

Know Your Rights: School Discipline

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What is the Native American Disability Law Center?

- ▶ Protection and Advocacy organization for Native Americans with disabilities living in the Four Corners
- ▶ Provide free legal assistance, advocacy and education in areas such as civil rights, special education, abuse and neglect, voting, accessibility, and housing
- ▶ Cover a large, mostly rural geographic area, including four states (New Mexico, Arizona, Colorado, and Utah)
- ▶ Attorneys, non-attorney advocates, social worker
- ▶ In NM, our sister agency is Disability Rights New Mexico (they can help too!)

What to expect today

- ▶ Introduction to education civil rights laws that protects all students with disabilities, including those with Autism, in NM public and charter schools and the federal Bureau of Indian Education (BIE) schools
- ▶ Why understanding your child's rights is important
- ▶ How to identify issues and concerns related to school discipline
- ▶ How to protect a student's rights if they are facing school discipline
- ▶ Importance of ensuring students with Autism are having their behavioral needs met in the classroom so that students stay in school learning in a safe, supportive environment
- ▶ Q&A (if time permits)

Who can we help? For example...

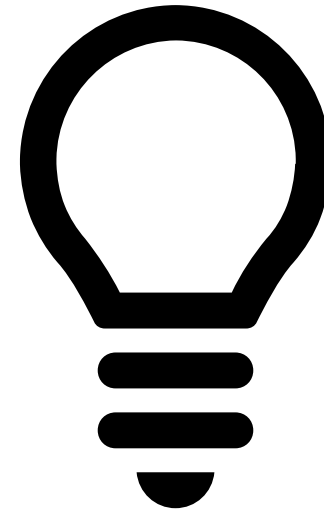
- ▶ Youth who have been suspended or face long-term suspension/expulsion from school
- ▶ Youth who have not yet been identified as being eligible for special education, but whose parents, JPO, or service providers believe may be eligible
- ▶ Youth who receive special education services and are in need of advocacy around those services
- ▶ Youth who have, or may be eligible for, 504 Plans and accommodations
- ▶ Children with disabilities who are facing disciplinary proceedings or have lost at a hearing

Examples of legal services we can provide

- ▶ Representation in Manifestation Determination Reviews
- ▶ Representation in Disciplinary Hearings (long-term suspension or expulsion)
- ▶ Advocacy around evaluations for eligibility for special education services
- ▶ Advocacy around IEP services, particularly requesting Functional Behavior Assessments and Behavior Intervention Plans
- ▶ Advocacy around Section 504 accommodations and legal requirements concerning discipline and Section 504

More than just an IDEA! Laws Protect Students!

- ▶ **Federal Laws: Section 504 of the Rehabilitation Act and Individuals with Disabilities in Education Act- (IDEA)-** Laws regarding the identification and education of students with disabilities
- ▶ New Mexico must comply with IDEA regarding students with disabilities
- ▶ **State Law:** New Mexico has specific laws related to school discipline of both students with and without disabilities
- ▶ **School District Policies and Student/ Parent Handbooks** also provide guidance on school discipline procedures



Section 504 of the Rehabilitation Act of 1973

- ▶ Section 504 is a federal disability civil rights law that protects all people with disabilities who receive services from a federally funded program aka students who attend public and Bureau of Indian Education schools
- ▶ If a student is protected by Section 504 and has a Section 504 plan, the student has protections related to their discipline
- ▶ Law requires that the school provide the services, supports, interventions, strategies and modifications to policies that students with disabilities need to address any disability-based behavior, including behavior that can lead to discipline
- ▶ If a parent disagrees with action a school takes, it can use the Section 504 procedural safeguards to complain (this can get complicated in BIE schools)
- ▶ Key concepts: early identification and evaluation, developing Section 504 plan with supports student needs to be provided “equal access to education”

IDEA: Student Protections & Discipline

- ▶ Has more procedural safeguards if a Student is eligible under IDEA and has an IEP in place
- ▶ Key concepts: Child Find/ identification, evaluation, eligibility, IEP development, general and special education and related services, behavioral needs met, progress monitoring, procedural safeguards
- ▶ Transition from Part C (early intervention) to Part B (ages 3-21).

