Special Education Discipline
Q & A

The discipline of special education students can be a difficult and confusing area resulting in legal exposure if the appropriate procedures are not followed. In general, a student with a disability under the Individuals with Disabilities Education Act (IDEA) is entitled to two sets of procedural protections prior to the implementation of discipline – the general education due process procedures under Chapter 37 of the Texas Education Code and the U.S. Constitution that are applicable to all students, and the IDEA procedural protections that are triggered when a change of placement occurs. The following is a comprehensive set of questions and answers that address these two sets of procedures and the applicable law.

General Education Procedures and Requirements Related to Discipline

(These general education procedures apply to the IDEA student who has violated the student code of conduct)

#1 Q: Are IDEA students subject to the same rules of behavior at school as other students?

A: Yes, unless the student's Individualized Education Program (IEP) specifically indicates otherwise.

#2 Q: Does Chapter 37 of the Texas Education Code (TEC) apply to IDEA students?

A: Yes, unless the student's IEP specifically indicates otherwise.

#3 Q: Which discipline techniques in Chapter 37 apply to IDEA students?

A: All of the discipline techniques in Chapter 37 apply to an IDEA student including removal from class by a teacher (TEC § 37.002); suspension for three days or less (TEC § 37.005); mandatory placement in the disciplinary alternative educational placement ("DAEP") (TEC § 37.006); permissive DAEP placement (TEC § 37.001(a)(2)); expulsion (TEC § 37.007); and emergency placement or expulsion (TEC § 37.019) Use of any of these techniques, however, may be subject to additional IDEA procedural protections and requirements if their use results in a change of placement, or discipline strategies are a part of the IEP of a student with a disability.

#4 Q: What general education due process procedures are required for a removal from the classroom by a teacher?

A: A teacher may remove a student from the classroom if the teacher has documented repeated interference with his or her ability to communicate with students or the students' ability to learn. A student may be removed if the behavior is so unruly, disruptive, or abusive that it interferes with the teacher's ability to communicate with the students or the students' ability to learn. (TEC § 37.002) This law allows potentially permanent removal from the classroom and should not be confused with a teacher's ability to send a student to the principal, or the principal to apply appropriate discipline techniques, and then return the student to the classroom. Each school must establish a three-member committee to determine placement of a student when a teacher refuses the return of a student to the teacher's class. The committee's placement determination regarding an IDEA student is subject to the requirements of the IDEA, federal regulations, state statutes, and agency requirements. (TEC § 37.003) An IDEA student may be returned to class if a determination is made either by the removal committee or the student's admission, review and dismissal (ARD) committee that the class is a part of the student's IEP and/or placement or the only appropriate setting for the student to receive FAPE.

#5 Q: What general education due process procedures are required for a removal to the DAEP (either mandatory or permissive)?

A: The principal or other appropriate administrator must schedule a conference within three school days after a student is removed from class, either by a teacher or by an administrator. The conference should include the principal or other appropriate administrator, a parent or guardian of the student, and the student. If the situation involves removal from the classroom by a teacher, then that teacher is included in the meeting. At the conference, the student is entitled to written or oral notice of the reasons for the removal, an explanation of the basis for the removal, and an opportunity to respond to the reasons for the removal. The student may not be returned to the regular classroom pending the conference. The principal then orders the discipline placement that is appropriate under the student code of conduct. If school district policy allows it, the student may appeal the administrator's decision to the board of trustees or the board's designee. The decision of the board or board's designee is final and may not be appealed. (TEC 37.009(a)) Once the student is in the DAEP, the student is entitled to a review of the student's status, including a review of the student's academic status, every 120 days. The student or the student's parent or guardian must be given the opportunity to present arguments for the student's return to the regular classroom or campus. (TEC Ann. § 37.009(e)) The district's student code of conduct may provide additional procedures for DAEP placement. (TEC § 37.001(a)(5))

#6 Q: Are there any additional protections or procedures if the DAEP placement extends beyond 60 days or the end of the next grading period?

A: Yes. A student's parent or guardian is entitled to notice of and an opportunity to participate in a proceeding before the board of trustees or the board's designee, as provided by board policy if the DAEP placement extends beyond 60 days or the end of the next grading period. Any decision of the board or the board's designee is final and may not be appealed. (TEC § 37.009(b))

#7 Q: Are there any additional protections or procedures if the DAEP placement will extend beyond the end of the school year?

