

AS9: He Did *What?*

The Appropriate Use of Interim Alternative Educational Settings

Presented by: Daniel Osher, Esq.



Learning Objectives

1. Participants will gain knowledge and an understanding of procedural compliance:

- When may IAES be used?
- How must IAES removals be made?

2. Participants will gain strategies for substantive compliance:

- What is a weapon?
- What is a controlled substance?
- What is a serious bodily injury?
- What is an appropriate IAES?

Who Is Entitled to Special Education Discipline Protections?

Students who are eligible for and are receiving special education are entitled to all of the protections described below. Students who are eligible for special education, but for whom the parents have refused special education services, are *not* entitled to any of the special education student discipline protections. (34 C.F.R. § 300.534(c)(1)(ii); 73 Fed. Reg. 73,012.)

Students not yet determined eligible for special education may assert special education due process protections, if the district had knowledge that the child has a disability *before the misconduct occurred*. (20 U.S.C. § 1415(k)(5).)

School districts are deemed to have knowledge that a child has a disability if any of the following apply:

- The parent has expressed concern *in writing* to district personnel that the child needs special education and related services;
- The student's behavior or performance indicates the need for services;
- The student's parent requested an evaluation; or
- The student's teacher or other agency personnel has expressed *specific* concerns about a pattern of behavior to the special education director or other district personnel.

(34 C.F.R. § 300.534(b).)

School districts do not have knowledge as a matter of law if any of the following apply:

- The parent refused to allow the district to assess the student;
- The parent refused special education services for the student; or
- The student was evaluated and determined not to be a child with a disability.

If the district had prior knowledge that the child has a disability, as defined above, it must comply with special education discipline requirements. If the district did not have knowledge prior to the student's misconduct, the student is subject to the same disciplinary measures applied to students without disabilities. (20 U.S.C. § 1415(k)(5)(D).)

If a parent requests an assessment during the time that the child is subjected to disciplinary action, the student remains in the placement determined by school authorities until the evaluation is completed. (34 C.F.R. § 300.534(d)(2).)

Parent Notification

Any time a district takes disciplinary action against a student who qualifies for special education disciplinary protections, the district must notify the parents of its decision and all applicable procedural safeguards on the day on which the decision to take disciplinary action is made. (20 U.S.C. § 1415(k)(1)(H).) This requirement applies regardless of whether the child is removed for 10 days or less, is removed for more than 10 days, or is placed in an interim alternative educational setting.

Removal for 10 School Days or Less

A student with a disability who violates a code of student conduct may be removed from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days, so long as the same change in placement would be made in the case of a nondisabled student. (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b).) In other words, special education students may be disciplined in the same manner as regular-education students for up to 10 school days.

If the district desires to change a student's placement for a period of time that is less than 10 school days, the district is not obligated to conduct a manifestation determination. Thus, a special education student may be placed in an interim alternative educational setting, placed in another setting, or suspended for up to 10 cumulative school days in a year, even if the misconduct is directly related to the student's disability. (20 U.S.C. § 1415(k)(1)(B).)

Calculation of "10 School Days." Special education student discipline provisions must be followed whenever a student is suspended, or placement is otherwise changed for disciplinary purposes, for more than 10 *consecutive* school days. If a student is removed for more than 10 *cumulative* school days during a school year, the student will be entitled to special education student discipline protections if the series of removals "constitutes a pattern." (34 C.F.R. § 300.536(a)(2).)

A series of removals constitutes a pattern that triggers special education protections if:

- The series of removals total more than 10 days in a school year;
- The child's behavior is substantially similar to the child's behavior in previous incidents that resulted in removal; and
- Factors such as the length of each removal, the amount of time the child has been removed, and the proximity of the removals to one another indicate a pattern.

(34 C.F.R. § 300.536(a)(2).)

Removal for More than 10 School Days

A local educational agency is not required to provide children with the exact same services in the exact same settings as they were receiving prior to the imposition of discipline. However, the special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP. (71 Fed. Reg. 46,716 (2006).)

