

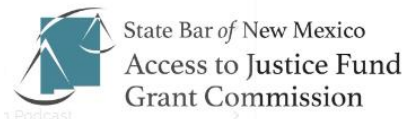


Disability Rights New Mexico (DRNM) is the designated protection and advocacy agency for the state of New Mexico. DRNM's mission is to protect, promote, and expand the rights of individuals with disabilities.

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Know Your Rights: *Disciplinary Protections for Students with Disabilities*



Disability Rights New Mexico
A Self-Help Guide

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Introduction

What is the purpose of this guidebook?

This guidebook is to help students and their parents advocate for themselves when a school seeks to impose disciplinary measures. Sometimes a student with disability-related behaviors suddenly faces disciplinary actions by school administrators for events that may be beyond the student's capacity to control. The school's actions may include a suspension, expulsion, a change of educational placement, or other hard situations to navigate.

This guide explains what the student and parents' rights are in these difficult situations. It describes the typical process for dealing with disciplinary issues, how you can prepare to advocate for your student and yourself, and how you can appeal or respond to disciplinary measures if they are imposed. This guidebook also can help you

prepare for the future to lessen the chances of these situations occurring again.

Behavior as Communication

Disability Rights New Mexico (DRNM) recognizes that all behaviors are a form of communication. When a school fails to meet a student's needs, a student may demonstrate behaviors that the school finds undesirable. The school may try to punish the student according to the district's "discipline matrix" or code of conduct. However, students with disabilities have special legal protections during these times and may not necessarily be disciplined according to the school district's rules. Students with Individualized Education Programs (IEPs), 504 Plans, or students suspected of having a disability are entitled to have their actions reviewed in *light of their disability* if they result in 10 or more days out of school. This means that the student, parents, teachers, therapists, administrators, and others should consider the impact of the student's disability on the

student's behaviors. Since all behaviors are some form of communication, it is the school's obligation to support and respond to behaviors in a manner that is consistent with the student's abilities.

Does my student have special protections?

There are three categories of students who may have special disciplinary-related protections. These include:

1. Students who receive special education services through an IEP.
2. Students who have a 504 Plan that provides accommodations or modifications to access school.
3. Students who may be suspected of having a disability, and the school district is aware of these concerns. This category can include students who are in the Student Assistance Team (SAT) process or Multi-Level Systems of Support (MLSS) process if the parent has expressed a concern **in writing** to a teacher or

administrator that the student may need special education or related services. It also includes students who are currently being evaluated for a disability, or students whose parents have requested from the district evaluations to determine the presence of a disability. Finally, it includes students whose teacher or other school personnel have raised specific concerns about a pattern of behavior directly to the school's special education director or other supervisory personnel.

Disciplinary Proceedings

This section will discuss the different types of student disciplinary proceedings and how you can prepare for them. Every school district in New Mexico operates a bit differently. It is best to ask for your school district's discipline handbook or code of conduct right away so that you can read it alongside this guidebook.

As you prepare for a disciplinary proceeding—usually a hearing held by the district’s disciplinary hearing officer—there are some general things to keep in mind.

First, it is useful to gather documents about your student’s disability. This includes evaluations from the school or community providers that have been conducted for the student, such as psychological evaluations, academic evaluations, social work reports, progress notes from therapists, etc. Any documents that can explain your student’s behaviors in light of their disability may be helpful. These records may explain that your student did not purposefully break school rules, have the skill to avoid the behavior, or understand the potential consequences of their actions. For instance, a student with autism may not understand the powerful impact of using certain words or phrases in a social setting with peers. A student with an intellectual disability may not be able to adequately think through the consequences of engaging in a physical altercation. A student with ADHD or

Tourette Syndrome might act impulsively or involuntarily, in ways that are difficult or impossible to control. There are countless ways in which a student’s disability may impact their behaviors, and as their advocate, you will need to “connect the dots” so that the school understands the relationship between their disability and their alleged actions.

Second, it may be useful to gather the support of professionals who know your student and understand their behaviors in light of their disability. This could include people like your student’s therapist, social worker, community support specialist or other caregiver (if your student is on a state waiver), or other people close to your student. These folks may be able to provide powerful testimony about your student and their disability.

