



A MODEL CODE on Education and Dignity

CHAPTER 4: FREEDOM FROM DISCRIMINATION

4.5 Students with Disabilities

Unlike other areas of the Model Code where existing laws vary state by state, the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 provide a strong federal law to protect the rights of students with disabilities by ensuring that everyone receives a free appropriate public education, regardless of ability. The IDEA in particular strives to grant equal access to students with disabilities and also provides additional special educational services and procedural safeguards. This section of the Model Code refers to the implementation of the IDEA and calls for some specific changes to the provisions of the IDEA.

Human Rights Goal

Students with disabilities are members of their communities and have the right to attend their neighborhood schools or other schools that meet their needs as determined in consultation with students and their families. Students with disabilities shall be provided with effective support measures in environments that maximize academic and social development, consistent with the goal of full participation in the least restrictive environment. To foster the full development of the child, corrective consequences for misconduct must be part of an instructional framework. All students shall be treated with respect and dignity, free from cruel, inhuman, or degrading treatment or punishment.³³²

Recommended Language

- A. States, districts and schools shall establish school-wide preventive and positive discipline policies that support all members of the school community (see Section 3.1) and that address the particular needs of students with disabilities,³³³ including:**
1. Proactive systems to identify, adopt and sustain effective practices and routines that prevent problematic behavior, reinforce appropriate behavior and have organized responses to misconduct.
 2. A multi-tiered approach that outlines the skills necessary to meet individual needs and ensure that cultural and individual differences are valued rather than criticized.
 3. Providing staff, families and students with the necessary information and training to ensure that behavioral expectations are clearly communicated, that behavior plans are developed collaboratively and understood by all, and that those plans are aligned with supporting the educational programs of students.
 4. Ensuring that no behavioral intervention shall cause physical or psychological injury, harm and/or deprive a student of basic human necessities or rights (including food, hydration and bathroom visits) or demean the student in any way.
- B. Federal and state laws must strengthen procedural protections to ensure that students and parents or guardians are meaningful partners in the provision of special education services, particularly when addressing the needs of a child with behavior problems:³³⁴**
1. Amend laws, regulations and policies to clarify that students themselves, along with their parents, guardians, or surrogate parents, have the right to participate fully in proceedings to determine the education and related services they shall receive. This includes a student's right to direct their own procedural rights under the IDEA in

³³² Convention on the Rights of Persons with Disabilities arts. XXIV, XV.

³³³ U.S Commission on Civil Rights. Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities (2019). Available at: <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf>.

³³⁴ Because the 2004 amendments to IDEA make it easier for schools to remove children for non-dangerous, non-weapon, non-drug related behaviors, and place the burden on parents to prove the connection between behavior and disability, it is critical for parents to have access to opinions from outside professionals that the behaviors complained of are "caused by" or have a "direct or substantial relationship" to the disability.

situations where the child's parent, guardian, or surrogate parent cannot or will not assert the child's rights themselves.³³⁵

