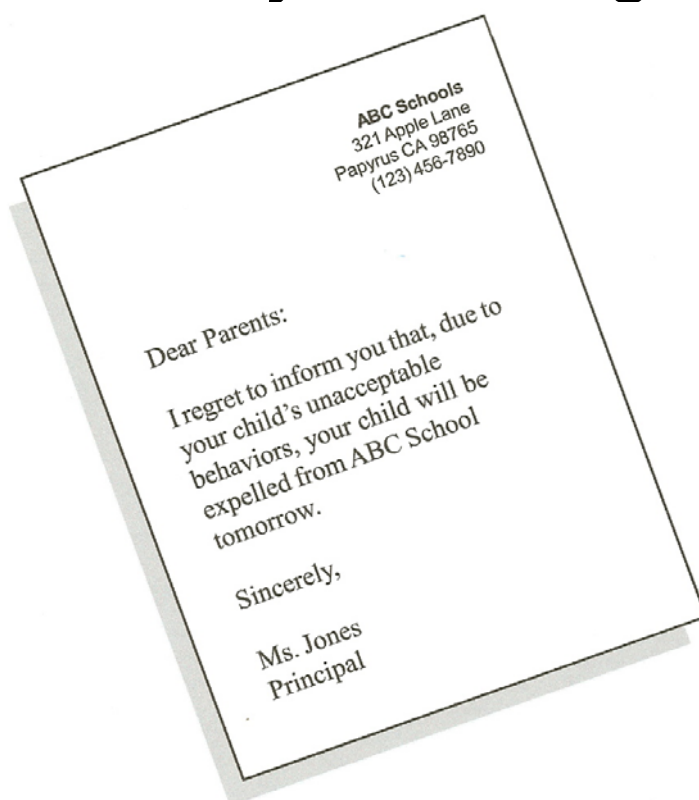


# YIKES! My Child with a Disability Is Being Considered for Expulsion!

## *What can I do?*

## *What are my child's rights?*



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# **YIKES! My Child With A Disability Is Being Considered for Expulsion!**

## ***What Can I Do? What Are My Child's Rights?***

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If your special needs child is being recommended for expulsion by his/her local school district ("District"), there are procedures that the District must follow prior to expelling him/her. Also, state and federal special education laws provide some protections for students with disabilities who are being considered for expulsion.

This publication will provide some basic information regarding your child's rights if he/she is being considered for expulsion and other related issues.

### *Topics Covered in this Publication:*

- A. Expulsions and Manifestation Determination Reviews
- B. Appealing A Manifestation Determination Review
- C. Expulsion Hearing By A School Governing Board
- D. Filing For An Appeal
- E. Expulsion Of A Student Who Has Not Been Made Eligible For Special Education

\*\*\* If your child has had many suspensions but has not yet been considered for expulsion, please also refer to our publication on suspensions for children with special needs, titled **EEK! My Child with a Disability Keeps Getting Suspended!** \*\*\*

## **A. EXPULSIONS AND MANIFESTATION DETERMINATION REVIEWS**

Generally, when a District decides to expel a special education student, the District must convene a manifestation determination review no later than 10 days<sup>1</sup> after the District decides to initiate expulsion. The purpose of a manifestation determination review is to determine whether the behavior that led to the decision to expel was caused by or was directly and substantially related to the child's disability, or was a direct result of the school's failure to implement the IEP. Sometimes the manifestation determination review is also called or referred to as "manifestation determination IEP" or "emergency IEP on expulsion."

The manifestation determination review is made by the IEP team, including the parent and other qualified personnel. The team must consider any relevant information in the student's file, including his/her IEP, any teacher observations, and any relevant information provided by his parent.<sup>2</sup> Based on this information, the team must determine whether:

- 1) the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- 2) the conduct in question was the direct result of the District's failure to implement the IEP.

