Student Discipline Hearings: Special Education

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I. INTRODUCTION TO SPECIAL EDUCATION DISCIPLINE ISSUES

The Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et. seq., hereafter sometimes referred to as "IDEA." (NOTE: many people refer to the sections of the act as beginning with § 600. Thus "§ 615" would be found at 20 U.S.C. § 1415, etc.) imposes special rules that govern the discipline of students with a disability. The statute and the federal regulations are available on a searchable website at http://idea.ed.gov/explore/home

The basic rule is that a special education student may not have her placement changed (i.e., suspensions of more than 10 days or expulsion) for conduct that is a manifestation of her disability. IDEA, § 615(k)(1)(F). If the behavior is not a manifestation of the student's disability, the student may be disciplined in the same manner and for the same duration as children without disabilities. IDEA, § 615(k)(1)(C).

One exception is that, regardless of manifestation, the schools may remove a student to an interim alternative educational setting, hereafter sometimes referred to as "IAES," for up to 45 school days if (1) the student possesses a weapon at school; or (2) the student possesses or uses or sells illegal drugs at school; or (3) the student has inflicted "serious bodily injury" upon another person while at school. IDEA, § 615(k)(1)(G). The schools may also ask a hearing officer to change the placement of a student with a disability to an IAES if remaining in the current placement is substantially likely to result in injury to the student or others. IDEA, § 615(k)(3)(A) and (B).

Another cardinal rule in the discipline area is that regardless of whether the conduct of a student was a manifestation of the student's disability, where a student with a disability is removed from his current placement, the schools must continue to provide educational services to ensure FAPE for the student and to enable the student to continue to participate in the general curriculum although in another setting. IDEA, § 615(k)(1)(D). See generally regarding discipline issues, 34 C.F.R. §§ 300.530 – 300.537.

The Supreme Court dealt with discipline issues and endorsed the stay put provision in the case of Honig v. Doe 484 U.S. 305, 108 S.Ct. 594, 559 IDELR 231 (1988). In that decision, the Supreme Court, noting the Congressional intent in preventing the exclusion of disabled students and reiterating the importance of the procedural safeguards under the IDEA, refused to read a dangerousness exception into the stay put provision. The high Court outlines the history of abuses of the discipline provision in that decision.

NOTE: due process hearings involving discipline issues are **expedited** hearings with different timelines. The due process hearing must be convened within 20 school days of the complaint and the hearing officer decision must be issued within 10 school days of the hearing. 34 CFR §300.532(c).

II. Discipline Hearings

—Appealing a Disciplinary Decision

Both the LEA and the parent of the child with a disability have the right to request a due process hearing to appeal decisions taken during disciplinary procedures, although the reasons these parties may do so differ. Summarizing these:

- Parents may appeal decisions regarding placement of their children (under §§300.530 and 300.531)(citations in this section are to the federal regulations found at 34 C.F.R. §300.;
- Parents may appeal decisions regarding manifestation determination under §300.530(e); and
- The LEA may appeal a decision to maintain the current placement of the child, if the LEA believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others. [§300.532(a)]

Procedures for filing a due process complaint. A hearing is requested by filing a due process complaint. Some points to note about the process include:

- The public agency must inform the parent of any free or low-cost legal or other relevant services in the area. [§300.507(b)]
- The due process complaint must remain confidential. [§300.508(a)(1)]
- The party who files a due process complaint must forward a copy of the complaint to the SEA. [§300.508(a)(2)]
- The due process complaint must include specific information: name of the child; address of the child's residence; name of the child's school; description of the nature of the problem, including any related facts; and a proposed resolution of the problem (to the extent known and available to the filing party at the time). [§300.508(b)]

Expedited hearings. The parent and the LEA have the opportunity for an expedited due process hearing on the disciplinary matter about which they are disagreeing. The expedited hearing must comply with IDEA's provisions for due process hearings (including hearing rights, such as a right to counsel, presenting evidence and cross-examining witnesses, and obtaining a written decision), although clearly the timelines for the hearing will be speeded up. The SEA or LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing. [§300.532(c)(2)]

Can due process be avoided? IDEA strongly favors avoiding due process hearings, when possible, by resolving disputes through alternate, less adversarial and more cost-effective means. Mediation is specifically mentioned as an option when a due process hearing, including when an expedited due process hearing, is requested. Under IDEA, parties can choose to use mediation to resolve a dispute regardless of whether a due process hearing has been requested, and a parent can choose not to have a resolution meeting, if the parent and the school district agree instead to use mediation to resolve their differences.

In the context of an expedited due process hearing, parents and the LEA have available to them either the resolution process or the mediation process as vehicles for resolving their differences without having to conduct an expedited due process hearing. They also may choose to waive either option and proceed directly to an expedited due process hearing. [§300.532(c)(3)] Waiving the resolution meeting, however, requires that both parties agree in writing to do so.

