Illinois Association of Private Special Education Centers

May 16, 2014

"Hot Topics" Including:

1. The Attorney-Client Relationship with Private Schools
2. Special Education Issues for Nonpublic Schools

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Ill. Admin. Code tit. 23, § 226.230

West's Illinois Administrative Code Currentness
Title 23: Education and Cultural Resources
Subtitle A: Education
Chapter I: State Board of Education
Subchapter F: Instruction for Specific Student Populations
Part 226: Special Education
Subpart C: The Individualized Education Program (Iep) (Refs & Annos)
➡➡ **226.230 Content of the IEP**

The content of each child's IEP shall conform to the requirements of 34 CFR 300.320. The additional requirements of this Section shall also apply.

a) Each IEP shall include:

1) A statement of measurable annual goals that reflect consideration of the State Goals for Learning and the Illinois Learning Standards (see 23 Ill. Adm. Code 1), as well as benchmarks or short-term objectives developed in accordance with the child's present levels of educational performance.

2) A statement regarding the child's ability to participate in State and district-wide assessments.

3) A statement as to the languages or modes of communication in which special education and related services will be provided, if other than or in addition to English.

4) A statement as to whether the child requires the provision of services beyond the district's normal school year in order to receive FAPE ("extended school year services") and, if so, a description of those services that includes their amount, frequency, duration, and location.

b) The IEP of a student who requires a behavioral intervention plan shall:

1) Summarize the findings of the functional behavioral assessment;

2) Summarize prior interventions implemented;

3) Describe any behavioral interventions to be used, including those aimed at developing or strengthening alternative or more appropriate behaviors;

4) Identify the measurable behavioral changes expected and methods of evaluation;

5) Identify a schedule for a review of the interventions' effectiveness; and

6) Identify provisions for communicating with the parents about their child's behavior and coordinating school-based and home-based interventions.

Ill. Admin. Code tit. 23, § 226.230

c) Beginning not later than the first IEP to be in effect when the child turns 14 1/2, and updated annually thereafter, the IEP shall include:

1) appropriate, measurable, postsecondary goals based upon age-appropriate assessments related to employment, education or training, and, as needed, independent living;

2) the transition services that are needed to assist the child in reaching those goals, including courses of study and any other needed services to be provided by entities other than the school district; and

3) any additional requirements set forth in Section 14-8.03 of the School Code [105 ILCS 5/14-8.03].

d) For purposes of 34 CFR 300.320(c), the age of majority under Illinois law is 18. The IEP of a student who may, after reaching age 18, become eligible to participate in the home-based support services program for adults with cognitive disabilities that is authorized by the Developmental Disability and Mental Disability Services Act [405 ILCS 80] shall set forth specific plans related to that program that conform to the requirements of Section 14-8.02 of the School Code.

(Source: Amended at 31 Ill. Reg. 9915, effective June 28, 2007)

23 ILAC § 226.230, 23 IL ADC 226.230

Current through rules published in the Illinois Register dated October 4, 2013

END OF DOCUMENT

the local educational agency--

(A) shall notify the child's parents of--

(i) that determination and the reasons for the determination; and

(ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability and to determine the child's educational needs; and

(B) shall not be required to conduct such an assessment unless requested to by the child's parents.

(5) Evaluations before change in eligibility

(A) In general

Except as provided in subparagraph (B), a local educational agency shall evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability.

(B) Exception

(i) In general

The evaluation described in subparagraph (A) shall not be required before the termination of a child's eligibility under this subchapter due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for a free appropriate public education under State law.

(ii) Summary of performance

For a child whose eligibility under this subchapter terminates under circumstances described in clause (i), a local educational agency shall provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.

(d) Individualized education programs

(1) Definitions

In this chapter:

(A) Individualized education program

(i) In general

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes--

(I) a statement of the child's present levels of academic achievement and functional performance, including--

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to--

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child--

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why--

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter--

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

(ii) Rule of construction

Nothing in this section shall be construed to require--

(I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and

(II) the IEP Team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of--

(i) the parents of a child with a disability;

(ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;

(iv) a representative of the local educational agency who--

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general education curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(C) IEP Team attendance

(i) Attendance not necessary

A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(ii) Excusal

A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if--

(I) the parent and the local educational agency consent to the excusal; and

(II) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

(iii) Written agreement and consent required

A parent's agreement under clause (i) and consent under clause (ii) shall be in writing.

(D) IEP Team transition

In the case of a child who was previously served under subchapter III, an invitation to the initial IEP meeting shall, at the request of the parent, be sent to the subchapter III service coordinator or other representatives of the subchapter III system to assist with the smooth transition of services.

(2) Requirement that program be in effect

(A) In general

At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5

In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2-year-old child with a disability who will turn age 3 during the school year), the IEP Team shall consider the individualized family service plan that contains the material described in section 1436 of this title, and that is developed in accordance with this section, and the individualized family service plan may serve as the IEP of the

Drafting Legally Compliant IEPS: Case Law from Courts and Administrative Hearings

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An IEP must contain "a statement of measureable annual goals, including academic and functional goals." 20 U.S.C. 1414(d)(1)(A)(i)(II); 23 Ill. Admin. Code 226.230(a)(1).

What is a measureable goal?

A goal is measureable if it includes baseline data, a clear measurement for progress that is quantifiable, and actual data is collected.

Administrative Hearing – Utica School District, 61 IDELR 149 (Michigan State Educational Agency, January 29, 2013)

An administrative law judge found a denial of FAPE because the District's IEP lacked measureable goals for the student. The judge found that the student's goals lacked baseline data and failed to identify the number of correct responses the student would need to meet his goal. Further, the student's social emotional goal was to be measured through monthly reports from the social worker, however, the social worker testified that she did not maintain monthly reports. The judge commented that, without the required data, the goal was not measureable.

A goal is measureable if the benchmarks are measureable.

U.S. District Court, Delaware – Red Clay Consolidated School District v. T.S. and R.S. as parents of J.S., 893 F. Supp.2d 643 (D. Del. 2012)

In this case, the District Court of Delaware refused to hold a district liable for annual goals that were not measureable when the benchmarks were measureable and when the student showed progress.

U.S. District Court, Southern District of New York – R.B. and M.L.B. v. New York City Department of Education, 113 LRP 39966 (S.D. N.Y. 2013)

The District Court found that although the annual goals were not measureable, the IEP was adequate because "the short term objectives contained sufficiently detailed information regarding the conditions under which each objective was to be performed and the frequency, duration, and percentage of accuracy required for measurement of progress and remedied any deficiencies in the annual goals."

U.S. District Court, Northern District of Illinois – James v. Board of Educ. of Aptakisic-Tripp Community Consolidated School District No. 102, 642 F. Supp.2d 804 (N.D. Ill. 2009)

An Illinois district court refused to hold a district liable when an annual goal broadly read "Sarah will improve reading skills and read with understanding from her current level by completing the following objectives," but the short term objectives under that goal were concise and capable of being measured. The court noted that the student's short term objectives included, "when reading independently, Sarah will decode a variety of reading materials at her current instructional level, 8 of 10 times that she is being assessed." In addition, the court noted that under each short term objective the IEP contained the student's present level of performance for that particular task. The court concluded that because the short term objectives were measureable, the IEP sufficiently complied with the requirements of the idea concerning the inclusion of measurable goals.

WHAT KIND OF BASELINE DATA IS REQUIRED?

Sufficient information about special education needs and current abilities.

Administrative Hearing – In re: Student with a Disability, 50 IDELR 236 (New York State Educational Agency, July 16, 2008)

A New York administrative hearing officer found that the present level of performance in a student's IEP did not provide sufficient information about his special education needs and current abilities and, therefore, the district failed to provide the child with a FAPE. Certain examples illustrated in the case include:

> "…other than, stating that the student has 'delays in fine-motor coordination,' the IEP lacks information about the severity of his fine-motor impairment and how that impairment affects his ability to complete school-based fine-motor activities, nor does it provide an idea about his current level of fine-motor ability."
>
> "Further, other than to state that the student's 'weak' expressive language skills affect his ability to interact appropriately in the classroom, the IEP does not describe how the student functionally communicates, the degree of difficulty he has communicating, or the level of adult prompting/assistance that is required due to his oral-motor weakness and expressive language skill deficits…"
>
> "…the IEP does not indicate what type of social skills are lacking or how the student currently interacts with peers."
>
> "…the IEP does not provide specific information about what math concept skills the student does possess, yet the IEP includes 'number' and 'measurement' concept annual goals and short-term objectives."

U.S. District Court, District of Hawaii – Aaron P. v. Hawaii Department of Education, 897 F. Supp.2d 1004 (D. Hawaii 2012)

A Hawaii District Count determined that the failure to include present levels regarding a student's self-injurious behaviors was serious enough to warrant a finding of a denial of a FAPE. The Court noted that an IEP must provide "a detailed assessment of a student's abilities and needs" and then must lay out a program to meet the student's educational goals. Since the student's severe behavioral problems affected her ability to receive educational benefit, the Court found that the failure to address those behaviors resulted in a denial of a FAPE.

U.S. District Court, Northern District of New York – D.G. v. Cooperstown Central School District, 746 F. Supp.2d 435 (N.D. N.Y. 2010)

The court determined that there was no violation when the iep goals were able to give the student's teachers sufficient information about baselines from which progress could be measured. The court found that the iep goals "provided enough information for teachers to meet d.g.'s needs and to enable him to be involved in and progress in the general education curriculum."

DO ALL GOALS HAVE TO BE MEASUREABLE?

Yes (and No)

U.S. District Court, Northern District of Indiana – Stanley v. M.S.D. of Southwest Allen County Schools, 628 F. Supp.2d 902 (N.D. Ind. 2008)

Without question, the law requires that all IEP goals be measureable. However, some courts have treated the improper drafting of IEP goals as a procedural violation, as opposed to a substantive one. Procedural violations require an additional inquiry: did the procedural violation result in a violation of a FAPE? If a court treats poor IEP goals as a procedural violation, it will then look to see if the poor goal writing has resulted in a denial of educational benefit to the student.

In the above case, an Indiana district court found that despite a failure to develop measureable goals (some goals were found to be measureable), the student did progress and receive educational benefit, therefore, there was no denial of a FAPE.

However . . .