If either item 1 or 2 above is true for the student, then he/she cannot be expelled and the conduct in question is considered a manifestation of the student's disability.<sup>3</sup>

### If Conduct Is A Manifestation of Disability

If the conduct is found to be a manifestation of the disability, the IEP team must complete a functional behavioral assessment and implement a behavioral intervention plan for the student.<sup>4</sup> If the student already has such a plan, the IEP team must review and modify the behavior plan as necessary to address the behavior.<sup>5</sup> A functional analysis assessment done under California's Hughes Bill regulations<sup>6</sup> would likely satisfy the requirement of conducting a functional behavior assessment under the federal regulations. The IEP team must also return the child to his/her current placement unless the conduct or behavior involved weapons, drugs or the infliction of serious bodily injury on someone, or unless the school and parent(s) agree otherwise<sup>7</sup>.

If the conduct is found to be a manifestation of the student's disability, based solely or in part on item 2 above – that the conduct in question is directly related to the District's failure to implement the IEP, then the District must take immediate action to correct the deficiency or problem.<sup>8</sup>

### If Conduct Is NOT A Manifestation of Disability

If the IEP team determines that the behavior was not a manifestation of the disability, then the District may continue with the expulsion proceedings and will likely recommend that the District's governing board expel the student. When the IEP team determines that the behavior was not a manifestation of the disability, the team is saying that (1) the behavior was not caused by, or that the behavior did not have a substantial relationship to the student's disability, and/or (2) the behavior was not as a direct result of the District's failure to implement the student's IEP.

If your child has been suspended or removed for 10 consecutive days, and either during or after the course of removal the District decides that they want to recommend him/her for expulsion, your child has the right to go back to his/her initial placement where the behavior occurred (after the 10 consecutive days of suspension or removal are up) pending a manifestation determination review. The exception is if his/her conduct or behavior involved weapons, drugs or inflicted serious bodily injury, in which case the school can change his placement for 45 school days to another setting<sup>9</sup>. However, for any placement change or removal amounting to more than 10 cumulative days in a school year, including suspension removals, your child must receive a free appropriate public education (FAPE) even if your child is in an alternative placement. This FAPE requirement means that the District must provide services, to the extent necessary, in order to allow the student to progress appropriately in the general curriculum and to make progress toward achieving his/her IEP goals.<sup>10</sup>

For example, suppose that your son has already been disciplined with 10 consecutive school days of suspension for aggressive behaviors, and on the 10<sup>th</sup> day of the suspension removal, the District notifies you that your son is being considered for expulsion for the aggressive behaviors. The District now has 10 days to hold a manifestation determination review meeting with you and other relevant members of the IEP team. For the purposes of this example, assume that his aggressive behaviors did not

cause serious injury and did not involve drugs or weapons, which means that while waiting for the manifestation determination review meeting and throughout the course of the manifestation determination process, your son can stay at his regular placement. During the manifestation determination meeting, if the IEP team finds that your son's aggressive behaviors are directly related to and/or caused by his disability, the District cannot expel him. Furthermore, the District must conduct a functional behavioral assessment and develop a behavioral intervention plan for your son if he has not had a functional behavioral assessment and behavioral intervention plan. Even if your son already has a behavior plan, then the IEP team must review it and modify it as necessary to address the aggressive behaviors which led to him being considered for expulsion.<sup>11</sup>

In the example above, if the aggressive behaviors also cause serious bodily injury to another peer, the District could put him in an alternative placement for up to 45 school days, where your son would stay even through and after the manifestation determination process, unless a judge or hearing officer orders otherwise. If your son already has 3 days of suspension for another incident earlier in the same school year, then starting on the 8<sup>th</sup> day of the 10 consecutive school days of suspension for the behaviors in this example, the District must provide your son FAPE. FAPE must be provided for the rest of the suspension and for the entire 45 school days in the alternative placement.

