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BEYOND SUSPENSION: VOLATILE & VIOLENT STUDENTS

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I. INTRODUCTION.

A. Relevant Law.

1. ***The Individuals with Disabilities Education Act (“IDEA”)***. This federal statute sets forth the rights of children with a disability and the procedures that school districts must follow with such students. With some exceptions, the same requirements that apply to the discipline of regular education students generally also apply to the discipline of students eligible for special education under IDEA. *See Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provision*, 81 IDELR 138 (OSEP 2022), at Question B-2 (hereinafter OSEP, 2022 Q&A).
2. ***Section 504 of the Rehabilitation Act of 1973 (“Section 504”)***. This federal statute applies to school districts and prohibits discrimination on the basis of disability.

NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel. ©2023 Ratwik, Roszak & Maloney, P.A.

3. ***State Laws and Rules.*** State laws address the discipline of students, including students with disabilities.

B. Relevant Concepts.

1. ***Change in Placement.*** A removal for a violation of the code of conduct is a change of placement if:

- a. The removal is for more than ten consecutive school days, or
- b. The student has been subjected to a series of removals that constitute a pattern because:
 - i. the “series of removals total more than 10 school days in a school year;”
 - ii. the student’s “behavior is substantially similar to the [student’s] behavior in previous incidents that resulted in the series of removals;” and
 - iii. “of such additional factors as the length of each removal, the total amount of time the [student] has been removed, and the proximity of the removals to one another.”
- iv. Note: 34 C.F.R. § 300.536(a). The U.S. Department of Education articulated that “[p]ortions of a school day that a child has been suspended may be considered a removal in determining whether there is a pattern of removals.” 71 Fed. Reg. 46,715 (2006).

2. ***IDEA Manifestation Determination.***

- a. **Changes in Placement.** A manifestation determination meeting must be held within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct. *See* 34 C.F.R. § 300.530(e)(1). For instance, a manifestation determination must be held within 10 school days of the decision to unilaterally place a student in an interim alternative educational setting for a period of up to 45 days in response to the student committing a violation of the school’s code of student conduct related to weapons, drugs, or serious bodily injury. *See* OSEP, 2022 *Q&A*, at Question E-1.

b. Manifestation.

- i. Discipline and Placement. School districts *may not* take disciplinary action that changes the placement of a student with a disability if the misbehavior is a manifestation of the student's disability with the exception of unilateral interim alternative educational setting ("IAES") placements for not more than 45 school days related to weapons, drugs, or serious bodily injury. *See* OSEP, 2022 *Q&A*, at Question B-2, E-1. For IAES placements, regardless of the outcome of the manifestation determination, the student may remain in the IAES for up to 45 school days. *Id.* In all other changes of placements, the school district must immediately return the student to his or her last agreed upon placement unless the parent agrees to a new placement as part of modifying the individual education program ("IEP") or behavior intervention plan ("BIP"). 34 C.F.R. § 300.530(f)(2).
- ii. Functional Behavioral Assessment ("FBA") and BIP. If the student's behavior is found to be a manifestation of the student's disability, the school district must either: (a) conduct an FBA unless it has conducted an FBA before the behavior and implemented a BIP; or (b) review the already developed BIP and modify it, as necessary, to address the behavior. 34 C.F.R. § 300.530(f)(1).

c. Not Manifestation.

- i. Discipline. If it is determined that the behavior of the child was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied generally in the same manner as long as it is not inconsistent with the student's IEP. 34 C.F.R. § 300.530(c).
- ii. FBA. When a student is subjected to disciplinary changes in placement that would exceed 10 consecutive school days for behavior found not to be a manifestation of his or her disability, the student must receive, as appropriate, an FBA and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(d)(1)(ii).

3. **Section 504 Manifestation Determination.** Section 504 requires schools to conduct an evaluation before changing a Section 504 eligible student's placement. This includes conducting a so-called "manifestation determination" (a type of evaluation) once the student's disciplinary removal exceeds 10 consecutive days or otherwise constitutes a change in placement. *See, e.g., Letter to Williams*, 21 IDELR 73, 78 (OSEP 1994).