The Individuals with Disabilities Education Act does not provide much guidance regarding which educational programs or services constitute the general curriculum for students with a disability who are removed for more than 10 school days in a school year for disciplinary reasons. General curriculum is simply defined as "the same curriculum as for nondisabled children." (34 CFR § 300.320(a)(1)(i).) Accordingly, states and local districts have discretion to determine what constitutes the general curriculum. Therefore, in some cases, honors-level classes or electives are a part of the general curriculum, and in others they may not be.

If a district seeks to change a student's placement for more than 10 school days, the district must hold an IEP team meeting to make a manifestation determination and consider behavior interventions.

Manifestation Determination: To conduct a manifestation determination, the district, the parent, and relevant members of student’s IEP team must meet to review all relevant information in the student’s file, including the student’s IEP, any teacher observations, and any relevant information provided by the parents to determine:

- (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the student’s disability; or
- (2) if the conduct in question was the direct result of the local educational agency’s failure to implement student’s IEP. (20 U.S.C. § 1415(k)(1)(E).)

If the behavior that gave rise to the violation of the school code is determined to *not* be a manifestation of the student’s disability, the student may be disciplined in the same manner as a regular education student. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c).) A student removed from the current placement for more than 10 school days must continue to receive educational services to enable the student to participate in the general education curriculum and to progress toward the goals set out in their IEP. (34 C.F.R. § 300.530(d).) These services may be provided in an IAES. (34 C.F.R. § 300.530(d)(2).) If appropriate, a student removed from his or her current educational placement for more than 10 school days may also receive an FBA and behavioral intervention services and modifications that are designed to address the behavior violation. (34 C.F.R. § 300.530(d).)

If the behavior that gave rise to the violation of the school code *was* a manifestation of the student’s disability, the student’s IEP team must: (1) conduct a functional behavioral assessment and implement a behavioral intervention plan (“BIP”), provided that such an assessment has not already been conducted; (2) if a BIP has already been developed, the BIP must be reviewed and modified, as necessary to address the behavior so that it does not recur; and (3) return the student to the placement from which he or she was removed, unless parent and district agree to change the placement as part of the modification of the behavioral intervention plan. (20 U.S.C. § 1415(k)(1)(F).)

Functional Behavioral Assessment (“FBA”): A functional behavioral assessment focuses on *any* behaviors that might interfere with a student’s education. (Capistrano Unified Sch. Dist., 108 LRP 9532 (SEA CA 2007). According to federal regulations, an FBA must be developed when a student’s behavior is found to be a manifestation of his or her disability; this is the only reference in the law to FBAs. School districts are left to determine the precise form and content of an FBA, as the contents of FBAs are not clearly defined by the law.

Behavior Intervention Plan (“BIP”): A behavior intervention plan is developed after an appropriate FBA has been conducted. A BIP is a written document that is developed when a student exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the student’s IEP. A BIP becomes part of the student’s IEP.

Interim Alternative Educational Settings (“IAES”)

Under certain circumstances, districts may place students in an IAES for up to 45 school days, regardless of whether the conduct was a manifestation of the student’s disability, and without parent consent. (20 U.S.C. § 1415(k)(1)(G).) If the school year ends before a student’s 45-day IAES placement is completed, the district may continue the IAES placement into the following school year. (71 Fed. Reg. 46,722 (2006).)

By counting 45 “school days” instead of 45 days, school officials are able to extend placements in alternative settings for approximately two additional weeks. “This generates some savings to the extent that it obviates the need for school officials to seek hearing officer approval to extend a child’s placement in an alternative setting.” (71 Fed. Reg. 46,750 (2006).)

A district may place a student in an IAES if the student:

1. Carries or possesses a weapon to or at school, on school premises, or to or at a school function;
2. Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function; or
3. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function.

(20 U.S.C. § 1415(k)(1)(G).)

