Administrator Strategies for Addressing Students with Disabilities Who Exhibit Dangerous or Disruptive Behaviors

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WEBINAR PRESENTATION NOTES

I. INTRODUCTION

With the staggering increase in the number of students with significant mental health issues in schools, it goes without saying that it is important that school personnel understand what they can or cannot do legally when a student with a disability presents dangerous or disruptive behaviors. This session will provide an overview of statutory and regulatory provisions related to the management of dangerous and/or significantly disruptive students with disabilities. Among other things, the IDEA's 45-day interim alternative educational setting provision will be addressed, as well as other options that may be available when "special circumstances" are not present.

II. COMMON QUESTIONS AND ISSUES REGARDING OPTIONS FOR ADDRESSING THE BEHAVIORS OF DANGEROUS/DISRUPTIVE STUDENTS WITH DISABILITIES

A. Exceptions to the Disciplinary "Change of Placement" Procedural Requirements

Most administrators are keenly aware of the "rules of discipline" that generally apply to students with disabilities and the "procedural hoops" that have to be cleared in order to properly remove a student with a disability. But are there any exceptions to those rules? The following questions will address this issue.

Question #1:

Are there any exceptions to all of the "procedural hoops" (i.e., the "10-day rule," the manifestation determination requirement, etc.) for students who are dangerous or significantly disruptive?

Answer:

There is a "special circumstances" provision under the IDEA which affords school personnel the option of unilaterally removing (immediately and without an IEP team meeting) a student with a disability to an interim alternative educational setting (IAES) for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the student's disability. However, this exception applies only if the student—

a. 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;

b. 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

c. 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(g).

Question #2:

So, what about a student who only threatens dangerous behavior?

Answer:

The "special circumstances" provisions discussed above do not apply. According to the clear language of the "special circumstances" provision, the student must have actually carried or possessed a weapon; knowingly possessed or used illegal drugs; or inflicted serious bodily injury upon another person. Threatening to do so is not sufficient to trigger the use of the 45-day "special circumstances" provision.

Question #3:

When one of the special circumstances actually applies and the student is moved to an IAES for 45 days, is the school still required to conduct a manifestation determination?

Answer:

Yes, according to the U.S. Department of Education:

a. "*Questions and Answers on Discipline Procedures*," 52 IDELR 213 (OSERS 2009), Question F-4. Even though the manifestation determination is required, the student may remain in the IAES, as determined by the IEP team, for not more than 45 school days, regardless of whether the violation was a manifestation of his/her disability.

But see:

b. *A.P. v. Pemberton Township Bd. of Educ.,* 45 IDELR 244 (D. N.J. 2006). ALJ's ruling that school district had improperly suspended a student for 20 days for drug use is overruled. Though the district failed to conduct a manifestation determination review within 10 days of the student's suspension for marijuana use, this was not sufficient error to justify ordering the student's return to school. IDEA 2004 permits districts to remove students for up to 45 days for drug use or possession, so the district's failure to hold a manifestation determination review was a harmless error. The school district could have suspended her for up to 25 days longer without regard to the outcome of the manifestation determination.

Question #4:

What is a "weapon" for purposes of the 45-day IAES "special circumstances" exception?

Answer:

Although some schools would rather use their own definitions (or a definition of weapon found in state and local laws), for purposes of the "special circumstances" disciplinary provision, a "weapon" under the IDEA has the meaning given the term "dangerous weapon" under the U.S. Code as follows:

> 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 pocketknife with a blade of less than 2 and 1/2 inches in length.

18 U.S.C. § 930(g)(2).

There have been some administrative decisions addressing the question of what constitutes a "dangerous weapon" for purposes of using the 45-day IAES "special circumstances" provision:

a. *Pocono Mountain Sch. Dist.*, 117 LRP 23351 (SEA Pa. 2017). Although the district's MDR team made an incorrect decision regarding manifestation, the district was authorized to move the student to the IAES placement where the student was observed poking a classmate in the neck with a pencil on one occasion and, one week later, poked classmates with 9-inch sewing shears. The sewing shears fit the definition of "weapon," because they were "readily capable of causing serious bodily injury through extreme physical pain or disfigurement."

b. *California Montessori Project*, 56 IDELR 308 (SEA Cal. 2011). Even where the 8 year-old student with an emotional disturbance pointed a pair of scissors at a classmate in an apparent fit of anger, the charter school was not entitled to move him to an IAES and must return him to the general education classroom immediately. An instrument or device qualifies as a "weapon" under the IDEA only if it is used for or capable of causing death or serious bodily injury. The scissors that this student pointed at his classmate did not meet that standard, because the scissors had dull blades and rounded tips and could cut paper only when the blades came together. As such, the scissors were not inherently dangerous, nor could the student use the scissors to inflict bodily injury. In this case, the student held the scissors with the blades in an open position, which would prevent them from cutting, and even if he had made contact with the other student's body with the scissors, the scissors were only capable of causing cuts or some physical pain, rather than "serious bodily injury." Thus, the scissors did not constitute a "weapon" as defined by the IDEA.

c. *Upper Saint Clair Sch. Dist.*, 110 LRP 57903 (SEA Pa. 2010). While the student with ADHD might not have meant to bring the knife with dual blades to school, it constitutes a "weapon" under the IDEA and the district had full discretion to remove him to an IAES for up to 45 school days. It is also irrelevant that the knife in question included non-weapon tools, such as a corkscrew. Because it had cutting blades of 2 and ½ and 3 inches, it is a weapon. In addition, whether the conduct was connected to a disability is irrelevant, as the IDEA regulations allow for the removal "without regard to whether the behavior is determined to be a manifestation of the child's disability."