Administrative Hearing – J.I v. CPS (Illinois State Educational Agency, April 17, 2008)

An Illinois hearing officer found that a district's IEP goals were not measureable and were predicated upon questionable data. The hearing officer found that the student received no educational benefit and, in fact, regressed during 1st and 2nd grades. The hearing officer ordered the district to fund and place the student at a private therapeutic day school and ordered retroactive reimbursement for the parent's unilateral placement at the private school. The district was also ordered to pay, as a form of compensatory education, for the parent's private tutoring of the student, as well as two additional years of education at the private school.

An IEP must also have "appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills." An IEP must contain "a statement of measureable annual goals, including academic and functional goals." 20 U.S.C. 1414(d)(1)(a)(i)(viii)(aa); 23 ill. Admin. Code 226.230(c)(1).

DO TRANSITIONAL GOALS HAVE DIFFERENT REQUIREMENTS?

No

Administrative Hearing – Utica School District, 61 IDELR 149 (Michigan State Educational Agency, January 29, 2013)

Transitional goals also must have baseline data. The data from transition assessments should be included in the goals and there should be a connection between the goals and transitional services provided in the IEP. There must be a clear steps or services identified in order for the student to meet his or her transitional goals.

But Transitional Plans Do Not Have to Dictate Goals

U.S. District Court, Eastern District of Pennsylvania– High v. Exeter Township School District, 110 LRP 7642 (E.D. Penn. 2010)

The parents of a student with a severe learning disability were unable to convince a District Court judge that the IEP was deficient due to the transition plan and IEP goals not being connected. According to the Court, "there is no requirement for a transition plan to dictate IEP goals."

The Court explained further that, "[u]nlike the IEP, a transition plan is not a strictly academic plan, but relates to several post-secondary skills, including independent living skills and employment. While it may be ideal if a transition plan influences IEP goals, a newly identified transition goal will not change the ability of a child to progress at a higher rate academically. Therefore, while the District helped Stephanie realize she wanted to attend college, the District was not required to ensure she was successful in fulfilling this desire."

The Court cited *Rowley* and found that, "[t]he IDEA is meant to create opportunities for disabled children, not to guarantee a specific result." Since the student was six grade levels behind in reading when she arrived at the District for eleventh grade, it was unreasonable for the parents to expect she would be reading at a twelfth-grade level by graduation.

Deficiencies in Transitional Plans are Treated As Procedural Violations

U.S. District Court, Southern District of Indiana – Tindell v. Evansville-Vanderburgh School Corporation, 805 F. Supp.2d 630 (S.D. Ind. 2011)

An Indiana Court noted that there was no comprehensive transitional plan in place for a student, but refused to find the district liable due to the student's severe behavioral and emotional impairment at the time. The Court treated the lack of a transition plan as a procedural violation and noted that the District would only be liable if the violation resulted in a denial of an educational benefit for the student. The district found that the student's anxiety and mood disorder required that he be placed on homebound and that he "was not in a position to benefit from an in-depth transition plan addressing social and vocational support services following graduation."

DISCIPLINE

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Special Education Discipline: New Case Law from Courts and Administrative Hearings 2014

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WHAT IS AN FBA/BIP?

It is an evaluation, and therefore school districts must follow IDEA's provisions concerning evaluations for FBA/BIP.

U.S. District Court, District of Columbia – Harris v. District of Columbia, 561 F. Supp. 2d 63 (DDC 2008)

The U.S. District Court of the District of Columbia found that a functional behavioral plan is an "educational evaluation," and therefore the parents have a right to an independent functional behavioral analysis at the public's expense if the parent disagrees with the school district's evaluation. The court was persuaded by the parent's argument that an FBA is considered an "educational evaluation" because it is central to the development of the IEP. The district court rejected the school district's contention that the FBA is merely a tool to help students with behavioral, not educational, problems. The district court's decision is consistent with other recent decisions that decline to distinguish behavioral from educational problems.

FUNCTIONAL BEHAVIOR ASSESSMENTS AND BEHAVIOR INTERVENTION PLANS: WHEN ARE THEY NECESSARY?

Not Necessary

Involuntary Behavior

Northern District of Indiana – Stanley C. v. MSD of Southwest Allen County Schools, 628 F. Supp.2d 902 (N.D. Ind. 2008))

In this case, the Northern District of Indiana held that the school corporation did not violate the IDEA in failing to conduct a FBA or devise a BIP for drooling. The Court found that the student's excessive drooling was not a voluntary behavior that required a BIP and, furthermore, even if she did, her "behaviors" were properly addressed via her IEP goals.

The Court relied on the fact that, the evidence and testimony of record from both parties supports the BSEA's conclusion that M.C.'s drooling was not a behavior to replace but rather was involuntary as a result of damage to her brain from her stroke.

Necessary

Even if interventions in Place

Eastern District of New York – Danielle G. v. New York City Department of Education, 50 IDELR 247 (E.D. NY. 2008)

The New York Federal Court held that a student's problematic behavior triggered a school district's duty to conduct a FBA, even though the student's teacher was able to redirect the student at times.

In this case Danielle, a second grader and a student diagnosed with Autism Spectrum Disorder, frequently became lost in her own thoughts and "finger play." The special education itinerant teacher working with her was able to redirect Danielle when her focus strayed from classroom lessons. Although this teacher was able to manage the student's behavior and help her refocus, Danielle still had difficulty completing assignments and organizing her books. The court relied on the plain language of the IDEA stating the IEP team must, "in the case of a child whose behavior impedes the child's learning or that of others," consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. Because Danielle engaged in self-stimulatory activity and was hyperactive, her behaviors impeded her learning and therefore an FBA was required.

Even if Behaviors are "Typical" For Disability

Administrative Hearing – Freemont Unified School District, 109 LRP 23265 (California State Educational Agency, February 20, 2009)

An administrative law judge in California ordered a school district to reimburse parents for the cost of their unilateral placement after finding the district failed to assess the three-year-old's behavior and develop a behavior intervention plan. The hearing officer found that a three-year-old child with Autism was engaging in tantrums at school related to his disability. The school district placed the child in a special day class, however the tantrums continued. The parents placed the student at a private school after the district refused to provide additional services. The district argued that a behavioral assessment is unnecessary because the behavior was typical for a preschooler with autism. However, because the student's behavior was related to his disability and impeded his ability to receive educational benefit, the hearing officer found the failure to develop a functional behavioral intervention plan deprived the child of an appropriate education under the IDEA.

When behaviors impede a student's ability to access educational benefit

Administrative Hearing – Redlands Unified School District, 49 IDELR 294 (California State Educational Agency, March 17, 2008)

A California school district committed a procedural violation by failing to conduct a functional behavioral assessment and develop a behavioral intervention plan. This procedural violation amounted to a denial of a FAPE because it deprived the student of educational benefit.

The hearing officer found that because an Autistic student's problem behaviors ultimately prevent him from attending school, the failure to develop a behavioral intervention plan amounted to a denial of FAPE. In this case, the student's behaviors did not decrease during the school year despite other interventions by the district and, in fact, the student's behaviors escalated. By the end of the year, the student was under so much stress that he "curled up in a ball position on the floor of his classroom and would not voluntarily get up."

As a result, the school district was ordered to provide compensatory education in the form of 430 hours of tutoring over the next two years and 25 hours during any ESY

period that occurs during the next two years. In addition, the school district was ordered to provide 390 hours of Lindamood-Bell instruction to the student during school vacations or other times the school is in recess for more than a week. The district was also ordered to provide 25 hours a week of in-home ABA services for the upcoming school year for a total of 50 weeks. Finally, the district was required to contract with a qualified independent evaluator who would administer a FBA to the student.

WHAT ARE THE REQUIREMENTS OF A FBA/BIP?

Must target all of the student's behavioral needs

Administrative Hearing – Department of Education, State of Hawaii, 5 ECLPR 127 (Hawaii State Educational Agency, March 6, 2008)

An independent hearing officer held that Hawaii Department of Education has to reimburse a five-year-old's parents for the private school expenses and for the 1:1 aide they hired to help ease the child's transition to kindergarten because of a deficient BIP.

While the district did create a functional behavioral assessment and behavioral intervention plan, it failed to mention the child's anxiety, hyperactivity and attention difficulties. "The FBA did not target all of the child's behavioral needs and did not address serious behaviors that could affect the child's learning and the learning of the child's classmates."

The parent prevailed in this case because the school district did not follow their own evaluations (BASC Survey), showing that the student had a variety of serious behavioral concerns. Each of the behavioral concerns impacted the student's learning and behavior in the classroom. Since the FBA did not target all the student's behavioral needs, the IEP was found not to provide the student with a free appropriate public education and, therefore, the district had to reimburse the parents for tuition for their private school.

***Jaaccari J v. Board of Educ. of City of Chicago*, 690 F. Supp. 2d 687, 700-01 (N. D. Ill. 2010)**

A school district's alleged failure to properly record disciplinary incidents involving special needs student did not constitute a procedural violation of the IDEA, absent any statutory or regulatory provision requiring such documentation.

Must be sufficiently specific

Administrative Hearting – New York City Department of Education, 49 IDEL 270 (New York State Educational Agency, February 7, 2008)

A New York school district was found to have violated the IDEA by failing to collect enough data and provide enough specificity concerning this child's target behaviors. Since the behavioral intervention plan did not state the frequency, duration, or intensity of these behaviors, nor did it describe the conditions or events that appeared to trigger the child's outburst, the behavioral intervention plan was determined to be too vague to provide the student with any assistance.

The administrative hearing officer also took issue with the behavioral intervention plan because it did not describe appropriate behavioral interventions and instead stated that "the child would stop screaming hitting himself and tensing his muscles." As a result, the child could not receive a "meaningful educational benefit" per Rowley.

Must have a Plan or Strategy to Improve Behavior

In re Student with a Disability, 49 IDELR 147 (Indiana State Educational Agency, January 3, 2008)

An independent hearing officer found a district's failure to develop appropriate behavioral interventions for a student with Autism amounted to a denial of FAPE. The student was placed in mainstream classes with two periods of special education support services each day. In this setting, the student engaged in disruptive and aggressive behaviors.

While the hearing officer took no issue with the student's placement, she did fault the district for failing to conduct a *meaningful* functional behavioral analysis. In this case, the district merely enforced a "point system" that rewarded the student for good behavior while penalizing the student for inappropriate behavior. The hearing officer stated, "It was not enough to report that the behavior occurred and describe it; the purpose of an FBA is to dissect the behavior so as to plan the most effective method of eliminating it." The hearing officer ordered the district to conduct an appropriate FBA and develop an appropriate BIP for the student.

