

## Preparing Defensible Manifestation Determination Conferences

*Presented by:*

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## Critical Issues in Documentation

- ▶ What documentation exists that describes a pattern of behavior? Does the documentation support the IEP and/or BIP?
- ▶ When using an 11<sup>th</sup> day removal what services need to be in place? How should the document support the services offered?
- ▶ Does the documentation support the manifestation determination? Have we considered all requisite data?
- ▶ What documentation needs to be in place to support a FAPE for interim alternative education services?
- ▶ What documentation is needed for using restraints?

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What documentation exists that describes a patterns of behavior?

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### When does the obligation to conduct FBAs/BIPs begin?

- ▶ A school may develop *“coordinated, early intervening services, for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) who have not been identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment.”*

IDEA, 20 U.S.C. §1413(f)(1)

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### When does the obligation to conduct FBAs/BIPs begin?

In implementing and coordinating early intervening services, activities may include:

- *professional development (which may be provided by entities other than LEA's) for teachers and other school staff to enable such personnel to deliver scientifically based academic instruction and behavioral interventions, including scientifically based literacy instruction, and where appropriate, instruction on the use of adaptive and instructional software, and*
- *providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction.*

IDEA, 20 U.S.C. §1413(f)(2)

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### FBA & Evaluation

Eligibility must be based on:

- ▶ The components of an ED evaluation must include: “A **functional behavior assessment** that includes an analysis of any interventions used to address the behaviors leading to the referral for the education evaluation.”
- ▶ The components of an evaluation for OHI and Autism Spectrum Disorder both require a “**systematic observation**.”
- ▶ “Systematic observation is “an observation that is conducted to measure specific, well-defined behaviors using structured recording procedures.”

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## Functional Behavioral Assessments 511 IAC 7-32-41

- ▶ A process that uses data
- ▶ to identify patterns in a student's behavior and
- ▶ [to identify] the purpose or function of the behavior for the student.
- ▶ An FBA may require written consent if it is an educational evaluation as defined by the definition of "educational evaluation" under Article 7.
- ▶ Written parental consent is not required when a FBA reviews existing data regarding a student.

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When are FBA legally triggered to be considered?

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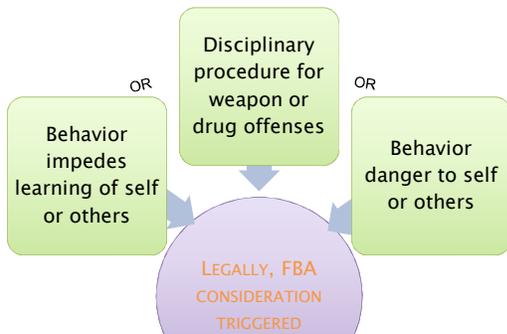
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Does the documentation support the IEP and/or BIP?

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**Behavior Intervention Plans**  
511 IAC 7-32-10

- ▶ A plan, agreed upon by the case conference committee and incorporated into the student's IEP that describes the following:
  - The pattern of behavior that impedes the student's learning or the learning of others.
  - The purpose or function of the behavior as identified in a functional behavioral assessment.
  - The positive interventions and supports, and other strategies, to:
    - address the behavior; and
    - maximize consistency of implementation across people and settings in which the student is involved.
  - If applicable, the skills that will be taught and monitored in an effort to change a specific pattern of behavior of the student. The behavioral intervention plan seeks to maximize consistency of implementation across people and settings in which the student is involved.
- ▶ The IEP can serve as the BIP as long as the documentation the parent receives meets all the requirements in this section.

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**BIP Review and Revisions**

The case conference committee must meet to review and/or revise a BIP if one or more committee member believes that modifications to an existing plan are necessary.

- The process of evaluating the success or failure of such a plan is essentially one of trial and error. The school must collect data to demonstrate student progress and effectiveness of BIP by data collection compared to the baseline FBA data.
- If behaviors escalate and disruptive behavior is anticipated necessitating a removal, then consider additional FBA data collection along with revisions to the BIP. FBA data must be collected with any removal of a student for more than ten (10) consecutive days.
- A case conference committee must review an existing BIP for disciplinary actions involving suspensions of more than 10 days, expulsions, or removals to IAES.

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## Catching Flaws in BIP/IEP Development

- A pattern of behavior or an isolated event?
- Behavior occurring in academic or nonacademic settings?
- Providing FAPE or appropriate BIP/IEP removals?
- Does the BIP specify how interventions will be implemented with maximum consistency across settings and people?
- Does regular progress monitor, review, and revision occur of BIPs in the same manner as with goals and objectives?