A: Yes. Before a student can be placed in a DAEP program for a period that extends beyond the end of the school year, the board or the board's designee must determine (1) that the student's presence in the regular classroom program or at the student's regular campus presents a danger of physical harm to the student or to another individual; or (2) the student has engaged in serious or persistent misbehavior that violates the district's student code of conduct. (TEC § 37.009(c))

#8 Q: Are there circumstances under which the DAEP placement can exceed one year?

A: Yes. A period of placement in the DAEP may not exceed one year unless, after a review, the district determines that (1) the student is a threat to the safety of other students or to district employees; or (2) extended placement is in the best interest of the student. (TEC § 37.009(d))

#9 Q: What general education due process procedures are required for expulsion?

A: The board or the board's designee must provide the student an appropriate due process hearing, and the student's parent or guardian must be invited, in writing, to attend. At the hearing, the student is entitled to be represented. As long as a good faith effort is made to inform the student and his/her parents or guardian of the time and place of the hearing, the district may hold the hearing regardless of whether they attend. If the decision to expel a student is made by the board's designee, the decision may be appealed to the board. The decision of the board may be appealed to a district court of the county in which the school district's central administrative office is located. (TEC § 37.009(f))

#10 Q: Are there any additional protections or procedures if the expulsion will exceed one year?

A: Yes. A period of expulsion may not exceed one year unless, after review, the district determines that (1) the student is a threat to the safety of other students or district employees; or (2) extended expulsion is in the best interest of the student. (TEC § 37.009(h))

#11 Q: What if a student is already serving in the DAEP or is expelled, and engages in additional conduct that would warrant placement in the DAEP or expulsion?

A: The district may conduct additional proceedings regarding the new conduct and may enter an additional order as a result of those proceedings. (TEC § 37.009(j))

#12 Q: Are there additional considerations when the district considers the assignment of disciplinary consequences to an IDEA student?

A: Yes. The first thing that must be determined before administering discipline to an IDEA student is whether the student has a IEP/BIP that affects when, whether, and how discipline can be assigned. Second, any disciplinary removal that constitutes a change in placement of an IDEA student must follow the procedural protections in the IDEA prior to implementation of the discipline.

IDEA PROCEDURES AND REQUIREMENTS RELATED TO DISCIPLINE

REMOVALS

#13 Q: What is a "removal?"

A: A removal is when a child who violates the student code of conduct is removed from his or her current placement (*e.g.*, the special education services the student receives in the general education classroom, special education classroom, or both) and put in another setting (such as DAEP), or is suspended, or is expelled. (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b))

#14 Q: Does sending a student home for a portion of the day constitute a removal?

A: Yes. Portions of a school day that a child has been suspended or sent home may be considered a removal. 71 Fed. Reg. 46715 (2006)

#15 Q: How do you count portions of a day?

A: The IDEA does not provide guidance on this issue. The school district should develop a system that is used consistently across campuses. For example, a student removed for 3½ hours or less would be considered removed for half a day. If the student is removed for more than 3½ hours, the student would be considered removed for a full day.

#16 Q: Does suspension from a bus constitute a removal?

A: Possibly. If the bus transportation is a part of the child's IEP, a bus suspension would be treated as a removal, unless the district 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. If the bus transportation is not a part of the child's IEP, a bus suspension is not a removal. The parent has the same obligation to get the student to school as other parents do. The school should consider whether the behavior on the bus is similar to behavior in the classroom that is addressed in an IEP and whether the bus behavior should be addressed in the IEP. (71 Fed. Reg. 46715 (2006))

#17 Q: Does in-school suspension constitute a removal?

A: It depends. In-school suspension (ISS) will not constitute a removal as along as (1) the student is afforded the opportunity to continue to appropriately participate in the general curriculum; (2) the student continues to receive the services on his/her IEP; and (3) the student continues to participate with non-disabled children to the extent he or she would have in the current placement. (*Randy M. v. Texas City Indep. Sch. Dist.*, 102 LRP 12446 (SEA TX 2001); 71 Fed. Reg. 46715 (2006)) If these three factors are satisfied, the ISS will not constitute a removal even if the ISS placement is for more than 10 consecutive school days. If these three factors cannot be satisfied, then the ISS assignment will constitute a removal.

#18 Q: Does assigning a student to detention after school or a Saturday class count as a removal?

A. No. After school detention or Saturday detention does not affect the student's special education placement during the school day and so it is not a removal of the student from his or her current placement.

#19 Q: Is there a period of time for which a student may be removed without the need for any additional procedures under the IDEA?

A: Yes. An IDEA student who violates the student code of conduct may be removed from his or her current placement for up to 10 consecutive school days, without implementing any IDEA procedures, as long as the same discipline would be applied to children without disabilities. (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1)) Removals of 10 consecutive school days or less are often referred to as a "short term removal."

