

# “You Can’t Punish Him, It’s Related to His Disability”: Addressing Discipline Under Section 504

William Buechler  
Buechler & Associates, P.C.  
attorneys@buechlerlaw.com

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## **FAPE UNDER SECTION 504**

Under 504, the focus is on *access* rather than educational benefit. FAPE under 504 is "the provision of regular or special education and related aids and services that ... are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met"

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## **STUDENT CODE OF CONDUCT**

The district's student code of conduct must specify that consideration will be given, as a factor in each decision concerning suspension, removal to a DAEP, expulsion or placement in a JJAEP to:

- Self-defense;
- Intent or lack of intent;
- The student's disciplinary history;
- A disability that substantially impairs the student's capacity to appreciate the wrongfulness of the conduct; or
- The student's status as homeless or in foster care.

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## **REMOVALS FOR LESS THAN 10 DAYS**

An administrator may place a student in an alternative placement for up to ten days as long as nothing in the student's plan would preclude such a placement.

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## **SUSPENSIONS OFF CAMPUS**

A 504 student can be suspended off campus for the same length of time that a nondisabled student can be suspended. Under Chapter 37 of the Texas Education Code, a suspension cannot exceed *three days*.

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## **10-DAY RULE**

School personnel may remove a student with a disability from his/her placement and who violates the Student Code of Conduct for not more than 10 consecutive school days, or a series of removals that does not constitute a change in placement. Any removals that would constitute a change in placement can only occur after the committee conducts a manifestation determination review. A change in placement occurs if the student is:

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## **10 DAY RULE (Cont'd)**

1. Removed from the student's current placement for more than 10 consecutive days; or
2. The student is:
  - A. Subjected to a series of removals totaling more than 10 school days;
  - B. The student's behavior is substantially similar to the student's behavior in the previous incidents that resulted in a series of removals; and
  - C. Additional factors exist, such as the length of each removal, the total amount of the time the student is removed, and the proximity of the removals to one another.

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## **MANIFESTATION DETERMINATION REVIEW**

An MDR must be held whenever a change in placement has occurred. The "10 day" rule for change of placement applies. A MDR should occur within 10 days of a decision to change a student's placement because of a student code of conduct violation.

The 504 regulations do not explicitly provide procedures or requirements for conducting an MDR.

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## **MANIFESTATION DETERMINATION REVIEW**

### Written Notice

Under Section 504, the *parent is not required* to be a member of the 504 committee. Therefore, there is no requirement that written notice be provided 5 school days prior to the meeting. However, it is recommended that the district provide written notice of the meeting to verify that notice was provided to the parent. Additionally, a copy of the MDR should be provided.

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## **MANIFESTATION DETERMINATION REVIEW**

### The Administrator's Responsibility

The administrator is responsible for (1) investigating and determining whether a student has committed a disciplinary infraction; and (2) assessing an appropriate disciplinary sanction. The imposition of the sanction is contingent upon whether the behavior is a manifestation of the student's disability.

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## **MANIFESTATION DETERMINATION REVIEW**

### The 504 Committee Responsibility

The 504 Committee is responsible for conducting the manifestation determination. The 504 Committee does not determine “guilt” or “innocence” nor does the 504 committee determine the sanction for the behavior.

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## **MANIFESTATION DETERMINATION REVIEW**

### The Members of the 504 Committee

The members of the committee must be professional employees who are personally familiar with the child. The members must also be knowledgeable about 504 and have the ability to interpret and understand assessment and evaluation data.

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## **MANIFESTATION DETERMINATION REVIEW**

### Record Review

The 504 committee needs to consider all relevant information including evaluation data.

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## **MANIFESTATION DETERMINATION REVIEW**

### Question(s) for MDR

The 504 committee must determine whether the conduct in question was *caused by or had a direct and substantial relationship to the student's disability*. If it does, the behavior is a manifestation of the disability.

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## **MANIFESTATION DETERMINATION REVIEW**

Conduct Involving Current Use of Drugs and Alcohol:

Under Section 504, a school may take any disciplinary measures that a non-disabled student receives, and no manifestation determination or due process procedures are required.

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## **MANIFESTATION DETERMINATION REVIEW**

Factors to Consider When Making an MDR

1. Analyze the child's behavior across settings and across time to determine if the conduct is a direct result of the student's disability.
2. The child's diagnosis or "eligibility" does not categorically determine a manifestation.
3. Misconduct must bear more than a weak relationship to the disability.
4. Consider the circumstances surrounding the behavior.

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## **MANIFESTATION DETERMINATION REVIEW**

### When the Behavior is Not a Manifestation

The student is treated the same as his nondisabled peers, and the administration's recommendation is implemented. The district must ensure that the student's accommodation plan will be implemented at the alternative placement.

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## **MANIFESTATION DETERMINATION REVIEW**

### When the Behavior is a Manifestation

Generally, the district must return the student to the placement, unless the parent and the school agree to change the placement. Consequences may be implemented, if appropriate. The 504 committee should consider developing a BIP for the student, or modifying an existing BIP.

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## **PROCEDURAL SAFEGUARDS**

A parent must be provided with a copy of Section 504 procedural safeguards which includes information on a parent's right to file a due process hearing.

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## **INVOLVEMENT OF POLICE**

School districts may call the police to intervene in matters involving 504 students, even when the intervention may result in the student's arrest. The district must demonstrate that it called the police pursuant to a policy equally applicable to disabled and nondisabled students.

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## **SOME POTENTIAL DISCIPLINE PITFALLS**

- Imposing discipline without knowing that the student is disabled
- Inadvertent changes in placement
- Failure to conduct an MDR
- Ignoring behavior or not imposing discipline because a student has a disability
- Not involving law enforcement when necessary
- Not conducting an adequate threat assessment

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## **“STAY PUT” and 504**

There is no specific stay put requirement under Section 504 or its regulations.

OCR has stated that “a fair due process system would encompass the school district waiting for the results of the process before making the change”.

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## **DUE PROCESS HEARING**

If a parent disagrees with the decision of the 504 committee, the parent may request a due process hearing in accordance with the school's 504 procedures. Unlike special education, TEA is NOT involved. The school district chooses the 504 hearing officer. The only prohibition is that the district cannot choose its own employee as the hearing officer. A Section 504 hearing does not allow for cross-examination. It is similar to a grievance presentation. There is no specific timeline for the rendering of a decision.

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## **OCR GUIDANCE ON 504 DISCIPLINE (7/22)**

- OCR's enforcement experience reflects:
  - "many students with disabilities face discipline because they are not receiving the support, services, interventions, strategies, and modifications to school or district policies that they need to manage their disability-based behavior."
  - "many students with disabilities are subjected to discrimination based on their disability when being disciplined, such as when students are unnecessarily disciplined more severely than students without disabilities for the same or similar behavior."
  - "the requirement not to discriminate extends to the conduct of everyone with whom the school has a contractual or other arrangement, such as school district police officers or resource officers."

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## **OCR GUIDANCE ON 504 DISCIPLINE (7/22)**

- Schools may need to make “reasonable modifications to disciplinary policies”.
- Schools must be careful not to use “unnecessary different treatment” when using discipline with a student with disabilities.
- Schools must look at facially neutral policies that may have a discriminatory effect upon students with disabilities.