d. *In re: Student with a Disability*, 50 IDELR 180 (SEA Va. 2008). The parents' claim that awls—metal spikes that are approximately 1 and ¾ inches long—do not meet the definition of "weapon" is rejected. Although the awls could be used for leatherworking, they fall within the law's definition of a weapon. Under the facts in this case, the awls carried to school were readily capable of causing serious bodily injury and, if misused by the student, were undoubtedly capable of injuring his victims, including notably causing the loss or impairment of an eye. In addition, the Fourth Circuit has held that "an object need not be inherently dangerous to be a dangerous weapon. Rather, innocuous objects or instruments may become capable of inflicting serious injury when put to assaultive use." *U.S. v. Sturgis,* 48 F.3d 784, 787 (4th Cir. 1995). The evidence here establishes that the student put the awls to "assaultive use" by brandishing them (and the pen in which he carried them) to threaten and intimidate other students and to extort money. The student admitted that he carried the awls to school to scare some of his peers and that he wanted other students to believe that the pen containing the awls was a weapon. Thus, the awls constituted a "weapon" under Virginia law and a "dangerous weapon" under the IDEA.

e. *Scituate Pub. Schs.*, 47 IDELR 113 (SEA Mass. 2007). Where sixth-grader with Asperger Syndrome, ADHD and LD pulled on the principal's necktie when he found out that he would not be allowed to leave school early did not trigger the 45-day discipline exception. The student did not carry or possess an object that was readily capable of causing death or serious bodily injury, so there was no weapon offense. The necktie did not fall within the statutory definition of a weapon and there was no indication that when the student grabbed and pulled the tie, he exercised any control over it. Rather, he grabbed the tie and held it for a few seconds while it was around the principal's neck.

f. *Anchorage Sch. Dist.*, 45 IDELR 23 (SEA Alaska 2005). While scissors per se are not dangerous, it is their use for other than normal purposes which can make them fit within the definition of a weapon, as they could be capable of producing injury or death if used inappropriately. When the 11 year-old student with Prader-Willi disorder lunged at his teacher with a pair of scissors, it was clear from the testimony of the teacher that she felt that she was put in danger. Thus, the principal had the right to suspend the student for a period of 45 school days because his use of the scissors constituted use of a weapon under the IDEA. It does not matter whether the student, because of his disability, would not have had the requisite intent to commit a felonious assault.

g. *Chester Upland Sch. Dist.*, 35 IDELR 104 (SEA Pa. 2001). A cigarette lighter with a retractable blade is a "weapon" under the IDEA and the district did not err in removing the student to an IAES for 45 days.

h. *Anaheim Union High Sch. Dist.*, 32 IDELR 129 (SEA Cal. 2000). Although the student used a paper clip to cut another student's neck on the school bus, the paperclip was not a "weapon" under the IDEA. The district did not show that the student used it to cause death or serious bodily injury or that the paper clip was "readily capable" of inflicting such harm.

i. *Alameda Unif. Sch. Dist.*, 32 IDELR 159 (SEA Cal. 2000). Because neither the district nor the parent provided information about the size of the knife that the student brought to school, no determination can be made as to whether the knife is a "weapon" under the IDEA.

j. *Independent Sch. Dist. #831*, 32 IDELR 163 (SEA Minn. 1999). The fact that a student used a pencil to poke a classmate in the hand did not qualify the pencil as a "weapon" under the U.S. Code or

the IDEA. Thus, the district erred in removing the student to an IAES for 45 days based upon a weapons offense.

Question #5:

What if the Superintendent insists that the federal Gun-Free Schools Act requires expulsion of the student with a disability for at least a year because the student brought a firearm to school?

Answer:

Under the Gun-Free Schools Act (GFSA), this may be true. However, there is that "special rule" contained in GFSA that provides that its provisions must be construed in a manner consistent with the IDEA. 20 U.S.C. § 7151(c). Thus, it is advisable that only where it is determined that the student's behavior was not a manifestation of disability, the student can be "expelled," as long as FAPE is provided. If the behavior was a manifestation, the IEP team will need to make the placement determination in accordance with IDEA's provisions.

Question #6:

What about the application of the GFSA to a 504-only student with a disability?

Answer:

While IDEA is mentioned in the law, Section 504 is not mentioned at all in the GFSA. However, the U.S. DOE has noted that the GFSA does not create any exceptions to any federal civil rights laws, including Section 504. *Policy Guidance – Gun-Free Schs. Act of 1994*, 21 IDELR 899 (US DOE 1994). The Office for Civil Rights (OCR) has also adopted the policy guidance provided by the U.S. DOE's Office of Special Education Programs (OSEP) in *OSEP Memorandum 95-16*, 22 IDELR 531 (OSEP 1995) with respect to students with disabilities covered by Section 504.

Question #7:

What about a definition of "illegal drug" and "controlled substance" for purposes of the "special circumstances" 45-day IAES exception?

Answer:

Remember, the special circumstance exists if a student 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. Under the IDEA, an "illegal drug" is a subset of the larger universe of "controlled substances." The term "controlled substance" is defined as "a drug or other substance identified under schedules I, II, III, IV, or V in Section 202(c) of the Controlled Substances Act (21 U.S.C. § 812 (c))." The schedules of the Controlled Substances Act are extensive and extremely detailed.

An "illegal drug," which is defined by the IDEA as a controlled substance does not include "a 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." Thus, a student could possess an illegal drug, but if it is prescribed for that student, the student would not fall under the exception for bringing it to school.

To illustrate the distinction made between a "controlled substance" and an "illegal drug" under the IDEA, consider the following hypothetical: Two students take Ritalin for ADHD. One has a prescription for Ritalin, which is a controlled substance, but it is not an illegal drug in that student's case for purposes of removal to an IAES. However, if that student sells her medication to the other student at a football game, that would trigger the special circumstances provision if she is caught. If she is not caught and the other student takes the Ritalin to school the next day and ingests it at lunch, that would be possession of an illegal drug by the second student. Right?