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## Findings from IHO Decisions:



- ▶ **Good faith efforts are not a defense.** "The biggest example of the failure of [the school] was to utilize data-driven measures for future programming and services."
- ▶ **Lack of Progress Must be Addressed.** "[The School] failed to take note that the Student was making little progress in his academic goals over the course of the IEP's at issue in the hearing."
- ▶ **The IEP/BIP Must be Followed with Fidelity.** "Since the School did not follow the behavior strategies from his previous IEP, or implement their own BIP, although they were set forth in the CCC notes and alleged to have been followed, any decisions regarding discipline are suspect."

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## Practice Tips

- ✓ Keep data to show that the behavior plan is reducing the behavior.
- ✓ Align goals to target behavior for data collection.
- ✓ Report data along with progress monitoring.
- ✓ If no progress, reconvene and adjust BIP.
- ✓ If behaviors are challenging, consider use of consultant.

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When using an 11<sup>th</sup> day removal what services need to be in place?

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What are NOT considered to be "removals"?

- ▶ Schools are not required to provide services to a student with a disability during any of the first ten (10) cumulative instructional days of removal in a school year, for violating a code of student conduct, if services are not provided to a nondisabled student who has been similarly removed.

511 IAC 7-44-1(a)

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What are NOT considered to be "removals"?

- ▶ A short-term removal of a student pursuant to the student's IEP is not a removal.
- ▶ An in-school suspension is not considered a removal if, during the in-school suspension, the student has the opportunity to:
  - (1) progress appropriately in the general curriculum;
  - (2) receive the special education services specified in the student's IEP; and
  - (3) participate with nondisabled students to the extent the student would have in the student's current placement.

511 IAC 7-44-1 (c) & (d)

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### What are considered to be “removals”?

- ▶ Article 7 defines a removal as the removal of as student for **any** part of a day.
- ▶ If bus transportation is part of a student’s IEP, a removal of a student off the bus is considered a removal for purposes of discipline procedures.
  - unless the school provides transportation in an alternative manner

511 IAC 7-44-1(b) & (e)

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### Removals

- ▶ If a student is either:
  - Removed for more than (10) consecutive instructional days in a school year or
  - Removed for more than ten (10) cumulative instructional days in a school year and the school determined that the removals constitute a change of placement.

Certain procedures must be followed by the school.

511 IAC 7-44-1(g) & (h)

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### How is it determined that a removal or a series of removals results in a change of placement for 10 cumulative days?

- ▶ A review must be made on a case-by-case basis, considering:
  - The student’s disciplinary history;
  - Ability to understand consequences; and
  - Supports provided to student prior to misconduct
- ▶ The review must consider:
  - Similarity of the behavior in each suspension;
  - Length of removals;
  - Cumulative time of removals; and
  - Proximity of removals to one another.

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What services need to be in place if on the 11<sup>th</sup> day removal the school does not consider the removal to be a change of placement?

- ▶ For removals of more than ten (10) cumulative instructional days that do not constitute pattern of removals/change of placement, school personnel, in consultation with at least one (1) of the student's teachers, determine the extent to which services are needed to enable the student to do the following:
  - (1) Continue to participate in the general education curriculum, although in another setting.
  - (2) Progress toward meeting the goals set out in the student's IEP.
- ▶ These services may be provided in an interim alternative education setting.

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How should the document support the services offered for services in the 11<sup>th</sup> day of suspension?

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How should documentation support the services offered for services in the 11<sup>th</sup> day of suspension?

Provide notice to the parent informing the parent of:

- ▶ number of days of removals;
- ▶ the rationale for determining that it is not considered to be a pattern/change in placement;
- ▶ the personnel (including teachers) who were consulted in the decision;
- ▶ the students' IEP with an explanation of how the students will be provided with services that continues to meet his/her IEP and general education curricular needs;
- ▶ a description of the duration, frequency and location of the services provided; and
- ▶ Procedural safeguards.
  - *Strongly consider either using the CCC process or to follow up with a CCC soon after providing notice.*

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### Catching Flaws in IAES development

- ▶ Did the CCC review the student's IEP and plan for how the goals and objectives would continue to be addressed through the IAES?
- ▶ Did the CCC determine the duration of service from beginning date to end date?
- ▶ Did the CCC review all the general education courses that the student participates in and develop of plan for how those areas would be addressed through the IAES?
- ▶ Did the CCC determine the frequency and location of the services provided?

