



**Question:** Is a district permitted to “emergency exclude” a student with a disability and an IEP from school without following special education discipline requirements?

**Answer:** No. All disciplinary removals for a student with a disability and an IEP must follow special education discipline requirements. Districts sometimes use different terms to describe removals, such as “sending the child home” due to behavior, “emergency exclusion,” or “suspension.” Regardless of the term used, if a district excludes a student with a disability and an IEP for part or all of the school day, or even an indefinite period of time, then the district must follow special education discipline requirements. Special education discipline requirements apply to the following:

- Children who are receiving FAPE under IDEA
- Publicly funded preschool programs
- Public charter schools
- Virtual schools / virtual setting
- Correctional facilities
- Publicly placed private school students for providing FAPE
- Parent consented to some but not all special education services
- Child not yet determined IDEA eligible, but LEA is deemed to have knowledge that the child is a child with a disability.

Neb. Rev. Stat. § 79-264(b) permits a district to exclude a student from school “[i]f the student’s conduct presents a clear threat to the physical safety of himself, herself, or others, or is so extremely disruptive as to make temporary removal necessary to preserve the rights of other students to pursue an education.” If a district excludes a student from school under the requirements of this statute, the district can and must also follow special education legal requirements. The U.S. Department of Education’s Office of Special Education and Rehabilitative Services (OSERS) makes this clear in its July 19, 2022, guidance, [\*Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions\*](#), Question and Answer E-5, as well as OSERS’ definition of “informal removal” and what districts must do when a child is informally removed.

An exclusion under Neb. Rev. Stat. § 79-264(b) meets the definition of an “informal removal” in OSERS’ guidance, requiring the district to follow “IDEA’s requirements to the same extent as disciplinary removals by school personnel using the school’s disciplinary procedures.” OSERS defines an “informal removal” as “action taken by school personnel in response to a child’s behavior that excludes the child for part or all of the school day, or even an indefinite period of time.” A district’s decision to exclude a student under Neb.





Rev. Stat. § 79-264(b) based on “the student's conduct” is the same as removing a student “in response to a child's behavior,” as contemplated in OSERS' guidance, requiring a district to follow special education discipline requirements regarding that removal.

Additionally, when districts exclude a student under Neb. Rev. Stat. § 79-264(b), the district will often undertake a risk or threat assessment of the student. This often provides helpful information and is not prohibited by special education law. OSERS issued the following guidance to assist a district in ensuring it provides FAPE to a student while school personnel are conducting a risk or threat assessment of a student with a disability.

Under IDEA, the procedural safeguards and right to FAPE for a child with a disability must be protected throughout any threat or risk assessment process, including the provision of services during any removals beyond 10 cumulative school days in a school year. 34 C.F.R. §§ 300.101 and 300.530(d). States and LEAs should ensure that school personnel involved in screening for, and conducting, threat or risk assessments of children with disabilities are aware that the child has a disability and are sufficiently knowledgeable about the LEA's obligation to ensure FAPE to the child, including IDEA's discipline provisions. Where appropriate, the LEA can ensure that the school personnel conducting the threat or risk assessment have access to, and are coordinating with, the child's IEP Team.

Coordination with the child's IEP Team prior to reaching the threat or risk assessment determination can allow for providing additional or different behavioral supports to mitigate or eliminate the perceived threat or risk. In addition, the IEP Team can provide valuable information about: (1) the nature of the child's disabilities and the needs of the child; (2) whether positive behavioral intervention and supports to address the specific behavior(s) have been implemented with fidelity, and, if so, the effectiveness of those supports; (3) specific additional supports and services that could be provided to mitigate or eliminate the risk of harm, without requiring exclusion from school; and (4) any proposed changes to the child's IEP or review of placement that are in process. When appropriate, the LEA could seek an expedited due process hearing to seek a removal of the child to an IAES [interim alternative education setting] for up to 45 days if returning the child with a disability to the previous placement is substantially likely to result in injury to the child or to others. 34 C.F.R. § 300.532(a). Regardless of the risk or threat assessment process utilized, the





LEA is responsible for ensuring that IDEA's discipline protections are followed and that FAPE is made available as appropriate.