#20 Q: Can a student be removed more than once in a school year on a short-term basis?

A: Yes. A school can impose multiple short-term removals during a school year as long as the cumulative days do not constitute a "change in placement." (34 C.F.R. § 300.530(b)(1)) However, after the first 10 cumulative days of removal in one school year, certain IDEA procedures apply. (See #21 Q:)

#21 Q: When do multiple short-term removals constitute a "change in placement"?

A: Multiple short-term removals will be considered a change in placement if they constitute a pattern of removal. (34 C.F.R. § 300.536(a)(2)) In determining whether multiple short-term removals constitute a pattern, the district must consider the following five factors: (1) whether the child has been subjected to a series of removals that total more than 10 school days in a school year; (2) whether the behavior is similar or substantially similar to the previous incidents that resulted in removal; (3) the length of each removal; (4) the total amount of time the child has been removed; and (5) the proximity of the removals to each other. This is a subjective analysis that is subject to challenge in a special education due process hearing. Once a school removes a student for a cumulative total of 10 school days, in one school year, it must consider these five factors for each subsequent short-term removal (*i.e.*, 10 consecutive school days or less) for the rest of the year to determine if a particular short-term removal results in a pattern and, thus, a "change in placement."

#22 Q: Who makes the decision that the removals do or do not constitute a change in placement?

A: The school district determines on a case by case basis whether a pattern of removals constitutes a change of placement. The school district should implement a procedure which is followed consistently across campuses that identifies who is to analyze these five factors and determine whether a particular short term removal should be treated as a change of placement. The

determination is subject to review through due process and judicial proceedings. (34 C.F.R. § 300.536).

#23 Q: Does a student have to be provided any type of services during a short-term removal?

A: For the first 10 cumulative days of removal in one school year, no services are required to be provided to an IDEA student, unless services would be provided to a regular education student. (34 C.F.R. § 300.530(d)(3)) However, once the child has been removed for 10 cumulative school days in the same school year, the district is required to provide services during any subsequent removals, regardless of length. School personnel must consult with at least one of the child's teachers to determine the extent to which services are needed so that the child continues to participate in the general educational curriculum and progress toward meeting the IEP goals. (34 C.F.R. § 300.530(b)(2); 34 C.F.R. § 300.530(d)(4)) For example, if a student has been removed for 10 cumulative days during the school year and is now subject to a 3-day suspension, the district must apply the five factors to determine whether the 3-day suspension should be treated like a change of placement. (See #21 Q) If it is determined not to constitute a change of placement, then school personnel must consult with at least one of the student's teachers to determine what services should be made available during the 3-day suspension so that the student will continue to participate in the general curriculum and continue to progress toward meeting IEP goals.

CHANGE IN PLACEMENT

#24 Q: Why is 10 school days an important factor in discipline?

A: Ten school days is the key trigger point for discipline removals. If a removal is for 10 consecutive or cumulative school days or less, then it does not constitute a change in placement. If a removal is for more than 10 consecutive or cumulative (if the removals constitute a pattern) school days, then the removal constitutes a change in placement and certain procedural steps must be taken prior to the implementation of the discipline.

#25 Q: What constitutes a "change in placement?"

A: Removal of an IDEA student from his or her current educational placement for more than 10 consecutive school days is a change in placement. (34 C.F.R. § 300.536(a)(1)) This is often referred to as a "long term removal." Examples of those removals are disciplinary alternative educational placements (DAEP) and

expulsions. Also, multiple short-term removals that constitute a pattern of removal will be considered a change in placement. (34 C.F.R. § 300.536(a)(2))

#26 Q: If the district is proposing a discipline removal that would constitute a change in placement, must the parent be notified?

A: Yes. The district must notify the parent of the recommended discipline on the date on which the decision is made to make a discipline removal that constitutes a change in placement and must provide the parents with the procedural safeguards notice. (34 C.F.R. § 300.530(h))

#27 Q: What procedures must be followed prior to proposing a removal that constitutes a change in placement (*i.e.*, expulsion, a long-term removal, or a series of short-term removals that constitute a pattern)?

A: Before any disciplinary action may be taken regarding an IDEA student that would constitute a change of placement, a manifestation determination review (MDR) must be conducted. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e); TEC § 37.004(b))

MANIFESTATION DETERMINATION REVIEW

#28 Q: What is a manifestation determination review (MDR)?

A: An MDR is a review conducted by the ARD committee when a discipline removal is proposed that would result in a change of placement.