—Authority of the Hearing Officer

If the parents and LEA have not resolved their disagreement via a resolution meeting or mediation, and the due process hearing goes forward, the hearing officer must issue a decision in an expedited due process hearing. In making that decision, the hearing officer may:

(i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of §300.530 or that the child's behavior was a manifestation of the child's disability; or

(ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

—LEA's Recourse to Returning a Student to His or Her Original Placement

Suppose that a hearing officer determines in an expedited due process hearing that a removed student will return to his or her original placement, and the LEA disagrees, believing that doing so is substantially likely to result in injury to the child or others. Does the LEA have any recourse but to return the child to the original placement?

Yes, the LEA does, but it's a limited one: to appeal the hearing officer's determination through another expedited due process hearing. The procedures we've just described "may be repeated, if the LEA believes that returning the child to the original placement is

substantially likely to result in injury to the child or to others" [§300.532(b)(3)].

Note that the LEA has the discretion to remove a child with a disability to an IAES for up to 45 school days, if the special circumstances involving weapons, drugs, or serious bodily injury are present. If the special circumstances are not involved, then school officials must seek permission from the hearing officer (71 Fed. Reg. 46722 using the process of appeal just described.

—May The Hearing Officer's Determination Be Appealed?

Yes. Any "party aggrieved by the findings and decision in the hearing may appeal to the SEA" [§300.514(b)(1)]. In some instances, bringing a civil action is also possible.

—The Child's Placement During the Appeal Process

Where will the child be placed until a decision on the appeal is issued—the original placement from which the child was removed during the disciplinary action, the interim alternative educational setting (IAES) to which he or she has been removed, or another setting that the parents and the school system agree to? **Historically, the "stay-put" principle required that child remain in his or her original placement. Now, under IDEA 2004, that's no longer true.**

General Answer: The "default" placement during an appeal now is the IAES. IDEA states that the child must remain in the IAES chosen by the IEP team until the hearing officer makes his or her decision on the appeal or the time period for the child's removal expires—whichever comes first—unless the parent and the SEA or LEA agree otherwise.

—Other Aspects of IDEA's Discipline Procedures

In addition to the issues identified above, IDEA's discipline procedures contain two other elements we'd like to touch upon in closing, so you're aware of them. The details are available in separate articles, for those who need them.

Basis of knowledge. Suppose this situation: A student who has not yet been found to be a "child with a disability" under IDEA has violated a code of student conduct. The school system takes disciplinary action according to its policies—at which time the student asserts that, in fact, he or she is a "child with a disability" as IDEA defines that term and that the protections under IDEA must guide the discipline policies that are applied. Is this permissible?

Answer: Of course the answer is "sometimes" and "under certain circumstances." The pivot point, without a doubt, is whether or not the school system had knowledge that the child was a "child with a disability" when the child violated the code of student conduct. This is called "**Basis of Knowledge**." Follow the link to learn the details.

Reporting crimes. Do IDEA's discipline procedures allow school systems to report crimes that are committed by children with disabilities? Yes, they do. Similarly, the law does not prevent State law enforcement and judicial authorities from exercising their responsibilities.

The agency reporting the crime must ensure that copies of the special education and disciplinary records are transmitted for consideration by the appropriate authorities—however, only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act (FERPA), a Federal law that protects the privacy of children's education records.

III. An Excerpt from OSEP's Q & A Guidance on IDEA Part B Dispute Resolution Procedures (July 2013):

"E. Expedited Due Process Hearings Authority: The requirements for expedited due process hearings are found in the regulations at 34 CFR §§300.532-533.

Question E-1: **What is an expedited due process hearing?**

Answer: An expedited due process hearing is a hearing involving a due process complaint regarding a disciplinary matter, which is subject to shorter timelines than a due process hearing conducted pursuant to 34 CFR §§300.507-300.516. Under 34 CFR §300.532(a), a parent of a child with a disability who disagrees with any decision regarding placement under 34 CFR §§300.530 and 300.531, or the manifestation determination under 34 CFR §300.530(e), or an LEA that believes that maintaining the child's placement is substantially likely to result in injury to the child or to others, may appeal the decision by requesting a hearing. If a parent or LEA files a due process complaint to request a due process hearing under one of these circumstances the SEA or LEA is responsible for arranging an expedited due process hearing, which must occur within 20 school days of the date that the due process complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing. 34 CFR §300.532(c)(2). Although this hearing must be conducted on an expedited basis under these shortened timelines, it is an impartial due process hearing subject to the requirements of 34 CFR §§300.507, 300.508(a)-(c), and §§300.510-300.514, except as provided in 34 CFR §300.532(c)(2)-(4), as described in Question E-3. 34 CFR §300.532(c)(1). The shortened timelines for conducting expedited due process hearings in disciplinary situations should enable hearing officers to make prompt decisions about disciplinary matters while ensuring that all of the due process protections in 34 CFR §§300.510-300.514 are maintained. Note that when a due process complaint requesting an expedited due process hearing is filed either by the parent or the LEA, the child must remain in the alternative educational setting chosen by the IEP Team pending the hearing officer's decision or until the time period for the disciplinary action expires, whichever occurs first, unless the parent and the public agency agree otherwise. 34 CFR §300.533 and 71 FR 46726 (August 14, 2006). 29 See Footnote 5 in Section A of this Q&A document for the definition of the term "parent" and for information about the transfer of rights accorded to parents under Part B of the IDEA to a student who has reached the age of majority under State law. Questions and Answers on IDEA Part B Dispute Resolution Procedures Page 2

