

**WISCONSIN ASSOCIATION OF SCHOOL
SUPERINTENDENT ASSISTANTS**

Seventh Annual Spring Conference

**Student Expulsion: What Every Superintendent
Assistant Needs To Know**

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I. Short-Term Disciplinary Suspensions, Wis. Stat. § 120.13(1)(b) and (bm).

A. Grounds for Suspension

1. The student may be suspended if it is determined:
 - a. That the student is guilty of noncompliance with a rule or of the conduct charged; and
 - b. That the student's suspension is reasonably justified. Wis. Stat. § 120.13(1)(b)3.
2. Pursuant to Wis. Stat. § 120.13(1)(b), the school district administrator or any principal or teacher designated by the school district administrator may suspend a student for not more than five (5) school days for any of the following reasons:
 - a. Noncompliance with school rules;
 - b. Knowingly conveying any threat or false information concerning an attempt or alleged attempt being made or to be made to destroy school property by means of explosives;
 - c. Conduct while at school or while under school supervision which endangers the property, health or safety of others;
 - d. Conduct while not at school or while not under school supervision which endangers the property, health or safety of others at school or under the supervision of a school authority;
 - e. Conduct that endangers the property, health or safety of any employee or school board member of the school district in which the student is enrolled, including related threats. Wis. Stat. § 120.13(1)(b)2.
3. The school district administrator or any principal or teacher designated by the administrator shall suspend a student for not more than five (5) days if the school district administrator, principal, or teacher determines that the student, while at school or while under the supervision of a school authority, possessed a firearm. Wis. Stat. § 120.13(1)(bm).
4. A "firearm" means (a) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (b) the frame or receiver of any such weapon; (c) any firearm muffler or firearm silencer; or (d) any destructive device. Such term does not include an antique firearm. 18 U.S.C. § 921 (a)(3).

B. Procedural Considerations

1. Prior to any suspension, the student must be advised of the reason for the proposed suspension. Wis. Stat. § 120.13(1)(b)3. Typically, the administrator also provides the student with an opportunity to present his or her version of the events and evidence in defense. School board policy may provide additional requirements related to notifying the parent/guardian.
2. The parent or guardian of a suspended minor student must be given prompt notice of the suspension and the reason for the suspension. Wis. Stat. § 120.13(1)(b)3.
3. A student may be suspended for an additional ten (10) school days (for a total of 15 school days) if a notice of an expulsion hearing has been sent by the 5th day of the suspension. Wis. Stat. § 120.13(1)(b)2. and (c)4. The fifteen (15) school days of a suspension must be consecutive.
4. A student suspended under this paragraph cannot be denied the opportunity to take any quarterly, semester or grading period examinations or to complete course work missed during the suspension period, as provided in any attendance policy established by the school board. Wis. Stat. § 120.13(1)(b)5.

C. Appeal of Suspension

1. Within five (5) school days following the commencement of the suspension, the suspended student or the student's parents may have a conference with the school district administrator or his or her designee who must be someone other than the principal, administrator or teacher in the suspended student's school. Wis. Stat. § 120.13(1)(b)4.
2. The reference to the suspension on the student's school record shall be expunged if the school district administrator or his or her designee finds any of the following:
 - a. The student was suspended unfairly or unjustly, or
 - b. The suspension was inappropriate, given the nature of the alleged offense, or
 - c. The student suffered undue consequences or penalties as a result of the suspension. Wis. Stat. § 120.13(1)(b)4.

3. The school district administrator or his or her designee must make a finding within fifteen (15) days of the conference. Wis. Stat. § 120.13(1)(b)4.
4. No appeal to the Department of Public Instruction (DPI) is available for a short-term suspension. *See Madison Metropolitan School District v. DPI*, 199 Wis. 2d 1, 17, 543 N.W.2d 843 (Wis. 1995) (the court affirmed the judgment of the circuit court in holding that the State Superintendent lacked authority to review the alleged suspension errors in its review of the expulsion decision).

