SPECIAL EDUCATION AND THE CAMPUS PRINCIPAL: TOP TEN AREAS OF CONCERN

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Number One: The FAPE Free Zone

1. *What is the AFAPE Free Zone@?*

   The school can take disciplinary action that has the effect of completely denying services to the student for a cumulative total of ten school days during the course of the school year without adverse legal consequences. No ARD meeting is required. No FBA need be done. The student is not entitled to a BIP, and a manifestation determination is not required. Life is easy for the campus principal in the FAPE Free Zone.

2. *How do you know that?*

   We know that students with disabilities are entitled to FAPE at all times, even when they have been Aexpelled@ from school for conduct unrelated to the disability. 34 CFR 300.121(a) requires that the state must have a policy that ensures that all eligible children have the right to FAPE Aincluding children with disabilities who have been suspended or expelled from school.@ But 34 CFR 300.121(d) qualifies that statement:

   > A public agency need not provide services during periods of removal under Section 300.520(a)(1) 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 CFR 300.121(d)(1).

3. *What are Aperiods of removal under Section 300.520(a)(1)@?*

That section of the regs authorizes the removal of a child with a disability from the current placement for Aany violation of school rules@ as long as nondisabled students would be treated the same.

4. *So does that mean that the student could be removed for behavior that is related to the disability?*

Yes. That's why a manifestation determination is not required. The results of such a determination would be irrelevant, since the school has the authority to take this action regardless of the possible connection between disability and behavior.

5. Has there been any interpretation of this?

Northeast ISD, 28 IDELR 1004 (Texas Hearing Officer, 1998). A three day suspension from school does not require a manifestation determination when it is the first such suspension in the school year.

Vidalia City Schools, 31 IDELR 124 (Georgia Hearing Officer, 1999). The hearing officer found no fault with the district=s suspension of the student for a total of five school days, noting that:

> The comments to the regulations make clear that a school district has the authority in its discretion to suspend a student for not more than 10 cumulative days during a school year without conducting a manifestation determination and without providing any educational services.

Sierra Sands Unified School District, 32 IDELR 78 (California Hearing Officer, 1999). The district placed the student in an alternative setting for ten days, pending expulsion proceedings. The parent challenged the adequacy of the services during the interim 10-day period. The district admitted that the services were inadequate, but asserted that it did not matter, since the district had no duty to serve the student at all until the 11th day. The hearing officer ruled for the district:

> The Hearing Officer finds that it is not necessary to address the District=s argument, because, in any event, the ten-day loss in special education services was *de minimis* and does not require a remedy.

Comment: There you have itBTHE FAPE FREE ZONE!

Number Two: What Days to Count

6. *OKB so there are ten days. What days must be counted?*

Days that are to be counted are days when the student is removed from Athe current placement.@ It is not clear exactly what amounts to a removal from Athe current placement.@ Certainly, if the student is suspended from school, you have to count the days of suspension, even if you apply some euphemism to the action, such as a cooling off day, a mental health day, or she just needed to have her parents come pick her up.

7. *What about parts of days?*

Neither the law nor the regulations give any guidance on this. However, the Adiscussion@ of the regs includes this:

> Portions of a school day that a child had been suspended would be included in determining whether the child had been removed for more than 10 cumulative school days or subjected to a change of placement under Section 300.519.

8. *What about in-school suspension?*

The regulations are silent on the issue, but the Adiscussion@ of the regs issued by the Office of Special Education Programs (OSEP) does provide some guidance. The discussion tells us that:

> An in-school suspension would not be considered a part of the days of suspension....as long as the child is afforded the opportunity to appropriately progress in the general curriculum, continue to receive the services specified on his or her IEP and continue to participate with nondisabled children to the extent they would have in their current placement.

9. *What about bus suspensions?*

Again, there is no guidance on this issue in the law or the regs. But the Adiscussion@ includes this:

> Whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child=s IEP. If the bus transportation is a part of the child=s IEP, a bus suspension would be treated as a suspension under Section 300.520 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 a part of the child=s IEP, a bus suspension would not be a suspension under

Section 300.520. In those cases, the child and his or her parents would have the same obligations to get to and from school as a nondisabled child who had been suspended from the bus. However, public agencies 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 behavioral intervention plan for the child.

10. *Has there been any interpretation of this?*

Daleville City Board of Education, 28 IDELR 144 (Alabama Hearing Officer, 1998). The hearing officer ruled that the district should have conducted a manifestation determination because Athe child has been subjected to in-school suspensions, which would appear to be covered by this portion of the law.@ No authority was cited. The hearing officer also determined that this procedural error by the school was harmless, because there was no evidence to show any connection between disability and behavior.