Weapon: A weapon is defined as “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 less than 2½ inches in length.” (18 U.S.C. § 930(g)(2).)

Example: Student was a seventh-grader with an unspecified disability. While on a school bus, Student grabbed one of his peers and cut the peer’s neck with a paper clip. District sought to place Student in an IAES under the special circumstances exception. The California Special Education Hearing Office (“SEHO”) found that the District was not entitled to place Student in an IAES because the District failed to show: 1) that a paper clip constituted a weapon under the IDEA; 2) that Student intended to use the paper clip to cause death or serious bodily injury; or 3) that a paper clip is readily capable of inflicting serious bodily harm. Thus, the SEHO concluded that the District’s unilateral placement of Student in an IAES was improper. (Anaheim Union High Sch. Dist., 32 IDELR 129 (SEA CA 2000).)

Example: Student was third-grader eligible for special education and related services under the category of emotional disturbance. After a confrontation with a classmate,

Student picked up a pair of scissors and pointed the scissors at his classmate with his right hand, while his left hand was on the back of his classmate's chair. Student was repeatedly saying that his classmate had "lied on" him. Charter school removed Student to an IAES on the grounds that he possessed a weapon. The Administrative Law Judge ("ALJ") concluded that the charter school erred in removing Student because an instrument or device qualifies as a "weapon" only if it is used for or is capable of causing death or serious bodily injury. The scissors Student pointed at his classmate did not meet that standard. An examination of the scissors revealed that they had dull blades and rounded tips and could cut paper only when the blades came together. Therefore, the scissors were not inherently dangerous. Additionally, Student could not use the scissors to inflict bodily injury. The ALJ noted that the Student held the scissors with the blades in an open position, which would prevent them from cutting. "Even if [the student] had made contact with [his classmate's] body using [the scissors], the scissors were only capable of causing cuts or some physical pain." Accordingly, the damage capable of being inflicted by the scissors fell well below the "serious bodily injury" standard and thus, the scissors were not a "weapon" as defined by the IDEA. (California Montessori Project, 56 IDELR 308 (SEA CA 2011).)

Example: Student was a 15-year-old high school student. Student was eligible for special education under the category of autistic-like behaviors. During class, Student discovered a Swiss army knife in his backpack. The knife belonged to a friend of Student, and Student had possession of it for a week or two before the date of the incident and had misplaced it. Student did not know the knife was in the backpack on the date of the incident until he discovered it during class. Student never showed it to any other students in the classroom after finding it in the backpack. Upon discovery, Student immediately advised a mental health therapist in the room and gave her the knife. Student was removed to an IAES for violation of the school weapons policy.

The knife contained two blades. One blade measured 2 ½ inches and the other measured 3 inches. Under the IDEA, a weapon is defined as 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 ½ inches in length." Here, the second blade was longer than 2 ½ inches and was readily capable of causing death or serious injury. Accordingly, the hearing officer concluded that the school district appropriately removed Student to an IAES for a period of 45 days because the knife in question was a weapon within the meaning of the IDEA. (Upper Saint Clair Sch. Dist., 110 LRP 57903 (SEA PA 2010).)

Example: Student was in middle school and regularly carried metal awls (metal spikes just under 2 inches in length) to school. Several students reported seeing Student pull out a pen containing the awls at school on repeated occasions. One student reported that Student had threatened to "shank" him if he did not give Student money at lunch. The same student said that Student had earlier threatened that if he did not buy Student lunch, Student would "shank" him, and Student then placed an awl on his shoulder for 2-3 seconds. Another student stated that Student had shown him an awl and said that if another student (with whom Student had a verbal altercation) tried to jump him, Student

would “shank” him. A third student reported that Student always carried a pen with the awls in it. According to the third student, Student threatened to “shank” him with the instrument because he heard the student was talking about him. Another student reported that he saw Student taking the “shank” out and say he was going to kill another student. Student was removed to an IAES.