II. Expulsions, Wis. Stat. § 120.13(1)(c) or (e).

A. Grounds for Expulsion

1. The school board may expel a student from school whenever it is satisfied that the interest of the school demands the student's expulsion and it:
 - a. Finds the student guilty of repeated refusal or neglect to obey school rules; or
 - b. Finds that a student knowingly conveyed or caused to be conveyed any threat or false information concerning an attempt or alleged attempt being made or to be made to destroy any school property by means of explosives; or
 - c. Finds that the student engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health or safety of others; or
 - d. Finds that the student engaged in conduct while not at school or while not under the supervision of a school authority which (1) endangered the property, health or safety of others at school or under school supervision or (2) endangered property, health or safety of any employee or school board member of the district in which the student is enrolled. Wis. Stat. § 120.13(c)1.
2. With respect to c. and d. above, conduct that "endangers" a person or property" includes making a threat to the health and safety of a person or making a threat to damage property. Wis. Stat. § 120.13(c)1.
3. In addition, the school board may expel from a school a student who is at least 16 years old if:
 - a. It is satisfied that the interest of the school demands the student's expulsion;

- b. It finds that the student repeatedly engaged in conduct while at school or while under the supervision of a school authority that disrupted the ability of school authorities to maintain order or an educational atmosphere at school or at an activity supervised by a school authority; and
 - c. Such conduct does not constitute grounds for expulsion under (a) – (d) above. Wis. Stat. § 120.13(c)2.
4. The school board shall commence proceedings and expel a student from school for not less than one (1) year whenever it finds that the student, while at school or while under the supervision of a school authority, possessed a “firearm” (*see* definition in previous section). Wis. Stat. § 120.13(c)2m.

B. Right To Hearing

1. Prior to expelling a student, the school board shall hold a hearing. Wis. Stat. § 120.13(1)(c)3.
2. Upon request of the student and, if the student is a minor, the student’s parent or guardian, the hearing shall be closed. Wis. Stat. § 120.13(1)(c)3. The student and/or parent or guardian has no right to demand that the hearing be open. Even though the student or parent may choose not to ask for a closed hearing, it is recommended that every expulsion hearing be held in closed session. Accordingly, when public notice of a meeting of the board of education is given, the statute authorizing closed meetings (Wis. Stat. § 19.85(1)(a) and (f)) should be used to close the hearing, whether the student requests a closed hearing or not.
3. The student and, if the student is a minor, the student’s parent or guardian, may be represented at the hearing by counsel. Wis. Stat. § 120.13(1)(c)3.

C. Notice of Hearing

1. Not less than 5 days before the hearing, the expulsion notice shall be sent. Separate notices must be sent to the student and, if the student is a minor, to the student’s parent or guardian. The separate notices should be mailed in separate envelopes.
2. The notice shall state all of the following:
 - a. The specific grounds for expulsion and the particulars of the student’s alleged conduct upon which the expulsion proceeding is based;

- b. The time and place of the hearing;
 - c. That the hearing may result in the student's expulsion;
 - d. That, upon the request of the student and, if the student is a minor, the student's parent or guardian, the hearing shall be closed;
 - e. That the student and, if the student is a minor, the student's parent or guardian, may be represented at the hearing by counsel;
 - f. That the school board shall keep written minutes of the hearing;
 - g. That if the school board orders the expulsion of the student, the school district clerk shall mail a copy of the order to the student, and if the student is a minor, to the student's parent or guardian;
 - h. That if the student is expelled by the school board the expelled student or, if the student is a minor, the student's parent or guardian may appeal the school board's decision to DPI;
 - i. That if the school board's decision is appealed to DPI, within 60 days after the date on which DPI receives the appeal, DPI shall review the decision and shall, upon review, approve, reverse or modify the decision;
 - j. That the decision of the school board shall be enforced while the department reviews the school board's decision;
 - k. That an appeal from the decision of DPI may be taken within 30 days to the circuit court for the county in which the school is located;
 - L. That the state statutes related to student expulsion are Wis. Stat. §§ 119.25 and 120.13(1); and
3. The district may issue amended notices to correct mistakes as long as the five-day notice requirement is satisfied.

D. Hearing Considerations

1. Timeliness of the hearing.

The hearing should, if possible, be held within the 15-day suspension period.

2. Pre-hearing explanation of procedures.

If the student and his or her parent or guardian are unrepresented by counsel, a concerted effort should be made by the school board to explain what will happen at the hearing, and to afford the student and parent every opportunity to present their case.

