

SPECIAL EDUCATION SEMINAR

Independence, Ohio
March 9, 2006

“Extreme Misconduct and the Special Education Student”

Presented by
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I. Discipline of Nondisabled Children

A. Goss v. Lopez, 419 U.S. 565 (1975)

1. Temporary suspensions require minimum due process guarantees:
 - a. Prior notice.
 - b. Presentation of grounds for intended suspension.
 - c. Opportunity to present explanation and/or defense.

B. O.R.C. §3313.661 - Student Conduct Policy

1. Specific infractions.
2. Applicability to students with disabilities.

- C. O.R.C. §3313.66
 - 1. Suspension.
 - 2. Expulsion.
 - 3. Permanent exclusion.
 - 4. Emergency removal.
 - 5. Other disciplinary procedures/measures.

II. Discipline of Students With Disabilities

A. Historical Cases

- 1. S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981)
 - a. Expulsion of handicapped child constitutes change of placement invoking procedural safeguards of IDEA.
 - b. Handicapped student cannot be expelled if misconduct is manifestation of his/her handicap.
 - c. Handicapped student may be expelled if there is no relationship between misconduct and handicap, but there may not be complete cessation of educational services during expulsion period.
- 2. Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982)
 - a. The Court followed Turlington in holding that expulsion of a handicapped child is a change of placement which invokes procedural protections of IDEA and handicapped child may be expelled in appropriate circumstances. But, during period of expulsion, there may not be a complete cessation of educational services.
 - b. However, handicapped child may not be expelled if disruptive behavior was a manifestation of his/her handicap.
 - c. A handicapped child may be suspended temporarily without employing IDEA procedures so long as he/she receives procedural protections of Goss v. Lopez, *supra*.

3. Lamont X. v. Quisenberry, 606 F. Supp. 809 (S.D. Ohio 1984)
 - a. Long term suspension of handicapped children even when home instruction was provided constituted change of placement under IDEA.
 - b. Home instruction program was not a normal procedure used by school district for dealing with disruptive students.

4. Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed.2d 686 (1988)
 - a. Issues
 - (1) Whether "stay-put" provision precludes school authorities from unilaterally excluding disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities.
 - (2) Whether a district court may order the state to provide educational services directly to a disabled child when the local agency fails to do so.
 - b. Decision
 - (1) Case was moot as to Respondent Doe, who was 24 years old.
 - (2) The Court refused to add a "dangerousness" exception to the "stay-put" provision of the IDEA.
 - (3) "Stay-put" provision prohibits unilateral action by school officials.
 - (4) IDEA does not limit equitable powers of court to temporarily enjoin dangerous handicapped child from attending school.
 - (5) School authorities may utilize normal procedures in dealing with dangerous children and may suspend for up to 10 school days.

- (6) Divided Court affirmed decision of Court of Appeals that state may be ordered to provide services directly to disabled child when local agency fails to do so.

5. Light v. Parkway C-2 School District, 21 IDELR 933 (8th Cir. 1994)

Court set forth two-part test for removal of dangerous disabled student from his/her educational placement to be met by school district.

- a. Whether maintaining child in current placement is substantially likely to result in injury to the child or others; and
- b. Whether the school district took steps to minimize the risk that the student will cause injury.

B. Individuals with Disabilities Education Improvement Act (IDEIA) of 2004, 20 U.S.C. §1400 *et seq.*

1. Free Appropriate Public Education (FAPE)

- a. Each state must have in effect a plan that provides assurances that FAPE is available to all children with disabilities residing in the state between the ages of 3 and 21, including children with disabilities who have been suspended or expelled. {20 U.S.C. §1412(a)(1)(A); 34 C.F.R. §300.121(a); 34 C.F.R. §300.101(a)}.
- b. However, a public agency need not provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if services are not provided to a child without disabilities who has been similarly removed. {34 C.F.R. §300.121(d)(1); 34 C.F.R. §300.530(d)(3)}.
- c. School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct. {20 U.S.C. §1415(k)(1)(A); 34 C.F.R. §300.530(a)}.
- d. School personnel may remove a child with a disability, who violates a code of student conduct, from the child's current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent such alternatives are applied to children

without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct, so long as those removals do not constitute a change of placement. {20 U.S.C. §1415(k)(1)(B); 34 C.F.R. §300.520(a)(1)(i); 34 C.F.R. §300.530(b)}.

