

# Discipline Under the IDEA and Section 504 of the Rehabilitation Act of 1973

Utah State Board of Education

December 18, 2023

# Preliminary Notes

- The information provided in this presentation does not, and is not intended to, constitute legal advice. Instead, all information and content is for general information purposes only.
- Individuals with questions regarding any particular legal matter are encouraged to contact their attorney for advice.
- USBE staff are not on your IEP/504 team and cannot answer questions about specific students.
- Individuals needing accommodations to access these materials under the Americans with Disabilities Act (ADA) should contact the USBE ADA Coordinator at (801) 538-7539.

# Learning Intentions & Success Criteria

## Learning Intentions:

- Discrimination and discipline data, disparities
- Review IDEA and Section 504 regulations on disciplining students with disabilities.

## Success Criteria:

- I am familiar with nondiscrimination provisions, discipline data, and disparities between student groups.
- I am aware of federal requirements concerning discipline of students with disabilities.

# Data trends

“The data trends are longstanding and clear: children with disabilities, particularly children of color with disabilities, are disciplined at far greater rates than their peers without disabilities, and these trends start as early as preschool and extend throughout high school.”

— Valerie C. Williams, Director, Office of Special Education Programs



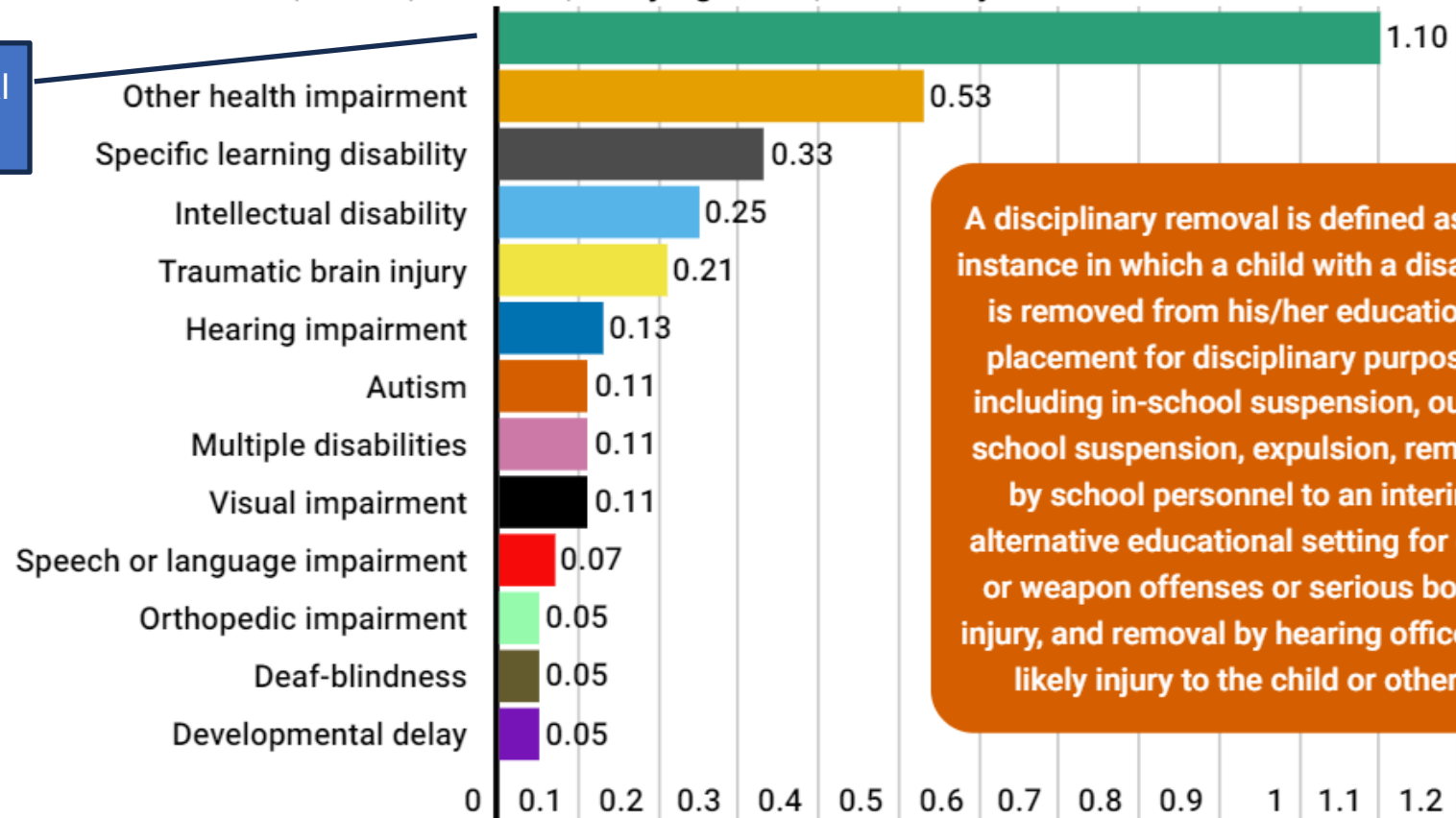
# For example

- Preschool students served under IDEA
  - [22.7 percent of total preschool enrollment](#)
  - [56.9 percent of preschool students who were expelled](#)
- School-age students with disabilities served under IDEA
  - [13.2 percent of total student enrollment](#)
  - [20.5 percent of one or more in-school suspensions](#)
  - [24.5 percent of one or more out-of-school suspensions](#)
- African American/Black children with disabilities 2019–20 school year
  - [17.2 percent of children with disabilities aged 3–21 served under IDEA](#)
  - [43.5 percent of all children with disabilities aged 3–21 served under IDEA who were suspended out of school or expelled for more than 10 school days](#)

(Williams, 2022)

**Total Disciplinary Removals Per Child or Student with a Disability, Ages 3 to 21, by Disability Type, Served Under IDEA, Part B, in the US, Outlying Areas, and Freely Associated States: SY 2017-18**

Emotional Behavioral Disability



A disciplinary removal is defined as any instance in which a child with a disability is removed from his/her educational placement for disciplinary purposes, including in-school suspension, out-of-school suspension, expulsion, removal by school personnel to an interim alternative educational setting for drug or weapon offenses or serious bodily injury, and removal by hearing officer for likely injury to the child or others.