3. Minutes of the Hearing.

The school board must keep written minutes of the hearing. Wis. Stat. § 120.13(1)(c). The record must reflect who was present, what evidence was presented in support of allegations of misconduct and what decision or action the board took based upon the evidence presented. *Nathan W. by Wilmot Board of Education*, Dec. and Order No. 296 (7/10/96).

4. Subpoenas.

The school board has the statutory authority to subpoena witnesses to appear and testify at the expulsion hearing. Subpoenas are usually prepared by counsel for the board or by counsel for the administration.

5. Procedure.

a. The administration presents its case first, since the administration has the burden of proof. The presentation of the case should normally include the presentation of witness testimony and exhibits.

b. The student and parent must be afforded an opportunity to cross-examine any of the school district's witnesses.

c. After the administration presents its case, the student and parent or guardian may present their case. The school district should be afforded an opportunity to cross-examine the student (if he or she testifies) and other witnesses.

d. School board members should ask whatever questions they have before going into deliberations.

6. Evidence.

a. It is recommended that the student and/or parent or guardian (or legal counsel) be given an opportunity to inspect any documents at least 24 hours prior to the hearing if such a request is made.

b. Hearsay is admissible at a school board student expulsion hearing.

- i. “[A] student’s right to due process in an expulsion hearing is satisfied even though some of the testimony presented was hearsay given by members of the school staff.” *Racine Unified School District v. Thompson*, 107 Wis.2d 657, 321 N.W.2d 334 (Ct. App. 1982).
- ii. “It must be shown that hearsay testimony of a speculative and unsubstantiated nature was relied on extensively before it would rise to the level of a constitutional deprivation of a due process right.” *Matter of the Expulsion of Jason M.*, Decision and Order No. 179 (June 27, 1991).
- c. The sufficiency of the evidence is for the school board to decide. DPI will not reverse an otherwise proper expulsion order based on a different view of the sufficiency of the evidence.
- d. Witnesses. There is no right on the part of the student to confront his or her “accusers.” (See below)

7. Use of Police Records.

- a. Pursuant to Wis. Stat. §§ 48.396 and 938.396, law enforcement agencies are allowed to share information with school districts.
- b. Wis. Stat. § 118.125(5)(b) states in part ... “Law enforcement officer’s records obtained under §§ 48.396 (1) or 938.396 (1) (b) 2. or (c) 3. ... may not be used by a school district as the sole basis for expelling or suspending a student or as a sole basis for taking any other disciplinary action, including action under the school district’s athletic code, against a pupil.” *See also* Wis. Stat. § 118.127(2), which contains almost identical language stating law enforcement records obtained by the school district may not be the sole basis for expelling or suspending student.
- c. As long as the records are not the sole basis for the expulsion, police records may be used.
- d. On administrative appeal, DPI found that a student’s expulsion hearing failed to comply with Wis. Stat. §118.125(5)(b). The Circuit Court overturned DPI’s decision, finding the term “sole” is most reasonably interpreted to mean only or singular as the commonly understood meaning of the words. The evidence presented at the hearing in question consisted of testimony from the reporting officer, the school principal, and the district superintendent, physical evidence, and the student’s school

records, in addition to the police report. According to the court, there was nothing in the record, and no substantial evidence, to support a finding that the police report was in actuality the “sole basis” for the District’s decision and that the other evidence was superfluous or mere window dressing. Therefore, DPI’s interpretation or application of the statute was unreasonable since under DPI’s interpretation, Wis. Stat. §118.125(5)(b) would prohibit an expulsion decision which is primarily based on reporting from law enforcement. *Dodgeland School District v. DPI*, Dodge Co. Cir. Ct., 09 CV 1047 (2/25/2010).

8. Identification of Student Witnesses

The court held that a high school student threatened with expulsion based on statements of other students did not have a due process right to learn the identities of the other students. *Newsome v. Batavia Local School District*, 842 F.2d 920, 924-925 (6th Cir. 1988). The *Newsome* court stated:

Newsome first contends that he was denied due process of law at the school board hearing when the board denied his request for permission to cross-examine his student accusers or to at least know their identities.

...

In this turbulent, sometimes violent, school atmosphere, it is critically important that we protect the anonymity of students who “blow the whistle” on their classmates who engage in drug trafficking and other serious offenses. Without the cloak of anonymity, students who witness criminal activity on school property will be much less likely to notify school authorities, and those who do will be faced with ostracism at best and perhaps physical reprisals. [Case citations omitted] Giving due weight to the important interest a student accused of serious misconduct has in his public education, we conclude that the necessity of protecting student witnesses from ostracism and reprisal outweighs the value to the truth-determining process of allowing the accused student to cross-examine his accusers.