- e. No manifestation hearing, functional behavior assessment or behavior intervention plan is required, because there is no obligation to provide FAPE.
- f. However, after a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal, the child must: (1) continue to receive educational services to the extent necessary 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; and (2) receive, as appropriate, a behavioral assessment and behavioral intervention services and modifications designed to address the behavior violation so it does not recur. {20 U.S.C. §1415(k)(1)(D); 34 C.F.R. §300.520(a)(1)(ii); 34 C.F.R. §300.530(b)(2) and (d)(1)}.
- g. Also, note that, as part of the IEP process, the IEP team shall, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavior interventions, and supports and other strategies to address that behavior. {20 U.S.C. §1414(d)(3)((B)(i); 34 C.F.R. §300.346(a)(2)(i); 34 C.F.R. §324(a)(2)(i)}. Focus is on preventing inappropriate behaviors from occurring in the first place.
- h. School day is defined as any day, including a partial day, that children are in attendance at school for instructional purposes. {34 C.F.R. §300.9(c)(1); 34 C.F.R. §300.11(c)(1)}.
 - (1) Days that are counted are days that the child is removed from "the current placement."
 - (2) Portions of a school day that a child has been suspended would be included in determining whether the child has been removed for more than 10 cumulative school days or subjected to a change of placement.

- (3) In-school suspension would not be considered a part of the days of suspension so long as the child is afforded the opportunity to continue to participate in the general education curriculum, continue to receive the services specified on his or her IEP, and continue to participate with nondisabled children to the extent the child would have in his/her current placement.
- (4) Whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is part of the child's IEP. If the bus transportation is part of the child's IEP, a bus suspension will be treated as a suspension, unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where all other services will be delivered. If the bus transportation is not part of the child's IEP, a bus suspension would not be a suspension. In those cases, a child or his or her parents would have the same obligation to get to and from school as a nondisabled child who had been suspended from the bus. However, a public agency should attend to whether the behavior on the bus is similar to behavior in a classroom that is addressed in an IEP and whether bus behavior should be addressed in the IEP or a behavioral intervention plan.

2. Change of Placement (34 C.F.R. §300.519; 34 C.F.R. §300.536)

- a. The removal is for more than 10 consecutive school days.
- b. The child has been subjected to a series of removals that constitute a pattern.
 - (1) The series of removals total more than 10 school days in a school year;
 - (2) The child's behavior is substantially similar to the behavior in the incidents that resulted in the series of removals, and taken cumulatively, is determined to be a manifestation of the child's disability; and
 - (3) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

- c. School personnel may remove a child with a disability from his or her current placement for not more than 10 school days at a single time, but there is no specific limit on the number of days in a school year that a child may be removed. However, school authorities may not remove a child with disabilities from the child's current educational placement if that removal constitutes a change of placement.
- d. A change of placement occurs if the removal is for more than 10 consecutive days, or the child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days. Multiple short-term removals of 10 consecutive days or less for separate incidents of misconduct are permitted, to the extent removals would be applied to children without disabilities, so long as those removals do not constitute a change of placement. The IDEA does not impose absolute limits on the number of days a child can be removed from his or her placement in a school year. Letter to Zirkel, 31 IDELR 138 (OSEP 1999).
- e. School personnel are not permitted to use repeated disciplinary removals of 10 school days or less as a means of avoiding the normal change of placement protections afforded by the IDEIA. Whether a pattern of removals constitutes a change of placement will be determined on a case-by-case basis by the public agency and subject to thorough due process and judicial proceedings.
- f. Except for removals that will be for not more than 10 consecutive school days and will not constitute a change of placement, within 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:
 - (1) The local educational agency, parent, and relevant members of child's IEP team must conduct manifestation review.
 - (2) Not later than date on which decision to take disciplinary action is made, the local educational agency must notify parents of decision and provide procedural safeguards notice. {34 C.F.R. §300.520(b); 34 C.F.R. §300.530(h)}.

3. The Eleventh Day Requirements
 - a. Continue to provide educational services to the extent necessary 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.
 - b. Receive, as appropriate, a functional behavioral assessment (FBA) and behavioral intervention services and modifications designed to address behavior violation so it does not recur.
 - c. Services may be provided in an interim alternative educational setting. {34 C.F.R. §300.530(d)(1) and (2)}.

4. Short Term Suspensions Beyond 10 Consecutive School Days That Do Not Constitute a Change of Placement
 - a. School personnel may implement short-term disciplinary action even after a student has been removed for 10 school days in a school year. But, services must be provided to extent necessary to enable child to participate in the general education curriculum and to progress toward meeting goals set out in IEP.
 - b. School personnel may remove a child with a disability, who violates a code of student conduct, from the child's current placement to an appropriate interim alternative education setting, another setting, or suspension for not more than 10 consecutive school days, 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 these removals do not constitute a change of placement. However, these removals are permitted only to the extent they are consistent with discipline that is applied to children without disabilities. {34 C.F.R. §300.520(a)(1); 34 C.F.R. 300.530(b)(1)}.
 - c. If current removal is for not more than 10 consecutive school days and is not change of placement, school personnel, in consultation with at least one of child's teachers, determine the extent to which services are needed, if any, and the location in which services, if any, will be provided. {34 C.F.R. §300.530(d)(4)}.