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Does the documentation support the manifestation determination made by the CCC?

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### What should be covered at the manifestation determination conference?

It is important to focus the MDC discussions.

- A MDC is not to determine whether the misconduct did or did not occur. *(This is an issue for an expulsion meeting.)*
- A MDC is not to determine or review whether the recommended discipline is appropriate for the offense. *(This is an issue for an expulsion meeting.)*
- The MDC must not presume relatedness based categorically on the student's disability.

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### What must be reviewed in a Manifestation Determination Conference?

*Components of a Review.* Within 10 school days of any decision to change the placement of a child with a disability, the case conference shall review all relevant information including:

- the student's IEP;
- any teacher observations; and
- any relevant information provided by the parents.

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### What decisions must be documented?

After reviewing the relevant information the MDC will determine:

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

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### Catching Flaws in MDC determination

▶ Has the MDC provided prior written notice of:

- A description of the proposed or refused action;
- An explanation of why the action was proposed or refused;
- A description of each evaluation, procedure, assessment, or record used as the basis for the proposed or refused action.

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Have we considered all requisite data when making a manifestation determination?

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What needs to be prepared in advance of a manifestation determination conference?

Review the student's educational file:

- ▶ What has been the trend of the student's IEPs for the past several years?
- ▶ What are the areas of focus for goals and objectives?
- ▶ What information is provided in the present levels of performance that is relevant to the behavior in question?

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*MDC preparation  
- continued-*

- Has there been any functional behavior assessments or behavior intervention planning?
- What has been the level or intensity of special education programming over the past couple years?
- How does the current IEP address behaviors that relate to the misconduct?
- Was the IEP being followed in all settings by all persons?
- What trends are seen in the evaluations that have been conducted?

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### *MDC preparation - continued-*

- What behaviors occurred on the date of the incident?
- How did the student respond in the investigatory interview?
- Who was involved in observing the misconduct?
- Have similarly related behaviors been observed prior to this misconduct?
- What and which teacher observations will be shared?
- If this MDC concerns cumulative suspensions, then review discipline history.

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What documentation needs to be in place to support a FAPE for interim alternative education services?

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### **If related, what next?**

If the misconduct is related to the student's disability, then the CCC:

- must conduct a FBA and implement a BIP (if none has been done before);
- review and/or revise any existing BIP to address the behavior; and
- return the student to the former placement before the incident occurred, unless otherwise agreed to by the parent and the School.
- Even if the conduct is related, CCC may still recommend the removal of the student to an IAES ***only if weapons, drug, or serious bodily injury was involved up to 45 days.***

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## If not related, what next?

If the misconduct is not related to the student's disability, then:

- School personnel may apply the relevant disciplinary procedures to the student in the same manner and for the same duration as students without disabilities
- For instance, the CCC may recommend the removal of the student to an interim alternative educational setting
- During any removal the student must continue to receive appropriate services as defined in 511 IAC 7-44-5(f)(1)-(3)
- A copy of the CCC recommendation is submitted to the expulsion examiner for the expulsion hearing.

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## How does the documentation reflect the following?

Appropriate services that enable the student to:

- continue to participate in the general education curriculum, although in another setting;
- progress toward goals set out in the student's IEP; and
- receive FBA/BIP services and modifications that are designed to address the behavior violation so that it does not recur, if appropriate. (If deemed not explain appropriate, why not.)

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## Catching Flaws in IAES Development

- ▶ Did the CCC review the student's IEP and plan for how the goals and objectives would continue to be address through the IAES?
- ▶ Did the CCC determine the duration of services from beginning date to end date?
- ▶ Did the CCC review all the general education courses that the student participates in and develop of plan for how those areas would be addressed through the IAES?
- ▶ Did the CCC determine the frequency and location of the services provided?

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## Appropriateness of IAES

- ▶ Each decision will be a case by case analysis; however, previous IHO decisions can assist the CCC decision for an IAES placement.
  - While the IAES does not have to comport with LRE, the IHO noted that the amount and type of instruction should be of sufficient duration and frequency to meet IEP goals based on student's abilities. - 109 LRP 75165.
  - School sending work packets home to the student for him to complete was not appropriate IAES; school should have provided a program to attend at which services were provided - 115 LRP 16763.
  - IHO concluded that the proposed IAES at an alternative school with smaller class sizes and more structure was an appropriate placement for a student who if stayed in current placement would "substantially likely to result in injury to student or others" - 111 LRP 21577.

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## How to Catch and Correct Flaws in Your Documentation to Support FAPE and Discipline

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