

# Student Discipline

## Disproportionality, Due Process & Determination

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*This presentation is for informational and discussion purposes only. Nothing herein should be construed as legal advice. Specific facts and circumstances can significantly impact the analysis of law and decisions outlined herein.*

# What we will cover today?

- I. **Disproportionality**
- II. **Due Process rights**
- III. **Discipline of special education students**
  - **Manifestation Determination**
  - **Special Circumstances**

# Disproportionality

- IDEA requires that tests and other materials used to assess students be:
  - Selected and administered so as not to be discriminatory on a racial or cultural basis; and
  - Provided and administered in the child's native language
    - 34 C.F.R. 300.304 (c)(1)

# Disproportionality

- Discussions of the “school-to-prison pipeline” have gained significant attention in recent years
- In 2014, the U.S. Department of Education’s Office for Civil Rights released a report on student discipline:
  - Black students suspended and expelled at rates three times greater than white students
    - 16% of black students have been suspended
    - 5% of white students have been suspended

-U.S. DOE OCR, Civil Rights Data Collection: School Discipline Issue Brief No. 1 (March 2014)

<http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>

# Disproportionality

- While black students represent 16% of students enrolled, they represent 27% of students referred to law enforcement and 31% of students subjected to a school related arrest
- Students with disabilities represented 12% of the overall student population, but 25% of those arrested
  - U.S. DOE OCR, Civil Rights Data Collection: School Discipline Issue Brief No. 1 (March 2014)  
<http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>

# Disproportionality

- "This critical report shows that racial disparities in school discipline policies are not only well-documented among older students, but actually begin during preschool."
  - Eric Holder, Attorney General

# Disproportionality

- Former Assistant Education Secretary of the DOE's Office of Civil Rights, Stephanie Monroe, has testified that:
  - Teachers refer minority students for special education evaluations while declining to evaluate white students with same symptoms
  - Districts frequently provide the wrong services to minority students
  - IEP teams often misinterpret test results of minority students

# Disproportionality

- Utilize each disciplinary issue as an opportunity to review student's IEP and revise if needed
  - Where student misbehavior continues, consider the possibility that the IEP or BIP do not adequately address the students needs
- Ensure communications with student's parents are provided in their native language



# Discipline under the IDEA

- Three sources of law govern disciplinary proceedings involving special education students:
  - *Goss v. Lopez*, 419 U.S. 565 (1975)
  - The Individuals with Disabilities Education Improvement Act of 2004 (IDEA)
  - State Law/ Board Policy

# *Goss v. Lopez*

- A suspension has the potential to seriously harm a student's reputation, future employment, and continued education
- Except in emergency situations, the 14<sup>th</sup> amendment requires, at a minimum, that all students receive notice and an opportunity to be heard in conjunction with a suspension
  - Formality of hearing to be determined in relation to seriousness of offense and length of suspension
  - Short Term v. Long Term

# *Goss v. Lopez*

“Having chosen to extend the right to an education to people of appellate class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred, and must recognize a student's legitimate entitlement to a public education as a property interest that is protected by the Due Process Clause, and that may not be taken away for misconduct without observing minimum procedures required by that Clause.”

-*Goss v. Lopez*, 419 U.S. at 573-74

# Students with Disabilities

- Students with disabilities may be afforded protections greater than those offered to the general education population, if as a result of their disability.
  - Short Term vs. Long Term Suspensions

# Short Term Suspensions

- A suspension for 10 cumulative school days or less in a school year
  - 34 C.F.R. 300.530(d)(3)
- A school day is defined as:
  - “[A]ny day, including a partial day, that children are in attendance at school for instructional purposes.”
    - 34 C.F.R. 300.11(c)(1)
      - In-School Suspensions?
      - Time Out?
      - Early Release?

# In-School Suspension

- In-School Suspensions does not constitute removal if:
  - Student is afforded an opportunity to progress in the general curriculum;
  - District continues to provide the services listed in the student's IEP; and
  - Student continues to participate with nondisabled students to the same extent they do in their current placement
    - 71 Fed. Reg. 46,715 (2006)

# In-School Suspension

- Consider:
  - Is the student receiving instruction from a qualified teacher?
  - Is the student receiving the services outlined in their IEP?
  - Is the student assigned classwork?
  - Does the student have access to their regular teacher, if needed?

# In-School Suspension

- Are the nature and quality of the services provided in the in-school suspension program comparable to the services the students otherwise receive?
  - *Greenville County (SC) Sch. Dist.*, 17 IDELR 1120 (OCR 1991)
- Must be more than mere supervision
- Students entitled to minimum due process rights even prior to in-school suspensions
  - *Orange v. County of Grundy*, 950 F. Supp. 1365 (E.D. Tenn. 1996)



# Short Term Suspensions

- Student may be disciplined as general education student during this period of time
- School not required to provide student with services, unless it also provides services to general education students who are similarly removed
  - New Jersey State Law- Home Instruction on the 5<sup>th</sup> day

# Short Term Suspensions

- At a minimum, student must receive:
  - Notice of the charges
    - Oral or written
  - Explanation of the evidence
    - Required if allegations are denied

# Short-Term Suspension

- Informal Hearing
  - Opportunity to explain situation
  - Must occur prior to suspension
    - May occur simultaneously with notice of charges
  - Hearing may be delayed in the interest of safety
    - Must be held as soon as practicable

# Short-Term Suspension

- Additional procedural safe guards as provided in State law or Board policy
  - Parental notice governed by State Law or Board Policy
  - No right to confront accuser
  - No right to counsel
  - Need not be in writing
    - But may be good practice

# Long-Term Suspension- General Education

- Occurs when a student is suspended for more than 10 consecutive school days
- “May require more formal procedures” than those provided for short-term suspensions
  - Goss v. Lopez, 419 U.S. 565, 584 (1975)