The hearing officer concluded that the awls qualified as weapons. The hearing officer concluded that the criminal code defines “weapon” to include a device or instrument that is readily capable of serious causing bodily injury, which is in turn defined as a cut, abrasion, bruise, disfigurement, or any other injury to the body. The hearing officer recognized that although the awls could be used for leatherworking, they did in fact fall within the definition of a weapon. If the awls were misused by Student, the awls were undoubtedly capable of injuring his victims, including notably causing the loss or impairment of an eye. Accordingly, it was appropriate for the school district to remove Student to an IAES for carrying or possessing a weapon on school grounds. (In re: Student with Disability, 50 IDELR 180 (SEA VA 2008.)

Illegal Drug: An illegal drug is defined as “a controlled substance but does not include a substance that is legally possessed or used under the supervision of a licensed health-care professional or under any federal legal authority.” (21 U.S.C. § 801 et seq.)

Controlled Substance: A controlled substance is defined as “a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act.” (21 U.S.C. § 812(c).) These schedules include a wide range of illegal and prescription drugs.

Serious Bodily Injury: Serious bodily injury is defined as “bodily injury which involves a substantial risk of death, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” (18 U.S.C. § 1365.)

Example: Student was a first grader eligible for special education and related services under the category of autistic-like behaviors. When Student’s instructor attempted to have Student clean up and go to lunch, Student jabbed his pencil on her arm several times. When he was several feet away from his instructor and she asked him to clean up, he said, “No,” ran toward her, and head-butted her in the left part of her chest with all of his force. The blow knocked the wind out of her, and she felt she could not breathe. Student was removed to an IAES.

Given the facts surrounding the instructor’s medical treatment and her own characterization of her pain as “the worst of [her] life,” the ALJ found sufficient evidence that the instructor suffered a serious bodily injury. Doctors diagnosed the instructor with an internal chest contusion and prescribed two medications that failed to resolve the pain. The ALJ pointed out that the teacher saw a physician three times in one week after her initial doctor’s visit due to her pain. Two drugs failed to provide relief. Further, the instructor had to curtail her daily activities, she missed a week of work, and she described her pain as a “10” on a scale of one to 10. Thus, under these circumstances, the school

district was able to establish that the instructor suffered a serious bodily injury. (Westminster Sch. Dist., 56 IDELR 85 (SEA CA 2011).)

Example: Student is an elementary school student eligible for special education and related services under the category of autistic-like behaviors. Student had an aggressive episode. Although school staff followed the BIP, Student did not calm down. Student was laying on the floor, throwing items, and reacting violently, teacher and aide decided to physically restrain Student on the floor by holding down his arms and legs so that he would not hurt himself or them. The classroom had to be cleared of other students, and staff requested that the principal come help calm Student. The principal helped physically restrain Student by holding down Student's legs. At some point, the principal stopped holding Student's legs to use his cell phone to call for more assistance. This caused Student's behavior to escalate. Student lunged at the principal and tried to grab the cell phone away from him. During this altercation, Student kicked the principal in the knee, and the principal felt a "sharp pain."

Student was removed to an IAES for this incident. Evidence presented during the hearing did not support the district's contention that the principal suffered extreme pain. Specifically, the principal never claimed in his statement or testimony that he was in severe pain, and his actions following the incident were not those of a person who was in severe pain. He did not seek medical attention immediately following the incident and never took prescription pain medication for the injury. Because the incident did not result in a serious injury, it was not appropriate for the district to place Student in an IAES. (Bisbee Unified Sch. Dist. No. 2, 54 IDELR 39 (SEA AZ 2010).)

Requirements for IAES: Students removed to an IAES are entitled to receive:

- Educational services to enable them to continue to participate in the general education curriculum and to progress toward the goals set out in their IEP; and
- As appropriate, an FBA, behavioral intervention services, and modifications that are designed to prevent the behaviors from recurring, if appropriate based upon the unique circumstances of the student's case. (40 U.S.C. § 1415(k)(1)(D).)