Students with Autism & School Discipline

- ▶ Autistic students may need services to support their behavior as well as their social, emotional, and mental health. Most behaviors are related to the student's Autism
- ▶ Autistic students with these supports needs are disproportionately suspended, expelled, restrained and secluded, and moved to more restrictive schools and placements
- ▶ Autistic students are often targets of discriminatory threat assessments and of police/ SRO attention in school
- ▶ According to Office of Special Education Programs (OSEP) data from 2019, students with Autism are less likely to be served inside the general education class 80% or more of the day *than all students with disabilities*

What is exclusionary discipline?

Refers to the removal of a student with a disability, whether on a short- or long-term basis, from a class, school, or other educational program or activity for violating a school rule or code of conduct

▶ Examples:

- ▶ Detention
- ▶ In school suspension (ISS)
- ▶ Out of school suspension (OSS)
- ▶ Expulsion
- ▶ Disciplinary transfer to alternative school
- ▶ Referral to law enforcement or juvenile probation

In general, schools must provide students with accommodations & supports and services

- ▶ 2022 Guidance from U.S. Dept. of Ed Office of Civil Rights (OCR) and Office of Special Education & Rehabilitative Services (OSERS), clarified:
 - ▶ Schools must do an individual, case-by-case analysis of whether student's behavior is related to their Autism; if yes, cannot remove the student
 - ▶ Section 504/ IDEA include "informal removals" as school discipline further protecting students
 - ▶ Schools must provide students with reasonable accommodations for behavior and modify discipline policies and when modifications are needed
 - ▶ Schools must provide supports and services for students with disabilities
 - ▶ Schools must educate all students in mainstream classrooms to the greatest extent possible

“Informal removals” are exclusionary discipline

- ▶ Informal exclusionary discipline is when a school doesn't invoke the schools' formal disciplinary procedures
- ▶ Putting the student on a Shortened school day (SSD) aka anything less than a full day or full week of school
- ▶ Calling a parent to come and pick the child up
- ▶ Whether informal or formal a student with a disability is entitled to Section 504 protections

Quick Section 504 and IDEA Orientation

- ▶ All students who have an IEP are also protected by Section 504
- ▶ Only some people protected by Section 504 will be protected by IDEA because IDEA is much narrower in terms of who is considered a student with a disability (i.e. must meet one of 13 specific eligibility criteria like Autism)
- ▶ Section 504 is intended to provide equal access to education and is much broader than IDEA
- ▶ Section 504 does include procedural protections for discipline, like requiring a manifestation determination evaluation before making a “significant change in placement”
- ▶ IDEA provides greater protections and if the student has a disability & needs special education, it’s generally best to request a comprehensive IDEA evaluation
- ▶ Both laws apply to both public schools and BIE schools

What types of disabilities qualify a student under IDEA?

- ▶ The statute defines children with disabilities as:
 - ▶ A child with
 - ▶ Intellectual impairment
 - ▶ hearing impairments including deafness
 - ▶ speech or language impairments
 - ▶ visual impairments
 - ▶ **AUTISM**
 - ▶ traumatic brain injury
 - ▶ emotional disturbance
 - ▶ other health impairments (includes ADHD, asthma, epilepsy, etc.)
 - ▶ or specific learning disability
 - ▶ AND who needs special education & related services.

Discipline Red Flags

- ▶ Behavioral problems at school, home or in community
- ▶ Below grade level performance
- ▶ Failing grades
- ▶ Help requested by parents, teachers, or others
- ▶ Student refuses to go to school
- ▶ Student fears or hates school
- ▶ School asks parents to go to school with student
- ▶ Student “gets sick” or goes to the school nurse’s office frequently

Discipline Red Hot Flags!

- ▶ Physical Restraint
- ▶ Truancy
- ▶ Delinquency referrals and charges
- ▶ Abuse and neglect referrals
- ▶ Exclusion

More Discipline Red Hot Flags!