OSERS' guidance makes clear that when districts exclude a student under Neb. Rev. Stat. § 79-264(b), districts must follow special education discipline requirements. Special education discipline requirements differ based upon the length of removal.

A **short term removal, not exceeding 10 consecutive school days, and not cumulating to more than 10 school days**, does not require the district to hold an IEP Team meeting or provide services. [34 C.F.R. § 300.530\(b\)\(1\), \(d\)\(3\)](#); [92 Neb. Admin. Code §§ 51-016.02B, 016.02D4](#).

All **short term removals which include or are subsequent to the 11th cumulative day, but do not constitute a change of placement**, require the district to provide services on the 11th cumulative day. These services are those necessary to enable the child to:

- 1) Participate in the general education curriculum (although in another setting); and
- 2) Progress toward meeting the goals in the IEP.

[34 C.F.R. § 300.530\(d\)\(4\)](#); [92 Neb. Admin. Code § 51-016.02D5](#). The district is not required to hold a manifestation determination. [34 C.F.R. § 300.530\(e\)](#); [92 Neb. Admin. Code § 51-016.02E](#). School personnel, in consultation with at least one of the child's teachers, determine the services to be provided. [34 C.F.R. § 300.530\(d\)\(4\)](#); [92 Neb. Admin. Code § 51-016.02D5](#).

A **removal for more than 10 consecutive days, or another removal that cumulates to more than 10 school days, and shows a pattern of removal constituting a change of placement** require the district to immediately begin providing the services previously indicated. [34 C.F.R. §§ 300.536\(a\), 300.530\(d\)](#); [92 Neb. Admin. Code § 51-016.01A, .016.02D](#). The IEP Team must meet to make a manifestation determination. If the behavior is a manifestation of the disability, the IEP Team must develop a FBA and BIP, or review the existing BIP, and make any changes needed to address behavior and return the student to their IEP placement unless the parent and district agree otherwise. [34 C.F.R. 300.530\(e\), \(f\)](#); [92 Neb. Admin. Code § 51-016.02E, 016.02F](#). The IEP Team determines the services and the place where the services will be provided. [34 C.F.R. §§ 300.530\(d\)\(5\), 300.531](#); [92 Neb. Admin. Code § 51-016.02D6](#).





A district may remove a student to an **interim alternative education setting (IAES) for up to 45 school days** for discipline resulting from weapons, drugs, or serious bodily injury. The district is required to immediately begin providing the services previously indicated. 34 C.F.R. § 300.530(d)(1); 92 Neb. Admin. Code § 51-016.02D. The IEP Team must meet to make a manifestation determination, determine the IAES setting and services, regardless of the manifestation determination, and determine if a FBA and BIP are appropriate. 34 C.F.R. § 300.530(d)(1), (d)(5); 300.531; 92 Neb. Admin. Code § 51-016.02D.

If the district believes that returning the child to the setting specified in the child's IEP would be **substantially likely to result in injury to the child or others**, the district may request an expedited due process hearing through the Nebraska Department of Education to request a **special education due process hearing officer to order a 45 school day IAES**. 34 C.F.R. § 300.532; 92 Neb. Admin. Code § 51-016.04; Letter to Huefner, OSEP, March 8, 2007. The burden of proof is on the district to justify the special education due process hearing officer ordering this removal. The IEP Team must meet to propose IAES services and determine if a FBA and BIP are appropriate. The special education due process hearing officer determines the services provided during removal.

You can find more information on special education discipline requirements, including resources that can be used to reduce the use of disciplinary removals on the U.S. Department of Education website, <https://sites.ed.gov/idea/topic-areas/#Discipline-Behavioral-Supports>.