#29 Q: Who conducts the MDR?

A: Federal law provides that the local educational agency, the parent, and relevant members of the IDEA team (as determined by the parent and local educational agency) are the people who must conduct an MDR. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.5300(e)(1)) Texas law, however, modifies this slightly and requires that the student's ARD committee conduct the MDR. (TEC § 37.004(b))

#30 Q: When does the MDR have to be held?

A: The MDR must be held within 10 school days of the decision to implement discipline that will change the student's placement. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1))

#31 Q: When must the parent be notified that an ARD meeting needs to be convened to conduct an MDR?

A: Proper notice of the ARD committee meeting must be sent to the parent within a reasonable time prior to the meeting. (34 C.F.R. § 300.503(a)) Texas regulations define "reasonable time" as 5 school days. (19 T.A.C. § 89.1015) The notice should be clear, complete, and list MDR as a task of the meeting.

#32 Q: What does the ARD committee do during an MDR?

A: Based on information presented and discussed during the meeting, the ARD committee must answer the following two questions to determine if the behavior subject to disciplinary action that will result in a change of placement is a manifestation of the student's disability:

(1) whether the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; and

(2) whether the conduct in question was the direct result of the district's failure to implement the IEP. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1))

Once the determination is made as to whether the behavior is a manifestation of the student's disability, the ARD committee may have other decisions to make. (See #s 36-41 Q)

#33 Q: What information should the ARD committee consider before answering these two questions?

A: The ARD committee must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1)) Other relevant information in the student's file may include the evaluation data, discipline history, and details of the event. While the ARD committee is not required to review every piece of information in the student's educational file, the team must review the information pertinent to that decision. (*In re: Student with a Disability*, 59 IDELR 150 (SEA N.Y. 2012))

#34 Q: What should the ARD committee discuss during the MDR?

A: The ARD committee should discuss why the behavior is or is not a manifestation of the student's disability. The ARD committee needs to have enough details about the misbehavior to be able to evaluate the relationship between the misbehavior and the student's disability. It is not sufficient, for example, for the ARD committee to only know that the student brought his prescribed medication for ADHD to school and gave it to another student. There needs to be details and context provided to the ARD committee to evaluate whether that behavior was caused by, or had a direct and substantial relationship to, the student's disability. The ARD committee must also determine whether the student's IEP was implemented. If the IEP was not implemented, the ARD committee must analyze whether that failure of implementation caused the misbehavior. The meeting should not be treated as a mere formality or prelude to assigning the student to the alternative placement. (*Flour Bluff Indep. Sch. Dist.*, 109 LRP 74053 (SEA TX 2008); *Greenville Indep. Sch. Dist.*, 113 LRP 27897 (OCR 2013))

#35 Q: What if the parents refuse to attend the MDR?

A: The ARD committee meeting to conduct an MDR must be properly noticed just like any other ARD committee meeting. To have the meeting without the parent present, the district must keep a record of its attempts to arrange a mutually agreeable time and place. Those attempts should include such things as telephone calls, written communications, visits with the parent and the results of those efforts. If these steps are taken, then the ARD committee meeting can be held even though the parent refuses to attend. (34 C.F.R. § 300.322(d))

#36 Q: What if the ARD committee answers "yes" to either of the questions?

A: The conduct shall be determined to be a manifestation of the child's disability. (20 U.S.C. § 1415(k)(1)(E)(ii); 34 C.F.R. § 300.530(e)(2))

#37 Q: Can the school district proceed with the discipline action if the conduct is determined to be a manifestation of his disability?

A: No. The child must be returned to the placement from which the student was removed unless (1) special circumstances involving weapons, drugs, or bodily injury exist or (2) the parent and school agree to the change of placement as a part of the modification of the BIP. (20 U.S.C. § 1415(k)(1)(F)(iii); 34 C.F.R. § 300.530(f)) However, under Texas law, an IDEA student may not be placed in an alternative education program solely for educational purposes. (TEC § 37.004(c))

#38 Q: What happens if the ARD committee determines the behavior is a manifestation of the disability but the violation of the student code of conduct is a mandatory DAEP placement or an expellable offensive?

A: The IDEA, a federal law, trumps any state laws or student code of conduct requirements for mandatory DAEP placement or expulsion.

#39 Q: What happens if the ARD committee answers "no" to both of the questions?