## ***B. APPEALING A MANIFESTATION DETERMINATION REVIEW THROUGH AN EXPEDITED DUE PROCESS HEARING***

If the District determines that the alleged behavior leading up to the district's decision to expel your child is not a manifestation of his/her disability and decides to change your child's placement, the District must provide you notification of its decision. The District must also provide you notice about procedural safeguards and rights.<sup>12</sup>

If you disagree with the District's determination, you have the right to appeal the decision through an expedited special education due process hearing. At the expedited due process hearing, an impartial hearing officer will re-examine whether your child's conduct was caused by, or had a direct and substantial relationship to, the child's disability or whether the conduct was the direct result of the District's failure to implement the IEP. The

expedited hearing is supposed to occur within 20 school days of your request for a hearing and you should receive a final decision from the hearing officer within 10 school days after the completion of the hearing.<sup>13</sup> Within 7 days after the request for an expedited hearing is filed, the law requires that the school and parents meet to try to resolve the appeal issues, unless both the parent and the school agree in writing not to do so.<sup>14</sup>

If you filed for an expedited due process hearing because you disagree with the manifestation determination and/or with any placement change and your child has been sent to an interim alternative placement, your child would remain in the alternative placement throughout the duration of the hearing process. If the time period of the alternative placement expires anytime before the end of the hearing, then your child should be returned to his/her regular placement, unless you and the District agree otherwise. Likewise, if the District did not send your child to an alternative placement as part of the disciplinary action, then your child would remain at his/her regular placement throughout the hearing process.<sup>15</sup>

You will need to file for a due process hearing as soon as possible *prior* to the date set for the District's expulsion hearing with the District's governing board ("Board"). The reason you want to file for a due process hearing before you have to appear before the Board is because you will want to ask the hearing officer for an order that the District not proceed with the expulsion hearing while you are pursuing your expedited due process hearing, and the hearing officer will need time to process that request and issue an order to the District to postpone the expulsion hearing until after the due process hearing is over and a decision has been issued. If a date for the appearance before the Board has already been set, you can still file for an expedited due process hearing after the appearance before, but again, you will want to do this as soon as possible. Additional information about due process hearings and expulsions can be found in Chapters 6 and 8 of PAI's *Special Education Rights and Responsibilities (SERR)* manual.<sup>16</sup>

As a result of the due process hearing, the hearing officer can order a change in the student's placement. The hearing officer could find that the behavior was a manifestation of the child's disability and order that the school take him back to the original placement. For those students who

were removed from their prior placements by school officials because the behavior involved weapons, drugs, or the infliction of serious bodily injury, or because the district found the behavior not to be a manifestation of the child's disability, a hearing officer could find that the behavior did not constitute a weapons, drugs, or serious bodily injury offense and order that the student be placed back in the placement from which the school officials removed him.<sup>17</sup>

As an example, suppose that your daughter, who is in special education, threw a pen which ended up hitting the teacher. The District took the position that this was a weapons-related offense, removed your daughter into an alternative placement, and at the manifestation determination review, the District determined that the conduct of throwing the pencil was not a manifestation of your daughter's disability. You disagree. You believe that (1) the pen is not a weapon, (2) the act of throwing the pen was directly related to your daughter's disability, and (3) the act of throwing the pen was directly resulted from the District's failure to implement your daughter's behavior plan and IEP. Because you disagree, you filed for an expedited due process hearing. At the hearing, if the hearing officer determines that the pen is not a weapon and that her conduct was directly related to her disability, the hearing officer could order the District to move your daughter back to her regular placement and stop the District's actions to expel your daughter. Furthermore, if the hearing officer also determines that the behavior plan was not implemented appropriately, the hearing officer could order the IEP team to meet and modify the behavior plan.