Source: U.S. Department of Education, EDFacts Data Warehouse (EDW): "IDEA Part B Discipline Collection," 2017-18. Data extracted from: <https://go.usa.gov/xG9u3>. Children and students reported in these categories may be subject to multiple disciplinary removals. U.S. Department of Education, EDFacts Data Warehouse (EDW): "IDEA Part B Child Count and Educational Environments Collection," 2017-18. <http://go.usa.gov/xdb6v>. Data for Maine, Minnesota, Montana, Vermont, Wyoming, and Wisconsin were excluded, and data for the Virgin Islands and Vermont were not available.

Total Disciplinary Removals Per 100 Children or Students with Disabilities, Ages 3 through 21, By Race/Ethnicity, Served Under IDEA, Part B, in the US, Outlying Areas, and Freely Associated States: SY 2018-19

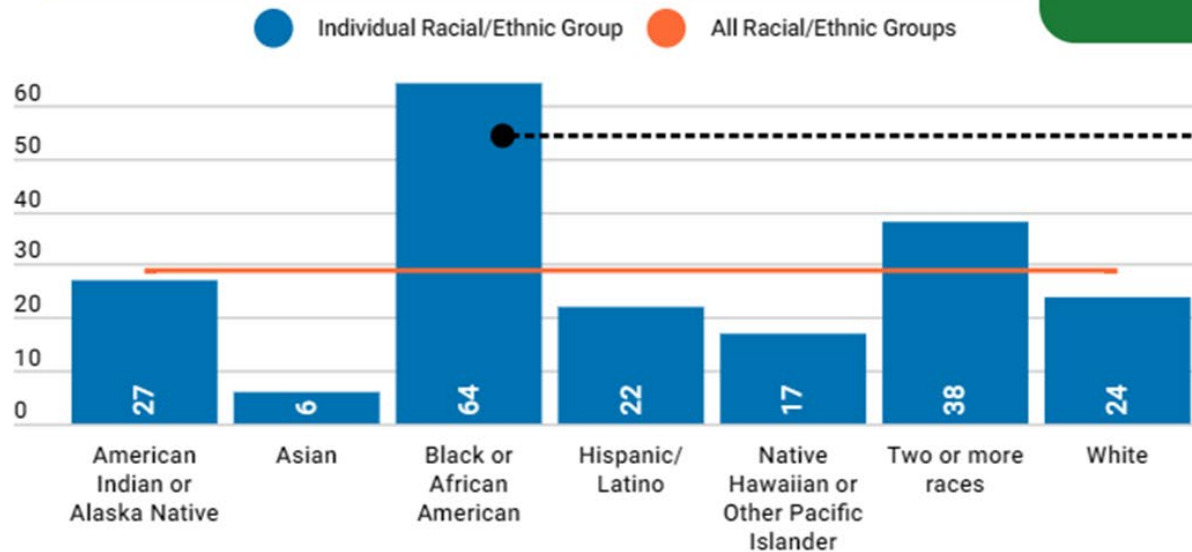
29

Number of disciplinary removals per 100 students with disabilities in the US, Outlying Areas, and Freely Associated States

2,138,492

Total Disciplinary Removals in the US, Outlying Areas, and Freely Associated States

A disciplinary removal is defined as any instance in which a child with a disability is removed from his/her educational placement for disciplinary purposes, including in-school suspension, out-of-school suspension, expulsion, removal by school personnel to an interim alternative educational setting for drug or weapon offenses or serious bodily injury, and removal by hearing officer for likely injury to the child or others. Children and students reported in these categories may be subject to multiple disciplinary removals.



Number of disciplinary removals per 100 Black or African American students with disabilities by State, Outlying Area, and Freely Associated State

< Alabama >

58

Source: U.S. Department of Education, EDFacts Data Warehouse (EDW): "IDEA Part B Discipline Collection," 2018-19. <https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/part-b-data/discipline/bdiscipline2018-19.csv>. Children and students reported in these categories may be subject to multiple disciplinary removals.

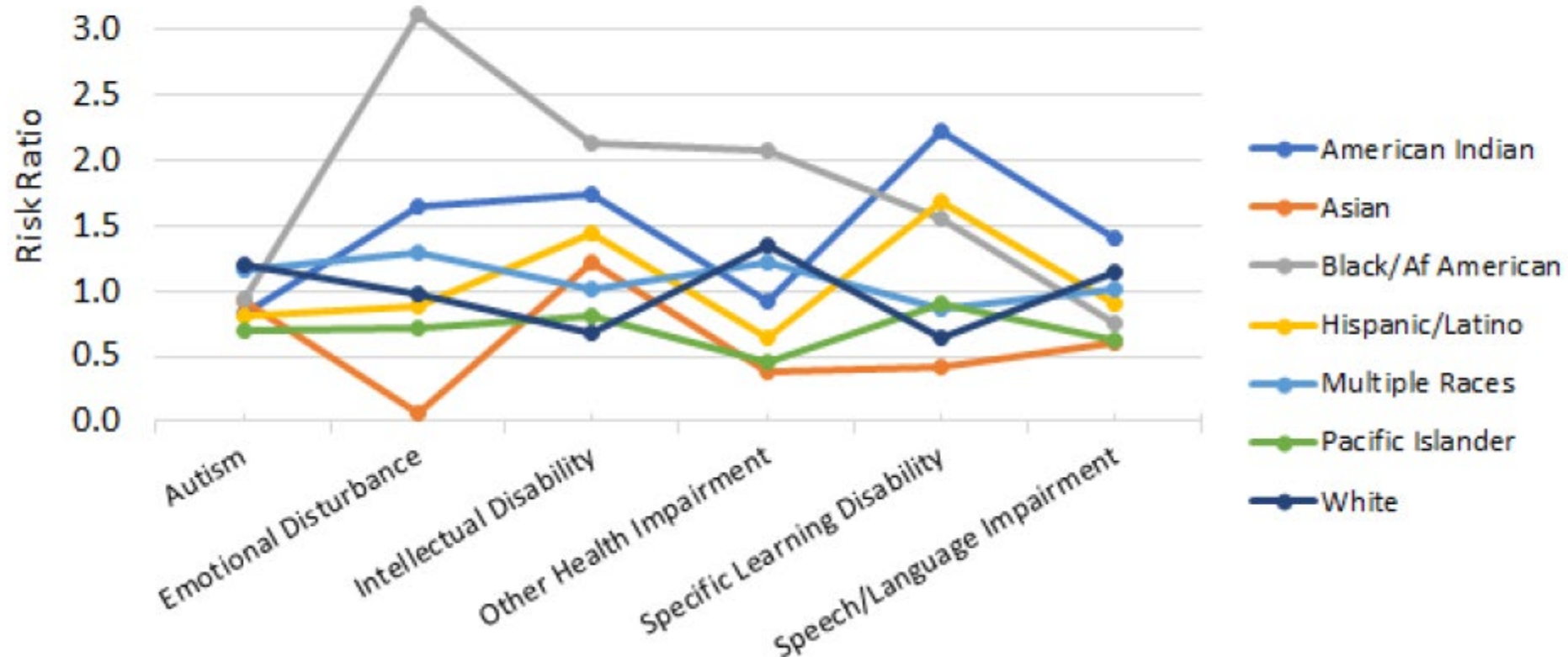
U.S. Department of Education, EDFacts Data Warehouse (EDW): "IDEA Part B Child Count and Educational Environments Collection," 2018-19.