Third, if necessary, familiarize yourself with research on your student’s disability and how it relates to unwanted behaviors. There are many organizations that can provide you with disability-specific

information regarding behaviors. For many disability categories, there is an “association,” “institute” or “society” web page where helpful information can be found—for example, Autism Society, Tourette Association of America, or Child Mind Institute. For basic information and links to other sites online, you can visit the New Mexico Public Education Department’s page on Disability Categories: <https://webnew.ped.state.nm.us/bureaus/special-education/disability-categories/>.

You may want to research these organizations online and create a file of information specific to your student’s disability and how it impacts their behavior and understanding of consequences. You may be able to present these resources in a manifestation determination review or disciplinary hearing.

Fourth, it is important to ask for all documents or exhibits which the school plans to use at the hearing. In the disciplinary notice that you receive telling you the time and place of the hearing, there

is supposed to be contact information for a person who you can ask for this information, or request a delay of the hearing. If that person’s name is not given in the notice, you can ask whoever signed the letter, or the school principal, for the information. Your student is entitled to a decision based solely on the evidence presented at the disciplinary hearing. Obtaining that information ahead of time will help you be ready to respond to their arguments, rather than getting this information for the first time on the day of the hearing. It may also influence the evidence you decide to bring to the hearing on behalf of your student.

Finally, it is important to understand what specific school rules/policies the school is saying your student has violated. The disciplinary notice should name the policy violation(s), which you can then go read more about in the school’s code of conduct, student handbook, or “discipline matrix.” If you do not know where to find the policy book, you can ask the school principal or another administrator. When

you read the actual language of the policy or policies your student supposedly violated, it can help to come up with arguments about how the student's conduct may not fit the description in the policy. You can also use this information to contest evidence the school intends to use at the hearing that is not relevant to the specific policy violation(s) alleged against your student. For instance, prior instances of absenteeism might not be relevant to a disciplinary hearing regarding a physical altercation with another student.

Types of Disciplinary Proceedings

Manifestation Determination Review (MDR)

If your student has a disability and is in special education, has an IEP, has a 504 Plan, is being evaluated for special education, OR if you have written to the school about your concerns that the student needs special education, OR if the special education director or other school supervisors have been told by teachers or

staff that there is a concerning pattern of behavior, there is an extra step that needs to happen before the student can be long-term suspended, expelled, or given a change of placement. This extra step is called a manifestation determination review (MDR). A MDR is a meeting where the participants ask two questions: (1) whether the student's conduct was caused by or directly related to their disability, and (2) whether the conduct was a direct result of their IEP or Behavior Intervention Plan (BIP) not being implemented by the school.

If the answer to either of these questions is yes, the school cannot go forward with the proposed discipline, and there will not be a disciplinary hearing. There is one exception to this rule, though: If the conduct involved serious bodily injury, illegal drugs, or dangerous weapons, the school can put the student in what is called an interim alternative educational setting (IAES) for no more than 45 school days, even where the behavior was caused by the disability or the IEP wasn't followed.

If you believe your student is entitled to a MDR and there has not been one scheduled before the disciplinary hearing, you can raise the issue in writing with the school principal and/or the person whose name is on the disciplinary notice.

You can invite people that you want to invite to the MDR meeting. This could include (for example) your student's therapist, a knowledgeable family member, or someone else who has a good understanding of your student's disability and how it impacts their behavior.

Long-Term Suspension and Expulsion Hearings

When the school is proposing a long-term suspension or expulsion of a student, it is required to hold a hearing and to send you a notice giving you information about the student conduct at issue, the school rules or policies allegedly violated, and the disciplinary penalty proposed. The notice will also tell you where and when the disciplinary hearing will be held. It should

also tell you how to request a delay of the hearing if you need one.

The hearing must be scheduled for a date no later than 10 school days from the date the parent receives the notice of hearing.

In almost all cases, it is important for you and your student to attend the hearing to try to convince the hearing officer that the district should not go through with the proposed long-term suspension or expulsion. If you and the student do not show up (if you "waive" the hearing), the district can and usually will go ahead with the hearing and impose the discipline proposed. The student is entitled to bring their own attorney, advocate, or other representative to the hearing, but only if the district is given 72 hours' notice that the person will be at the hearing representing the student. You can also request to delay the hearing if you need more time to locate an attorney, advocate, or other representative.

