

Pushing the Limits:

Expanding Special Education Mediation into Suspensions

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Some Data on Suspensions...*

- The percent of students with disabilities in NYC schools - 18%.
- In the last 10 years 1/3 of the suspensions in NYC schools are of special education students.
- If you are a student with a disability you are 4 times more likely to be suspended than your non-disabled peers.
- Black students (33% of the student body) served 53% of suspensions over the past 10 years.

* Much of the data in this presentation is from EDUCATION INTERRUPTED: The Growing Use of Suspensions in NYC's Public Schools, published by the NYCLU and the Student Safety Coalition.

And a few more interesting facts:

- The Southern Poverty Law Center has found that black and Latino children are more likely than their white peers to be disciplined for infractions that are based upon the subjective judgments of educators and school personnel, such as disrespect, loitering and excessive noise. (Education Interrupted)
- In NYC, black students account for 55% of suspensions for subjective offenses such as engaging in disruptive behavior, disrespectful behavior, or using obscene gestures. (Education Interrupted)

And just in case we haven't made our point.

- In some years in NYC, for every student without a disability who was suspended, 5 of his disabled peers were.
- Students classified as learning disabled or emotionally disturbed account for half of the total number of students with disabilities, but more than 80% of the suspensions that occur in this population. (Education Interrupted)
- Between 1999-2008, 36% of students with disabilities were black, but black students represented 53% of suspensions among students with disabilities.

A study by the National Center for Education Statistics found that students who are suspended repeatedly are those most at risk of dropping out. (Education Interrupted)

The Law on Suspensions

- The Regulations of the Commissioner of Education (issued by the NY State Education Department)
- The Chancellor's Regulations (issued by the NYC DOE)
- The Citywide Standards of Discipline and Intervention (Discipline Code)

What Laws Apply to Who?

- If the student does not have a legally-recognized disability, or has no disability, then regular disciplinary rules apply.
- If the child does have a legally-recognized disability, but their behavior is determined to be unrelated to the student's disability, regular education discipline rules apply. The child is still entitled to receive services.
- If the child does have a legally recognized disability, and the team decides behavior is related to disability, the school may not impose a regular education exclusion, nor change the child's placement if parent requests due process objecting to change in placement.

First: Educational Exclusions

- Crisis removal (Immediate removal for safety)
- Teacher removal (up to 4 days from a particular class): teacher must have filled out a removal form which includes any interventions attempted by teacher.
- Principal's suspension (up to 5 days in-house or at an alternate site).
- Superintendent's Suspension (6 days to 1 year, or expulsion if the student is over 17).

Due Process Protections: Opportunities for Positive Interventions

As part of the student's Due Process protections, each step along this path must be documented.

And each step provides opportunity for communication between the family, the child, and the school.

Mediation is an obvious tool to assist in this communication.

Special Protections for Students with Disabilities

- Students with IEP's **OR** a 504 plan who are removed from their current educational programs in excess of 10 school days are entitled to specific protections under the Individuals with Disabilities Education Improvement Act (IDEIA) and State Regulations.
- IDEA regulations require that the child receive services and an FBA and BIP. 300.530(d)(ii)

Students who MAY have Disabilities

- If a student does NOT have an IEP, he/she may also be entitled to IDEIA protections if it is determined that the DOE is “deemed to have knowledge” that the student is a student with a disability. If this is the case, the student will first be entitled to an expedited evaluation for special education services within 15 school days.

“deemed to know”

If the student does not have an IEP, the child may still be entitled to an MDR if the NYC DOE is “deemed to know” that the child has a disability.

The NYC DOE is “deemed to know” if, prior to the conduct under consideration:

- The parent expressed concern in writing to the school informing them that the student is in need of special education; OR
- The parent has requested an evaluation of the student to determine whether the student is a student with a disability; OR
- A teacher, or other personnel of the school district, has expressed specific concerns in writing about a pattern of behavior demonstrated by the student directly to the Committee on Special Education Office or to the school principal.

Each of these “deemed to know”
circumstances are an opportunity for
communication between the parent, child
and school.

Exceptions to “deemed to know”

- NYC DOE is NOT “deemed to know” if:
 - The parent has not allowed evaluation of the student; or
 - The parent has refused services; or
 - It was determined by the IEP Team that the student is not a student with a disability; or
 - The parent revokes consent for Special Education services.

The Manifestation Determination Review: Legal Framework

- Asks whether the behavior that led to the suspension is a result of, or substantially related to, the child's disability.
- Under the IDEIA regulations, if the IEP team determines that the behavior was a manifestation of the child's disability the team either must maintain the current program, unless all agree to a change, conduct an FBA and implement a BIP or,
- If the child already had a BIP, review the plan and modify it as necessary.

When is an MDR Required?

An MDR must be scheduled under the following circumstances:

- If the student is suspended by the Superintendent and the disposition may result in the student being removed for more than 10 consecutive days,
 - **OR**
- If the imposition of either a Teacher Removal or Principal's Suspension will result in the student being removed for more than 10 aggregate school days in a 40 day period,

When is an MDR Required? Continued...

- Where a Principal seeks to impose a Principal's Suspension or a Teacher Removal and there have been multiple disciplinary actions involving the student during the current school year, the Principal must determine whether this student's behavior constitutes a pattern.
- If the Principal determines that a pattern exists, an MDR must be scheduled by the Principal.