9. “Miranda warnings” for students are not required.

In *Expulsion of Jeremy B. by the Waukesha School Board*, Decision and Order No. 395 (8/16/99), the State Superintendent ruled:

[T]he parents allege that the police questioning of Jeremy violated his rights because Jeremy's parents and his lawyer were not present. . . . It was not improper for the school board to rely on the evidence that resulted from the interview. Expulsion hearings are not criminal proceedings. The exclusionary rule, which in criminal cases may demand the exclusion of illegally obtained evidence does not apply to administrative expulsion hearings. [Case citations omitted] No evidence was produced at the hearing to suggest that the procedures used were contrary to any constitutional or statutory provisions. Furthermore, there is no evidence that Jeremy was subject to "custodial interrogation" when he was questioned by Detective Wall. When the subject is not "in custody" there is no need for "Miranda" warnings. [Case citations omitted] Therefore, the panel properly considered the statements made by Jeremy to Detective Wall.

E. Board Deliberations

1. After hearing all the evidence, the board of education must deliberate and decide the case. Deliberations should be in private without the presence of anyone from the school administration. DPI has ruled that the presence of an administrator during the Board's deliberations is reversible error.
2. In order to constitute a valid expulsion, the board must specifically find each of the following: (1) that the student engaged in the conduct charged in the hearing notice, (2) that the student thereby violated the expulsion statute (the particular statutory ground must be specified); and (3) that the interests of the school demand the student's expulsion.
3. The board also determines the length of the expulsion period and may consider whether educational services will be provided during the period of expulsion.
4. The board should vote in closed session.

F. Imposing Penalties

1. The length of the expulsion period is within the board's discretion.
2. In Wisconsin, the State Superintendent has specifically ruled that there is no provision in Wis. Stat. § 120.13(1)(c), that limits the duration of an expulsion and, accordingly, an expulsion for the remainder of a student's career appears to be statutorily permissible. *See, e.g., Jesse K. by the School Board of Joint District No. 2 of Sun Prairie*, Decision and Order

No. 131, p. 7, June 17, 1985.

3. A board considering the permanent expulsion of a student would be well advised, nonetheless, to consider the age of the student, his or her past history of behavior, and the actual disruptive effect of his or her conduct, as well as any evidence the student offers as a reason for mitigating the punishment, before deciding to permanently expel a student. Moreover, school boards would be well advised to specifically advise the student who has been permanently expelled, that he or she may apply for readmission, preferably after one year, and would be entitled to a hearing at that time for the presentation of any evidence tending to show that the student has been rehabilitated. The board could, then, at its discretion, modify its original expulsion order.

G. Expulsion Order

1. Upon the ordering by the school board of the expulsion of a student, the school district clerk shall mail a copy of the order to the student and, if the student is a minor, to the student's parent or guardian. Wis. Stat. § 120.13(1)(c)3.
2. In order to constitute a valid expulsion, the board must specifically find each of the following: (1) that the student engaged in the conduct charged in the hearing notice, (2) that the student thereby violated the expulsion statute (the particular statutory ground must be specified); and (3) that the interests of the school demand the student's expulsion.

H. Appeal of Expulsion Decision

1. The expelled student, or if the student is a minor, the student's parent or guardian, may appeal the expulsion to the state superintendent. Wis. Stat. § 120.13(1)(c)3. There is no statutory time limit for filing the appeal.
2. If the school board's decision is appealed to the state superintendent, the state superintendent shall review the decision and shall, upon review, approve, reverse or modify the decision within 60 days after the date on which the state superintendent received the appeal. Wis. Stat. § 120.13(1)(c)3.
3. DPI will only review the procedures that were followed. DPI will not review the sufficiency of the evidence, the credibility of the witnesses or the appropriateness or the length of any expulsion.
4. The decision of the school board shall be enforced while the state superintendent reviews the decision. Wis. Stat. § 120.13(1)(c)3.

5. An appeal from the decision of the state superintendent may be taken within 30 days to the circuit court of the county in which the school is located. Wis. Stat. § 120.13(1)(c)3.

