subgroup of individuals, such as stereotypes specific to Black girls that may not necessarily apply to all Black students or all girls. When OCR receives a complaint alleging discrimination in the use of discipline under more than one law, OCR has the authority to investigate and, where appropriate, find a violation under any law in its jurisdiction.

VI. CONCLUSION

OCR is committed to ensuring that students are not subjected to discrimination based on their disabilities and to enforcing the FAPE rights of students with disability-based behavior and prohibitions against the discriminatory use of student discipline. In addition to providing the information shared in this guidance, OCR can provide technical assistance to schools, districts, States, and other recipients in understanding and fulfilling their responsibilities under Section 504. OCR is also available to answer questions from students, parents or guardians, community-based organizations, and other stakeholders who are interested in learning more about the rights of students with disabilities and their families under Section 504.

If you have questions about the information in this guidance or would like technical assistance, we encourage you to contact OCR at OCR@ed.gov or by calling 800-421-3481 (TDD: 800-877-8339). You can also learn more by visiting www.ed.gov/ocr and by following [OCR's blog](#) to stay up to date on OCR's latest resources.

Thank you for your commitment to improving public education by supporting the needs of students with disability-based behavior and eliminating disability discrimination in the use of student discipline.

¹⁵⁷ See 34 C.F.R. § 104.4; see 28 C.F.R. § 35.130(b)(7).

¹⁵⁸ See *supra* note 8 and note 11.

APPENDIX: GLOSSARY OF KEY TERMS AND ACRONYMS USED IN THIS GUIDANCE¹

Behavioral Intervention Plan (BIP)—an individualized plan, often in writing, usually based on information provided through a functional behavioral assessment (FBA), that identifies behavioral supports individually tailored to a student’s needs to ensure FAPE. See 34 C.F.R. § 104.33(b)(1)(i). This may also be called a Behavior Support Plan. Although not referenced in Section 504’s regulations, this term is generally understood to mean a component of a student’s educational program designed to address behaviors that interfere with the student’s learning or that of others and behaviors that are inconsistent with school expectations. A BIP generally describes the behavior that inhibits the student from accessing learning and the positive behavioral interventions and other strategies that are to be implemented to reinforce positive behaviors and prevent behavior that interferes with the student’s learning and that of others.

Behavioral Supports—the supports, services, interventions, strategies, and modifications to policies used to support and respond to a student’s behavioral needs to ensure FAPE. See 34 C.F.R. § 104.33(b)(1)(i). Behavioral supports may be provided through a positive behavioral interventions and supports (PBIS) framework. To learn more about PBIS, please visit <https://www.pbis.org/>.

Corporal Punishment—paddling, spanking, or other forms of physical punishment imposed on a child.² In a majority of States, this practice is prohibited by State law.

Disability-Based Behavior—behavior that is caused by or has a direct and substantial relationship to a student’s disability.

Educational Environment (also **educational setting**)—(1) the academic setting (meaning the class, school, or program) in which a student with a disability receives regular or special education and related aids and services, decided as part of the student’s placement; and (2) the setting in which schools provide students nonacademic and extracurricular services and activities, such as meals, recess, counseling services, physical recreational athletics, and transportation. See 34 C.F.R. § 104.34.

Exclusionary Discipline—the formal or informal removal, whether on a short-term or long-term basis, of a student from a class, school, or other educational program or activity for violating a school rule or code of conduct. Examples can include detentions, in-school suspensions, out-of-school suspensions, suspensions from riding the school bus, expulsions, disciplinary transfers to alternative schools, and referrals to law enforcement, including referrals that result in school-related arrests. An in-school suspension is an instance in which a child is temporarily removed from his or her regular classroom(s) for at least half a day for disciplinary purposes, but remains

¹ Except where terms in this Glossary are directly from a statute or regulation that OCR enforces, or OCR’s CRDC definitions, the terms and acronyms below are offered to assist the reader only for purposes of clarity in this guidance, the terms are not intended to apply more broadly and are not binding in any way.

² This definition is used in the 2020-2021 CRDC. The CRDC collects data on leading civil rights indicators related to access and barriers to educational opportunity from preschool through 12th grade.

under the direct supervision of school personnel. Direct supervision means school personnel are physically in the same location as students under their supervision.³

Free Appropriate Public Education (FAPE)—the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of a student with a disability as adequately as the needs of students without disabilities are met, and that complies with Section 504’s requirements pertaining to evaluation, placement, setting, and procedural safeguards. See 34 C.F.R. § 104.33(b)(1). Another Federal law, the **Individuals with Disabilities Education Act (IDEA)**, also requires FAPE. See 34 C.F.R. §§ 300.17, 300.101, 300.102 (defining FAPE under the IDEA). Although FAPE under the IDEA is distinct from FAPE under Section 504, implementation of an Individualized Education Program (IEP) developed in accordance with the IDEA is one way to meet Section 504’s FAPE standards. See 34 C.F.R. § 104.33(b)(2). This would include implementation of IDEA’s discipline provisions. To learn more about FAPE under the IDEA, please visit <http://idea.ed.gov/>. To learn more about the IDEA requirements applicable to discipline, please consult OSERS’s *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions* (July 19, 2022), available at <https://sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf>.

Functional Behavioral Assessment (FBA)— assessment used to understand the function and purpose of a child’s specific, interfering behavior and factors that contribute to the behavior’s occurrence and non-occurrence for the purpose of developing effective positive behavioral interventions, supports, and other strategies to mitigate or eliminate the interfering behavior.

Individualized Education Program (IEP)—consistent with the requirements in the IDEA regulations at 34 C.F.R. § 300.22, a written statement for a child with a disability that is developed, reviewed, and revised in accordance with the IDEA’s requirements for FAPE.

Manifestation Determination—under Section 504, an evaluation is required by 34 C.F.R. § 104.35(a), prior to a significant change in placement due to a disciplinary removal, to determine whether a student’s behavior was caused by, or had a direct and substantial relationship to, the student’s disability. See also 34 C.F.R. § 104.35(c) (explaining requirements for evaluations). For purposes of this document, this type of evaluation is referred to as a “manifestation determination.” Additionally, the manifestation determination includes consideration of whether the school failed to implement the student’s Section 504 plan by failing to provide the behavioral supports necessary to address the student’s disability-based behavioral needs and, as a result, denied the student FAPE. See 34 C.F.R. § 104.33(b)(1)(i). Under such circumstances, where the school’s failure to meet the student’s behavioral needs denied FAPE to the student, a disciplinary removal would add to the denial of FAPE.

Mechanical Restraint⁴—the use of any device or equipment to restrict a student’s freedom of movement. The term does not include devices implemented by trained school personnel, or

³ This definition is used in the 2020-2021 CRDC.

⁴ This definition is used in the 2020-2021 CRDC. On December 13, 2021, the Department proposed a revised definition for mechanical restraint. For the most current information on how OCR defines this term, please visit <https://www2.ed.gov/about/offices/list/ocr/data.html>.

utilized by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed, such as:

- Adaptive devices or mechanical supports used to achieve proper body position, balance, or alignment to allow greater freedom of mobility than would be possible without the use of such devices or mechanical supports;
- Vehicle safety restraints when used as intended during the transport of a student in a moving vehicle;
- Restraints for medical immobilization; or
- Orthopedically prescribed devices that permit a student to participate in activities without risk of harm.

Person with a Disability—someone who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. *See* 29 U.S.C. § 705(20)(B) (Section 504 definitions); 34 C.F.R. § 104.3(j). A **qualified student with a disability** means a student who is a person with a disability and who is any of the following: (1) at an age at which students without disabilities are provided elementary and secondary educational services; (2) at an age at which State law requires schools to provide elementary and secondary educational services to students with disabilities; or (3) a child entitled to FAPE under the IDEA. *See* 34 C.F.R. § 104.3(l)(2).

Physical Restraint⁵—a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a student who is acting out to walk to a safe location.

Placement—the regular and/or special education program in which a qualified student with a disability receives FAPE, meaning the educational instruction, services, supports, interventions, and modifications to policies that students receive to meet their individualized needs. To learn more about Section 504's requirements for placement, see 34 C.F.R. §§ 104.34, 104.35.

Program or Activity—all of the operations of the entities described in 29 U.S.C. § 794(b) and 34 C.F.R. § 104.3(k), including all the operations of a local educational agency (LEA).

Recipient—any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. 34 C.F.R. § 104.3(f). Recipient includes an elementary and secondary public school (including public charter schools), private school, local educational agency, or State educational agency that receives Federal financial assistance from the Department of Education.

⁵ This definition is used in the 2020-2021 CRDC. On December 13, 2021, the Department proposed a revised definition for physical restraint. For the most current information on how OCR defines this term, please visit <https://www2.ed.gov/about/offices/list/ocr/data.html>.

Related Aids and Services—the developmental, corrective, and other supportive aids and services that a student needs in order to receive FAPE. See 34 C.F.R. pt. 104, App. A, ¶ 23.

Restraint—as used in this guidance, the term restraint(s) refers to [physical](#), [mechanical](#), or other restraint(s).

Seclusion⁶—the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. It does not include a timeout, which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purpose of calming.

Section 504-only Student—a student with a disability, as defined under Section 504, who is not eligible for FAPE under the IDEA.

Section 504 Plan—an individualized plan, often in writing, that a school may choose to use to record the regular or special education and related aids and services that a specific student with a disability covered under Section 504 will receive, and the appropriate setting for that student to receive the services.

Section 504 Team—the group of persons who must be knowledgeable about the child, the meaning of evaluation data, and the placement options as required by 34 C.F.R. § 104.35(c), that determines for a qualified student with a disability the individualized services the student needs to receive FAPE and the setting to receive those services. The Section 504 Team often includes the student’s parents or guardians, among others knowledgeable about the student.

Significant Change in Placement—In the context of disciplinary removal(s), (1) a removal from class or school that lasts longer than 10 consecutive school days, or (2) a series of removals from class or school that together total more than 10 school days in a school year and constitute a pattern of removal. Additionally, a disciplinary transfer to an alternative school could constitute a significant change in placement depending on the facts and circumstances.

Supplementary Aids and Services—those aids and services that enable a student with a disability to participate in the regular education program to the maximum extent appropriate to the student’s needs.

⁶ This definition is used in the 2020-2021 CRDC. On December 13, 2021, the Department proposed a revised definition for seclusion. For the most current information on how OCR defines this term, please visit <https://www2.ed.gov/about/offices/list/ocr/data.html>.



POSITIVE, PROACTIVE APPROACHES TO SUPPORTING CHILDREN WITH DISABILITIES: A GUIDE FOR STAKEHOLDERS

OSEP Policy Support 22-01 (TA guide)

U.S. DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND
REHABILITATIVE SERVICES

JULY 19, 2022

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<https://www.federalregister.gov/documents/2007/01/25/E7-1066/final-bulletin-for-agency-good-guidance-practices>. Except for any statutory or regulatory requirements described in this guidance, this significant guidance is nonbinding and does not create or impose new legal requirements. For further information about the Department’s guidance processes, please visit www2.ed.gov/policy/gen/guid/significant-guidance.html.

Introduction

Every child should have access to a high-quality education provided in a safe, supportive, and predictable¹ learning environment free from discrimination, filled with healthy, trusting relationships, and one that ensures their social, emotional, and academic growth and development. Children with disabilities have historically faced systemic barriers to accessing their education and, in light of the COVID-19 pandemic, have faced greater challenges to their social, emotional, and academic development and success.² It is therefore crucially important for schools and early childhood programs to support the social, emotional, academic, and behavioral needs of children with disabilities; consider the harmful effects that inappropriate and ineffective discipline can have on child development and outcomes; and invest in alternative strategies and supports to address learning and behavioral needs. The Department recognizes and appreciates school administrators, teachers, and educational staff across the Nation who work to provide a safe, positive, and nondiscriminatory education environment for all students, teachers, and other school staff. Schools need not choose between keeping their school community—including students and school staff—safe and complying with the law.

The Individuals with Disabilities Education Act (IDEA) guarantees each eligible child with a disability a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet the child’s unique needs. Under IDEA, the vehicle for providing FAPE is through an appropriately developed individualized education program (IEP) based on the individual needs of the child. An IEP must include a child’s present levels of academic achievement and functional performance, and the impact of a child’s disability on their involvement and progress in the general education curriculum. IEP goals must be aligned with

¹ “Predictable,” as used in positive behavioral interventions and supports, has the common definition of something that is obvious or has known expectations. Predictable learning environments may contribute to a sense of safety for children thereby limiting behavior that is not consistent with a school’s code of student conduct.

² Orsander, M., Mendoza, P., Burgess, M., & Arlini, S.M. (2020). [The hidden impact of COVID-19 on children and families with disabilities](#). London, Save the Children International.

grade-level content standards for all children with disabilities.³ The IEP must also include a statement of the special education and related service and supplementary aids and services to be provided to the child.⁴ When an IEP is appropriately developed and effectively implemented, children can experience social, emotional and academic success. IDEA also includes specific provisions to address situations in which the behavior of a child with a disability impedes the child's learning or that of others. As part of the obligation to provide FAPE, in the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider — and include in the IEP — the use of positive behavioral interventions and supports, and other strategies, to address that behavior.⁵ Even with these requirements, data⁶ suggests that many children with disabilities may not be receiving appropriate behavioral interventions and supports and instead are being removed from the classroom through disciplinary removals. This resource offers alternative strategies that early childhood programs, schools, and local educational agencies (LEAs) can use in place of aversive practices⁷ or exclusionary discipline.⁸

As State educational agencies (SEAs), LEAs, schools, early childhood programs, and educators (including administrators, teachers, specialized instructional support personnel, and others employed by schools and early childhood programs) work diligently to ensure children have the opportunity for safe, in person learning, disciplinary practices and policies should be examined and, when appropriate, changed where disparities⁹ in their use persist. In this technical assistance document (a companion to the [Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions](#), which outlines the legal requirements related to behavior support and discipline for eligible students with disabilities under IDEA), the Office of

³ States are permitted to define alternate academic achievement standards for children with the most significant cognitive disabilities, provided those standards are aligned with the State's academic content standards, promote access to the general curriculum, and reflect professional judgment of the highest achievement standards possible, in accordance with 34 C.F.R. § 200.1(d). 34 C.F.R. § 300.160(c)(2)(i).

⁴ 34 C.F.R. §§ 300.17 and 300.320-300.324.

⁵ 34 C.F.R. §§ 300.324(a)(2)(i) and (b)(2); and 300.320(a)(4).

⁶ See accompanying Dear Colleague Letter.

⁷ Aversive practices include, but are not limited to, restraint, seclusion, unpleasant spray to the face, securing a student to a chair (unrelated to providing occupational therapy or other medical support), and taping a student's mouth, as well as the use of electrical stimulation devices for the purpose of addressing self-injurious behavior or aggressive behavior.

⁸ Exclusionary discipline, although not defined in IDEA and its implementing regulations, as used in this and the accompanying documents, refers to the removal, whether on a short-term or long-term basis, of a child with a disability from a class, school, or other educational program or activity for violating a school rule or school's code of student conduct. Examples can include detentions, in-school suspensions, out-of-school suspensions, suspensions from riding the school bus, expulsions, disciplinary transfers to alternative schools, and referrals to law enforcement, including referrals that result in school-related arrest.

⁹ In [Supporting Students with Disabilities and Avoid the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973](#), the Department's Office for Civil Rights explains that statistical evidence suggesting disproportionate use of discipline for certain conduct, alone, does not prove discrimination under the federal laws that protect the educational rights of students with disabilities, but may raise a basis for examination of whether disability discrimination is occurring.

Special Education Programs (OSEP) provides information about resources, strategies, and evidence-based practices that (while not required by law) can help States, LEAs, schools, early childhood programs, educators, and families in their efforts to meet IDEA requirements and, in doing so, improve outcomes for children with disabilities.

I. Proactively Addressing Disparities in, and Negative Outcomes from, Exclusionary Discipline

Given the negative outcomes associated with, and the disparities in the use of, exclusionary discipline,¹⁰ SEAs, LEAs, schools, and early childhood programs should identify ways to significantly reduce their use.¹¹ States and other entities that operate educational programs, including early childhood education programs, should consider enacting policies that restrict, or prohibit, the use of disciplinary practices such as suspension and expulsion in particular situations or for particular groups of children.¹² Although there may be instances when a child's behavior, such as causing physical harm to self or others, warrants exclusionary disciplinary action, preventing the need before it occurs can be an effective first step in most situations. Proactive systematic approaches that focus on instruction and supports, and that are implemented with fidelity and cultural responsiveness, are likely to address disparities; reduce the use of exclusionary discipline; and result in positive developmental, academic, and behavioral outcomes for all children including those with disabilities.¹³ Further, in the Office of Special Education and Rehabilitative Services' (OSERS') view, exclusionary discipline should not be used for non-violent offenses such as tardiness, absenteeism, or subjective offenses such as defiance or disrespect. A reduction in exclusionary discipline is associated with a positive school

¹⁰ Chu, E., & Ready, D.D. "Exclusion and Urban Public High Schools: Short- and Long-Term Consequences of School Suspensions." *American Journal of Education*, 124 (August 2018). Available at: <https://www.journals.uchicago.edu/doi/pdf/10.1086/698454>; Gerlinger, J, Viano, S, Gardella, J.H., Fisher, B.W., Curran, F. C., & Higgins, E. M. (2021). Exclusionary School Discipline and Delinquent Outcomes: A Meta-Analysis, *Journal of Youth and Adolescence* 50, 1493–1509.

¹¹ States can play an important role in helping LEAs and early childhood programs to build the capacity to implement a proactive approach. For a thorough discussion of State obligations in reducing discipline disparities, see accompanying [Questions and Answers: Addressing the Behavioral Needs of Children with Disabilities and IDEA's Discipline Provisions](#). States may also use IDEA section 611 funds, as described in Section III of this document.

¹² For example, Head Start requires programs to prohibit or severely limit the use of suspension due to a child's behavior and, where suspension is deemed necessary, the program must first engage with mental health professionals, parents, and other specialized professionals to determine whether other options might be appropriate. See 45 C.F.R. § 1302.17. See also Head Start Policy & Regulations at: <https://eclkc.ohs.acf.hhs.gov/policy/45-cfr-chap-xiii/1302-17-suspension-expulsion>.

