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Time Out: Successful Discipline of Special Education Students

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I. RELEVANT STATUTES AND DEFINITIONS

- A. IDEA.** The Individuals with Disabilities Education Act. This federal statute sets forth the rights of children with a disability and the procedures that schools must follow in regard to such students.
- B. Child with a Disability.** A term used in IDEA which refers to a child who has been determined to meet IDEA criteria and need special education and related services.
- C. FAPE.** “Free Appropriate Public Education.” Generally speaking, this phrase refers to special education and related services that have been provided at public expense (without charge), in compliance with state and federal law, and in compliance with the student’s individual education program/plan (“IEP”).

Practice Point: In 2017, the U.S. Supreme Court issued a new definition of “FAPE.” See *Endrew v. Douglas County School District*, 137 S. Ct. 988 (2017). The new standard requires each child’s educational program to be “appropriately ambitious in light of his circumstances” and grant “every child the chance to meet challenging objectives.”

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 While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments.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. ©2017 Ratwik, Roszak & Maloney, P.A.

- D. **Section 504.** Part of the Rehabilitation Act of 1973. This federal statute applies to schools and prohibits discrimination on the basis of disability.
- E. **Individual with a Disability.** A term used in Section 504 which refers to an individual who has, is regarded as having, or has a record of having a physical or mental impairment which substantially limits one or more of the person's major life activities. This is the same standard used in the Americans with Disabilities Act.
- F. **Pupil Fair Dismissal Act.** A Minnesota law that governs the circumstances under which a school district (or charter school) can suspend, expel or exclude students. The Act provides the following three independent grounds for dismissing (expelling or suspending) students from school:
 - 1. Willful violation of reasonable school board regulations. Such regulations must be clear and definite and provide notice to the pupils that they must conform their conduct to its requirements;
 - 2. Willful conduct that materially and substantially disrupts the rights of others to an education; and
 - 3. Willful conduct that endangers the student, other pupils or the property of the school district.

Minn. Stat. § 121A.45, subd. 2.

II. SUSPENSION AND EXPULSION OF DISABLED STUDENTS

- A. **Expulsion and Suspension.** The student's misconduct must meet at least one of the grounds for expelling a student under the Pupil Fair Dismissal Act.
- B. **Removing a Special Education Student from School may Constitute a Change in Placement.** An expulsion or a suspension of a special education student for a period of time *in excess of ten days* constitutes a change in placement that requires a review of the student's IEP and triggers due process rights, including the right to a contested hearing. Moreover, if the behavior leading to the discipline is related to or arose out of the student's disability, a suspension exceeding ten days violates the IDEA.
 - 1. The ten day rule is rooted in the case of *Honig v. Doe*, 484 U.S. 305 (1988). In that case, the United States Supreme Court held that an expulsion or a suspension of a special education student for a period in

excess of ten school days constituted a unilateral change in the student's special education placement by a school district. Parental consent is required before changing the placement of a student with an IEP.

2. The holding of *Honig v. Doe* is reflected in IDEA. Under the IDEA, school personnel may suspend a student (or order a change to an appropriate interim alternative educational setting) for "not more than 10 school days," if such an action would be applied to children without disabilities. 20 U.S.C. § 1415(k)(1)(B).
 3. **Right to Challenge Disciplinary Decisions Using IDEA Mechanisms.** Parents may challenge any change in placement, including changes in placement resulting from disciplinary actions. While such a challenge is ongoing, IDEA mandates that the student remain in his or her current educational setting. This is called the "stay put" requirement. 34 C.F.R. § 300.514.
 4. **Effect of Stay Put Placement.** Because the "stay-put" provision applies to any changes in placement (including expulsions and suspensions in excess of ten days), the student is entitled, if an objection to the change in placement is made, to remain in his or her current educational placement pending the outcome of conciliation, mediation, a local due process hearing, and any appeal. This process may take several months.
 5. **Section 504 Considerations.** Under Section 504, disciplining a student for behavior that is caused by his or her disability may be evidence of disability discrimination.
- C. Partial Days of Suspension.** The Pupil Fair Dismissal Act states that the definition of "suspension" "does not apply to dismissal from school for one school day or less, **except** as provided in federal law for a student with a disability." Minn. Stat. § 121A.41, subd. 10. The Act further states: "A dismissal of one school day or less is a day or a partial day of suspension if the child with a disability does not receive regular or special education instruction during that dismissal period. The notice requirements under section 121A.46 do not apply to a dismissal of one day or less." This language essentially codifies the MDE's position that removing a child with a disability from school for one day or less counts as a day of suspension for special education purposes, unless the child's IEP is implemented during the period of removal.
- D. In-School Suspension.** An in-school suspension counts as a day of suspension for purposes of IDEA unless the student is afforded the opportunity to continue to appropriately progress in the general curriculum, to continue to receive the

services specified on his/her IEP, and to continue to participate with nondisabled students to the extent the student would have participated with such students in their current placement.