Must be Updated to Meet a Student's Worsening Behavior

Lakeland School District, 111 LRP 70768 (Pennsylvania State Educational Agency, October 28, 2011)

A Pennsylvania district had to provide compensatory education services to a high school graduate for failing to provide FAPE during the student's junior and senior school years. The student with ADHD and learning disabilities had been receiving special education services since seventh-grade. By the student's ninth-grade year, teachers expressed concerns about the student's problematic behaviors including disrupting class, eloping, and verbal aggression. The district's IEPs didn't specifically address these behaviors. The student's behaviors progressively worsened. And, during the student's junior and senior years, the student had numerous unexcused absences and poor academic performance. After the student graduated from high school, the student's parents filed for due process alleging denial of FAPE. An IHO explained that pursuant to both 20 USC § 1414(d) and 34 CFR § 300.324, in order to provide FAPE, districts must develop IEPs that are responsive to a student's identified educational needs. The IHO noted that this district was unquestionably aware that the student's behavioral problems impacted the student's learning. Several evaluation reports reflected that the student's abilities were in the average range but that the student's behavior impeded educational success. The IHO pointed out that the IEPs did not address the student's problematic behavior. The clearly ineffective BIP from 2006 was not revised as the behaviors and absences worsened during the 2007-08 and 2008-09 school years, nor was there an attempt to develop a positive behavior support plan or to make a comprehensive inquiry into why

Student was not attending school. The IHO posited that the student's excessive unexcused absences did not justify the district's failure to address his behavior but rather, it made the omission "glaring." Moreover, the IHO observed that the student's numerous unexcused absences should have alerted the district that the student might have had additional unmet needs Thus, the IHO concluded that the district's prolonged failures to address the student's educational needs warranted provision of compensatory educational services even though the student had already graduated.

DISCIPLINARY ISSUES FOR STUDENTS WITH DISABILITIES

Relationship between Misconduct and Disability

Violations regarding drugs

Lancaster Elementary School District, 49 IDELR 53 (California State Educational Agency August 28, 2007)

The hearing officer found that the student's learning disability was not related to student's drug offense (marijuana and tobacco). The hearing officer rejected the student's claim that frustration with schoolwork prompted him to bring drugs to school.

AND . . .

Los Angeles Unified School District, 111 LRP 60703 (California State Educational Agency August 15, 2011)

A 15-year old student with ADHD was unable to convince an ALJ that a MDR team erred in finding that his sale of a prescription drug to another student was not the result of impulsivity caused by his disability. The student had previously engaged in conduct in school thought to be manifestations of his disability. Those misbehaviors included fights with other students, class disruptions, yelling inappropriate comments in class, insulting staff and peers and bullying. When the district learned of the student's sale of the prescription drug to another student, which violated the school code, it initiated a pre-expulsion meeting in which it made a manifestation determination. The district considered expert opinion, the IEP, teacher observations, the relevant portions of the student's records, and information from the parents. Based on the circumstances surrounding the misconduct, the district determined that the student's misconduct was not a manifestation of his student's SLD. The student initially planned the details of the sale with another student, went home, and brought the drug back the next day to complete the sale. This conduct, the district determined, was the result of premeditation rather than impulsivity caused by the student's ADHD. The parents initiated due process to contest the district's determination that drug sale was not a manifestation of the student's disability. Federal regulations, implementing 20 USC § 1415(k)(1)(E), mandate that the essential attendees at a manifestation determination meeting review all relevant information in a student's file, including the IEP, teacher observations, and relevant information from parents in determining whether the conduct at issue was caused by, or had a direct and substantial relationship to, the

student's disability. Due in part to the contrast between the student's misconduct deemed manifestations of his disability and the conduct at issue in this instance, the California ALJ agreed with the district's contention that the student's drug sale was premeditated and deliberate rather than a result of impulsiveness triggered by ADHD. The ALJ decided that the district complied with federal regulations in its organization and administration of the manifestation determination meeting and the student was unable to show that the determination was incorrect. Thus, all relief sought by the student was denied.

BUT SEE . . .

San Diego Unified School District, 52 IDELR 301 (California State Educational Agency July 29, 2009)

For several days prior to an incident involving a drug sale, a 13-year-old student with ADHD acted as a "middle man" in the sale. The student was not taking his medication during this time. A hearing officer found that the student's ADHD related impulsivity led him to become part of the drug transaction, and therefore the conduct was a manifestation of his disability. Although in this case, the student was involved in the transaction for several days, the hearing officer still found it was related to the student's disability.

NOTE: Hearing officers and courts have come to different conclusions about whether such behavior is impulsive and/or related to the student's disability. For example, in **San Diego Unified School District, 109 LRP 54649 (California State Educational Agency August 12, 2009),** the hearing officer found that "arranging to supply drugs to another student is not impulsive behavior if it takes place over the course of hours or days and involves a series of decisions."

Whether misconduct is similar to what is exhibited in school

Swansea Public Schools, 47 IDELR 278 (Massachusetts State Education Agency April 4, 2007)

In this case, a student with ADHD and ODD was involved in a dispute with the assistant principal, where the student lunged and physically threatened her, screaming, kicking the door, and acting completely out of control. The school district found the behavior not related to the student's disability because the student had not engaged in physically threatening behavior prior to the confrontation. Furthermore, the student had "leadership abilities and was able to work well with others."

The hearing officer reversed that determination holding that the district could not sever the connection between the disability and the behavior. The hearing officer noted that in previous situations the student was able to regain control by leaving the building or obtaining support from staff. In this case, the student was stopped from leaving the building and no special education staff members were present to support the student.

In re Student with a Disability, 53 IDELR 173 (Wisconsin State Educational Agency April 8, 2009)

A 13-year-old student with an emotional disability committed an act of vandalism to the principal's home on the anniversary of his brother's suicide. Although a therapist diagnosed the student with Post-Traumatic Stress Disorder arising from the suicide, the district found the act of vandalism was not a manifestation of his disability because the misconduct differed from that which the student displayed in school. In school, the student would seek attention, act as a leader, and display defiance. However, the student was invited to participate in the act of vandalism.

A hearing officer rejected the district's determination and the district had to reinstate the student. The hearing officer found that the IEP team failed to consider all of the relevant information, such as previous notes concerning the student's low leadership skills, which contradicted the team's reasoning that the student was a leader. Furthermore, the district failed to consider that the conduct would have brought attention to the student and failed to give sufficient weight to the therapist's testimony that linked the act to the recurrence of the student's trauma.

BUT SEE . . .

Lincoln Unified School District, 111 LRP 74067 (California State Educational Agency November 30, 2011)

A California district appropriately focused on a student's disability, rather than his behavior plan, in determining whether his misconduct warranted expulsion. The 17-year-old student, with a SLD based on a reading disorder, had a lengthy disciplinary record for violence, threats of violence, use of profanity, and defiance. The student threatened physical violence against a librarian when he was asked to remove earphones pursuant to a posted library policy. The student's behavior escalated to the point where school security was summoned and the district resolved to expel him for the remainder of the school year. The student filed for due process alleging that he was wrongfully expelled. The ALJ noted that the district convened a timely MDR meeting at which it determined that the student's misconduct was not a manifestation of his disability and that the expulsion was therefore, appropriate. Here, the student's behavior plan provided, "When [Student] is confronted or redirected in an authoritative manner by school staff members, he will respond back with obscenities and verbalizing physical threats that can escalate into physically aggressive behavior." The plan "all but predicted the occurrence of the conduct that ultimately led to his expulsion," the ALJ observed. However, according to 20 USC 1415(k)(E)(i), a student's misconduct is a manifestation of his disability only if it is either caused by, or has a direct and substantial relationship to the student's disability. The district's director of special education testified that it was conceivable that the student's disability could manifest into inappropriate behavior. For instance, if the student became frustrated while attempting to read a passage out loud in class, he could potentially act inappropriately, which would indicate a relationship between his disability and his misconduct. However, the ALJ pointed out that nothing about the library incident suggested that the student's reading disorder prevented him

from restraining his hostile conduct. His aggression was triggered by his aversion to direction from authoritative figures, not by his disability. If a student's conduct is not caused by his disability, a district may employ normal school disciplinary procedures. 34 CFR 300.503(c). Thus, the district appropriately expelled this student.

Consider all of the student's disabling conditions

Township High School District 214, 54 IDELR 107 (Illinois State Educational Agency, February 4, 2010 due process hearing decision)

After a student posted a threat on Facebook to another student ("When I come back to school I'm going to look for u and kill you"), the district held a MD review and found no link to the student's disability and expelled him. The district staff at the MD review noted that the student had to log onto Facebook, decide whether to send a private or public message, then type and send a message. Consequently, the student's ADHD and impulsivity is not related to such a planned event. The IHO disagreed, finding that the school failed to consider other aspects of the student's disability, such as the student's poor executive functioning, mood disorder, and inability to self-regulate. Had they considered all aspects of the student's disability, they would have found the behavior related. In addition, the IHO found the district's argument that the behavior was planned was "simply unsupportable."

Fulton County School District, 49 IDELR 30 (July 11, 2007)

After a student allegedly threatened to kill his teacher, a Georgia district failed to conduct a proper manifestation determination review meeting when it refused to consider all of the student's disabling conditions. In this case the district only considered the impact of the student's ADD at the MDR meeting and ignored the student's diagnosis of ODD. The student's IEP stated that, "the main area of concern was his oppositional behavior," and therefore the hearing officer determined that the student's ODD should have been discussed. The hearing officer then found that student's behavior was directly related to his ODD.

Murietta Valley Unified School District and San Marcos Unified School District, 53 IDELR 108 (California State Educational Agency (May 14, 2009)

A California student's action in looking under the stalls of the girl's bathroom was found to be not related to his disability. The school district erred in failing to consider all of the relevant information in the file. The district only considered the student's primary disability in the manifestation determination and did not consider the student's cognitive impairment, even though the district's own testing revealed the student was mentally retarded. Furthermore, the assistant principal, as the senior administrator on the team, had a "chilling effect" on the mother's participation when he declared that the student's disability was not at issue, rather the safety of the student body. His statement also illustrated that the team failed to "undertake its core responsibility to provide the student with a considered manifestation determination."