- ▶ Sending home informally
- ▶ Removing from class, activities, sports, bus
 - ▶ Denying participation
 - ▶ Repeated suspension
 - ▶ Expulsion
- ▶ Referral to law enforcement

As a parent or guardian...

- ▶ If a Student is not succeeding, try to find out why:
 - Does the student have academic needs that are not being addressed?
 - Does the student have mental health needs that are not being addressed?
 - Does the student have non-school related issues that are not being addressed?

Functional Behavior Assessments and Behavior Intervention Plans

- ▶ What is a Functional Behavior Assessment(FBA)??
 - ▶ Evaluation used to develop positive behavioral supports and a **Behavior Intervention Plan (BIP)**
 - ▶ Purpose is to try and determine what function a student's behavior serves. What is the student "getting" or "avoiding" through the behavior?
 - ▶ Based on observation of student, student interview, parent interview, teacher interview, review of records
 - ▶ Gold standard is that it is performed by **Board Certified Behavior Analyst (BCBA)**, but this rarely happens
 - ▶ **MUST** be done if after **Manifestation Determination Review (MDR)**, school finds that behavior is result of disability. If BIP already in place, must be reviewed.

Behavior Intervention Plan

- ▶ Should take information from FBA to create plan with:
 - ▶ Target behaviors
 - ▶ Specific goals that are measurable
 - ▶ Intervention description-how it will be done
 - ▶ When the intervention starts and how often it will be done
 - ▶ Method of evaluation
 - ▶ Persons responsible for each part of the intervention and evaluation
 - ▶ Data from evaluation

Prior Written Notice (PWN)

- ▶ Parents must receive prior written notice from the school if it (1) Proposes to begin or change the identification, evaluation, or *educational placement* of a child or the provision of a free appropriate public education (FAPE) to a child; or (2) Refuses to begin or change the identification, evaluation, or educational placement of a child or the provision of FAPE to a child.
- ▶ A change of educational placement for disciplinary purposes is:
 - (1) The removal is for more than 10 consecutive school days; or
 - (2) The child has been subjected to a series of removals that constitute a pattern
 - (i) Because the series of removals total more than 10 school days in a school year;
 - (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
 - (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