Question E-2: **What is the hearing officer's authority in an expedited due process hearing?**

Answer: An impartial hearing officer conducting an expedited due process hearing under 34 CFR §300.511 hears, and makes a determination regarding, the due process complaint. Under 34 CFR §300.532(b)(2), a hearing officer also has the authority to determine whether the child's removal from his or her placement violated 34 CFR §300.530 (authority of school personnel); whether a child's behavior was a manifestation of his or her disability; and whether maintaining the child's current placement is substantially likely to result in injury to the child or to others. In determining what is the appropriate relief, if any, the hearing officer may return the child to the placement from which he or she was removed or may order that a child's placement be changed to an appropriate interim alternative educational setting for no more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. 34 CFR §300.532(b)(2). These procedures may be repeated if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others. 34 CFR §300.532(b)(3). A decision in an expedited due process hearing may be appealed consistent with 34 CFR §§300.514 and 300.516. 34 CFR §300.532(c)(5). In a one-tier system, where the SEA conducts the expedited due process hearing, a party aggrieved by the findings and decision has the right to appeal by bringing a civil action in a State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. 34 CFR §§300.516(a) and 300.532(c)(5). In a two-tier system, where the public agency directly responsible for the education of the child conducts the expedited due process hearing, the findings and decision in the hearing can be appealed to the SEA. 34 CFR §300.514(b). If a party is dissatisfied with the SEA's decision, the party may appeal by bringing a civil action in an appropriate State or Federal court, pursuant to 34 CFR §300.516. 34 CFR §300.514(d).

Question E-3: **How is the timeline for conducting an expedited due process hearing calculated? Does this timeline begin after the resolution period?**

Answer: The following shortened timelines apply when a due process complaint requesting an expedited due process hearing is filed. The resolution meeting must occur within seven days of receiving notice of the parent's due process complaint (34 CFR §300.532(c)(3)(i)), unless the parents and the LEA agree in writing to waive the resolution meeting, or agree to use the mediation process described in 34 CFR §300.506 (34 CFR

§300.532(c)(3)). Under 34 CFR §300.532(c)(3)(ii), the due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint. Thus, for expedited due process Questions and Answers on IDEA Part B Dispute Resolution Procedures Page 3 hearings, there is a 15-day resolution period from the date the parent's due process complaint requesting an expedited due process hearing is received, and the time period for resolution is measured in terms of calendar days, not school days. Under 34 CFR §300.11(a), "[d]ay means calendar day, unless otherwise indicated as business day or school day." The Part B regulations define school day as "any day, including a partial day that children are in attendance at school for instructional purposes. School day has the same meaning for all children in school, including children with and without disabilities." 34 CFR §300.11(c). Further, the expedited due process hearing must occur within 20 school days from the date that the parent's due process complaint requesting a due process hearing is filed. Thus, the resolution period is part of, and not separate from, the expedited due process hearing timeline. If an expedited due process hearing occurs, the hearing officer must make a determination within 10 school days after the hearing. 34 CFR §300.532(c)(2).

Question E-4: **May the parties mutually agree to extend the resolution period to resolve an expedited due process complaint?**

Answer: No. There is no provision in the IDEA or the Part B regulations that permits adjustments to the 15-day resolution period for expedited due process complaints. 34 CFR §300.532(c). Also, there is no provision in the Part B regulations permitting the parties to agree to extend this time period. Therefore, when the parties have participated in a resolution meeting or engaged in mediation and the dispute has not been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint, the expedited due process hearing may proceed. 34 CFR §300.532(c)(3)(ii).