Pottstown School District, 29 IDELR 119 (Pennsylvania Review Panel, 1998). State law defines a Achange in placement@ as Aan exclusion...from the educational environment for more than....15 cumulative days in a school year.@ The panel ruled that assignments to ISS do not necessarily count toward that 15-day total.

Trevor C. v. North East ISD, (Texas Hearing Officer; 6-29-00) Trevor was a 13-year old, classified as ED and OHI. Trevor had a BIP which called for him to go to the SRC (Student Reassignment Center) in the event of certain behaviors. This consequence was used approximately 20 days between September and March. The parents argued that this many removals of the student amounted to a Achange of placement@ which meant that the school should have conducted a manifestation determination. The hearing officer agreed. Furthermore, the hearing officer ruled that the manifestation determination should have been done even though the SRC removals were authorized by the BIP, which had been agreed to by the parents.

Number Three: The Proper Use of a BIP

11. *When does a student get a BIP?*

There are two situations in which a BIP is called for. First, the student must have a BIP whenever the days of removal from the IEP placement due to disciplinary problems add up to 11 or more in a single school year.

Second, the IEP team is to consider the use of a BIP AIn the case of a child whose behavior impedes his or her learning or that of others.@ This language is taken from 34 CFR

300.346 of the regulations which spells out several Aspecial factors@ that must be taken into account in writing the IEP.

12. *Does the law indicate how the committee is to come up with a BIP?*

Not exactly. But the regs make it clear that a BIP is to focus on positive, proactive strategies designed to prevent inappropriate behaviors from occurring in the first place. Section 300.346 puts it this way:

> In the case of a child whose behavior impedes his or her learning or that of others [the IEP team shall] consider, if appropriate, *strategies, including positive behavioral interventions, strategies, and supports* to address that behavior. 34 CFR 300.346(a)(2)(i).

In the section of the regs dealing with removals of more than ten days, it puts it this way:

> As soon as practicable after developing the [FBA], and completing the assessments required by that plan, the LEA shall convene an IEP meeting to develop *appropriate behavioral interventions to address that behavior* and shall implement those interventions. 34 CFR 300.520(b)(2).

13. *Any disciplinary action taken after developing a BIP must be authorized by the BIPBright?*

Wrong. We would put it differently. We would say that the disciplinary action Acannot be prohibited by the BIP.@ In other words, if the BIP says Ano corporal punishment@ then corporal punishment cannot be used. If the BIP says Ano lunch detention@ then lunch detention cannot be used. But there is nothing in the law that requires the BIP to authorize actions that the school already has the authority to impose, such as short term removals, ISS, lunch detention, etc.

The discussion of the regs says the same thing by noting that schools can deal with minor disciplinary problems Athrough [among other things], restrictions in privileges, so long as they are not inconsistent with the child=s IEP.@

14. *How has this been interpreted?*

Glenn H. v. Corpus Christi ISD, 30 IDELR 88 (Texas Hearing Officer, 1999). The student had a BMP in place in the spring of 1998 that seemed to work well. His grades were good, and his behavior Asignificantly improved.@ The same BMP was in place in the fall of 1998, but the District did not consistently implement it. A meeting was held in October of 1998 to revise the BMP. The parent challenged the new BMP.

The hearing officer ruled that the revised BMP was Apremature and not supported by sufficient information.@ The BMP that had been agreed to in May:

> had not been implemented properly or tested for deficiency. The reinforcers that had worked so well in Spring 1998 simply had not been activated. No one from the District was providing [the student] on a daily basis with his assignment sheets and point sheets. Teachers were not consistently asking for these documents and they apparently were not following through when [the student] failed to present them. [The mother] was likewise not asking for these instruments on a daily basis. A coordinated effort to comply with [the student=s] BMP simply was not in place in Fall 1998. Relying upon [the student] to pick up these sheets, to complete them daily, and have them checked daily and weekly is asking too much of a child with severe ADHD.

Comment: IDEA 1997 had no impact on this case. This is an old, familiar message: if you have a BMP (or BIP, as they are now called) it must be implemented consistently. Failure to implement a behavior plan that has been agreed to is sure to create problems for the school district.

Trevor C. v. North East ISD, (Texas Hearing Officer; 6-29-00). Trevor was a 13-year old, classified as ED and OHI. Trevor had a BIP which called for him to go to the SRC (Student Reassignment Center) in the event of certain behaviors. This consequence was used approximately 20 days between September and March. The parents argued that this many removals of the student amounted to a Achange of placement@ which meant that the school should have conducted a manifestation determination.