2. Amend procedural safeguards to allow parents or guardians and professionals brought by parents or guardians the right to meaningful observation of the child in their classroom and provide clear guidelines and support in conducting observations.
 3. When parents, guardians or students exercise their right to an independent educational evaluation (IEE), school districts shall either pay for independent educational evaluations or file for due process.
 - a. 34 C.F.R. § 300.502 shall be amended to state that failure to file for due process within 10 calendar days of a parent or guardian's IEE request (or 5 calendar days if there is a manifestation determination, change in placement, or hearing request is pending) results in the parent's or guardian's right to a publicly funded IEE as a matter of law.³³⁶
 4. The school shall have the burden of proof in a due process hearing where the parent or guardian or student challenges a change of placement of a child with a disability because of a school disciplinary violation.³³⁷
 5. School districts must honor hearing officer decisions in a timely manner. Timeframes for implementation of decisions shall be written into all due process decisions and settlement agreements.
- C. Federal and state laws must strengthen the requirements for effective, evidence-based positive interventions as part of the Individualized Education Plan (IEP) process.³³⁸**
1. 20 U.S.C. Sec. 1401 (26) (Definition for Related Services) shall be amended to include Positive Behavior Supports, Functional Behavior Analysis (FBA), and Behavior Intervention Plans (BIP) as related and supplementary services.³³⁹
 - a. Require that the FBA and BIP be reviewed and updated annually.
 - b. Develop standards for a "properly conducted" FBA and BIP.
 - c. Develop clear guidelines for additional personnel necessary for support.
 2. 20 U.S.C. Sec. 1414 (d)(3)(B)(i) (Consideration of Special Factors) shall be amended to the following: "in case of a child whose behavior impedes the child's learning or that of others, it is required that the IEP Team consider the use of School-wide Positive Behavior Interventions and Supports (SWPBIS supports and other strategies to address that behavior."
- D. State and Federal law must specify that exclusion from the student's current educational placement because of behavior that is a manifestation of the child's disability shall be presumed to be discriminatory.**
1. Disciplinary removal of a child with a disability shall be defined as any removal from the child's current educational placement for any length of time totaling more than one class period for violation of a school rule, including but not limited to formal suspension and expulsion as defined in Section 3.2 Guidelines for Suspensions, Expulsions and Removals as well as informal removals such as denial of access to recess or field trips or shortened days.³⁴⁰ (34 C.F.R. Sec. 300.536 must define disciplinary removal to be consistent with this provision.)
 2. Schools shall carefully consider all of the factors set forth in Section 3.2. Guidelines for Suspensions, Expulsions and Removals when considering disciplinary removal as an option for a child who has been or should have been identified as having a disability that affects the child's behavior.

³³⁵ Children must have a right to participate in processes that directly impact their substantive right to a free appropriate public education under the IDEA. This right is in line with the American Bar Association's Resolution calling for a right to counsel at public expense for low-income persons in adversarial proceedings where basic human needs are at stake, including education. See generally Am. Bar Ass'n, Resolution 112A (2006), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A_authcheckdam.pdf.

³³⁶ The regulations state that school districts must either pay for the IEE or file for due process if they disagree with parent's request. 34 C.F.R. § 300.502 (2012). But many school districts simply decline to pay for the IEE, and refuse to file for due process. This forces parents to file for due process and bear the burden of proof, which requires them to hire expert witnesses to testify to their need for an independent evaluation, and bear enormous costs. As a result, many parents go without an IEE.

³³⁷ The decision in *Schaffer v. Weast*, 546 U.S. 49 (2005) places the burden of proof on parents who are the least equipped to bear it. Students with disabilities face a discriminatory impact in school removals. Also, appealing a no-manifestation determination is expensive and requires expert witnesses and counsel. Placing the burden of proof on the school district ensures equity and fairness in the process.

³³⁸ The term Individualized Education Program or IEP is defined as a written program for a child with a disability that is developed, reviewed, and revised in a meeting that must include a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals, a description of how the child's progress toward meeting the annual goals will be measured, and a statement of the special education and related services that will be provided to the child. 34 C.F.R. § 300.320(a)(1-4) (2012).

³³⁹ Currently, the only explicit recognition of an FBA in the IDEA is the right to one when a child is removed from his current placements under IDEA's discipline provisions. 20 U.S.C. § 1415(k)(1)(D)(ii) (2012).

³⁴⁰ See generally Candis Watson Bowles Et Al., *Passive Aggressive Discipline: "Helping" Kids By Denying FAPE* (2009).