The disciplinary hearing is very informal compared to a trial in court. Although the participants are expected to be polite and respectful, everyone speaks directly to the hearing officer, who is in charge of the discussion.

At the hearing, the school will present its version of the facts related to the proposed discipline. It will usually also present other information, like the student's current grades, attendance records, past disciplinary actions or incidents, and anything else that might be relevant to the hearing officer in making their decision. As mentioned above, the district is supposed to give you all of the documents, records, etc. that they plan to use at the hearing ahead of time if you have requested it ahead of the hearing. If they have not, and you are seeing the documents for the first time that day, you can ask for time to look over what they have given you.

At some point during the hearing, the student and/or their representative(s), including the parent(s), will be given the

chance to present the student's version of the facts. When giving the student's facts and arguments about why the proposed discipline should not happen, you can try as much as you can to tie the arguments to the school's documents/records or to documents you have brought to show the hearing officer. It can also be helpful to explain why you believe a less serious penalty (for example, a shorter suspension, or in-school suspension, etc.) is more appropriate.

It is important to consider whether the student should "testify" at the disciplinary hearing, particularly if criminal charges have been brought or if there is a risk of criminal charges. In those cases, it might be good to consult with the student's criminal defense attorney about whether it is a good idea for the student to explain their version of what happened. This is particularly true because the hearing officer will often put pressure on the student to "accept responsibility" and admit to their actions. This might be appropriate and helpful sometimes, but it can also have bigger consequences if there

is a risk of criminal charges being brought. Attendees at school disciplinary hearings can be asked to later testify in court about what the student said at the school disciplinary hearing.

The district is required to record the hearing, and it can be helpful to request a copy of that recording during the hearing, particularly if there might need to be an appeal later.

The hearing officer might announce their decision at the end of the hearing with a written notice, or might send the notice later, within 5 working days of the hearing. The decision should explain whether the district proved that the student violated school rules or policies, and if so, what penalty is being imposed, including the duration of any suspension or expulsion.

New Mexico Public Education Department rules explain more of the details of disciplinary hearings. They can be found by searching “6.11.2 NMAC” in your web browser, and looking for the section called

“Long-term suspension and expulsion.” The section on hearings and notices of hearing is currently numbered 6.11.2.12(G)(4).

Actions that can be taken if the long-term suspension or expulsion is imposed:

Disciplinary Appeal. A student has a right to appeal the disciplinary decision if the penalty is: (a) expulsion, (b) long-term suspension, (c) in-school suspension of longer than one semester, or (d) denial or restriction of student privileges for one semester or longer. An appeal is done by sending a letter or email to the “review authority” named in the hearing officer decision within 10 school days after the student is informed of the decision. (When in doubt, you can send the appeal to the superintendent and the school principal.) The appeal should be in writing and should explain (1) why the facts that came out at the hearing do not support the decision that was made, (2) if applicable, any new facts that came out since the hearing that

would change the decision, and (3) why the penalty imposed is not appropriate, and a lesser penalty is more appropriate. More details about disciplinary appeals can be found at NMAC 6.11.2.12(G)(4)(n), (q), (r).

Expedited Request for Due Process. If a student and parent disagree with the results of a MDR, or with a disciplinary decision changing the placement of the student, they can request an expedited due process hearing. The process is similar to the one described in the “Planning for the Future” section below, except that it moves much more quickly. The expedited due process hearing must be held within 20 school days of the date the request is filed, and the due process hearing officer’s decision must be made within 10 school days after the hearing.

Request for Expedited Evaluation If a student with a disability has been long-term suspended or expelled but has not yet been identified as needing special education or related services, the parent can request an

expedited evaluation. The request would be in writing (letter or email) to the superintendent, school principal, and special education director, and can include any history of previous requests for evaluation. It would refer to the disciplinary hearing officer’s decision, and specifically request expedited evaluation and provision of special education and related services.

Ongoing Rights for Students during Disciplinary Periods

If a student with an IEP is long-term suspended/expelled, they are still entitled to services. The student must continue to receive educational services to enable them to participate in the general education curriculum and progress toward the goals in their IEP. They are also entitled to receive, if appropriate, a Functional Behavioral

Assessment (see below) and behavior intervention services and modifications that are designed to address the behavior at issue so that it does not happen again.