In situations where students are still in their original placements because their behavior did not involve weapons, drugs or the infliction of serious bodily injury (or because the IEP team determined that the behavior was a manifestation of the child's disability), a hearing officer can still order a student's placement changed to an interim setting for up to 45 school days if the hearing officer finds that maintaining the student's current placement is substantially likely to result in injury to the student or others, even if the behavior is a manifestation of the student's disability. During those 45 school days, if no decision has been made about what the permanent placement for the student will be, the school can request another hearing asking for another order from the hearing officer to place the student in the interim alternative setting for an additional 45 school days.<sup>18</sup>

If you are unsuccessful or unhappy with hearing officer's decision in the expedited due process hearing, you have the right and option to file for an appeal of that decision.<sup>19</sup>

### **C. EXPULSION HEARING BY A SCHOOL GOVERNING BOARD**

If the District decides to recommend expulsion, the District will refer you and your child to the District's governing board ("Board") for a hearing to determine whether your son/daughter should be expelled. This hearing with the Board is held within 30 school days<sup>20</sup> after the school principal decides to expel your child, and the Board is required to make a decision within 10 school days after the Board hearing, unless you request a postponement of the hearing or decision in writing<sup>21</sup>. Please note that this hearing is very different from the due process hearing described in Section B above.

If you are unsuccessful in your expedited due process hearing, and the Board also recommends and decides to expel your child, you have the right and option to appeal the Board's decision. You have 30 days following the Board's decision to file an appeal to the County Board of Education.<sup>22</sup>

There are many rules regarding a recommendation for expulsion and readmission after expulsion, and they *can vary* from one district to another. You should contact your child's District for a copy of its written rules and policies. More information about the various rules can be found in Cal. Ed. Code §§ 48916– 48927.

### **D. FILING FOR AN APPEAL**

Please be advised that there are important filing deadlines that apply to your respective appeals of the district's manifestation determination and expulsion proceedings. We therefore advise you to seek further legal advice regarding these deadlines as soon as possible. If you wish to seek additional assistance or representation, you should contact the Office of Administrative Hearings (OAH) and request a referral list of attorneys and/or advocates that specialize in special education advocacy. The contact information is as follows:

Office of Administrative Hearings  
Special Education Division  
2349 Gateway Oaks Drive, Suite 200  
Sacramento, CA 95833-4231  
Phone: 916-263-0880  
Fax: 916-263-0890

You can find the Mediation and Hearing Request form on the special education page of OAH's website.<sup>23</sup> As of October 2006, the forms are available in both English and in Spanish. On the website, OAH also makes available Parents' Rights and Procedural Safeguards in English, Spanish, Tagalog, Hmong and Vietnamese. If you are unable to access the internet, you can call the OAH office directly and request copies of these documents, or you can call your local District.

***E. EXPULSION OF A STUDENT WHO HAS NOT BEEN MADE ELIGIBLE FOR SPECIAL EDUCATION***

If the District has not assessed your child for special education, and you feel that he/she would be eligible, your child is entitled to the same pre-expulsion protections that a special education student has ***if*** you can establish that the District had knowledge that your child had a disability ***before*** the behavior leading up to the disciplinary action occurred. A District is deemed to have knowledge of your child's disability before his misbehavior if, before his misbehavior, one of the following four things is true<sup>24</sup>:

- 1) you expressed concerns, in writing, to the teacher or other school officials, that the child is in need of special education (exception is made if a parent is illiterate or has a disability that prevents the parent from making concerns known in writing),
- 2) you requested that your child be evaluated for special education, or
- 3) a teacher or other school personnel expressed concerns about the child's behavior or performance to special education officials or supervisory personnel in the school district.

If you feel that the District had knowledge of your child's disability prior to the District's decision to expel, you have the right and option to file for a due process hearing to present your arguments. You should request an expedited hearing and file as soon as possible and include any and all written evidence of one or more of the four indicators listed above regarding the school's prior knowledge.

If the District did not have any prior knowledge of your child's disability, then your child would likely be subjected to the same disciplinary actions as all other children<sup>25</sup>, and would not be able to have the additional levels of review described in this publication.