- E. Bus Suspensions.** If a student is suspended from the bus and bus transportation is part of the student's IEP, each day of suspension from the bus counts as a day of suspension for purposes of IDEA, unless the school district arranges for alternative transportation. If bus transportation is not a part of the student's IEP, a bus suspension would not count as a suspension for purposes of IDEA.
- F. Is there an Annual Cap on the Cumulative Number of Days a Special Education Student May Be Suspended?** The federal regulations state that while schools may suspend a special education student for only ten days per incident, there is no cumulative cap of ten days of suspension per school year. However, the regulations warn that school districts may not subject students to a pattern of suspensions or multiple suspensions for the same course of conduct.
1. A pattern of short-term suspensions, none of which exceeds ten days, can be evidence of a practice of disregarding the impact of a student's disability upon his or her misconduct. Such a practice may cause a parent to assert a denial of FAPE on the ground that the school district failed to provide appropriate programming, improperly changed the student's placement, and discriminated against the student on the basis of his or her disability.
 2. In determining whether a district's actions have resulted in a **pattern of removal** that constitutes a change of placement, the following factors should be considered:
 - a. the length of each removal;
 - b. the total amount of time that the child has been removed during the school year;
 - c. the proximity of the removals to each other; and
 - d. the reason for each removal, including whether the child's most recent behavior is substantially similar to the child's behavior in previous incidents that resulted in removal. 34 C.F.R. § 300.536(a).
 3. Schools are wise to limit their use of suspensions with special education students and, when necessary, suspend for shorter periods of time rather

than suspending for five or ten days at a time. Rarely will a student be suspended for significantly more than ten days in a school year without triggering a change in placement

G. Manifestation Determinations. School districts and charter schools *may not* expel a disabled student if the misbehavior is a manifestation of the student’s disability, *but may* expel a disabled student if the misconduct is not a manifestation of the student’s disability. *See* 34 C.F.R. § 300.530; *see also* Minn. Stat. § 121A.43.

1. **Federal Law.** The IDEA provides that a manifestation determination meeting must be held within ten (10) 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).
 - a. For purposes of conducting a manifestation determination, a “change in placement” occurs when a student has been removed from class (e.g., suspended) for five (5) consecutive school days or ten (10) cumulative school days. Minn. Stat. § 121A.43. Partial day suspensions count towards this limit and the total amount of time for which a school can suspend a student with a disability. *Id.*
 - b. The manifestation determination must also be made if:
 - i. The student is placed in an interim alternative educational setting for a period of up to 45 days; or
 - ii. A hearing officer orders a change in a student’s placement to an alternative education setting for a period up to 45 days.
2. **Minnesota Law.** Minnesota law provides that “relevant members of the child's individualized education program team, including at least one of the child's teachers” must meet if a child with a disability has been suspended for more than five consecutive school days or ten cumulative school days in the same year, provided that the suspension does not involve a recommendation for expulsion or other change in placement. Minn. Stat. § 121A.43.
 - a. At that meeting, the team must “determine the extent to which the child needs services in order to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals in the child's individualized education program.” *Id.*

- b. The meeting “must occur as soon as possible, but no more than ten days after the sixth consecutive day of suspension or the tenth cumulative day of suspension.” *Id.*
3. **Manifestation Determination Process.** At the meeting, the IEP team must:
- a. consider all relevant information, including any assessments, observations of the child, and the student’s IEP and placement;
 - b. review the relationship between the child’s disability and the behavior subject to the disciplinary action;
 - c. determine whether the student’s IEP, placement and services are appropriate.
 - d. A behavior is a manifestation of the student’s disability if the team determines that either:
 - i. The conduct was caused by, or had a direct and substantial relationship to the child’s disability; *or*
 - ii. The conduct was the direct result of the school’s failure to implement the IEP.
 - e. 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. 34 C.F.R. 300.524. A school district may not expel a student for misbehavior that is a manifestation of the student’s disability.
4. **Manifestation Determination Under Section 504.** Section 504 requires schools to conduct an evaluation before changing a 504 eligible student’s placement. This includes conducting a so-called “manifestation determination” (a type of evaluation) once the student’s suspensions exceed 5 cumulative days or 10 consecutive days in any given school year.
5. **Notification Requirement for Expulsion.** Upon deciding to expel a student, the school district must notify the student’s parent or guardian of the decision and provide them with a copy of the procedural safeguards brochure. *See* 34 C.F.R. § 300.530(h).