When a student is removed to an IAES, the IAES must be an "appropriate" placement for the student. What constitutes an appropriate IAES will depend on the unique circumstances of each individual case. (71 Fed. Reg. 46,722 (2006).)

An appropriate IAES does not have to replicate every aspect of the services that a student would receive in his or her normal classroom. For example, an IAES does not have to replicate the specialized equipment of a chemistry classroom or auto mechanics classroom. (71 Fed. Reg. 46,716 (2006).)

A student's IEP team is responsible for determining what constitutes an appropriate IAES. (20 U.S.C. § 1415(k)(2).)

Example: Student is 11 years old and eligible for special education under the category of emotional disturbance. Student was involved in several disciplinary incidents. Student was observed attempting to trip a teacher walking upstairs. Student was referred for disciplinary action for pushing another student into hallway lockers. Student was also observed fighting. Student stood within an inch of a teacher's face while refusing to comply with the teacher's directive. Student was given a disciplinary referral by a teacher for smacking a girl in the face with his back pack on the way into an assembly. Student physically blocked the classroom doorway, preventing his regular classroom teacher from exiting the room. Student was given a 10-day out of school suspension for assaulting two students in the bathroom. Student was removed to an IAES at a new school site with a more structured and therapeutic program.

The hearing officer found that although the alternative placement was a new school, it was run by qualified staff who were capable of assisting students with behavioral issues. Moreover, the placement was less restrictive than the home-bound placement that the mother had sought since the prior school year. Accordingly, the IAES was appropriate. (Dunklin R-5 Sch. Dist., 51 IDELR 202 (SEA MO 2008).)

Example: Student is a 15-year-old student who is eligible for special education and related services under the categories of emotional disturbance and a specific learning disability. Student received multiple suspensions for threatening and violent behavior. After Student physically attacked another student, he was removed to an IAES. Student's IEP team determined that an appropriate IAES would consist of a therapeutic program with behavioral management integrated into the program and a small class size.

The academic and behavioral progress that a teenager made during his 45-day placement in an IAES convinced the hearing officer that the placement should be permanent. The hearing officer found that the alternative school, which offered small class sizes in a structured, therapeutic setting, was the student's least restrictive environment. Student did not have any behavioral problems in the alternative school. After determining that Student needed a therapeutic setting to receive an educational benefit, the hearing officer approved the district's request to continue the student's placement in the alternative school. (Sutton Pub. Schs., 51 IDELR 90 (SEA MA 2008).)

Residential Placements: A residential placement may constitute an appropriate IAES. Student was a 9-year-old fifth-grader with diagnoses of Down syndrome and ADHD. Student engaged in a number of aggressive episodes both in the community and at school. Student's maladaptive behaviors were sudden and violent. After Student attempted to seriously injure a teacher, the District sought to place Student in a residential IAES for up to 45 school days. Parents insisted that alternatives to a residential placement should be tried first. The Office of Administrative Hearings ("OAH") held that, "the law requires an appropriate IAES placement, but does not require exhaustion of all possible alternatives." The residential placement would allow Student to receive special education services, progress in the general education curriculum, progress towards his IEP goals, and immediately address his maladaptive behaviors so that they may be reduced or eliminated. Thus, OAH concluded that the residential placement was

an appropriate IAES for Student. (Fort Bragg Unified Sch. Dist., 52 IDELR 84 (SEA CA 2008).)

Home Instruction an appropriate IAES: Home instruction may constitute an appropriate IAES. (71 Fed. Reg. 46,722 (2006).) The appropriateness of this setting would depend on the particular circumstances of an individual case. Factors to consider in making this determination include:

- The length of the removal
- The extent to which student has been previously removed from his or her placement
- The student's individual needs
- The student's educational goals

If there is no alternative school or other similar public facility in the district, there is no requirement that a district place a student in a private school or facility for the duration of an IAES, so long as placement at home meets the criteria for an appropriate IAES as set out in 34 CFR 300.530. If an alternative school or other facility exists in the district, but the student is still placed on home instruction, the district should be prepared to justify why a less-restrictive IAES was not appropriate.