<https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/part-b-data/child-count-and-educational-environments/bchildcountandedenvironments2018-19.csv>.

Data for Wisconsin was excluded and data for the Iowa was not available.

August 2021

### SWD Identification Risk by Race/Ethnicity, SY 2020





# Discipline under the IDEA and USBE Special Education Rules

Utah State Board of Education – Special Education Section  
December 18, 2023

# Learning Intentions

The purpose of the learning experience is for attendees to be able to review, articulate, and self-monitor learning in the areas of:

- Special Education Discipline
- Manifestation Determination
- Services During Removal
- Interim Alternative Education Settings (IAES)
- Protections for Students Not Yet Determined Eligible under IDEA

# Success Criteria

- I can articulate the protections afforded to students with disabilities when they are disciplined.
- I can explain when a manifestation determination review (MDR) needs to be conducted.
- I can articulate the two questions that must be answered at an MDR.
- I can explain what happens following an MDR.
- I can articulate by whom and how decisions about interim alternative educational settings (IAES) are made.
- I can explain when students who have not been identified as students with disabilities may be afforded additional protections when facing discipline.

# IDEA Discipline Requirements

# What is Discipline?

USBE Special Education Rules I.E.12.

- **Discipline** means the **consequences** a school imposes on a student who violates a school's code of student conduct or rules as determined by school personnel.
  - The term "discipline" as used in these Rules does not include the use of corporal punishment which is prohibited by UCA 53G-8-302.
- Basic principle: All students may be subject to discipline. **Students with disabilities** who receive special education and related services (or who may be) **are entitled to some additional protections.**

# Heavily Oversimplified Bird's Eye View – Discipline of Students in Special Education

- If a student on an IEP violates a school's code of conduct, the IDEA and Rules allow a student to be suspended without services for **up to 10 school days** in a school year.
- During those 10 days, LEA personnel may apply the relevant disciplinary procedures to students with disabilities **in the same manner and for the same duration** as the procedures would be applied to students without disabilities.
- However, **after the 10th day of removal** there is something called a **disciplinary change in placement** and **certain rights are triggered** for students receiving special education services.
- After a student with a disability has been **removed from their current placement for 10 school days** in the same school year, the **school must provide services to the extent required in the student's IEP** during any subsequent days of removal.

USBE Special Education Rules V.; 34 CFR § 300.530

# Special Education Rules

- [USBE Special Education Rules](#)



## SPECIAL EDUCATION RULES

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June 2023

# What is Considered a Change of Placement?

A disciplinary change of placement occurs if:

- a. The removal is for **more than ten consecutive school days**, including shortened school days; or
- b. The student has been **subjected to a series of removals that constitute a pattern**, including shortened school days:
  - (1) Because the series of removals total **more than ten school days in a school year**;
  - (2) Because the **student's behavior is substantially similar** to the student's behavior in previous incidents that resulted in the series of removals; and
  - (3) Because of such additional factors as the **length** of each removal, the total **amount of time** the student has been removed, and the **proximity of the removals** to one another.

USBE Special Education Rules V.D.; 34 CFR § 300.530



# Shortened School Day

- As used in these Rules, shortened school days occur when a student's school day is **reduced solely by school personnel in response to the student's behavior for disciplinary purposes**, rather than the student's IEP team or placement team for that student to receive a FAPE.

USBE Special Education Rules V.D.2.

# Informal Removals May Result in a Shortened School Day

- In general, the use of informal removals to address a student's behavior, if implemented repeatedly throughout the school year, could constitute a disciplinary removal from the current placement. Therefore, the discipline procedures in 34 C.F.R. §§ 300.530 through 300.536 and these Rules V. would generally apply **unless all three** of the following factors are met:
  - (1) The student is afforded the **opportunity to continue to appropriately participate** in the general curriculum;
  - (2) The student **continues to receive the services** specified on the student's IEP; and
  - (3) The student **continues to participate with nondisabled children** to the extent they would have in their current placement.

USBE Special Education Rules V.D.2.

# You Be the Judge: Change of Placement?

Removing an 11-year-old with OHI/ADHD from class to engage in a preferred activity, to deescalate, or to participate in state assessments, after he had already been suspended for 10 days was ....

a) a removal for disciplinary purposes and did trigger a manifestation determination review.

b) not a removal for disciplinary purposes and did not trigger a manifestation determination review.

*Capistrano Unified Sch. Dist., 114 LRP 38670 (SEA CA 2014)*

# You Be the Judge: NOT a Change of Placement

Removing an 11-year-old with OHI/ADHD from class to engage in a **preferred activity**, to **deescalate**, or to **participate in state assessments**, after he had already been suspended for 10 days was ....

- a) a removal for disciplinary purposes and did trigger a manifestation determination review.
- b) not a removal for disciplinary purposes and did not trigger a manifestation determination review.

*Capistrano Unified Sch. Dist., 114 LRP 38670 (SEA CA 2014)*

# FAPE Obligations During Disciplinary Removals

- If a student on an IEP violates a school's code of conduct, the IDEA and Rules allow a student to be suspended without services for **up to 10 school days** in a school year.
- During those 10 days, LEA personnel may apply the relevant disciplinary procedures to students with disabilities **in the same manner and for the same duration** as the procedures would be applied to students without disabilities.