¹³ Scott, T.M., Gage, N.A., Hirn, R.G., Lingo, A. S., & Burt, J. (2019). An examination of the association between MTSS implementation fidelity measures and student outcomes, *Preventing School Failure: Alternative Education for Children and Youth*, 63:4, 308-316, DOI: 10.1080/1045988X.2019.1605971.

climate¹⁴ which fosters safety and promotes a supportive environment with respectful, trusting, and caring relationships.¹⁵

Developing positive early learning environments and school climates while implementing evidence-based strategies and improving, and equitably applying, program and school discipline policies and practices, starts with an investment in building the necessary expertise within the educator workforce. A critical step in addressing disparities, significantly reducing the use of exclusionary discipline and aversive practices and improving outcomes for children with disabilities is providing educators with resources, strategies, and professional knowledge to foster a positive school climate. When schools and early childhood programs foster climates of inclusion, safety, and belonging, while implementing evidence-based practices, the use of exclusionary discipline and aversive practices (such as restraint or seclusion) can be reduced significantly.¹⁶

A. Using an Evidence-Based Approach to Support and Respond to Student Needs

A culturally and linguistically responsive multi-tiered system of supports (MTSS) is a comprehensive prevention framework designed to improve developmental, social, emotional, academic, and behavioral outcomes using a continuum of evidence-based strategies and supports.¹⁷ Within an MTSS framework, educators implement:

- universal strategies and supports designed for all children,
- targeted strategies and supports for children with additional needs, and
- intensive strategies and supports to meet the specific needs of individual children.

With data-driven decision making and evidence-based approaches to meeting each child's needs, MTSS provides a valuable framework to help schools address long-standing inequities in

¹⁴ Huang, F. L. & Cornell, D. (2018). The relationship of school climate with out-of-school suspensions. *Children and Youth Services Review*, 94, 378–389. <https://doi.org/10.1016/j.childyouth.2018.08.013>.

¹⁵ School Climate Improvement. National Center on Safe Supportive Learning Environments (NCSSLE). (n.d.). Retrieved April 7, 2022, from <https://safesupportivelearning.ed.gov/school-climate-improvement>.

¹⁶ Gregory, A., Cornell, D., & Fan, X. (2011). The relationship of school structure and support to suspension rates for Black and White high school students. *American Educational Research Journal*, 48, 904-934. <https://journals.sagepub.com/doi/10.3102/0002831211398531>; Heilbrun, A., Cornell, D., & Konold, T. (2018). Authoritative school climate and suspension rates in middle schools: Implications for reducing the racial disparity in school discipline, *Journal of School Violence*, 17(3), 324-338, <https://doi.org/10.1080/15388220.2017.1368395> Mattison, E., & Aber, M.S. (2007). Closing the achievement gap: The association of racial climate with achievement and behavioral outcomes. *American Journal of Community Psychology*, 40, 1–12, <https://doi.org/10.1007/s10464-007-9128-x>.

¹⁷ Essential components of MTSS. Center on Multi-Tiered System of Supports. (n.d.). Retrieved April 7, 2022, from <https://mtss4success.org/essential-components>.

achievement.¹⁸ Additionally, MTSS focuses on meeting the needs of all children by using universal screening, progress monitoring, and data-based decision making at all tiers of a flexible structure that allows schools and early childhood programs to customize and organize practices, supports, and services based on the needs of each child.

1. Universal Academic & Behavioral Supports

Universal instructional and behavioral supports are the strategies provided to all children within a school or early childhood program. Universal design for learning (UDL) and positive behavioral interventions and supports (PBIS) are evidence-based strategies that may be implemented at the universal level, which means they are strategies that benefit all children and can be implemented at all tiers in MTSS.

Implementing Universal Design for Learning

When considering the need for interventions, it is important to determine if a child's behaviors that are inconsistent with school expectations are a consequence of developmentally inappropriate expectations, academic difficulty, or other factors. In some cases, a child's behavior can be impacted by their environment, academic experience, developmental level, or social emotional needs. For example, if a child is struggling academically, developmentally, or with social emotional health, and is not provided with appropriate supports or interventions, disruptive behavior may occur as a signal that the child's needs are not being met.¹⁹ Thus, it is important to consider whole-school and program-wide approaches that also proactively address the way children receive and engage with their environment, peers, and instructional material.²⁰

UDL²¹ is a framework to improve and optimize teaching and learning based on scientific insights into how humans learn.²² UDL challenges educators to consider how to intentionally design

¹⁸ Jackson, D. (2021, July). Leveraging MTSS to Ensure Equitable Outcomes. Center on Multi-Tiered System of Supports. Retrieved October 2021, from https://mtss4success.org/sites/default/files/2021-07/MTSS_Equity_Brief.pdf.

¹⁹ As discussed later, these issues can also be indications that an individual student has a disability and should be evaluated to determine if special education or related aids and services are necessary to meet the student's needs on an individualized basis in order to provide FAPE.

²⁰ States can access more information about accessible instructional materials through the federally funded National Center on Accessible Educational Materials. <https://aem.cast.org/about/national-center-accessible-educational-materials-learning>.

²¹ The Higher Education Opportunity Act (2008) defines UDL as: "a scientifically valid framework for guiding educational practice that — (A) provides flexibility in the ways information is presented, in the ways students respond or demonstrate knowledge and skills, and in the ways students are engaged; and (B) reduces barriers in instruction, provides appropriate accommodations, supports, and challenges, and maintains high achievement expectations for all students, including students with disabilities and students who are limited English proficient." 20 U.S.C. § 1003(24).

²² About universal design for learning. CAST. (2022, February 8). Retrieved April 7, 2022, from <https://www.cast.org/impact/universal-design-for-learning-udl>.

instruction and assessment to promote multiple means of engagement, representation, and action/expression.²³ In doing so, UDL is rooted in a strengths-based approach to learning for all children, and research has demonstrated that UDL can increase developmental outcomes and academic achievement, including for children with disabilities.²⁴

Implementing Positive Behavioral Interventions and Supports

To fully access and participate in the learning environment, all children should know the school- and program-wide behavioral expectations required to be successful, have opportunities to practice meeting those expectations, and receive support for and reinforcement of those behaviors by skilled adults trained in evidence-based practices.

PBIS is an MTSS framework focused on improving behavior by integrating data, systems, and evidence-based practices within three tiers of support: universal, targeted, and individual. These tiers are fluid, and the amount of support and interventions should be differentiated over time and across settings based on the child's needs. Using this tiered system, all children would benefit from universal supports and services, while smaller groups that need more targeted and intensive supports and services would receive them. According to the [Center on Positive Behavioral Interventions and Supports](#) and the [National Center for Pyramid Model Innovations](#), implementation of PBIS results in:

- Improved outcomes, such as increased academic achievement and social and emotional competence for children with disabilities, and reduced bullying behaviors;
- Significant reductions in inappropriate behavior;²⁵
- Reduced use of exclusionary discipline, including reduced discipline referrals and suspensions; and
- Reduced use of restraint and seclusion.²⁶

²³ Teaching Excellence in Adult Literacy Center. (2019, April 8). TEAL Center Fact Sheet no. 2: Fact sheet: Universal design for learning. Retrieved December 2021, from <https://lincs.ed.gov/state-resources/federal-initiatives/teal/guide/udl>.

²⁴ Basham, J., Blackorby, J., & Marino, M. (2020). Opportunity in crisis: The role of universal design for learning in educational redesign. *Learning Disabilities: A Contemporary Journal*, 18(1), 71–91. Retrieved October 2021, from: <https://files.eric.ed.gov/fulltext/EJ1264277.pdf>.

²⁵ Hemmeter, M. L., Snyder, P. A., Fox, L., & Algina, J. (2016). Evaluating the implementation of the pyramid model for promoting social emotional competence in early childhood classrooms. *Topics in Early Childhood Special Education*, 36, 133–146. Retrieved April 2021, from: <https://journals.sagepub.com/doi/full/10.1177/0271121416653386>.

²⁶ Center on PBIS. (2022). Supporting and Responding to Student's Social, Emotional, and Behavioral Needs: Evidence-Based Practices for Educators (Version 2). Retrieved April 9, 2022, from <https://www.pbis.org/pbis/getting-started>.

2. Targeted Supports

Consistent with IDEA, if the behavior of a child with a disability impedes their learning or the learning of others, the use of positive behavioral interventions and supports and other strategies must be considered to address that behavior.²⁷ For some children whose behavioral needs are not met with school- and program-wide strategies, the IEP team should determine what more targeted, individualized interventions and supports are necessary. Targeted supports are typically provided in smaller groups to allow for more explicit instruction and additional opportunities to practice positive behaviors and receive constructive feedback. Social skills instruction, supports on developing social relationships, self-management strategies, check and connect (a mentoring intervention designed to spot early signs of disengagement, improve school performance, and reduce school dropout), and restorative practices, are examples of interventions that may be provided as targeted supports.²⁸

Restorative practices focus on developing caring connections, listening to and valuing others' opinions, promoting accountability, repairing harm, and supporting reintegration back into the educational environment. Implementing restorative practices as a targeted support could include using restorative group conferencing, restorative circles, and conversations among students to facilitate healing.²⁹ Research suggests that combining restorative practices with schoolwide positive behavioral supports reduces disciplinary referrals and disparities in the use of discipline.³⁰

3. Individualized or Intensive Supports

Some children may benefit from intensive supports that are designed to meet the specific needs of an individual child. These supports can be more intensive than school-wide or targeted and small-group approaches. Such supports may include conducting a functional behavioral assessment (FBA) and implementing a corresponding behavioral intervention plan (BIP) or providing wraparound services³¹ or individual counseling.

²⁷ 34 C.F.R. § 300.324(a)(2)(i).

²⁸ Tier 2. Center on PBIS. (2021). Retrieved October 7, 2021, from <https://www.pbis.org/pbis/tier-2>.

²⁹ Wachtel, T. (2016). References. Defining restorative. International Institute for Restorative Practices. Retrieved October 10, 2021, from https://www.iirp.edu/images/pdf/Defining-Restorative_Nov-2016.pdf.

³⁰ Vincent, C. G., English, J., Girvan, E. J., Sprague, J. R., & McCabe, T. M. (2016). School-wide positive and restorative discipline (SWPRD): Integrating school-wide positive behavior interventions and supports and restorative discipline. *Inequality in School Discipline*, 115–134. https://doi.org/10.1057/978-1-137-51257-4_7.

³¹ In this context, “wraparound services” refers to the school- and community-based medical and mental health services provided in tandem as supports for a child with serious behavioral needs and their family based on the child’s and family’s unique needs.

Functional Behavioral Assessment Process

The FBA is a process for identifying the reasons behind, or factors contributing to, a child's behavior.^{32,33} This process is rooted in the understanding that behavior is a form of communication and can provide a deeper understanding of what a child is trying to convey through their behavior. By investigating the conditions and other factors that contribute to the occurrence of the behavior, the response that the behavior elicits, and the reasoning for the continuation of the behavior, the FBA process provides useful information to inform the development of appropriate, effective interventions that address the root cause of the behavior, rather than using a punitive approach as an attempt to stop or reduce the behavior.

Although IDEA does not provide specific requirements for what should be included in the FBA process, it is generally understood that an effective FBA process³⁴ is individualized and, at a minimum, should:

- Clearly define the interfering behavior.
- Collect indirect and direct data on the occurrence and nonoccurrence of the behavior.
- Analyze data to determine trends and develop a hypothesis of the function of the behavior.
- Lead to the development or revision of a BIP (which is monitored, evaluated, and adjusted as needed).

The first step in the FBA process is to clearly define the behavior of concern (interfering behavior) to ensure that it is measurable and observable, and that data are collected on the specific behavior. Data collection provides information on the frequency, duration, conditions, location, and individuals present when the interfering behavior does and does not occur; the events or conditions that typically occur before and after the interfering behavior; and other

³² As noted in [*Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions, Appendix I*](#), a functional behavioral assessment (FBA) is used to understand the function and purpose of a child's specific, interfering behavior and factors that contribute to the behavior's occurrence and non-occurrence for the purpose of developing effective positive behavioral interventions, supports, and other strategies to mitigate or eliminate the interfering behavior.

³³ In *D.S. v. Trumbull Board of Education*, 975 F.3d 152 (2d Cir. 2020), the U.S. Court of Appeals for the Second Circuit disagreed with the Department's interpretation that a functional behavioral assessment (FBA) is considered an evaluation or reevaluation under IDEA that triggers a parent's right to request an independent educational evaluation at public expense. Based on this, OSERS intends to review its previously stated positions on this matter, including whether an LEA must seek parental consent before conducting an FBA for an eligible child with a disability. (See Questions E-4 and E-5 of OSERS' 2009 Q&A document.)

³⁴ For more information on the FBA process, see "Using FBA for Diagnostic Assessment in Behavior" from the National Center on Intensive Intervention, available at: https://intensiveintervention.org/sites/default/files/Handout%20a%20-%20Functional%20Behavior%20Assessment_FBA_Process.%20pdf.pdf.

relevant information. Based on the analysis of those data, a hypothesis is developed indicating the settings or events that may trigger the occurrence of the interfering behavior (antecedent), a description of the interfering behavior (behavior), and the responses that perpetuate the interfering behavior (consequence). Each of these components should be carefully considered to ensure that appropriate and effective interventions are identified and implemented. Therefore, individual(s) conducting the FBA should be well-versed and trained in observation and data collection and analysis.³⁵

The IEP Team may rely on the information collected and analyzed through the FBA³⁶ process to understand factors that contribute to the occurrence and non-occurrence of the child's behavior and to inform the development of an effective BIP and identify additional supports and services to be included in the IEP.³⁷ Guided by the data and information collected through the FBA that identified the function of the behavior, a BIP takes an individualized, proactive, and preventative approach to addressing the interfering behavior. In general, a BIP describes how antecedents that trigger the interfering behavior will be addressed and how new skills and replacement behaviors will be taught and reinforced.³⁸

Lastly, once developed, the BIP should be reviewed periodically to determine its effectiveness and whether it needs to be adjusted. Identifying criteria for success can be helpful in guiding the IEP Team in monitoring the interventions.

II. Investing in School and Educator Capacity

Shifting schools and early childhood programs away from exclusionary and disproportionate disciplinary practices toward a more positive school and program climate requires building educator capacity. Educators play an integral role in supporting children and fostering a positive school climate and are critical partners in meaningfully addressing disparities in the uses of exclusionary discipline. Therefore, it is important for SEAs, LEAs, schools, and early childhood programs to invest time and resources in ensuring that educators are equipped with the skills and supports including evidence-based training and professional development necessary to implement these strategies in culturally and linguistically responsive and affirming ways.

³⁵ The OSEP-funded IRIS Center offers a module on Functional Behavioral Assessment available at: <https://iris.peabody.vanderbilt.edu/module/fba/challenge/#content>.

³⁶ 34 C.F.R. § 300.530 specifies when an FBA is required. For more information, see accompanying [*Questions and Answers: Addressing the Behavioral Needs of Children with Disabilities and IDEA's Discipline Provisions*](#).

³⁷ Sugai, G., Lewis-Palmer, T. & Hagan-Burke, S. (2000). Overview of the Functional Behavioral Assessment Process, *Exceptionality*, 8(3), 149–160, https://doi.org/10.1207/S15327035EX0803_2.

³⁸ National Center on Intensive Intervention. (2013). *Supra* note 43.

A. Culturally and Linguistically Responsive Practices

Implementing proactive school- and program-wide interventions may reduce rates of exclusionary discipline, yet discipline disparities may often persist in the absence of specific attention to address them.³⁹ To meet the needs of all children, proactive, evidence-based program- and school-wide approaches should be implemented in a culturally and linguistically responsive way that affirms the multi-faceted identity of each child.⁴⁰

The MTSS framework may be used to address issues leading to disparate outcomes for children with disabilities, particularly children who are of color, English language learners, or from low-income families. The MTSS framework's use of data-based decision making provides an opportunity to objectively examine disparities and ensure equity in implementation of discipline policies across groups of children. In general, when schools and early childhood programs implement practices that include setting high expectations for all children, recognizing and affirming children's multi-faceted backgrounds and cultures to strengthen their learning, and providing access to effective instruction and resources for learning, children are given an equitable opportunity to learn and achieve more positive outcomes.⁴¹ Emerging evidence suggests that effective practices include strengthening relationships with children; embedding culturally and linguistically supportive practices within early childhood programs, schools, and classrooms; and developing and implementing policies that support equity.⁴²

When educators connect with and understand children and take children's perspectives into consideration, they build empathy and respond to children's behavior in more affirming ways. As educators build more welcoming environments that center children's experiences, the climate of the classroom, early childhood program, or school can begin to change, and the disproportionate use of discipline can decrease. Early childhood programs, schools, LEAs, and SEAs can consider ongoing and effective professional development in these areas to ensure educators are equipped with the skills to create a culturally responsive learning environment for all children.

³⁹ Gregory, A., Skiba, R.J., & Mediratta, K. (2017). Eliminating disparities in school discipline: A framework for intervention. *Review of research in Education*, 41, 253–278, <https://doi.org/10.3102%2F0091732X17690499>.

⁴⁰ McIntosh, K., Sugai, G., Smolkowski, K., Horner, R. H., & Girvan, E. J. (2018, February 1). A 5-point intervention approach for enhancing equity in school discipline. Practice Guides. Retrieved October 10, 2021, from <https://www.pbis.org/resource/a-5-point-intervention-approach-for-enhancing-equity-in-school-discipline>.

⁴¹ Klingner, J. K., Artiles, A. J., Kozleski, E., Harry, B., Zion, S., Tate, W., & Riley, D. (2005). Addressing the disproportionate representation of culturally and linguistically diverse students in special education through culturally responsive educational systems. *Education Policy Analysis Archives*, 13(38), 1–40.

⁴² Leverson, M., Pinkelman, S., Rose, J, McIntosh, K., & Smith, K. (2021, March). Center on PBIS: Resource: PBIS cultural responsiveness field guide: Resources for trainers and coaches. Retrieved October 7, 2021, from <https://www.pbis.org/resource/pbis-cultural-responsiveness-field-guide-resources-for-trainers-and-coaches>.

B. Educator Preparation and Ongoing Professional Development

To effectively implement evidence-based practices such as UDL or PBIS within an MTSS framework, educators should have specific knowledge and skills in effectively supporting and responding to children. Often, education preparation programs provide limited instruction and training on how to effectively support and respond to behaviors, and specifically to behaviors of children with disabilities.⁴³ Consequently, many teachers often list challenges related to managing and supporting student behavior, as well as high stress and emotional and physical exhaustion, as reasons for leaving the profession.⁴⁴ Some of these challenges can be mitigated by aligning teacher preparation programs and pre-service experiences to the skills teachers will need in the classroom.

Educators should have access to ongoing job-embedded professional development,⁴⁵ coaching, and consultation with specialized instructional support personnel⁴⁶ who have expertise in responding to and supporting the full range of student needs. LEA, school, and early childhood program leadership should prioritize job-embedded professional development opportunities for educators to both strengthen their foundational knowledge and skills and provide support to teachers, specialized instructional support personnel, and other staff who may need additional skills or assistance.

