

The Tricky Business of Manifestation Determinations

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Why are Manifestation Determinations so Tricky?

- Challenging circumstances
 - Complex procedures
 - Subjective decisions



A Few Words About Free Appropriate Public Education (FAPE)

FAPE

- “Therefore, a court’s inquiry in suits brought under [the IDEA] is twofold. First, has the [school district] complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the [school district] has complied with the obligations imposed by Congress and the courts can require no more.” *Board of Educ. v. Rowley*, 102 S.Ct. 3034 (1982).

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FAPE

- The IEP Team must— “In the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior....” 34 C.F.R. § 300.324(a)(2)(i).
- “FBAs and BIPs must also be used proactively, if the IEP Team determines that they would be appropriate for the child.” *OSERS Questions and Answers on Discipline Procedures*, Q/A E-3 (Revised June 2009).

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FAPE

- “Public agencies are strongly encouraged to conduct functional behavioral assessments (FBAs) and integrate behavioral intervention plans (BIPs) into the IEPs for students who exhibit problem behaviors well before the behaviors result in proposed disciplinary actions for which FBAs and BIPs are required under the federal regulations.” 6.31.2.11(F)(1) NMAC.

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When is a Manifestation Determination Review (MDR) Required?

An MDR is *only* required when there is a “Disciplinary Change of Placement”

- **Consecutive day** change of placement
 - More than 10 consecutive school days
- Short-term **cumulative day** change of placement
 - Series of removals that “constitute a pattern”

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What is a Disciplinary Change of Placement?

A disciplinary change of placement occurs when:

- Removal is for more than 10 consecutive school days, or
- A series of removals constitute a pattern of removals:
 - Because the series of removals total more than 10 school days in a school year;
 - Because the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; *and*
 - 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.

See 34 C.F.R. § 300.536.

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Change of Placement Analysis: **Cumulative Day Removal**

- Whether or not short-term cumulative day removals are a “change of placement” is a judgment made by the school district.
- The determination is final unless the parent challenges the decision through the Individual with Disabilities Education Act (IDEA) due process procedures, and a hearing officer or court reaches a different conclusion.

See 34 C.F.R. § 300.536(b).

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Counting Days

We count “days of removal” which are characterized broadly to include removals “to an appropriate interim alternative educational setting, another setting, or suspension.” 34 C.F.R. § 300.530(b)

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Case Study: 10 means 10

“[The student] was suspended for a total of only six school days across the 2007-2008 and 2008-2009 school years. Accordingly, while Parents clearly wanted the District to perform a manifestation determination, and Parents are correct that “[s]chools can perform a [manifestation determination] *anytime* a child exhibits maladaptive behavior,”... the law did not *require the District to perform a manifestation determination until a student is suspended for ten school days in a single year. Accordingly, the District had no legal obligation to provide a manifestation determination....*” *Avila v. Spokane Sch. Dist. #81*, 64 IDELR 171 (E.D. Wash. 2014) (*Court’s Emphasis*).

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Know Which Days to Count:

- **Always count:**
 - Out-of-School Suspension (OSS)
- **Sometimes count:**
 - In-School Suspension (ISS)
 - Bus suspension
 - Portions of a school day
- **Rarely count:**
 - After school detention
 - Lunch detention

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In-School Suspension (ISS)

- The regulations specifically refer to days of removal to “another setting” as days that count. See 34 C.F.R. § 300.530(b)(1).
- The U.S. Department of Education clarifies: “[I]t has been the Department’s long term policy that an in-school suspension would not be considered a part of the days of suspension addressed in § 300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child’s IEP, and continue to participate with non-disabled children to the extent they would have in their current placement. This continues to be our policy.” 71 Fed. Reg. 46715 (August 14, 2006).

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Bus Suspension

- “Whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child’s IEP. If the bus transportation were a part of the child’s IEP, a bus suspension would be treated as a suspension under § 300.530 unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where services will be delivered. If the bus transportation is not a part of the child’s IEP, a bus suspension is not a suspension under § 300.530.” 71 Fed. Reg. 46715 (August 14, 2006).

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Time-Out vs. Portions of a School Day

- “Such procedures [that are not considered a change of placement] may include the use of study carrels, **time-outs**, detention, or the restriction of privileges.” *Honig v. Doe*, 559 IDELR 231 (1988).
- “Portions of a school day [in which] a child has been suspended may be considered as a removal in regard to determining whether there is a pattern of removals as defined in § 300.536.” 71 Fed. Reg. 46715 (August 14, 2006).
- *Horizon Science Academy of Cleveland*, 110 LRP 65947 (Ohio SEA 2009). Hearing officer acknowledged a time-out would not be considered a “removal” for purposes of determining disciplinary change of placement, whereas a removal for a portion of the school day would be considered a “removal.” Sending student to the hallway or office constituted time-out because student returned to class during the class period/lesson.