A burgeoning question faced by schools today relates to medical marijuana and where that fits within the definition of "illegal drug." There is not much case law regarding the issue. Due process hearing decisions seem to conflict as to whether districts must permit students to use medical marijuana on campus or permit their parents to administer the medication at school. *Compare, e.g., Maple Shade Twp. Bd. of Educ.*, 115 LRP 54898 (SEA N.J. 2015) [request for emergency order that would allow parent of a 15 year-old student with multiple disabilities to administer medical marijuana to her child at school] with *Rincon Valley Union Elem. Sch. Dist.*, 73 IDELR 25 (SEA Cal. 2018) [IEP, which prevented student from coming to school with THC oil, denied FAPE]. State law provisions must be consulted as to the use/possession/administration of medical marijuana at school.

Question #8:

What is "serious bodily injury" for purposes of the 45-day exception?

Answer:

"Serious bodily injury" is defined by the IDEA by reference to 18 U.S.C. § 1365(h)(3) (a consumer products tampering law), which defines it as bodily injury inflicted upon another person 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.

So, it is *really serious* bodily injury! It is important to note, again, that a threat to inflict serious bodily injury is not sufficient, and the fact that the student is injuring him/herself is not covered.

There are a couple of cases that provide examples of what is/is not "serious bodily injury" for purposes of the 45-day "special circumstances" exception:

a. *Southfield Pub. Schs.*, 118 LRP 11554 (SEA Mich. 2018). Where administrator suffered extreme pain from the bite, punches and kicks inflicted by the student and was prescribed muscle relaxers and pain relievers, serious bodily injury was inflicted. Further, the administrator suffered injuries limiting her range of motion in her arms and the use of her leg, requiring PT to regain full use of them.

b. *Pittsburgh Pub. Sch. Dist.*, 116 LRP 48011 (SEA Pa. 2016). No serious bodily injury occurred where principal suffered a migraine when the student punched her in the head, but the pain significantly abated when she drove herself home, took medication for migraine headaches and laid down for 30 minutes.

c. *Orange Co. Sch. Bd.*, 115 LRP 4475 (SEA Fla. 2014). Student did not inflict serious bodily injury upon a classmate when providing the classmate with a prescription pill that resulted in erratic behaviors for one day after ingestion.

d. *West Orange Cove Consol. Indep. Sch. Dist.*, 63 IDELR 148 (SEA Tx. 2014). No serious bodily injury occurred when the student struck the teacher and the teacher experienced redness, swelling and pain, but only missed one day of work to go to the doctor. The teacher only reported "soreness," and the injury was described as a "sprain" in an accident report. Further, she was able to "clearly communicate the events to school personnel and returned to her classroom immediately after the event" and there was no evidence that the teacher sought further medical care.

e. *In re: Student with a Disability*, 115 LRP 44815 (SEA N.H. 2014). Student who struck paraprofessional inflicted serious bodily injury when hitting the paraprofessional who suffered a severe concussion, including symptoms such as intense headaches, nausea, light sensitivity, lack of energy, difficulty focusing and impaired thought processes.

f. *Central Dauphin Sch. Dist.*, 115 LRP 1141 (SEA Pa. 2014). Though the principal suffered scrapes and contusions when the student struck her, she did not sustain serious bodily injury because her report of the incident did not mention pain and she was not prescribed pain medication when she sought medical treatment.

g. *Moon Twp. Area Sch. Dist.*, 113 LRP 3142 (SEA Pa. 2012). Teacher was not in extreme pain where she refused prescription pain medication and did not miss any work. Further, on the day the student struck the teacher's arm, the teacher met with the student's father, ran an errand, and returned to school to fill out paperwork, all before seeking medical treatment for the injury.

h. *Westminster Sch. Dist.*, 56 IDELR 85 (SEA Cal. 2011). District was justified in moving a 6 year-old student with autistic-like behaviors to an IAES regardless of the fact that his conduct was a manifestation of his disability. The teacher suffered a serious bodily injury when the student ran at her at full force, hitting her in the chest with his head. Doctors diagnosed her with an internal chest contusion and she was prescribed two medications that failed to resolve her pain, which she described as the worst of her life. The threshold of "extreme physical pain" was reached here where the teacher saw a physician three times in one week after her initial visit for pain. In addition, two drugs failed to provide relief, she had to curtail her daily activities, she missed a week of work and she described her pain as a "10" on a scale of one to ten. Thus, she suffered serious bodily injury.

i. *In re: Student with a Disability*, 54 IDELR 139 (SEA Kan. 2010). Although a paraprofessional suffered pain, discomfort and disorientation after being hit on the head four times by a student with his knuckles, that was not a basis for the district to place the child in an IAES. Because the paraprofessional did not suffer "extreme pain," her injuries did not fall within the statutory definition of "serious bodily injury." Though the paraprofessional reported dizziness, blurred

vision and pain that she rated a "seven" on a scale of one to 10, she was given no pain medication at the hospital and was back to normal the next day. Clearly, serious bodily injury must involve 1) a substantial risk of death; 2) extreme physical pain; 3) protracted and obvious disfigurement; or 4) protracted impairment of a bodily member, organ or mental faculty. Under the facts, the IHO correctly ruled that the injury did not fit the statute when he reasoned that "common minor symptoms from knuckle wraps to the head by a small child ... while without doubt very uncomfortable" do not fit the statutory definition of extreme physical pain.

j. *Bisbee Unif. Sch. Dist. No. 2*, 54 IDELR 39 (SEA Az. 2010). School district was not justified in moving the autistic student to an IAES based upon his kicking of the principal. Although the district claimed that the principal experienced extreme physical pain, the principal's statements and actions after the incident revealed otherwise, where he said he felt a "sharp pain" and went home for the rest of the day. Although the principal's knee was swollen, he did not seek medical attention, drove 200 miles the next day and received a cortisone injection three weeks later.

k. *Southern York Co. Sch. Dist.*, 54 IDELR 305 (SEA Pa. 2010). Student did not inflict serious bodily injury when he allegedly physically assaulted a district employee on the bus. Although the behavior was injurious and frightening, no one sought outside medical attention.