The hearing officer agreed. Furthermore, the hearing officer ruled that the manifestation determination should have been done even though the SRC removals were authorized by the BIP, which had been agreed to by the parents.

Anthony F. v. Goliad ISD, (Texas Hearing Officer; 1-29-01). Anthony was a 16-year old, classified as ED. He had a BIP which authorized his removal from school for certain reasons. The hearing officer ruled that Anthony had received FAPE, despite some problems. In particular, the hearing officer pointed out that the school had not kept good records pertaining to how often, and why, Anthony was removed from school for disciplinary reasons. The failure to keep good records prevented the school from adequately evaluating Anthony=s progress.

But despite this problem, Anthony made progress in school, his parents were involved in the process, and they had never challenged the IEP before going to hearing. The parents were not entitled to any relief.

Walter K. v. Goliad ISD, (Texas Hearing Officer; 3-12-00). Walter was a very large (6'5"B355) 16-year old, classified as ED and LD. The hearing officer denied the request for residential placement, but still found fault with the district=s BIP. The hearing officer determined that the BIP should have included more provisions for implementing the plan at home, and for providing parent and in-home training. Also, the BIP should have included more contingency plans for handling Walter when he got out of control, including specific techniques, and/or more staff.

Gene F. v. Corpus Christi ISD, (Texas Hearing Officer; 2-14-00). Gene was a 13-year old, classified as ED. The district placed him at its Student Learning and Guidance Center, over parental objection. According to the hearing officer, the SLGC operated under a standardized discipline approach, and did not implement Gene=s BIP. Also, the hearing officer concluded that the district did not provide counseling for Gene while he was at SLGC, even though counseling was a necessary related service for him.

Based on these findings, the hearing officer concluded that the district denied FAPE to the student by failing to provide appropriate services while he was at the SLGC.

Number Four: How to Do a Manifestation Determination

15. *When is the school required to conduct a manifestation determination?*

34 CFR 300.523(a) tells us that the manifestation determination must be done in three different circumstances. First:

> If an action is contemplated regarding behavior described in Sections 300.520(a)(2)....

ABehavior described in 300.520(a)(2)@ involves possession or use of drugs or weapons at school.

Second:

> If an action is contemplated regarding behavior described in Sections....300.521....

Section 300.521 describes the process for obtaining an interim exception to the stay put rule due to dangerousness. So the Abehavior described@ in 300.521, presumably, is the behavior that would cause the school district to seek such relief.

Third:

> If an action is contemplated .....involving a removal that constitutes a change of placement under Section 300.519 for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the LEA that applies to all children.

To summarize, then, a manifestation determination is required when the school proposes to use its authority to put students in alternative settings for drug or weapon offenses; when the school seeks a hearing officer=s order for an interim placement due to dangerousness; and when the school proposes a removal from the current placement that amounts to a change of placement for any misconduct for which nondisabled students might be similarly disciplined.

16. *By whom is it to be done?*

By the ARD Committee Aand other qualified personnel in a meeting.@ 34 CFR 300.523(b).

17. *How is it to be done?*

Please note first of all that it must be done Ain a meeting.@ A hallway review, or sign-off is not sufficient.

18. *Is there a time by which this meeting must be held?*

Yes. The meeting must be held:

> Immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made... 34 CFR 300.523(a)(2).

19. *What exactly is the committee supposed to do in this meeting?*

This group must:

1. First consider, in terms of the behavior subject to disciplinary action, all relevant information, includingB

   (i) Evaluation and diagnostic results, including the results or other relevant information supplied by the parents of the child;

   (ii) Observations of the child; and

   (iii) The child=s IEP and placement; and

2. Then determine thatB

(i) In relationship to the behavior subject to disciplinary action, the child=s IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child=s IEP and placement;

(ii) The child=s disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(iii) The child=s disability did not impair the ability of the child to control the behavior subject to disciplinary action. 34 CFR 300.524(c).

20. *What this is really about is simply determining if the student knows right from wrongBright?*

Wrong! ADoes the student know the difference between right and wrong@ is clearly not the correct question to ask. The questions asked by the ARD committee should more closely track the language of the regulations. Note that the regs discuss whether the student=s disability impaired the ability to understand, or the ability to control. In both instances, the committee should focus on the specific behavior in question.