I. Educational Services During the Expulsion

1. Educational services are not required except for students with disabilities. DPI recommends that school boards provide some opportunity for educational services during the expulsion period.
2. A school district in Wisconsin need *not* offer any educational alternatives, including homebound education, to a regular education student who has been lawfully expelled. There is no provision in Wis. Stat. § 120.13(1), requiring the continuation of educational services to a lawfully expelled student.
3. The State Superintendent has ruled repeatedly that, although it might be advisable for districts to offer alternative educational programs to students who have been expelled, there is currently no law which requires them to do so. *Dale C. by the Central Westosha School District*, Decision and Order No. 137, p. 11, May 15, 1986. The Department of Public Instruction has made a practice in its decisions of encouraging districts to provide at least homebound study for regular education students who have been expelled, although the State Superintendent has acknowledged that such a program is not required. *Brandon G. by the West DePere School District*, Decision and Order No. 160, p. 7, April 27, 1989.
4. However, in a Dane County Circuit Court decision, a judge ordered the Madison Metropolitan School District to provide educational services to a student who was expelled and is under a juvenile court order to continue his education. Students who are expelled from the District are typically given no services unless they are eligible for special education. However, Circuit Court Judge David Flanagan decided that the District remained obligated under state law to formulate an educational plan for a 16-year-old student who was expelled after his arrest on a misdemeanor drug charge. In his decision, the judge stated that state law permits him to issue orders to persons who contribute to the condition of a juvenile by any act or omission. In this case, the District's refusal to try to find some educational opportunity for the boy was ruled an omission which contributed to the delinquency of the boy. *In the Interest of M.D.T.*, Case No. 09 JV 419, (Order dated Oct. 19, 2009).

III. Conditional Early Reinstatement (commonly referred to as Early Readmission), Wis. Stat. § 120.13(1)(h).

A. Definition

1. Early reinstatement means readmission to school of an expelled student before the expiration of the term of expulsion specified in the student's expulsion order.
2. Early readmission conditions mean:
 - a. A condition(s) that a student is required to meet before he or she may be granted early readmission to school; or
 - b. A condition that a student is required to meet after his or her early readmission but before the end of the term of the expulsion specified in the student's expulsion order.

B. Procedures

1. A school board may specify one or more early readmission condition(s) in the expulsion order of a student expelled from school under which he or she may be reinstated to school before the end of the term of his or her expulsion.
2. The early readmission conditions must be related to the reasons for the student's expulsion.
3. If the expulsion order is issued by an independent hearing officer, the student, or if the student is a minor, the student's parent or guardian, may appeal the determination regarding whether an early readmission condition specified in the expulsion order is related to the reason for the student's expulsion to the board.
 - a. The appeal must be made within 15 days after the date on which the expulsion order is issued.
 - b. The school board's decision regarding the determination is final.
4. The school district administrator, or the designee, determines whether a student has met the early readmission conditions that he or she is required to meet before he or she may be granted early readmission.

Note: The designee must be someone other than a principal, administrator, or teacher in the student's school.

5. The school district administrator, or the designee, may grant the student early readmission. The determination of the school district administrator, or the designee, is final.
6. The school district administrator, or the designee, may revoke the student's early readmission if he or she violates an early readmission condition, which he or she was required to meet, after his or her early reinstatement, but before the expiration of the term of expulsion.
 - a. The school district administrator, or the designee, must advise the student of the reason for the proposed revocation, including the early readmission condition alleged to have been violated before revoking the student's early readmission.
 - b. The student must be provided an opportunity to present his or her explanation of the alleged violation.
 - c. The school district administrator, or the designee, makes a determination that the student violated the early reinstatement condition and that revocation of the student's early readmission is appropriate.
 - d. If the school district administrator, or designee, revokes the student's early readmission, he or she must give the student, and if the student is a minor, the student's parent or guardian, prompt written notice of the revocation and the reason for the revocation, including the early readmission condition violated.
7. If the student's early readmission is revoked, the student's expulsion shall continue to the expiration of the term specified in the expulsion order unless the student, or, if the student is a minor, the student's parent or guardian, and the school board agree, in writing, to modify the expulsion order.
8. The student, or if the student is a minor, the student's parent or guardian, may request a conference with the school district administrator, or the designee, if the early readmission is revoked.
 - a. The request for a conference must be made within 5 school days after the revocation of the student's early readmission.
 - b. A school district administrator's designee must be someone other than a principal, administrator, or teacher in the student's school.
 - c. If a conference is requested, it must be held within 5 school days following the request.