However, after a student with a disability has been removed from their current placement for ten school days in the same school year, during any subsequent days of removal **the LEA must provide services to the extent required by the IEP.**

USBE Special Education Rules V.B.2. & 3.; 34 CFR § 300.530

# Services During Removal

1. A student with a disability who is removed from the student's current placement must:
  - a. Continue to receive educational services so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP; and
  - b. Receive, as appropriate, a functional behavior assessment (FBA), and behavior intervention services and modifications that are designed to address the behavior violation so that it does not recur.
2. The services may be provided in an interim alternative educational setting (IAES).
3. An LEA is only required to provide services during periods of removal to a student with a disability who has been removed from the student's current placement for ten school days or less in that school year **if it also provides services to a student without disabilities who is similarly removed.**

# Services During Removal Cont.

4. After a student with a disability has been removed from their current placement for ten school days in the same school year, if the current removal is for **not more than ten consecutive school days and is not a change of placement**, school personnel, in consultation with at least one of the student's teachers, determine the extent to which services are needed, so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP.
5. If the removal is a change of placement, **the student's IEP team determines appropriate services to be provided during the removal.**

USBE Special Education Rules V.C.; 34 CFR § 300.530

# Comprehension Check #1

A disciplinary change of placement occurs:

- A. Only if a student has been removed for more than ten consecutive calendar days, including shortened school days.
- B. If a student has been subjected to a series of removals that constitute a pattern of removals more than ten school days in a year, including shortened school days.
- C. If a student has been removed for more than ten consecutive school days, including shortened school days.
- D. B & C



# Comprehension Check #2

Under what circumstances must a student with a disability be provided services if she is removed for 10 days or less?

- A. If it's 10 days or less, services are never required.
- B. Only if a student is an online student
- C. If services are also provided to a student without disabilities who is similarly removed
- D. If the school has sufficient resources

# Comprehension Check #3

True or False?

If a student's placement is changed due to disciplinary removal, only the student's IEP team (including parents) may determine appropriate services during the removal.

# Manifestation Determination Process

# Disciplinary Change of Placement Triggers a Manifestation Determination Review (MDR)

Within ten school days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the LEA, the parent or adult student, and relevant members of the student's IEP team (as determined by the parent or adult student and the LEA) must review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parent(s) or adult student to determine:

- a. If the conduct in question was **caused by**, or had a **direct and substantial relationship to**, the student's **disability**; or
- b. If the conduct in question was the **direct result of the LEA's failure to implement the IEP**.

USBE Special Education Rules V.E.; 34 CFR § 300.530

# Two Key Determinations

1. Causation/Direct & Substantial; or
2. Direct result of failure to implement the IEP
  - If either are true → the conduct **must be** determined to be a **manifestation of the disability**.
  - Notice the IDEA does **not** require perfect consistency in implementing the IEP; if the school has not implemented the IEP consistently, there still must be a **causal connection** between that failure and the student's misconduct.
    - Regardless, however, the LEA must immediately take steps to implement IEP and correct deficiencies.

# Who Conducts the Manifestation Determination?

- The “LEA, the parent or student who is an adult, and **relevant members** of the IEP team” (as determined by the parent or adult student and the LEA)
- The IDEA gives no guidance as to which members of the IEP team are “relevant.”
- Members of the team are expected to attend the meeting **with a mind that is open—not blank.**
  - They can know about the situation, discuss it, and have opinions about it before the manifestation determination is conducted.

# Potential Team Members

- Someone who can provide an **accurate summary** of the findings of the regular education administrators
- Teachers with **experience** with the student in the school setting
- Experts who are **knowledgeable** of the evaluation and its implications for behavior in the school setting
- **Parent or adult student should be informed** of their right to bring other individuals whom they believe will provide knowledge or special expertise

# Which Data Will Be Reviewed at the MDR?

- Team must review all **“relevant information”** in the student’s file, including the IEP, any teacher observations, and any relevant information provided by the parents.
- **While courts have not interpreted the law to be exhaustive**, requiring review of every piece of information contained in a student’s educational file, the MDR team must review the **information pertinent to the decision**.



# Data That May Be Relevant at the MDR

- Patterns of attendance, discipline, grades
- Universal screening data (MTSS is both academic and behavioral)
- IEP
- Other behavior data and interpretations of data
- FBA, BIP, etc.
- Observations of student
  - Previous and current behavioral observations
  - Recent changes in behavior, mood, level of frustration, etc.
  - Understanding of consequences
  - Ability to control behavior

# Data That May Be Relevant at the MDR (Cont.)

- Ability to understand consequences:
  - Are the student's thought processes logical?
  - Did the student understand the consequences for the violation?
  - Did the student know the behavior was inappropriate?
  - Does the student know and understand the code of conduct?
  - Has the student demonstrated the ability to follow school rules?
  - Has the student demonstrated an understanding of the consequences of behavior?
- Ability to control behavior:
  - Are there situations in which the student is able to control the behavior?
  - Are there factors that explain the misconduct?
  - Was the behavior premeditated or did the student have a plan?

# If Conduct *Was* a Manifestation of Student's Disability

If the team makes the determination that the conduct was a manifestation of the student's disability, the team must either:

- 1) Conduct an FBA and implement a BIP for the student; or
- 2) If a BIP has already been developed, **review and modify it, as necessary**, to address the behavior; and
- 3) Return the student to the placement from which the student was removed, unless the parent or adult student and the LEA agree to a change of placement as part of the modification of the behavior intervention plan.
  - Unless the misconduct falls under the definition of "special circumstances" in Rules V.E.5.

USBE Special Education Rules V.E.; 34 CFR § 300.530

# If Conduct *WAS* the Direct Result of LEA's Failure to Implement IEP

If the LEA, the parent or adult student, and relevant members of the student's IEP team determine that the misconduct was the direct result of the LEA's failure to implement the IEP, the LEA must **take immediate steps to remedy those deficiencies.**

USBE Special Education Rules V.E.; 34 CFR § 300.530

Keep progress monitoring a priority! This is a way to ensure that IEPs are being implemented with fidelity.