Example: Student was a 17-year-old student with learning disabilities. He was suspended from school after he purchased marijuana from a fellow student. Student was removed to an IAES that consisted of home instruction for six weeks.

The hearing officer found that although there may have been alternatives to providing home instruction to Student, home instruction "could have been appropriate." However, the hearing officer found that in this instance, home instruction was academically inappropriate because the school district did not specify that Student would continue to receive testing modifications and resource room services. The IEP failed to indicate that resource room services (transitional support) would be provided while Student was suspended from school. The hearing officer held for Student because the school district was not able to offer any explanation for its failure to recommend that Student receive any special education service while in the interim alternative educational placement. (Board of Educ. of Akron Cent. Sch. Dist., 28 IDELR 909 (SEA NY 1998).)

Availability of IAES When Current Placement Is Substantially Likely To Result In Injury

A local educational agency cannot unilaterally place a student in an IAES merely because it believes that the student poses a safety risk. However, a local educational agency can file a due process complaint to request a change in placement if it believes that maintaining a student's current placement is substantially likely to result in injury to the student or others. (34 CFR § 300.532(a).)

The expedited due process hearing must occur within 20 school days of the date the complaint requesting the hearing is filed and the hearing officer must make a determination within 10 school days after the hearing. (34 CFR § 300.532(c)(2).)

Expedited hearings on disciplinary matters are subject to all of the IDEA's procedural requirements, including the duty to hold a resolution session. (Letter to Gerl, 51 IDELR 166 (OSEP 2008).)

If the hearing officer determines that maintaining the student's current placement is substantially likely to result in injury, either to the student or to others, the IHO can order that the student be placed in an IAES for up to 45 days. (34 CFR § 300.532(b)(2)(ii).)

If the local educational agency believes that returning the student to the original placement is substantially likely to result in injury to the student or to others, the local education agency can repeat this process. (34 CFR § 300.532(b)(3).)

Verbal threats, without any physical injury, are not sufficient to create a substantial likelihood of future dangerous conduct. (See Cabot Sch. Dist., 27 IDELR 304 (SEA AR 1997); Scranton Sch. Dist., 29 IDELR 133 (SEA PA 1998); Alzheimer Sch. Dist., 38 IDELR 149 (SEA AR 2003) (IHO found the student's behavior, which included a fight with another student and verbal threats against the school resource officer after being accosted was "disruptive, verbally abusive and insubordinate," but it did not reach the standard for justifying removal to an alternative placement).)

Example: Student is 13 years old and has an unspecified disability. Student was removed to an IAES. While placed in an IAES student received six separate disciplinary infractions for threatening, aggressive, and/or destructive behavior, including assault. During one of the six incidents, Student became enraged and busted a glass door. Student then proceeded to beat his head against a metal railing and hit himself in the face. Student was placed in the custody of the juvenile court.

The school district filed for an expedited due process hearing to extend Student's 45-day placement because returning Student to his original placement was likely to result in injury to Student or others. The District was able to support its position that Student's behavior continued to present a significant risk of danger to himself and/or others. Specifically, evidence indicated that Student continued to engage in aggressive, antisocial behavior during his 45-day IAES. Student continued to be dangerous and presented a

significant risk of injury to others, as demonstrated by instances of uncontrolled rage while at the 45-day IAES. Accordingly, the District met its burden of proof that the 45-day IAES placement should be extended for an additional 45 days. (Westran R-I Sch. Dist., 51 IDELR 290 (SEA MO 2008).)

Honig Injunction

A local educational agency can still apply to a court to obtain a *Honig* injunction to temporarily remove a dangerous student from his current placement. The IAES procedures are available in addition to, rather than instead of, the long-settled discretion to apply to a court for a *Honig* injunction.