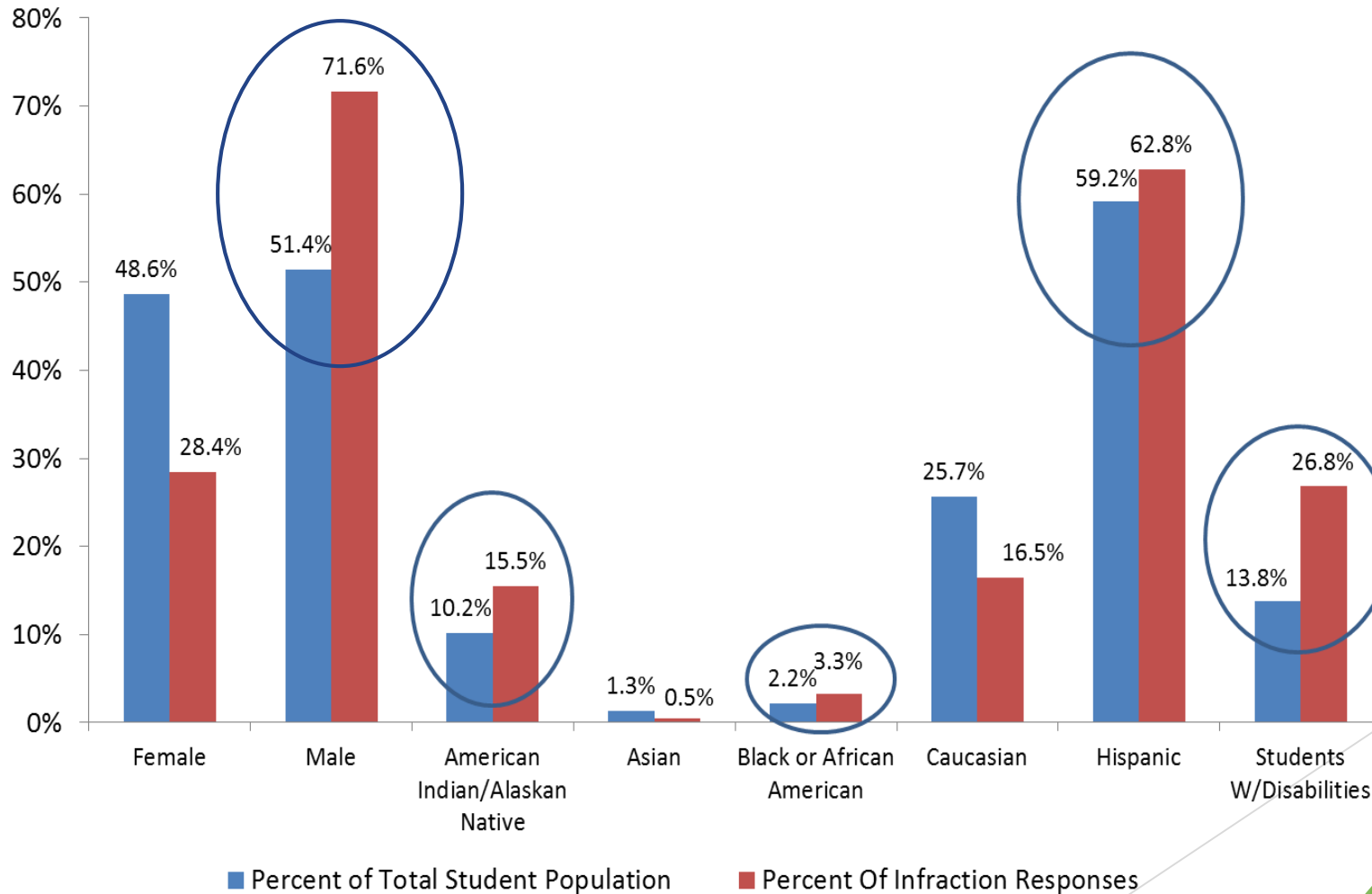
We care so much about
keeping kids with
disabilities in school
because of the...

Short and Long Term Effects of School Discipline

- ▶ Youth who have been suspended or expelled are more likely than other youth to be held back a grade level, leave school, or become involved in the juvenile justice system.
- ▶ Contact with the justice system during adolescence is related to persistent offending, academic failure, high drop out rates, and reduced adult earnings and unemployment.
- ▶ Research has linked dropping out of school with engaging in subsequent criminal activities.
- ▶ Suspension and expulsion makes coming in contact with the juvenile justice system within the next year **THREE TIMES** more likely.
- ▶ Students who are suspended are more likely to commit crimes on the actual suspension days than on non-suspension days, including weekends and holidays.

Discipline

Male, Minority, and Students With Disabilities Have A Disproportionate Chance Of Being Arrested, Referred to Justice System, Suspended or Expelled (2012-2013)



Two Different Procedures Based on Disability Status

Students Not Protected by IDEA

- ▶ Subject to temporary suspension, in school suspension, detention, or long-term suspension/expulsion
- ▶ “Temporary Suspensions” are up to 10 school days (unless made shorter by district) and require only a ‘rudimentary’ hearing. Can happen within minutes of behavior.
- ▶ Long Term Suspension/Expulsion subject to minimum safeguards

Students Protected by IDEA

- ▶ Subject to temporary suspension, in school suspension and detention in similar ways to non-disabled peers
- ▶ Long Term Suspension/Expulsion requires adherence to safeguards provided by IDEA