⁴³ Freeman, J., Simonsen, B., Briere, D. E., & MacSuga-Gage, A. S. (2014). Pre-service teacher training in classroom management: A review of state accreditation policy and teacher preparation programs. *Teacher Educational and Special Education*, 37, 106–120. Retrieved from: <http://doi.org/10.1177/0888406413507002>; Wei, R. C., Darling-Hammond, L., & Adamson, F. (2010). Professional development in the United States: Trends and challenges. Dallas, TX: National Staff Development Council; Begeny, J. C., & Martens, B. K. (2006). Assessing pre-service teachers' training in empirically validated behavioral instruction practices. *School Psychology Quarterly*, 21, 262–285. <http://doi.org/10.1521/scpq.2006.21.3.262>; Chesley, G. M., & Jordan, J. (2012). What's missing from educator prep. *Educational Leadership*, 69, 41–45.

⁴⁴ Brownell, M. T., Smith, S. W., McNellis, J. R., & Miller, M. D. (1997). Attrition in special education: Why teachers leave the classroom and where they go. *Exceptionality*, 7(3), 143–155. https://doi.org/10.1207/s15327035ex0703_1; Ingersoll, R. M., & Smith, T. M. (2003). The wrong solution to the teacher shortage. *Educational Leadership*, 60, 30–33; Ingersoll, R., Merrill, E., Stuckey, D., & Collins, G. (2018). *Seven Trends: The Transformation of the Teaching Force*, updated October 2018. Research Report (#RR 2018–2). Consortium for Policy Research in Education, University of Pennsylvania. Retrieved from https://repository.upenn.edu/cpre_researchreports/108; Smith, T. M., & Ingersoll, R. (2004). What are the effects of induction and mentoring on beginning teacher turnover. *American Education Research Journal*, 41, 681–714; Stevenson, N. A., VanLone, J., & Barber, B. R. (2020). A commentary on the misalignment of teacher education and the need for classroom behavior management skills. *Education & Treatment of Children*, 43(4), 393–404.

⁴⁵ Job-embedded professional development refers to teacher learning that is grounded in day-to-day teaching practice and is designed to enhance teachers' content-specific instructional practices with the intent of improving student learning see <https://learningforward.org/wp-content/uploads/2017/08/job-embedded-professional-development.pdf>.

⁴⁶ ESSA defines specialized instructional personnel as (i) school counselors, school social workers, and school psychologists; and (ii) other qualified personnel involved in providing assessment, diagnosis, counseling, educational, therapeutic, and other necessary services (including related services as that term is defined in section 602 of IDEA (20 U.S.C. 1401)) as part of a comprehensive program to meet student needs.

To effectively support students and respond to behavior, school and program personnel should have knowledge, skills, and experience in topics such as:

- Understanding the unique needs of each child with a disability and the rights afforded to children with disabilities under IDEA;
- Being aware of potential signs of stress;
- Being prepared to be the first contact and resource for children in need of support;
- Implementing universal screening and understanding screening data to make informed decisions about child needs and appropriate instructional and behavioral strategies;
- Implementing evidence-based prevention and intervention practices (such as positive behavioral interventions and supports, safe physical escort, conflict prevention, understanding antecedents, de-escalation, and conflict management) across all school or program settings to effectively support and respond to child behavior (e.g., classrooms, administrative office, hallways, playgrounds, cafeteria, school bus);
- Conducting FBAs;
- Effectively designing, implementing, and evaluating IEPs and BIPs, in collaboration with families and with support from specialized support personnel; and
- Re-integrating children into the school or program after extended periods of virtual learning or other absences from school.

III. Federal Funding Available to Address Disparities in, and to Reduce the Use of, Exclusionary Discipline

In addition to implementing coordinated policies, multiple funding streams can, and should, be used to address discipline disparities, improve school climate, and provide behavioral supports. IDEA requires LEAs to meet the functional, including behavioral, needs of eligible children with disabilities as part of their obligation to provide FAPE. Thus, IDEA Part B funds can be used to provide support and direct services related to addressing the behavior of children with disabilities, including technical assistance and professional development and training in this area.⁴⁷

At the SEA level, States may reserve a portion of their IDEA Part B funds to carry out certain authorized State-level activities to support children with disabilities and educators. For example, SEAs may use the IDEA section 611 funds they reserve for State-level activities, other than administration, for support and direct services, including technical assistance, personnel preparation, and professional development and training; to assist LEAs in providing positive

⁴⁷ Federal funds can be used for these purposes, provided, among other factors, the costs are necessary and reasonable for the performance of the Federal award and allocable to the Federal grant. 2 C.F.R. § 200.403.

behavioral interventions and supports and mental health services for children with disabilities; and to support capacity building activities and improve the delivery of services by LEAs to improve results for children with disabilities.⁴⁸

Another area in which IDEA funds may be used to provide behavioral supports is with coordinated early intervening services (CEIS).⁴⁹ CEIS are services provided to students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade three) who are not currently identified as needing special education and related services, but who need additional academic and behavioral supports to succeed in a general education environment.⁵⁰ IDEA allows LEAs to use up to 15 percent of funds they receive under Part B of IDEA for CEIS.⁵¹ This reservation is known as voluntary CEIS. This can include professional development for teachers and other school staff to enable such personnel to deliver scientifically based academic and behavioral interventions, and to provide educational and behavioral evaluations, services, and supports.⁵²

An LEA that has been identified as having significant disproportionality based on race or ethnicity with respect to the identification, placement, or discipline of children with disabilities under IDEA section 618(d)(1) must reserve the maximum amount of funds under IDEA section 613(f) (i.e., an amount equal to 15 percent of the LEA's IDEA Part B section 611 and 619 subgrants) for comprehensive CEIS activities under IDEA section 618(d)(2)(B). When LEAs with significant disproportionality use funds reserved for comprehensive CEIS to identify and address the factors contributing to the significant disproportionality, numerous factors should be considered.⁵³ These factors can include the inappropriate use of disciplinary removal and other policies, practices, and procedures that contribute to the significant disproportionality.⁵⁴ Additionally, an LEA may use comprehensive CEIS funds for training and professional development and behavioral evaluations and supports, such as FBAs, BIPs, and PBIS, where doing so addresses the factors identified by the LEA as contributing to the significant disproportionality identified by the State. Comprehensive CEIS funds may also be used for

⁴⁸ 34 C.F.R. § 300.704(b)(4)(i), (iii), and (viii). See also *OSEP Letter to Batson* (Dec. 11, 2008), available at: <https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/letters/2008-4/batson121108stateactivities4q2008.pdf>.

⁴⁹ 34 C.F.R. § 300.226.

⁵⁰ Id. See also OSEP Memo 08-09 (July 28, 2008), available at <https://www2.ed.gov/policy/speced/guid/idea/ceis-guidance.pdf>.

⁵¹ Section 613(f) of IDEA (20 U.S.C. § 1413(f)); 34 C.F.R. § 300.226.

⁵² In the case of an LEA's required use of IDEA Part B funds for comprehensive CEIS due to being identified with significant disproportionality, the LEA may also use the funds to address the needs of children already identified as eligible for special education and related services. 34 C.F.R. § 300.646(d)(2)(ii). For more information, see OSEP's Significant Disproportionality (Equity in IDEA) Essential Questions and Answers (Mar. 2017), available at: <https://sites.ed.gov/idea/files/significant-disproportionality-qa-03-08-17.pdf>.

⁵³ For more information see OSEP's Significant Disproportionality (Equity in IDEA) Essential Questions and Answers (Mar. 2017), available at: <https://sites.ed.gov/idea/files/significant-disproportionality-qa-03-08-17-2.pdf>.

⁵⁴ 34 C.F.R. § 300.646(d)(1)(ii).

preschool-aged children and children with disabilities, in certain LEAs identified with significant disproportionality to address discipline disparities and the behavioral needs of children.⁵⁵ Further, CEIS funds may be consolidated with certain other Federal funds in a schoolwide program under Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA), provided that the applicable requirements for both funding streams are met.⁵⁶

Finally, ESEA allows for some funds to be used to support MTSS, particularly Title II funds for professional development. Additionally, the Department has clarified that funds provided to States and LEAs through the Elementary and Secondary School Emergency Relief (ESSER) Fund and the Governor’s Emergency Education Relief (GEER) Fund are available to assist SEAs’ and LEAs’ efforts to address social, emotional, behavioral, and mental health needs, including PBIS.⁵⁷

IV. Federal Resources to Support State and Local Efforts to Address Disparities in, and Reduce the Use of, Exclusionary Discipline

In September 2021, the Department released [*Supporting Child and Student Social, Emotional, Behavioral and Mental Health*](#) to provide information and resources to enhance the promotion of mental health and the social and emotional well-being among children and students. That resource highlights seven key challenges to providing school- or program-based mental health support across early childhood, K–12 schools, and higher education settings, and presents seven corresponding recommendations. It includes examples of how the recommendations are being put into action by early childhood programs, schools, communities, and States across the country.

In addition, the Department funds several technical assistance centers that provide resources related to behavior that can be accessed by SEAs, LEAs, schools, early childhood programs, and educators.

- **National Technical Assistance Center on Positive Behavioral Interventions and Supports:** Funded since 1998, the purpose of the Center on PBIS is to improve the capacity of SEAs, LEAs, and schools to establish and sustain the PBIS framework to (a) scale up tier 2 and 3 systems to improve outcomes for students with or at risk for

⁵⁵ 34 C.F.R. § 300.646(d)(1) and (2). See also OSEP Memo 08-09 (July 28, 2008), available at <https://www2.ed.gov/policy/speced/guid/idea/ceis-guidance.pdf>.

⁵⁶ 34 C.F.R. § 300.206. See also the Department’s Office of Elementary and Secondary Education Sept. 13, 2013, letter to State Directors on maximizing flexibility in the administration of Federal grants, available at: <https://www2.ed.gov/programs/teacherqual/flexibility-swp091313.pdf>.

⁵⁷ U.S. Department of Education, *Frequently Asked Questions: Elementary and Secondary School Emergency Relief Programs Governor’s Emergency Education Relief Programs*, Washington, DC, May 2021. Available at: https://oese.ed.gov/files/2021/05/ESSER.GEER_FAQs_5.26.21_745AM_FINALb0cd6833f6f46e03ba2d97d30af953260028045f9ef3b18ea602db4b32b1d99.pdf. See also U.S. Department of Education. (2021). *Supporting Child and Student Social, Emotional, Behavioral, and Mental Health Needs*. Retrieved October 8, 2021, from <https://www2.ed.gov/documents/students/supporting-child-student-social-emotional-behavioral-mental-health.pdf>.

disabilities, (b) enhance school climate and school safety, and (c) improve conditions for learning to promote the well-being of all students. The Center on PBIS (a) provides the technical assistance to encourage large-scale implementation of MTSS to address social, emotional, behavioral, and mental health needs; (b) provides the organizational models, demonstrations, dissemination, and evaluation tools needed to comprehensively and effectively implement MTSS across an array of contexts; and (c) extends the lessons learned from PBIS implementation to the broader agenda of educational reform. The Center also provides support to the School Climate Transformation District and State grants. The website (www.pbis.org/) includes resources, tools, and trainings to enhance district and State efforts to build capacity and systemically integrate social, emotional, behavioral, and mental health strategies and supports in schools.

- **National Center for Pyramid Model Innovations (NCPMI):** The NCPMI works to improve and support the capacity of State systems and local programs to implement an early childhood MTSS to improve the social, emotional, and behavioral outcomes of young children with, and at risk for, developmental disabilities or delays. The goals of the Center are to assist States and programs in their implementation of sustainable systems for the implementation of the Pyramid Model for Supporting Social Emotional Competence in Infants and Young Children within early intervention and early education programs with a focus on improving the social, emotional, and behavioral outcomes of young children birth to five, reducing the use of inappropriate disciplinary practices, promoting family engagement, using data for decision-making, integrating early childhood and infant mental health consultation, and fostering inclusion. (<https://challengingbehavior.org/>)
- **National Center on Intensive Interventions (NCII):** NCII works to build the capacity of SEAs, LEAs, universities, practitioners, and other stakeholders to support implementation of intensive intervention in literacy, mathematics, and behavior for students with severe and persistent learning and/or behavioral needs. NCII's approach to intensive intervention is data-based individualization. The website includes tools to support the implementation of evidence-based practices for intensive behavior. (<https://intensiveintervention.org/>)
- **IRIS Center:** The IRIS Center is a national center dedicated to improving education outcomes for all children, especially those with disabilities birth through age twenty-one, through the use of effective evidence-based practices and interventions. The Center has training modules available for pre- and in-service development for educators on supporting and responding to school behavior, including cultural considerations and behavior. (<https://iris.peabody.vanderbilt.edu/>)
- **Comprehensive Center Network (CCNetwork):** The CCNetwork is comprised of 19 Regional Comprehensive Centers and 1 National Center that provide capacity-building technical assistance to States, districts and schools in their design and implementation of

evidence-based policies, practices, programs, and interventions that improve instruction and educational outcomes for all students. SEAs may request capacity-building support from their Comprehensive Centers. The CCNetwork produces and disseminates research-based tools and resources to build the capacity of educational leadership in social, emotional, behavioral, and mental health approaches to better support the well-being of students, school staff, and families. (<https://compcenternetwork.org/>)

- **Center to Improve Social and Emotional Learning and School Safety (CISELSS):** The purpose of the CISELSS is to provide technical assistance to support States and districts in the implementation of social and emotional learning evidence-based programs and practices. The CISELSS works to build the knowledge and capacity of (1) SEAs to support their LEAs and (2) LEAs to support their schools. (<https://selcenter.wested.org/>)
- **National Center on Safe Supportive Learning Environments (NCSSLE):** Funded by the Department’s Office of Safe and Supportive Schools, NCSSLE offers information and technical assistance to States, districts, schools, institutions of higher education, and communities focused on improving school climate and conditions for learning. NCSSLE operates under the premise that, with the right resources and support, educational stakeholders can collaborate to sustain safe, engaging, and healthy school environments that support student academic success. The website includes information about the Center’s training and technical assistance resources, products and tools, and latest research findings. (<https://safesupportivelearning.ed.gov/>)
- **What Works Clearinghouse (WWC):** Funded by the Department’s Institute of Education Sciences, the WWC has been a central and trusted source of scientific evidence on education programs, products, practices, and policies. The WWC reviews relevant research, determines which studies meet rigorous standards, and summarizes the findings. The WWC focuses on high-quality research to answer the question “what works in education?” (<https://ies.ed.gov/ncee/wwc/FWW/Results?filters=,Behavior>)

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QUESTIONS AND ANSWERS: ADDRESSING THE NEEDS OF CHILDREN WITH DISABILITIES AND IDEA'S DISCIPLINE PROVISIONS

OSEP Q&A 22-02

**U.S. DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND
REHABILITATIVE SERVICES**

JULY 19, 2022

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The U.S. Department of Education (Department) is committed to ensuring that all children have access to a high-quality education provided in a safe, supportive, and predictable¹ learning environment free from discrimination²; filled with healthy, trusting relationships; and one that ensures each child’s social, emotional, academic, and functional³ growth and development. For eligible children with disabilities, this commitment requires full implementation of Part B of the Individuals with Disabilities Education Act (IDEA). The Department is concerned that misapplying or, in some cases, not applying, the provisions found in IDEA, including the discipline provisions, has contributed to inappropriate exclusion, particularly for children of color with disabilities, and resulted in denying access to critical educational opportunities.⁴ The Department recognizes and appreciates school administrators, teachers, and educational staff across the Nation who work to provide a safe, positive, and nondiscriminatory education environment for all students, teachers, and other school staff. Schools need not choose between keeping their school community—including students and school staff—safe and complying with the law. Furthermore, IDEA requirements do not interfere with a school’s ability to address extraordinary situations in which a child’s behavior, including behavior related to the child’s disability, is an immediate threat to their own or others’ safety, such as by contacting crisis

¹ “Predictable,” as used in positive behavioral interventions and supports, generally refers to something that is obvious or has known expectations. Predictable learning environments may contribute to a sense of safety for children thereby limiting behavior that is not consistent with a school’s code of student conduct.

² This document only addresses requirements related to the rights of children with disabilities eligible for special education and related services under the Individuals with Disabilities Education Act (IDEA). Children with disabilities also have rights under Section 504 of the Rehabilitation Act of 1973 (Section 504). The Department’s Section 504 regulations prohibits disability discrimination by recipients of Federal financial assistance, such as State educational agencies (SEAs) and local educational agencies (LEAs). 29 U.S.C. 794; 34 C.F.R. pt. 104. Section 504 is enforced by the Department’s Office for Civil Rights (OCR). OCR also enforces laws prohibiting discrimination by recipients of Federal financial assistance, on the basis of race, color, national origin, sex, and age. For OCR guidance on topics under these laws, please visit <http://www.ed.gov/ocr>. For more information about the protections of Section 504 for students with disabilities from disability discrimination in the context of school discipline, see [Supporting Students with Disabilities and Avoid the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973](#), and [Fact Sheet: Supporting Students with Disabilities and Avoid the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973](#). For more information about the prohibitions against discrimination on the basis of race, color, or national origin, see <http://www.ed.gov/ocr>.

³ Although not defined in IDEA, the word “functional,” as used in the IDEA regulations, generally refers to activities and skills that are not considered academic or related to a child’s academic achievement as measured on Statewide achievement tests. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Regulations, Analysis of Comments and Changes, 71 Fed. Reg. 46540, 46579 (Aug. 14, 2006). The Department believes it is reasonable to interpret “functional performance” to include areas such as behavioral and mental health factors that impact the involvement and progress by a child with a disability in the general education curriculum.

⁴ See the Office of Special Education and Rehabilitative Services (OSERS), Dear Colleague Letter on Ensuring Equity and Providing Behavioral Supports to Students with Disabilities (Dec. 1. 2016) (“2016 DCL”), available at: <https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf>; and See supra note 2, Supporting Students with Disabilities and Avoid the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973.]

intervention specialists or law enforcement. The Department offers this Questions and Answers (Q&A) document (along with [*Positive, Proactive Approaches to Supporting Children with Disabilities: A Guide for Stakeholders*](#)) to all education stakeholders, including families and educators, to support the implementation of IDEA's discipline provisions in a way that upholds the law's promise of equality of opportunity.