II. AGREEMENTS.

A. Agreements.

1. **Agreements in the IEP Process.** An IEP team must propose an IEP that provides a FAPE to an IDEA-eligible student. The IDEA also requires the team to review the IEP periodically, but not less than annually. 34 C.F.R. § 300.324(b)(1)(i). The IDEA also requires the team, "as appropriate," to revise the IEP to address "any lack of expected progress toward the annual goals," the "results of any reevaluation," information about the student provided to, or by, the parents regarding eligibility and the student's educational needs, the student's anticipated needs, and other matters." 34 C.F.R. § 300.324(b)(1)(ii). Agreements are frequently reached through these processes.
2. **Agreement After Manifestation Determination.** After conduct is found to be a manifestation of a student's disability, the parent and school district can agree to a change of placement as part of the modification of the IEP or BIP. 20 U.S.C. 1415(k)(1)(F)(iii); 34 C.F.R. § 300.530(f)(2). The agreement could be for an interim or permanent change to the student's placement. *See M.M. ex rel. L.R. v. Special Sch. Dist. No. 1*, 512 F.3d 455, 463 (8th Cir. 2008).
3. **Agreement During Due Process Hearing or Judicial Review.** "[D]uring the pendency of mediation, a due process hearing, or judicial review, the child shall remain in the then current educational placement unless the parent and school officials agree to an interim or permanent change." *M.M.*, 512 F.3d at 463. This is true even if the current educational placement is not appropriate. As the Eighth Circuit held, "[w]hen a parent and the school district's educational professionals agree that a child with a behavioral disability needs a change of placement but cannot agree on an appropriate alternative, the school district must maintain the current, admittedly inappropriate placement under the stay-put IEP until the due process proceedings have concluded, unless the parties agree to an interim alternative placement." *Id.* at 464.

III. UNILATERAL REMOVALS.

A. Transfers.

1. ***Change in Placement?*** Whether a transfer constitutes a change in placement is a “fact-specific issue.” *Hale ex rel. Hale v. Poplar Bluffs R-I Sch. Dist.*, 280 F.3d 831, 834 (8th Cir. 2002).
2. ***Administrative Transfer.*** An administrative transfer for “fiscal or other reasons unrelated to the [] child [with disabilities]” is generally not a change in placement if the two locations are materially and substantially similar. *Hale*, 280 F.3d at 835; *J.A.*, 2015 WL 756885, at *4; *St. Paul Indep. Sch. Dist. #625* (Minn. SEA 2010) (holding that the change in school locations was not a change in placement because the “Student continues to receive the same amount of special education services, is mainstreamed in the same manner, and is offered the same core subject areas”). The Office for Special Education Programs advised that, “[i]n making such a determination, the effect of the change in location on the following factors must be examined:
 - a. whether the educational program set out in the child's IEP has been revised;
 - b. whether the child will be able to be educated with nondisabled children to the same extent;
 - c. whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and
 - d. whether the new placement option is the same option on the continuum of alternative placements.”

Letter to Tymeson, 78 IDELR 260 (OSEP 2021).

3. ***Disciplinary Transfer.*** However, “an expulsion from school or some other change in location made on account of the disabled child or his behavior has usually been deemed a change in educational placement that violates the stay-put provision if made unilaterally.” *Hale*, 280 F.3d at 835; *J.A. ex rel. T.L. v. Moorhead Pub. Sch.*, No. CIV. 14-4639 ADM/LIB, 2015 WL 756885, at *4 (D. Minn. Feb. 23, 2015).

B. Unilateral Removals.

1. ***Unilateral Removals for Not More than 10 Consecutive School Days.*** School personnel “may remove a child with a disability who violates a code of student conduct from his or her 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 (as long as those removals do not constitute a change of placement).” 34 C.F.R. § 300.530(b)(1).
2. ***Unilateral Removal for More than 10 School Days.***
 - a. ***Discipline.*** If the conduct is not a manifestation of the student’s disability, the general disciplinary procedures can be applied in the same manner and for the same duration as the procedures would be applied to children without disabilities, including for a change in placement exceeding 10 consecutive school days. 34 C.F.R. § 300.530(c).
 - b. ***Appeal.*** If the parent disagrees with the change in placement, the parent can appeal the decision by requesting an expedited due process hearing. 34 C.F.R. § 300.532(a). When an appeal is made, the student must remain in the IAES pending the decision of the administrative law judge or until the expiration of the 45 school days, whichever occurs first, unless the parent and school district agree otherwise. 34 C.F.R. § 300.533.

C. Unilateral 45 (School) Day Placements.

1. ***Authorized Reasons.*** Regardless of whether the behavior was a manifestation of the student’s disability, a school district may unilaterally place the student in an appropriate IAES for up to 45 school days if the student does any of the following:
 - a. Carries or possesses a weapon while at school, on school premises, or to or at a school function;

A “weapon” is defined as a “weapon, device, instrument, material, or substance . . . that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length.”

- b. Sells or solicits the sale of a controlled substance at school, on school premises, or at a school function; or

A “controlled substance” is a “drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act.”

- c. Knowingly possess or uses illegal drugs at school, on school premises, or at a school function;

An “illegal drug” is a “controlled substance; but does not include a controlled 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.”