# If Conduct *Was NOT* a Manifestation of Student's Disability

- If **not** a manifestation, relevant disciplinary procedures applicable to students without disabilities may be applied to child in **same manner and for same duration** as for students without disabilities. Except:
  - Student is **entitled to FAPE** and must continue to receive educational services, 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 the child's IEP; and
  - Receive, as appropriate, a **functional behavioral assessment**, and **behavioral intervention services and modifications**, that are designed to address the behavior violation so that it does not recur.

USBE Special Education Rules V.E.; 34 CFR § 300.530

# Comprehension Check #4

True or False?

A manifestation determination review must occur the day after a student's removal results in a disciplinary change of placement.

- **Within ten school days** of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the LEA, the parent or adult student, and relevant members of the student's IEP team (as determined by the parent or adult student and the LEA) must review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parent(s) or adult student.

# Comprehension Check #5

What is the last day that  
an LEA may hold an MDR?

APRIL 2023						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
26	27	28	29	30	31	
			10			
2	3	4	5	6	7	
	SPRING BREAK					
9	10	11	12	13	14	
16	17	18	19	20	21	
23	24	25	26	27	28	

# Comprehension Check #5 Answer

What is the last day that  
an LEA may hold an MDR?

April 19

APRIL 2023						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
26	27	28	29	30	31	
2	3	4	5	6	7	
	SPRING BREAK					
9	10	11	12	13	14	
16	17	18	19	20	21	
23	24	25	26	27	28	



# Comprehension Check #6

When is a student's conduct a manifestation of her disability?

- A. When a student engages in a "safe school" violation
- B. When the conduct is the direct result of LEA's failure to implement the IEP
- C. When the conduct caused by, or had a direct and substantial relationship to, the student's disability
- D. All of the above
- E. B & C Only

# Comprehension Check #7

Student's conduct was determined to be a manifestation of her disability at the MDR. Student already has a BIP and there are no "special circumstances" present.

Which steps must the LEA/IEP team immediately take?

- A. Take immediate steps to remedy any implementation deficiencies.
- B. Review and modify BIP, as necessary, to address the behavior
- C. Return the student to the placement from which the student was removed
- D. All of the above
- E. A & B Only

# Manifestation

- The act of knocking the phone out of the teacher's hand may have been oppositional but were the types of behaviors noted in the evaluation and IEP. *District of Columbia Public Schools, 115 LRP 40248 (E.D. DC. 2015).*
- Student with ED's chokehold and assault of classmate was directly and substantially related to his disability where BIP specifically targeted student's history of resorting to physical violence when angered. *District of Columbia Public Schools, 114 LRP 34500 (SEA DC 2014).*
- Student's ED caused her to be impulsive and combative, which triggered her to elope from class and start a fire on school grounds. *District of Columbia Public Schools, 114 LRP 3336 (SEA DC 2013).*

# Not a Manifestation

- 6th-grader's creation of a list of schoolmates he wanted to shoot was not a manifestation of a recently diagnosed pervasive developmental disorder. *Z.H. by R.H. and J.H. v. Lewisville Indep. Sch. Dist.*, 65 IDELR 147 (E.D. TX 2015).
- Student's decision to bring knife to school, conceal it, and display it to other students was not a manifestation of his ADHD, but a conscious choice. *High Tech Middle North County*, 114 LRP 53441 (SEA CA 2014).
- 6th-grader's decision to assault staff was not a manifestation of his ADHD or Asperger syndrome when student's 25-minute tirade ceased upon being told that the police would be called--he had control over his behavior. *In re: Student with a Disability*, 115 LRP 6203 (SEA VA 2014).

# Interim Alternative Educational Setting (IAES)

- The **student's IEP team** determines the IAES for services.
- The **student's IEP team** determines the IAES for services if:
  - The behavior that gives rise to the removal is **not a manifestation** of the student's disability and constitutes a **change of placement**; or
  - The behavior falls under the **special circumstances** in Rules V.E.5.

USBE Special Education Rules V.G.; 34 CFR § 300.531

# What is an IAES anyway?

- Apart from being a terrible acronym...
- IAES means an **appropriate setting** determined by the student's IEP Team or a **hearing officer** in which the student is placed for **no more than 45 school days**.
- This setting enables the student to continue to receive educational services so as to enable them to **participate** in the general education curriculum (although in another setting) and **progress** toward meeting the goals set out in the IEP.
- As appropriate, the setting includes **provision of an FBA, and behavioral intervention services and modifications** to address the behavior violation so that it does not recur.

USBE Special Education Rules I.E.30.

# Special Circumstances

The IDEA identifies **three special circumstances** in which the LEA is authorized to remove a student to an IAES for not more than 45 school days whether the student's behavior is a manifestation of the disability or not:

School personnel are authorized to take disciplinary action if the student:

- 1. Carries or possesses a weapon** to or at school, on school premises, or to or at a school function under the jurisdiction of a State or LEA;
- 2. Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance**, while at school, on school premises, or at a school function under the jurisdiction of a State or LEA; or
- 3. Has inflicted serious bodily injury** upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or LEA

USBE Special Education Rules V.E.5.; 34 CFR § 300.530

# Special Circumstances Key Practice

- First – when a student commits a special circumstance offense, **be sure to conduct an MDR, even though the outcome does not drive the placement decision**
  - An MDR is required because the team's review could indicate a need for **positive behavior strategies**, such as an FBA or BIP.



# Special Circumstances Definitions - Drugs

- **Controlled substance:** drug or other substance identified under schedules I,II, III, IV or V in section 202(c) of the Controlled Substances Act
- **Illegal drug:** means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed.
- There is an intent element of “knowingly.”

# Special Circumstances Definitions - SBI

- **Serious bodily injury** means bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty (18 USC § 1365).
- Serious bodily injury does **not** include a cut, abrasion, bruise, burn, disfigurement, physical pain, illness, or impairment of the function of a bodily member, organ or mental faculty that is temporary (20 USC § 1365).
  - Serious bodily injury has to be **very** serious
  - Injury must be bodily – not emotional or mental

# Special Circumstances Definitions - Weapons

- **Weapon** means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2.5 inches (18 USC § 930).
  - Weapon includes a firearm defined in part by federal law as any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosive
  - Also any explosive, incendiary, or poison gas “destructive device.”