Overview of Long Term Suspension/Expulsion for Regular Education Students

- ▶ Student may be short-term suspended while waiting for formal hearing on long term suspension
- ▶ WRITTEN NOTICE to student, through his or her parents that MUST contain:
 - ▶ School rule alleged to have been violated and concise statement of alleged act by student and possible penalty
 - ▶ Date, time, place of hearing and statement that parents and students are entitled to be present
 - ▶ Statement that hearing will take place unless delay granted or parents consent to waiver and *clear and conspicuous* warning that failure to appear will not delay hearing and could result in imposition of punishment
 - ▶ Statement that the student has the right to be represented by legal counsel and must give notice to hearing officer 72 hours prior to hearing
 - ▶ Description of procedures governing hearing
 - ▶ Name, address, and telephone number of contact person through whom student or parent can seek further information, including evidence

Expulsion or Long Term Suspension Hearing

- ▶ If temporary suspension expires before expulsion hearing, student must be returned to school unless interim hearing is held
- ▶ Rules of evidence do not apply; not a trial
- ▶ *School* has burden of proof of misconduct
- ▶ Student Rights:
 - ▶ Right to be represented by counsel
 - ▶ Right to present evidence
 - ▶ Right to confront and cross-examine witnesses
 - ▶ Right to have decision based solely on evidence presented at the hearing and applicable legal rules, including rules of student conduct
- ▶ Standard is Preponderance of the Evidence (more likely than not)
- ▶ Recording of meeting or minutes must be kept

Decision After Hearing

- ▶ Can happen directly after hearing.
- ▶ Must be delivered to student and parent within 5 working days and include concise summary of evidence upon which the decision was made
- ▶ Hearing authority may also be disciplinarian, but not necessarily. If not, discipline must be imposed within 5 working days after decision of hearing authority
- ▶ Student has right of review. Must be submitted to review authority within ten school days after student is informed of decision.
- ▶ Review must be completed within 15 days of request.

If a school had knowledge a student has a disability, school must follow procedures governing students with disabilities

- ▶ A school is considered to have knowledge that the child is a child with a disability if:
 - ▶ Before the behavior that caused the discipline happens;
 - ▶ The parent has expressed concern in writing to supervisory or administrative personnel or a teacher of the child that the child needs special education services; or
 - ▶ The child's teacher or other school personnel have expressed specific concerns about the child's pattern of behavior directly to the special education director or other supervisory personnel.

Procedures for Long Term Suspension/Expulsion or Change of Placement for Students w/Disabilities

- ▶ Students with disabilities may be suspended for up to 10 days (same as regular education students)
- ▶ **After 10 days or before change of placement, School must hold Manifestation Determination Review (MDR)!!!**
- ▶ Manifestation Determination Review (MDR):
 - ▶ w/in 10 school days of decision to change placement
 - ▶ Parents, students, and anyone with special knowledge of the child has right to be there!
 - ▶ IEP Team must determine if:
 - ▶ Conduct in question was caused by, or had a direct and substantial relationship to the child's disability; or
 - ▶ Conduct in question was result of failure to implement the IEP
 - ▶ If answer to above is YES, conduct must be found to be manifestation of disability and student must be returned to prior placement and FBA conducted or BIP reviewed.
 - ▶ If answer to above is NO, school can proceed with long term suspension/expulsion hearing.

What if I disagree with MDR??

- ▶ If School decides that the behavior was NOT a result of the student's disability and you disagree, you can challenge the decision through a State Complaint or Request for Expedited Due Process Hearing.
- ▶ The School MUST provide you with a copy of your Procedural Safeguards concerning State Complaints and Due Process Hearings.
- ▶ There are forms available on the New Mexico Public Education Department website.
- ▶ If possible, you should consult with an attorney.

Things to Remember about MDRs

- ▶ An MDR **MUST** be conducted **BEFORE** a long-term suspension or expulsion hearing is initiated.
- ▶ An MDR answers the question: “Is the behavior in question evidence of the student’s disability or is it wholly unrelated to the disability?”
- ▶ The MDR is **NOT** about whether the student actually committed the offense or whether the penalty for the offense is too harsh. Those considerations will be addressed in a disciplinary hearing.
- ▶ Parents and students are important participants in the MDR!
- ▶ The School should not have its decision made prior to the MDR.
- ▶ The School must provide written notice to the parents about its decision

THERE ARE ONLY THREE WAYS STUDENTS W/DISABILITIES CAN BE REMOVED FROM EDUCATIONAL PLACEMENT FOR DISCIPLINE



1. School finds behavior was NOT manifestation of disability.

If school makes this finding, Parent can file an Expedited Due Process Complaint to appeal the decision. Otherwise, regular discipline proceedings followed.