After the disciplinary decision is made, the district should send a notice of an IEP team meeting to discuss what special education and services the student will receive, and in what setting, during the period of long-term suspension or expulsion.

Planning for the Future

Once your disciplinary situation is beginning to resolve, it's good to think about how to avoid this in the future.

There are a number of proactive steps you can take to get your student the support they need while also setting up future protections.

- **Request a Functional Behavioral Assessment (FBA).** You may consider asking for an FBA to be conducted for

your student. A FBA is a type of behavioral evaluation in which a professional observer/evaluator collects data regarding the student's behaviors in the school setting over a pre-determined period of time. The data is then analyzed to determine if there is a pattern of behaviors that materialize due to certain circumstances. For instance, a student with sensory processing disorder may demonstrate certain behaviors every day when exposed to the sights, sounds, and smells of the school cafeteria. A FBA will help determine if there is a pattern of behaviors that the school can identify and proactively address.

- **Develop a Behavior Intervention Plan (BIP).** If an FBA is conducted and the data indicates a strong pattern of behaviors, a BIP may be warranted. A BIP is developed by the student's IEP, 504, or other team in order to address the student's behaviors. The BIP usually targets

one or two specific undesired behaviors. The plan should include ways for staff to intervene when the student needs behavioral support, including de-escalation techniques and positive reinforcements.

- **Ask for additional evaluations.** Sometimes students with disabilities do not have all their needs identified. Additional evaluations, such as a neuropsychological exam, might be helpful to pinpoint the full scope of the student's needs.
- **Request an expedited initial Special Education evaluation. As explained above,** if your student has not been identified as having a disability and you are concerned that they need special education, this is a good time to request an expedited evaluation for special education services. You can ask (preferably in writing) for the school district to conduct evaluations in any areas that concern you about your student's development. Under

the normal timeline, the school district has 15 school days to respond to your request and let you know whether or not it agrees to do the evaluation, and to seek your consent if it does agree. The school district has 60 calendar days from the date of you sign a consent form to evaluate your student. If the district refuses to test your student for special education eligibility, you have the right to appeal their decision. Although there is no clear standard on a timeline for an "expedited" evaluation, it is reasonable to expect that the district will respond more quickly than 15 school days, and will complete the evaluation sooner than 60 days from the time you sign a consent form.

Other Ways to Advocate

Depending upon your situation, there may be other avenues available to advocate for

your student. These are the most commonly used ones.

- **Filing a state complaint with Special Education Division of the New Mexico Public Education**

Department. If you believe that the school district failed to provide your student with a Free and Appropriate Public Education (also known as FAPE), you can file this type of complaint. A neutral, state-hired investigator will be assigned to review the case and produce their findings within 60 days of receiving your complaint. A state complaint must be filed within one year of the adverse action(s) taken against your student. Learn more about an NMPED complaint here:

<https://webnew.ped.state.nm.us/bureaus/special-education/dispute-resolution/state-complaint/>

- **Request Alternative Dispute Resolution (ADR) through the New Mexico Public Education**

Department. Again, if you believe that the school district failed to provide your student with FAPE, you can request that the New Mexico Public Education Department assists to resolve the matter. ADR consists of two pathways. The first is a Mediation process with a neutral, state-hired mediator. This results in a legal mediation agreement that you, your student, and the school district must abide. The second ADR pathway is to ask the NMPED for a Facilitated IEP (FIEP) meeting. In this scenario, a neutral IEP facilitator is hired to conduct an IEP meeting in which the student, parents, and district equally participate. It's important to note that the school district must agree to participate in the ADR process. You cannot force the district to take part. Learn more about the ADR process here:

<https://webnew.ped.state.nm.us/bureaus/special-education/dispute-resolution/>

- **Request a due process hearing against the school district with the New Mexico Public Education Department.** This is a legal proceeding in which you will appear in front of a due process hearing officer to argue that the district failed to provide your student with FAPE. In New Mexico, only the student's parents or a licensed attorney may represent the student in this legal proceeding. (In other words, a non-attorney Advocate is not allowed to provide this service in New Mexico). The hearing officer will listen to arguments from you and from the school district's attorney and make a decision in the matter. A request for due process must be made within two years of the adverse action(s) taken against your student. You can find more information here: <https://webnew.ped.state.nm.us/bureau/special-education/dispute-resolution/due-process-hearings/>

Please see above for information about making an “expedited” due process hearing request related to a disciplinary decision that results in a change of placement, or disagreement with a MDR decision.