ADHD

In re: Student with a Disability, 109 LRP 56732 (Virginia State Educational Agency April 17, 2009)

An IHO found that a Virginia school district was correct in finding a student's disruptiveness was planned and willful, not a result of impulsivity due to his ADHD. The IEP team found that the student's objectionable behavior occurred over a sufficient period of time and was not a response to a sudden stimulus. In addition, the fact that the student switched from one objectionable behavior to another, indicated forethought and planning. In this case, the parent produced no evidence that the student's actions were caused by his disability.

Danny K. v. Department of Education, State of Hawaii, 111 LRP 63834 (Dist. Ct. Hawaii September 27, 2011)

The District Court found that the IHO correctly ruled that the school district had conducted an appropriate MD review and that the student's conduct of setting an explosive firework off at school was not a manifestation of his diagnosis of ADHD inattentive type, because it was a planned activity requiring sustained attention and follow through with directions. Moreover, the Court found that if the student's conduct "was not simply an unrelated wrongful intentional act on his part" the Court would agree that the student's conduct probably resulted from his Conduct Disorder, where the hearing officer specifically found that student's Conduct Disorder affected his behavior.

Additionally, the Court did not find that as part of the MD review, the MD team is required to consider admission of guilt as the conduct to be reviewed for the purpose of a manifestation determination, rather "the manifestation team was required by the IDEA to determine whether the actions leading to Student's potential suspension – as determined by the [district's] investigation – were a manifestation of his eligible disability." In this case, the conduct for purposes of the MD review was the explosion, and not the alleged false confession.

See also above section involving drugs, where two courts came to opposite determinations regarding ADHD students under very similar fact patterns.

Response to Intervention (RTI) and Not Yet Eligible

Jackson v. Northwest Local School District, 55 IDELR 104 (S.D Ohio September 1, 2010)

A third grader with ADHD was entitled to the protections of the IDEA, even though she was not yet found eligible for special education services. The district had provided intervention services for two years and recommended an outside mental health examination. Although the district never conducted a case study, their actions and the fact that the child was receiving RTI, provided justification for the district to suspect the child had a disability. Therefore, the district was required to conduct a MD review prior to expelling the student.

Harrison (CO) School District Two, 57 IDELR 295 (Office for Civil Rights, Western Division, Denver (CO) July 20, 2011)

Implementation of RTI strategies did not offset a Colorado district's failure to timely evaluate and reevaluate a student with ADHD. The student's mother enrolled him in the district for the 2008-09 school year, and made it clear that the student had ADHD. Instead of evaluating the student for special education or related services eligibility, the district implemented RTI strategies. When the student's misbehavior escalated, she asked for an evaluation. The district did not comply; instead, it intensified the RTI strategies already in place. The student received 10 suspensions for his misbehavior. The district eventually completed an IEP for the student in June 2010. The mother filed an OCR complaint alleging the district's denial of FAPE in failing to timely evaluate the student and significantly changing his placement before determining whether his misconduct was a manifestation of his disability. Noting the district's contention that it used RTI throughout the student's entire enrollment and continued to monitor and adjust his services which facilitated FAPE, OCR explained that RTI does not justify delaying or denying the evaluation of a student with a disability who is believed to need special education and related services. The district's implementation of RTI strategies, OCR explained, was not effective as the student's misconduct escalated. The district should have inquired about his ADHD and determined whether an evaluation was needed. RTI, OCR posited, "may have been justified to identify promising instructional strategies," but it does not warrant a delay in evaluation when there's a palpable need. Moreover, the district's use of ongoing interventions did not suffice as consideration of the student's behavior as it related to his ADHD. Ten suspensions, some of which were multi-day, resulted in the student's deprivation of instruction that his other classmates received. OCR concluded that the frequency and volume of removals constituted a significant change in placement which the district erroneously undertook without considering whether or not the student's ADHD caused the misconduct that resulted in his suspensions. Thus, the district denied the student FAPE.

Fairfield-Suisun Unified School District, 112 LRP 31491 (California State Educational Agency May 25, 2012).

A student who commits a conduct violation is entitled to special education protections if the district knew that the child was a child with a disability before the disciplinary incident. One manner in which the school district is deemed to have knowledge is when a teacher or other personnel express specific concerns about the child's behavior to an administrator. Further, those concerns do not have to specifically mention a specific disability or a need for special education. In this case teachers had expressed many concerns about the student's psychotic thinking, interests in guns, aggressive and bullying behaviors. The hearing officer also noted that the student's good grades did not preclude a finding that the district should have held an MDR prior to expelling the student.

Section 504

Springfield (IL) School District #186, Office for Civil Rights, Midwestern Division, Chicago (June 29, 2010)

A school district violated Section 504 by expelling a student with a 504 plan without first conducting a MD review. The district believed erroneously that the student had no right to a MD review because the student did not have an IEP.

In re Barnstble Public Schools, 111 LRP 48728 (Massachusetts State Educational Agency July 12, 2011)

Because a Massachusetts district failed to consider an independent psychological report when it conducted an MD review of a teen accused of bullying, it violated Section 504. Noting that the procedural violation denied FAPE to the student, who was suspended indefinitely, the IHO instructed the district to make its determination again.

Hamilton (OH) Local School District, 111 LRP 70119 (Office for Civil Rights, Midwestern Division, Cleveland (OH), September 16, 2011)

A student's medical problems and excessive absences should have prompted an Ohio district to evaluate her for Section 504 eligibility. Despite having knowledge that the first-grader's 34 absences were related to her chronic hypoglycemia and migraines, the district initiated truancy proceedings against her and reassigned her to an online program. The student's mother filed for due process alleging that the district denied her daughter FAPE. The FAPE requirement, OCR explained, is not subject to a reasonable accommodation standard or other limitation. Thus, accommodating a student with a disability may require modifications to a regular education program, including adjustments to policies on absences if the student's disability impacts her attendance. OCR observed that before charging the student with truancy, the district had sufficient knowledge that she had a physical impairment that substantially limited a major life activity. OCR decided that the district violated the Section 504 regulation in failing to consider whether it needed to modify its attendance policy to ensure that the student was not discriminated against for absences related to her disability.

Definition of a Weapon

California Montessori Project, 56 IDELR 308 (California State Educational Agency, April 29, 2011)

An 8-year-old with an emotional disability pointed a pair of scissors at another student in a fit of anger. The school district removed the student and placed him in an interim alternative educational setting (IAES) for 45 days based on possession of a weapon. The IHO ordered that the school district immediately place the child back in his prior educational setting, finding the pair of scissors was not a "weapon" within the meaning of the statute. The scissors had dull blades and rounded tips and could only cut paper when the blades came together. Therefore, the scissors were not dangerous and could not cause "serious bodily injury."

Upper Saint Clair School District, 110 LRP 57903 (Pennsylvania State Educational Agency, June 4, 2010)

An autistic child brought a knife to school that met the definition of a "weapon." The school district placed the student in an IAES for 45 days. The parents argued that it was

an accident and the student did not intend to bring the knife to school. The student was reaching into his backpack and once he realized the weapon was there, turned it over to his therapist. The district's decision was upheld and the IHO stated that there was no requirement for the district to prove the student intended to bring the knife onto school grounds.

Scituate Public Schools, 47 IDELR 113 (Massachusetts State Educational Agency January 29, 2007)

The fact that a sixth grade student with Asperger's Syndrome, ADHD and a learning disability pulled on his principal's necktie after learning that he would not be permitted to leave early did not justify removal to an IAES. The IDEIA allows for removal of a student to an IAES regardless of whether the behavior is a manifestation of the student's disability, in cases where the student possesses a weapon. However, the hearing officer found that the necktie did not fit the statutory definition of a weapon and the student was not "in possession" of the necktie.

The term "weapon" is defined by statute to have the meaning given the term "dangerous weapon" under Section 930(g)(2) of Title 18 of the United States Code, which reads as follows: "The term 'dangerous 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 1/2 inches in length." The hearing officer found that a necktie was not readily capable of causing death or serious bodily injury.

The hearing officer then addressed whether, in any event, the student "possessed" the necktie. Finding no cases addressing the word in the context of the IDEIA, he defined the word according to Black's Law Dictionary. To possess is defined as "[t]o have in one's actual control; to have possession of." Since there was no indication that the student exercised control when he pulled the principal's tie, he was not found to be in possession of it.

In re: Student with a Disability, 50 IDELR 180 (Virginia State Educational Agency June 5, 2008)

A student who regularly carried metal awls to school was found to be in possession of a weapon, and therefore, subject to a 45-day removal under the IDEA. The awls had spikes less than two inches in length. Although, the hearing officer recognized that the awls could be used for leatherworking, she still concluded that the awls fit the definition of "weapon" because they were capable of causing serious bodily injury.

Serious Bodily Injury

Westminister School District, 56 IDELR 85 (California State Educational Agency January 13, 2011)

A 6-year-old with autistic behaviors was placed in an IAES after head butting his teacher and causing serious bodily injury. The IHO noted that districts can establish "serious bodily injury" by showing that the victim had "extreme physical pain." The teacher was diagnosed with an internal chest contusion and characterized the pain as the "worst of her life." She was prescribed two pain medications that failed to resolve the pain. In addition, she saw a physician three times in one week after her initial doctor's visit due to the pain. Under these circumstances, the IHO found the district met its burden of demonstrating serious bodily injury.

Bisbee Unified School District No. 2, 54 IDELR 39 (Arizona State Educational Agency January 6, 2010)

An ALJ found that an Arizona school district was not justified in removing a student with autism to an IAES because he kicked his elementary school principal. Although the district claimed that the student inflicted extreme physical pain when he lunged at the principal and kicked him while being restrained, the principal's actions following the incident revealed otherwise. The principal said he felt a "sharp pain" and went home for the rest of the day. Although his knee was swollen, he did not seek medical attention. The next day, he drove 200 miles. Three weeks later, he received a cortisone injection. Despite finding that the incident was related to the student's disability, the district removed the student to an IAES. The parent claimed the removal violated the IDEA. The ALJ agreed.

A district can move a student to an IAES for up to 45 school days without regard to whether his conduct was related to his disability in several instances, including when the student has inflicted serious bodily injury. "Serious bodily injury" requires substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted impairment of a bodily member, organ, or mental faculty. Here, the evidence did not support the district's contention that the principal suffered extreme pain. The principal never claimed in his statement or testimony that he was in severe pain. Therefore, the district should not have removed the student to an IAES.