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Pattern of Removals

Elements that Constitute a Pattern

- The series of removals total more than 10 school days in a school year;
- The child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; and
- There are additional factors such 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.

See 34 C.F.R. § 300.536(a)(2).

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Case Study: No Pattern

The three suspensions totaling more than 10 days in a school year did not constitute a pattern because the first two suspensions (4-1/2 day OSS in October, and 3 day OSS in early December) for theft were not substantially similar to the third suspension in late December for possessing a weapon on campus (8 day OSS). *East Metro Integration District No. 6067*, 110 LRP 34370 (SEA Minn. 2010).

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Case Study: Pattern #1

- “Although none of the Student’s suspensions in the instant case were for greater than 10 school days in a row, the Student’s series of removals, totaling 58 days in his [] grade year, constituted a pattern, both with respect to the frequency and types of infractions that lead to the disciplinary actions. The discipline log prepared by the District confirms that these removals were in close proximity to each another and for behavior substantially similar to the Student’s behavior in previous incidents. Incidents ranged from refusing to walk with the rest of the class, inappropriate comments to refusing to listen to staff, refuses to do what the Assistant Principal tells him, and refusing to go to ISS and special education testing.” *Lewiston Public Schools*, 110 LRP 17745 (Me. SEA 2009).

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Case Study: Pattern #2

- “For the non-consecutive removals to constitute a ‘pattern’ under 34 CFR § 300.536(a), the Petitioner must also establish that the student’s behaviors which resulted in the later discipline incidents [were] substantially similar to his behavior in previous incidents. ... Mother averred that Student’s behavior which resulted in his suspensions was, on each occasion, being somewhere else in the school when he was supposed to be in class. I conclude that Mother has met her burden of proof to show that Student subjected to a ‘change of placement’ for which an MDR meeting was required, in that he was removed from school for more than 10 school days beginning March 31, 2015, and the behaviors which led to his removals were substantially similar. DCPS’ failure to convene an MDR meeting was therefore a violation of the IDEA.” *District of Columbia Pub. Schs.*, 115 LRP 40472 (SEA D.C. 2015)

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Case Study: Pattern #3

- “Upon completing the ISS for the fourth incident, Petitioner had been suspended in ISS and OSS for a total of 11 days. ... The removals that had taken place as a result of the first four incidents constitute a pattern because Petitioner’s behavior was substantially similar in all four incidents -- three HTPs [Hit, Trip, Push] and one near-HTP; the removals total more than ten school days; and the four incidents occurred in such close proximity to each other that Respondent had suspended Petitioner for about one-quarter of the school days that had elapsed to this point. ... For these reasons, as explained in the Conclusions of Law, at the time of the suspension for the fourth incident, Respondent was required to conduct a manifestation determination hearing. But Respondent did not do so.” *Highlands County Sch. Bd.*, 115 LRP 27365(SEA Fla. 2015).

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Cumulative Short-Term Removals

- Not all removals past the 10 cumulative days are considered a “change of placement.”
- A short-term removal is a “change of placement” only if the series of removals “constitute a pattern.”
- Note that exceeding ten school days is only one-third of the definition of “pattern.”

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Cumulative Short-Term Removals

- There is no limitation on short-term removals that do not constitute a change of placement. See 34 C.F.R. § 300.530(b).
- However, beyond 10 cumulative school days, services must be provided to the child.

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Services During Removals that are Not a Change of Placement

“FAPE-Free Zone”

“A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for ten (10) school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.” 34 C.F.R. § 300.530(d)(3).

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Services Beyond the FAPE-Free Zone

Beginning on the 11th day of removal in a school year, regardless of whether it is a change of placement, the child 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 in the child’s IEP.” 34 C.F.R. § 300.530(d)(1)(i).

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**Determining Services for Removals
that are Not a Change of Placement**

If not a change of placement, the regulation provides:

... school personnel, in consultation with at least one of the child's teachers, [must] determine the extent to which services are needed, as provided in §300.101(a) [guarantee of a FAPE], so as 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 in the child's IEP.

34 C.F.R. § 300.530(d)(4).

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**Determining Services for Removals
that are Not a Change of Placement**

The U.S. Department of Education believes that "the extent to which educational services need to be provided and the type of instruction to be provided would depend on the length of the removal, the extent to which the child has been removed previously, and the child's needs and educational goals. For example, a child with a disability who is removed for only a few days and is performing near grade level would not likely need the same level of educational services as a child with a disability who has significant learning difficulties and is performing well below grade level." 71 Fed. Reg. 46717 (August 14, 2006).