l. *Pueblo City Schs. Dist. 60*, 110 LRP 7461 (SEA Co. 2009). Striking a teacher and running into a teacher is not the infliction of serious bodily injury.

m. *Pocono Mountain Sch. Dist.,* 109 LRP 26432 (SEA Pa. 2008). The student's behavior of following another student into the bathroom and breaking the peer's nose may have been a violation of the district's "violent behavior" policy, but it did not justify removal to an IAES. Although the behavior was frightening and intimidating, a broken nose does not fit into the IDEA's narrow definition of infliction of "serious bodily injury."

n. *In re: Student with a Disability*, 108 LRP 45824 (SEA W.Va. 2008). Where the student kicked teacher's shins and stomped her toes, she did not suffer serious bodily injury. Even though her shins and toes were red after the incident, she had no bruises, bleeding or extreme pain and required no medical care.

o. *El Paso Co. Sch. Dist. Eleven*, (SEA Tx. 2007). Evidence did not establish a "serious bodily injury" where student assaulted district administrative and security personnel. Although he bit a staff member on the arm and caused injury, it was not sufficient to rise to the "stringent definition" of serious bodily injury.

p. *Tehachapi Unif. Sch. Dist.*, 106 LRP 22450 (SEA Ca. 2006). Though the student's conduct resulted in a mild concussion to another student and a broken nose to another, it did not involve serious bodily injury within the meaning of the IDEA. There was no evidence of extreme physical pain, substantial risk of death, or protracted injury.

q. *Altheimer Sch. Dist.*, 38 IDELR 149 (SEA Ark. 2003). Student's behavior, which included a fight with another student and verbal threats against the school resource officer after being accosted where disruptive, verbally abusive and insubordinate. However, the behavior did not reach the standard for justifying removal to an IAES.

B. Continuation of Services During Disciplinary Removals and the Interim Alternative Educational Setting (IAES)

Question #9:

So, if a student with a disability commits a serious offense that is found NOT to be a manifestation of the student's disability, the student can be expelled without any services, just like a student without a disability, right?

Answer:

Although the law does contemplate that the student with a disability would be subject to the same consequences that a student without a disability would face for the same behaviors and for the same duration, it is clear that this is not really true, because the language of the law also requires that even where there is no manifestation, "FAPE" must continue for the student with a disability. 34 C.F.R. § 300.101 and § 300.530(d). Thus, there is no such thing as true "expulsion" for a student with a disability.

Question #10:

What about a 504-only student with a disability? Can that student be treated like a non-disabled student and be expelled or suspended without services?

Answer:

Section 504 does not contain the same requirement to continue services for a student with a disability where the behavior at issue has been found not to be a manifestation unless a student without a disability in the same situation would continue to receive some services during an expulsion or suspension. If that is the case, the student with a disability would be entitled to the same.

Question #11:

Assuming a student with a disability under the IDEA is properly suspended for more than 10 days, "expelled" or otherwise placed in an Interim Alternative Educational Setting (IAES) through the "special circumstances" provision, what constitutes "FAPE" during that removal and who decides it?

Answer:

According to the IDEA regulations, the student's IEP team determines what will be the IAES for continued services during a long-term suspension or expulsion that is a disciplinary change of placement. 34 C.F.R. § 300.531. The regulations also provide that the student must continue to receive educational services *so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP*. 34 C.F.R. § 300.530(d)(i) (emphasis added).

The U.S. Department of Education has set out some interesting language when faced with the question of what this language means by clarifying in the commentary to the 2006 regulations that services so as to enable the child "to continue to participate in the general educational curriculum" does not mean "that a

school or district must replicate every aspect of the services that a child would receive if in his or her normal classroom. For example, it would not generally be feasible for a child removed for disciplinary reasons to receive every aspect of the services that a child would receive if in his or her chemistry or auto mechanics classroom, as these classes generally are taught using a hands-on component or specialized equipment or facilities." 71 Fed. Reg. 46716 (2006).

In subsequent commentary, DOE clarified further that:

> while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP. An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. However, the special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP.

71 Fed. Reg. 46716 (2006).

In its *Questions and Answers on Discipline Procedures* issued by OSERS in 2009, the U.S. DOE opined that what constitutes an appropriate IAES "will depend on the circumstances of each individual case." 52 IDELR 231 (OSERS 2009), Question C-1. Apparently, then, the best answer may be "it depends."

There is some decisional guidance on this issue that may be of some help:

a. *Farrin v. Maine Sch. Admin. Dist. No. 59*, 35 IDELR 189, 165 F.Supp.2d 37 (D. Me. 2001). Where the student's sale of marijuana at school was not a manifestation of his disability or his "impulsivity" problem, his "expulsion IEP" is upheld. Although the alternative program excluded art, computers and physical education, it did not foreclose the student's ability to obtain the credit or skills needed to graduate later. In addition, the program enabled him to progress in the general curriculum.

b. *Windemere Park Charter Acad.*, 111 LRP 1872 (SEA Mich. 2010). The IAES providing 75 minutes of instruction three days per week did not enable the student to continue to participate in the general curriculum and to progress toward meeting his IEP goals where the student is not receiving "anything near" the educational services that his IEP determined he needed before his expulsion. Further, he did not receive services on a daily basis as he did prior to the expulsion, and not all subjects were covered each session. Finally, the student received none of the supports in his IEP, such as extended time for completing assignments.

Question # 12:

What about the use of "home instruction" as an IAES?

Answer:

Although OSEP has opined that "home instruction" cannot be offered as a district's *only* IAES option from which IEP teams can choose, whether a student's home would be an appropriate interim alternative setting would depend on the particular circumstances of an individual case, such as the length of each removal, the extent to which the student has been previously removed from his/her regular placement, and the student's individual needs and educational goals. 52 IDELR 231 (OSERS 2009), Question C-2.