Substantially Likely to Result in Injury

Rialto Unified School District, 114 LRP 1023 (California State Educational Agency, November 19, 2013)

Finding that an eight-year-old student's behavior (physical aggression to children and District personnel and eloping behavior) put the student at-risk in the classroom, on the playground and in the school parking lot, the hearing officer in this case determined that continuing the current placement was substantially likely to result in injury. The hearing officer noted that the behaviors continued to escalate despite the district reviewing and revising of the student's goals, conducting a FBA and providing a BIP, adding additional aides and support staff to supervise and assigning a trained analyst to observe and assist the aide.

San Leandro Unified School District, 114 LRP 550 (California State Educational Agency, December 16, 2013)

Finding that the student's anger and violent emotions were unpredictable and not remediated by the District's interventions including reviewing and revising the behavior goals, creating a FBA and BIP, adding highly skilled staff to support the student and paling the student in a separate isolated classroom, the hearing officer determined that the student was substantially likely to injure himself or others in his current placement.

Grossmont Union High School District, 56 IDELR 245 (California State Educational Agency, March 14, 2011)

The school district's decision to place a 16-year-old with ED in an IAES was upheld. The facts established that the student had escalating aggression and defiance over a period of a few months, which created a "substantial risk of injury" if he were to remain in his current educational setting. The student was caught throwing objects off the school roof, was aggressive with peers and staff, and fled staff members and refused to leave campus when ordered to do so. The student was defiant to school staff members and became increasingly aggressive, resulting in a volatile and uncontrollable situation.

Fullerton Joint Union High School, 48 IDELR 147 (California State Educational Agency, June 6, 2007)

The district filed an expedited due process hearing to place a student with escalating behaviors in an interim alternative educational setting (IAES) for up to 45 days. Under the IDEIA, the district may move a student to an appropriate IAES for up to 45 school days when the student's current placement is substantially likely to result in injury to the student or another person. At the time the district filed, the student had been attending a special day class at a traditional high school, with approximately 2,500 students. The student had been attending the day class from October to April of a school year. Two aides were assigned to the student.

The testimony at hearing described the student's behaviors, which included: (1) writing a note in code which said "I could set the building on fire;" (2) becoming agitated by a car playing loud music in the parking lot to the point where the student chased the car screaming for it to shut up and was almost hit by another vehicle; (3) exhibiting frequent outbursts in class, requiring a break to a bathroom, which he would then clog the toilet and sink causing the bathroom to flood; (4) grabbing the wrist of an aide, pushing a teacher, and hitting a teacher and an aide; (5) throwing a trash can into a classroom, narrowly missing another student; (6) throwing desks against a metal door; (7) hitting himself in the head; (8) generally exhibiting aggressive and unpredictable behavior, such as jumping on the hood of a parked car in the school parking lot and kicking the windshield until it shattered.

Based on these facts, the administrative hearing officer found that there was a substantial likelihood that injury would result to either the student or to another. The district sought to place the student in an IAES that served the county's moderate to severe students with developmental disabilities with behavioral and emotional

components to their disability. The school served 40 students and the student to instructor ratio was no greater than 4-1. The school was completely separated from the high school where it was located with a separate entrance and fenced in parking lot. All staff members were trained to deal with students with significant behavioral problems. Consequently, the hearing officer also found that the IAES was appropriate.

Letter to Huefner, Office of Special Education Programs (March 8, 2007)

OSEP Director Alexa Posny noted that a school district may repeat the procedures for filing an expedited hearing, if it believes that returning the student to the original placement is substantially likely to result in injury to the child or to others after the 45 days in an IAES.

New York City Department of Education, 107 LRP 11702 (New York State Educational Agency, February 9, 2007)

The administrative hearing officer upheld the district's placement of the student at an IAES. The record contained 21 reports of incidents between November 1, 2005 and May 19, 2006 describing the child's episodes of punching, biting, kicking, head-butting and running away during the fourth grade. The social worker reported that the child was not always able to understand social cues or assess social situations and needed reminders about inappropriately touching others or interfering with the personal space of others. She also reported that the child's aggressive episodes sometimes required intervention from several adults. An IAES was justified under the IDEIA.

Fort Bragg Unified School District, 52 IDELR 84 (California State Educational Agency, December 8, 2008)

A period of several weeks of compliance at home was not enough evidence to establish that the student was unlikely to cause injury in his day placement, where the student had a history of violent and unpredictable behavior in that setting.

The school district was, therefore, justified in placing a nine-year-old mentally retarded student in a residential setting to address his need for intensive behavioral interventions.

Saddleback Valley Unified School District, 52 IDELR 56 (California State Educational Agency, January 7, 2009)

A district cannot rely on a prior weapons possession to make a finding of a second 45-day removal where the student was improving his self-control and no longer engaged in self-injurious behaviors. Minor incidents of misconduct, such as teasing and verbal threats, were not enough to warrant a second 45-day removal.

Must Continue to Provide Services

Detroit City School District, 111 LRP 1824 (Michigan State Educational Agency, November 12, 2010)

Even if misconduct is unrelated to a student's disability, the school must continue to provide educational services so as to enable the student to participate in the general education curriculum and progress towards her IEP goals. An "administrative transfer" without services violates that provision. Further, what is required is more than merely sending books and assignments home without educational instruction.

Prince George's County Public Schools, 110 LRP 72210 (Maryland State Educational Agency, July 15, 2010)

If the misconduct is unrelated, it is the responsibility of the school district, not the parent, to find a placement for services to be provided. A school district violated the provision of the IDEA requiring services to continue after an expulsion, where the district gave the parent a phone number for an alternative school, knowing the school had a waiting list and that the student would not be immediately served.

Change of Placement

In re: Student with a Disability, 55 IDELR 299 (Wyoming State Educational Agency, December 17, 2010)

Once a school district removes a student from his classroom for more than 10 days, it raises the possibility that the removals constitute a change of placement in violation of special education law. In Wyoming, a school district was found to have violated the IDEA when it repeatedly sent home a student with cognitive impairments due to physical and verbal aggression. While the school kept no record of the number of times it had done so, the evidence at hearing indicated the student was removed on at least 20 occasions. The IHO determined this pattern constituted a change in placement and ordered that the district stop the practice and provide the student with compensatory education.

Smackover (AR) School District, Office for Civil Rights Southern Division, Dallas, 113 LRP 24693, (Arkansas March 1, 2013)

The Office of Civil Rights indicated that, for purposes of determining whether a "significant change in placement" has occurred, it may count the days a student is given an in-school suspension (ISS). In cases in which an ISS results in "exclusion from the regular education environment and from access to the district's educational programs and activities," it is more likely that the OCR will count ISS days for determining whether a significant change of placement had occurred. In this case, although the student was provided his speech therapy, OCR found that the student was not provided any academic instruction to the student or access to same aged peers. The student's learning environment was significantly changed, as he was "removed from the building where he regularly attended classes with students at his own grade-level and placed in an isolated temporary classroom with students from all grades." Consequently, sixteen days of ISS was a change in placement and the district was obligated to conduct an MDR prior to assigning the student to his 11th day of ISS.

District of Columbia Public Schools, 113 LRP 32357 (District of Columbia State Educational Agency, June 21, 2013)

A District of Columbia hearing officer, relying on the comments to the federal regulations, found that 20 days of in-school suspension (ISS) did not constitute a change in placement and did not require the district to conduct an MDR. The Official Comments to the Federal Regulations indicate that an ISS "is not considered part of the days of suspension…as long as the Student is afforded an opportunity to continue to appropriately participate in the general education curriculum, continues to receive services specified on the child's IEP, and continues to participate with nondisabled children to the extent that they would have in their current placement." Finding that the student in this case only missed one period per day due to the ISS and was afforded an opportunity to make up the work from that period, that the student didn't miss special education services or the ability to participate with nondisabled peers, the IHO held that the District was not obligated to provide a MDR.

SCHOOL DISCIPLINE, THE FIRST AMENDMENT & OFF-CAMPUS BEHAVIOR

New Illinois Law

Public Act 97-0340

On January 1, 2012, Public Act 97-0340 went into effect in Illinois. Public Act 97-340 effectively amended the Illinois School Code, 105 ILCS 5/1-1 *et seq*., by providing that gross disobedience or misconduct for which a school board (except Chicago Public Schools) may expel pupils includes that "**perpetuated by electronic means**." *See* 105 ILCS 5/10-22.6(a). Provides that a school board (including Chicago Public Schools and special charter districts) may suspend or by regulation authorize the superintendent of the district or the principal, assistant principal, or dean of students of any school to suspend a student for a certain period of time, not to exceed 10 school days, or may expel a student for a definite period of time, not to exceed two calendar years, if (i) that student has been determined to have made an explicit threat on an Internet website against a school employee, a student, or any school-related personnel, (ii) the Internet website through which the threat was made is a site that was accessible within the school at the time the threat was made or was available to third parties who worked or studied within the school grounds at the time the threat was made, and (iii) the threat could be reasonably interpreted as threatening to the safety and security of the threatened individual because of his or her duties or employment status or status as a student inside the school. 105 ILCS 5/10-22.6(d-5)

Related Case Law

The First Amendment & Misconduct by Electronic Means

Kara Kowalski v. Berkeley County Schools, et al., 652 F.3d 565 (4th Cir. 2011)

In a case involving cyber-bullying, a student sued the school district for limiting her First Amendment free speech rights by suspending her for creating a hate website against another student at school. The Fourth Circuit determined that the speech created actual or reasonably foreseeable "substantial disorder and disruption" at school; therefore, this was not the "speech" a school is required to tolerate and did not merit First Amendment protection.

T.V., M.K. v. Smith-Green Community School Corp., et al., No. 1:09-CV-290-PPS, 2011 WL 3501698 (N.D. Ind. Aug. 10, 2011)

This was the first case to address in a comprehensive manner whether and to what extent the First Amendment's Free Speech Clause would apply to "sexting". Students brought an action against their school district and principal alleging that their First Amendment rights were violated when the school suspended them from extracurricular activities for posting provocative and suggestive photographs on a social media website. The court held that the students' conduct was speech within the realm of the First Amendment. In addition, the court found the "off campus" conduct to be protected "expressive" conduct that did not *substantially interfere with requirements of appropriate discipline in the operation of the school*. Accordingly, the court found the punishment imposed to be a violation of the First Amendment. Additionally, the portion of the student handbook providing that, "If you act in a manner in school or out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extra-curricular activities for all or part of the year," was found to be impermissibly overbroad and vague under constitutional standards.