- d. Inflicts “serious bodily injury” upon another person at school, on school premises, or at a school function.

A “serious bodily injury” is a “bodily injury” that involves “a substantial risk of death,” “extreme physical pain,” “protracted and obvious disfigurement,” or “protracted loss or impairment of function of a bodily member, organ or mental faculty.” This is a very high standard.

20 U.S.C. § 1415(G), (k)(7); 34 C.F.R. § 300.530(g), (i); *see* 18 U.S.C. § 930(g)(2); 18 U.S.C. § 1365(h)(3).

2. ***Placement.***

- i. **Selection.** The placement selected “must 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.” OSEP, 2022 *Q&A*, at Question D-3. The “determination will depend on the circumstances of each individual child’s case.” *Id.* “Factors that could be considered when determining placement in an IAES include the specific programs and services available in the alternative setting, such as additional counseling services, behavioral and academic supports and other services, or programs that could address the behavior that led to the need for the child's placement in an IAES.” *Id.*

- ii. **Options.** The IAES “could be a different setting in the child's current school, a setting in a different school in the LEA, or in some other setting.” OSEP, 2022 *Q&A*, at Question D-3. Home instruction, including virtual home instruction, or hybrid instruction “could be additional options for an IEP Team to consider when determining the appropriate IAES for a child with a disability.” OSEP, 2022 *Q&A*, at Question D-5. However, an IEP team “should be cautious about excluding a child with a disability from their regular educational program to provide virtual instruction for the sole purpose of responding to a child’s behavior” because “[r]emoving a child from the regular education program without ensuring behavioral supports have been made available throughout a continuum of placements, including in a regular education setting, could result in an inappropriately restrictive placement and denial of FAPE.” *Id.* As such, “the IEP Team likely will need to consider other options beyond ‘home instruction’ when determining the appropriate IAES.” *Id.*
3. **FBA and Services.** While in the IAES, the student must “[c]ontinue to receive educational services [in order to receive a FAPE] 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. The student must also “[r]eceive, as appropriate, an [FBA], and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.” 34 C.F.R. § 300.530(d). However, school districts do not need to “replicate every aspect of the services that a child would receive if in his or her normal classroom” while the student is in the IAES. 71 Fed. Reg. 46,716 (Aug. 14, 2006).
4. **IEP Team Decision.** The IEP team “determines the [IAES] for services.” 34 C.F.R. § 300.531.
5. **Appeal.** If the parent disagrees with the unilateral placement in the IAES, the parent can appeal the decision by requesting an expedited due process hearing. 34 C.F.R. § 300.532(a). When an appeal is made, the student must remain in the IAES pending the decision of the administrative law judge or until the expiration of the 45 school days, whichever occurs first, unless the parent and school district agree otherwise. 34 C.F.R. § 300.533.

IV. EXPEDITED DUE PROCESS HEARING AND INJUNCTIONS.

A. Expedited Due Process Hearing Request Seeking an Appropriate Interim Alternative Educational Setting.

1. Request: A school district may request an expedited due process hearing if it “believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others.” 34 C.F.R. § 300.532(a).
2. Hearing: The hearing “must occur within 20 school days of the date the complaint requesting the hearing is filed.” 34 C.F.R. § 300.532(c)(2); Minn. Stat. 125A.091, subd. 19; 2023 ARSD 24:05:26:09.08; Kirsten Baesler, NDDPI, *IDEA Regulations for Students with Disabilities* 11 (June 2019).
3. Outcome: The administrative law judge “must make a determination within 10 school days after the hearing.” 34 C.F.R. § 300.532(c)(2); Minn. Stat. 125A.091, subd. 19; 2023 ARSD 24:05:26:09.08; Kirsten Baesler, NDDPI, *IDEA Regulations for Students with Disabilities* 11 (June 2019). The administrative law judge may “[o]rder a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.” 34 C.F.R. § 300.532(b)(2)(ii).

B. Expedited Due Process Hearing Request Seeking to Keep the Student in the Appropriate Interim Alternative Educational Setting.

1. Request: The school district can file another expedited due process hearing request seeking to keep the student in an appropriate interim alternative educational setting if it “believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.” 34 C.F.R. § 300.532(b)(3).
2. Outcome: The administrative law judge can once again “[o]rder a change of placement of the child with a disability to an appropriate [IAES] for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.” 34 C.F.R. § 300.532(b)(3).
3. Repeating the Process: This process can be repeated as many times as necessary. 34 C.F.R. § 300.532(b)(3).

C. Injunction.

When a student is a danger to self or others, school districts “have the right to seek injunctive relief from a court when they believe they have the need to do so.” 64 Fed. Reg. 12,621 (Mar. 12, 1999).