Question E-5: **How must SEAs and LEAs apply the timeline requirements for expedited due process hearings if the due process complaint is filed when school is not in session?**

Answer: When a due process complaint requesting an expedited due process hearing is filed during the summer or when school is not otherwise in session, the SEA or LEA responsible for arranging the expedited due process hearing is not required to count those days in calculating the expedited due process hearing timelines. A school day has the same meaning for all children in school, including children with and without disabilities. 34 CFR §300.11(c)(2). Therefore, any day that children without disabilities are

not in school is not counted as a school day, and is not considered in calculating the expedited due process hearing timelines. For example, a day on which a public agency only provides extended school year services to children with disabilities and does not operate summer school programs for all children cannot be counted as a "school day." 71 FR 46552 (August 14, 2006). In contrast, if a due process Questions and Answers on IDEA Part B Dispute Resolution Procedures Page 4 complaint requesting a hearing is filed under 34 CFR §§300.507-300.516, when school is not in session, the SEA is required to meet the 30-day resolution period and 45-day hearing timelines in 34 CFR §§300.510 and 300.515(a).

Question E-6: May a party challenge the sufficiency of a due process complaint requesting an expedited due process hearing?

Answer: No. The sufficiency provision in 34 CFR §300.508(d), described previously in Questions C-3 and C-4 of this Q&A document, does not apply to expedited due process complaints. Because of the shortened timelines that apply to conducting an expedited due process hearing, it would be impractical to extend the timeline in order for this provision to apply. 34 CFR §300.532(a) and 71 FR 46725 (August 14, 2006).

Question E-7: **May a hearing officer extend the timeline for making a determination in an expedited due process hearing?**

Answer: No. The SEA or LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the due process complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing. 34 CFR §300.532(c)(2). There is no provision in the Part B regulations that would give a hearing officer conducting an expedited due process hearing the authority to extend the timeline for issuing this determination at the request of a party to the expedited due process hearing. A State may establish different procedural rules for expedited due process hearings than it has established for other due process hearings, but except for the timelines in 34 CFR §300.532(c)(3), those rules must be consistent with 34 CFR §§300.510 through 300.514.

Question E-8: **How can the parties meet the requirement in 34 CFR §300.512(b) to disclose evaluations and recommendations to all parties at least five business days before an expedited due process hearing begins?**

Answer: Because the 15-day resolution period for a due process complaint requesting an expedited due process hearing concludes well before the 20-school-day period within which the hearing must occur, the parties should have enough time to meet this requirement before the hearing begins. This is

because 15 calendar days would usually be the equivalent of 11 school days. Also, there is nothing in the IDEA that would prevent the parties from agreeing to disclose relevant information to all other parties less than five business days prior to an expedited due process hearing. 71 FR 46706 (August 14, 2006). Questions and Answers on IDEA Part B Dispute Resolution Procedures Page 5.

Question E-9: **May a school district proceed directly to court for a temporary injunction to remove a student from his or her current educational placement for disciplinary reasons or must the school district exhaust administrative remedies by first filing a due process complaint to request an expedited due process hearing?**

Answer: While this situation is not addressed specifically by the Part B regulations, the Department's position, in the context of discipline, is that a school district may seek judicial relief through measures such as a temporary restraining order when necessary and legally appropriate. In addition, there is extensive case law addressing exigent circumstances where exhaustion of administrative remedies is not required or where the failure to exhaust administrative remedies may be excused. In general, a school district that goes directly to court seeking to remove a child with a disability would need to show that the proposed removal is appropriate (e.g., that other interventions will not reduce the immediate risk of injury) and that exhaustion of the expedited due process hearing process should not be required (e.g., due to the exigency of the situation). If appropriate, prior to seeking a court order, the LEA should attempt other interventions which could include, but are not limited to, the use of positive behavioral interventions and supports and other strategies to address the behavior giving rise to the proposed removal. See 34 CFR §§300.324(a)(2)(i) and 300.530(e)-(f).

IV. Restorative Justice as an Alternative to Discipline

A recent CADRE webinar explored the possibility of using Restorative Justice or Restorative Principles as an alternative to Discipline for students with disabilities.

Here is the video of the webinar:
https://tadnet.adobeconnect.com/_a984157034/p484azs1zo3/?launcher=false&fcsContent=true&pbMode=normal

Here is a transcript of the webinar:
http://www.directionservice.org/cadre/pdf/Restorative%20Justice%20Webinar%20Transcript.pdf

Here are the written materials that accompanied the webinar:
http://www.directionservice.org/cadre/pdf/RestorativeJustice_6Nov2014_FinalVersion.pdf

Larimer County Sch Dist, Poudre (CH) No. 2015:510 (SEA Colo 7/14/15) In this case, a state complaint investigator issued a decision requiring the SD, that had failed to comply with IDEA discipline requirements, to provide training to its staff - including training on alternatives to traditional discipline- including restorative justice. See my blog post.