Who Attends an MDR?

The mandated members for an MDR Team are:

- The Parent/Guardian
- The School Psychologist and/or School Social Worker
- A School district representative familiar with the Student
- Additional members may attend if it is agreed upon by the Parent and the MDR team, i.e. related service providers, family physician, parent advocate.

What information should be considered at an MDR?

- IEP or 504 Plan
- Evaluations
- FBA/BIP
- Online Occurrence Reporting System (OORS) report
- Teacher Observations
- Relevant information gathered by the parent

How Does the Team Determine Whether Student's Behavior Was a Manifestation of Disability?

- Review the IEP and all relevant materials for evidence of the student's disability.
- Consider the behavior, events that led up to the behavior, and patterns of previous behaviors.
- Determine the immediate triggers prior to the behavior subject to disciplinary action
- Separate out conduct that only bears an attenuated relationship to the student's disability
- Evaluate if the antecedent triggers that may have occurred immediately prior to the behavior subject to disciplinary action have a direct and substantial relationship to the disability.

Determine if Non-Implementation of IEP Caused Misconduct

- The team must also consider whether a part of the IEP was not implemented, and if so, consider whether this non-implementation directly results in the conduct in question.
- If it is believed that the educational services are insufficient the MDR team must request a re-evaluation immediately following the completion of the MDR.

Manifestation? Yes/No?

- If YES: a **Functional Behavior Assessment (FBA)** must be conducted and a **Behavior Intervention Plan (BIP)** must be developed and implemented. If the student already has a BIP, review and implement it immediately to address the behavior that resulted in the suspension.
- If NO: a suspension plan must be developed to determine services to be provided at the suspension site. The IEP team may develop an FBA/BIP if it is deemed appropriate.

The following criteria are no longer
considered for an MDR

- Were the child's IEP and placement appropriate?
- Were the special education services, supplementary aids and services and any behavior intervention-strategies provided consistent with IEP and placement?
- Did the child's disability impair his/her ability to understand the impact and consequences of the disciplinary behavior?
- Did the child's disability impair his/her ability to control the disciplinary behavior?

IEP Teams now consider the
following criteria:

- Is the disciplinary behavior caused by or had a direct and substantial relationship to the child's disability?
- Is the disciplinary behavior a direct result of the school's failure to implement the IEP?

This less nuanced assessment has made it
Harder for Families

When Can Mediation Come in?

- AT ANY POINT. But, in particular:
- During the earlier suspensions and exclusions
- Once a child has a suspension which triggers an MDR – the MDR itself can be mediated
- If the family/school disagree with the result of the MDR – Mediation can be used instead of an appeal through a hearing

Case Examples from New York State

- SR was suspended by the superintendent on 2/24/10 for creating a substantial risk of serious injury by either recklessly engaging in behavior, and/or using an object that appears capable of causing physical injury (e.g. lighter, belt buckle, or umbrella).
- The parent pled no contest to the charge on 3/2/10. SR was found guilty and a 60-day continued suspension was recommended. The school was ordered to convene a manifestation determination review to decide if the behavior was caused by or had a direct or substantial relationship to his disability.
- The team convened a manifestation determination review and found that SR's behavior was not a manifestation of his disability. We disagreed and requested mediation.

Example Continued

- SR is an eighteen year old classified with having an Emotional Disturbance, and placed in a 12:1:1 with counseling.
- SR had been previously diagnosed with Oppositional Defiant Disorder, Attention Deficit Hyperactive Disorder and Grandiosity, a symptom of mania in Bipolar Disorder. This information and additional data that should have been considered in making a decision regarding whether the behavior is a manifestation is documented in SR's file but is also documented in a psycho-educational evaluation conducted by the school by a NYS Certified Psychologist. Additionally, SR was receiving individual treatment at the Adolescent Health Center since November 2009. In working with SR, the treatment center found that SR has significant psychiatric issues that impair his judgment and social functioning.

Result of mediation

- After two hours of active discussion and the participation of SR's clinician, the team reversed their decision and found that the behavior was a manifestation of SR's disability.
- A proper transition plan was developed
- A behavioral intervention plan was developed.
- SR returned to his high school of choice.

Example Continued

Present at mediation were:

- Regional Administrator
- CSE Regional Representative
- School IEP Team-school psychologist & social worker
- Guidance Counselor
- AP of Special Education
- Principal
- Advocate
- Parent
- Student
- Mediator

Case Example #2

E.W. was a middle school child with emotional disturbance who had been suspended for engaging in sexual conduct at school with a few of the boys in her class. An MDR was conducted to determine if her behavior was related to her disability and the team determined that it was not.

E.W.'s advocate filed for an appeal of the MDR determination as well as a mediation.

Present at the mediation were: E.W.'s mother, advocate, and case manager, the CFN, the principal, E.W.'s teacher, the school social worker and two mediators.

Take a moment to think of possible outcomes to the mediation.

Here are some of the solutions found in this case:

Problems Encountered

- Personalities of the parties.
- Assertions that the MDR decision can not be reconsidered through mediation.
- Reluctance to bring a mediator in at earlier stages.

QUESTIONS