2. School believes that maintaining student in current placement is substantially likely to result in injury to student or others.

School cannot make this decision itself. Must file an appeal in same manner of due process complaint to New Mexico PED



3. Behavior is manifestation of disability BUT special circumstances apply:

Behavior involved drugs, weapons, or substantial bodily injury.

In this case, student can be placed in Interim Alternative Setting for up to 45 days.

Student has right to appeal.

Special Circumstances Defined: “The Big Three”

- ▶ The child carries or possess a weapon to or at a school or school function;
- ▶ Knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance at a school or school function; or
- ▶ Has inflicted serious bodily injury upon another person while at school or at a school function.

If a student with disabilities is removed for disciplinary reason, the IEP team must determine the Interim Alternative Education Setting (IEAS)

Student with a disability who is removed from current placement must continue to received special education and related services.

New Mexico's law on long term suspension and expulsion

- ▶ New Mexico has a law on the books that allows schools to suspend or expel a student indefinitely
- ▶ That means your student may never be able to come back to the school in person and receive his/ her education if the school's consequences was for long term suspension/ expulsion
- ▶ No other school district has to enroll or accept your student
- ▶ School still has to implement the IEP in accordance with IDEA, but schools can do that with homebound or online learning
- ▶ Efforts to change this law

When in doubt, ask for time and ask questions!

If the School asks you to sign something that you don't understand, ask them to explain it or to give you time to think about it before you sign.

If you think the School has violated IDEA or your child's rights under state law, call EPICS, PRO, the NM State SPED Ombudsman, DRNM or NADLC immediately.



"I can't sign that behavior contract unless my attorney reviews it."

Practical Advocacy Suggestions

- ▶ **ASK QUESTIONS!** It's ok to continue asking until you fully understand the answer.
- ▶ **ASK FOR IT IN WRITING!** If schools are making decisions about your child's education, it is important to have them put it in writing for your records.
- ▶ **IT'S OK TO DISAGREE!** If you don't agree with a school's decision regarding your child, make sure to ask that your request is included in the PWN.
- ▶ **Keep calm and carry on!** Understandably, conversations can sometimes become heated when the concern your child. Take some deep breaths, try to stay calm, and ask the school to clearly explain and document the decisions they are making.
- ▶ **Remember- YOU and your child are the experts on your lives.**

More Discipline Advocacy Tips



- ▶ Ask Is Behavior Related to Student's Disability
- ▶ Review the Behavior Intervention Plan
- ▶ Avoid Behavior Contracts
- ▶ Review Incident Reports
- ▶ **AVOID**
 - Police
 - Restraint & Seclusion
 - Timeout
 - Moving the Student to a Different School

“ The western law way is to punish you, so that you don't repeat the behavior. But the Navajo way is to focus on the individual. You separate the action from the person.”

- Robert Yazzie, Chief Justice Emeritus of the Navajo Nation Court.

Restorative Justice & Culturally Responsive Practices

- ▶ Restorative Justice means nonpunitive intervention and support provided by the school to a pupil to improve the behavior of the pupil and remedy any harm caused by the pupil. Restorative Practices within the field of education are positive social interactions that create equitable and safe learning conditions. Engaging restoratively with students before, during, and following a disciplinary offense fosters student accountability, growth, and the opportunity to repair the harm.
- ▶ <https://sourcenm.com/2023/08/21/growing-number-of-nm-schools-pursue-restorative-justice-to-keep-kids-in-schools/>
- ▶ Trauma informed schools & trainings - can ask for this at your school!
- ▶ Trauma can serve as a basis of protection under Section 504. *Stephen C. vs. BIE* (D. Ariz. 2017).

Questions and Thank you!!

How to Contact Us:

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We're on Instagram and Facebook, too!