V. Recent Caselaw

a. Letter to Gerl 51 IDELR 166 (OSEP 5/1/8) In the scenario of an expedited hearing, the fifteen calendar day resolution period runs **concurrently** with the twenty school day limit for the convening of the hearing. Although the five business day rule for disclosure of evidence must also be factored in, DOE feels that there is nonetheless sufficient time to schedule the expedited hearing.

b. Dear Colleague Letter 114 LRP 1091 (US DOE & DOJ 1/8/14) The United States Departments of Education and Justice issued policy guidance for school districts and states to **reduce unlawful discrimination** in student discipline policies. This seems to be a conscious decision by the Administration to attack the school-to-prison pipeline problem. Although the thrust of the guidance is obviously to reduce racial discrimination in school discipline, the Dear Colleague letter notes specifically that the contents of the guidance also fully apply to discipline that discriminates against children with disabilities and other protected groups. (See footnote 4 on pages 2-3 of the Dear Colleague Letter). You can read the DOE blog article here. You can review the video by Secretary Duncan and the complete guidance package here. The Dear Colleague Letter is available here.

c. Letter to Sarzynski 59 IDELR 141 (OSEP 6/21/12) OSEP ruled that if a student receives transportation as a related service and if a **bus suspension** constitutes a change of placement, district must conduct an MDR even if the parent decides to drive the student to school.

d. Memo to Chief Sch Officers Re Dispute Resolution Procedures Under Part B of IDEA 61 IDELR. 232 (OSEP 7/23/13) The 64 page Q & A attachment includes a

section on **expedited hearings**; Questions and Answers on Discipline Procedures 52 IDELR 231 (OSERS 6/1/9) (NB OSERS offers guidance in the situation where **consent is revoked**); Questions and Answers on Procedural Safeguards and Due Process Procedures 52 IDELR 266 (OSERS 6/1/9).(NB OSERS clarifies that a school district may still go directly to court for a **temporary injunction** to remove a student for safety reasons. In OSERS' opinion a district need not exhaust administrative remedies in that situation.); Questions and Answers on Serving Children with Disabilities Eligible for Transportation 53 IDELR 268 (OSERS 11/1/9) (NB OSERS clarifies that because a **school bus suspension** may be a change of placement, it may trigger all of the IDEA disciplinary protections, including educational services to enable student to access the general curriculum)

e. District of Columbia v. Doe ex rel Doe 611 F.3d 888, 54 IDELR 275 (DC Cir 7/6/10) DC Circuit ruled that HO did not exceed his authority where he **reduced** a disciplinary **suspension.** HO reduced a 45 day suspension to an 11 day suspension noting the trivial nature of the infraction and finding that the more lengthy suspension denied FAPE to the student. Court notes that in legislative history Congress intended to strip schools of the unilateral authority they traditionally had to exclude children with disabilities. Note this reverses the district court decision at 573 F.Supp.2d 57, 51 IDELR 8 (D.DC 8/28/8) cited in previous outlines.

f. Warrior Run Sch Dist 114 LRP 37530 (JG) (SEA Penna 3/17/14) HO ruled that IDEA **disciplinary protections** were available **only to** students who are eligible or who should have been identified; Bloom Township HS Dist # 206 (MS) 112 LRP 21291 (SEA

Ill 4/23/12) Where the student was not eligible under IDEA, HO dismissed allegations re improper discipline.

g. In Re Student With A Disability 52 IDELR 239 (SEA **WV** 4/8/09) Under IDEA'04 changes, conduct is a **manifestation** of a disability only if 1) the disability caused or is substantially related to the conduct, or 2) the conduct is the direct result of the failure to implement the IEP; District of Columbia Public Schs (JG) 111 LRP 60123 (SEA DC 4/10/11) HO found a denial of FAPE where the school district failed to conduct a manifestation determination where a **series/pattern** of suspensions constituted a change of placement because the pattern of removal for over 20 days total for incidents involving similar types of misconduct over a short period of time. HO ordered **MDR** and a review of student's bip for possible modifications; Anaheim Union HS Dist v JE 61 IDELR 107 (CD Calif 5/21/13) Court ruled that school district had **notice** of student's **likely status** as child with a disability, and therefore should have done MDR before placing student in an alternative school. 504 teams discussion of his failing grades and inability to remain in class coupled with an attempted suicide were sufficient to confer knowledge on school district. **Contrast**, Conneaut Area City Schs 113 LRP 26341 (SEA Ga 6/7/13) State complaint investigator found that an MDR was not required where student had two suspensions totaling 8 school days; Minneapolis Special Sch Dist # 1 113 LRP 28527 (SEA Minn 5/20/13) State complaint investigator ruled that an MDR was not required because student was out of school for suspensions only 8 days, therefore not a change of placement; Dist of Columbia Pub Schs (PV) 114 LRP 25503 (SEA DC 5/9/14) HO held that numerous incidents of sending student home for being disruptive or

