

Special Education Spotlight

A Focus on Meeting State Requirements and Federal Discipline Requirements for Students with Individualized Education Programs in Pennsylvania Public Schools



pennsylvania
DEPARTMENT OF EDUCATION

Bureau of Special Education
Pennsylvania Training and Technical Assistance Network

Meeting State Requirements and Federal Discipline Requirements for Students with Individualized Education Programs (IEPs) in Pennsylvania Public Schools

Comparing State and Federal Discipline Requirements

The following three parts synthesize the Pennsylvania and federal requirements for disciplining students eligible under Chapter 14 (corresponding to the IDEA). In reviewing the contents of these three parts, two caveats warrant emphasis. First, for those items where the applicable legal sources conflict, the one that provides stronger or more specific protection to the student applies. For example, Pennsylvania's Chapter 14 contains specific requirements regarding

restraints. Second, these summaries only provide a user-friendly overview; consult the specific legal sources, such as the new Chapter 14

regulations, in consultation with legal counsel wherever necessary and appropriate.

I. Discipline Other Than Suspensions and Expulsions

The following two-column overview synthesizes the Pennsylvania and federal requirements for various forms of discipline except suspensions and expulsions for students with disabilities. The column on the left is based on the 2008 Chapter 14 regulations, which went into effect on July 1, 2008.

The acronyms herein are:

IEP = Individualized Education Program
PDE = Pennsylvania Department of Education



Pennsylvania	Federal, or National
I. CORPORAL PUNISHMENT	
<ul style="list-style-type: none"> ■ prohibited 	<ul style="list-style-type: none"> ■ not a violation of the Constitution unless shockingly excessive ■ possible violation of the IDEA where not in the IEP and not beneficial to the child ■ possible consequences of state tort liability and teacher termination
II. PHYSICAL RESTRAINT	
<ul style="list-style-type: none"> ■ requires prior parental consent ■ allowed only when the student is a clear and present danger to himself/herself or to others and when less restrictive measures, including de-escalation techniques, have proven to be less effective ■ requires timely written notice and meeting of IEP team within 10 school days unless written waiver by the parents after said notice ■ allowed in IEP only upon specified conditions, including requisite staff training and positive behavior support ■ requires PDE-prescribed data collection and reporting for cyclical compliance monitoring ■ may not be in prone position (i.e., child held down facing the floor), which is prohibited altogether 	<ul style="list-style-type: none"> ■ not a violation of the Constitution unless shockingly excessive or gross departure from professional norms
III. MECHANICAL RESTRAINT	
<ul style="list-style-type: none"> ■ allowed only when in IEP agreed to by the parents and as determined by a qualified medical professional ■ may not be in prone position 	<ul style="list-style-type: none"> ■ not a violation of the IDEA where within limitations of the IEP ■ possible disciplinary action against the teacher
IV. TIME-OUT	
<ul style="list-style-type: none"> ■ prohibited if in locked structures or in “spaces from which the student cannot readily exit” 	<ul style="list-style-type: none"> ■ possible violation of the Constitution where shockingly excessive ■ not a violation of the IDEA where in accordance with the IEP or otherwise within accepted limits
V. OTHER	
<ul style="list-style-type: none"> ■ requires positive behavior support program (including a preceding functional behavioral assessment) in the IEP (1) when an intervention is needed to address problem, learning-interfering behavior, and (2) after referral to law enforcement authorities ■ also prohibits other aversives, such as: <ul style="list-style-type: none"> ● punishment for a manifestation of the student’s disability ● noxious substances ● withholding meals, water, air, or other basic human rights ● “treatment of a demeaning nature” ● methods implemented by untrained personnel or which have not been outlined in the district’s plan ● requires district policy and procedures on behavior support services, including training in the use of positive behavior supports 	<ul style="list-style-type: none"> ■ IDEA requires the IEP team to consider “positive behavioral interventions and supports, and other strategies” to address behavior that impedes the child’s learning or that of others ■ IDEA allows reporting a crime to law enforcement authorities for prosecution of the eligible child

II. Procedural Requirements for Suspensions and Expulsions

This chart is merely a simplified summary of the law; again, readers are advised to review the applicable sources of law in consultation with counsel for formulating policy or responding to specific situations. The focus is procedural, not substantive, requirements for suspension/expulsions in public schools. The applicable sources of law start with the U.S. Constitution's due process clause in the Fourteenth Amendment, as initially interpreted by the U.S. Supreme Court in *Goss v. Lopez*, and the federal legislation/regulations for students with disabilities. Added to the federal minimum are Pennsylvania regulations. Finally, local school board policy may provide further procedural requirements beyond those listed herein. The acronyms used herein (and defined in the Glossary) are: FAPE = free appropriate public education; FBA = functional behavioral assessment; IAES = interim alternate educational setting; NOREP = notice of recommended educational placement; PBSP = positive behavior support plan (which is used in place of the less specific "behavior intervention plan" in the IDEA).