A: When the answer to both questions is "no," then the student's behavior is not a manifestation of the disability. When the behavior is not a manifestation, the relevant disciplinary procedures applicable to students without disabilities may be applied to the IDEA student. The IDEA student may be disciplined in the same manner and for the same duration as a child without a disability. The ARD committee determines the appropriate interim alternative setting (the discipline setting), and must also determine that a free appropriate public education (FAPE) can be provided in that setting. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c); 20 U.S.C. § 1415(k)(2)) The ARD committee determines the setting in which the discipline removal will occur because this is a change of placement. The ARD committee should consider the discipline setting recommended by the campus administration, but not automatically place the student there. The ARD committee must examine the setting and determine if the student can be provided FAPE there.

#40 Q: What is "FAPE" in the discipline setting?

A: In order to provide FAPE in a discipline setting, the student must be able to continue to participate in the general education curriculum, although in a different setting, and progress toward meeting the goals set out in the student's IEP. (20 U.S.C. § 415(k)(1)(D)(i); 34 C.F.R. § 300.530(d)(i)) However, the student does not have to receive the exact same services in exactly the same setting as before the discipline. (*Troy City Bd. of Educ.*, 27 IDELR 555 (SEA AL 1998)) The U.S. Department of Education has said that it does not interpret the term "participate" to mean that a school or district must replicate every aspect of the services that a child would receive in his or her current placement. (71 Fed. Reg. 46716 (2006)) The ARD committee should adjust the student's IEP to reflect what will be provided in the discipline setting. If the student is properly expelled for misbehavior that is not a manifestation of his or her disability, the obligation to provide FAPE continues even though the student is expelled.

#41 Q: Can school personnel decide not to change the student's placement for disciplinary reasons, even if the ARD committee found that the student's conduct was not a manifestation?

A: Yes. When determining a change of placement, school personnel may consider unique circumstances on a case-by-case basis. (20 U.S.C. § 1415(k)(1)(A); 34 C.F.R. § 300.530(a)) This provision does not permit the school to bypass required procedures, but school personnel familiar with the student and the circumstances may decide a discipline change of placement should not be implemented, even if the misbehavior is not a manifestation of the disability. (71 Fed. Reg. 46714 (2006))

#42 Q: What if the ARD committee does not reach mutual agreement in an ARD meeting to conduct an MDR?

A: Under Texas rules, if mutual agreement is not achieved by the ARD committee, the parent is offered a single opportunity to recess for up to 10 school days, unless the parties agree to a longer time, and then reconvene to attempt to achieve mutual agreement. (19 T.A.C. § 89.1050(f)(1)) However, if the student has committed an expellable offense, an offense which might lead to a placement in a DAEP, or the student's presence on the campus presents a danger of physical harm to the student or others, the 10-day recess is not required. If the ARD committee does not reach mutual agreement on the MDR analysis, the ARD committee meeting concludes and the parent is not offered a 10 school day recess. The district implements the decision of the school-based members of the ARD committee and provides prior written notice to the parent as required by IDEA under 34 C.F.R. § 300.503. (19 T.A.C. § 89.1050(f)(3), (g))

#43 Q: What happens if the parents appeal the proposed discipline decision under the general education procedures in the student code of conduct?

A: The school should continue with the general education appeal procedure; however, that process does not affect the requirement to conduct an MDR.

#44 Q: Which process should be conducted first – the general education appeal or the MDR?

A: This is not specifically addressed in the IDEA. The school can take the position that until the general education appeal procedures have run their course, no "decision" has been made to implement discipline that would amount to a change of placement. Once the general education appeal process is complete, if the final decision is discipline, then notice goes to the parent of IDEA procedures and

the school has 10 school days to conduct an MDR. The school can also treat the recommendation of discipline that will result in a change of placement as the trigger to give notice and conduct an MDR in 10 school days. If the behavior is not a manifestation, then the general education appeal process can proceed. If it is a manifestation, then there may be no need to continue the general education appeal process.

#45 Q: Does the ARD committee determine whether the student is "guilty of the offense?"

A: No. Campus administration should investigate to determine whether the student committed the conduct as alleged and, if so, what the appropriate consequence is under the student code of conduct. The conclusions from the investigation are presented to the ARD committee conducting the MDR along with details sufficient for the ARD committee to answer the two questions required in the MDR.

SPECIAL CIRCUMSTANCES

#46 Q: Are there different IDEA rules that apply if the student's conduct involves weapons, drugs, or the infliction of serious bodily injury?

A: Yes. School personnel may remove a student to an interim alternative educational setting, without regard to whether the behavior is determined to be a manifestation of the student's disability, in cases where the student, while at school, on school premises, or to or at a school function, (1) carries or possesses a weapon; (2) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance; or (3) inflicts serious bodily injury upon another person. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g))

#47 Q: What constitutes a "weapon" under the IDEA?