6. **Functional Behavioral Assessment and Behavior Intervention Plans.**

The IDEA requires that a school district conduct a functional behavioral assessment in connection with discipline whenever:

- a. a student is suspended or expelled for behavior found not to be a manifestation of his or her disability;
- b. a student is unilaterally removed to a 45 day interim educational placement; or
- c. a student's behavior is found to be a manifestation of his or her disability.
 - i. This requirement does not apply if the student was already the subject of a functional behavioral assessment prior to the conduct occurring if a behavior intervention plan resulted from the assessment.
 - ii. If the student already had a behavior intervention plan, and the conduct was found to be a manifestation of the student's disability, then the team must review and, if necessary, modify the plan.

34 C.F.R. § 300.530(d), (f).

- d. IDEA notice and meeting requirements applicable to assessments generally also apply to functional behavioral assessments.

H. FAPE. Under both state and federal law, special education students are entitled to receive FAPE during the period of expulsion (beginning on the eleventh cumulative day of removal). *See* 34 C.F.R. § 300.530(b)(2); Minn. Stat. § 121A.43(d). The end result is often an expulsion in form, but not in substance.

I. Alternative Educational Services. Before suspending or expelling a student, a district must attempt to provide alternative educational services, unless it appears that the pupil will create an immediate and substantial danger to self or to surrounding persons or property. Minn. Stat. § 121A.45, subd. 1.

- 1. Alternative educational services may include, but are not limited to, special tutoring, modified curriculum, modified instruction, other modifications or adaptations, instruction through electronic media, special education services, homebound instruction, supervised homework, or

enrollment in another district or in an alternative learning center. Minn. Stat. § 121A.41, subd. 11.

J. Alternative educational services beginning sixth consecutive day. The Pupil Fair Dismissal Act further provides that schools must provide every student, disabled and non-disabled, with “alternative educational services” to the extent that a suspension exceeds five consecutive school days. Minn. Stat. § 121A.41, subd. 11.

1. The Act further states: “A child with a disability shall be provided alternative educational services to the extent a suspension exceeds five consecutive school days.” Minn. Stat. § 121A.43(b).

K. Written Suspension Notices. The Pupil Fair Dismissal Act requires administrators to provide written notices of suspension containing specific information and a copy of the Pupil Fair Dismissal Act before the suspension takes place, unless the student will create an immediate and substantial danger to surrounding persons or property. The notice must also be mailed to the student and parent/guardian within 48 hours of the informal administrative conference.

L. Written Expulsion Notices. Written notice of intent to expel/exclude must be served upon the pupil and parent/guardian personally or by mail. The Pupil Fair Dismissal Act requires the notice to contain specific information. It must be include an additional copy of the Pupil Fair Dismissal Act.

M. Meeting to Determine the Extent of the Services that Are Necessary for a Suspended Student. The PFDA states:

When a child with a disability has been suspended for more than five consecutive school days or ten cumulative school days in the same school year, and that suspension does not involve a recommendation for expulsion or exclusion or other change of placement under federal law, relevant members of the child's individualized education program team, including at least one of the child's teachers, shall meet and determine the extent to which the child needs services in order to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals in the child's individualized education program. That meeting must occur as soon as possible, but no more than ten days after the sixth consecutive day of suspension or the tenth cumulative day of suspension has elapsed.

N. Meeting to Consider Mental Health Screening. If a student is removed from school for more than ten cumulative days in a school year, the school district must make reasonable attempts to convene a meeting with the student and the parent or guardian before subsequently removing the student from school and, with the permission of the parent or guardian, must arrange for a mental health screening of the student. Minn. Stat. § 121A.45, subd. 3.

1. The purpose of this meeting is to consider (a) the pupil's need for assessment or other services and (b) whether the parent or guardian should have the pupil assessed or diagnosed to determine whether the pupil needs treatment for a mental health disorder.
2. With the permission of the parent or guardian, the district must arrange for a mental health screening for the student. However, the district is not required to pay for the mental health screening.