Dispute Resolution and IAES

Parents of a child with a disability who disagrees with any decision regarding their child's disciplinary placement, or the manifestation determination, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. (20 U.S.C. § 1415(k)(3)(A).) An expedited hearing must be held within 20 school days of the request, and the hearing officer must issue a decision within 10 school days after the hearing. (20 U.S.C. § 1415(k)(4)(B).)

Typically, "stay put" is the placement that has been agreed upon and implemented prior to the dispute arising. (20 U.S.C. § 1415(j); Cal. Edu. Code § Ed. Code § 56505(d).) However, when a student is placed in an IAES, and either party files for due process, the IAES is the stay put placement. (20 U.S.C. § 1415(k)(4)(A).)

Under the IDEA, parents should not be able to seek stay put orders regarding IAES placements, because as a matter of law, the IAES is the stay put placement. Whether the student was appropriately placed in the IAES is properly a subject for the expedited hearing. Nonetheless, at least the California OAH has been willing to consider whether the requirements for placement in an IAES have been met within the context of a stay put motion. Therefore, districts should be prepared to immediately defend decisions to place students in an IAES.

Potential Gotchas:

- Not providing special education discipline protections when the district has "knowledge" of a student's disability.
- Not expediting assessment when a parent requests that a student be assessed after a disciplinary event.
- Suspending a student for more than 10 cumulative days without holding a manifestation determination, when the behavior constitutes a pattern.
- Placing a student in an IAES for using an instrument that is not a "weapon" or for inflicting an insufficiently serious wound.

- Not providing educational services to students who are suspended for more than 10 days or placed in an IAES.



AS9: He Did *What?*
**The Appropriate Use of Interim Alternative
Educational Settings**

Daniel Osher, Esq.

May 7, 2012 1:45 – 3 p.m.

May 9, 11:15 a.m. – 12:30 p.m.

Learning Objectives

- Procedural compliance
 - When may IAES be used?
 - How must IAES removals be made?
- Substantive compliance
 - What is a weapon?
 - What is a controlled substance?
 - What is a serious bodily injury?
 - What is an appropriate IAES?

Outline

- Eligibility for Special Education Protections
- Parental Notifications
- Permissible Disciplinary Removals
- Manifestation Determination
- Interim Alternative Educational Settings

Protections

- When do disciplinary protections apply to a student?
 - If the student is eligible for special education and related services, or
 - Student is not yet eligible for special education and related services, but the district “had knowledge” student had a disability before incident occurred

Protections

District is deemed to have knowledge if:

1. The parent has expressed concern the parent has expressed concern *in writing* to district personnel that the child needs special education and related services;
2. The student's behavior or performance indicates the need for services;
3. The student's parent requested an evaluation; *or*
4. The student's teacher or other agency personnel has expressed *specific* concerns about a pattern of behavior to the special education director or other district personnel

Protections

- District does not have knowledge if:
 1. The parent refused to allow the district to assess the student;
 2. The parent refused special education services for the student; *or*
 3. The student was evaluated and determined not to be a child with a disability

Parent Notification

- All applicable procedural safeguards
- On the day on which the decision to take disciplinary action is made

Disciplinary Removals

- Less than 10 school days
 - Not obligated to conduct a manifestation determination.
 - Can discipline just like a regular education student.
- More than 10 school days
 - Must conduct a manifestation determination.
 - Can only discipline if behavior is not a manifestation of disability
 - May place in IAES if requirements met

Calculation of Days

- A series of removals constitutes a pattern that triggers special education protections if:
 - The series of removals total more than 10 days in a school year;
 - The child's behavior is substantially similar to the child's behavior in previous incidents that resulted in removal; and
 - Factors such as the length of each removal, the amount of time the child has been removed, and the proximity of the removals to one another indicate a pattern

Manifestation Determination

- Determine:
 - if the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or
 - if the conduct in question was the direct result of the local educational agency's failure to implement student's IEP

IAES

Available in the event of bad behavior occurring while traveling to or at school, on school premises, or to or at a school function:

- Carries or possesses a weapon,
- Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, or
- Has inflicted serious bodily injury upon another person

Weapon

- 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 less than 2½ inches in length

Weapon

Example:

Is a paper clip a weapon?

