

## **DISCIPLINE 101 AND BEYOND: Key Rules for Everyday Compliance and Lessons Learned the Hard Way**

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### **Short-Term Removal**

- School personnel may remove a child with a disability who violates code of conduct to interim alternative setting, another setting, or suspension for not more than 10 school days to the extent such removal applies to children without disabilities. (Assuming no special provisions in the student's IEP.)
- IDEA does not mention multiple removals of less than 10 days each, but the final regulations do.



### **34 CFR § 300.530(b)**

(b) General. (1) School personnel under this section may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and FOR ADDITIONAL REMOVALS OF NOT MORE THAN 10 CONSECUTIVE SCHOOL DAYS IN THAT SAME SCHOOL YEAR FOR SEPARATE INCIDENTS OF MISCONDUCT (so long as those removals do not constitute a change of placement under § 300.536).



### **What Constitutes a Removal?**

In other words, "What counts as a day?"

- Suspension from school?
- Portions of the day?
- Bus removals?
- In-school suspension (ISS)?



### **2006 Interpretive Comments Related to 34 CFR § 300.530 Regarding Change of Placements**

Portions of a school day that a child had been suspended may be considered as a removal in regard to determining whether there is a pattern of removals as defined in § 300.536.

*Federal Register*, Vol. 71, p. 46715 (August 2006)



### **2006 Interpretive Comments Related to 34 CFR § 300.530 Regarding Change of Placements**

If the bus transportation is a part of the child's IEP, a bus suspension would be treated as a suspension under § 300.530 unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where services will be delivered.

*Federal Register*, Vol. 71, p. 46715 (August 2006)



### 2006 Interpretive Comments Related to 34 CFR § 300.530 Regarding Change of Placements

If the bus transportation is not a part of the child's IEP, a bus suspension is not a suspension under § 300.530.

*Federal Register*, Vol. 71, p. 46715 (August 2006)



### 2006 Interpretive Comments Related to 34 CFR § 300.530 Regarding Change of Placements

However, public agencies should consider whether the behavior on the bus is similar to behavior in a classroom that is addressed in an IEP, and whether the child's behavior on the bus should be addressed in the IEP or a behavioral intervention plan for the child.

*Federal Register*, Vol. 71, p. 46715 (August 2006)



### 2006 Interpretive Comments Related to 34 CFR § 300.530 Regarding Change of Placements

**An in-school suspension would not be considered a part of the days of suspension in § 300.530 so long as the child:**

- Is afforded the opportunity to continue to appropriately participate in the general curriculum;
- Continues to receive the services on his or her IEP;
- Continues to participate with nondisabled children to the extent they would have in their current placement.

*Federal Register*, Vol. 71, p. 46715 (August 2006)



### For Example -

Was a student's assignment to ISS pending the resolution of the MDR and due process case an inappropriate change in placement?



### *Randy M.*

- No. District proved that student's existing IEP had been implemented during his assignment in ISS, and he made educational progress, and appropriately interacted with nondisabled peers in ISS. Therefore, his assignment in ISS did not constitute a change in placement under IDEA.

*Randy M. b/n/f Mrs. M. v. Texas City Indep. Sch. Dist.*, No. 162-SE-100 (April 7, 2000), *appealed*, *Randy M. v. Texas City ISD*, 32 IDELR 168, 93 F. Supp 2d 1310 (S.D. Tex. 2000)



### 34 CFR § 300.536(a) Change of placement because of disciplinary removals

- For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, a change of placement occurs if –
  - (1) The removal is for more than 10 consecutive school days; or
  - (2) The child has been subjected to a series of removals that constitute a pattern –



### 34 CFR § 300.536(a) continued . . .

- (i) Because the series of removals totals more than 10 school days in a school year;
- (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
- (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.



### 34 CFR § 300.536(b)

- (1) The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.
- (2) This determination is subject to review through due process and judicial proceedings.



### 34 CFR § 300.530(d)(4)

- After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under § 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.



## Long-Term Removals & Manifestation Determination Reviews



### MDR Meeting

- When district proposes removal of student that would exceed 10 school days due to violation of code of conduct, district, parent, and relevant members of IEP Team shall meet to conduct MDR within 10 school days of district's decision.
- Relevant members of IEP team shall be determined by parent and district.