A: The term "weapon" is defined as 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. "Weapon" does not include a pocket knife with a blade of less than 2½ inches in length. (34 C.F.R. § 300.530(i)(4); 18 U.S.C. § 930(g)(2))

#48 Q: What are some examples of a "weapon" under the IDEA?

A: The following items were found to be a weapon under the IDEA: a metal awl (metal spike two inches long) used to threatened students (*In re: Student with a Disability*, 50 IDELR 180 (SEA VA 2008); scissors used to attack a student (*Anchorage Sch. Dist.*, 45 IDELR 23 (SEA AK 2005); cigarette lighter with a retractable blade (*Chester Upland Sch. Dist.*, 35 IDELR 104 (SEA PA 2001); a knife with a blade 2½ inches or longer (*Alameda Unified Sch. Dist.*, 32 IDELR 159 (SEA CA 2000) The following items, however, were found to not be a weapon under the IDEA: pulling on the assistant principal's necktie really hard and choking him, leaving red marks on his neck (*Scituate Public Schs.*, 47 IDELR 113 (SEA MA 2007); scratching a fellow student with a paper clip (*Anaheim Union High Sch. Dist.*, 32 IDELR 129 (SEA CA 2000); stabbing a classmate with a pencil (*Indep. Sch. Dist. #831*, 32 IDELR 163 (SEA MN 1999)

#49 Q: What constitutes a "controlled substance" under the IDEA?

A: "Controlled substance" is defined as a drug or other substance identified in the Controlled Substances Act (21 U.S.C. § 812(c)) (34 C.F.R. § 300.530(i)(1))

#50 Q: What constitutes "illegal drugs" under the IDEA?

A: "Illegal drugs" are defined as 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 the Controlled Substances Act or any other provisions of federal law. (34 C.F.R. § 300.530(i)(2)) This means that a student who possesses medication prescribed for the student may be in violation of the student code of conduct and subject to discipline, but would not come under the special circumstances in IDEA that would allow school personnel to place the student in an interim alternative setting without regard to whether the misbehavior was a manifestation of the disability. However, if the IDEA student was in possession of a medication prescribed for another person, such as his or her parent, the student would come under the special circumstances in IDEA.

#51 Q: Is temporary possession sufficient to prove the student "knowingly possesses?"

A: Yes. The student does not have to own the drugs to "knowingly possess" them. Temporary control can amount to possession. (*Warrensville Heights City Sch. Dist.*, 108 LRP 53428 (SEA OH 2008))

#52 Q: What constitutes "serious bodily injury" under the IDEA?

A: "Serious bodily injury" is defined as bodily injury which involves (1) a substantial risk of death; (2) extreme physical pain; (3) protracted and obvious disfigurement; or (4) protracted loss or impairment of the function of a bodily member, organ, or mental faculty. (34 C.F.R. § 300.530(i)(3); 18 U.S.C. § 1365(h)(3))

#53 Q: What are some examples of "serious bodily injury" under the IDEA?

A: Serious bodily injury is a high standard and the hardest of the three special circumstances to apply. In *Westminster Sch. Dist.*, 56 IDELR 85 (SEA CA 2011), a student rammed his head into a teacher's chest causing the teacher to suffer internal chest contusions. The teacher reported it was the worst pain in her life; she was prescribed two medications; and missed a week of work. These facts were found to constitute serious bodily injury. However, the following injuries were found to not constitute serious bodily injury: a broken nose (*Pocono Mountain Sch. Dist.*, 109 LRP 26432 (SEA PA 2008)); a swollen, kicked knee (*Unified Sch. Dist. No. 2*, 54 IDELR 39 (SEA AZ 2010)); kicked shins and a stomped toe (*In re: Student with a Disability*, 108 LRP 45824 (SEA WV 2008)); assault of a district employee who was able to return to work the next day (*Southern York County Sch. Dist.*, 54 IDELR 305 (SEA PA 2010)); and a student hitting a paraprofessional on the head repeatedly with the student's knuckles, causing dizziness, blurred vision and pain (*In re: Student with a Disability*, 54 IDELR 139 (SEA KS 2010)) Whether the actions of an IDEA student have inflicted serious bodily injury is a question that must be decided on a case-by-case basis.

#54 Q: How long may an IDEA student be removed to an interim, alternative educational setting for one of these special circumstances (*i.e.*, weapons, drugs, serious bodily injury)?

A: The student may be removed for up to 45 school days. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g)) The requirement to provide FAPE in the discipline setting applies to these removals.