III. SCHOOLS HAVE LIMITED AUTHORITY TO UNILATERALLY REMOVE SPECIAL EDUCATION STUDENTS FROM SCHOOL

A. Unilateral 45 (School) Day Placements. Under the IDEA, a school district may unilaterally place a student in an appropriate interim alternative educational setting for up to 45 *school* days if the student does any of the following while at school, on school premises, or at a school function:

1. carries or possesses a weapon,
 - a. A weapon is generally defined as a device, instrument, material or substance that is used for or is readily capable of causing death or serious bodily injury, including a knife with a blade exceeding two and a half inches in length. 18 U.S.C. § 930(g)(2) (2004).
2. knowingly possess or uses illegal drugs
3. sells or solicits the sale of a controlled substance; or
4. inflicts "serious bodily injury" on another person.
 - a. The infliction of "serious bodily injury" requires a showing of 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.

B. IEP Team Determines the Interim Alternative Educational Setting. The IEP team must select a setting that enables the student to continue participating in the general curriculum, although in another setting, and to continue receiving services and modifications, including those described in the current IEP, which will enable the student to meet the goals in the IEP. The alternative setting must include services and modifications designed to address the misbehavior so that it does not recur.

C. Manifestation Determination Required. The IEP team must do a manifestation determination before invoking the right to unilaterally change the student's placement for up to 45 days. 20 U.S.C. § 1415(k)(1)(B) & (E) (2004).

Practice Tip: The school may impose a 45-day unilateral change of placement regardless of the outcome of the manifestation determination.

D. Stay Put Placement. If the parent challenges the appropriateness of an interim alternative educational setting, the student remains in the interim alternative educational setting pending the hearing officer's decision.

E. Area Learning Centers. After many years, Minnesota Statutes section 124D.128, subdivision 3, was amended to state that "[a] district must inform all pupils and their parents about the learning year program **and that participation in the program is optional.**" Based upon this amendment, the MDE issued an opinion in 2002 stating that a school district may no longer unilaterally place a student in an ALC.

F. No Dangerousness Exception to Stay-Put Rule. In the 1988 case of *Honig v. Doe*, the U.S. Supreme Court held that the stay-put rule does not have a "dangerousness" exception. This generally meant that even a special education student who posed limited danger to others was entitled to remain in his or her current placement if the parent challenged a change in placement. The *Honig* Court, however, did suggest that where a student poses an immediate threat to the safety of others, school officials may seek a court injunction temporarily precluding the dangerous disabled child from attending school.

2. **Standard for Obtaining an Injunction.** School officials must satisfy a very high standard before a court will enjoin a student from attending school. To obtain a court issued injunction, a school district must be able to demonstrate:

- a. That the student presents a substantial risk of serious physical harm to self or others;
 - b. That the school has proposed an appropriate change in placement which it is ready and able to implement, subject only to parental approval or approval by a hearing officer in a due process hearing;
 - c. That the school has made all reasonable efforts to accommodate the child's disabilities so as to minimize the likelihood that the child will injure self or others; and
 - d. That despite the reasonable efforts of the school, injury remains substantially likely to result. *Light v. Parkway C-2 School District*, 41 F.3d 1223 (8th Cir. 1994).
3. **Courts are Reluctant to Enjoin Students From Attending School.** See *School District of Philadelphia v. Stephan M. and Theresa M.*, 25 IDELR 506 (E.D. Penn. 1997) (no injunction where student used razor blade to cut another student, because district did not take preventative steps); *Phoenixville Area Sch. Dist. v. Marcus B.*, 25 IDELR 452 (E.D. Penn. 1997) (no injunction where student punched others and hit principal, because student was not sufficiently dangerous); *Clinton County R-III Sch. Dist. v. C.J.K.*, 896 F. Supp. 948 (W.D. Mo. 1995) (no injunction where student had violently thrown furniture and threatened school officials, because court found student was not substantially likely to harm self or others).

G. Administrative Transfers. Students do not have a right to attend any particular school within a district. Minn. Stat. § 120A.36. Applying this standard, the United States District Court for the District of Minnesota held that a student who was transferred to another school did not have a claim to attend the school from which he was transferred. *J.K. ex rel. Kaplan v. Minneapolis Public Schools*, 849 F.Supp.2d 865, 872 (D. Minn. 2011). The student in that case was transferred for bullying and hazing another student during an overnight baseball team trip.