21. *Has there been any interpretation of this?*

Rudy F. v. Poteet ISD, 29 IDELR 423 (Texas Hearing Officer, 1998). The school proposed to place the student in a disciplinary alternative program for possession of marijuana. The hearing officer made rulings on several issues that often come up in special ed discipline cases. These included 1) that the special education hearing process is not the forum in which to argue that the student did not commit the offense he is charged with; 2) that there are exceptions to the stay put rule, including cases involving possession of illegal drugs; and 3) that if the conduct of the student is not a manifestation of his disability, he can be disciplined for the same length of time and in the same manner as a regular education student, provided that FAPE is still provided. The hearing officer ruled that Rudy=s marijuana possession was not a manifestation of his learning disability, despite the fact that the District failed to completely implement the student=s BIP:

> The BIP contains the requirement: AFind support person for Rudy to talk to when he is oppositional.@ None of the school administrators and teachers at the hearing

> knew the identity of the support person, except that.....the educational diagnostician [who] assumed it was the high school counselor.....However, it was not shown that this omission affected Rudy=s truancy or his behavior of possession of marijuana. Also, in spite of the omission, his noncompliant behavior in class actually improved during the spring semester of 1998.

Comment: Here=s a hearing officer applying the Ano harm, no foul@ principle. Not all hearing officers will do so.

Student v. Searcy Public Schools, 30 IDELR 825 (Arkansas Hearing Officer, 1999). The student was found to be under the influence of alcohol at school. The school proposed expulsion. The student was a fully mainstreamed LD student. School personnel determined that his drinking was not a manifestation of his disability. The parent disagreed with the manifestation determination and asked for a hearing. Since alcohol is not a drug, the stay put rule kicked in, and the student went back to his regular placement pending the due process hearing. The hearing officer ruled that the manifestation determination was fatally flawed because a regular education teacher did not attend the IEP meeting at which the determination was made. The Hearing Officer:

> Even though the LEA supervisor and principal who attended the Review may have had knowledge of the Student=s regular class participation...the IDEA requirements are definite. The participation of at least one regular class teacher on the IEP Team is required. The District cannot be excused from having the participation of a regular class teacher as part of the IEP team.

The Hearing Officer ordered the District to re-convene the team, and do it right this time.

Comment: Here=s a hearing officer who does not apply the Ano harm no foul@ principle. Do you think the involvement of a regular education teacher would have made a difference? This case should be reminder to those who slip in and out of IEP team meetings not to do so.

Brown County School Corp. 31 IDELR 200 (Indiana Board of Special Education Appeals, 1999). An appeals panel ruled that the student=s possession of marijuana at school was related to his disability, and therefore ordered the district not to expel the student. The panel concluded that Anot all factors were duly considered@ and that Athe public agency was remiss in not addressing behavioral problems and teaching judgment skills of the Student in his IEP.@ This LD student did not bring the pot to schoolBhe got it from a girl who asked him to hold it for awhile.

Comment: It sounds like this kid got suckered. We suspect that the girl knew the heat was on, and so she kindly asked the boy to hold it for her. He gets caught. We=re willing to

bet that the girl was cute. Under similar circumstances, most high school boys would have done the same. Perhaps these are among the other Afactors@ not Aduly considered.@

William v. Carrollton-Farmer=s Branch ISD, (Texas Hearing Officer; 1-29-01). William was a 15-year old, classified as ADHD. He was arrested at school for delivering prescription drugs to other students. The ARD conducted a manifestation determination, determined that William=s behavior was not a manifestation of his disability, and placed him in the JJAEP.
The hearing officer ruled for the school district on all counts. The MDR was properly done. The behavior was not related to the disability. The JJAEP could provide FAPE.

Christopher P. v. Klein ISD, (Texas Hearing Officer; 12-7-00). Christopher was an 8th grader, classified as ED and OHI. The district proposed to place him in the AEP for what it considered the deliberate biting of another student. The student claimed he was just playing around, and meant no harm. The ARD concluded that the incident was not a manifestation of Christopher=s disability, but the parents disagreed with this conclusion. They contended that it was an impulsive act, related to his ADHD, especially since he had not taken his medication yet.

The hearing officer ruled that the school district bears the burden of establishing that behavior is not a manifestation of the student=s disability. The hearing officer ruled that the district had failed to meet this burden.

The hearing officer overruled the ARD=s determination in part because the form used by the district did not precisely track the language in the regulations with regard to manifestation determinations. According to the hearing officer, behavior is related to the disability if the disability causes a reduced ability to understand, or a reduced ability to control the behavior in question. Even though the student retains some ability to understand that his behavior is wrong, and some ability to control his behavior, as long as his understanding or ability to control is somewhat reduced by the disability, then the behavior must be considered to be a manifestation of the disability.

Number Five: Eligibility for Special Education

22. *When is a student eligible for special education?*

A student is eligible for special education when the student needs adaptations to the content, the method or the delivery of instruction due to a disability.