This document updates and supersedes the Office of Special Education and Rehabilitative Services' (OSERS) guidance titled *Questions and Answers on Discipline Procedures*, issued in June 2009,⁵ and includes additional questions and answers that address topics that have arisen as the field continues to carry out the discipline provisions of IDEA and its implementing regulations. Key topics include removing a child with a disability from their current educational placement and the responsibilities of individualized education program (IEP) teams to address the behavioral needs of children with disabilities through the evaluation, reevaluation, and IEP development process to ensure the provision of a free appropriate public education (FAPE).⁶

A glossary of key terms and acronyms used in this document can be found in Appendix I. [Parents](#) who would like to request additional support in understanding IDEA's discipline provisions and the rights afforded to children with disabilities may wish to contact the parent training and information center (PTI) in their area for direct assistance and referrals to other organizations. The Department provides funding to PTIs to support parents in gaining skills to effectively participate in the education and development of their children. Parents can locate the PTI for their area at <https://www.parentcenterhub.org/find-your-center/>.⁷

⁵ In *D.S. v. Trumbull Board of Education*, 975 F.3d 152 (2d Cir. 2020), the U.S. Court of Appeals for the Second Circuit disagreed with the Department's interpretation that a functional behavioral assessment (FBA) is considered an evaluation or reevaluation under IDEA that triggers a parent's right to request an independent educational evaluation at public expense. Based on this, OSERS intends to review its previously stated positions on this matter including whether and when an LEA must seek parental consent before conducting an FBA for an eligible child with a disability. (See Questions E-4 and E-5 in OSERS' 2009 Q&A document).

⁶ FAPE means special education and related services that: (1) are provided at public expense, under public supervision, and without charge; (2) meet the standards of the SEA, including the requirements of IDEA; (3) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (4) are provided in conformity with an IEP that meets the requirements of 34 C.F.R. §§ 300.320 through 300.324. 34 C.F.R. § 300.17. Based on State law governing the education of all children, some States do not provide public education to children through age 21. IDEA does not require the provision of FAPE to children with disabilities aged 3, 4, 5, 18, 19, 20, or 21 to the extent those ages are outside the public education age limit under State law or practice, or the order of any court. See 34 C.F.R. § 300.102(a)(1).

⁷ This document contains resources and examples that are provided for the user's convenience. The inclusion of these materials is not intended to reflect their importance, nor is it intended to endorse any views expressed, or products or services offered. These materials may contain the views and recommendations of various subject-matter experts as well as hypertext links, contact addresses and websites to information created and maintained by other public and private organizations. The opinions expressed in any of these materials do not necessarily reflect

The Department has determined that this document provides significant guidance under the [Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices](#), 72 Fed. Reg. 3432 (Jan. 25, 2007). Except for any statutory or regulatory requirements described in this guidance, this significant guidance is nonbinding and does not create or impose new legal requirements.

For further information about the Department's guidance processes, please visit:

www2.ed.gov/policy/gen/guid/significant-guidance.html.

The questions and answers in this document are not intended to be a replacement for careful study of IDEA and its implementing regulations. IDEA, its implementing regulations, and other important documents related to IDEA and the regulations are found at:

<https://sites.ed.gov/idea/>

School Climate and Student Discipline Resources:

www.ed.gov/discipline

the positions or policies of the Department. The Department does not control or guarantee the accuracy, relevance, timeliness, or completeness of any outside information included in these materials. Inclusion of such information does not constitute an endorsement by the Department or the Federal government, nor a preference/support for these examples as compared with others that might be available and be presented. Additionally, this discussion should not imply an endorsement of any organization, curriculum, or learning model.

TABLE OF CONTENTS

A.	Obligations to Meet the Needs of Eligible Children with Disabilities under IDEA.....	5
B.	An Overview of IDEA’s Discipline Procedures	9
C.	Change in Placement.....	11
D.	Interim Alternative Educational Setting (IAES).....	17
E.	Special Circumstances	21
F.	Manifestation Determination Review	24
G.	IDEA’s Requirements for FBAs and BIPs	28
H.	Provision of Services During Periods of Removal	30
I.	Protections for Children Not Yet Determined Eligible for Services under IDEA.....	32
J.	Application of IDEA Discipline Protections in Certain Specific Circumstances.....	38
K.	Resolving Disagreements.....	43
L.	State Oversight and Data Reporting Responsibilities	47
APPENDIX I:	Glossary of Key Terms and Acronyms, as Used in This Guidance	51

A. Obligations to Meet the Needs of Eligible Children with Disabilities under IDEA

Question A-1: What are some of the obligations of LEAs⁸ to provide FAPE to children with disabilities enrolled in public schools and children with disabilities placed in private schools by an LEA as a means of providing FAPE?

Answer: The cornerstone of IDEA is the entitlement of each eligible child with a disability to FAPE that emphasizes special education and related services designed to meet the child's unique needs and that prepares the child for further education, employment, and independent living. All children enrolled in public schools and children with disabilities who are publicly placed in private schools by an LEA are entitled to FAPE. Under IDEA, the vehicle for providing FAPE is through an appropriately developed IEP based on the individual needs of the child. An IEP must include a child's present levels of academic achievement and functional performance, and the impact of a child's disability on their involvement and progress in the general education curriculum. IEP goals must be aligned with grade-level content standards for all children with disabilities.⁹ The child's IEP must be developed, reviewed, and revised in accordance with the requirements outlined in IDEA in 34 C.F.R. §§ 300.320 through 300.328.¹⁰ IDEA also provides procedural safeguards, including extensive due process protections, to children with disabilities and their [parents](#).

Question A-2: Must school personnel support the behavioral needs of children with disabilities?

Answer: Yes. IDEA and its implementing regulations require IEP Teams to follow certain procedures to ensure that IEPs meet the individualized needs, including the behavioral needs, of children with disabilities. 20 U.S.C. § 1414(d) and

⁸ To increase readability, the Department has used the term "LEA" in place of "public agency." Public agency is defined in 34 C.F.R. § 300.33 to include the SEA, LEAs, educational services agencies (ESAs), nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities. The program requirements under Part B of IDEA apply to public agencies. See 34 C.F.R. §§ 300.120 and 300.600(b)(2).

⁹ States are permitted to define alternate academic achievement standards for children with the most significant cognitive disabilities, provided those standards are aligned with the State's academic content standards, promote access to the general curriculum, and reflect professional judgment of the highest achievement standards possible, in accordance with 34 C.F.R. § 200.1(d). 34 C.F.R. § 300.160(c)(2)(i).

¹⁰ For examples, see pages 5–8 of the Office of Special Education and Rehabilitative Services (OSERS), Dear Colleague Letter on Ensuring Equity and Providing Behavioral Supports to Students with Disabilities (Dec. 1. 2016) ("2016 DCL"), available at: <https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf>.

34 C.F.R. §§ 300.320 through 300.324. The initial evaluation or reevaluation, for example, must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, and assess the child in all areas related to the suspected disability, including, if appropriate, social and emotional status. 34 C.F.R. §§ 300.304(b) and (c)(4); 34 C.F.R. §§ 300.304 through 300.311.

The IEP Team must consider information about a child's current functional (e.g., behavioral) performance provided by parents, classroom teachers, and other service providers when developing the child's IEP. 34 C.F.R. §§ 300.321 and 300.324. Once the IEP is developed, IEP Teams must: (1) review the child's IEP periodically, but not less than annually, to determine whether the child's annual goals are being achieved; and (2) revise the IEP, as appropriate, to address: any lack of expected progress towards the annual goals in the child's IEP and in the general education curriculum; the results of any reevaluation; information about the child provided to or by the parent; the child's anticipated needs; or other matters. 34 C.F.R. § 300.324(b)(1).

The LEA must ensure that the child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation. Further, each teacher and provider must be informed of their specific responsibilities for implementing the IEP and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP. 34 C.F.R. § 300.323(d). This includes any positive behavioral interventions and supports, and other strategies that the IEP Team determines are necessary to address the child's behavioral needs.

Question A-3: Are there specific requirements for supporting children with disabilities whose behavior impedes their learning or that of others?

Answer: Yes. IDEA specifically requires IEP Teams to consider the use of positive behavioral interventions and supports, and other strategies, for any child with a disability whose behavior impedes their learning or that of others. 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i). The IEP Team may elect to address the behavior through annual goals in the IEP. 34 C.F.R. § 300.320(a)(2)(i). The child's IEP may include modifications to the child's program, supports for the child's teachers or other school personnel, and any special education and related services and supplementary aids and services necessary to enable the child to advance appropriately toward attaining those behavioral goals. 34 C.F.R. § 300.320(a)(4).

Question A-4: What steps should a child's IEP Team take to support the behavioral needs of a child with a disability?

Answer: When a child with a disability demonstrates behavior that impedes the child's learning or that of others, appropriate behavioral supports may be necessary to ensure that the child receives FAPE. The IEP Team must consider and when determined necessary for ensuring FAPE, include or revise behavioral supports in the child's IEP. 34 C.F.R. §§ 300.320(a)(4) and 300.324(a)(2)(i). When developing, reviewing, and revising the IEP, IEP Teams should determine whether behavioral supports are needed to ensure FAPE to the child: (1) special education and related services; (2) supplementary aids and services; and (3) program modifications or supports for school personnel. 34 C.F.R. § 300.320(a)(4). Under IDEA, special education and related services and supplementary aids and services are to be based on peer-reviewed research to the extent practicable; thus, behavioral supports should be supported by evidence. 34 C.F.R. § 300.320(a)(4).¹¹

Question A-5: What steps should school personnel take if they observe that a child with a disability is exhibiting behaviors that impede their learning or the learning of others, but the child's IEP does not include positive behavioral interventions and supports and other strategies to address those behaviors?

Answer: In this case, the LEA should reconvene the IEP Team, which includes the parent, to discuss next steps to ensure that the IEP addresses the behavior that impedes the child's learning or the learning of others. The IEP Team could decide additional data are needed to determine the child's educational needs including how to address the child's behaviors, and the LEA could seek parental consent to conduct additional assessments to produce the necessary data. If the IEP Team determines it has sufficient information, it could revise an existing IEP such as by providing the child additional services and supports to help address the child's behavior.¹² If changes are needed after a child's annual IEP

¹¹ For more information on these requirements, see 2016 DCL, pp. 6–7.

¹² Additional services and supports, supplementary aids and services, and program modifications and supports for school personnel could include: counseling services for mental health needs (e.g., anxiety, depression, etc.); social skill instruction; explicit reinforcement of positive behavior (such as through a classroom token economy); explicit instruction in stress, anxiety, and depression management; consultation with a professional with expertise in behavioral interventions to create a positive behavioral support plan; increased access to counselors; access to targeted strategies based on peer-reviewed research to support social, emotional, behavioral, or mental health needs (e.g., anxiety scaling, mindfulness exercises); changing the student's class schedule; training staff on additional positive behavioral supports and universal design for learning; and, access to consultation with related

Team meeting for a school year, the parent and the LEA may agree not to convene the full IEP Team and instead develop a written document to amend the IEP. 34 C.F.R. § 300.323(a)(4). For additional information on revising or amending an IEP, see Questions C-8 through C-10 in [Questions and Answers on Individualized Education Programs \(IEPs\), Evaluations, and Reevaluations](#) (2011).

Question A-6: How could it impact a child with a disability if their IEP Team fails to consider and provide for needed behavioral supports?

Answer: As OSERS noted in its [2016 DCL](#),¹³ the failure of the IEP Team to consider and provide for needed behavioral supports through the IEP process may result in a child not receiving a meaningful educational benefit or FAPE. In addition, an LEA’s failure to make behavioral supports available throughout a continuum of alternative placements, including in a regular education setting, could result in an inappropriately restrictive placement and constitute a denial of placement in the least restrictive environment.

The failure of the IEP Team to consider and provide for needed behavioral supports could also lead to behavior that is inconsistent with the school’s code of student conduct.¹⁴ To the extent a child’s behavior, including its impact and consequences (e.g., violations of a school’s code of student conduct, classroom disruptions, disciplinary removals, and other exclusionary disciplinary measures), impede the child’s learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). If the child’s IEP already includes behavioral supports, upon repeated incidents of child misbehavior or classroom disruption, the IEP Team may need to meet to consider whether the child’s behavioral supports are being consistently implemented as required by the IEP or whether they should be changed. It is critical that IDEA provisions designed to support the needs of children with disabilities and ensure FAPE are appropriately implemented so as to avoid an overreliance on, or misuse of, [exclusionary discipline](#) in response to a child’s behavior.

service providers and others with specialized expertise. See [Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment](#) (Sept. 30, 2021). Also, see pages 5–8 of OSERS 2016 DCL for examples of behavioral supports for children with disabilities.

¹³ See 2016 DCL.

¹⁴ As used in this document, “code of student conduct” includes the expectations for behavior when participating in programs, including early childhood programs, and schools.

B. An Overview of IDEA’s Discipline Procedures

Question B-1: Does IDEA define “discipline”?

Answer: No. IDEA does not define “discipline.” IDEA section 615(k) and the implementing regulations at 34 C.F.R. §§ 300.530 through 300.536 explain the rights of children with disabilities and the authority of school personnel when a child is suspended, expelled, or temporarily placed in an [interim alternative educational setting \(IAES\)](#) for disciplinary purposes. For the purposes of this Q&A, “discipline” is intended to mean the consequences a school imposes on a child who violates a school’s code of student conduct or rules as determined by school personnel.^{15,16}

Question B-2: Do IDEA’s implementing regulations prescribe specific disciplinary actions that an LEA must take when a child with a disability violates a school’s code of student conduct?

Answer: No. IDEA does not prescribe specific disciplinary actions an LEA must take, but it *does* set some limits. For example, IDEA does not preclude an LEA from disciplining a child with a disability for violating a school’s code of student conduct like any other student, but it does preclude an LEA from doing so in situations where the disciplinary action would result in a change in placement and the behavior that gave rise to the violation of the school’s code of student conduct is determined to be a manifestation of the child’s disability, with the exception of disciplinary removals due to “[special circumstances](#)”.
34 C.F.R. §§ 300.530(c) and 300.530(g). For more information, see Section C

¹⁵ The term “discipline” as used in this document does not include the use of corporal punishment. While IDEA does not prohibit the use of [corporal punishment](#) in schools and programs, the Department previously urged States to eliminate this practice from schools, and instead promote supportive, effective disciplinary measures. The Department’s letter on this topic noted that in-school corporal punishment is often not applied equally to all students and is disproportionately applied to students of color and students with disabilities. In addition, the letter noted the use of corporal punishment is ineffective as a strategy to address inappropriate behavior and is also associated with negative academic outcomes. See November 22, 2016 letter from former Secretary John King. <https://www2.ed.gov/policy/gen/guid/school-discipline/files/corporal-punishment-dcl-11-22-2016.pdf>

¹⁶ IDEA does not prohibit a school or preschool program from imposing consequences for a child that do not result in an exclusionary disciplinary measure. Such practices are not addressed in IDEA and could include actions such as loss of privileges, after-school detention, or performing community service. Likewise, some schools utilize a restorative practices approach to build better relationships, and address harms, needs, and obligations, within the school community. See generally, Supporting Students with Disabilities and Avoid the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973, and Fact Sheet: Supporting Students with Disabilities and Avoid the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973, and <http://www.ed.gov/ocr>, for discussion of prohibitions against discrimination on the basis of disability and race, color, or national origin.

on “Change in Placement,” Section E on “Special Circumstances,” and Section F on “[Manifestation Determination Reviews](#).”

Question B-3: Does the Office of Special Education Programs (OSEP) consider restraint or [seclusion](#) to be appropriate strategies for disciplining a child for behavior related to their disability?

Answer: No. OSEP is not aware of any evidence-based support for the view that the use of restraint or seclusion is an effective strategy in modifying a child’s behaviors that are related to their disability. The Department’s longstanding position is that every effort should be made to prevent the need for the use of restraint or seclusion and that behavioral interventions must be consistent with the child’s rights to be treated with dignity and to be free from abuse. Further, the Department’s position is that restraint or seclusion should not be used except in situations where a child’s behavior poses imminent danger of serious physical harm to themselves or others.¹⁷ The Department has developed and disseminated a resource document recommending that [physical restraint](#) or seclusion “never be used as punishment or discipline.”¹⁸ IDEA does not expressly allow or prohibit the use of restraints or seclusion. IDEA does, however, require the consideration of the use of positive behavioral interventions and supports, and other strategies, to address the behavior of a child with a disability that impedes their learning or that of others. Therefore, IEP Teams should consider and incorporate into a child’s IEP other interventions and supports that are evidence-based.¹⁹

¹⁷ See May 15, 2012 letter from former Secretary Arne Duncan to educators, accompanying the Department’s [Restraint and Seclusion: Resource Document](#).

¹⁸ Id. In addition, see OCR’s [2016 Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities](#). This DCL explains when restraint or seclusion may result in discrimination on the basis of disability.

¹⁹ It also is worth noting that the U.S. Department of Justice has investigated for compliance with Title II of the Americans with Disabilities Act (ADA), LEAs that unnecessarily and repeatedly restrain or seclude children with disabilities. See e.g., <https://www.justice.gov/opa/press-release/file/1452621/download>. In addition, the U.S. Department of Education’s Office for Civil Rights conducts investigations to determine if an LEA’s restraint or seclusion of students with disabilities constituted disability discrimination in violation of Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act. See, e.g., <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-reaches-agreement-resolve-restraint-and-seclusion-compliance-review-michigans-huron-valley-schools>

C. Change in Placement

Question C-1: When do disciplinary actions and programmatic changes constitute a [change of placement](#)?

Answer: A change of placement occurs if: (1) the removal is for more than 10 consecutive [school days](#); or (2) the child has been subjected to a series of removals that constitute a pattern (i) because the series of removals total more than 10 school days in a school year; (ii) because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and (iii) because of such additional factors such as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 C.F.R. § 300.536(a).