There is limited case law regarding the use of "home instruction" as an IAES. An IAES "is almost presumed to be something either more restrictive or shy of the individual's FAPE as defined in his or her IEP or both," *New Mexico Pub. Educ. Dept*., 105 LRP 44703 (SEA NM 2005). If a district places the student at home or in a more restrictive setting, some hearing officers have found that the district must be able to justify why a less restrictive IAES was not appropriate. *See, e.g., Akron Cent. Sch. Dist*., 28 IDELR 909 (SEA NY 1998); *Hawkins Co. Bd. of Educ*., 35 IDELR 23 (SEA TN 2001) [if the district has an alternative school but nonetheless placed the student at home, it should be prepared to justify why a less restrictive IAES was not the proper setting]. In one hearing decision, the hearing officer found that the district violated the LRE mandate with placement of a student in an IAES that involved a shortened school day and a homebound program "based upon administrative convenience." *Las Cruces Pub. Schs.*, 105 LRP 44660 (SEA NM 2004).

C. When Parents Challenge Removal to an IAES

Question #13:

What if the parent disagrees with the district's removal of a student to an IAES or expulsion?

Answer:

Where the district has found no manifestation and recommends a disciplinary removal to an IAES, the parent can challenge the manifestation determination or the IAES selected by "appealing" to a due process hearing officer and initiating an *expedited due process hearing*. 34 C.F.R § 300.532 (emphasis added). If the hearing officer determines that the removal was not conducted in accordance with the IDEA or that the student's behavior was a manifestation of the student's disability, the hearing officer may return the student to the placement from which the student was removed.

Unlike a typical placement challenge via a due process hearing, when a parent initiates an expedited due process hearing under the discipline provisions of the IDEA, there is no "stay-put," and the student will remain in the IAES pending the expedited decision of the hearing officer or until the expiration of the IAES time period decided by the team or the 45-days if the special circumstances provision was used, whichever occurs first, unless the parent and the SEA or LEA otherwise agree. 34 C.F.R. § 300.533.

While most of the court and hearing officer decisions regarding a parent challenge to a disciplinary removal have been decided in favor of the school district, there have been some reported cases where parents have successfully challenged a student's disciplinary removal because the school district did not follow proper procedures under the law or did not make an appropriate manifestation determination:

a. *Wyoming Area Sch. Dist.*, 118 LRP 51139 (SEA Pa. 2018). Student's expulsion denied FAPE where MDR was held without providing the parent a sufficient opportunity to participate in the process. When the district contacted the parent to schedule the MDR meeting, the parent indicated she and her attorney could not attend and asked that it be scheduled for a later date. Believing that the MDR was required to be held within 10 calendar days of the date of the incident and the requested date was the last day to make the deadline, the school district went ahead with the MDR meeting, found that the behavior at issue was not a manifestation and expelled the student. Because the process significantly impeded the parent's right to participate in educational decision-making, the expulsion is reversed, and 200 hours of compensatory education services are awarded.

b. *Orange Co. Sch. Bd.*, 118 LRP 36395 (SEA FL 2018). District must immediately return the student with an undisclosed disability to a traditional, non-alternative school placement and conduct an FBA and implement a BIP because of its failure to consider all relevant information when conducting the MDR. After the student made a verbal threat in November 2017, the MDR team convened. On the day of the MDR, the parents informed the team that they had emailed the student's evaluation, as well as a letter for the team to consider, but the team did not consider it. The MDR team should have reviewed all documentation that the parents brought to the MDR as the IDEA requires. The district's argument that the MDR was limited to all information collected before the incident is rejected. In addition, the student's behavioral history, emails sent to his teacher and the verbal threat in November 2017 indicate that the threat he made had a direct and substantial relationship to the disability and was, therefore, a manifestation.

c. *Henry Co. Sch. Dist.*, 119 LRP 700 (SEA Ga. 2018). District is ordered to return the student from his expulsion to his regular placement where the district failed to implement the student's BIP during a fight. Here, the student's teacher did not direct the student to go to a safe place after the fight was defused, as per the BIP, once he showed an ability to regulate his behavior by complying with verbal instruction. Rather, after the fight had been defused temporarily by the school athletic coach, the other classmate reengaged the student and the student swung at the classmate and unintentionally hit the coach. This conduct was "more likely than not" a direct result of the district's failure to implement the student's BIP, especially considering that the student responded positively to the teacher implementing the BIP in another situation that same day.

d. *Fremont Co. Sch. Dist. #25*, 71 IDELR 224 (SEA WY 2017). District denied FAPE when it found student's behaviors were not a manifestation of his OHI. When the student made a threat to beat up and kill a staff member, a team was convened to conduct a manifestation determination and a recommendation for expulsion was made. The decision is overruled where previous assessments of the student overlooked appropriate qualifying disabilities and critical staff were not trained to implement and monitor implementation of the student's BIP to better ensure effectiveness and prompt refinement of unwanted behaviors. Thus, the district is ordered to return the student to his current placement because the behavior was a manifestation.

e. *Seattle Sch. Dist.*, 60 IDELR 266 (SEA Wash. 2012). Where the district did not consider the impact of all of the other disabilities a student with ADHD had when it decided to expel him for bringing a homemade explosive device to school, it must reconsider its disciplinary decision that the conduct was not a manifestation. In making a manifestation determination, districts must review all relevant information in a student's file. A district may violate the IDEA when its manifestation determination only considers the disability upon which a student's special education eligibility is

based. Here, the student's special education eligibility was based on his ADHD, but by the time his MD review took place, he had also been diagnosed with disruptive behavior disorder and anxiety disorder. Although the disruptive behavior disorder was referenced in the student's most recent evaluation and at least one MD team member was aware of his anxiety disorder, the team did not take into account either disorder in reaching its manifestation decision. On this basis, the parent has satisfied his burden of showing the district failed to conduct a proper manifestation review. However, there is insufficient evidence to determine whether the child's conduct was in fact a manifestation of his disability. Although the student had a history of bringing inappropriate items to school—acts believed to be related to his disability when done impulsively—the team had reason to think that the conduct in this case was premeditated. They believed that the student may have made the device some time ago and brought it to school with the intent to ignite it. Because of the conflicting possibilities, the matter is remanded to the student's MD team to make a new determination by at least considering the student's additional disabilities.