23. *Any kind of disability?*

No. The student must have one of the disabilities specified in the law. These include mentally retarded, hearing impaired, speech impaired, visually impaired, learning disabled, emotionally disturbed, other health impaired, orthopedically impaired, autistic, traumatic brain injured.

24. *Where does ADD fit? ADHD?*

OHI (Other Health Impaired) is an umbrella term which includes any condition that results in limited health, vitality or alertness. This could include ADD and ADHD. This does not mean that every child who is diagnosed as having ADD is eligible for special education as OHI. It simply means that if the student=s underlying condition (ADD) causes a limited health, vitality or alertness which results in the student needing adaptations to the content, method or delivery of instruction, then the student would qualify as OHI.

25. *Who determines eligibility?*

The ARD Committee. The decision about eligibility should be based on current, comprehensive and appropriate testing. The decisions as to which tests should be administered to a student should be made by the testing professionals, not the principal.

Number Six: The Dangerous Student

26. *What is the school supposed to do when the student=s behavior violates the code of conduct, but it is related to the disability?*

Here are six alternatives. First, the school can seek an agreement with the parent as to an appropriate placement for the student. In the Q and A issued by OSEP there is this:

> It is also extremely important to keep in mind that the provisions of the statute and regulation concerning the amount of time a child with a disability can be removed from his or her regular placement for disciplinary reasons are only called into play if the removal constitutes a change of placement *and the parent objects to proposed action by school officials (or objects to a refusal by school officials to take an action) and requests a due process hearing.* (Emphasis added). Q and A #1.

Second, if the violation is a drug or weapon offense, the school can place the student in an Ainterim alternative educational setting@ for 45 calendar days. The discussion of the regs makes it clear that the 45-day interim placements for drug or weapon offenses Aare exceptions to the general rule that children with disabilities may not be disciplined through a change of placement for behavior that is a manifestation of their disability.@ More on this below.

Third, if no agreement with the parent can be reached, and maintaining the current placement is considered dangerous, then the school can seek an expedited hearing and an order from the hearing officer for a 45-day interim placement.

Fourth, if the problem is with the first Adetermination@ required by the manifestation determination, (i.e., that the school did not properly implement a good IEP and placement prior to the student=s misconduct), the school should fix the IEP and/or placement. The regs put it this way:

> If, in the [manifestation determination] a public agency identifies deficiencies in the child=s IEP or placement or in their implementation, it must take immediate steps to remedy those deficiencies. 34 CFR 300.523(f).

Fifth, if the problem is with the second Adetermination@ (i.e., that the student did not understand the impact and consequences of the behavior in question) neither the regs nor the discussion give us any specific guidance as to what to do. But it seems only logical that the school would propose changing the IEP (and possibly the placement) so as to teach the student to understand the inappropriateness of such behaviors.

Sixth, if the problem is with the third Adetermination@ (i.e., that the student did not have the ability to control the behavior in question) neither the regs nor the discussion give us any specific guidance. But again, it seems only logical that the school would propose changing the IEP, and possibly the placement, so as to teach the student to control inappropriate behaviors.

Number Seven: Dealing with Drugs and Weapons

27. *What are the special rules for drug and weapon offenses?*

There are several of them. First of all, the school can order the student into an "interim alternative educational setting" for up to 45 calendar days:

> School personnel may order--
>
> (2) A change in placement of a child with a disability to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days, if--

(i) The child carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or a local educational agency; or

(ii) The child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency. 34 CFR 300.520(a)(2).

28. *Who decides what is" an appropriate interim alternative educational setting"?*

The ARD Committee. This is required by 34 CFR 300.522, which goes on to spell out the requirements for the interim setting:

(b) Any interim alternative educational setting in which a child is placed under Sections 300.520(a)(2) or 300.521 must--

(1) Be selected so as to enable the child to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and

(2) Include services and modifications to address the behavior described in Sections 300.520(a)(2) or 300.521, that are designed to prevent the behavior from recurring.

29. *I'm confused. I thought that when drugs or weapons are involved, the campus administrator could take action without an ARD.*

That's correct. They can assign the student to "an appropriate interim alternative educational setting" for up to 45 days. But an ARD meeting is still necessary to select the appropriate setting. The ARD also has to conduct an FBA and develop a BIP.