# Weapons

- Metal awl (metal spike 2 inches long) was a weapon. *In re: Student With a Disability*, 50 IDELR 180 (SEA VA 2008).
- Scissors qualified as a weapon. *Anchorage Sch. Dist.*, 45 IDELR 23 (SEA AK 2005).
- Cigarette lighter with retractable blade was a weapon. *Chester Upland Sch. Dist.*, 35 IDELR 104 (SEA PA 2001).
- District properly placed a student with SLD in an IAES regardless of MDR result when the student possessed a knife two-and-a-half inches long when measured from the handle to the point of the blade. *Propel Charter Schs.*, 116 LRP 48618 (SEA PA 2016).

# Not a Weapon

- Pulling on the assistant principal's necktie. *Scituate Pub. Schs.*, 47 IDELR 113 (SEA MA 2007).
- Scratching a fellow student with a paper clip. *Anaheim Union High School Dist.*, 32 IDELR 129 (SEA CA 2000).
- Stabbing a classmate with a pencil. *Independent Sch. Dist. #831*, 32 IDELR 163 (SEA MN 1999).
- Dull scissors not capable of inflicting serious bodily injury. *California Montessori Project*, 56 IDELR 308 (SEA CA 2011).

# Comprehension Check #8

Select all that are true:

- A. Regardless of the setting (IAES placement or otherwise), FAPE must continue.
- B. IEP services must continue to allow participation in the general curriculum and progress toward IEP goals.
- C. Behavioral services should be provided, as appropriate, to address the misconduct so that it does not recur.
- D. Serious bodily injury can include emotional trauma
- E. Special circumstances and “safe school violations” mean the exact same thing and can be used interchangeably

# Bottom Line...

- Regardless of the setting (IAES placement or otherwise), FAPE must continue.
- IEP services must continue to allow participation in the general curriculum and progress toward IEP goals.
- Behavioral services should be provided, as appropriate, to address the misconduct so that it does not recur.

# Protections for Students NOT Determined Eligible for Special Education Services

A student who has not been determined to be eligible for special education and related services under Part B of the IDEA, and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the LEA had knowledge that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred.

USBE Special Education Rules V.J.; 34 CFR § 300.534



# Basis of Knowledge

An LEA is deemed to be knowledgeable if (prior to the behavior that precipitated the disciplinary action) –

- 1. The parent or adult student expressed concern in **writing to supervisory or administrative personnel** of the appropriate educational agency, **or a teacher** of the student, that the student is in need of special education and related services; or
- 2. The parent of the student or adult student **requested an evaluation** for special education and related services; or
- 3. The **teacher** of the student, or **other personnel** of the LEA, expressed **specific concerns about a pattern of behavior** demonstrated by the student directly to the director of special education of the agency or to other supervisory personnel of the agency.

USBE Special Education Rules V.J.; 34 CFR § 300.534

# No Knowledge

An LEA would **not** be deemed to have knowledge that a student is a student with a disability if –

- The parent of the student or the adult student:
  - Has **not allowed** an **evaluation** of the student; or
  - Has **refused services** under this part; or
  - The student has been **evaluated** in accordance with **and determined to not be a student with a disability** under Part B of the IDEA.

Rules V.J.; 34 CFR § 300.534

# Success Criteria Recap

- I can articulate the protections afforded to students with disabilities when they are disciplined.
- I can explain when a manifestation determination review (MDR) needs to be conducted.
- I can articulate the two questions that must be answered at an MDR.
- I can explain what happens following an MDR.
- I can articulate by whom and how decisions about interim alternative educational settings (IAES) are made.
- I can explain when students who have not been identified as students with disabilities may be afforded additional protections when facing discipline.

# Section 504

# The Link Between IDEA and 504

The Office for Civil Rights (OCR) interprets Section 504 as requiring **similar** disciplinary protections as the Individuals with Disabilities Education Act (IDEA) when a student is subjected to a "significant change in placement" under 34 CFR § 104.35.

# Section 504 Nondiscrimination Provisions

- Section 504 protects students with disabilities from disability discrimination in all aspects of student discipline.
- Disability discrimination means excluding, denying benefits to, or otherwise discriminating against a student based on their disability, including by denying them equal educational opportunity in the most integrated setting appropriate to their needs.
- Two ways:
  1. The school subjects a student to unnecessary different treatment based on disability.
  2. The school's criteria, policies, practices, or procedures have unjustified discriminatory effects on students based on disability.

# Significant Change of Placement

- A “**significant change in placement**” under Section 504 occurs when a student with a disability is suspended or expelled for **more than 10 consecutive school days** in a single school year.
  - *Confluence Academies (MO)*, 64 IDELR 85 (OCR 2013); and *Youngstown (OH) City Sch. Dist.*, 114 LRP 29317 (OCR 02/26/14).
- Also, a **pattern of short disciplinary removals that total more than 10 cumulative days** in a school year can constitute a “significant change in placement” under 504.
  - *Broward County (FL) Sch. Dist.*, 36 IDELR 159 (OCR 2001); *Rutherford County (TN) Schs.*, 62 IDELR 271 (OCR 2013); and *Tombstone (AZ) Unified Sch. Dist.*, 80 IDELR 138 (OCR 2021).

# Least Restrictive Environment

- LEAs must educate a student with a disability in an academic setting alongside students without disabilities to the **maximum extent appropriate for the needs of the student** with a disability unless the Section 504 team reaches an individualized determination that the student's needs cannot be met and/or their disability-based behavior significantly impairs the student's ability to learn or the ability of other students to learn satisfactorily in that environment even with **supplementary aids and services**.
  - 34 C.F.R. § 104.34(a).
- Supplementary aids and services could include, among other examples, preferential seating, counseling services, or the implementation of a BIP.



# Counting the Days Toward a “Significant Change of Placement”

- In 2022, the Office of Special Education and Rehabilitative Services (OSERS) published guidance that specifically addressed how to **calculate** the 10 days of suspension and emphasized the perils of informal removals:
  - *Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973* (OSERS 07/19/22).
- Be mindful of **shortening school days**. Shortened school days may contribute to a “significant change of placement” unless key criteria are met.
- **In-school suspensions** that total more than ten consecutive school days may be a “significant change in placement” under Section 504 if they result in an interruption in the services or educational program that the district must provide to the student with a disability. *Greenville County (SC) Sch. Dist.*, 17 IDELR 1120 (OCR 1991).