Question #14:

How "expedited" is the disciplinary hearing process?

Answer:

While the typical due process hearing completion timeline is 75 calendar days, the expedited hearing on a disciplinary challenge must occur within 20 school days of the date the complaint requesting the hearing is filed, and the hearing officer must make a determination within 10 school days after the hearing. (Any resolution meeting must occur within 7 calendar days of the due process complaint and resolved within 15 calendar days).

D. When the School District May Request an Expedited Hearing

Question #15:

Can a school district request an expedited due process hearing to seek a "change of placement?"

Answer:

Yes. The IDEA contemplates that a school district may initiate an expedited hearing whenever it believes that maintaining the current placement of the student is "substantially likely to result in injury to the student or others." In such cases, a hearing officer may order a change of placement of the student to an appropriate IAES, but for not more than 45 school days if the hearing officer agrees that maintaining the current placement of the student is substantially likely to result in injury to the child or others. 34 C.F.R. § 300.533.

In *Letter to Huefner*, 47 IDELR 228 (OSEP 2006), OSEP "clarified" that a school district might use the expedited hearing process if, for instance, a child has been removed from the current placement pending a manifestation determination and the district seeks a hearing officer's intervention to challenge the decision to return the child to the current placement as a result of a finding that there was a manifestation. In addition, a district might initiate an expedited hearing at the conclusion of a 45-day placement in order to extend that placement if the district believes that returning the student to the current placement is

substantially likely to result in injury to the child or others. This process may be repeated, and the school district can continue to initiate expedited hearings, if the school district believes that returning the student to the original placement is substantially likely to result in injury to the child or to others. 34 C.F.R. § 300.532.

There have been some hearing decisions where the school district has sought this kind of 45-day relief via a request for an expedited due process hearing:

a. *Arcadia Unif. Sch. Dist.*, 119 LRP 3402 (SEA Cal. 2019). District's request to move student with ED to an IAES for up to 45 days is granted where the student presented aggressive behaviors toward others on a daily basis and had already injured two aides and two classmates within the first semester of the school year. The district appropriately conducted an FBA and developed and implemented a BIP for the student. Even with a 1:1 aide dedicated to supervision and redirection of the student, the student was still injuring others. In addition, there is no evidence that the student's behaviors will reduce over time, even with positive interventions and the student is likely to continue engaging in dangerous and unpredictable behaviors. The district is not required to wait until a severe injury occurs to request removal to an IAES.

b. *Vilonia Sch. Dist.*, 72 IDELR 136 (SEA Ark. 2018), *aff'd* 75 IDELR 100 (E.D. Ark. 2019). School district's request to change the placement of the student to an IAES is denied because the student is not a danger to self or others. The student's social media posts holding a gun for a photo and using a hashtag of "I love it when they run" and a post that "I fight to kill, I don't fight to hurt people" and posting a picture of him hanging himself with a belt were not addressed to any one person or audience.

c. *El Segundo Unif. Sch. Dist.*, 117 LRP 41962 (SEA Cal. 2017). District may place student in an IAES because maintaining the teenager's current educational placement would result in substantial risk of injury to others where the student chased and threatened another student and, when staff tried to intervene to stop the incidents, the student did not listen to redirection and grabbed, kicked and hit staff. The student also made verbal threats, shouting "I'll kill you," lunged at and chased aides with her fists, and punched, slapped, kicked and pushed a staff member at least five times.

Question #16:

So, what happens when the 45 school days for the IAES expires?

Answer:

The presumption is that the student will be placed back in the original placement from which the student was removed unless the school district initiates another hearing to continue the 45-day placement or finds some other way to legally remove the student.

E. The Option to Follow the Traditional "Change of Placement" Process

Question #17:

Because these disciplinary change in placement provisions are so complicated, would it make more sense to just work through a student's IEP team and propose a long-term or more permanent change of placement to, for example, a more restrictive environment with additional supports or services, rather than to invoke the disciplinary provisions of the IDEA and seek to "expel" the student or place the student in an IAES?

Answer:

Probably so, especially if the school already has a fairly good idea that the conduct at issue will be found to be a manifestation of the student's disability.

Should an IEP team decide to follow a traditional change of placement process, after the IEP team makes its proposal for a change in placement (rather than a proposal to seek disciplinary removal), if the parent does not challenge the proposed change of placement after receiving sufficient written notice and notice of procedural safeguards, then the district could proceed with the proposed change of placement after a reasonable period of time, (which the U.S. Department of Education has indicated could be 10 calendar days or what would be reasonable under the circumstances. *See Letter to Winston*, 213 IDELR 102 (OSEP 1987)).

Once the parents have received notice of the proposed change of placement but have not requested a hearing to challenge the proposed change of placement within the specified timeframe, the student's placement will have changed and becomes the student's current placement for stay-put purposes:

> *Scordato v. Kinnikinnick Sch. Dist.,* 72 IDELR 248 (N.D. Ill. 2018). Notice that the district would be implementing a proposed IEP within 10 days of its issuance made the proposed new placement at the public high school the student's stay-put placement where the parents did not file their request for due process within the 10 days. While the parents filed their due process complaint to challenge the student's movement to a high school from middle school in March, the new IEP had already taken effect by the time the parents filed it. Thus, under the February 2018 IEP, the student is set to transition to high school, not stay in middle school, which reflected his educational goals, including postsecondary transition planning. While the parents' concerns are acknowledged, the stay-put placement is the high school.