Anaheim Union High School District, 32 IDELR 129 (SEA
CA 2000)

Weapon

Example:

Were safety scissors a weapon?

California Montessori Project, 56 IDELR 308 (SEA CA
2011)

Weapon

Example:

Was a Swiss army knife a weapon?

Upper Saint Clair School District, 110 LRP 57903 (SEA
PA 2010)

Illegal Drugs

- A controlled substance
- Does not include a substance that is legally possessed or used under the supervision of a licensed health-care professional or under any federal legal authority

Controlled Substance

- A controlled substance is defined as “a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act”
- These schedules include a wide range of illegal and prescription drugs

Serious Bodily Injury

- Bodily injury which involves a substantial risk of death, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty

Serious Bodily Injury

Example:

Did a head-butting cause serious injury?

Westminster School District, 56 IDELR 85 (SEA 2011)

Serious Bodily Injury

Example:

Did a kicking cause serious injury?

Bisbee Unified School District No. 2, 54 IDELR 39 (SEA
AZ 2010)

Requirements for IAES

- Educational services to enable students to continue to participate in the general education curriculum and to progress toward the goals set out in their IEP; and
- As appropriate, an FBA, behavioral intervention services, and modifications that are designed to prevent the behaviors from recurring, if appropriate based upon the unique circumstances of the student's case

Requirements for IAES

Example:

Was a new school an appropriate IAES?

Dunklin R-5 School District, 51 IDELR 202 (SEA MO
2008)

Requirements for IAES

Example:

Was home instruction an appropriate IAES?

Fort Bragg Unified School District, 52 IDELR 84 (SEA CA
2008)

Requirements for IAES

Example:

Was home instruction an appropriate IAES this time?

Board of Education of Akron Central School District,
28 IDELR 909 (SEA NY 1998)

Home Instruction

- Factors to consider:
 - The length of the removal
 - The extent to which student has been previously removed from his or her placement
 - The student's individual needs
 - The student's educational goals

One more basis for IAES—with a catch

- A district cannot unilaterally place a student in an IAES merely because it believes that the student poses a safety risk
- A district can file a due process complaint to request a change in placement if it believes that maintaining a student's current placement is substantially likely to result in injury to the student or others

One more basis for IAES

Example:

Were verbal threats substantially likely to result in injury?

Alzheimer Sch. Dist., 38 IDELR 149 (SEA AR 2003)

One more basis for IAES

Example:

Was self-injurious behavior substantially likely to result
in injury?

Westran R-I School District, 51 IDELR 290 (SEA MO
2008)

Honig Injunction

- A local educational agency can still apply to a court to obtain a *Honig* injunction to temporarily remove a dangerous student from his current placement

Dispute Resolution

- Parents of a child with a disability who disagrees with any decision regarding their child's disciplinary placement, or the manifestation determination, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing.
- An expedited hearing must be held within 20 school days of the request, and the hearing officer must issue a decision within 10 schools days after the hearing

Stay Put

- The placement that has been agreed upon and implemented prior to the dispute arising
- When a student is placed in an IAES, and either party files for due process, the IAES is the stay put placement

Potential Gotchas!

- Not providing special education discipline protections when the district has “knowledge” of a student’s disability
- Not expediting assessment when a parent requests that a student be assessed after a disciplinary event
- Suspending a student for more than 10 cumulative days without holding a manifestation determination, when the behavior constitutes a pattern
- Placing a student in an IAES for using an instrument that is not a “weapon” or for inflicting an insufficiently serious wound
- Not providing educational services to students who are suspended for more than 10 days or placed in an IAES

THANK YOU FOR ATTENDING

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