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**Determining Services for Removals that
are Not a Change of Placement**

- There is no requirement that parents be consulted.
- There is no requirement to conduct an IEP Team Meeting to develop an FBA or a BIP.
- This includes services leading up to a change of placement pending the MDR/IEP meeting.

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The Manifestation Determination Review (MDR)

Conducting the MDR

- The MDR must be conducted by “the LEA, the parent, and relevant members of the child’s IEP Team (as determined by the parent and the LEA).” 34 C.F.R. § 300.530(e)(1).
- The MDR must take place “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.” 34 C.F.R. § 300.530(e)(1).
- The MDR must take place before the disciplinary change of placement occurs.

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Conducting the MDR

- The Team “must review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents” in order to make its determination. 34 C.F.R. § 300.530(e)(1).

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Case Study: Conducting the MDR

Bristol Twp. Sch. Dist. v. Z.B. by K.B. and R.B., 116 LRP 1736 (E.D. Pa. 2016):

- “Dr. Newsham protested during the hearing that she included the parents in the conversation at the manifestation determination review, read her findings aloud, and gave the team an opportunity to object. But, ultimately, Dr. Newsham convened the manifestation determination with a prefabricated document that encompassed solely her views and conclusions and then asked if anyone objected, which is materially different than, say, for efficiency, filling in background information gathered ahead of time in order to facilitate meaningful discussion about the appropriate answers to the two crucial questions at the heart of the manifestation determination, questions that Dr. Newsham had already answered ‘no’ to.”

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Case Study: Conducting the MDR

Bristol Twp. Sch. Dist. v. Z.B. by K.B. and R.B., 116 LRP 1736 (E.D. Pa. 2016):

- “The manifestation determination team also did not consider any specifics regarding the incident in question, or specifics about Z.B.’s behavior as a manifestation of his disability. Although the worksheet provided a space for a detailed description of the incident and the behavior in question, all the team considered was that Z.B. had engaged in ‘aggressive assault behavior.’ Dr. Newsham candidly explained, ‘To be quite honest, we looked at it more from a global picture. We didn’t [dive] into the specifics. We weren’t looking at what occurred during that specific incident. We were looking at does [Z.B.’s] disability have anything to do with aggressive behaviors? And the team absolutely did not feel that.’”

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Question No. 1:

Was the conduct in question “the direct result of the [District’s] failure to implement the IEP?” 34 C.F.R. § 300.53(e)(1)(ii).

- Note that the law directly asks about cause and effect.

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Question No. 2:

Was the conduct in question “caused by, or [did it have] a direct and substantial relationship to, the child’s disability”? 34 C.F.R. § 300.530(e)(1)(i).

- The “direct and substantial relationship” language is used to distinguish behavior that has only an “attenuated” relationship to the student’s misconduct.
- An example of an attenuated relationship is when low self-esteem resulting from the disability causes the student to engage in the misconduct.

See House Committee FAQ.



Answering Question No. 2

The U.S. Department of Education endorsed language indicating that the MDR/IEP team should “analyze the child’s behavior as demonstrated across settings and across time when determining whether the conduct in question is a direct result of the disability.” 71 Fed. Reg. 46720 (August 14, 2006).



Case Study: “Did he do it?”

“It is not the Court’s role to determine whether Student falsely confessed to setting off the firework, and neither was it the role of the hearings officer or of the manifestation determination team. Instead, the manifestation team was required by the IDEA to determine whether the actions leading to Student’s potential suspension — as determined by Defendant’s investigation — were a manifestation of an eligible disability or of Defendant’s failure to implement the April IEP.” *Danny K. v. DOE State of Hawaii*, 57 IDELR 185 (D. Haw. 2011).



**Review all Behaviors that
Constitute a Pattern of Removals**

- Each of the behaviors underlying the removals that constitute a pattern should be considered.
- One special education due process hearing officer found that the MDR was flawed because the MDR/IEP team “did not discuss any of the student’s suspensions prior to the February 19, 2009 5-day suspension.” The hearing officer ordered the district to reconvene its MDR to consider each of the removals totaling more than 10-school days that constituted a pattern.

District of Columbia Public Schools, 110 LRP 29736 (SEA D.C. 2009).

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If the Answer is “Yes” to Either Question

“The conduct must be determined to be a manifestation of the child’s disability.” 34 C.F.R. § 300.530(e)(2).