Making a "change of placement" via the traditional IEP team process may be a more preferable and expedient option, particularly where it is likely that the behavior at issue was a manifestation of the student's disability. This would take the placement issue out of the disciplinary process and would work like any other change of placement to a more restrictive setting, where the proposal is based upon the student's needs and circumstances, rather than punishment for a violation of the student code of conduct. *See, e.g., M.M. v. Special Sch. Dist. No. 1*, 49 IDELR 61, 512 F.3d 455 (8th Cir. 2008).

Of course, in an emergency situation involving one of the "special circumstances," the school may need to resort to the immediate removal of the student to an IAES for up to 45 school days but, even then,

should go ahead and convene an IEP team to propose a long-term change of placement for the student rather than seeking to extend for another IAES or an expulsion, particularly where the team finds that the behavior was a manifestation of the students disability.

The same option may be better in dealing overall with a dangerous or substantially disruptive student who did not commit one of the "special circumstances" offenses (drugs, weapons or serious bodily injury). Although the emergency 45-day removal could not be used, the district could convene an emergency IEP team that could work with the parent to effectuate a long-term change of placement (not the imposition of disciplinary sanctions) to a more restrictive environment, as appropriate, rather than seeking to suspend, expel or otherwise impose traditional disciplinary sanctions. Should the parent disagree with the proposed change of placement and the parent requests a due process hearing to challenge it, the district could then defend its proposed change of placement as appropriate under the IDEA.

Question #18:

But what if we use the traditional "change of placement" avenue for moving a dangerous student and the parent requests a due process hearing to challenge it? Won't we be in "stay-put?"

Answer:

Yes, that would be the case. However, if this approach leaves a dangerous student in an unsafe setting during stay-put, the school district could (and probably should) immediately seek temporary injunctive relief from a court to keep the student out of the current placement until such time as the due process hearing officer determines whether the proposed change of placement is appropriate. *See, e.g., Gadsden City Bd. of Educ. v. B.P.*, 28 IDELR 166, 2 F.Supp.2d 1299 (N.D. Ala. 1998) and *Alex G. v. Board of Trustees of Davis Jt. Unif. Sch. Dist.*, 44 IDELR 130, 387 F.Supp.2d 1119 (E.D. Cal. 2005). This would seem preferable to asking for an expedited due process hearing, since the hearing officer only has the authority to remove the dangerous student for up to 45 school days and the "expedited" hearing may not be "expedited" enough (the expedited hearing must occur within 20 school days of the hearing request and the hearing officer is to make a determination within 10 days after the hearing, for a total of 30 school days). In addition, the decision of a hearing officer is "appealable." 34 C.F.R. § 300.532(5). So, where would that leave the dangerous student during the appeal?

There have been a couple of fairly recent cases where school districts have resorted to the "*Honig* injunction" approach when faced with such a situation:

Seashore Charter Schs. v. E.B., 64 IDELR 44 (S.D. Tex. 2014). District's motion to change the autistic student's stay-put placement from a K-8 charter school to a special education program in the student's neighborhood high school pending the outcome of the due process hearing brought by the parent is granted. Given the charter school's unsuccessful efforts to hire a special education teacher after the previous one resigned, the school was no longer capable of addressing the student's aggressive behaviors. In contrast, the local high school was "ready, willing and able" to implement a program for the student with age-appropriate peers and post-secondary transition services. In addition, the student was substantially larger than his classmates and had a tendency to hit, bite, scratch and pull hair, even when accompanied by a teacher or aide. Thus, his continued presence at the charter school created a dangerous situation and a substantial risk of harm to others. Thus, it is ordered that he not return to the charter

school and remain in the high school's self-contained program until the hearing officer issues a decision in the due process case.

Wayne-Westland Comm. Schs. v. V.S., 64 IDELR 139 (E.D. Mich. 2014) and 65 IDELR 15 (E.D. Mich. 2015). District's motion for an injunction temporarily prohibiting a teenager with a disability from entering the high school grounds is granted where an administrator's statement indicates that the student has become physically violent on multiple occasions. A court may, in appropriate situations, temporarily enjoin a dangerous student from attending school when the student poses an immediate threat to the safety of others, Here, the district's complaint showed that the 6-foot, 250-pound student kicked, punched and spit on students and staff; threatened to rape a female staff member; and threatened to stab two staff with a pen. After the IEP team reduced the student's attendance to one hour a day, the student attacked the school's security liaison. When told to leave the school building, the student tried to force his way back into the building and four staff members were required to hold the school doors shut to keep him out. Since then, the student had also threatened to bring guns to school, made racist comments to staff, and punched the school's director in the face. Thus, the district may temporarily educate the student through an online charter school program. NOTE: On February 4, 2015, the court granted a permanent injunction barring the student from entering any premises owned by the district or attending school events. The district was able to prove all four factors required to obtain permanent relief: 1) that it would suffer irreparable harm; 2) the remedies available at law are inadequate to compensate for that harm; 3) the balance of hardships tip in its favor; and 4) the injunction would not be against public interest. This is so because of the student's history of physical violence that demonstrated an "extreme risk" of imminent and irreparable injury. Remedies such as money damages would be inadequate to address any injuries to others resulting from the student's conduct and schoolmates and staff would suffer a far greater injury than the student, who can continue his education through an online program. Protecting the safety of others is in the public's interest.