aggressive were not disciplinary in nature and therefore did not trigger the MDR requirement. (?); Avila v Spokane Sch Dist #81 64 IDELR 171 (ED Wash 11/3/14) Court rejected parent argument that SD was required to conduct an MDR to determine whether there was a connection between student's autism and the conduct he was suspended for. Where suspension was for six days and there was no pattern of removals, there was no change of placement and no MDR was required; MN v Rolla Public Sch Dist # 31 59 IDELR 44 (WD Missouri 6/6/12) Court held that moving student to an on campus alternative program housed in a trailer was not a change of placement and that a series of disciplinary actions did not constitute a pattern of removal. No MDR required;

h. Larimer County Sch Dist, Poudre (CH) No. 2015:510 (SEA Colo 7/14/15) A state complaint investigator issued a decision requiring the SD, that had failed to comply with IDEA discipline requirements, to provide training to its staff - including **training on alternatives to traditional discipline**- including **restorative justice**. See my blog post.

i. Wayne-Westland Community Schs v VS & YS 64 IDELR 139 (ED Mich 10/9/14) Court granted SD a **Honig v Doe injunction**. Court granted TRO prohibiting teen from entering upon school grounds where he was **extremely dangerous** and temporarily permitted SD to educate the student through an online charter program. The 6 foot 250 pound student has kicked, punched and spat on students and staff, threatened to rape a teacher and made racist comments; Seashore Charter Sch v EB by GB 64 IDELR 44 (SD Tex 9/3/14) Court issued **Honig v Doe injunction**. Court found that a 15 year old with autism had a tendency to bite, scratch and pull hair and that this constituted a dangerous situation at a charter school, ordering his stay put placement to his neighborhood HS until HO rules. {Honig v. Doe (1988) 484 U.S. 305,108 S.Ct. 592, 59

LRP 8952}(These used to be **rare**). But See, Troy Sch Dist v KM by Janice M & Warren M 64 IDELR 303 (ED Mich 1/16/15) Court **denied Honig v Doe injunction** where SD did not demonstrate that maintaining student's placement was likely to result in injury to student or others. The incident occurred when SD did not provide a safe person as required by IEP and resulted in no serious injuries and where SD waited until after HO ruled SD had violated IDEA and ordered student returned to HS. {Honig v. Doe (1988) 484 U.S. 305,108 S.Ct. 592, 59 LRP 8952}(These used to be **rare**)

j. Letter to Anonymous 113 LRP 14615 (FPCO 2/13/13) FPCO ruled that IDEA HO does not have authority to override the parental consent requirement before a school district discloses a student's educational record. IDEA incorporates FERPA…In the letter, a HO ordered a school district to produce records for the **other students involved in a disciplinary infraction** at parent's request. FPCO ruled that the school district would have violated FERPA if it had complied with the HO's order without the consent of the other parents (??)Contrast, Morton v Bossier Parish Sch Bd 63 IDELR96 (WD Louisiana 5/6/14) Court **upheld** the validity of an **interrogatory** by parents of a teen who allegedly committed suicide after disability-based harassment. Interrogatory sought the names, addresses and phone numbers of **all students who attended class with the student for two years before his death.** Mgst noted that before complying with the interrogatory, SD must notify classmates and parents of the court order to permit them to seek protective order under FERPA; and Letter to Soukup 115 LRP 18668 (FPCO 2/9/15) Consistent with the long-standing view of the Department of Education, FPCO ruled that **FERPA permits** a school to disclose to the parent of a **harassed** student information about the **disciplinary** sanctions imposed upon the perpetrators of the

harassment (including stay away from the student; stay out of the school; or transfer to another class) FPCO noted that where any **civil rights laws** conflict with FERPA, the civil rights law **override** any conflicting provisions of FERPA.

k. ZH by RH & JH v Lewisville Independent Sch Dist 65 IDELR 147 (ED Tex 3/24/15) adopting Mgst @ 65 IDELR 106 Court ruled that SD did not violate IDEA when it found that a sixth grader's creation of a **list of students that he wanted to shoot** was **not a manifestation** of his PDD-NOS (diagnosed 5 days after incident) and ADHD. The **shooting list** was developed over several days and not a result of ADHD impulsivity. (Note analysis is in Mgst decision)

k. **not a manifestation** of the student's disability, In Re Student With A Disability 52 IDELR 239 (SEA **WV** 4/8/9) HO **reversed** an expulsion and a finding of no manifestation where the school district MDT was a 20 minute meeting with no discussion of the student's disabilities or the possibility that they were related to his misconduct and ignored teacher reports stating that he was easily manipulated into wrongdoing; In Re Student with a Disability 108 LRP 45824 (SEA WV 6/4/8) HO overturned finding of no manifestation where the student's IEP noted that his violent behaviors are likely caused by his disabilities and where MD team reached opposite conclusion on similar behavior two months earlier. HO ruled that kicking a teacher was a manifestation of PDD and ADHD; Southington Bd of Educ 113 LRP 42841 (SEA CT 6/14/13) HO ruled after expedited dph that student having 200 steroid pills was not a manifestation of his ADHD; New Haven Unified Sch Dist 113 LRP 28568 (SEA Calif 5/20/13) HO affirmed expulsion finding that a student's punching and kicking a principal who attempted to restrain her while she was having a fistfight with another student was