If you make a request for evaluation for special education eligibility during the time period in which your child is being disciplined, then the evaluation must be expedited. Although law requires an expedited evaluation, there is no rule on the timeframe in which the expedited evaluation must be completed. While the evaluation is being conducted, your child could remain in the alternative setting for suspension or expulsion, without educational services. If the evaluation determines that your child has a disability and is eligible for special education services, then the District must provide your child with special education services and all special education rules and responsibilities apply.<sup>26</sup>

***Note:*** *If you would like other chapters from the SERR manual or other publications, you can download them from PAI's website at [www.pai-ca.org](http://www.pai-ca.org) or you can request them by calling our office toll-free at (800) 776-5746*

### **Abbreviations to Legal Cites**

§, §§	Section, Sections
20 U.S.C.	Title 20 of the United States Code
34 C.F.R.	Title 34 of the Code of Federal Regulations
Cal. Ed. Code	California Education Code
5 C.C.R.	Title 5 of the California Code of Regulations

## Endnotes

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- <sup>1</sup> 20 U.S.C. §§ 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1)
- <sup>2</sup> 20 U.S.C. §§ 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1)
- <sup>3</sup> 20 U.S.C. §§ 1415(k)(1)(E), 1415(k)(1)(F); 34 C.F.R. § 300.530(e)(1)(i) & (ii)
- <sup>4</sup> 20 U.S.C. § 1415(k)(1)(F)(i); 34 C.F.R. § 300.530(f)(1)(i)
- <sup>5</sup> 20 U.S.C. § 1415(k)(1)(F)(ii); 34 C.F.R. § 300.530(f)(1)(ii)
- <sup>6</sup> Cal. Ed. Code §§ 56520 – 56525; 5 C.C.R. §§ 3001 (d), (e) and (f), and 3052; see also Chapter 5 of PAI’s manual, *Special Education Rights and Responsibilities*
- <sup>7</sup> 20 U.S.C. § 1415(k)(1)(F)(iii), 1415(k)(1)(G); 34 C.F.R. § 300.530(f)(2), 300.530(g)
- <sup>8</sup> 34 C.F.R. § 300.530(e)(3)
- <sup>9</sup> 20 U.S.C. §§ 1415(j) and (k)(7); 34 C.F.R. §§ 300.530(f)(2), 300.530(g)
- <sup>10</sup> 34 C.F.R. §§ 300.530(b)(2) and (d), 300.536
- <sup>11</sup> 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f)
- <sup>12</sup> 20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. § 300.530(h)
- <sup>13</sup> 20 U.S.C. §§ 1415(k)(3)(A) and (B), 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(1) and (2)
- <sup>14</sup> 34 C.F.R. § 300.532(c)(3)
- <sup>15</sup> 20 U.S.C. §§ 1415(k)(4)(A); 34 C.F.R. § 300.533
- <sup>16</sup> The manual *Special Education Rights and Responsibilities* is available in several languages for free internet download at [www.pai-ca.org/pubs](http://www.pai-ca.org/pubs) or by calling 800.776.5746
- <sup>17</sup> 20 U.S.C. §§ 1415(k)(2) and (3)(B); 34 C.F.R. § 300.532(b)
- <sup>18</sup> 34 C.F.R. § 300.532(b)(3)
- <sup>19</sup> 20 U.S.C. §§ 1415(g) and (i); 34 C.F.R. §§ 300.514, 300.516; Cal. Ed. Code §56505(k)
- <sup>20</sup> The timeline for a hearing -before the governing Board is 40 school days, if the Board does not meet on a weekly basis.
- <sup>21</sup> Cal. Ed. Code § 48918(a)
- <sup>22</sup> Cal. Ed. Code § 48919
- <sup>23</sup> [www.oah.dgs.ca.gov/Special+Education/Default.htm](http://www.oah.dgs.ca.gov/Special+Education/Default.htm)
- <sup>24</sup> 20 U.S.C. §1415(k)(5); 34 C.F.R. §§ 300.534(a) and (b)
- <sup>25</sup> 20 U.S.C. §1415(5)(D)(i); 34 C.F.R. §§ 300.534(d)(1)
- <sup>26</sup> 20 U.S.C. §1415(5)(D)(ii); 34 C.F.R. §§ 300.534(d)(2)