#55 Q: Does the ARD committee still have to conduct a MDR even if the student's offense falls under the special circumstance category?

A: Yes. The 45 school day placement provision does not justify bypassing required procedures. (71 Fed. Reg. 46714 (2006)) In fact, the MDR will be particularly relevant if the school seeks to impose a penalty that lasts longer than the 45 school days. If the student's behavior is not a manifestation, then the school can impose a longer penalty than the 45 school days. If the behavior is a

manifestation, then the student can only serve 45 school days and must return to the original placement after that.

#56 Q: Must the MDR be conducted prior to the removal of the student?

A: Certainly, the course of least risk is to conduct the MDR prior to removal. However, in *Dallas ISD*, 110 LRP 36304 (SEA TX 2010), the hearing officer noted that school personnel could remove the student under one of these special circumstances without regard to whether the behavior was a manifestation of the disability. The hearing officer did not find the district in violation of the IDEA even though the MDR was done by the ARD committee after the removal.

#57 Q: Can a school use a 45 school day placement multiple times during a school year?

A: A 45 school day placement cannot be extended or renewed in connection *with the same offense*. *Letter to Bachman*, 29 IDELR 1092 (OSEP 1997) However, 45 school day placements can be used multiple times in a school year if there are *multiple qualifying offenses*. (64 Fed. Reg. 12648 (1999))

#58 Q: Is there any point during a discipline situation that the district is required to conduct an FBA or create and implement a BIP?

A: Yes. If a student's behavior is found to be a manifestation of the disability, the district is required to conduct a functional behavioral assessment, unless the school already conducted such assessment prior to the ARD committee's manifestation determination. The district is also required to implement a behavior intervention plan for the student. If the student already has a behavior intervention plan in place, the school should review the plan and modify it, as necessary, to address the behavior. (20 U.S.C. § 1415(k)(1)(F)(i)-(ii); 34 C.F.R. § 300.530(f)) If the student's behavior is found to not be a manifestation of the disability, or if a student is removed for drugs, weapons, or the infliction of serious bodily injury, the statute provides that the student must receive an FBA, behavioral intervention services and modification, "as appropriate," to address the behavior violation so that it does not recur. Other regulations contemplate that the ARD committee should address problematic behavior in the IEP. If the student's behavior impedes his or her learning or that of other students, the ARD committee must "consider" the use of positive behavioral interventions and supports to address that behavior. (34 C.F.R. § 300.324(a)(2)(i))

IDEA Discipline Due Process Hearings

#59 Q: Can a parent request a due process hearing to challenge the MDR decision?

A: Yes. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a))

#60 Q: Can a parent request a due process hearing to challenge a placement decision?

A: Yes. The ARD committee determines the interim alternative educational setting the student will be in during the discipline period. This decision may be challenged by the parent. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a))

#61 Q: Can the district request a due process hearing in a discipline situation?

A: Yes. If the district believes that maintaining the current placement of the student is substantially likely to result in injury to the child or others, the district may request a hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a)) For example, if the ARD committee determines that the student's misbehavior is a manifestation, the student is to be returned to his or her current placement. The school may believe that if the student returns to his or her current placement, injury to the student or to others is likely to occur. In such a situation, the district may request a due process hearing and seek an order from the hearing officer to place the student in a different setting.

#62 Q: What are the timelines for a due process hearing for a discipline situation?

A: A request for a due process hearing in the discipline context results in an expedited hearing, which must occur within 20 school days of the date the complaint is filed. After the hearing, the hearing officer has 10 school days to render a decision. The resolution session must be held within seven days of receiving the complaint. Decisions in expedited due process hearings are appealable. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c))

#63 Q: What authority does a hearing officer have in a discipline expedited hearing?

A: If the parent appeals the decisions of the ARD committee, the hearing officer may return the IDEA student to the placement from which the child was removed. If the district requests the hearing, the hearing officer may order a change in placement of an IDEA student 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. (20 USC § 1415(k)(3)(B); 34 C.F.R. § 300.532(b)) The district may request multiple hearings to continue the placement in the interim alternative educational setting for 45 school days at a time, if the district continues to believe that, if returned to his or her former placement, the student is substantially likely to injure self or others.

#64 Q: Can a hearing officer rule on the guilt or innocence of a student's misconduct or the appropriateness of the disciplinary consequence?