### Consideration of Information at MDR Meeting

- Group shall review all relevant information in student's file, including:
  - IEP;
  - Any teacher observations; and
  - Any relevant information provided by parents.



### Consideration of Information at MDR Meeting

- Other relevant information in student's file, including:
  - Evaluation data;
  - Discipline history;
  - Details of the incident.



### MDR Questions

- Group shall determine:
  - (1) Was the conduct in question caused by, or did it have a direct and substantial relationship to, the child's disability?
  - (2) Was the conduct in question the direct result of the district's failure to implement the IEP?



### Consider Each Question Separately

- If the answer to either question (1) or question (2) under § 300.530(e)(1) is "yes," the conduct shall be determined to be a manifestation of the child's disability.
- To be a manifestation, conduct cannot have "attenuated association, such as low self-esteem, to child's disability." H.R. REP. No. 779, 108th Cong., 2d Sess., at 225 (2004).



### ED Student threatened to bring gun to school and shoot police officer

- IEP Team found no manifestation
- Hearing Officer disagreed – behavior was a manifestation
- IEP Team did not discuss how ED manifested itself in student – no rationale for decision – no explanation why – did not consider all relevant information.

*Flour Bluff ISD, 109 LRP 74053 (SEA TX 2008)*



### When Behavior Is Manifestation

- IEP Team shall:
  - (1) Conduct FBA and implement BIP (if not done prior);
  - (2) If BIP exists, review BIP and modify it, as necessary, to address behavior; and
  - (3) Return child to placement (unless parent and district agree to change placement as part of BIP modification and unless 45-day removal applies).



### When Behavior Isn't Manifestation

- If no manifestation, relevant disciplinary procedures applicable to children without disabilities may be applied to child in same manner and for same duration as for children without disabilities (except student must continue to receive FAPE).
- Interim alternative educational setting (IAES) will be determined by IEP Team.



### What does this mean?

- Principal has proposed discipline consequence
- IEP Team does MDR – not a manifestation.
- IEP Team considers regular education discipline consequence (IAES)
- If FAPE can be provided there, IEP Team places in the discipline setting (IAES)



IDEA does NOT preclude discipline placement (IAES) from carrying over into next school year.

*Federal Register*, Vol. 71, p. 46722 (2006).



### Considerations When Student Violates Code of Conduct

- School personnel may consider any unique circumstances on case-by-case basis when determining whether to order a change in placement for child with disability who violated student code of conduct.



### What does that mean?

- Determined at the local level
- By people familiar with the student and the circumstances
- May include discipline history, ability to understand consequences, expressions of remorse
- Used to determine whether a disciplinary change of placement is appropriate.

*Federal Register*, Vol. 71, p. 46714 (2006).



### 45-Day Removals (drugs, weapons, serious bodily injury)

- For certain violations of code of conduct, district may remove student to IAES (determined by IEP Team) for not more than 45 **school** days regardless of whether behavior was manifestation.



### Possession of Weapons

- District may remove student for 45 school days (regardless of MDR determination) if student carries or possesses a weapon on school premises or to or at a school function.



### IDEA Definition of “weapon” is in 18 USC 930(g) – “dangerous weapon”

- Weapon, device, instrument, material or substance
- Animate or inanimate
- That is used for, or is readily capable of,
- Causing death or serious bodily injury
- Term does NOT include a pocket knife with a blade of less than 2 ½ inches



### For Example -

- Student Code of Conduct prohibits all knives = removal to a DAEP
- Student brings pocket knife with 2 inch blade
- Subject to DAEP removal (IAES) – MDR would be conducted
- Student could NOT be removed for 45 school days without regard to MDR determination (pocket knife is not a “weapon” under IDEA regulation)



Weapon includes a firearm defined in part by federal law as any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosive . . .

And also any explosive, incendiary, or poison gas “destructive device”



### Weapon

- Metal awl (metal spike 2 inches long) was a weapon. *In re: Student With a Disability*, 50 IDELR 180 (SEA VA 2008)
- Scissors qualified as a weapon. *Anchorage Sch. Dist.*, 45 IDELR 23 (SEA AK 2005)
- Cigarette lighter with retractable blade was a weapon. *Chester Upland Sch. Dist.*, 35 IDELR 104 (SEA PA 2001)
- Knife with a blade 2 ½ inches or longer was a weapon. *Alameda Unified Sch. Dist.*, 32 IDELR 159 (SEA CA 2000)



### Not a Weapon

- Pulling on the Assistant Principal’s necktie. *Scituate Pub. Schs.*, 47 IDELR 113 (SEA MA 2007)
- Scratching a fellow student with a paper clip. *Anaheim Union High School Dist.*, 32 IDELR 129 (SEA CA 2000)
- Stabbing a classmate with a pencil. *Independent Sch. Dist. #831*, 32 IDELR 163 (SEA MN 1999)



### Possession/Use of Illegal Drugs

- District may remove student for 45 school days (regardless of MDR determination) if 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.



### Definitions come from federal law

- Controlled substance – drug or other substance identified under the Controlled Substances Act
- Illegal drug – a controlled substance, but does NOT include a controlled substance that is legally possessed or used under the authority of a health care professional



### For Example -

- Student brings his ritalin prescription to school and keeps it in his pocket
- Student gets caught = DAEP placement
- MDR must be conducted for this violation of the Student Code of Conduct
- 45 school day placement not available because possession of ritalin does not meet the definition of possession of an illegal drug



### Would the outcome be different if the Student:

- Sold his ritalin pills to another student?
- Gave his ritalin pills to another student?



### Note:

- Alcoholism and drug addiction do not = special education eligibility.
- Drug treatment and rehabilitation programs – medical in nature (an excludable medical service). *Field v. Haddonfield Bd. of Educ.*, 18 IDELR 253 (D. N. J. 1991)
- Drug abuse does not = emotional disturbance. *Springer v. Fairfax County Sch. Bd.*, 27 IDELR 367 (4<sup>th</sup> Cir. 1998)



- Student caught smoking marijuana given discipline hearing and sent to DAEP. LATER, IEP meetings were held to do MDR.
- Not a violation of IDEA because 45 school day removal for drugs applied. *Dallas ISD*, 110 LRP 36304 (SEA TX 2010)



- Student “knowingly possessed” illegal drug when he tried to get rid of baggie of marijuana he was holding for someone else. *Warrensville Heights City Sch. Dist.*, 108 LRP 53428 (SEA OH 2008)



### Infliction of Serious Bodily Injury

- District may remove student for 45 school days if student has inflicted serious bodily injury upon another person while on school premises or at school function.
- “Serious bodily injury”: substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ or mental faculty. 18 USC 1365(h)(3)



TEC Chapter 37.007 lists many offenses for which a student must or may be expelled. Committing an expellable offense that involves contact with another does not automatically mean a 45 school day placement for serious bodily injury is available as a placement.



### For Example:

- The Student engages in sexual contact with a child younger than 17
- This is a mandatory expellable offense as indecency with a child
- School staff could not claim the infliction of serious bodily injury simply based on the charge



### Serious Bodily Injury - NO

- Hardest of 3 to interpret
- Most assaults will NOT qualify
- Broken nose not enough. *Pocono Mountain Sch. Dist.*, 109 LRP 26432 (SEA PA 2008)
- Swollen kicked knee not enough. *Bisbee Unified Sch. Dist. No. 2*, 54 IDELR 39 (SEA AZ 2010)
- Lots of pain one day but not the next not enough. *In re: Student with a Disability*, 110 LRP 14304 (SEA KS 2010)



### Serious Bodily Injury – NO cont’d

- Kicked shins & stomped toes not enough. *In re: Student with a Disability*, 108 LRP 45824 (SEA WV 2008)
- Assault of district employee who returned to work next day not enough. *Southern York County Sch. Dist.*, 54 IDELR 305 (SEA PA 2010)



### Serious Bodily Injury – YES

- Student rammed head into teacher’s chest with full force.
- Internal chest contusions.
- 2 medications – worst pain of her life.
- Missed one week’s work.
- Extreme physical pain proven. *Westminster Sch. Dist.*, 56 IDELR 85 (SEA CA 2011)



For 45 school day placements for serious bodily injury . . .