Children without Disabilities	
In-school suspension (ISS)	<ol style="list-style-type: none"> 1. Give the student prior oral notice and an opportunity to respond plus: <ul style="list-style-type: none"> • If ISS exceeds 10 days, provide an informal hearing (as specified in Box G) before the 11th day. 2. Notify the parents or guardian within a reasonable time afterwards. 3. Make some provision for the student's education during the ISS. <p style="text-align: center; font-size: 2em; border: 1px solid black; padding: 5px; width: 40px; margin: 0 auto;">A</p>
1-3 consecutive school days	<ol style="list-style-type: none"> 1. Give oral notice to the student and an opportunity to respond prior to the suspension. <p>Exception: When it is clear the student poses a threat to the health, safety, or welfare of the school community, this informal notice and hearing may be delayed until as soon as possible afterwards.</p> 2. Immediately notify the parents and the superintendent in writing. 3. Give the student the right and responsibility to make up missed work and exams. <p style="text-align: center; font-size: 2em; border: 1px solid black; padding: 5px; width: 40px; margin: 0 auto;">D</p>
4-10 consecutive school days	<ol style="list-style-type: none"> 1. Use the same suspension procedure as for nondisabled students (Box D) plus: <ul style="list-style-type: none"> • Provide notification to the parents and the student that includes the reasons for the suspension and the time and place of an informal hearing sufficiently in advance, but within first 5 days, of the suspension. • Provide informal hearing with appropriate school official, where student has right to question witnesses present, to speak, and to produce his own witnesses. <p style="text-align: center; font-size: 2em; border: 1px solid black; padding: 5px; width: 40px; margin: 0 auto;">G</p>
More than 10 consecutive days or more than 15 cumulative school days for "children with other disabilities"	<ol style="list-style-type: none"> 1. Notify the parents by certified mail of the charges and provide at least three days notice of the time and place of a formal hearing, a copy of the expulsion policy, notice that legal counsel may represent the student, and the hearing procedures. 2. Keep the student in his current class unless informal hearing determines that <ol style="list-style-type: none"> 1) he would constitute threat to health, safety, or welfare of others, and 2) it is not possible to hold the formal hearing within 10 days. <p>Note: If the student is determined to be a threat, the student may be excluded for more than 10 school days, but not more than 15 school days without a formal hearing, unless the parties agree that any student so excluded shall be provided with alternative education.</p> 3. Provide a formal hearing with the school board, its committee, or its hearing officer, where student has these rights: <ul style="list-style-type: none"> • choice of private or public hearing • right to counsel at own expense • requirement that attorney prosecuting the student be separate from and not subordinate to the attorney advising the board • names of adverse witnesses and copies of their statements or affidavits • right to confront and cross examine these witnesses • right to testify and to present his own witnesses • record of the hearing • right to judicial appeal • make provision for compulsory school-age student if parents are unable to provide education <p style="text-align: center; font-size: 2em; border: 1px solid black; padding: 5px; width: 40px; margin: 0 auto;">J</p>

Children with Mental Retardation

- Use the same ISS procedures as for nondisabled students (see Box A).

Exception: If instruction is not continued during the ISS in accordance with the child's IEP, the ISS arguably counts toward a formal change of placement, which would require full special education procedures, including a Notice of Recommended Educational Placement (NOREP) and the right to a hearing.

B

- This step is a formal change in placement, which requires full special education procedures, including a NOREP and the right to a hearing.

Exception: Unless the student's actions involve weapons, illegal drugs, or infliction of serious bodily injury.

E

- This step is also a formal change in placement, with the same prerequisites and exception as Box E.

H

- This step is also a formal change in placement, with the same prerequisites as Box E.

Exception: Where student is clearly dangerous to himself or others, seek an interim change of placement via an impartial hearing officer or an expedited judicial *Honig* hearing.

K

Children with Other Disabilities

- Use the same ISS procedures as for students with mental retardation (see Box B).

C

- Use the same 1-3 day suspension procedures as for nondisabled students (see Box D).

F

- Use the same 10-day suspension procedures as for students without disabilities (see Box G).

I

1. Have the specified team, including the parents, determine within the 10-day period whether the misconduct is a manifestation of the disability (see next, checklist section).
2. If the team determines that the misconduct is not a manifestation, the district may either use the same disciplinary procedures as for students without disabilities, except that it must continue to provide FAPE, or implement an IAES.
3. If the team determines that the misconduct is a manifestation (a) have IEP team promptly develop a FBA and PBSP or, if the child already has one, fine-tune it, and (b) either (1) return the child to the current placement; (2) if the parent agrees, move the child to a new placement; (3) in the three specified special circumstances (weapons, illegal drugs, or infliction of serious bodily injury) unilaterally implement an IAES, or (4) in other cases of dangerousness, arrange for a *Honig* hearing or an expedited IAES impartial hearing.