- a. All short-term removals of more than one hour or class period and less than one full school day shall be recorded in the child's educational file and shall be recorded in a central data base with key demographics, as defined in Section 5.2 Monitoring and Community Analysis.
 - b. Students suspected of having disabilities, but who have yet to be identified as having a disability, shall receive increased intervention services, including a special education assessment, when appropriate and consistent with the school's obligation to engage in Child Fund under the IDEA.
 - c. Students with disabilities who are disciplined with a series of short term removals or suspensions that total five or more days in a school year shall have an IEP Team meeting to review the student's entire program to determine what modifications and accommodations may be necessary to bring about a positive change in student behavior. Environmental supports and other interventions, both successful and unsuccessful, must be documented so that the student's program continues to be built around the student's needs.
 - d. Federal law triggering the manifestation determination requirement (34 CFR 300.536 (a)(2)(ii)) shall be amended to state "[b]ecause the child's behavior is substantially similar to the child's behavior in previous incidents and is caused by the child's disability or has a direct and substantial relationship to the disability..."
 - e. School personnel shall obtain the approval of a district level administrator responsible for overseeing the special education program prior to removing a child from school for disciplinary purposes, except when the emergency removal provision in Section 3.5 Alternative Schools applies.
3. When a removal of a child from school triggers a manifestation determination under 20 U.S.C. Sec.1415(k)(E):
 - a. The parent or guardian and their child have a right to legal counsel as a matter of right and at public expense in all due process or judicial review proceedings stemming from the manifestation hearing (see Section 3.2 Guidelines for Suspensions, Expulsions and Removals, sub-section on Due Process);
 - b. If any member of the IEP Team raises concerns that an unidentified disability was the cause of the disciplinary incident, an evaluation shall be conducted after the manifestation determination, and considered by the IEP Team;
 - c. Parents or guardians shall have a right to a review of all relevant information in the child's file, including all of the child's education records and any new information provided to the IEP Team by parents, guardians or other individuals; and
 - d. If applicable, schools shall immediately remove any suspension or expulsion from the child's record if the behavior is determined to be a manifestation of the disability.
 4. The student shall have the right to "stay put" in the current educational placement pending a final decision on disciplinary removal. The only exception to this is under an "emergency situation" as defined by Section 3.2 Guidelines for Suspensions, Expulsions and Removal, sub-section P (Emergency Removal).
 5. A student with a disability must continue to receive FAPE during the period of removal from their current educational placement.³⁴¹
- E. Students with disabilities shall be referred to law enforcement or the court system only in situations involving a real and immediate threat to physical safety (see emergency removal provisions in 3.2 Guidelines for Suspensions, Expulsions and Removal, sub-section P (Emergency Removal) and limits on the role of law enforcement in section 3.3 Law Enforcement and Criminalization in School Environments):**
1. An Intervention Support Team³⁴² shall be convened to determine the seriousness of the behavior and if it meets the criteria stated above and with the following process:
 - a. When a school initiates a report or referral to law enforcement or the court system of any student with a disability, the school shall conduct a manifestation determination within 10 school days of the report or referral.
 - i. The school shall provide the determination to the juvenile court.
 - ii. The school shall withdraw its referral or report if:
 - aa. The behavior is determined to be a manifestation of the student's disability; and
 - bb. The school failed to properly address the student's behavioral needs according to the school's obligations under the IDEA or Section 504 and district discipline policies.
 2. Juvenile Court Responsibilities
 - a. School based reports or referrals that result in juvenile prosecutions shall be reviewed by the juvenile court.

³⁴¹ Children who are removed for more than 10 days from their current placement must "continue to receive educational services, as provided in section 1412(a)(1), 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." 20 U.S.C. § 1415 (k)(1)(D) (emphasis added).

³⁴² A risk assessment team can be comprised of a school administrator, mental health professional based in the school and law enforcement officer connected to the school.

- b. The juvenile courts shall consider whether the school's action or inaction contributed to the behavior of the student.
- c. The juvenile courts shall have the authority to:
 - i. Subpoena all pertinent records with respect to the child's disability;
 - ii. Supervise the school's progress in meeting the child's needs, in addition to supervising the child's progress; and
 - iii. Enjoin school districts to withdraw their report or referral.
- d. Juvenile courts shall annually review all school-based reports and referrals for patterns. If a pattern of referral from a school or school district is indicated, the Juvenile Court shall initiate a work group of stakeholders (including parents or guardians, students and community leaders) and develop a Memorandum of Understanding to specify the roles and responsibilities of all stakeholders in reducing school-based referrals.³⁴³

³⁴³ See generally Juvenile Detention Alternatives Initiative, <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative.aspx>.