- d. If removal is for more than 10 consecutive school days or is a change of placement, the child's IEP team determines appropriate services and the location in which the services will be provided. {34 C.F.R. §300.530(d)(5)}.

5. Functional Behavioral Assessment (FBA)

- a. Not defined in the law or the regulations.
- b. FBA is to be developed by the IEP Team.
- c. Does not have to be complex.
- d. May be a review of existing data that can be completed at the IEP meeting called to develop the assessment plan.
- e. FBA is a systematic process for describing problem behavior, identifying the environmental factors, the setting and the events that predict problem behavior, and guiding the development of effective and efficient behavioral support plans. This information is used to identify and teach appropriate replacement behaviors and reduce the frequency and severity of problem behavior. The four main outcomes of functional behavior assessment are: (a) a definition of problem behaviors, (b) description of the conditions under which problem behavior is and is not likely to be observed, (c) identification of the function (the why) of the problem behavior, and (d) direct observation data to support these outcomes. *www.pbis.org*
- f. The general purpose of functional assessment of behaviors is to provide the IEP team with additional information, analysis, and strategies for dealing with undesirable behavior, especially when it is interfering with the child's education. The process involves some variant of identifying core or "target" behaviors; observing the pupil (perhaps in different environments) and collecting data on the target behavior, antecedents, and consequences; formulating an hypothesis about the cause(s) of the behavior; developing an intervention(s) to test the hypothesis; and collecting data on the effectiveness of the intervention(s) and change the behavior. Joseph M. v. ISD No. 2310, 29 IDELR 330 (Minnesota 1998).

In this case, the school district's FBA was one and one-half pages, and was based on a 70-minute observation of the student during a party being held in the classroom, during which no instruction was taking place, and an interview with the teacher. The FBA was held not to be in compliance with the requirements of the IDEA.

g. Components of the FBA

- (1) Background and purpose: to assist the school in developing an effective plan to help the student better adjust to the school as a social and academic setting.
- (2) Description of major target behavior(s): frequency, duration, intensity, immediate ecological antecedents, and possible behavioral antecedents.
- (3) Specific consequences of the emission of the target behavior.
- (4) Possible function(s) of the target behavior(s).
- (5) Alternative behaviors which serve the same function as the target behavior(s) or are incompatible with the emission of the target behavior.
- (6) Specific conditions under which alternative behaviors should be taught.
- (7) Recommended modifications in the physical environment(s).
- (8) Recommended modifications in the social environment.

h. Use of experts.

6. Behavioral Intervention Plan (BIP)

- a. Required, as appropriate, when the student has been removed from school more than 10 days during the school year, and/or "in the case of a child whose behavior impedes the child's learning or that of others." {34 C.F.R. §300.346(a)(2)(i); 34 C.F.R. §300.324(a)(2)(i); 34 C.F.R. §300.530(d)(1)(ii)}.

- b. Focus of BIP is on positive, proactive strategies designed to prevent inappropriate behaviors from occurring.
 - c. Components of a BIP
 - (1) Establishment of target behavior(s).
 - (2) Consequences (but do not limit disciplinary options by loading up BIP with consequences).
 - (3) Positive strategies, supports, and interventions.
 - (4) BIP does not have to authorize disciplinary actions that school district already possesses.
 - d. In Modesto City School District, 30 IDELR 170 (California 1998), Hearing Officer found that school district's BIP violated a state law that specified what a plan should include.
 - (1) Description of target behavior was incomplete because it failed to indicate who the student was hitting or what he was hitting them with;
 - (2) The frequency of the behavior is not identified;
 - (3) The description of antecedents was too general;
 - (4) By targeting only one behavior, the BIP neglected the other areas of concern.
 - e. The BIP must be properly and consistently implemented and reviewed and modified as appropriate.
7. Manifestation Determination (20 U.S.C. §1415(k)(1)(E); 34 C.F.R. §300.523; 34 C.F.R. §300.530(e))
- a. Within 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, the local educational agency, the parent, and relevant members of the IEP team (as determined by the parent and the local educational agency) shall 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 to determine:

- (1) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
 - (2) If the conduct in question was the direct result of the local educational agency's failure to implement the IEP.
- b. If the local educational agency, the parent, and relevant members of the IEP team determine that either of the above is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability. If the local education agency, parent, and relevant members of the IEP team determine conduct was manifestation of child's disability, the IEP team must either:
- (1) Conduct a functional behavioral assessment (FBA), unless school district had already conducted a FBA before the behavior that resulted in the change in placement occurred, and implement a behavioral intervention plan (BIP); or
 - (2) If a BIP has already been developed, review the BIP and modify it as necessary to address the behavior; and
 - (3) Return the child to the placement from which he/she was removed, unless parent and school district agree to a change of placement as part of the modification of the BIP. {20 U.S.C. §1415(k)(1)(E) and (F); 34 C.F.R. §300.530 (e) and (f)}.
- c. If the IEP team finds no manifestation between the misconduct and the disability:
- (1) The student can be removed from his/her current placement for more than 10 school days, and the same disciplinary procedures that apply to students without disabilities are applicable.
 - (2) However, during any time of removal and change of placement, the school district must continue to provide the student with educational services that will enable the student to continue to participate in the general education curriculum, although in another setting, and progress toward meeting the goals set out in the student's IEP.