A: The traditional view is that a due process hearing officer can only rule on the ARD committee's actions and not on the guilt or innocence of the student or appropriateness of the disciplinary consequence. However, a recent letter from OSEP stated that the hearing officer may decide not only the appropriateness of a district's MDR and placement decision, but that the hearing officer also has discretion to decide whether the conduct actually amounted to a code of conduct violation. (*Letter to Ramirez*, 113 LRP 3448 (OSEP December 5, 2012))

#65 Q: Once a due process hearing is filed challenging a discipline decision, does "stay put" prevent the student from going to the interim alternative educational setting?

A: No. The student shall remain in the interim alternative educational setting (the discipline setting) pending the decision of the hearing officer or until the expiration of the assigned discipline, whichever occurs first, unless the parent and the district agree otherwise. (20 U.S.C. § 1415(k)(4)(A); 34 C.F.R. § 300.533)

STUDENTS NOT YET IDENTIFIED

#66 Q: Can a child who has not yet been determined to be eligible for special education services assert the disciplinary protections of the IDEA?

A: Yes. If the district has knowledge that the child was a child with a disability before the behavior that led to the disciplinary action against the student, the parent can assert the protections of IDEA in the disciplinary process. (34 C.F.R. § 300.534(a); *Eanes Indep. Sch. Dist.*, 29 IDELR 647 (SEA TX 1998))

#67 Q: When will a district be deemed to have "knowledge?"

A: The district will be deemed to have knowledge if, before the behavior occurs, (1) the parent of the child expressed concern in writing to supervisory or administrative personnel of the district, or a teacher of the child, that the child is in need of special education and related services; (2) the parent of the child requested an evaluation of the child; or (3) the teacher of the child, or other personnel of the district, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education or to other supervisory personnel. (34 C.F.R. § 300.534(b))

#68 Q: If the school did not have knowledge before the misbehavior, can the parent request an IDEA evaluation?

A: Yes. If parent requests an evaluation, the evaluation must be expedited. The IDEA regulations do not define "expedited." The evaluation should be completed in less time than allowed by law to complete an initial evaluation, which, in Texas, is 45 school days. (TEC § 29.004) During the evaluation, the student remains in the discipline setting. The IDEA does not give any guidance for what a school is to do if the evaluation is completed, the ARD committee determines the student to be IDEA eligible, and the student is still in the discipline setting. The course of least risk would be to conduct an MDR using the new evaluation data and analyzing the behavior that led to the discipline placement. If it is a manifestation, the ARD committee would move the student to the special education placement developed by the ARD committee.

#69 Q: What if the parent revokes consent for special education services?

A: The student will be subject to the same disciplinary procedures and timelines applicable to general education students and not entitled to IDEA's discipline protections. (73 Fed. Reg. 73012-13)

REPORTS OF A CRIME

#70 Q: Does the Gun-Free Schools Act incorporated into the No Child Left Behind Act override the requirements of the IDEA?

A: No. The Gun-Free Schools Act conditions the receipt of some federal funding on the adoption by a state of a one year mandatory expulsion policy for a student who brings a gun to school. The Gun-Free Schools Act has exceptions in it, including the option to provide an expelled student educational services in an alternative setting. The Gun-Free Schools Act states its provisions must be construed consistently with the IDEA. When an IDEA student brings a gun to

school and discipline, including expulsion, is proposed that would result in a change of placement, the ARD committee must follow the MDR process as it would for any other student. Because a weapon is involved, removal for 45 school days is available to school personnel even if the behavior is a manifestation of the disability.

#71 Q: Does the IDEA prevent a district from reporting a crime committed by an IDEA student?

A: No. Nothing in the IDEA prohibits a district from reporting a crime committed by an IDEA student to the appropriate authorities, nor does it prevent law enforcement authorities from exercising their responsibilities regarding a report . (34 C.F.R. § 300.535)

#72 Q: Must parents be notified before a report is made to authorities?

A: No. School personnel do not have to follow IDEA procedures, such as notice to the parent and an ARD committee meeting, prior to reporting a crime. (*Northside Independent School District*, 28 IDELR 1118 (SEA TX 1998))

#73 Q: What must the district provide to law enforcement when it makes a report?

A: If the district reports a crime, the district must provide copies of special education and discipline records for consideration by the authorities. IDEA does not specify how much information is to be provided. The district should provide enough information for law enforcement authorities to be able to get a picture of the student's current functioning and performance. The district should seek parent consent to provide the records to law enforcement. If the parent does not consent, records can be provided to law enforcement only to the extent it would be permissible under an exception in the Family Educational Rights and Privacy Act ("FERPA") to the general rule that personally identifiable student records can be released to a third party only with the parent's consent. (71 Fed. Reg. 46, 728 (2006))