L

Checklist of the IDEA and Chapter 14 Suspension/Expulsion Requirements

The requirements of the 2004 IDEA legislation and the 2006 IDEA regulations are complicated and not completely clear, thus being subject to interpretation with regard to formal suspensions and expulsions as well as any other “removals.” This checklist, which overlaps with and supplements the chart on the previous pages, provides one version of a roadmap to the discipline provisions as a basis for comparing your own interpretation and assessing your district’s compliance.

In considering the contents, remember that the requirements apply not only to students already determined to be eligible under the IDEA but also those for whom (1) the parent has expressed concern in writing to the child’s teacher or to district administrative or supervisory personnel that their child needs special education; (2) the parent has requested, and not yet received, an evaluation of the child for special education; or (3) the child’s teacher or other district staff member has

expressed specific concern to the special education director or other district supervisor about a pattern of behavior demonstrated by the child.

Finally, other than the special rule for cumulative removals of more than 15 cumulative days, Chapter 14 provides for a positive behavior support plan, which is used below in place of the IDEA term “behavioral intervention plan.” The other acronyms are also the same as in the previous, overlapping chart.

I. Suspensions/Expulsions of greater than 11 Consecutive School Days or less than 16 Cumulative School Days

- A. Did your district meet the procedural requirements in whichever box—A, B, D, E, G, or H—applies in the chart?
- B. For those removals beyond 10 cumulative days within the same school year, but less than 16 cumulative days that constitute a pattern, did your district provide services that, in consultation with at least one of the child’s teachers, “are needed ... to enable the child to continue to participate in the general education curriculum, ... and to progress toward meeting the goals set out in the child’s IEP”?

Note: Under Pennsylvania law, it is possible that less than 15 cumulative days within one school year could be a change of educational placement if the child has been subjected to a series of removals that constitute a pattern (1) because a series of

removals total more than 10 days in a school year; (2) because the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in a 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.

- C. For each eligible child who requires specific interventions to address behavior that interferes with learning, did your district provide and implement a BSP, which is based on a functional behavioral assessment and which utilizes positive reinforcement and other positive techniques to shape the child’s behavior?

II. Suspensions/Expulsions of greater than 10 Consecutive Days (or the Cumulative Equivalent) for Weapons, Illegal Drugs, or Infliction of Serious Bodily Injury

- A. Did a team composed of the district representative, the parent, and other members of the IEP mutually determined to be relevant do a manifestation determination that was...
 - preceded by notice to the parents of their procedural safeguards not later than the date on which the decision to take this disciplinary action is made?
-AND-
 - conducted within 10 school days after the date on which the decision to take this disciplinary action is made?
-AND-
 - based on all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents
-AND-

II. Suspensions/Expulsions of greater than 10 Consecutive Days (or the Cumulative Equivalent) for Weapons, Illegal Drugs, or Infliction of Serious Bodily Injury - *continued*

- according to these criteria:
 - Did the child's disability cause, or have a direct and substantial relationship to, the conduct in question?
-OR-
 - Did the district fail to implement the IEP, and if so, did that failure cause the conduct in question?
-AND-
- B. If the team determined that the answer to both of these questions was NO and your district used regular education procedures, did the district ...
 - continue to provide full FAPE?
-AND-
 - if the parent filed for an impartial hearing to challenge the manifestation determination, not move the child except to a duly determined interim alternate educational setting?
-UNLESS-
 - for code of conduct violations for weapons, illegal drugs, or serious bodily injury, unilaterally place the child in an IAES that ...
 - 1) is no longer than 45 school days
-AND-
 - 2) enables the student to continue to progress in the general education curriculum and to progress toward meeting the student's IEP goals
-AND-
 - 3) provides the child, as appropriate, a FBA, and behavior intervention services and modifications, which are designed to address the behavior violation so that it does not recur
- C. If the team determined that the answer to either of these two questions was YES, did the district ...
 - conduct an FBA and PBSP or, if the child already has a PBSP, review and, modify it, as necessary, to address the behavior
-AND-
 - either return the child to the IEP placement, move the child to a new placement if the parent has agreed with it as part of the modified PBSP,
-OR-
 - for code of conduct violations for weapons, illegal drugs, or serious bodily injury, unilaterally place the child in an IAES that ...
 - 1) is no longer than 45 school days
-AND-
 - 2) enables the student to continue to progress in the general education curriculum and to progress toward meeting the student's IEP goals
-AND-
 - 3) provides the child, as appropriate, a FBA, and behavior intervention services and modifications, which are designed to address the behavior violation so that it does not recur
 - OR-
 - for other dangerous situations, seek an expedited impartial hearing or a *Honig* hearing to determine whether maintaining the current placement is substantially likely to result in injury to the child or to others (and, if so, with the remedy in the case of an expedited impartial hearing being an IEAS that meets the three aforementioned criteria)

Thanks to Perry Zirkel for his assistance with the development of this publication.