The calculation of the 10 school days of suspension addressed in 34 C.F.R. § 300.530 could include exclusions that take place outside of IDEA's discipline provisions which occur because of a child's behavior. Actions that result in denials of access to, and significant changes in, a child's educational program could all be considered as part of the 10 days of suspension and also could constitute an improper change in placement. These actions could include when a school administrator unilaterally informs a parent that their child with a disability may only remain in school for shortened school days because of behavioral issues or when a child with a disability is not allowed by the teacher to attend an elective course because of behavioral concerns. These types of actions are generally considered disciplinary removals unless all three of the following factors are met: (1) the child is afforded the opportunity to continue to appropriately participate in the general curriculum; (2) the child continues to receive the services specified on the child's IEP; and (3) the child continues to participate with nondisabled children to the extent they would have in their current placement.²⁰ Further, the immediate removal of a child with a disability to a more restrictive setting for more than 10 days in response to disability-related behavior also could constitute an improper disciplinary removal or an

²⁰ These factors are the same factors the Department applies to in-school suspensions, for purposes of 34 C.F.R. § 300.530. In the Analysis of Comments and Changes accompanying the Part B regulations, the Department explained: "It has been the Department's long term policy that an in-school suspension would not be considered a part of the days of suspension addressed in 34 C.F.R. § 300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. This continues to be our policy." The explanation concludes by indicating that whether an in-school suspension would constitute a day of suspension would depend on the unique facts and circumstances of each case. [71 Fed. Reg. 46715 \(Aug. 14, 2006\)](#).

improper change of placement if not specifically authorized under, and implemented consistent with, IDEA requirements. For example, school personnel must consider whether prior notice and a copy of the procedural safeguards must be provided to the parent of a child with a disability consistent with the requirements under 34 C.F.R. §§ 300.503 and 300.504 or whether the removal would require that a timely manifestation determination review occur under 34 C.F.R. § 300.530(e). (See Section F for additional information on manifestation determination reviews). SEAs should examine these practices in conjunction with their duty to monitor LEAs' compliance with the discipline provisions and the IEP, placement, and the least restrictive environment requirements of IDEA. 34 C.F.R. §§ 300.149 and 300.600. In addition, LEAs should ensure that they have in effect policies, procedures, and programs that are consistent with the applicable State policies and procedures and any State-imposed requirements that are not required under IDEA, 20 U.S.C. § 1407(a); 34 C.F.R. § 300.201.

Question C-2: Who makes the determination as to whether a pattern of removals constitutes a [disciplinary change in placement](#)?

Answer: The LEA makes the determination, on a case-by-case basis, of whether a pattern of removals constitutes a change in placement under the discipline provisions in IDEA. 34 C.F.R. § 300.536(b)(1). Under IDEA, school authorities may only remove a child with a disability who violates a school's code of student conduct from the child's current placement to an appropriate IAES, another setting, or suspension, for not more than 10 school days at a time. This removal may only occur to the extent that such disciplinary action is applied to children without disabilities for the same violation. 34 C.F.R. § 300.530(b). When school personnel determine that a change of placement would occur as a result of a proposed disciplinary action, prior notice and a copy of the procedural safeguards must be provided to the parent of a child with a disability consistent with the requirements under 34 C.F.R. §§ 300.503 and 300.504. If school personnel determine that a pattern of removals is not a change in placement, the child's parent may challenge this decision through IDEA's dispute resolution mechanisms, which include filing a State complaint under 34 C.F.R. § 300.153, filing a due process complaint to request an expedited due process hearing under 34 C.F.R. § 300.532(a), or requesting mediation under 34 C.F.R. § 300.506. See Section J for additional information on resolving disputes.

Question C-3: Can the imposition of [short-term disciplinary removals](#) (i.e., 10 consecutive school days or less) be a basis for reconvening the child's IEP Team?

Answer: Yes. Under 34 C.F.R. § 300.324(b), IEP reviews and revisions are appropriate to address, among other issues: any lack of expected progress toward meeting the annual goals; the results of any reevaluation; information about the child provided to, or by, the parent; the child's anticipated needs; or other matters such as the behavior that led to the short-term disciplinary removal including the impact on the child's learning or that of others.

Frequent use of short-term disciplinary removals or [informal removals](#) of children with disabilities may indicate that the child's IEP does not appropriately address their behavioral needs, which may result in a denial of FAPE.²¹ School staff should be aware of, and gauge the need for and effectiveness of, behavioral interventions when implementing exclusionary disciplinary measures that continually or significantly interfere with a child's instruction and participation in school activities (e.g., a pattern of office referrals, repeatedly sending a child out of school on "administrative leave" or regularly requiring a child to leave the school early and miss instructional time).²² Some of the factors that may be considered when considering the use of short-term removals include: (1) the circumstances that led to the child's removal; (2) whether the child was being provided services in accordance with the IEP; (3) whether the behavior can be addressed through minor changes to classroom or program practices (e.g., adjusting the time the child transitions to lunch in the cafeteria); and (4) whether the IEP Team should be reconvened to address possible changes to the IEP. In situations where the child's behavior and the resulting removals impede the child's learning or that of others, LEAs must review and revise the child's IEP to ensure that appropriate behavioral supports and services are in place to address the behavior that is resulting in such disciplinary removals. Further, the LEA must take the steps necessary to ensure that the child's IEP, including any positive behavioral interventions, supports, and other strategies, are consistently implemented. 34 C.F.R. §§ 300.323 and 300.324(a)(2).

²¹ 2016 DCL at pp. 11–12.

²² Id. at p. 12.

Question C-4: If a removal is for 10 consecutive school days or less and occurs after a child has been removed previously for 10 school days in that same school year, and the LEA determines that the subsequent removal does *not* constitute a change of placement based on the factors described in Question C-1, must the agency provide written notice to the parent under IDEA?

Answer: No. Under IDEA an LEA is required to provide written notice only if it determines that a short-term removal constitutes a change of placement. Therefore, in the circumstance described in the question, the LEA is not required by IDEA to provide written notice to the parent.²³ However, notice of the removal to the child's parent may be required under State law or other procedures the State has adopted for the implementation of IDEA requirements.

Question C-5: When the parent of a child with a disability and school personnel agree about changing the child's placement after the child has violated a school's code of student conduct, is the change considered a removal under the discipline provisions?

Answer: No. If the parent of a child with a disability and the LEA agree to a specific change in the current educational placement of the child to implement the child's current IEP, then it is not considered a removal under the discipline provisions. However, where the parent and the LEA agree that a child with a disability requires additional services and supports from those in the current IEP, the IEP must be revised before the new placement is determined. For example, if school personnel and the parent agree that a different educational placement is required to better implement the child's current IEP in order to ensure the provision of FAPE, the new placement would not be considered a "change of placement" in the context of the discipline requirements. Such changes in placement remain subject to the placement requirements in 34 C.F.R. § 300.116 and the prior written notice requirements in 34 C.F.R. § 300.503.

Question C-6: Are informal removals, such as administratively shortened school days, considered a school day when calculating a disciplinary change in placement?

Answer: IDEA's implementing regulations define school day as any day, including a partial day, that children attend school for instructional purposes. Additionally,

²³ Although notice under IDEA is not required in these circumstances, due process under the Fourteenth Amendment to the U.S. Constitution requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against them and, if they deny them, an explanation of the information that school officials have and an opportunity to present the student's version. *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

school day has the same meaning for all children in school, including both those with and without disabilities. 34 C.F.R. § 300.11(c). In the discipline context, administratively shortened school days occur when a child's school day is reduced solely by school personnel, rather than the child's IEP Team or placement team, in response to the child's behavior. In general, the use of informal removals to address a child's behavior, if implemented repeatedly throughout the school year, could constitute a disciplinary removal from the current placement. Therefore, the discipline procedures in 34 C.F.R. §§ 300.530 through 300.536 would generally apply unless all three of the following factors are met: (1) the child is afforded the opportunity to continue to appropriately participate in the general curriculum; (2) the child continues to receive the services specified on the child's IEP; and (3) the child continues to participate with nondisabled children to the extent they would have in their current placement. 71 Fed. Reg. 46715 (Aug. 14, 2006).

In general, a school day for a child with a disability should not be longer or shorter than a school day for children without disabilities. However, if a child's IEP Team determines a child needs a longer or shorter school day in order to receive FAPE, then appropriate modifications should be incorporated into the IEP by the child's IEP Team to ensure that the child continues to receive FAPE. These modifications must be based on the unique needs of the child, such as when the nature or severity of the child's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily and a shortened school day is warranted. This determination would be made by the child's IEP and placement teams that may include, when appropriate, the child's medical provider or other treatment specialists. In addition, a practice of shortening a child's school day as a disciplinary measure could be considered a denial of FAPE if the child's IEP Team does not also consider other options such as additional or different services and supports that could enable a child to remain in school for the full school day.

Question C-7: Is an [in-school suspension](#) considered a school day that must be counted when determining whether a removal constitutes a change of placement?

Answer: It depends. It has been the Department's longstanding interpretation that an in-school suspension generally would be considered part of the days of suspension unless the child: (1) is afforded the opportunity to continue to appropriately participate in the general curriculum; (2) continues to receive the services specified on the child's IEP; and (3) continues to participate with nondisabled children to the extent they would have in the child's current placement.

71 Fed. Reg. 46715 (Aug. 14, 2006). It is important to recognize that even if all three of these factors are met, an in-school suspension still removes the child from the educational placement determined to be appropriate by the child's placement team, and additional actions may need to be taken by the child's IEP Team. For example, the repeated use of in-school suspension may indicate that a child's IEP, or the implementation of the IEP, does not appropriately address their behavioral needs. Therefore, the child's IEP Team should consider whether additional positive behavioral interventions and supports or other strategies would assist the child in the current placement.

Question C-8: When a child's IEP requires transportation as a related service, are bus suspensions subject to IDEA's discipline protections for determining a change of placement?

Answer: It depends. If transportation is a related service required for the provision of FAPE (i.e., to assist the child with a disability to benefit from special education) and therefore required to be included in the child's IEP, a bus suspension must be treated as a suspension under 34 C.F.R. § 300.530, and all of the IDEA's discipline procedures and protections for eligible children with disabilities would apply.²⁴ In addition, transportation must be provided to a child with a disability placed in an IAES if transportation is required for the child to access the services provided in the IAES.

An LEA is not required to provide alternative transportation to a child with a disability who has been suspended from transportation for 10 school days or less unless the LEA provides alternative transportation to children without disabilities who have been similarly suspended from bus service.

34 C.F.R. § 300.530(d)(3). If bus transportation is not required for FAPE and is not a part of the child's IEP, a bus suspension is not considered a disciplinary removal under 34 C.F.R. § 300.530. In those cases, transportation is not part of the provision of FAPE, and the child and the child's parent have the same obligations to get the child to and from school as a nondisabled child who has been suspended from bus services. 71 Fed. Reg. 46715 (Aug. 14, 2006). For additional information see Questions and Answers on Serving Children with Disabilities Eligible for Transportation.

²⁴ Under [34 C.F.R. § 300.34](#), related services mean transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education.

D. Interim Alternative Educational Setting (IAES)

Question D-1: What is an [IAES](#)?

Answer: IDEA does not define an IAES. However, OSEP's [data documentation file for discipline](#) data collected under IDEA Section 618 defines an IAES as:

an appropriate setting determined by the child's IEP Team or a hearing officer in which the child is placed for no more than 45 school days. This setting enables the child to continue to receive educational services so as to enable them to participate in the general education curriculum (although in another setting) and to progress toward meeting the goals set out in the IEP. As appropriate, the setting includes a [functional behavioral assessment \(FBA\)](#), and behavioral intervention services and modifications to address the behavior violation so that it does not recur.

Question D-2: Under what circumstances may a child be placed in an IAES?

Answer: There are several circumstances under which a child may be placed in an IAES:

- When a removal is a change of placement as defined in 34 C.F.R. § 300.536, services are provided in an IAES following the tenth day of the removal. This situation may occur after a child with a disability has been removed from their current placement for 10 school days in the same school year. During any subsequent days of removal, the public agency must provide services and may do so in an IAES. 34 C.F.R. § 300.530(b).
- An IAES also may be considered when a change in placement that would exceed 10 consecutive school days is proposed and the behavior that gave rise to the violation of the school's code of student conduct is determined *not* to be a manifestation of the child's disability under 34 C.F.R. § 300.530(d). In this situation, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities. 34 C.F.R. § 300.530(c). However, the child would continue to receive educational services in an IAES during the portion of the removal that exceeded 10 school days.
- Under 34 C.F.R. § 300.530(g), school personnel may consider removing a child with a disability from their current placement and placing them in an IAES for not more than 45 school days without regard to whether the

behavior is determined to be a manifestation of the child's disability if the child: (1) carries a [weapon](#) to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA; (2) knowingly possesses or uses [illegal drugs](#) or sells or solicits the sale of a [controlled substance](#), while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or (3) 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 an LEA.

During an expedited due process hearing, if a hearing officer determines that maintaining the child's current placement would be substantially likely to result in injury to the child or to others, then the hearing officer may change the placement to an appropriate IAES for not more than 45 school days.

34 C.F.R. § 300.532(b)(2). This procedure may be repeated if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others. 34 C.F.R. § 300.532(b)(3). See Section J of this document for additional information on expedited due process hearings and Question K-2 on resolving disagreements.

Question D-3: Which alternative settings can be considered as an IAES?

Answer: While IDEA does not specify the alternative setting in which educational services must be provided in an IAES, the determination of an IAES must be selected to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. This determination will depend on the circumstances of each individual child's case. 20 U.S.C. 1415(k)(1)(D)(i). 71 Fed. Reg. 46722 (Aug. 14, 2006). For example, an IAES could be a different setting in the child's current school, a setting in a different school in the LEA, or in some other setting. Factors that could be considered when determining placement in an IAES include the specific programs and services available in the alternative setting, such as additional counseling services, behavioral and academic supports and other services, or programs that could address the behavior that led to the need for the child's placement in an IAES.

Question D-4: Who determines the appropriate IAES for a child with a disability when the disciplinary removal is a change of placement?

Answer: If the removal is a change in placement under 34 C.F.R. § 300.536, the child's IEP Team, which includes the parent, determines the IAES for the provision of special education and related services. 34 C.F.R. § 300.531.

Question D-5: Are there situations where a child's home could be an appropriate IAES for a specific child with a disability?

Answer: It depends. Generally, the appropriateness of an IAES will depend on individual circumstances. For removals under 34 C.F.R. § 300.530(c), (d)(5), and (g), the child's IEP Team, which includes the parent, determines the appropriate IAES. 34 C.F.R. § 300.531. Section 615(k)(1)(D) of IDEA and 34 C.F.R. § 300.530(d) state that an appropriate IAES must be selected "so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." Therefore, the IEP Team likely will need to consider other options beyond "home instruction" when determining the appropriate IAES. As noted in the [Analysis of Comments and Changes](#)²⁵:

Whether a child's home would be an appropriate interim alternative educational setting under § 300.530 would depend on the particular circumstances of an individual case such as the length of the removal, the extent to which the child previously has been removed from his or her regular placement, and the child's individual needs and educational goals. In general, though, because removals under §§ 300.530(g) and 300.532 will be for periods of time up to 45 days, care must be taken to ensure that if home instruction is provided for a child removed under § 300.530, the services that are provided will satisfy the requirements for services for a removal under § 300.530(d) and section 615(k)(1)(D) of the Act. 71 Fed. Reg. 46722 (Aug. 14, 2006).

OSERS also recognizes that, for a child who has been removed from their current educational placement for disciplinary reasons, home instruction could be delivered through a virtual, in-person, or hybrid approach. Virtual home instruction or hybrid instruction could be additional options for an IEP Team to consider when determining the appropriate IAES for a child with a disability as long as the services allow the child to continue to participate in the general education curriculum and progress toward meeting the goals set out in the child's IEP.

However, SEAs and LEAs should be cautious about excluding a child with a disability from their regular educational program to provide virtual instruction

²⁵ See IDEA's final regulation package, titled "Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes," that can be found at 71 Fed. Reg. 46540-46845 and is available at: https://sites.ed.gov/idea/files/20060814-Part_B_regulations.pdf.

for the sole purpose of responding to a child's behavior. Removing a child from the regular education program without ensuring behavioral supports have been made available throughout a continuum of placements, including in a regular education setting, could result in an inappropriately restrictive placement and denial of FAPE. See Question J-5 for additional information regarding virtual instruction.

Question D-6: To what extent do the services set out in the child's IEP need to be provided in the IAES when there is a removal?

Answer: It depends on the needs of the child. In general, the child's IEP Team will make an individualized decision for each child with a disability regarding the appropriate services to be provided in the IAES. The regulation in 34 C.F.R. § 300.530(d)(1) states that a child with a disability who is removed from their current placement for disciplinary reasons under 34 C.F.R. § 300.530(c) or (g) must continue to receive educational services as provided in 34 C.F.R. § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the child's IEP goals. For removals that constitute a change of placement under 34 C.F.R. § 300.536, the child's IEP Team determines the appropriate services under 34 C.F.R. § 300.530(d)(1). 34 C.F.R. §§ 300.530(d)(5) and 300.531. If a child whose placement has been changed under 34 C.F.R. § 300.530(c) or (g) is not progressing toward meeting the IEP goals, then it would be appropriate for the IEP Team to review and revise the determination of services and/or the IAES.

E. Special Circumstances

Question E-1: Is a manifestation determination review required when the child has committed a violation of a school's code of student conduct involving a removal due to weapons, drugs, or serious bodily injury?

Answer: Yes. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team must conduct the manifestation determination review. 34 C.F.R. § 300.530(e); see also Section F, below. However, regardless of whether the violation was a manifestation of their disability, when the removal is for weapons, drugs, or serious bodily injury,²⁶ under 34 C.F.R. § 300.530(g), the child may remain in an IAES, as determined by the child's IEP Team, for not more than 45 school days.²⁷

Question E-2: Is a child with a disability who has been removed by school personnel due to conduct included within the definition of "special circumstances" in 34 C.F.R. § 300.530(g) entitled to receive educational services?

Answer: Yes. In accordance with 34 C.F.R. § 300.530(d), a child with a disability who has been removed from their current placement pursuant to 34 C.F.R. § 300.530(g) must continue to receive educational services to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. The child must also receive, as appropriate, an FBA and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. These services may be provided in an IAES. 34 C.F.R. § 300.530(d)(2).

²⁶ It is important to note that the definition of "serious bodily injury" (see APPENDIX I: Glossary of Key Terms and Acronyms, as Used in this Guidance) requires a certain degree of severity, and in OSERS' view, the most common violations of a school's code of student conduct likely do not involve bodily injury or may not rise to the required level of severity.

²⁷ In some circumstances, there may be legal consequences for a child with a disability who violates a code of student conduct, such as by bringing a firearm to school. School personnel should continue to communicate with the child's parent and, if necessary, law enforcement or corrections officials, to ensure the child's right to FAPE is protected.

Question E-3: Are school personnel required to report crimes committed by a child with a disability at school or at a school function?

Answer: Under most State laws, school personnel must report certain crimes that occur on school grounds to the appropriate authorities.²⁸ School personnel should consult the applicable State law at the time of the incident. Nothing in IDEA and its implementing regulations prohibit the school or LEA from reporting crimes committed by a child with a disability to appropriate authorities or prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability. 34 C.F.R. § 300.535(a). If the school or LEA reports a crime committed by a child with a disability, it must ensure that copies of the child's special education and disciplinary records are transmitted for consideration by the appropriate authorities to whom the school or LEA reports the crime. 34 C.F.R. § 300.535(b)(1). However, the school or LEA may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act. 34 C.F.R. § 300.535(b)(2).