# Long-Term Suspension- General Education

- The 7<sup>th</sup> Circuit has held that long-term suspensions:
  - “[D]o not require a more elaborate hearing in order to comport with due process, so long as the student receives the fundamentally fair procedures set out in Goss.”
    - Coronado v. Valleyview Pub. Sch. Dist. 537 F.3d 791, 796 (7<sup>th</sup> Cir. 2008)

# Long-term Suspension- Special Education

- Districts must provide parents with notice in order to change a student's educational placement
  - Description of the proposed action
  - Description of explanation for proposed action
    - 34 C.F.R. 300.503(b)

# Long-term Suspension- Special Education

- Disciplinary action considered a change of placement when:
  - Removal is for more than 10 consecutive school days; or
  - A student has been subject to a series of removals that constitute a pattern
    - 34 C.F.R. 300.536(a)



# Long-term Suspension- Special Education

- A pattern of removals constitutes a change of placement when:
  - The series of removals totals more than 10 school days in a school year; and
  - The child's behavior in each incident is substantially similar
- Consideration also given to the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another
  - 34 C.F.R. 300.536(a)

# Manifestation Determination

- Must occur prior to a disciplinary-related change in placement (10 days/pattern)
- Parent and relevant IEP team members must determine whether a student's conduct was a manifestation of their disability
- Districts are prohibited from suspending students for more than 10 days for conduct which is related to their disability
  - 34 C.F.R. 300.530(e)
  - Discrimination Discussion

# Manifestation Determination

- Parties required to engage in a mutual determination as to which members of IEP team are “relevant”
  - *Philadelphia City Sch. Dist.*, 47 IDELR 56 (SEA Pennsylvania 2007)
- Best practice is to have the IEP Team there, minus “specials” if not relevant to the behavior

# Manifestation Determination

- Team must review:
  - Disciplinary records
  - IEP
  - Teacher observations
  - Relevant information provided by parents
    - 34 C.F.R. 300.530(e)

# Manifestation Determination

- Determine whether similar behaviors have occurred in the past
  - Patterns of behavior
  - Settings where behavior generally takes place
  - Time of day
  - Triggering events
- If behavior is a manifestation of the student's disability, it should occur during different settings and different times

# Manifestation Determination

- Conduct considered a manifestation of a student's disability when:
  - Conduct was “caused by, or had a direct and substantial relationship to, the child's disability”;  
or
  - Conduct was the “direct result of the district's failure to properly implement the student's IEP”  
- 34 C.F.R. 300.530(e)

# Manifestation Determination

- If “No”, behavior is not a manifestation of the student’s disability:
  - Student subject to same disciplinary action as general education students;
  - Student must continue to receive educational services so as to allow them to progress in curriculum and towards meeting IEP goals
    - 34 C.F.R.300.530(d)

# Manifestation Determination

- Student to be placed in an Interim Alternative Educational Setting (IAES) during the length of their long-term suspension
  - Requires full IEP team to meet
- IAES must provide:
  - General education curriculum;
  - Progress towards IEP goals; and
  - Behavioral intervention services



# Manifestation Determination

- Not required to provide exactly the same services in exactly the same settings as the student was receiving prior to removal
  - May place student on home instruction
    - 71 Fed. Reg. 46,716 (2006)
- District to conduct a functional behavioral assessment and develop or modify an existing behavioral intervention plan to address behavior

# Manifestation Determination

- Parents may file for due process to challenge a finding that the behavior was not a manifestation of their disability
- IAES shall serve as the “stay-put” placement for the duration of the long-term suspension

-34 C.F.R. 300.533

# Manifestation Determination

- If “Yes”, behavior is a manifestation of the student’s disability:
  - District must conduct:
    - A functional behavioral assessment and implement a behavioral intervention plan (BIP) for the student; or
    - Review the plan and modify it, as necessary, to address the behavior
  - Student returned to placement listed in IEP
    - Unless parties agree to a change of placement
      - 34 C.F.R. 300.530(f)

# School Bus Suspension

- Where a student engages in negative behavior on the bus, their bus privileges may be revoked
- Losing bus privileges may constitute a removal when:
  - Bus transportation is part of the student's IEP; and
  - The District fails to provide the student with an alternate means of transportation
    - 71 Fed. Reg. 46,715 (2006)

# School Bus Suspension

- Losing bus privileges does constitute a removal if transportation is not a related service
- If behavior seen on bus is similar to behavior seen in class, consider reviewing IEP and/or conducting FBA

# Special Circumstances

- Students may be placed in an IAES for 45 school days, without a manifestation determination, when they do any of the following on school property or at a school-sponsored function:
  - Carry or possess a weapon
  - Possess, use, or sell an illegal drug
  - Inflict serious bodily injury upon another
    - 34 C.F.R. 300.530(g)

# Special Circumstances

- Weapon is defined using federal definition of a “dangerous weapon”
  - A weapon, device, instrument, material, or substance that is used for, or is capable of, causing death or serious bodily injury
  - Does not include a pocket knife with a blade of less than 2.5 inches in length
    - 18 U.S.C. 930 (g)(2)

# Special Circumstances

- Illegal drugs are defined using the definition of a “controlled substance” found in the Controlled Substances Act
  - Does not include:
    - Tobacco
    - Alcohol
    - Over-the-counter drugs
    - Prescription medication taken as prescribed

21 U.S.C. 812



# Special Circumstances

- “Serious bodily injury” is defined by Section 1365(h)(3) of the U.S. criminal code
  - Injury that involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member, organ, or mental faculty

# Special Circumstances

- Student may be placed in IAES for up to 45 school days for each separate drug or weapons offense
  - 64 Fed. Reg. 12,620 (1999)

# Questions ?