- **File an Office of Civil Rights (OCR) complaint against the school district.** The OCR is a joint division of the U.S. Department of Justice and U.S. Department of Education. If you believe that the school district discriminated against your student because of their disability, you may consider filing an OCR complaint. OCR complaints must typically be filed within 180 days of the act of discrimination. You can file an OCR complaint online or find more information here: <https://www2.ed.gov/about/offices/list/ocr/qa-complaints.html>

- **File an Ethics complaint against an individual working for the school district.** If you believe that a district staff member or contract employee acted in an unethical matter with your student, you may file an Ethics complaint with the New Mexico Public Education Department. Most district staff are required to maintain a professional license, such as a license to teach, coach, provide therapy services, or to serve as a principal or superintendent. An Ethics complaint alleges that they acted outside their scope of practice or in a manner that is unfitting for a professional in their position. You can read more about an NMPED Ethics complaint here:
<https://webnew.ped.state.nm.us/wp-content/uploads/2018/02/Licensure-Frequently-Asked-Questions.pdf>

Glossary: Words to Know

Adverse action – when the school makes a decision that you believe to be against your student’s educational interests. Example: the school suspends your student for posting threatening content on social media while at school.

Behavior Intervention Plan (BIP) - a written plan created for a student based on the outcome of the functional behavior assessment (FBA). The FBA should identify what is causing a challenging behavior, and the BIP specifies the actions that school staff will take to improve or replace the behavior. A student is not required to have an IEP or 504 plan in order to qualify for a BIP.

Change of Placement. A change of placement is when a student with a disability has been removed from school for 10 or more consecutive days, or when there is a series of smaller removals within the

school year that are not consecutive but that add up to 10 or more days and show a pattern.

Functional Behavioral Assessment (FBA) – an assessment that seeks to identify behaviors that are interfering with a child’s learning through data collection. One or more professionals observe the student across a variety of school settings and times to collect data on the student’s behaviors. The data is then reviewed to identify patterns that can be addressed to help the student engage in desired behaviors.

Individualized Education Program (IEP)- a written plan developed to ensure that a child with a qualifying disability receives specialized instruction and related services. IEPs are developed by the parents, student, and school staff to make sure that the child receives a Free and Appropriate Public Education (FAPE). IEPs are governed by the implementing regulations of the Individuals with Disabilities in Education Act (IDEA). They must be updated at least annually by the IEP team.

504 Plan – a plan for students with disabilities that describes how the school will provide access to the student. 504 Plans are different from IEPs in that specialized instruction and services usually not provided. Rather, 504 Plans provide instructions on how the school will modify things or accommodate the student in specific ways. 504 Plans are typically in writing and are for students whose disabilities are not severe enough to require special education services, but who still require accommodations to have equal access to public education.

Manifestation Determination Review (MDR) – a special meeting held to determine if a student’s actions were the result of their disability. After the school district proposes to suspend, expel, or change the placement of a student with an IEP for 10 or more days, and before a disciplinary hearing is held, the team must decide if the student’s behaviors were caused (or had a direct relationship to) their disability, or if the event occurred because the school district failed to follow the

student's IEP. An MDR must occur if the school is considering removing the student from school or changing their placement for more than 10 days. This meeting must happen if the student has been expelled or suspended for 10 or more days already during the current school year. Whole days and partial days count towards the 10-day total. See "Disciplinary Proceedings" section above for more information about MDRs.

School Resource Officer (SRO) – SROs are typically sworn law enforcement officers employed by the school district to promote safety and prevent crime in schools. Although it may be helpful for an SRO to know about your student's disability, they are usually not a member of your student's educational team. They do not have authority to make decisions or give input about your student's educational placement or other matters related to the provision of services.

Threat Assessment – an evaluation to determine if a student poses a threat of

violence to the school. It generally is conducted by a professional or team of professionals who will attempt to determine if the student has intent and means to carry out a violent threat. Some districts are now requiring a threat assessment before allowing students back to school after being suspended. This is a quickly-growing area of law and there is much debate as to the effectiveness and legality of mandated threat assessments.

You can find more self-advocacy information here:

<https://drnm.org/self-advocacy>