30. *What about a manifestation determination?*

The ARD must do that also. However, the school can require the student to stay in the alternative setting for 45 calendar days regardless of the outcome of the manifestation determination. This is made clear in the discussion:

> The 45-day placements...[for drugs and weapons]....are exceptions to the general rule that children with disabilities may not be disciplined through a change of placement for behavior that is a manifestation of their disability. If a child has been

> placed in a 45-day placement....and his or her behavior is determined to be a manifestation of the disability....it may be possible to return the child to the current educational placement before the expiration of the up to 45-day period by correcting identified deficiencies in the implementation of a child's IEP or placement. However, public agencies are not obliged to return the child to the current placement before the expiration of the 45-day period (and any subsequent extensions under Section 300.526(c)) if they do not choose to do so.

31. *So what's the point of the manifestation determination in a drug or weapon case?*

If the student's conduct is a manifestation of the disability, the school should revise the IEP or BIP to address this behavior. If it is not a manifestation, the school may wish to impose disciplinary consequences beyond the 45-calendar days, provided that this is consistent with how non-disabled students would be handled.

32. *So how does the timing of all this work out?*

The ARD must meet "not later than 10 business days after....commencing a removal that constitutes a change of placement....including the action [authorized for drug and weapon offenses]." 34 CFR 300.520(b)(1). So the principal or designee can make an "interim assignment" of the student for 10 business days, while the ARD gets together. The ARD can choose an appropriate setting to continue the placement for up to 45 calendar days. Those first pre-ARD meeting days do count as part of the 45.

33. *45 school days? Business days? Calendar days?*

Calendar. The regs use the word "days", which is defined in the regs as:

> Day means calendar day unless otherwise indicated as business day or school day. 34 CFR 300.9.

So it's 45 calendar days, even when some of those days are school holidays. The discussion says this:

> Interim alternative educational settings....are limited to 45 calendar days, unless extended under Section 300.526(c) for a child who would be dangerous to return to the child's placement before the removal. The fact that school is in recess during a portion of the 45 days does not "stop the clock" on the 45 days during the school recess.

Please note that the "exception" under 34 CFR 300.526 requires an order from a special education hearing officer.

34. *How does the law define the term "weapon"?*

IDEA defines "weapon" to have the same meaning as the term "dangerous weapon" under paragraph 2 of the first subsection (g) of 18 U.S.C. 930, which says that:

> 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.

35. *How does the law define drugs and controlled substances?*

A controlled substance is a drug or other substance defined 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 one that is legally possessed or used under the supervision of a licensed health care professional, or otherwise legally used or possessed.

36. *I thought the school was required to expel students who bring firearms to school.*

You are thinking of the Gun Free Schools Act of 1994 (20 U.S.C. 8921) which says exactly that with regard to states that receive federal funds (all of 'em). But you have to read the entire law. It requires each state to adopt a law calling for the expulsion of gun-toting students, but the state law must include a provision that "shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis." Furthermore, the Gun Free Schools Act specifically says:

> The provisions of this section shall be construed in a manner consistent with IDEA. 20 U.S.C. 8921(c).

Translation: the school must make a manifestation determination with regard to the gun possession, cannot expel at all if the gun possession is a manifestation of the disability, and must continue to provide FAPE. This is one area where the superintendent not only can, but must make an exception to the general rule. So it is misleading to say that students must be expelled for one year for gun possession.

For the OSEP take on this issue, see the letter from Thomas Hehir, dated December 17, 1997, at 29 IDELR 976:

> Most importantly, the Gun-Free Schools Act explicitly states that the Act must be construed in a manner consistent with the IDEA. 20 U.S.C. 8921. As stated above, the Department=s position continues to be that compliance with the Gun-Free Schools Act can be achieved consistent with the requirements that apply to students with disabilities as long as discipline of such students is determined on a case-by-case basis in accordance with IDEA 1997.
>
> Section 612(a)(1) requires that FAPE be made available to disabled students expelled from school. This requirement to make FAPE available is applicable to students with disabilities who bring weapons to school.

37. *Has there been any interpretation of this?*

Georgetown ISD, 28 IDELR 904 (Texas Hearing Officer, 1998). The hearing officer confirmed that possession of a knife at school provided an exception to the stay put rule.

Akron Central School District, 28 IDELR 909 (New York Review Officer, 1998). The review officer focused on the requirement that an interim alternative setting must "be selected so as to enable the child....to continue to receive those services and modifications, including those described in the current IEP, that will enable the child to meet the goals set out in that IEP." He found fault with the school district because its proposed interim setting (homebound) would not include the resource room services that were prescribed in the current IEP.

San Antonio Union School District, 28 IDELR 1265 (California Hearing Officer, 1998). Interpreting state law, the hearing officer concluded that "stay put" does apply when the student is subject to expulsion for possession of a cap gun, which looked like a real gun.