1. A change from one school to another is not necessarily a "change in placement" under the IDEA. *Hale v. Poplar Bluff R-I School Dist.*, 280 F.3d 831, 834 (8th Cir. 2002); see also *Letter to Fisher*, 21 IDELR 992 (OSEP 1994), *J.S. v. Lanape Regional High School Dist. Bd. of Ed.*, 102 F.Supp.2d 540 (D. NJ 2000), *Minnesota Department of Education Complaint Decision No. 10-041C* (May 10, 2010)

IV. PROTECTIONS FOR CHILDREN NOT YET IDENTIFIED AS HAVING A DISABILITY

- A. Students who have not been formally identified as children with disabilities may nonetheless have protections under IDEA. A student who has not been identified as a child with a disability may assert the procedural and substantive protections that apply to special education students – including the right to a manifestation determination – if the school district had “knowledge” that the child had a disability before the behavior that precipitated the disciplinary action. 20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.534.
- B. **Definition of “Knowledge.”** In determining whether a regular education student is entitled to the procedural safeguards of IDEA, the pivotal question is whether the school district had “knowledge” that the child had a disability.
1. **Knowledge of a Disability.** Under IDEA, a school district is deemed to have knowledge if:
 - a. the parent expressed concern in writing to supervisory or administrative personnel, or to a teacher of the child, that the child is in need of special education and related services;
 - b. the parent requested an evaluation of the child pursuant to IDEA;
 - c. a teacher or other school staff has expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director or to other supervisory personnel.
 2. **Exception.** A school district will not be deemed to have knowledge of a disability if (a) the parent has refused to allow the student to be evaluated; (b) the parent has refused services; or (c) if the student was evaluated and deemed ineligible for services. 20 U.S.C. § 1415(k)(5)(C) (2004); 34 C.F.R. § 300.534.
 3. **Revocation of Consent.** Is a school district deemed to have knowledge that a student is a child with a disability if the parent revoked consent for special education services before the disciplinary incident but asks that such services be reinstated after the disciplinary incident?
- C. **Impact of Lack of Knowledge.** If the school district did not have knowledge that the student was a child with a disability before taking disciplinary measures against the student, the student may be subjected to the same disciplinary

measures applied to students without disabilities who engage in comparable behaviors.

D. Impact of Knowledge. If the school district had “knowledge” that a student had a disability before the behavior that precipitated the disciplinary action, the student may assert the procedural and substantive protections that apply to special education students—including the right to a manifestation determination.

1. **Manifestation Determination Pending a Formal Evaluation.** Under federal law, a school district must complete a manifestation determination within ten school days of a decision to change the child’s placement (e.g., expulsion). Minnesota law requires that the team conduct a manifestation determination and determine the appropriateness of the student’s IEP *before initiating an expulsion.*

a. Schools must consider the available information, including all relevant information in the student’s file, any teacher observations, and any data provided by the parents. Nothing requires or prohibits a school district from revisiting the determination at a later date.

E. Parent May Request Evaluation. Even if the school has no knowledge of a disability, as defined above, the child’s parent may request an evaluation while the disciplinary action is pending. Such evaluations must be conducted in an *expedited* manner. Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services. 20 U.S.C. § 1415(k)(5)(D)(ii) (2004). If the child is determined to have a disability, then the special education and related services of IDEA must be provided.

V. PRACTICAL CONSIDERATIONS

A. Remember to Address Behavior Through the IEP Process. Disability related behavior must be approached through programming, not discipline. Parents have a right to receive prior notice of and to be involved in all significant decisions regarding a student’s special education placement.

1. Staff members must follow IEPs and behavior plans to address student behavior.

2. Teams should meet and review IEPs and behavior plans as necessary to respond to lack of expected progress or emerging behaviors.

B. Communication Between Building Administrators and Special Education Staff Is Critical.

1. **Step One.** The first step an administrator should take before suspending or beginning the process to expel any student is to determine whether the student receives special education under an IEP or is subject to a Section 504 accommodation plan.
2. **Step Two.** If the student has an IEP or a Section 504 Plan, the administrator should contact the student’s case manager or the director of special education to determine whether traditional school discipline is an appropriate action for the student.
3. **Step Three.** Establish a preliminary plan of action and assign responsibilities. Consider whether the case may be heading down the special education track, the discipline track, or both. Make sure that the special education and regular education staff have a clear understanding of their obligations as you follow-through on the preliminary plan of action.

Practice Point. The Minnesota Safe and Supportive Schools Act requires school districts and charter schools to adopt a policy to address bullying (and cyberbullying, and retaliation). Minn. Stat. § 121A.031, subd. 4. One of the required components of the policy is to revise the child’s IEP or 504 plan, if appropriate, to address skills and proficiencies the student needs to respond to, or not engage in, bullying, cyberbullying, and prohibited retaliation. *Id.* The team cannot make the necessary revisions if special educators and/or the 504 Coordinator are not aware of the conduct and potential consequences.

C. Withdrawal Agreements—Proceed With Caution.