Question E-4: Does IDEA require or prohibit a risk or threat assessment when a child with a disability commits a violation of the school's code of student conduct?

Answer: No. Neither the statute nor the IDEA regulations address the completion of a risk or threat assessment of a child with a disability.

Question E-5: When school personnel are conducting risk or threat assessments of a child with a disability, how must the LEA ensure FAPE is provided to the child?

Answer: Under IDEA, the procedural safeguards and right to FAPE for a child with a disability must be protected throughout any threat or risk assessment process, including the provision of services during any removals beyond 10 cumulative school days in a school year. 34 C.F.R. §§ 300.101 and 300.530(d). States and LEAs should ensure that school personnel involved in screening for, and conducting, threat or risk assessments of children with disabilities are aware that the child has a disability and are sufficiently knowledgeable about the LEA's obligation to ensure FAPE to the child, including IDEA's discipline provisions. Where appropriate, the LEA can ensure that the school personnel conducting

²⁸ For more information, see [School Discipline Policies — Education Commission of the States \(ecs.org\)](https://ecs.org/School-Discipline-Policies) (May 2021).

the threat or risk assessment have access to, and are coordinating with, the child's IEP Team.

Coordination with the child's IEP Team prior to reaching the threat or risk assessment determination can allow for providing additional or different behavioral supports to mitigate or eliminate the perceived threat or risk. In addition, the IEP Team can provide valuable information about: (1) the nature of the child's disabilities and the needs of the child; (2) whether positive behavioral intervention and supports to address the specific behavior(s) have been implemented with fidelity, and, if so, the effectiveness of those supports; (3) specific additional supports and services that could be provided to mitigate or eliminate the risk of harm, without requiring exclusion from school; and (4) any proposed changes to the child's IEP or review of placement that are in process. When appropriate, the LEA could seek an expedited due process hearing to seek a removal of the child to an IAES for up to 45 days if returning the child with a disability to the previous placement is substantially likely to result in injury to the child or to others. 34 C.F.R. § 300.532(a). Regardless of the risk or threat assessment process utilized, the LEA is responsible for ensuring that IDEA's discipline protections are followed and that FAPE is made available as appropriate.

F. Manifestation Determination Review

Question F-1: What is a manifestation determination review?

Answer: A manifestation determination review is a review conducted by the LEA, the parent, and relevant members of the IEP Team (as determined by the parent and the LEA) of all relevant information in the child's file to determine if the conduct that gave rise to the violation of the school's code of student conduct (see Question F-2) was caused by, or had a direct and substantial relationship to, the child's disability, or if the behavior in question was the direct result of the LEA's failure to implement the IEP. 34 C.F.R. § 300.530(e)(1); 71 Fed. Reg. 46748 (Aug. 14, 2006).

Question F-2: When must a manifestation determination review be conducted?

Answer: A manifestation determination review must be conducted when school personnel propose to change the placement of a child with a disability because of a violation of the school's code of student conduct. The manifestation determination review also must take place when the LEA is deemed to have knowledge that the child is a child with a disability, even if the child has not yet been found eligible for special education and related services at the time the discipline is proposed (see Question H-7 for additional information). The manifestation determination review must occur within 10 school days of the decision to change the placement of the child because of a violation of the school's code of student conduct. 34 C.F.R. § 300.530(e)(1).

Additionally, while IDEA requires a manifestation determination to be conducted when there is a change of placement (see Question F-7), IDEA does not prohibit IEP Teams from conducting a manifestation determination review during other situations when a child's behavior is inconsistent with the school's code of student conduct. Information from such reviews can assist the IEP Team's decision-making, including whether to conduct an FBA; whether to create, implement, or change a [behavioral intervention plan \(BIP\)](#); or in considering the need for, and implementation of, positive behavioral interventions and supports and other strategies to support any child with a disability whose behavior impedes their learning or that of others.

Question F-3: When must a child's behavior be determined to be a manifestation of the child's disability?

Answer: The behavior must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that the child's behavior was caused by, or had a direct and substantial relationship to, the child's disability, or the behavior in question was the direct result of the LEA's failure to implement the IEP.
34 C.F.R. § 300.530(e)(1)(i)-(ii). This could include situations where the child did not consistently receive all services required by their IEP.

Question F-4: What actions must an IEP Team take if the conduct in question is determined to be a manifestation of the child's disability?

Answer: If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must either: (1) conduct an FBA, unless the LEA had conducted an FBA before the behavior that resulted in the change of placement occurred, and implement a BIP for the child; or (2) if a BIP already had been developed, review the BIP and modify it as necessary to address the behavior.
34 C.F.R. § 300.530(f)(1). See Section G for additional information about FBAs and BIPs.

The IEP Team also must return the child to the placement from which the child was removed unless the parent and the LEA agree to a change of placement. In addition, when the removal is for weapons, drugs, or serious bodily injury under 34 C.F.R. § 300.530(g), the child may remain in an IAES, as determined by the child's IEP Team, for the duration of the removal (not more than 45 school days), regardless of whether the violation was a manifestation of their disability.
34 C.F.R. § 300.530(f)(2).

If the behavior in question was the direct result of the LEA's failure to implement the IEP, the LEA must take immediate steps to remedy those deficiencies. 34 C.F.R. § 300.530(e)(3). Such steps could include meeting with each teacher and other service provider of the child to review their specific responsibilities related to implementing the child's IEP, verifying that the specific accommodations, modifications, and supports required for the child, or on behalf of the child, are in place, and determining any compensatory services necessary to address the LEA's failure to implement the child's IEP.

Question F-5: What actions may school officials take if the conduct in question is determined *not* to be a manifestation of the child's disability?

Answer: For disciplinary changes in placement that would exceed 10 consecutive school days when the conduct that gave rise to the violation of the school code is determined *not* to be a manifestation of the child's disability, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities. 34 C.F.R. § 300.530(c). However, a child with a disability who is removed from the child's current placement when the conduct in question is determined *not* to be a manifestation of the child's disability must continue to receive educational services as provided in 34 C.F.R. § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. Further, the child must receive, as appropriate, an FBA and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(d)(1). While in some instances the conduct in question may not have a direct and substantial relationship to the child's disability, the child may benefit from an FBA and additional behavioral supports to address the underlying behavior.

Question F-6: What occurs if the IEP Team cannot reach consensus on whether a child's behavior was or was not a manifestation of the child's disability?

Answer: If the parent of a child with a disability, the LEA, and the relevant members of the child's IEP Team cannot reach consensus on whether or not the child's behavior was a manifestation of the disability, the LEA must make the determination and provide the parent with prior written notice pursuant to 34 C.F.R. § 300.503. The parent of the child with a disability has the right to exercise their procedural safeguards, including by requesting mediation and/or an expedited due process hearing to resolve any disagreement about the manifestation determination. 34 C.F.R. §§ 300.506 and 300.532(a). A parent also has the right to file a State complaint alleging a violation of IDEA related to the disputed manifestation determination. 34 C.F.R. § 300.153.

Question F-7: Is the IEP Team required to hold a manifestation determination review each time that a child is removed for more than 10 consecutive school days, and each time that the LEA determines that a series of removals constitutes a change of placement?

Answer: Yes. The regulations require that “within 10 school days of *any* decision to change the placement of a child with a disability because of a violation of a code of student conduct,” the LEA, the parent, and relevant members of the child’s IEP Team must conduct a manifestation determination review. 34 C.F.R. § 300.530(e) (emphasis added). Under 34 C.F.R. § 300.536, a change of placement occurs if: (1) the removal is for more than 10 consecutive school days; or (2) if the LEA determines, on a case-by-case basis, that a pattern of removals constitutes a change of placement because (i) the series of removals total more than 10 school days in a school year, (ii) the child’s behavior is substantially similar to the behavior that resulted in the previous removals, and (iii) because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. See Question C-1 for information regarding change in placement.

G. IDEA’s Requirements for FBAs and BIPs²⁹

Question G-1: When must an IEP Team conduct an FBA and develop and implement a BIP?

Answer: The IEP Team must conduct an FBA and implement a BIP when the LEA, parent, and relevant members of the IEP Team determine that the child’s conduct that resulted in a change of placement was a manifestation of the child’s disability because the conduct was caused by, or had a direct and substantial relationship to, their disability, or the conduct was a direct result of the LEA’s failure to implement the IEP. If the LEA had already conducted an FBA and had developed a BIP before the behavior that resulted in the change of placement occurred, the IEP Team must review the BIP for the child, and modify it, as necessary, to address the behavior. 34 C.F.R. § 300.530(e) and (f).

Question G-2: Are there other circumstances in which it may be appropriate to conduct an FBA?

Answer: Yes. In the context of discipline, if the IEP Team determines that the child’s conduct is *not* a manifestation of the child’s disability, or if the child’s placement is changed to an IAES based on “special circumstances,” IDEA requires the LEA to provide the child, *as appropriate*, an FBA and behavioral intervention services and modifications that are designed to address the behavior so that it does not recur. 34 C.F.R. § 300.530(d)(1)(ii) (emphasis added). For additional information, see Question F-5.

Question G-3: Who is qualified to conduct an FBA?

Answer: IDEA requires States to establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of IDEA are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities. 34 C.F.R. § 300.156(a). Each LEA must ensure that all personnel necessary to carry out the purposes of IDEA are appropriately and adequately prepared, including personnel who conduct FBAs. 34 C.F.R. § 300.207. Further, each LEA must ensure that assessments and other evaluation materials used to assess a child are, among other requirements, administered by trained and knowledgeable personnel. 34 C.F.R. § 300.304(c)(1)(iv).

²⁹ For more information about the use of FBAs and BIPs to address a child’s behavior that impedes their ability to access learning and create and maintain positive social relationships, see [Positive, Proactive Approaches to Supporting Children with Disabilities: A Guide for Stakeholders](#) (July 2022).

Schools are expected to have properly trained professionals available to conduct FBAs and to formulate and provide positive behavioral interventions and supports. It is the LEA’s responsibility, working with the SEA as necessary, to provide professional development, in-service training, and technical assistance, as needed, for school staff members to be able to conduct an FBA and provide positive behavioral interventions and supports. For more information about who can provide behavioral supports to a child when the services are included in the child’s IEP, see Question C-4 in [Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment](#) (Sept. 30, 2021).

The Department has invested in several technical assistance centers that provide resources related to behavior that can be accessed by SEAs, LEAs, schools, early childhood programs, and educators. Online professional development and training modules are among the many resources created by these technical assistance centers. For more information, see [Positive, Proactive Approaches to Supporting Children with Disabilities: A Guide for Stakeholders](#) (July 2022).

H. Provision of Services During Periods of Removal

Question H-1: When is an LEA required to provide services to a child with a disability during removals for disciplinary reasons that total no more than 10 school days in a school year?

Answer: An LEA is required to provide services during periods of removal to a child with a disability who has been removed from their current placement for 10 school days or less in that school year, only if it provides services to a child without disabilities who is similarly removed. 34 C.F.R. § 300.530(d)(3). Although not required, LEAs are encouraged to provide services during such short-term removals to assist children with disabilities to continue to make progress toward their IEP goals and to prevent them from falling behind. Information about whether the LEA provides services in this circumstance must be included in the explanation of procedural safeguards it provides to parents under 34 C.F.R. § 300.504.

Question H-2: When must the LEA provide services to a child with a disability who has been removed from the child's current educational placement for disciplinary reasons that total more than 10 school days in a school year, and how are determinations made about the services that will be provided?

Answer: Once a child's cumulative days of removal in a school year exceed 10 school days, beginning with the 11th cumulative day and during any subsequent days of removal, the LEA must provide services in accordance with 34 C.F.R. § 300.530(d) as described below:

- If the current removal is for 10 consecutive school days or less and is *not* a change of placement under 34 C.F.R. § 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in 34 C.F.R. § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. 34 C.F.R. § 300.530(d)(4). Services may not always be required during brief periods of removal. School staff determine how best to address the child's needs in these circumstances. 71 Fed. Reg. 46718.
- If the current removal, regardless of length, *is* a change of placement under 34 C.F.R. § 300.536, the child's IEP Team determines appropriate services to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the

goals set out in the child's IEP. The child must receive, as appropriate, an FBA and behavioral intervention services and modifications that are designed to address the behavior so that it does not recur.

34 C.F.R. § 300.530(d)(1) and (5).

- Likewise, in circumstances where a child's disciplinary removal *is* a change of placement and either for behavior that is determined *not* to be a manifestation of their disability or for behavior involving special circumstances under 34 C.F.R. § 300.530(g), the child must continue to receive educational services. The child's IEP Team determines what services will be provided to the child; if they will be provided in an IAES; and, if so, what that IAES will be. 34 C.F.R. §§ 300.530(d)(1) and (5) and 300.531.

I. Protections for Children Not Yet Determined Eligible for Services under IDEA

Question I-1: When are children who have not yet been determined eligible for special education and related services under IDEA entitled to the discipline protections?

Answer: A child who has not yet been identified as eligible for special education and related services under the IDEA and has violated a code of student conduct — and their parent — may assert any of IDEA’s discipline protections in circumstances where the LEA is deemed to have knowledge that the child is a “child with a disability” before the behavior that precipitated the disciplinary action occurred (see Question I-2 for further information).
34 C.F.R. § 300.534(a).

Question I-2: When would an LEA be deemed to have knowledge that a child is a child with a disability?

Answer: Under 34 C.F.R. § 300.534(b), an LEA would be deemed to have knowledge that the child is a child with a disability if, before the behavior that brought about the disciplinary action occurred: (1) the parent expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or to the child’s teacher, that the child is in need of special education and related services; (2) the parent requested an evaluation of the child’s eligibility for special education and related services under IDEA; or (3) the child’s teacher or other LEA personnel expressed specific concerns about a pattern of behavior demonstrated by the child directly to the LEA’s director of special education or to other supervisory personnel of the LEA.

Question I-3: Under what circumstances would an LEA *not* be deemed to have knowledge that a child is a child with a disability despite the existence of one or more factors identified in 34 C.F.R. § 300.534(b)?

Answer: There are specific exceptions to when an LEA must be deemed to have knowledge as described above. An LEA would *not* be deemed to have knowledge if the parent did not allow the LEA to conduct an evaluation of the child pursuant to 34 C.F.R. §§ 300.300 through 300.311 or refused special education and related services under IDEA. Also, an LEA would *not* be deemed to have knowledge if the child has been evaluated in accordance with 34 C.F.R. §§ 300.300 through 300.311 and determined not to be a child with a disability under IDEA. 34 C.F.R. § 300.534(c)(2).

Question I-4: What disciplinary protections are available to a child who has been referred for an evaluation under IDEA and is removed for a violation of the school's code of student conduct prior to a determination of eligibility?

Answer: If a child engages in behavior that violates the school's code of student conduct prior to a determination of their eligibility for special education and related services and the LEA is deemed to have knowledge that the child is a child with a disability, the child is entitled to all of IDEA's protections afforded to a child with a disability, unless a specific exception applies. In general, once the child is properly referred for an evaluation under IDEA, the LEA would be deemed to have knowledge that the child is a child with a disability for purposes of IDEA's disciplinary provisions. However, under 34 C.F.R. § 300.534(c) and as noted above, the LEA is considered *not* to have knowledge that a child is a child with a disability if the parent has not allowed the LEA to conduct an evaluation of the child under IDEA, if the parent has refused special education and related services, or if the child has been evaluated and determined *not* to be a child with a disability under IDEA. In these instances, the child and the parent may not assert any of the disciplinary protections available under the IDEA and the LEA may utilize the same measures applicable to children without disabilities who engage in comparable behavior. However, as set out in I-6 below, certain additional conditions may apply.

Question I-5: Is a child's participation in a multi-tiered system of supports (MTSS) to address academics, such as a [response to intervention \(RTI\)](#) process, sufficient to provide the LEA with knowledge that allows the child and parent to assert IDEA's discipline protections?

Answer: Generally, no. Participation in an RTI process, in and of itself, does not appear to meet the standard in 34 C.F.R. § 300.534 for when a child and parent may assert IDEA's discipline protections. However, where the RTI process is the result of one of the factors or actions specified in 34 C.F.R. § 300.534(b), and no specific exceptions, as set out in 34 C.F.R. § 300.534(c), apply, the IDEA's discipline protections may be asserted. For example, if the child's participation in the RTI process is based on the parent expressing concern in writing to the child's teacher that the child is in need of special education and related services, and the parent has not prevented the evaluation from occurring, then the LEA would likely be deemed to have knowledge as of the time of receipt of the parent's written communication.

Question I-6: What disciplinary measures may an LEA take if it is deemed *not* to have knowledge that the child is a child with a disability (i.e., there is no basis of knowledge)?

Answer: If, prior to taking disciplinary measures against the child, an LEA does not have knowledge that the child is a child with a disability, the child may be subjected to the same disciplinary measures that are applied to children without disabilities who engage in comparable behaviors. However, if the parent of a child or an LEA makes a request for an evaluation of the child during the time period in which the child is subjected to disciplinary measures, the evaluation must be conducted in an expedited manner. Until the evaluation is completed, the child may remain in the educational placement determined by school authorities, which could include suspension or expulsion without educational services. 34 C.F.R. § 300.534(d). If the child is determined to be IDEA-eligible, the agency must provide special education and related services in accordance with IDEA, including the discipline requirements in 34 C.F.R. §§ 300.530 through 300.536.

Question I-7: Once an LEA is deemed to have knowledge that a child is a child with a disability, can the manifestation determination review be postponed until the initial evaluation is completed or the initial IEP Team meeting is held?

Answer: No. If a child engages in behavior that violates a code of student conduct prior to a determination of their eligibility for special education and related services and the LEA is deemed to have knowledge that the child is a child with a disability before the behavior that precipitated the disciplinary action occurred, the child and parent may assert the disciplinary protections under IDEA, including the manifestation determination review provisions under 34 C.F.R. § 300.530(e). This is so even if the child has not yet been found eligible for special education and related services. Thus, when an LEA is deemed to have knowledge that a child is a child with a disability, within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must conduct a manifestation determination review. IDEA does not include an exception that would give the LEA additional time to complete an evaluation of the child's eligibility under IDEA prior to conducting the manifestation determination review.

Question I-8: How should the manifestation determination review be conducted prior to a determination of eligibility when the LEA may have little to no information about the child's disability and the purpose of the review is to determine whether the behavior is the result of the child's disability?