Rudy F. v. Poteet ISD, 29 IDELR 423 (Texas Hearing Officer, 1998). The school proposed placing the student in a disciplinary alternative setting due to possession of marijuana. The hearing officer ruled that there are exceptions to the stay put rule, including cases involving possession of illegal drugs.

Vista Unified School District, 29 IDELR 749 (California Hearing Officer, 1998). The exception to stay put did not apply in this case because the student was charged with possession of a knife at a park after school. Since the student was not charged with possession of the knife at school or a school function, the stay put rule applied.

Independent School District No. 279, Osseo Area School, 30 IDELR 645 and 33 IDELR 28 (Minnesota Hearing Officer, 1999). This is the case discussed above involving the student who brought an unassembled paintball gun onto the school bus on his very first day as a special education student. Among other things, the District declared the paintball gun a "weapon" under federal law. The Hearing Officer disagreed. The Hearing Officer said that a firearm should be considered a weapon even if it is unloaded and/or inoperable. But this does not apply to a paintball gun:

> It is possible that a paintball gun, (or a golf club, a hockey stick, or a baseball bat) could be used in a manner that would threaten or be readily capable of causing serious bodily harm, and in those circumstances those items might well be considered dangerous weapons.

Anaheim Union High School District, 32 IDELR 129 (California Hearing Officer, 2000). The hearing officer ruled that a paper clip is not a "weapon" as defined in federal law. The

school recommended expulsion of the student for allegedly grabbing another student on the bus and cutting his neck with the paper clip. The hearing officer was not persuaded that a paper clip was capable of causing death or serious bodily injury, as required by the definition of "weapon" in federal law.

Comment: You have to wonder if this is the result Congress intended.

Parent v. Osceola County School Board, 32 IDELR 144 (M.D.Fla. 1999). The student was assigned to an alternative school after cutting another student's face with a box cutter. The court ruled that the alternative school provided FAPE, even though it offered limited extra-curricular activities and did not have a reading instructor certified in special education. The student earned passing grades in all courses, and his behavior improved. The alternative school was also the LRE for the student, since he could not attend the regular high school without posing a threat of injury to teachers and students. In contrast, his behavior at the alternative school was much improved. Any procedural violations committed by the school were too minor to amount to a denial of FAPE.

Alameda Unified School District, 32 IDELR 159 (Calif. Hearing Officer, 2000). The hearing officer could not determine whether stay put applied or not because no one presented evidence as to the length of the blade. If more than 2.5 inches, stay put does not apply, and the student can be placed in an appropriate, interim, alternative setting "which may include home instruction" for 45 calendar days. If less than 2.5 inches, stay put applies.

ISD #831, 32 IDELR 163 (Minnesota Hearing Officer, 1999). The hearing officer ruled that a pencil is not a "weapon" under federal law, even though it pierced the skin of another student. Thus the district could not unilaterally override the stay put provision. Nor was the hearing officer convinced that maintaining the current placement was substantially likely to result in injury to the child or others. Most of the student=s misconduct was verbal. The hearing officer described the pencil incident as "not an intentional infliction of harm upon a fellow student, but an accident more related to the Student's tendencies toward impulsive behavior which are consistent with his disabling condition."

The factual description of the "pencil incident" was as follows:

> On May 5, 1999, the Student and a friend were joking around and the friend tossed a pencil backwards which hit a third student in the head. That third student or someone else in the vicinity threw something which hit Student on his broken arm. The Student who had a pencil in his hand swung back his hand behind him and accidentally poked his friend's hand with the pencil just as his friend put his hand up to block Student's arm. The point of the pencil broke his friend's skin. A small piece of lead was removed from the friend's hand.

Comment: the hearing officer observes that the "pencil incident" was impulsive behavior "consistent with his disabling condition." But this is irrelevant. The exception to "stay put" based on dangerousness can be invoked whether the behavior is or is not related to disability.

Number Eight: Implementation of the IEP

38. *Do I have the responsibility to make sure that the IEP is implemented?*

Yes! As campus principal, you have the overall responsibility for compliance with the law, and proper education of all students. This certainly includes the special education students. When a parent complains that an IEP is not being properly implemented, we think the appropriate administrative response is: "let me look into that for you, and I'll get back to you." Please note that this is the identical appropriate response to virtually any other parent complaint (e.g., sexual harassment, racial discrimination, inappropriate comments by a teacher).

39. *What's the best way for me, as campus principal, to make sure IEPs are being implemented?*

Hold teachers accountable by using the PDAS.

Here are some PDAS indicators to keep in mind when dealing with teachers who are not fully implementing the IEP:

Domain I:

Indicator 1: Students are actively engaged in learning.
Indicator 2: Students are successful in learning.