D.J.M. v. Hannibal Public School District #60, 647 F.3d 754 (8th Cir. 2011)

In this case, a high school student brought § 1983 civil rights action against his school district alleging that his suspension, which was based on alleged threats the student made to shoot other students, violated his First Amendment freedom of speech rights. The Eighth Circuit found that the student's statements were not protected speech under either "true threat" or substantial disruption analysis. A "true threat" is a statement that a reasonable recipient would interpret as a serious expression of intent to harm or cause injury to another and is intended to be communicated to another by the speaker. Such a statement is not considered protected speech. The student communicated his statements to a friend via "instant messaging", who then shared "something serious" with an adult, who informed the school principal and superintendent. Furthermore, the student's conduct was that which might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities, and thus is not protected by the First Amendment.

Off-Campus Behavior

J.S. v. Blue Mountain School District, 650 F.3d 915 (3rd Cir. 2011) & Layshock v. Hermitage School District, 650 F.3d 205 (3rd Cir. 2011)

Both cases concern students engaging in off-campus behavior involving the posting and creation of fake profiles of each of the students' principals on social networking sites. Parents of both high school students brought actions against the school district alleging

that disciplining the students was a violation of their First Amendment rights. The Third Circuit ruled that the school district did not have authority to punish these students for their off-campus expressive conduct. In *Layshock*, the Court stated "the First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline."

R.S. v. Minnewaska Area Sch. Dist. No. 12-588 (D. Minn. Sept. 6, 2012)

In this case a school district sought to discipline a 12 year old student for two postings on her Facebook wall. According to the Court, "one posting expressed her dislike of a school employee and another expressed salted curiosity about who had 'told on her.'" The Court refused to dismiss the case and found that, if true, the student's complaint would amount to "violations of [her] constitutional rights." The court determined that there existed a valid claim that the student's first amendment free speech rights were violated when the school disciplined her for off campus postings.

Suspension, Expulsion and Discipline Under the IDEA

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INTRODUCTION

A New York City study found that while disabled children constitute thirteen percent of the student body, this minority percentage is responsible for 50.3 *percent* of violent incidents directed against staff. Almost all of these attacks emanate from the categories of autism and seriously emotionally disturbed children. Apparently with considerations such as these in mind, Congress in 1997 amended the Individuals with Disabilities Education Act ("IDEA") so as to encourage state boards of education to set aside dollars for the purpose of providing direct services to children, *including* alternative programming for children who have been expelled from school.[1] It is ironic to observe that state education agencies now have, under §1411(f)(3) of the amendments, the authority to *take money away* from school districts that are currently doing a good job of providing a free appropriate public education ("FAPE") to students and to reallocate it to those districts who are *not*. In the 2004 reauthorization of the IDEA, Congress once again amended significant portions of the statute as it relates to disciplining students with disabilities. The recent amendments provided districts more flexibility to discipline students with disabilities. What follows is an attempt to make sense of a number of quite complicated provisions, some of which have been added for the first time to IDEA. A serious attempt has been made to write clearly and simply and to reduce the need for the repeated cross-referencing that is endemic to the amendments. It is hoped that parents and educators alike will find this initial review helpful.

I. Suspensions

In Illinois, suspensions are defined as "a period not to exceed 10 school days."[2] The IDEA protects students with disabilities from excessive suspensions by defining the removal from the students "then-current educational placement" for more than 10 school days as a "change of placement".[3] In general, districts cannot unilaterally change a student's placement without consent from the parents. Therefore, suspensions 10 school days or less are not considered a "change of placement" and do not require the parents' consent. During the 10-days of suspension, the federal implementing regulations suggest that IEP services do not need to be provided, although the statute itself does not provide for any interruption of educational services.[4]

It is clear that districts cannot suspend students with disabilities for longer than 10 days in a row without resorting to the additional procedures required when districts seek an expulsion or change of placement (which will be discussed in more detail below in Section II). However, there is currently great debate as to what extent a district can suspend a student with disabilities more than 10 *non-consecutive* days within a school year before the suspensions constitute a change of placement, and therefore, subject to these additional procedures.

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1 *20 U.S.C. §1411(e)(2)(c)(ix).*
2 *105 ILCS 5/10-22.6(b).*
3 *20 U.S.C §1415(j) and (k)(1)(B).*
4 Compare, 34 CFR 300.530 with 20 USC §1415(k).

When looking at more than 10 non-consecutive days of suspensions, the general rule is that a change of placement occurs when "the child has been subjected to a series of removals that constitute a [pattern of removals]." [5] To determine whether a "pattern" exists, the school district will on a case-by-case basis look to factors such as (1) whether the child's behavior is substantially similar to previous incidents, (2) the total amount of time the child has been removed, (3) the length of each removal, and (4) the proximity of the removals to one another.[6] The district's decision is subject to review through due process and judicial proceedings. If the parent files for due process, there is a statutory injunction, referred to as the "stay put provision" enjoining the school district from changing the "current" educational placement during the pendency of all proceedings under the IDEA.[7]

> *PRACTICAL APPLICATION OF THE LAW: Districts should take a conservative approach toward suspending students for more than 10 school days in any given school year. Parents and districts should carefully monitor students who are repeatedly suspended and proactively request a meeting to discuss the student's current educational program. Alternative behavioral intervention plans and/or more supportive placements should be considered in lieu of multiple suspensions from school. Only in situations where the student has engaged in dangerous behaviors harmful to the child or educational environment should a district go beyond 10 suspension days in a school year.*

Finally, in addressing cases of suspensions for less than 10 days, it should be noted that students with disabilities retain the same procedural rights as their non-disabled peers to contest a school suspension using the regular education procedures. While a suspension may not be considered a change in placement, school district still must report the suspension immediately to the parents of guardian of the student along with a full statement of the reasons for the suspension and notice of the right to review that decision.[8] If the parents or guardian request a review, either the school board or hearing officer would review the actions of the school administrators. The student would have the ability to be heard and present evidence contesting the allegations. The board would then take action "as it finds appropriate." While decisions regarding suspensions may be reviewed judicially, Courts are reluctant to overturn a district's discretion in disciplinary matters where the deprivation of schooling is 10 days or less.

II. Expulsions

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5 *34 C.F.R. §300.536.*
6 *Id.*
7 20 U.S.C §1415(j).
8 *105 ILCS 5/10-22.6.*

The general rule as set forth by the United States Supreme Court and the IDEA, is that no disabled student may be expelled for behavior that is a manifestation of his or her disability.[9] There are significant changes in the 2004 amendments to the IDEA concerning the standards for determining when behavior is a manifestation of a student's disability. In order for a school district to expel a student with disabilities, the relevant members of the student's IEP must meet in what is typically called a manifestation determination review ("MDR") meeting. An MDR meeting must be convened within 10 school days of any decision to expel or change the placement of the student.

> *PRACTICAL APPLICATION OF THE LAW: Since there are strict 10 day timeframes to implement the manifestation review meeting, district typically suspend students with disabilities for 10 days in order to have time to assemble to relevant staff and review the student's situation. Parents, on the other hand, often use this time to contact legal counsel as well as the student's private clinical providers so that the student's entire clinical "picture" will be provided at the meeting as well as other mitigating or relevant information.*

At the MDR meeting all relevant information[10] shall be considered in order to address two questions: (1) Is the conduct in question caused by, or had a substantial relationship to, the student's disability; and (2) Is the conduct in question the result of the school district's failure to implement the IEP. If either answer is "yes" then the behavior is a manifestation and the school may not expel the student or change his or her educational placement. In addition, a "yes" to either question creates in the school district an additional responsibility of conducting a functional behavioral assessment and implementing a behavioral intervention plan based on that assessment, or if a behavioral plan already exists, the affirmative duty to review and modify the plan as necessary. Finally, unless the behavior falls into one of the special circumstances described below in Section III, the student must be returned back to the educational placement from where he or she was removed unless the district and parents agree to a change in placement as part of the behavioral plan.

If the district at the MDR determines that the behavior was unrelated to the student's disability and the IEP was properly implemented then the student is subject to a change of placement and any other disciplinary measures that could be imposed on a non-disabled student, including expulsion through the regular education expulsion process. Under the IDEA, the school district must still provide special education services to an expelled student with disabilities, so as to enable the child to continue to progress in the general education curriculum and progress towards meeting his or her IEP goals. These services would be provided to the expelled student in an alternative educational setting.

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[9] 20 U.S.C §1415(k)(3) and Honig v. Doe, 108 S.Ct. 592 (1988).

[10] Relevant information can include, among other items, any evaluative and diagnostic results (including all information supplied by the parents), an observation of the child, and a review of the child's IEP and current placement.

The decision of the MDR team with respect to placement or the manifestation determination is subject to appeal through a due process hearing. As previously indicated, the filing of the due process request triggers the "stay put provision" of the IDEA, which enjoins the district from removing the student from his or her then-current educational placement during the pendency of any all proceedings under the IDEA. The U.S. Supreme Court stated unequivocally in *Honig v. Doe* that unless the parents and school district agree, the student remains in the then-current educational placement. Referring to the intent of Congress the Court stated,

> *We think it clear, ... that* ***Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.*** *In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts.*[11] (Emphasis Added)

The Court also remarked that the absence of an "emergency" exception to the stay-put provision for "dangerous" students was "conspicuous."

Therefore, the filing of a due process request enjoins the district from removing (i.e. expelling) the student until the issues are resolved through the administrative hearing. The Court's interpretation is consistent with the reasons for initial passage of the EHA, which included the fact that school systems across the country had excluded one out of every eight disabled children from classes. The Supreme Court stated that participating states must educate all disabled children, regardless of the severity of their disabilities.