Perry A. Zirkel is university professor of education and law at Lehigh University, where he formerly was dean of the College of Education and more recently held the Iacocca Chair in Education for its five-year term. He has a Ph.D. in Educational Administration and a J.D. from the University of Connecticut, and a Master of Laws degree from Yale University. He has written more than 1,100 publications on various aspects of school law, with an emphasis on legal issues in special education. He writes a regular column in *Phi Delta Kappan*, another for *Principal* magazine, and a third, more recently, for *Teaching Exceptional Children*. Past president of the Education Law Association and co-chair of the Pennsylvania special education appeals panel from 1990 to 2006, he is the author of the two-volume reference *Section 504, the ADA, and the Schools*, and the recent CEC monograph *The Legal Meaning of Specific Learning Disability*.

Glossary

Chapter 14 – The Pennsylvania regulations for special education that incorporate and extend beyond the IDEA regulations.

Due Process – The procedures that parents can use to disagree with the decisions of school district officials concerning special education. These procedural safeguards include the parents' right to written notice, mediation, a resolution session, a formal impartial hearing, and appeal.

Eligible Young Child – A child who is less than the age of beginners and at least 3 years of age and who meets the criteria in the IDEA definition of a child with a disability.

Free Appropriate Public Education (FAPE) – A program of education and other services for an eligible child that is designed to meet the child's special education needs and that allows the child to make meaningful progress in the educational setting.

Functional Behavioral Assessment (FBA) – Not defined in the IDEA or Chapter 14 but generally understood to be a process designed to collect information about the environment in which challenging behaviors occur, the events that trigger the behaviors, and the consequences that may be maintaining those behaviors.

Honig hearing – A state or federal court hearing for a preliminary injunction under the Supreme Court's decision in *Honig v. Doe*, 484 U.S. 305 (1988) to change the placement of a child with a disability where the behavior is a manifestation of the child's disability and district officials show that maintaining the child's current placement is substantially likely to result in injury either to the child or to others

Individuals with Disabilities Education Act (IDEA) – The federal law that provides partial funding and minimum national standards for special education services, including specified rights of children with special education needs and their parents.

Individualized Education Program (IEP) – The plan written by the IEP team (including parents) that specifically describes the programs and services necessary for a free appropriate public education for the eligible child.

Interim Alternative Educational Setting (IAES) – A temporary educational placement of no more than 45 school days that is allowed only in specified special circumstances—code of conduct violations for weapons, illegal drugs, or serious bodily harm or, where an impartial hearing officer determines that maintaining the current placement is substantially likely to result in injury to the child or to others. In such cases, the IDEA requires that 1) the IAES educational services “enable the student to continue to progress in the general education curriculum, although in another setting, and to progress toward meeting [the student's IEP] goals”; and 2) the child “receive, as appropriate, a functional behavioral assessment, behavior intervention services and modifications, that are designed to address the behavior violation so that it does not recur.”

Manifestation Determination – A process conducted by the district representative, the parent, other members of the IEP team mutually determined to be relevant to determine whether 1) the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or 2) the conduct in question was the direct result of the district's failure to implement the IEP.

Mechanical Restraint – A device that controls involuntary movement or lack of muscular control of students when due to organic causes or conditions and for the purpose of preventing injury to the student or others or to promote normative body positioning and physical functioning.

Notice of Recommended Educational Placement (NOREP) – The form issued to parents to inform them of the placement recommended by the IEP team and of their procedural protections under the IDEA and Chapter 14.

Positive Behavior Support Plan (PBSP) – A plan for students with disabilities and eligible young children who require specific interventions to address behavior that interferes with learning and that 1) is developed by the IEP team, 2) is based on a functional behavioral assessment, 3) becomes part of the IEP, 4) utilizes positive reinforcement and other positive techniques, ranging from the use of positive verbal statements as a reward for good behavior to specific tangible rewards, to shape the child's behavior,

Restraint – The application of physical force, with or without the use of any device, for the purpose of restraining the free movement of an eligible student's body. Expressly excluded are 1) briefly holding, without force, an eligible student for the purpose of calming or comforting the student; 2) guiding the eligible student to an appropriate activity or holding the student's hand for the purpose of escorting the student from one area to another; 3) hand-over-hand assistance with feeding or task completion; 4) techniques prescribed by a qualified medical professional for reasons of safety or therapeutic treatment, agreed to by the parents, and specified in the IEP; and 5) devices used for physical or occupational therapy, seatbelts in wheel chairs or on toilets used for balance and safety, safety harness in buses, and functional positioning devices.