



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

JUL 25 2000

Mr. David P. Osterhout, LCSW, BCD
733 East Route #70
Elmwood Business Park, Suite #303
Marlton, New Jersey 08053

Dear Mr. Osterhout:

This is in response to your letter dated April 27, 2000 to Assistant Secretary Judith E. Heumann, in which you seek clarification of the requirements in Part B of the Individuals with Disabilities Education Act (Part B) for conducting a manifestation determination review for children with disabilities in disciplinary situations. An explanation of the relevant requirements of Part B follows.

The U.S. Supreme Court decision in the case of *Honig v. Doe*, 108 S.Ct. 592 (1988) established that a student with a disability could not be unilaterally removed from school for more than ten school days for misconduct that arose from the student's disability. The Individuals with Disabilities Education Act Amendments of 1997 (IDEA '97) included specific provisions in law requiring a manifestation determination review before a school district could implement a disciplinary removal that constituted a change of placement and defining how to determine whether behavior is a manifestation of a child's disability. 20 U.S.C. §1415(k)(4); see also 34 CFR §300.523.

Your inquiry takes issue with the requirement that a manifestation determination review is triggered only by removals from the current placement that would constitute a change in placement in the disciplinary context. A manifestation determination review must be conducted if an action is contemplated involving a removal by school personnel to an appropriate interim alternative educational setting of a child who commits offenses involving weapons or drugs, or if a school district asks a hearing officer to remove a child from the current placement who is substantially likely to injure self or others if maintained in the current placement. 34 CFR §300.523(a). Thus, a manifestation determination review would not be required under Part B when a student engages in behavior that violates a rule or code of conduct of the LEA applicable to all students, unless the LEA is contemplating a removal that would constitute a change of placement in the disciplinary context. 20 U.S.C. § 1415(k)(4) and 34 CFR §300.523(a).

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Section 300.519 of the Part B regulations defines "change of placement for disciplinary removals" as a "removal for more than 10 consecutive school days" or "a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another." 34 CFR §300.519(a)-(b).

Although a manifestation determination review would not appear to be required in the situation prompting your inquiry, we would like to point out that IDEA '97 also contains a number of provisions that require school officials to take proactive measures to address the needs of students with behavioral issues. If a child's behavior impedes his or her learning or that of others, the individualized education program (IEP) team must consider if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address the behavior. 20 U.S.C. §1414(d)(3)(B)(i) and 34 CFR §300.346(a)(2)(i). If the IEP team determines that such interventions or services are needed, the IEP team must include a statement to that effect in the student's IEP, and the interventions or services must be provided to the student. 34 CFR §300.346(c); see also Preamble to the final Part B regulations, 64 Fed. Reg. 12406, 12415 (Mar. 12, 1999).

In addition, in disciplinary situations, the final regulations also provide that either before or not later than 10 business days after either first removing the child for more than 10 school days in a school year or commencing a removal that constitutes a change of placement under §300.519, the LEA must convene an IEP meeting to develop an assessment plan if the LEA did not conduct a functional behavioral assessment and implement a behavioral intervention plan for the child before the removal that resulted in disciplinary action occurred. If the child already has a behavioral intervention plan the IEP team must review the plan and its implementation, and modify the plan and its implementation, if necessary, to address the behavior. 34 CFR §300.520(b)(1)-(2).

It also is important to note that the obligation to conduct a functional behavioral assessment or to review an existing behavioral intervention plan is not linked only to situations that constitute a change of placement. This is because it is essential for LEAs to take appropriate steps to address behavior that interferes with the learning of the student with a disability or that of others, regardless of whether the behavior could result in a change of placement. See: Analysis of Comments and Changes, Attachment 1 to the Final Part B regulations, 64 Fed. Reg. at 12618 (Mar. 12, 1999).

In the specific situation you describe in your inquiry, we believe that an evaluation or reevaluation of the child consistent with 34 CFR §§300.532-300.536 should produce information that would enable the LEA to ascertain the behavioral aspects of the child's disability so that the child IEP team will have the information it needs to consider and develop strategies, including positive behavioral interventions, strategies and supports to address that behavior. 34 CFR §§300.347 (a)(2)(i);(c). In addition, as the need arises.

proper use of functional behavioral assessment and implementation of appropriate behavioral interventions and strategies could identify the potential link between the student's misbehavior and the student's disability and could curb the student's misbehavior in future situations.

We hope that you find this explanation helpful. If we can be of further assistance, please contact Dr. JoLeta Reynolds of the Office of Special Education Programs at (202) 205-5507.

Sincerely,

Kenneth R. Warlick
Director
Office of Special Education Programs

cc: Ms. Barbara Gantwerk
New Jersey Department of Education