9. The student must be reinstated to school following the conference if:
 - a. The student did not violate an early readmission condition; or
 - b. The revocation was inappropriate.
10. If the student is reinstated, the reinstatement is:
 - a. Under the same readmission conditions as in the expulsion order; and
 - b. The early reinstatement revocation must be expunged from the student's record.
11. If the school district administrator, or designee, finds that the student violated an early readmission condition and that the revocation was appropriate, he or she must mail separate copies of the decision to the student, and, if the student is a minor, to the student's parent or guardian.
12. The decision of the school district administrator, or the designee, is final.
13. Typical conditions for conditional early readmission related to frequent student offenses:
 - a. AODA and compliance with any treatment recommendations.
 - b. Anger management.
 - c. Psychological evaluation and treatment.
 - d. Community service.
14. DPI will not review a denial of early readmission because of failure to meet the stated conditions. *Laura S. by the Viroqua School Board, Decision and Order No. 410 (3/31/00).*
15. The board does not have authority to put conditions on enrollment *after* the conclusion of the expulsion term.

IV. Manifestation Determination Reviews.

A. In General

1. School administrators have become accustomed to participating in a meeting at which the IEP Team reviews the relationship between the student's disability and the behavior subject to the disciplinary action to determine whether a student's misconduct was a manifestation of his or her disability, which is a prerequisite to any decision to order a change in the student's placement for disciplinary reasons.
2. Generally, when a student's misconduct *is* a manifestation of his or her disability, the student must be returned to his or her IEP placement, unless the parent and the school district agree to a change of placement.
3. If the student's misconduct *is not* a manifestation of his or her disability, the school administrators have broader authority to impose the district's general disciplinary consequences.

B. The Individuals With Disabilities Education Act (IDEA) of 2004

1. The 2004 IDEA significantly changed the definition that is to be used to determine whether the student's misconduct is a manifestation of his or her disability, as well as streamlined the required procedure for a manifestation determination review.
2. Previously, the IEP Team was required to convene and determine whether the student's conduct was "related to" the student's disability. This required a systematic procedure of considering the student's evaluation findings, student observations, and the appropriateness and implementation of the student's IEP to determine whether the student's disability impaired his or her ability to understand the behavioral consequences of his conduct or his or her ability to control behavior. If the IEP Team concluded that the behavior subject to disciplinary action was a manifestation of the student's disability, the student's placement could not be changed unilaterally by school district authorities and the student could not be expelled from school.
3. Now, new language in the law requires a review to determine:
 - a. If the conduct in question was *caused by*, or had a *direct and substantial relationship* to, the child's disability; or
 - b. If the conduct in question was the *direct result* of the local educational agency's failure to implement the IEP.

4. In other words, the standard for prohibiting school administrators from imposing a unilateral change in the student's placement has been lowered. The intent of Congress is that disability characteristics that have only an attenuated or tangential relationship to the misconduct, such as low self-esteem, should not prevent school officials from removing students with disabilities from the school environment.

C. Review of Student's File

1. Within 10 school days of any decision to change the placement of a student with a disability without parental consent because of a violation of a code of student conduct, certain persons must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to make the required determination of whether the student's misconduct was a manifestation of his or her disability. However, the requirements of who must conduct the review have changed.
2. Prior law required that the IEP Team review the information.
3. Now, the 2004 IDEA requires that the school district, the parent, and "relevant members" of the IEP Team (as determined by the parent and the LEA), review the relevant information about the student.
 - a. It may be determined that some members of the student's IEP Team will not have relevant information for the discussion, depending on the type of misconduct in question, when it occurred, and who was present.
 - b. The parent and school administration determine the individuals who will participate in the review such that one party will not be able to "veto" the participation of a person from the review who is deemed by the other party to be necessary.
 - c. If the persons conducting the review determine that either one or the other of the above two conditions applies to the student in question, the conduct shall be determined to be a manifestation of the student's disability and the student's placement may not be unilaterally changed by the school district administration.