But see:

Troy Sch. Dist. v. v. K.M., 64 IDELR 303 (E.D. Mich. 2015). District's request for a temporary restraining order is denied where it was not shown that the district would suffer irreparable harm or imminent injury if the teenager returned to his public high school. The IDEA's stay-put provision requires that a student remain in his then-current educational placement during any pending administrative proceedings. While a court can authorize a change in placement when a student engages in violent or dangerous behavior, it cannot do so unless the district shows that maintaining the student in his current placement is substantially likely to result in injury to the student or others. Here, the district did not meet that burden where the incident that resulted in the student's most recent suspension occurred in the absence of the "safe person" required by his IEP and no serious injuries were recorded. Thus, the student is not substantially likely to injure himself or others if the district implements his IEP. NOTE: In a subsequent case regarding placement for the student and appealing a hearing officer decision, the court upheld the parent's challenge to the district's proposed placement in a center-based program for children with ED. Based upon testimony from psychologists and autism experts, the student could have made educational progress in a general education setting. While the student has had multiple behavioral incidents in mainstream classes, several of which resulted in emergency evacuations or police intervention, the experts testified that the student was on "high alert" because he was so fearful during the school day—"Police involvement, restraints and seclusion can be frightening for any student, but more so for a student with disabilities." According to the psychologists and autism experts, the student is highly intelligent, learns quickly, has a strong work ethic and wants to be successful. In addition, experts have opined that

he needs to interact with nondisabled peers to acquire social and behavioral skills and that he could benefit from a mainstream class if provided appropriate support services. Thus, the ALJ's decision that the district denied FAPE is upheld and the order requiring the district to provide a one-to-one psychologist with autism training as the student's "safe person" is clearly permissible under the IDEA.

F. The Role of Criminal Authorities

Question #19:

What about reporting behaviors that are crimes to criminal authorities? Is that a "change in placement?"

Answer:

Prior to the 1997 IDEA Amendments, the Sixth Circuit Court of Appeals had affirmed the decision of a Tennessee district court that contacting criminal authorities by filing a juvenile court petition was an initiation of a "change of placement" that could not be done until the appropriate procedural steps had been taken. *Morgan v. Chris L.*, 25 IDELR 227, 106 F.3d 401 (6th Cir. 1997). In response to this decision, Congress amended the IDEA in 1997.

The IDEA now specifically contains a "rule of construction" that addresses referral to and action by law enforcement and judicial authorities as follows:

> Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

20 U.S.C. § 1415(k)(6) and 34 C.F.R. § 300.535.

Several courts and hearing officers have interpreted these provisions:

a. *Rochester Community Schs. v. Papadelis,* 55 IDELR 79, 2010 WL 3447892 (Mich. Ct. App. 2010). Where the school district filed a petition with the juvenile authorities for school incorrigibility as contemplated under state law, the filing does not constitute a "change in educational placement." Thus, a manifestation determination was not required prior to the filing of the petition with juvenile authorities.

b. *Osseo Sch. Dist.*, 53 IDELR 35 (SEA Minn. 2009). The assistant principal's referral of a student to the police liaison officer at the school for fighting with a classmate did not deny FAPE to the 9th grade ED student, even where the office subsequently brought charges against the student in juvenile court. The actions of school officials pursuant to school policy did not reduce the student's access to special education services or supports.

c. *Poteet Indep. Sch. Dist.*, 29 IDELR 423 (SEA Tx. 1998). The 14 year-old's status as an LD student did not immunize him from truancy charges. Thus, the district did not violate the IDEA by filing charges without conducting a manifestation determination.

d. *Northside Indep. Sch. Dist.*, 28 IDELR 1118 (SEA Tx. 1998). An IEP meeting is not required for a student with a disability who is removed from school for more than 10 school days as a result of the school's calling the police.

e. *Fort Smith Pub. Schs.*, 29 IDELR 399 (SEA Ark. 1998). Whether a school district should file a juvenile court petition alleging misconduct by a student with a disability is a matter of judgment. Nothing in the IDEA bars a school district from filing such a petition.

Notwithstanding the provision in the IDEA allowing for the reporting of crimes, school administrators should be cautioned against the "over-use" of school resource officers or the juvenile system, particularly if such is being used as a "substitute" for the school's IDEA/programming obligations. Schools must also ensure that school resource officers are trained appropriately:

a. *In re: Tony McCann*, 17 IDELR 551 (Tenn. Ct. App. 1990). Where the district filed an "unruly child petition" in juvenile court but took no action to address the student's needs under IDEA while waiting two months for the juvenile court to take action, the district's filing constituted a "change of placement." The student remained out of school pending the completion of the juvenile court-ordered evaluations.

b. *Wordlow v. Chicago Bd. of Educ.,* 73 IDELR 117 (N.D. Ill. 2018). District may be sued for the school security officer's handcuffing of a compliant 6-year-old with a disability and alleged violation of her 4th Amendment rights, based upon the district's failure to provide appropriate training on the proper use of restraint and other issues. The district's motion for judgment is denied and a jury will decide whether the district had a "custom or policy" of failing to appropriately train security personnel. While a district is not automatically liable for an employee's violation of a student's constitutional rights, a district can be liable if the constitutional violation was a direct result of a district's practice, custom or policy. When the alleged custom or practice is the failure to train school personnel, the parent must prove that the district failed to provide appropriate training despite knowing or having reason to believe that a lack of training would result in constitutional violations. Here, the district argued that the parent could not show this, because by her own allegations, all but 174 of its school security officers had received appropriate training at the time of the incident. However, a jury must determine whether this number---just over 10% of all district security officers—constitutes a sufficient number of untrained officers to establish a "failure to train" policy or widespread practice. In addition, the parties' dispute over the number of prior handcuffing incidents by school security officers raises questions as to whether the district knew that a constitutional violation was likely. Thus, the factual disputes prevent granting either parties' motions and the jury will decide this case. In addition, the parent may proceed with her 4th Amendment claims against the security officer who handcuffed her daughter as a "teaching moment" after she took candy from a teacher.

Question #20:

Can a juvenile judge "change the placement" of a student with a disability without running afoul of the IDEA?

Answer:

Yes, and they have.

a. *In the Matter of P.E.C.,* 46 IDELR 47, 211 S.W.3d 368 (Tex. Ct. App. 2006). Where judge committed juvenile delinquent to the Texas Youth Commission, this is not a "change in placement" under the IDEA. The authority of a juvenile court to modify a juvenile's disposition by removing him from probation and committing him to the TYC is not limited by the IDEA. IDEA's provisions deal with exclusion of disabled children by *schools*, not courts.

For More Information:

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