not a manifestation of her SLD or ADHD; Jefferson County Bd of Educ v. SB ex rel JB 788 F.Supp.2d 1347, 56 IDELR 300 (ND Ala 5/26/11) Court found that handgun possession was **not a manifestation** of the student's disability, SLD; Penn Hills Sch Dist (CS) 111 LRP 15389 (SEA Penna 1/17/11) HO agreed with MDR team that the student's fighting was not a manifestation of his math/reading disability and approved his placement in an IAES for 45 days which was consistent with discipline imposed on all students; Danny K by Luana K v. Dept of Educ, State of Hawaii 57 IDELR 185 (D Haw 9/27/11) Court upheld HO decision that a student's detonation of an explosive device in the school bathroom was not a manifestation of his ADHD. Court stated that it is not the role of the MDR or the court to determine whether the student falsely confessed (??); Los Angeles Unified Sch Dist 111 LRP 60703 (SEA Calif 8/15/11) HO found that MDR ruled correctly that the student's sale of prescription drugs was not a manifestation of the impulsivity caused by his ADHD; Center Unified Sch Dist 112 LRP 12038 (SEA Calif 3/2/12) HO upheld district MDR conclusion that smoking marijuana in school bathroom that was received the day before as a birthday gift was not a manifestation of ADHD impulsivity; District of Columbia Public Schs (VD) 59 IDELR 88 (SEA DC 2/3/12) HO upheld district MDR conclusion that setting off a firecracker in the cafeteria was not a manifestation of ADHD where surveillance video showed that the student waited until no adult was watching; Wicks v Freedom Area Sch Dist 66 IDELR 130 (WD Penna 9/28/15) Court ruled that SD properly followed IDEA discipline procedures and concluded at MDR that student's drug use on campus was not a manifestation of his disability. SD properly expelled student and transferred him to an alternative school.

l. **manifestation:** Milton Public Schs 49 IDELR 236 (SEA Miss 1/30/8) Where school district suspended the student despite a finding that the behavior was a manifestation, HO awarded compensatory ed; Swansea Public Schs 47 IDELR 278 (SEA Mass 4/4/7) HO held that the conduct of a 17 year old with ADHD and OD in lunging at an assistant principal and shouting obscenities was a manifestation of his disabilities.

m. Ocean Township Bd of Educ v. ER ex rel OR 63 IDELR 16 (D NJ 3/10/14) Noting that in disciplinary cases, **stay put is the IAES**, court granted TRO motion by SD and reversed ho's stay put order that paced student back into neighborhood HS.

n. JF by Abel-Irby v New Haven Unified Sch Dist 64 IDELR 212 (ND Calif 11/19/14) Court dismissed parent suit challenging SD MDR determination was moot where all available relief had already been provided, including an fba/bip; Mars Area Sch Dist v CL by KB 66 IDELR 153 (WD Penna 10/16/15) SD appeal of HO decision in parent's favor in expedited discipline case was **moot** where parent enrolled student in a private school; Link v Metropolitan Nashville Bd of Public Educ 113 LRP 52143 (Tenn. Ct App 12/19/13) On appeal of decision that expulsion was not excessive, parents attempted to add issue of appropriateness of district MDR but court dismissed because issue was not the subject of dph below;

o. KA ex rel JA v Abington Heights Sch Dist 65 IDELR 174 (MD Penna 4/20/15) Court denied SD motion to dismiss §504 and §1983 (14th due process) claims where parent alleged that SD expelled a student receiving 504 services without an MDR. Failure to conduct MDR was evidence of disability discrimination.

p. Garmany v Dist of Columbia 935 F.Supp.2d 177, 61IDELR 15 (DDC 3/30/13) Court upheld HO ruling that **in-school suspensions** of a student with an SLD did not violate his bip or deny him FAPE.

q. Griffin-Spaulding County Schs 112 LRP 44596 (SEA GA 6/14/12) Where a student transferred from out of state but parent had **revoked consent** before moving, the new district did not have to implement a 3 year old IEP and parent request to do so was the equivalent of a request for an initial evaluation. Discipline protections did not apply to the student in time before found eligible again.

r. Student with a Disability 57 IDELR 59 (SEA NY 5/16/11) SRO overturned HO and ruled that LEA did not properly convene an MDR. MDR meeting was not documented; there was a question about whether the parent participated; and the team used an IEP no longer in effect.

s. Vincent ex rel BV v. Kenosha Unified Sch Dist 59 IDELR 242 (ED Wisc 9/26/12) Court affirmed HO decision finding denial of FAPE where district **excluded** the student from school altogether from September 30, 2008 to May 11, 2009.