Answer: Under 34 C.F.R. § 300.530(e)(1)(i), when conducting the manifestation determination review, the LEA, the parent, and relevant members of the IEP Team (as determined by the parent and the LEA) must review all relevant information in the child's file, including any teacher observations and any relevant information provided by the parent, to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's suspected disability. Because the LEA has not yet developed an IEP for the child, the LEA would be unable to determine whether the child's conduct was the direct result of the LEA's failure to implement the child's IEP. 34 C.F.R. § 300.530(e)(1)(ii). However, an improper or unreasonable delay in determining eligibility and developing and implementing the IEP could be considered a failure to implement the IEP for purposes of the manifestation determination review.

There is nothing in IDEA that would prevent the LEA from conducting the manifestation determination review in connection with its evaluation and eligibility determination, so long as the manifestation determination review is conducted within 10 school days of the decision to change the child's placement due to a violation of the school's code of student conduct. Where the LEA cannot conduct or finish the evaluation before the timeline for conducting a manifestation determination review, it would still need to convene a group of knowledgeable persons, as determined by the parent and the LEA, to conduct the manifestation determination review even though the LEA has yet to make its eligibility determination. 34 C.F.R. § 300.534(a). In such cases, the group would likely consider the information that served as the LEA's basis of knowledge that the child may be a child with a disability under IDEA, such as concerns expressed by a parent, a teacher, or other LEA personnel, including any pattern of behavior demonstrated by the child, the child's suspected disability, and the relationship of the child's behavior to the suspected disability. Based upon its review and consideration of the available information, the group would determine whether the conduct in question was caused by, or had a direct and substantial relationship to, the child's suspected disability. 34 C.F.R. § 300.530(e).

Question I-9: When must the LEA conduct an initial evaluation in an expedited manner for a child who has not yet been determined to be a child with a disability and is subjected to a disciplinary removal, and what is the timeline for such an evaluation?

Answer: It depends on the circumstances. While an LEA may choose or find it necessary to expedite evaluations, under IDEA, expedited evaluations are only required in situations where the LEA is *not* deemed to have knowledge that the child may have a disability and a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under 34 C.F.R. § 300.530. In the Analysis of Comments and Changes, the Department noted that:

What may be required to conduct an evaluation will vary widely depending on the nature and extent of a child's suspected disability and the amount of additional information that would be necessary to make an eligibility determination. However, 34 C.F.R. § 300.534(d)(2)(i), consistent with section 615(k)(5)(D)(ii) of the Act, specifies that the evaluation in these instances be "expedited," which means that an evaluation should be conducted in a shorter period of time than a typical evaluation conducted pursuant to section 614 of the Act, which must be conducted within 60 days of receiving parental consent for the evaluation. 71 Fed. Reg. 46728 (Aug. 14, 2006).

Question I-10: What steps can SEAs and LEAs take to ensure that parents are informed that concerns about their child's need for special education and related services must be expressed in writing in order for the discipline protections to apply?

Answer: In its child find policies and procedures, an SEA may choose to include ways to provide information to the public regarding IDEA's requirements and protections for disciplinary purposes when a parent has expressed in writing to school personnel concerns regarding the child's need for special education and related services. Examples of ways to provide such information include making the information available on the State's website, the LEA's website, parent handbooks, or in the SEA's and/or LEA's procedural safeguards notice.

The requirement that a parent express their concern in writing is taken directly from IDEA's statute and implementing regulations. 20 U.S.C. 1415(k)(5)(B)(i); 34 C.F.R. § 300.534(b)(1). However, there is nothing in IDEA or its implementing regulations that would prevent a parent from requesting

assistance to communicate their concerns in writing.³⁰ Some States have included a provision in their State rules implementing IDEA that parents must be afforded assistance to submit a written request for an initial evaluation, if needed. The Department funds PTIs and Community Parent Resource Centers (CPRCs) to assist parents of children with disabilities. There are over 100 PTIs and CPRCs in the United States and Territories that provide training, resources, and support on a wide variety of topics. Parents can locate the appropriate PTI or CPRC for their area at <https://www.parentcenterhub.org/find-your-center>.

Question I-11: If a teacher (or other school personnel) has specific concerns related to a child's pattern of behavior, must such concerns be submitted in writing to school or LEA officials in order for the LEA to be deemed to have knowledge that the child is a child with a disability?

Answer: No. Under 34 C.F.R. § 300.534(b)(3), teachers or other LEA personnel are not required to submit a written statement expressing specific concerns about a pattern of behavior demonstrated by the child in order for the LEA to be deemed to have knowledge that the child is a child with a disability. Although a written statement is not necessary, the teacher of the child or other LEA personnel must express their specific concerns directly to the special education director or other supervisory personnel of the agency in order for the LEA to be deemed to have knowledge that the child is a child with a disability. In addition, the State's or LEA's child find policies and procedures may provide guidelines regarding how teachers and other LEA personnel should communicate their specific concerns regarding a child's pattern of behavior. If the State's or LEA's child find or referral procedures do not specify how such communication should occur, the State or LEA is encouraged to change its guidelines to provide a method for communicating direct expressions of specific concerns regarding a child's pattern of behavior. See 71 Fed. Reg. 46727 (Aug. 14, 2006).

³⁰ If a parent with a disability needs such assistance as a reasonable modification or to ensure effective communication, it may be required under Federal civil rights laws such as Section 504 of the Rehabilitation Act. See also, [Frequently Asked Questions on Effective Communication](#), Question 7.

J. Application of IDEA Discipline Protections in Certain Specific Circumstances

Question J-1: Do the discipline provisions in IDEA apply to children with disabilities aged three through five who receive FAPE in preschool settings?

Answer: Generally, yes. Despite their young age, preschool children with disabilities are too often removed from their current educational placement for disciplinary reasons.³¹ Preschool children with disabilities aged three through five who receive services necessary for FAPE under IDEA are entitled to the same disciplinary protections that apply to all other IDEA-eligible children with disabilities, including a manifestation determination review when a proposed disciplinary removal constitutes a change of placement. See Section F above.

IDEA’s disciplinary protections are available to children with disabilities who attend public preschool programs operated by the LEA, those who attend preschool programs operated by public agencies other than LEAs (such as Head Start or community-based childcare), and those who are placed in a private preschool program by the LEA in order to ensure the provision of FAPE. When a child with a disability is placed in a program that is not operated by the LEA, it is critical that program staff are informed of relevant IDEA requirements, including the discipline protections afforded to preschool children with disabilities when their behavior does not meet school or program expectations. See also the joint statement issued by the U.S. Department of Health and Human Services/U.S. Department of Education, [Policy Statement on Expulsion and Suspension Policies in Early Childhood Settings](#).³²

Some States and early childhood programs have adopted more stringent rules regarding the disciplinary removal of preschool-aged children from their programs and, in some cases, prohibit such removals altogether.³³ Such practices recognize the significance of lost instruction and support to young learners’ development. For example, Head Start’s Program Performance

³¹ During the 2017-2018 school year, 22.7 percent of the nation’s 1.5 million preschoolers were children with disabilities were served under IDEA. During that year, preschoolers with disabilities served under IDEA were expelled 2.5 times greater than their share of the total preschool population. [Office for Civil Rights’ Discipline Practices in Preschool](#), 2017-2018 Civil Rights Data Collection (Jul. 2021).

³² U.S. Department of Health and Human Services/U.S. Department of Education [Policy Statement on Expulsion and Suspension Policies in Early Childhood Settings](#) (undated).

³³ [Start with Equity from the Early Years to the Early Grades](#), Children’s Equity Project Bipartisan Policy Center, (July 14, 2020).

Standards explicitly state that programs “must prohibit or severely limit the use of suspension due to a child’s behavior” and that “[a] program cannot expel or unenroll a child from Head Start because of a child’s behavior.”³⁴ Further, Head Start’s program standards of conduct expressly prohibit using corporal punishment, isolating a child for disciplinary purposes, and binding or tying a child to restrict movement or taping a child’s mouth.³⁵

Question J-2: When a parent consents to the initial provision of some, but not all, of the proposed special education and related services, do the discipline provisions in IDEA apply if the child violates the school’s code of student conduct?

Answer: Yes. In this circumstance the child has been evaluated and determined to be a child with a disability under IDEA. When a parent consents to the initial provision of some, but not all, of the proposed special education and related services listed in a child’s IEP, the child is still considered a child with a disability and is entitled to all the protections of IDEA.

Question J-3: Do the discipline provisions in IDEA apply if the child violates the code of student conduct after a parent revokes consent for special education and related services?

Answer: No. Under 34 C.F.R. §§ 300.9 and 300.300, parents are permitted to unilaterally withdraw their children from receipt of special education and related services by revoking their consent for the provision of special education and related services to their children. When a parent revokes consent for special education and related services under 34 C.F.R. § 300.300(b), the parent has refused services as described in 34 C.F.R. § 300.534(c)(1)(ii); therefore, the LEA is *not* deemed to have knowledge that the child is a child with a disability, and the child will be subject to the same disciplinary procedures and timelines applicable to general education students and not entitled to IDEA’s discipline protections.³⁶ It is expected that parents will take into account the possible consequences under the discipline procedures before revoking consent for the provision of special

³⁴ 45 C.F.R. § 1302.17. For more information, see [U.S. Department of Health and Human Services, Head Start Early Childhood Learning and Knowledge Center, Head Start Policy and Regulations](#).

³⁵ [45 C.F.R. § 1302.90\(c\)\(1\)\(ii\)\(A\)-\(C\)](#).

³⁶ To learn about students’ rights under Section 504, please see 34 C.F.R. §§ 104.31 through 104.39; Supporting Students with Disabilities and Avoid the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973, and Fact Sheet: Supporting Students with Disabilities and Avoid the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973; [Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools](#); and [Protecting Students With Disabilities \(ed.gov\)](#).

education and related services. 73 Fed. Reg. 73012-13 (Dec. 1, 2008). If a parent revokes consent for their child, the parent maintains the right to subsequently request an initial evaluation to determine if the child is a child with a disability who needs special education and related services, including when their child has a discipline issue. 73 Fed. Reg. 73014 (Dec. 1, 2008). If the parent requests an initial evaluation after the child has violated the school’s code of student conduct and the LEA agrees an evaluation is needed, the child may be disciplined in the same manner as a child without a disability, pending completion of the evaluation. 34 C.F.R. § 300.534(d)(2).

Question J-4: Do IDEA’s discipline provisions apply to children with disabilities who attend public charter schools?

Answer: Yes. Children with disabilities who attend public charter schools, and their parents, retain all IDEA rights and protections. 34 C.F.R. § 300.209(a). These IDEA rights and protections include the discipline procedures in 34 C.F.R. §§ 300.530 through 300.536. For more information, see OSERS’ [Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools under the Individuals with Disabilities Education Act](#) (Dec. 28, 2016).

Question J-5: Do the discipline provisions in IDEA apply when children with disabilities receive instruction in a virtual setting?

Answer: Yes. If a State or LEA operates virtual schools or offers virtual instruction, children with disabilities whose needs can be met through virtual learning must have an IEP implemented in a way that provides all the services and supports necessary for the child to receive FAPE through such service delivery.³⁷ See Question G-2, [Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment](#) (Sept. 30, 2021). Children receiving FAPE in a virtual setting are entitled to the same discipline procedures afforded to all children with disabilities.

IEP Teams and placement teams must ensure that the instructional methodology for delivery (e.g., in-person, virtual, hybrid), timing, frequency, service setting, and location of services appropriately support the child with a disability in achieving the functional and academic goals set out in the child’s IEP, including those that address the child’s social, emotional, and behavioral needs. See

³⁷ For more information about online instruction for children with disabilities, see [OSERS’ Dear Colleague Letter on Virtual Schools](#) (Aug. 5, 2016).

Section G, [Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment](#) (Sept. 30, 2021).

Question J-6: Do IDEA's discipline provisions apply to children with disabilities in State and local correctional facilities?

Answer: Yes. A child with a disability in a correctional facility who violates a facility's code of student conduct (e.g., a rule for the educational program or setting) is entitled to the protections in IDEA's discipline procedures that must be afforded to all children with disabilities. These protections apply regardless of whether a child who violates a code of student conduct is subject to discipline in the facility or removed to restricted settings, such as confinement to the child's cell or "lockdown" units. In any event, a removal from the current educational placement that results in a denial of educational services for more than 10 consecutive school days, or a series of removals that constitute a pattern that total more than 10 school days in a school year, is a change in placement, which, in turn, requires a manifestation determination review under IDEA. Any exclusion from the classroom is particularly harmful for children with disabilities in correctional facilities. In general, even in the presence of disciplinary concerns, correctional facilities run by public entities have an obligation to ensure that special education and related services are provided to eligible children with disabilities. See OSERS' [Dear Colleague Letter on the Individuals with Disabilities Education Act for Students with Disabilities in Correctional Facilities](#) (Dec. 5, 2014).

While IDEA's discipline protections apply, it is important to note there may be additional factors to consider, particularly when a child with a disability has been convicted as an adult under State law and is incarcerated in an adult prison. Under such circumstances, the IEP Team may modify the child's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

34 C.F.R. § 300.324(d)(2). In addition, IDEA makes no specific provision for funding educational services for individuals with disabilities incarcerated in a Federal prison.³⁸

³⁸ [OSEP Letter to Yudien](#) (Aug. 19, 2003) and [OSEP Letter to Mahaley](#) (Mar. 2, 2011).

Question J-7: Do IDEA's discipline provisions apply to children with disabilities placed by an LEA³⁹ in a private school or facility as a means of providing FAPE?

Answer: Yes. A child with a disability placed by an LEA in a private school or facility as a means of providing FAPE has all the rights of a child with a disability who is served by an LEA. 34 C.F.R. § 300.146(c). The responsibility for ensuring that these children and their parents receive the same rights they would have if educated directly by the LEA rests with the State and the LEA that places the child in, or refers the child to, the private school or facility. These rights include the discipline procedures in 34 C.F.R. §§ 300.530 through 300.536.

Question J-8: Do IDEA's discipline procedures apply to children with disabilities who are placed by their parents in private schools, who are not enrolled in the LEA, and for whom FAPE is not at issue?

Answer: No. IDEA's discipline procedures do not apply to these children.⁴⁰

³⁹ It is important to note that a noneducational agency, such as a State or local social services or health services agency, may place a child with a disability in a private school or treatment facility. OSERS has stated that under IDEA, when a child with a disability is placed or referred by a State social service, social welfare, or similar State agency, whether for education or treatment reasons, at a private school or facility, whether within the State or outside of the State, the SEA in the State in which the child resides is responsible for ensuring that FAPE is made available to the child during the course of the child's placement at the private school or facility. In general, and absent applicable law to the contrary, OSERS would consider a child to be a resident of the State in which the child's parent or legal guardian resides or in which the child is a ward of the State. 34 C.F.R. § 300.149. See also [OSEP Memorandum 05-08 Educational Expenses for Children in Private Residential Facilities](#) (Mar. 17, 2005).

⁴⁰ Under IDEA, "parentally-placed private school children with disabilities" means children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school in 34 C.F.R. § 300.13 or secondary school in 34 C.F.R. § 300.36, other than children with disabilities covered under 34 C.F.R. §§ 300.145 through 300.147. 34 C.F.R. § 300.130. See also OSERS' [Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools](#) (Feb. 2022).

K. Resolving Disagreements

Question K-1: May a parent appeal, through a due process hearing, any discipline-related decision regarding their child's placement or a determination that their child's behavior was not a manifestation of the child's disability?

Answer: Yes. A parent of a child with a disability who disagrees with an LEA's decision regarding the child's placement under 34 C.F.R. §§ 300.530 and 300.531 or a determination of whether their child's conduct was or was not a manifestation of the child's disability under 34 C.F.R. § 300.530(e) may appeal the decision by requesting a hearing, which is done by filing a due process complaint. 34 C.F.R. § 300.532(a). the parent requests a hearing, the SEA or LEA must then arrange for an expedited due process hearing, which must occur within 20 school days of the date that the due process complaint requesting the hearing is filed, and the hearing officer must make a determination within 10 school days after the hearing. 34 C.F.R. § 300.532(c)(2). Although this hearing must be conducted on an expedited basis, it must be conducted consistent with the same requirements that apply to impartial due process hearings in 34 C.F.R. §§ 300.507, 300.508(a)-(c), and §§ 300.510 through 300.514, except as provided in 34 C.F.R. § 300.532(c)(2)-(4). 34 C.F.R. § 300.532(c)(1). For more information about expedited due process hearings under IDEA, see Section E of [OSERS' Questions and Answers on Part B Dispute Resolution Procedures](#) (Jul. 23, 2013).

Question K-2: Under what circumstances may an LEA seek to challenge the requirement to maintain the current placement of a child with a disability who has violated the school's code of student conduct?

Answer: An LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others may challenge the requirement by requesting a hearing. 34 C.F.R. § 300.532(a). At the hearing, the LEA must prove this assertion to the hearing officer. A hearing officer will exercise their judgment after considering and weighing the evidence presented when determining whether maintaining the child's current placement is substantially likely to result in injury to the child or others. If the hearing officer agrees with the LEA, then the hearing officer may remove the child to an appropriate IAES for not more than 45 school days. 34 C.F.R. § 300.532(b)(2). These procedures may be repeated if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others. 34 C.F.R. § 300.532(b)(3). For more information about expedited due

process hearings under IDEA, see Section E of [OSERS' Questions and Answers on Part B Dispute Resolution Procedures](#) (Jul. 23, 2013).

Question K-3: May a parent use IDEA's State complaint procedures to resolve alleged violations regarding an LEA's disciplinary action, including disciplinary changes of placement and manifestation determinations?

Answer: Yes. The State complaint procedures in 34 C.F.R. §§ 300.151 through 300.153 are available to any individual or organization, including one from another State, who alleges that an LEA has violated any requirement of IDEA or the Part B regulations. While impartial due process hearing officers have the authority to hear appeals from parents of discipline-related decisions regarding placement under 34 C.F.R. §§ 300.530 and 300.531 and the manifestation determination review under 34 C.F.R. § 300.530, this does not limit an SEA's authority to resolve the same issues under the State complaint procedures. The expedited time frame for resolving due process complaints does not apply to the resolution of State complaints. For more information about State complaint procedures under IDEA, see Section B of OSERS' [Questions and Answers on Part B Dispute Resolution Procedures](#) (Jul. 23, 2013).

Question K-4: Are the mediation procedures in 34 C.F.R. § 300.506 available to resolve disagreements regarding discipline matters?