# Informal Disciplinary Removal Examples

Examples from *Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973*, (OSERS 07/19/22):

- Requiring a parent to pick up their child early.
- Shortening the student's day without 504 team action.
- Requiring student to be in virtual instruction.
- Forcing a parent to transfer their child to another school.
- Requiring a parent to attend class with the student.

**Informal removals are subject to the same Section 504 requirements as formal removals.**

# “Significant Change of Placement” Activates an MDR

- A “significant change of placement” **activates** the need for a manifestation determination review (MDR) to determine **if a student's misconduct is related to a disability**.
- The process for determining The MDR is a key step in the discipline process under both Section 504 because **it impacts the type of discipline** the district can impose on the student **and** whether the district may **remove** the student from his **current placement** because of a code of conduct violation.
- Title IX considerations — the LEA Title IX Coordinator **MUST** be contacted **IMMEDIATELY** when alleged misconduct is of a sexual nature.

# MDR under Section 504

Within **10 school days** of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA-and **relevant members** of the child's 504 Team must review all **pertinent information** in the student's file, including the child's 504 plan, any teacher observations, and any relevant information provided by the parents to determine if the student's misconduct was caused by or related to their physical or mental impairment.

Dunkin (MO) R-V Sch. Dist. , 52 IDELR 138 (OCR 2009)

# MDR Team Members

- Someone who can provide an **accurate summary** of the findings of the regular education administrators.
- Teachers with **experience** with the student in the school setting.
- Experts **knowledgeable** of the evaluation and its implications for behavior in the school setting.
- **A parent\* or adult student *should* be involved and informed** of their right to bring other individuals they believe will provide knowledge or special expertise.

\*Note: Parents and students are not required members of the MDR team according to the 504 regulations but must be provided with notice before all significant changes in placement, which includes their procedural safeguards.

# OCR Guidance on Members of MDR Team

- *Should* include a parent (or adult student)
  - *Mobile County (AL) Sch. Dist.*, 353 IDELR 378 (OCR 1989)
- People knowledgeable about the student, the meaning of the evaluation data, and placement options in the least restrictive environment.
  - *OCR Memorandum*, 16 IDELR 491 (OCR 1989) and 34 CFR 104.35(c)(3) .
- People knowledgeable about Section 504 procedures.
  - *Greenville (TX) Indep. Sch. Dist.*, 113 LRP 27897 (OCR 04/11/13).

# 504 MDR Step One

Determine whether the behavior in question was caused by or has a direct and **substantial relationship** to the student's disability. The school must provide the 504 Team with **relevant and recent information** from various sources *See Broward County (FL) Schs., 64 IDELR 23 (OCR 2013)*. Information could include:

- Previous evaluations related to disability-based behavior
- Section 504 plan and any updates to the plan (including BIP, if available)
- Information about whether there was **failure to implement Section 504 Plan**
- Psychological or medical evaluation data related to the behavior at issue (including FBA)
- Relevant information provided by the parents or guardians
- Relevant discipline records and incident reports
- Relevant teacher notes and observations (see earlier slide for behavioral and cognitive examples)
- Academic and attendance records

# Denial of FAPE

In reviewing information about the implementation of the student's Section 504 plan as part of this evaluation, the team may find that the school failed to provide behavioral supports and services required by the plan to address the behavior underlying the proposed discipline. In this instance, the behavior would be based on disability because the school failed to meet the student's behavioral needs as required by the Section 504 plan. Depending on the facts, such a failure to implement the Section 504 plan could deny the student FAPE and the Section 504 team would need to consider whether, due to the denial of FAPE, the student is entitled to compensatory services. Under these circumstances, any disciplinary removal could compound the school's failure to address the student's disability-based needs by extending the denial of FAPE during the removal period.

— OCR Guidance July 2022



# 504 MDR Step Two

Depends on whether the behavior for which the school proposed discipline was determined to be based on students' disability.

**Exemption:** School personnel may remove a student to an interim alternative educational setting for not more than **45 days** without regard to whether the behavior is determined to be a manifestation of the child's disability if the behavior was due to

- Possession of a dangerous weapon at school or during a school event
- Serious bodily injury to others
- Possession or sale (not use) of illegal drugs or controlled substances

# OCR Guidance if Student's Conduct *IS* a Manifestation of Student's Disability

- The student **may not** be disciplined.
- The evaluation team must **determine whether** the student's current educational placement is **appropriate**.
- The LEA must **reevaluate** the student to determine whether his current educational placement and Section 504 accommodations and related aids and services are appropriate.
- The LEA should determine whether the student needs a **behavioral intervention plan**.
- For example, in *Tulsa (OK) Public Schools*, 46 IDELR 49 (OCR 2005), OCR determined that a district complied with all the requirements of Section 504 with respect to the student's discipline and placement decisions. It conducted an MDR prior to the student's expulsion, convened a team of knowledgeable individuals who were familiar with the student, and agreed to readmit the student and develop a new behavioral intervention plan for him. The district also reevaluated the student, and a team of knowledgeable individuals made adjustments.

# If Conduct *IS NOT* a Manifestation of Student's Disability under 504

- Note that Section 504 is VERY distinct from IDEA if conduct is not a manifestation.
- If, after an MDR, the team determines that the student's conduct was **not related** to his disability, the district may suspend the student for more than 10 consecutive school days. *See S-1 v. Turlington*, 552 IDELR 267 (5th Cir. 1981), *cert denied*. OCR Memorandum, 307 IDELR 07 (OCR 1989); and *Kansas City (MO) #33 Sch. Dist.*, 43 IDELR 117 (OCR 2004).
- Although the district is free to subject the student to its disciplinary code, if the conduct is **not a manifestation**, the discipline must still be **nondiscriminatory**. This means the district may not discipline a student with a disability more harshly than students without disabilities. *Belleville Twp. (IL) High Sch. Dist. 201*, 52 IDELR 270 (OCR 2008); and *Allen Village (MO) Charter Sch.*, 116 LRP 16680 (OCR 09/24/15).