III. Special Circumstances

Prior to the 1997 and 2004 amendments, school districts seeking to override the "stay put" provision had to affirmatively go into Court and seek a restraining order or injunction based on the severity or dangerousness of the student's misconduct. The legislature finally added an "emergency" exception (previously noted by the *Honig* Court to be absent) to stay-put in the 1997 and 2004 amendments. There now exist several circumstances where upon the commission of certain offenses, the school district can unilaterally place a student with disabilities in an interim alternative educational setting regardless of whether the behavior was a manifestation of the student's disability. If a student with disabilities while at school, on school premises, or at a school function (1) carries or possesses a weapon, (2) knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance, or (3) inflicts "serious bodily injury" upon another person, that student can be removed to an alternative educational setting for up to 45 school days without regards to whether the behavior is determined to be a manifestation of the student's disability.

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[11] Honig at 604.

PRACTICAL APPLICATION OF THE LAW: 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 2 ½ inches in length." 20 U.S.C. §812(c)

It is important to note that districts can place students who have committed any of the three acts unilaterally. However, the interim alternative placement must be determined by the IEP Team, not an individual school administrator. The placement must be selected so as to enable the child to *continue to progress in the general curriculum*, although in another setting, to *continue to receive all IEP services* that will enable the child to meet his IEP goals, and finally shall include *services and modifications* designed to address the behavior so it will not reoccur.[12] Even if the district elects to place a student in a 45-day placement, they are still obligated to follow the procedural timeframes regarding holding a MDR meeting.

The decision to place a child in an interim alternative placement may be appealed through a due process request. Furthermore, under the new amendments, school districts can file their own due process to request an order from a hearing officer ordering an alternative placement for 45 school days if the student does not fit into one of the three special circumstances, but the district believes that maintaining the current placement is substantially likely to result in injury to the child or to others.

IV. Due Process for Disciplinary Decisions

A special education due process hearing may be requested by the parent of a child with a disability who disagrees with any decision regarding the manifestation determination or placement resulting from an MDR or unilateral alternative 45-day placement. As noted above, the district can also request a hearing to place a student in an alternative 45-day placement if the district believes that maintaining the current placement is substantially likely to result in injury to the child or others.

If the school district has placed the student in a 45-day interim alternative setting, then the student will remain in that placement pending the decision of the hearing officer or the expiration of the time period, whichever occurs first. Therefore, all challenges to 45-day placements are expedited, meaning that they must occur within 20 school days of being requested with a decision issued within 10 school days. At expedited hearing, the hearing officer will determine one of the following questions: (1) whether the child shall be placed in the proposed alternative educational setting; or (2) whether the district has demonstrated that the child's behavior was not a manifestation of the child's disability.[13]

[12] *20 U.S.C. §1415(k)(1) and (2).*
[13] 23 Ill Admin. Code 226.655

PRACTICAL APPLICATION OF THE LAW:

Events	Appeal By	Status of Hearing
MDR (Not related)	Parents	Expedited
Unilateral 45-Day Placement (Special Circumstance)	Parents	Expedited
Unilateral 45-Day Placement (No Special Circumstance)	District	Expedited
MDR (Related, Change of Placement other than 45-day)	Parents	Non-expedited
MDR (Related, No Change of Placement, Change of Services)	Parents	Non-expedited

Consequently, there can be circumstances where two separate due process hearings are required to resolve all issues. Take for example the situation where a student brings drugs to his traditional high school where he attends. The District convenes an MDR and finds that the behavior is related, but determines that after looking at other disciplinary incidents over the course of the year, that the current placement is not meeting the student's needs and therefore also recommends a therapeutic day placement. In addition, the district exercises its right to unilaterally place the student at a 45-day placement pending his more permanent placement.

In the above case, the parent has the right to challenge the 45-day placement through an expedited hearing. In addition, the parent can bring a non-expedited hearing to challenge the change in placement. So where is the stay-put placement during these appeals? For 45-school days the student would remain at the 45-day placement until the expedited hearing is resolved in the student's favor or the 45-school days expire. At the conclusion of the 45-day placement the stay-put would convert back to the traditional high school until the completion of the non-expedited hearing. Of course, if the facts warrant, the district could bring an additional expedited due process hearing alleging that the current placement is dangerous to the student or others. If the hearing officer agrees that the student was a danger to themselves or others, the district could place the student in subsequent additional 45-day alternative placements while the non-expedited hearing was pending.

If the nature of the student's behavior does not fall under one of the special circumstances, then the filing of a due process triggers the stay-put provision and the student may not be removed from the last agreed upon IEP placement. While a great deal of detail has been provided regarding the amendment's complex special circumstances, the IDEA remains essentially intact in that there is still a presumptive injunction enjoining school districts from changing the "current" educational placement during the pendency of all proceedings under the Act that do not fall under the narrow special circumstances exceptions.

This is underscored by a recent Massachusetts administrative due process hearing overturning the district's decision to place a student with Asperger syndrome, ADHD and multiple LDs in a 45-day interim alternative setting for pulling the principal's tie when he learned he would not be permitted to leave school early. The hearing officer in that case noted that the student did not cause serious bodily injury and refused to find that the tie was a "weapon," as it was not capable of causing death or serious injury. Furthermore, the hearing officer noted that the student did not "possess" or "carry" the necktie. Since there were no special circumstances present, the district was not permitted to change the student's placement

unilaterally. *Scituate Public Schools*, 47 IDELR 113 (Massachusetts State Educational Agency, January 29, 2007)

V. What is the Current Placement During Appeals?

In summary, when a *parent* requests a hearing to challenge a disciplinary action taken by a school district for weapons/drugs/risk of injury behavior, and this challenge involves a dispute as to the alternative educational setting chosen or the manifestation determination decision made, the child must remain in the alternative education setting until the expiration of the time period in the applicable paragraph, i.e., not more than 45 days.[14]

If a child is placed in an interim 45-day alternative placement for weapons/drugs/risk of injury behavior and school personnel propose to change the placement *after the expiration* of the 45 day time period, during the pendency of any challenge to the proposed change, the child must remain in the location he was in *prior to being moved* to the alternative educational setting, except that the local education agency may request an "expedited hearing" if they think it is dangerous for the child to go to the pre-AES placement.[15] In this instance, to order a change in placement, the officer must find that:

- ✓ the school district has shown that maintenance of the current placement is substantially likely to result in **injury to the child or others**;
- ✓ the current alternative educational **setting is appropriate**;
- ✓ the school district has made **reasonable efforts** to minimize the risk;
- ✓ the alternative educational setting meets the "additional requirements" to enable the child to **continue to participate in the general curriculum** even though he is placed in another setting and to **continue to receive all IEP services** enabling the child to meet his IEP goals, including modifications designed to address the behavior in question.

VI. Protections for Children Not Yet Eligible for Special Education - 20 U.S.C. §1415(k)(5)

A child can invoke special education procedures, even if he or she is not yet eligible for special education, if the school district had knowledge that the child had a disability *before* the behavior in question occurred. The basis of such "knowledge" is as follows:

1. The parent (if not illiterate) has expressed a concern in writing that the child is in need of special education services to either supervisory or administrative personnel of the district or to a teacher of the child.

-- OR --

2. The parent has requested a Case Study Evaluation;

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[14] *20 U.S.C. §1415(k)(4).*
[15] *20 U.S.C. §1415(k)(7)(B) & (C).*

-- OR -

3. A teacher or "other [school district] personnel" have expressed concern about the child's behavior or performance to the Special Education Director or to "other supervisory personnel" of the local education agency.[16]

If there is no "knowledge" found to be present, the child may be subject to the same discipline rules as others.[17] However, if a request for an evaluation is made during the time the child is subjected to disciplinary procedures, the evaluation must be "expedited."[18] No time period is specified, however.

If the child is determined to be a child with a disability, the district must provide special education services and extend all of the disciplinary procedural protections of the Act, including holding an MDR meeting.

VII. Other Considerations: Records Confidentiality Issues

A provision requires that any school district reporting a crime must ensure that copies of the special education and disciplinary records are transmitted for consideration by the appropriate authorities to whom it reports the crime.[19] Although this provision is explicitly intended to reverse some of the case law which held that a report to juvenile authorities is an arguable change of placement, the amendment goes too far and in fact would be a direct violation of the mental health confidentiality acts of many states. Certainly, any conveyance of "special education and disciplinary records" without proper consent of the parents and any minor age 12 to 18 would be a clear violation of the Illinois Department of Mental Health and Developmental Disabilities Confidentiality Act, thereby raising the possibility of an award of attorney fees and damages to the parents from the violating district.

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16 *20 U.S.C. §1415(k)(5)(B).*
17 *20 U.S.C. §1415(k)(5)(D)(i).*
18 *20 U.S.C. §1415(k)(5)(D)(ii).*
19 *20 U.S.C. §1415(k)(6)(B).*

APPENDIX A

NOTE: An expedited due process request should be used when contesting the manifestation determination or placement in an alternative educational setting resulting from disciplinary action.

EXPEDITED DUE PROCESS REQUEST FORM

(to be hand delivered or sent by certified mail)

Date: _____

_____, Superintendent
_____
_____

Re: **(Name of Student, Age, Date of Birth)**

Dear Superintendent _____:

Please treat this correspondence as a formal request for a due process hearing pursuant to 105 ILCS 5/14-8.02b, 23 Illinois Administrative Code §226.655, 20 U.S.C. 1415(k)(3) and 34 CFR 300.532, 300.533, 300.507 and 300.508.

I. Name of Child:

The name, age, and date of birth of the child are stated above.

II. Address of Child's Residence:

Address:
_____
City/State/Zip:
_____
Phones:
_____

III. Name of School the Child is Attending:
_____
_____

IV. Description of the Nature of the Problem, Including Facts Relating to the Problem:
_____
_____

V. Proposed Resolution of the Problem to the Extent Known and Available at the Present Time:
_____
_____

For the above listed reasons, it is our position that the district has failed to provide our child with a free appropriate public education as required by state and federal law. We will participate in state sponsored mediation efforts.

Sincerely,

_____

Parent(s)

Harassment and Bullying

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Public Act 96-0952 Effective June 28, 2010, Concerning Bullying and Harassment

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The general assembly has recently enacted an anti-bullying law which is fairly comprehensive. The law defines "bullying" as:

> *Any severe or pervasive physical or verbal act or conduct, including communications made in writing or electronically, directed toward a student or students that has or can be reasonably predicted to have the effect of one or more of the following:*
>
> 1. *Placing the student or students in reasonable fear of harm to the students personal property;*
>
> 2. *Causing a substantially detrimental effect on the students physical or mental health;*
>
> 3. *Substantially interfering with the student's academic performance; or*
>
> 4. *Substantially interfering with the students ability to participate in/or benefit from the services, activities, or privileges provided by a school.*

Bullying is also generally described as taking certain forms, including without limitation one or more of the following: harassment, threats, intimidation, stalking, physical violence, sexual harassment, sexual violence, theft, public humiliation, destruction of property, or retaliation for asserting or alleging an act of bullying. The statute goes on to say that this is not an exclusive list.