Answer: Yes. The mediation process offers an opportunity for parents and LEAs to resolve disputes about any matter under IDEA's regulations, including matters arising prior to the filing of a due process complaint. 34 C.F.R. § 300.506(a). This includes matters regarding the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to a child with a disability. However, it is important to remember that mediation must be voluntary on the part of both parties and may not be used to deny or delay a parent's right to a due process hearing on a due process complaint, including an expedited due process hearing. For more information about mediation under IDEA, see Section A of OSERS' [Questions and Answers on Part B Dispute Resolution Procedures](#) (Jul. 23, 2013).

Question K-5: Must parents exhaust their administrative remedies under IDEA before filing a civil lawsuit in Federal or State court?

Answer: It depends. There are several circumstances where a parent is not required to exhaust their administrative remedies under IDEA before seeking relief from a Federal or State court. One of those is when the failure to take immediate action

will adversely affect a child's mental or physical health.⁴¹ Before the IDEA administrative process may be circumvented under this exception, there must be a sufficient preliminary showing that the child will suffer serious and irreversible mental or physical damage. In some instances, this might include situations where a child is being subjected to harsh disciplinary actions, is frequently removed from necessary specialized instruction and related services, or is improperly restrained or secluded. This analysis is a fact-based inquiry that will depend on the individual circumstances of each case.

Question K-6: Do hearing officers have the authority under IDEA to order remedies, such as compensatory education services or an independent educational evaluation, when ruling on issues in an expedited due process complaint related to a parent's appeal of a disciplinary placement decision or the manifestation determination?

Answer: Yes. Hearing officers conducting due process hearings on expedited due process complaints filed under 34 C.F.R. § 300.532(a) have the authority and responsibility to order relief that is appropriate to remedy the alleged violations based on the facts and circumstances of each individual complaint. This is so even though 34 C.F.R. § 300.532(b)(2) authorizes certain specific actions related to placement that a hearing officer also may take in resolving an expedited due process complaint. A hearing on an expedited due process complaint is treated as an impartial due process hearing, which is subject to the hearing decision requirements in 34 C.F.R. § 300.513. For example, in a matter alleging a violation of the discipline provisions (e.g., an improper manifestation determination), a hearing officer may find that the child did not receive FAPE if a disciplinary removal was improper and adversely impacted the child. See 34 C.F.R. § 300.513(a)(2)(iii). In addition to a conclusion that the child must return to the placement from which they were removed, the hearing officer could further conclude that, during the removal, the child was denied required instruction and services and that the denial had an adverse impact. In such circumstances, a hearing officer could order the LEA to provide compensatory services to remedy the impact of the loss of instruction and services on the child's receipt of FAPE.

⁴¹ See, e.g., *Komninos by Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778-79 (3d Cir. 1994) ("At least one Court of Appeals has recognized another exception—when exhaustion would work 'severe or irreparable harm' upon a litigant. This last exception finds support in the legislative history of the [IDEA] which states that exhaustion would not be necessary when 'an emergency situation exists (e.g., the failure to take immediate action will adversely affect a child's mental or physical health).' H.R.Rep. No. 296, 99th Cong., 1st Sess. 7 (1985).") (internal citations omitted).

Moreover, there may be instances where a parent's expedited due process complaint includes issues that must be handled in an expedited manner under 34 C.F.R. § 300.532 and also includes issues that are outside the scope of the discipline provisions. As appropriate, the hearing officer may choose to bifurcate the issues and rule on the discipline-related matters in the expedited due process complaint within the required shorter timeline. See 34 C.F.R. § 300.532(c)(2).⁴² Any issues raised in the complaint that are unrelated to discipline could then be resolved in the same manner and timelines as a due process complaint filed under 34 C.F.R. § 300.507.

⁴² See also [OSEP Letter to Snyder](#) (Dec. 13, 2015).

L. State Oversight and Data Reporting Responsibilities

Question L-1: What obligations do SEAs have to address disparities in discipline?

Answer: The SEA, under its general supervisory responsibilities in 34 C.F.R. §§ 300.149 and 300.600, must ensure that LEAs in the State meet the program requirements under IDEA with a particular emphasis on those requirements that are most closely related to improving educational results and functional outcomes for children with disabilities. The inappropriate use of suspension, expulsion, and other exclusionary removals significantly limits the ability of children with disabilities to receive educational benefit consistent with their IEPs. Therefore, SEAs should pay particular attention to LEA and Statewide discipline data and discipline policies, procedures, and practices when exercising their general supervisory responsibilities.

Question L-2: Must SEAs ensure that the discipline protections apply to children with disabilities placed by an LEA in a private school or facility?

Answer: Yes. SEAs must ensure that the same IDEA disciplinary provisions and protections that apply to a child with a disability attending a public school of an LEA also apply and are available to children with disabilities placed by an LEA in a private school or facility as a means of providing FAPE. See 34 C.F.R. §§ 300.146(c) and 300.325(c). One practice is to ensure that placement agreements or contracts between LEAs and private schools, or the requirements applicable to such schools, specifically address IDEA's discipline provisions. SEAs also must include these schools and children in their monitoring activities to ensure that children attending these schools are not ignored and left vulnerable to noncompliant and potentially harmful disciplinary practices. 34 C.F.R. §§ 300.146-300.147.^{43,44}

⁴³ See, e.g., California Department of Education, *California Department of Education Completes Investigation into Guiding Hands School* (Jan. 15, 2019) <https://www.cde.ca.gov/nr/ne/yr19/yr19rel11.asp> (describing the SEA's revocation of a private school's certification, but only after the death of a student and numerous violations of improper and dangerous use of restraints).

⁴⁴ See Disability Rights California, *Protect Children's Safety and Dignity: Recommendations on Restraint and Seclusion in Schools* (2019) https://www.disabilityrightsca.org/system/files/file-attachments/Restraint_and_Seclusion_Report.pdf.

Question L-3: Must SEAs and LEAs ensure children with disabilities placed in a public agency that is not an LEA are also afforded IDEA's discipline protections?

Answer: Yes. SEAs and LEAs must ensure that all publicly-placed children with disabilities have available the same discipline protections that are available to children with disabilities attending their local public school. For example, for preschool children with disabilities placed in and attending a program operated by another public agency (e.g., Head Start), the SEA and LEA must ensure that the interagency agreements include IDEA's discipline protections. Likewise, in States where a public charter school is neither an LEA nor part of an LEA, SEAs must ensure the same discipline protections that are available in other public schools. 34 C.F.R. § 300.209(d).⁴⁵ Such programs and placements also would fall within the scope of the SEA's general supervision responsibilities, which may include monitoring activities.

Question L-4: Are States required to collect and analyze data related to significant discrepancies in long-term suspensions and expulsions of children with disabilities?

Answer: Yes. IDEA requires States to collect data on the number of children with disabilities who are subjected to long-term suspensions or expulsions. 20 U.S.C. § 1418(a)(1)(A)(v)(III). Further, States must disaggregate the data by race and ethnicity and examine the data to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities: (1) among LEAs in the State; or (2) compared to the rates for nondisabled children within those LEAs. 20 U.S.C. § 1412(a)(22)(A). If the SEA finds that significant discrepancies are occurring, the SEA must review and, if appropriate, revise (and/or require the affected LEA to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards. 20 U.S.C. § 1412(a)(22)(B). The SEA must ensure, as a part of its general supervisory responsibilities, that these policies, procedures, and practices comply with IDEA requirements.

⁴⁵ IDEA regulations identify three types of charter schools for determining which public agency is responsible for ensuring that children with disabilities receive FAPE and how IDEA funds are provided to the charter school. The three types of charter schools are: (1) charter schools that are public schools of the LEA; (2) public charter schools that are LEAs; and (3) public charter schools that are not an LEA or a school that is part of an LEA. 34 C.F.R. § 300.209.

Question L-5: Are States required to collect and analyze data to determine if significant disproportionality based on race and ethnicity is occurring in discipline of children with disabilities?

Answer: Yes. IDEA's significant disproportionality regulations in 34 C.F.R. §§ 300.646-300.647⁴⁶ require SEAs to determine whether significant disproportionality based on race and ethnicity is occurring both in the State and the LEAs of the State with respect to the incidence, duration, and type of disciplinary removals from placement, including suspensions and expulsions. If the SEA determines that significant disproportionality is occurring, it must provide for the annual review and, if appropriate, revision of the policies, practices, and procedures used in disciplinary removals to ensure that the policies, practices, and procedures comply with the requirements of IDEA. 34 C.F.R. § 300.646(c)(1). States also must require LEAs with significant disproportionality to publicly report on any revisions of their policies, practices, and procedures. 34 C.F.R. § 300.646(c)(2). Such LEAs also must reserve 15 percent of their IDEA (sections 611 and 619) funds to provide comprehensive coordinated early intervening services to address factors contributing to the significant disproportionality in discipline. 34 C.F.R. § 300.646(c) and (d).

Question L-6: Must a State's chosen methodology for determining significant discrepancies in the rate of long-term suspensions and expulsions of children with disabilities under 34 C.F.R. § 300.170 be reasonable?

Answer: Yes. As noted above, the State must ensure that disaggregated data is examined to determine if significant discrepancies in the rates of long-term suspensions and expulsions of children with disabilities are occurring either: (1) among LEAs in the State; or (2) compared to the rates for nondisabled children within those LEAs. 20 U.S.C. § 1412(a)(22). If this examination is not occurring in any meaningful way at the LEA level, OSEP may determine that a State's chosen methodology is not reasonably designed to meet this requirement. Factors that OSEP may consider in determining reasonableness of the State's methodology include whether none, or a very low percentage of, the State's LEAs are being examined for significant discrepancy under the State's chosen methodology, and whether statistically sound alternative methodologies exist or are being used by similarly-situated States.

⁴⁶ The IDEA regulation on Significant Disproportionality is available at [34 C.F.R. § 300.646](#), and Determining Significant Disproportionality is found at [34 C.F.R. § 300.647](#).

Question L-7: May States enact additional laws or policies that provide additional protections to children with disabilities, or require additional reporting on disciplinary practices beyond what is required under IDEA?

Answer: Yes. States may, and often do, provide additional protections and services to children with disabilities that exceed IDEA's requirements. The Education Commission of the States has conducted a [50-State Comparison of School Discipline Policies](#). The Commission's website identifies States that have strategically chosen to limit the use of suspension and expulsion for young children, use nonpunitive approaches instead of exclusionary measures, or require additional data reporting.

APPENDIX I: Glossary of Key Terms and Acronyms, as Used in This Guidance⁴⁷

Analysis of Comments and Changes refers to the Department’s extensive discussion and analysis of comments received from the public on its notice of proposed rulemaking under the reauthorized IDEA (2004) and accompanies the final Part B regulations implementing IDEA 2004 that were issued in the Federal Register (Fed. Reg.) on August 14, 2006. IDEA’s final regulation package, titled “Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes,” can be found at 71 Fed. Reg. 46540–46845 and is available at:

https://sites.ed.gov/idea/files/20060814-Part_B_regulations.pdf. The supplemental regulation package, also referenced within this document, was issued on December 1, 2008, and can be found at 73 Fed. Reg. 73006–73029 (available at: https://sites.ed.gov/idea/files/20081201-Part_B_supplemental.pdf).

Behavioral intervention plan (BIP), although not defined in IDEA and its implementing regulations, is generally understood to mean a component of a child’s educational program designed to address behaviors that interfere with the child’s learning or that of others and behaviors that are inconsistent with school expectations. A BIP generally describes the behavior that inhibits the child from accessing learning and the positive behavioral interventions and other strategies that are to be implemented to reinforce positive behaviors and prevent behavior that interferes with the child’s learning and that of others. In the discipline context, such plans are especially important to prevent the child’s behavior that resulted in disciplinary action from recurring. 34 C.F.R. § 300.530(d). For a child with a disability whose behavior impedes their learning or that of others, and for whom the IEP Team has determined that a BIP is appropriate, or for a child with a disability whose violation of the code of student conduct is a manifestation of the child’s disability, the IEP Team must include a BIP in the child’s IEP (or, if a BIP already has been developed, review and modify it as necessary) to address the behavioral needs of the child.

Disciplinary Change in Placement or Change of Placement, under IDEA, (for purposes of removal of a child with a disability from the child’s current educational placement for disciplinary reasons) means a child with a disability who has been removed from their current educational placement for disciplinary reasons for more than 10 consecutive school days; or that the child has been subjected to a series of removals that constitute a pattern: (1) because the series of removals total more than 10 school days in a school year; (2) because the child’s

⁴⁷ Except where terms in this Glossary are directly from a statute, including IDEA, or its implementing regulations, the terms and acronyms below are offered to assist the reader only for purposes of clarity in this guidance, are not intended to apply more broadly, and are not binding in any way.

behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and (3) because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 C.F.R. § 300.536(a). This determination is made by the LEA and triggers IDEA's discipline protections, including a manifestation determination review, and is subject to review through due process and judicial proceedings. 34 C.F.R. § 300.536(b).

Controlled substance, under IDEA, means a drug or other substance identified under schedules I, II, III, IV, or V in the Controlled Substances Act ([21 U.S.C. § 812\(c\)](#)). 34 C.F.R. § 300.530(i)(1).

Corporal punishment involves paddling, spanking, or other forms of physical punishment imposed on a student. In a majority of States, this practice is prohibited by State law.

Exclusionary discipline, although not defined in IDEA and its implementing regulations, as used in this and the accompanying documents, refers to the removal, whether on a short-term or long-term basis, of a child with a disability from a class, school, or other educational program or activity for violating a school rule or code of conduct. Examples can include detentions, in-school suspensions, out-of-school suspensions, suspensions from riding the school bus, expulsions, disciplinary transfers to alternative schools, and referrals to law enforcement, including referrals that result in school-related arrest.

Functional behavioral assessment (FBA) is used to understand the function and purpose of a child's specific, interfering behavior and factors that contribute to the behavior's occurrence and non-occurrence for the purpose of developing effective positive behavioral interventions, supports, and other strategies to mitigate or eliminate the interfering behavior.

Illegal drug, under IDEA, means 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 the Controlled Substances Act or under any other provision of Federal law. 34 C.F.R. § 300.530(i)(2).

Informal removal, although not defined in IDEA and its implementing regulations, means 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. Informal removals include administratively shortened school days when a child's school day is reduced by school personnel, outside of the IEP Team and placement process, in response to the child's behavior.

In-school suspension, although not defined in IDEA and its implementing regulations, means an instance in which a child is temporarily removed from their regularly assigned classroom(s) for disciplinary purposes but remains under the direct supervision of school personnel. Direct supervision means school personnel are physically in the same location as students under their supervision. An in-school suspension would be considered a part of the days of suspension addressed in 34 C.F.R. § 300.530 unless the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. See 71 Fed. Reg. 46715 (Aug. 14, 2006).

Interim alternative educational setting (IAES), although not defined in IDEA and its implementing regulations, as currently defined for purposes of discipline data collected under IDEA section 618, means an appropriate setting determined by the child's IEP Team or a hearing officer in which the child is placed for no more than 45 school days. This setting enables the child to continue to receive educational services so as to enable them to participate in the general education curriculum (although in another setting) and progress toward meeting the goals set out in the IEP. As appropriate, the setting includes provision of an FBA, and behavioral intervention services and modifications to address the behavior violation so that it does not recur.

Long-term disciplinary removal, although not defined in IDEA and its implementing regulations, as currently defined for purposes of discipline data collected under IDEA sections 616 and 618, mean suspensions and expulsions of children with disabilities for more than ten school days in a school year.

Manifestation determination review, under IDEA, means the decision as to whether the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or if the conduct in question was the direct result of the LEA's failure to implement the child's IEP, including a BIP if required by the IEP. The LEA, parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP and any BIP, any teacher observations, and any relevant information provided by the parent. This review must be conducted within 10 school days of any decision to change the placement of a child with a disability because of a violation of the code of student conduct. 34 C.F.R. § 300.530(e).

Multi-tiered systems of supports, although not defined in IDEA and its implementing regulations, means a comprehensive continuum of evidence-based, systemic practices to support children's needs with regular observation to facilitate data-based instructional decision-making.

Parent, under IDEA, means: (1) a biological or adoptive parent of a child; (2) a foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent; (3) a guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is

a ward of the State); (4) an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or (5) a surrogate parent who has been appointed in accordance with 34 C.F.R. § 300.519 or Section 639(a)(5) of IDEA. 34 C.F.R. § 300.30.

Physical restraint, although not defined in IDEA and its implementing regulations, means a personal restriction that immobilizes or reduces the ability of a student to move their torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching, or holding of the hand, wrist, arm, shoulder, or back for the purpose of inducing a student who is acting out to walk to a safe location.

Response to intervention (RTI) although not defined in IDEA or its implementing regulations, is understood to mean a schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors. IDEA includes a provision mandating that States allow, as part of their criteria for determining whether a child has a specific learning disability, the use of a process based on the child's response to scientific, research-based intervention. See 34 C.F.R. § 300.307(a)(2). RTI is an example of an MTSS (defined above). See also, [OSEP Memo 11-07](#).

School day, under IDEA, means any day, including a partial day, that children are in attendance at school for instructional purposes. **School day** has the same meaning for all children in school, including children with and without disabilities. 34 C.F.R. § 300.11(c).

Seclusion, although not defined in IDEA and its implementing regulations, is the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. The term does not include a timeout, which is a behavior management technique that is part of an approved program involving monitored separation of the student in a non-locked setting and is implemented for the purpose of calming.

Serious bodily injury, under IDEA, has the meaning given the term *serious bodily injury* under [18 U.S.C. 1365\(h\)\(3\)](#). 34 C.F.R. § 300.530(i)(3). Under the current definition in 18 U.S.C. 1365(h)(3), *serious bodily injury* means bodily injury that involves — (1) a substantial risk of death; (2) extreme physical pain; (3) protracted and obvious disfigurement; or (4) protracted loss or impairment of the function of a bodily member, organ, or mental faculty. This definition cannot be altered by States or local school boards. See 71 Fed Reg. 46722.

Short-term disciplinary removal, although not defined in IDEA and its implementing regulations, means the removal of a child from their educational placement for 10 consecutive school days or less. 34 C.F.R. § 300.530(b).

Special circumstances, under IDEA, means a violation of a code of student conduct because the child — (1) carries a weapon to school or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the SEA or LEA; (2) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of the SEA or LEA; or (3) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the SEA or LEA. 34 C.F.R. § 300.530(g).

Weapon, under IDEA, has the meaning given the term *dangerous weapon* under [18 U.S.C. 930\(g\)\(2\)](#). 34 C.F.R. § 300.530(i)(4). Under the current definition in 18 U.S.C. 930(g)(2), dangerous 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 pocketknife with a blade of less than two and one half inches in length.