# If Conduct *IS NOT* a Manifestation of Student's Disability under 504 Continued

- Where an IDEA-eligible student is suspended for conduct that is not a manifestation of his disability for over 10 days, the IDEA requires that the district continue to provide education services that allow the child to progress toward his IEP goals. [34 CFR 300.530](#) (d). However, there is no such requirement under Section 504, and OCR letters of findings have indicated that they need not be provided for a student solely eligible under Section 504. *See OSEP Memorandum 95-16*, 22 IDELR 531 (OSEP 1995).
- Nevertheless, a district must provide educational services to a properly suspended Section 504 student with a disability if it has a policy or practice of providing services to nondisabled students removed for similar offenses. *See OSEP Memorandum 95-16*, 22 IDELR 531 (OSEP 1995); and 34 CFR 104.4.

# “Stay-Put” and Section 504

- Section 504 has an *implicit stay-put* component. OCR posits that "a fair due process system (i.e., procedural safeguards) would encompass a district waiting for the results of due process before making the change [of placement]." Thus, OCR believes that a fair due process system would encompass the school district waiting for the results of the process before making the change. — See *OSEP Memorandum 95-16*, 22 IDELR 531 (OSEP 1995); and 34 CFR 104.4; *Letter to Zirkel*, [22 IDELR 667](#) (OCR 1995).
- The student with a disability is still entitled to a free appropriate public education (FAPE), including behavioral supports for disability-based behavior. Where a school provides educational instruction and services to students without disabilities during the pendency of disciplinary proceedings or the period of disciplinary removal, it also must provide educational instruction and services to similarly situated students with disabilities during the pendency of their evaluation.  
— 34 C.F.R. § 104.33(b)(1)(i); 104.4(a), (b)(1)(i)-(iv), (vii).

# Test Your Knowledge

# Case in point

- A student in *Putnam County School District* had a pattern of serious behavioral problems. The district met several times throughout the year to discuss positive behavioral interventions, implemented various interventions, and created behavioral contracts for the student. Still, the student was suspended out of school several times for a total of 16 school days.
- Although the student **had never been evaluated** under the IDEA or Section 504, the parent alleged that the district violated the IDEA by subjecting the student to more than 10 suspension days without conducting a manifestation determination review.

# True or False

A district can subject a student to disciplinary removals without regard to whether their misconduct is a manifestation of a disability if the student **does not** have a 504 plan or the 504 plan does not include accommodations or related aids and services addressing behavior.



The answer?



# The Decision

The Florida Education Department (ED) agreed with the parent, noting that the district had a **basis of knowledge** that the student was a student with a disability. The ED pointed out that the district **clearly was aware** of and concerned about the student's **recurring behavioral problems**. The fact that it repeatedly sought parental consent to evaluate the student further bolstered the parent's claim that the district knew the student was a student with a disability, the ED determined. Assuming the suspensions constituted a **pattern of removals**, the ED concluded that the student was entitled to the protections available to other IDEA-eligible students, **including a manifestation determination review**.

# In addition

A district is deemed to have knowledge that the student is a student with a disability if:

1. the parent has expressed concern in writing to district supervisory or administrative personnel, or to one of the child's teachers, that the child needs special education and related services;
2. the parent requested an evaluation; or
3. district personnel expressed specific concerns about a pattern of behavior demonstrated by the child directly to the special education director or other district supervisory personnel.

— 34 CFR 300.534 (b).

# Child Find

- A pattern of disciplinary action with a student should be a red flag that prompts LEAs to meet their Child Find obligations.
- Do not just consider what is on the 504 plan for the manifestation determination. There may be undetermined disabilities that have gone unnoticed that require reevaluation for before a significant change of placement.

# Potential root causes underlying behavior

- Mental health conditions
- Difficulty communicating effectively, managing behavior, and lack of social skills due to a disability
- Harassment and bullying
- Discrimination
- Drug abuse
- Cultural norms
- Language barriers
- Trauma
- Homelessness
- Intergenerational poverty
- Prior involvement in the juvenile justice system

# MDR Key Practices

- Remember that an MDR is **not** used or designed to determine whether specific misconduct actually occurred.
- Draw a **clear distinction** between the regular discipline process and the MDR for staff and parents.
- Help staff and parents **understand the differences** between the discipline process and the MDR.
- Understand the **similarities and differences** between an MDR under 504 and an MDR under IDEA.

# Friends, Waffles, Work...



# Relicensure Credit and Upcoming Webinar

- For 1.5 relicensure points/hours questionnaire will be sent through the Section 504 listserv. Form will need to be submitted by January 19, 2024. Email me if you need to be added to the listserv.
- Upcoming webinar January 31, 2024. Making your documents and presentations accessible!



# Contact Information

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# Resources

- [OSEP Dear Colleague Letter on Supporting Behavior of Students with Disabilities \(issued August 2016\)](#)
- [Presidio OCR case 2023](#) — inappropriate use of MDR (this was the case Jordan brought up)
- [A letter from Secretary Cardona to our nation's Educators, School Leaders, Parents, and Students about the importance of supporting the needs of students with disabilities.](#)
- [Dear Colleague Letter](#) from OSEP Director, Valerie C. Williams.
- [Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions](#): provides information on 12 key topic areas.
- [Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline under Section 504 of the Rehabilitation Act of 1973](#)
- [Positive, Proactive Approaches to Supporting Children with Disabilities: A Guide for Stakeholders](#)
- [Letter from Secretary Cardona 2023](#) — The one I mentioned

# Resources continued

- [Section 504 Manifestation Determination Review Form \(PDF File\) \(Spanish\)](#)
- [Section 504 Notice of Decision and 504 Plan \(PDF File\) \(Spanish\)](#)
- [Section 504 Notice of Manifestation Determination Meeting](#)
- [USBE Least Restrictive Behavioral Interventions Technical Assistance Manual](#)
- [Utah Code 53G-8](#) Discipline and Safety
- [Utah Administrative Code R277-609](#) Standards for LEA Discipline Plans and Emergency Safety Interventions
- [Breaking the School-to-Prison Pipeline for Students with Disabilities](#), National Council on Disability (issued June 2015)
- [Instead of Suspension: Alternative Strategies for Effective School Discipline](#), Duke University Center for Child and Family Policy and the Children's Law Clinic at Duke Law School, 2015.
- [Discipline Discussions: The Impact and Harm of Exclusionary Discipline](#)
- [OSEP Fast Facts](#)