Domain II:

Indicator 2: Instructional content is learner-centered (e.g., relates to the interests and *varied characteristics* of students.
Indicator 4: Instructional strategies include motivational techniques to successfully and actively engage students in the learning process.
Indicator 5: Instructional strategies are aligned with the objectives, activities, *student characteristics, prior learning,* and work and life applications, both within the discipline and with other disciplines.

Domain III:

Indicator 3: Assessment strategies are appropriate to the *varied characteristics* of students.

Domain V:

Indicator 3: The teacher encourages and supports students who are reluctant or having difficulty.

Domain VII:

Indicator 1: The teacher complies with all policies, operating procedures, and legal requirements (national, state, district and campus). The teacher participates in the development of operating procedures and offers suggestions for improvement.

Indicator 2: The teacher complies with all verbal and written directives, participates in the development of operating procedures, and offers suggestions for improvement.

Domain VIII:

Indicator 7: The teacher works with teachers, counselors, and other school professionals to seek information to identify and assess the needs of assigned students in at-risk situations.

Indicator 8: The teacher meets with parents and/or other teachers of students who are failing or in danger of failing to develop an appropriate plan for intervention.

Number Nine: Handling Conflict

40. *What do we do when the ARD fails to come to consensus?*

You can conclude the meeting without coming to consensus. The basis for the lack of consensus should be clearly documented in the minutes of the meeting.

41. *And then what?*

It depends on what you are dealing with. If it is *initial placement* into the special education program, and the parent will not agree, the district must re-consider the situation, and take appropriate action. The student cannot be placed into a special education program without

parental consent. So if that is the sticking point, the district will have to re-consider and decide what to do.

Once the student is in special ed, disagreements are to be handled in accordance with the Texas "recess" rule, 19 T.A.C. 89.1050(h). Here is what it says:

(h) All members of the ARD committee shall have the opportunity to participate in a collaborative manner in developing the IEP. A decision of the committee concerning required elements of the IEP shall be made by mutual agreement of the required members if possible. The committee may agree to an annual IEP or an IEP of shorter duration.

(1) When mutual agreement about all required elements of the IEP is not achieved, the party (the parents or adult student) who disagrees shall be offered a single opportunity to have the committee recess for a period of time not to exceed ten school days. This recess is not required when the student=s presence on the campus presents a danger of physical harm to the student or others or when the student has committed an expellable offense or an offense which may lead to a placement in an alternative education program (AEP). The requirements of this subsection (h) do not prohibit the members of the ARD committee from recessing an ARD committee meeting for reasons other than the failure of the parents and the school district from reaching mutual agreement about all required elements of an IEP.

(2) During the recess the committee members shall consider alternatives, gather additional data, prepare further documentation, and/or obtain additional resource persons which may assist in enabling the ARD committee to reach mutual agreement.

(3) The date, time, and place for continuing the ARD committee meeting shall be determined by mutual agreement prior to the recess.

(4) If a ten-day recess is implemented as provided in paragraph (1) of this subsection and the ARD committee still cannot reach mutual agreement, the district shall implement the IEP which it has determined to be appropriate for this student.

(5) When mutual agreement is not reached, a written statement of the basis for the disagreement shall be included in the IEP. The members who disagree shall be offered the opportunity to write their own statements.

(6) When a district implements an IEP with which the parents disagree or the adult student disagrees, the district shall provide prior written notice to the parents or adult student as required in 34 C.F.R. 300.503.

(7) Parents shall have the right to file a complaint, request mediation, or request a due process hearing at any point when they disagree with decisions of the ARD committee.

42. *So it looks like there is an exception to the "recess" rule when we are dealing with student discipline.*

Right. When the student has committed an expellable offense, or an AEP offense, or is otherwise dangerous on campus, the district is not required to permit a recess. If the district wants to reach closure on the issues without a recess, it can do so.

43. *And if it is NOT a discipline case, and it is NOT initial placement, the school implements the IEP it thinks appropriate, even though the parent disagrees with it.*

Right. But only after you have complied with the recess rule, including giving the parent written notice of the proposed decision.

Number Ten: Don't Lose Sight of the Big Picture

Special education is the most legally micro-managed area of school operations. There are more rules and regulations, jargon, procedures, paperwork, and traps for the unwary or inexperienced. It is easy to get lost in that quagmire, and thus, lose sight of the big picture.

We have created these laws and regulations in an effort to guarantee that each child receives an education appropriate for his or her needs.

"We Are Responsible for Children...." and that is the Big Picture.

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