- (3) If appropriate, the IEP team is to conduct a FBA and develop and/or modify a BIP for the student designed to address the behavior that is the subject of the disciplinary violation so that it does not recur.
8. Removal Under Special Circumstances (20 U.S.C. §1415(k)(1)(G); 34 C.F.R. §300.520(a)(2); 34 C.F.R. §300.530(g))
 - a. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where the child:
 - (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of a state or local educational agency;
 - (2) Knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function under the jurisdiction of a state or local educational agency; or
 - (3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a state or local educational agency.
 - (4) Definitions
 - (a) "Weapon" means a weapon, device, instrument, material or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2.5 inches in length. {34 C.F.R. §300.520(d)(3); 34 C.F.R. §300.530(i)(4)}.
 - (b) "Controlled substance" means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act. An illegal drug is a controlled substance except for a substance legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority. {34 C.F.R.

§300.520(d)(1) and (2); 34 C.F.R. §300.530(i)(1) and (2)}.

(c) “Serious bodily injury” is defined as bodily injury that involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a body member, organ, or mental faculty.

(d) “Bodily injury” is defined as a cut, abrasion, bruise, burn or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary. {34 C.F.R. §300.530(i)(3)}.

9. Dangerousness Exception to Stay Put

a. A hearing officer may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer, in an expedited due process hearing, determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. {20 U.S.C. §1415(k)(3)(B)(ii)(II); 34 C.F.R. §300.532(b)(2)(ii)}.

b. A school district also has option of seeking a court order instead of a order from a hearing officer, and there is no requirement that the district must exhaust its administrative remedies prior to seeking relief in court. Gadsden City Board of Education v. B.P., 28 IDELR 166 (N.D. Ala. 1998).

10. Appeal (20 U.S.C. §1415(k)(3))

a. The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

b. A hearing officer shall hear, and make a determination regarding an appeal.

- c. In making the determination, the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may:
 - (1) Return a child with a disability to the placement from which the child was removed; or
 - (2) Order a change in placement of a 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 such child is substantially likely to result in injury to the child or to others.

11. Placement During Appeals

Child remains in interim alternative educational setting if placement results from team decision that behavior is not a manifestation until hearing officer rules otherwise in expedited hearing or expiration of the time of interim setting, unless parent and state or local educational agency agree otherwise. {20 U.S.C. §1415(k)(4)(A); 34 C.F.R. §300.533}.

12. Protections for Children Not Yet Eligible for Special Education and Related Services (20 U.S.C. §1415(k)(5))

- a. A child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violates a code of student conduct may assert any of the protections provided by the IDEIA if the local educational agency had knowledge that the child was a child with a disability before the occurrence of behavior that precipitated the disciplinary action.
- b. A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred:
 - (1) The parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
 - (2) The parent of the child has requested an evaluation of the child; or

- (3) The teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency, or to other supervisory personnel of the agency.
 - c. The local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation or has refused services or the child has been evaluated and it was determined that the child was not a child with a disability.
13. Referral to Law Enforcement (20 U.S.C. §1415(k)(6))
 - a. Nothing in the IDEIA prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a child with a disability. {34 C.F.R. §300.529(a); 34 C.F.R. §535(a)}.
 - b. An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime. {34 C.F.R. §300.529(b)(1); 34 C.F.R. §300.535(b)(1)}.
 - c. An agency reporting a crime may transmit copies of the child's special education and disciplinary records only to the extent permitted by the Family Educational Rights and Privacy Act. {34 C.F.R. §300.529(b)(2); 34 C.F.R. §300.535(b)(2)}.
14. Tips for Dealing with Behavioral Problems
 - ✓ Address behavior as part of IEP process if it is a component of child's disability.
 - ✓ Conduct a FBA as appropriate.
 - ✓ Develop BIP and incorporate into IEP.
 - ✓ Keep detailed records of student's behavior (logs, anecdotal records, video tapes, etc.).

- ✓ Consult a behavioral specialist/expert.
- ✓ Provide appropriate supplementary aids and services.
- ✓ Train employees in crisis intervention/management techniques.
- ✓ Seek alternative or more restrictive placements, as appropriate.
- ✓ Keep lines of communication open with parents.
- ✓ Involve law enforcement and juvenile authorities when necessary.
- ✓ Call the school attorney before the mess is made.

III. Conclusion