t. **safety exception** Saddleback Valley Unified Sch Dist 109 LRP 5815 (SEA Calif 1/7/9) Where a student had previously engaged in self-injurious behaviors, but had not done so for the last year, HO found that IAES was not justified by the **safety exception**; Contrast, White Bear Lake Area Sch 113 LRP 28309 (SEA MN 5/13/13) HO approved removal of student to a therapeutic placement for 45 days where student engaged in many violent behaviors and district efforts to address the behaviors were unsuccessful.

u. **serious bodily injury** Bisbee Unified Sch Dist No. 2 54 IDELR 39 (SEA Ariz 1/6/10) HO ruled that school district was not justified in removing a student to an IAES for **serious bodily injury**. Student kicked principal, but statutory definition was not met where principal had swelling and went home but did not seek medical attention and drove 200 miles the next day; Southern York County Sch Dist 54 IDELR 305 (SEA Penna DD 5/11/10) HO noted statutory definition of serious bodily injury as "…**substantial risk of death**, extreme pain, **obvious disfigurement** or the impairment of the function of a bodily member, organ or mental facility…" Here no medical treatment sought and staff who were assaulted did not miss any work time, therefore IAES placement overturned by HO; Student with a Disability 54 IDELR 139 (SEA Kansas 2/26/10) SRO upheld HO who ruled no serious bodily injury where no pain medication was given at the hospital and the paraprofessional who was struck returned to work the next day. Contrast, Westminster Sch Dist 56 IDELR 85 (SEA Calif 1/13/11) HO found that student had inflicted serious bodily injury where the six year old with autism ran at teacher with all his force hitting her in the chest with his head. Two drugs failed to alleviate the pain and the teacher missed a week of work. Teacher described pain as 10 on a scale from 1 to 10. HO approved IAES placement (???)

v. "dangerous **weapon**" provision California Montessori Project 56 IDELR 308 (SEA Calif 4/29/11) HO found that district misapplied the weapon exception in assigning a student to an IAES. Although an LEA may place a child in IAES for up to 45 days regardless of manifestation if she has dangerous weapon on school grounds, the "weapon" must be capable of inflicting serious injury or death. Here 8 year old with ED pointed a scissors at a classmate, but the scissors had dull blades and could only cut

paper. HO ordered student back to previous placement; Contrast, Upper St Clair Sch Dist 110 LRP 57903 (SEA Penna 6/4/10) Ho found that fact that student brought a knife to school was enough to trigger the "dangerous **weapon**" provision justifying an IAES placement. HO found that **intent** to possess a knife was not required.

w. student knowingly possessed illegal **drugs** at school Lewisville Independent Sch Dist (AL) 111 LRP 76534 (SEA TX 11/22/11) HO approved of IAES placement without regard to manifestation where the student knowingly possessed illegal **drugs** at school.

x. Doe by Doe v. Todd County Sch Dist 625 F.3d 459, 55 IDELR 185 (8th Cir. 11/12/10) Eighth Circuit held that school district did not violate a student's constitutional rights by failing to change his IAES. 4 days into suspension IEPT changed his suspension to a placement at an alternative high school. Only IEPT, not school board could change placement; CC by Cripps v Hurst-Euless-Bedford Independent Sch Dist 65 IDELR 195 (ND Tex 5/21/15) Court affirmed HO who ruled that SD's IAES was not inappropriate just because the juvenile authorities had decided not to prosecute the student for photographing another student on the toilet.

y. Jackson v. Northwest Local Sch Dist 55 IDELR 104 (SD Ohio 9/1/10) Court ruled that sch dist **should have** been aware that a third grader with ADHD had a disability instead of providing intervention services for two years. Her RtI team recommended a mental health eval but never a SpEd eval; Court found school district violated IDEA by not having manifestation determination even tough **not** yet found **eligible**. See also 55 IDELR 71 (SD Ohio 8/3/10)(Magist J decis)

z. Other Resources:

1. Report by **Council of State Governments**: The Council of State Governments released a report on school discipline that tells school districts to spare the rod. The report notes that an over reliance by schools on suspensions is fueling the school to prison pipeline. The report is highly critical of **zero tolerance** discipline policies. The School Discipline Consensus Report mentions frequently that kids with disabilities are targeted for school discipline. Indeed the report emphasizes that children with disabilities are **twice as likely** as their non-disabled peers to be singled out for school discipline. The Report includes sixty recommendations to keep kids in the classroom and out of the courtroom. You can read the entire 436 page report here. Video and press coverage of the report are available here.

2. My Interview of Assistant Secretary of OSERS **Michael Yudin** included his warning against **ten free days of suspension.** He said that there is nothing free when a child with a disability is suspended. See my interview.

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