D. Meeting After Review

1. Neither the prior version nor the amended version of the IDEA specifies that a meeting must occur of the persons conducting the review of the student's relevant information. However, when the U.S. Department of Education promulgated federal regulations in 1999, it added the

requirement that the manifestation determination review was to be conducted *at a meeting*.

2. The final regulations related to IDEA 2004 simply require an IEP Team to review all relevant information in the child's file to determine if 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 IEP.
3. The purpose of the change in the law was to simplify the discipline process and make it easier for school officials to discipline children with disabilities when discipline is appropriate and justified. As a practical matter, however, school personnel may want to consider continuing to conduct manifestation determination process in connection with an IEP team meeting.

E. Short Term Removal

1. IDEA 2004 draws a distinction between short-term disciplinary actions and long-term actions. The line of demarcation is 10 school days.
2. A manifestation determination need not be conducted for removals that will be for not more than 10 consecutive school days and does not constitute a change in placement. 34 C.F.R. § 300.530(b)(1). In other words, manifestation determinations are limited to removals that constitute a change in placement under 34 C.F.R. § 300.536.
3. With a short-term disciplinary action, the administration is empowered to take action quickly and with relatively little complication.
4. There is no requirement for an IEP team meeting or a manifestation determination prior to this 10-day (consecutive or cumulative) removal(s), so long as: (1) the student has violated the code of conduct and (2) the student is treated the same as a student without a disability would be treated.

F. Long Term Removal

1. Long-term disciplinary action, a change in placement, can be imposed upon the student with a disability if:
 - a. The student's behavior is determined not to be a manifestation of the child's disability;
 - b. The student is treated the same as a student without a disability would be treated for the same infraction; and

- c. The school continues to make a free appropriate public education (FAPE) available.
2. Under these circumstances the student can be “removed” for the same length of time as a student without a disability would be removed, and can be served in “an interim alternative educational setting.”
3. Long-term discipline (over 10 consecutive or cumulative school days) is a change in placement. Thus, a manifestation determination must be conducted.

G. Conduct That Is a Manifestation of the Student’s Disability

1. When the conduct is determined to be a manifestation of the student’s disability, the student must be returned to his or her placement from which he or she was removed (unless it is a 45 day removal as described below), and the IEP Team must conduct a functional behavioral assessment, if it had not already been done, consistent with previous law.
2. The new law clarifies that when a student’s conduct is a manifestation of his or her disability, the IEP Team *must* implement a behavior intervention plan (also known as a “BIP”) if the student did not previously have one. The new rules, however, do not identify a specific timeline that must be followed for implementing a new behavior intervention plan.
3. Additionally, if the student had a behavior intervention plan, the IEP Team must review the plan and modify it, as necessary, to address the behavior under review. If the student had a behavior intervention plan in place at the time of his or her violation of the student code of conduct, the group that convenes to consider whether the student’s conduct was a manifestation of his or her disability will need to consider whether the school had failed to implement such a plan, and such a failure may prohibit the school district from unilaterally removing the student from his or her educational placement.

H. Conduct That is Not a Manifestation of the Disability

1. Unless the student’s conduct is determined to have a direct and substantial relationship to his or her disability or to be a direct result of the district’s failure to implement the student’s IEP, the student may be disciplined in the same manner and for the same duration as a nondisabled student. (This includes placement in an interim alternative educational setting discussed below). That is, school administrators, or, in the case of expulsion, the school board, may order a change in the student’s placement that exceeds 10 school days without parental consent.

2. Students with disabilities must continue to receive a free appropriate public education (FAPE) in the form of educational services when their placements are changed because of a disciplinary consequence in order to enable them to participate in the general education curriculum and to make progress toward meeting the goals set out in their IEPs.
3. Additionally, such students are to receive, as appropriate, a functional behavior assessment, behavior intervention plan, and modifications that are designed to address the behavior violation so that it does not occur again.
4. Within 10 business days after school administrators first remove a student with a disability for more than 10 school days, remove a student to an interim alternative educational setting, or initiate a removal that constitutes a change of placement, the school district *must* convene an IEP Team meeting and develop a functional behavioral assessment (FBA) plan to address the behavior if such assessment had not previously been conducted, or to review the plan and its implementation and modify it as necessary if the student already has a behavior intervention plan (BIP). As soon as it is practicable after developing the assessment plan and completing the assessments, the IEP Team *shall* meet to develop appropriate behavioral interventions.