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**If the Conduct is a Manifestation of the
Student’s Disability**

The MDR/IEP Team must either:

- Conduct a functional behavioral assessment (“FBA”), unless the District had previously conducted an FBA (presumably on the same behavior) before the behavior that resulted in the change of placement, AND implement a BIP for the child; or
- If a BIP already has been developed, review the BIP, and modify it, as necessary, to address the behavior; and

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If the Conduct is a Manifestation of the Student's Disability

... the MDR/IEP Team must:

- Return the child to the placement from which the child was removed unless:
 - the offense involved “special circumstances” and resulted in an emergency removal (drugs, weapons, serious bodily injury); or
 - the parent and school agree to a change of placement as part of the modifications of the BIP.

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If the Conduct is NOT a Manifestation of the Student's Disability

“[S]chool personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.” 34 C.F.R. § 300.530(c).

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Role of IEP Team if the Conduct is NOT a Manifestation of the Student's Disability

- Ensures that the child receives “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.” 34 C.F.R. § 300.530(d)(1)(ii).
- “[D]etermines 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 in the child’s IEP.” 34 C.F.R. § 300.530 (d)(1)(i).
- “[D]etermines the interim alternative educational setting for services....” 34 C.F.R. § 300.531.

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Why do we Have to Provide Services
When Conduct is NOT a Manifestation?

- “A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d).” 34 C.F.R. § 300.101(a).

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**When Behavior IS a Manifestation
of the Disability and a Special
Circumstance Exists**

Special Circumstances

There are three special circumstances:

“[I]f the child —

1. Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an 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 an SEA or an 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 an SEA or an LEA.”

34 C.F.R. § 300.530(e).

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Weapon

- “Weapon has the meaning given the term ‘dangerous weapon’ under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.” 34 C.F.R. § 300.530(i)(4).
- “The term ‘dangerous 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 1/2 inches in length.” 18 U.S.C. § 930(g)(2).

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Illegal Drug or Controlled Substance

- “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 or used under any other authority under that Act or under any other provision of Federal law.” 34 C.F.R. § 300.530(i)(2).
- “Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section (21 U.S.C. 812(c)).” 34 C.F.R. § 300.530(i)(1).
- See 21 U.S.C. § 812(c) for schedules of controlled substances, available at:
<http://www.justice.gov/dea/pubs/csa/812.htm>.

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Serious Bodily Injury

- “Serious bodily injury has the meaning given the term ‘serious bodily injury’ under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.” 34 C.F.R. § 300.530(i)(3).
- “The term ‘serious bodily injury’ means bodily injury which involves—
 - (A) a substantial risk of death;
 - (B) extreme physical pain;
 - (C) protracted and obvious disfigurement; or
 - (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”18 U.S.C. § 1365(h)(3).

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Implications of a Special Circumstance

- “School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child’s disability....” 34 C.F.R. § 300.530(g).
- The 45 school days for special circumstances carry over from one school year to the next.
- If the behavior is not a manifestation of the disability, then the district does not need to rely on the special circumstance, and school personnel are not limited to a 45 school day removal.

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Role of IEP Team When Relying on a Special Circumstance

The role of the IEP Team is the same as when the behavior is not a manifestation of the disability:

- Ensures that the child receives “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.” 34 C.F.R. § 300.530(d)(1)(ii).
- “[D]etermines 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 in the child’s IEP.” 34 C.F.R. § 300.530 (d)(1)(i).
- “[D]etermines the interim alternative educational setting for services....” 34 C.F.R. § 300.531.

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Parent Disagreement and Appeal

Parent Disagreement with Outcome of MDR

- “If the parents of a child with a disability, the LEA, and the relevant members of the child’s IEP Team cannot reach consensus or agreement on whether the child’s behavior was or was not a manifestation of the disability, the public agency must make the determination and provide the parent with prior written notice pursuant to 34 CFR § 300.503.”
- “The parent of the child with a disability has the right to exercise his or her procedural safeguards by requesting mediation and/or a due process hearing to resolve a disagreement about the manifestation determination. 34 CFR § 300.506 and § 300.532(a). A parent also has the right to file a State complaint alleging a violation of Part B related to the manifestation determination. See 34 CFR § 300.153.”

Questions and Answers on Discipline Procedures, 52 IDELR 231 (OSERS 2009), Q/A F-1.

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Parent Appeal of the MDR or the Interim Alternative Educational Setting

When an appeal under paragraph (3) has been requested by either the parent or the local educational agency—

- A. the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and
- B. the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

20 U.S.C. § 1415(k)(4).

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