**APPLICATION MUST BE DETERMINED ON A CASE BY CASE BASIS**



45 school day placements can be used multiple times in a school year if there are multiple qualifying offenses.

*Federal Register, Vol. 64, p. 12648 (1999)*



What procedures apply if there is a 45 school day violation of rules?



- MDR must still be done
- If behavior is a manifestation, IEP team must do FBA and develop BIP – or modify BIP already in place



- If behavior is NOT a manifestation
  - Regular discipline applies
  - Discipline can be assigned for more than 45 school days



What does it mean to receive FAPE in the discipline setting?



- It is not exactly the same services in exactly the same setting as before discipline.
- But special education and related services must
  - Enable student to continue to participate in the general curriculum
  - “General curriculum” – same as for nondisabled students. 300.320(a)(1)(i)
  - Progress toward meeting goals and objectives. 71 Fed. Reg. 46,716 (2006)



### Discipline setting must address student's individual needs



**District need not replicate all services and instruction student would receive if in school. *Troy City Bd. of Educ., 27 IDELR 555 (SEA AL 1998)***



- IAES 75 minutes 3 times per week – too little instruction.
- He was not allowed to continue to participate in the general curriculum.
- No daily services.
- No accommodations and modifications provided.
- IAES not appropriate.

*Windemere Park Charter Academy, 111 LRP 1872 (SEA MI 2010)*



### Discipline setting was on campus in ISS

- Received assignments from teachers.
- Had IEP accommodations.
- Allowed to attend some classes.
- Received counseling.
- IAES provided FAPE.

*China Spring ISD, 110 LRP 36343 (SEA TX 2010)*



### Hearing officer ordered student returned to placement from IAES

- Could not work on IEP goals.
- District did not provide psychological, counseling and social behavioral services set out in IEP.

*Oregon City Sch. Dist., 28 IDELR 96 (SEA OR 1998)*



### Provision of Behavioral Assessment and Services

- For student who is removed for drug or weapon offense, for inflicting serious bodily injury, or for violation of code of conduct that would lead to removal of more than 10 school days, district must provide FBA, behavior intervention services, and modifications designed to address behavior so it doesn't reoccur.
- Must provide regardless of MDR outcome.



### Hearings Regarding Discipline



### Appeal of Discipline or MDR Determination

- Parent who disagrees with any decision regarding placement for disciplinary purposes or with the MDR determination may request a hearing.



### Hearing Officer's Determination on Appeal

- Hearing officer may order change in placement in response to appeal.
- Hearing officer may return child to placement from which he or she was removed or order that child be placed in appropriate interim setting for 45 school days or less if current placement is substantially likely to result in injury to child or to others.



### What does that mean?

First, hearing officer can agree with MDR and placement and it continues to the end.

OR

Second, hearing officer may disagree and return student to previous placement.



### What else does it mean?

- District may want to remove a student to a different placement because the student is dangerous.
- District files for a due process hearing.
- District must prove keeping student in the current placement is substantially likely to result in injury to student or others. §300.532(a)



- If hearing officer agrees, he/she can order a 45 day placement.
- Placement proposed by the District must be appropriate and provide FAPE.
- District may repeat the process at the end of the 45 days.



- Verbal threats without physical injury are probably not enough.
- Threatening mayhem and violently pushing furniture not enough. *Clinton County R-111 School District v. C.J.K.*, 23 IDELR 306 (W.D. Mo. 1995)
- Fight with another student and threats against school staff not enough. *Alzheimer Sch. Dist.*, 38 IDELR 149 (SEA AR 2003)



### No Stay-Put During Discipline Hearing

- While appeal is pending, child shall remain in interim alternative educational setting (discipline setting) until hearing officer makes decision or until time applicable to relevant disciplinary consequence expires, whichever occurs first.



### Expedited Hearing for Appeal of Discipline Decision

- District or SEA will arrange for expedited hearing, which will occur within 20 school days of date hearing is requested and will result in determination within 10 school days after hearing. 300.532(c)(2)
- Expedited hearings follow the same procedural rules including a resolution session



### Summary of Important Issues Regarding Discipline

- MDR meeting
- Standards for MDR
- Allowable 45-day removals
- No stay-put during discipline hearing



### Thank you!

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