Applicable to Private Schools

The general assembly has found that school district and non-public, non-sectarian elementary and secondary schools should educate students, parents, and school district or non-public, non-sectarian elementary or secondary school personnel about what behaviors constitute prohibited bullying.

When Prohibited

All bullying is prohibited during any school sponsored education program or activity, while in school and on school property or school buses or other school vehicles, at designated school bus stops waiting for the school bus, or at school sponsored or school sanctioned events or activities or through the transmission of information from a school computer or computer network or other similar electronic school equipment.

Basis of Harassment

Bullying on the basis of actual or perceived race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental disability, military status, sexual orientation, gender related identity or expression, unfavorable discharge from military service, association with a person or group with one or more of the mentioned actual or perceived characteristics, or any other distinguishing characteristic, is prohibited in all school districts and non-public, non-sectarian elementary and secondary schools.

Written Policy Required

Each school district and non-public, non-sectarian elementary or secondary school must create and maintain a policy on bullying which must be filed with the State Board of Education. Each school district and private school must communicate its policy on bullying to students and their parent or guardian on an annual basis and said policies have to be updated every two years and re-filed with the State Board of Education.

The Task Force

The section at 105 ILCS 5-27-23.9 creates a school bullying prevention task force.[1]

The task force is charged with the job of exploring the causes and consequences of bullying in schools, identifying promising practices that reduce incident of bullying, highlighting training and technical assistance opportunities for schools to effectively address bullying, evaluating the effectiveness of schools' current anti-bullying policies and other bullying prevention programs, and other related issues.

The state superintendent must appoint fifteen members to the task force within sixty days of the effective date of this Act or by approximately the end of August of this year.

The task force must submit a report to the governor and the general assembly on any recommendations for preventing and addressing bullying in schools in the state of Illinois, as well as a proposed timeline for meeting the task forces charges identified in the section.

[1] Brooke Whitted has been appointed by the State Superintendent as a member of the Task Force.

Bullying and School Liability Case Summaries

WHITTED + TAKIFF + HANSEN LLC

INTRODUCTION

Bullying and student-on-student harassment is a pervasive problem in the U.S. and has reached schoolchildren of all ages, genders, and races. According to an Associated Press report in *Education Week*, a study was conducted by the Josephson Institute of Ethics of 43,000 high school students, in which 43% of students reported being bullied in the past year and 50% reported bullying someone else.[1] In that same article's Editor's Note, another survey conducted by the Olweus Bullying Prevention Program reported that 17% of boy and girl students report being bullied two to three times a month or more within a school semester.[2] Schools are in a unique position to protect the lives of these young victims. School officials have a "comprehensive authority…, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[3] The Supreme Court has in the past recognized "that the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[4] Some student misconduct, regarded as bullying, which goes unaddressed may put schools in violation of federal anti-discrimination laws and may lead to school liability.

CASE SUMMARIES

PUBLIC SCHOOL LIABILITY

Gebser v. Lago Vista Independent School District (1998)[5]

The Supreme Court, in 1998, defined the standard of liability for cases involving sexual harassment of students by a school employee. This case involved the alleged sexual harassment of a student by a school teacher off-campus. The student brought suit against the school, and the Supreme Court determined that liability could only be imposed if the school official, someone who has at minimum the authority to address the discrimination, was "deliberately indifferent" to the harassment. While the Supreme Court concluded that a school could be liable for damages to a student due to such harassment by a teacher, in this case it found that the school was not liable.

Davis v. Monroe County Board of Education (1999)[6]

The Supreme Court in *Davis* determined that private damages action could lie against a school board, as a recipient of federal funds, in instances of student-on-student harassment, when it

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[1] Associated Press (AP). *Education Week*. "New study reports 50% of high school students admit to bullying in the past year." (October 27, 2010).
[2] *Id.*
[3] *Davis v. Monroe County Board of Education*, 526 U.S. 629, 646 (1999) (citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 507 (1969)).
[4] *Veronia School District 47J v. Acton*, 515 U.S. 646, 655 (1995). *See also New Jersey v. T.L.O.*, 469 U.S. 325, 342, n. 9 (1985) ("The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities.").
[5] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 118 S. Ct. 1989 (1998).
[6] *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S. Ct. 1661 (1999).

acts with "deliberate indifference" to known acts of harassment in its programs or activities. However, this is only true for harassment that is so "severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." The *Davis* case defines standards by which it would be determined whether a school board will be held liable for private damages in instances of student-on-student harassment and not standards by which a school and its administrators should address bullying and harassment.

Based on the *Davis* case, the following five-part harassment test was developed to determine if public school liability may exist, based on Title IX of the Education Amendments of 1972, which prohibits gender discrimination in federally funded educational programs:

(1) The student is a member of statutorily protected class (gender, race, disability)
(2) The peer harassment is based upon the protected class
(3) The harassment is severe, pervasive and objectively offensive
(4) A school official with authority to address the harassment has actual knowledge of it
(5) The school is deliberately indifferent to the harassment

Tinker v. Des Moines Independent School District (1969)[7]

This case involved an action against a school district to obtain an injunction against the enforcement of a school regulation prohibiting students from wearing black armbands while on school facilities to exhibit their disapproval of Vietnam hostilities. The Supreme Court concluded that public schools have a compelling interest in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying. However, in this particular case, the Supreme court held that in the absence of demonstration of any facts that might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, or any showing that disturbances or disorders on school premises actually occurred, regulation prohibiting wearing the black armbands and issuing suspensions to those students who refused to remove them was an unconstitutional denial of the students' right of expression and free speech.

T.K. and S.K. v. New York City Department of Education (E.D.N.Y. April 2011)[8]

The federal district court applied a broad standard of liability to the New York public schools in this case, finding that a disabled student had stated a valid claim that she had been denied a free appropriate public education under the federal *Individuals with Disabilities Education Act*, due to school officials' failure to remedy peer-bullying and harassment based on her disability. Note that the court in this case incorporated the standard set out in the Office of Civil Rights "Dear Colleague Letter" from October 2010.[9] Based on the letter, the Court concluded that schools should take prompt and appropriate action when responding to bullying that may interfere with a special education student's ability to obtain an appropriate education.

[7] *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).
[8] *T.K. and S.K. v. New York City Department of Education*, 779 F. Supp. 2d 289 (E.D.N.Y. 2011).

DeGooyer v. Harkness (S. Dakota 1944)[10]

This was the very first hazing case in a non-postsecondary setting. In this case the South Dakota Supreme Court affirmed a jury verdict that found the high school athletic coach liable for his active participation in the initiation rights of the school's lettermen club that led to the wrongful death of a student. The particular initiation employed in this case was to administer an electric shock via a device, with the coach present and assisting. The court found that the coach was charged with the "highest degree of care that skill and vigilance could suggest," and that he failed to observe the duty owed to the student being initiated, and thus was liable for the student's wrongful death.

Gendelman, et al. v. Glenbrook North High School, et al. (N.D. Ill. May 2003)[11]

This case was on the international media and involved an annual "powder puff" high school hazing event, where five students ended up being hospitalized. The school district responded by giving 10-day suspensions to 32 students, and all faced potential expulsions. Most students suspended were seniors who were set to graduate in a few weeks. Two such seniors brought an action in the federal court to enjoin the school district from preventing their graduations. The Northern District of Illinois denied their request for the temporary restraining order. Parenthetically, the discipline was based on a little known school district prohibition against "secret societies" even though everyone in the school, for many years, knew of the event.

Golden v. Milford Exempted Village School District (Ohio Ct. App. Oct. 2011)[12]

This case involved an attack on a member of the freshman basketball team by several fellow team members, but particularly one student who had engaged in aggressive sexual behavior toward other team members throughout the season. The student-aggressor targeted the freshman while other members of the team held the student down while waiting to board a bus to travel to basketball practice. No adults were supervising the students as they waited for the bus. When the word of the attack got out, the school district conducted an investigation. The student-victim and his parents filed suit against the student-aggressor and the school district and basketball coach. Claims against the school district and coach included civil hazing and negligent supervision. The court determined that the acts that occurred were not acts of "civil hazing" and could rather be considered "bullying". Accordingly, the school district was not held liable under the civil hazing statutes of the state. With regard to the claim of negligent supervision, the Court found that while it was the basketball coach's duty to supervise the team, there was no evidence that the coach acted in a manner that would be considered reckless, or willful and wanton that would lead to liability and overcome the qualified immunity provided to governmental employees.

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[10] *DeGooyer v. Harkness et al.*, 13 N.W.2d 815 (S. Dakota 1944).
[11] *Gendelman v. Glenbrook North High School*, No. 03 C 3288, 2003 WL 21209880 (N.D. Ill. 2003).
[12] *Golden v. Milford Exempted Village School District Board of Education*, No. CA2010-11-092, 2011 WL 4916588 (Ohio App. 12th Dist. Oct. 17, 2011).

PUBLIC SCHOOLS, THE FIRST AMENDMENT AND BULLYING

Kara Kowalski v. Berkeley County Schools, et al. (4th Cir. July 2011)[13]

In a case involving cyber-bullying, a student sued the school district for limiting her First Amendment free speech rights by suspending her for creating a hate website against another student at school. The Fourth Circuit determined that the speech created actual or reasonably foreseeable "substantial disorder and disruption" at school; therefore, this was not the "speech" a school is required to tolerate and did not merit First Amendment protection.

T.V., M.K. v. Smith-Green Community School Corporation, et al. (N.D. Ind. Aug. 2011)[14]

This was the first case to address in a comprehensive manner whether and to what extent the First Amendment's Free Speech Clause would apply to "sexting". Students brought an action against their school district and principal alleging that their First Amendment rights were violated when the school suspended them from extracurricular activities for posting provocative and suggestive photographs on a social media website. The court held that the students' conduct was speech within the realm of the First Amendment. In addition, the court found the "off campus" conduct to be protected "expressive" conduct that did not *substantially interfere with requirements of appropriate discipline in the operation of the school*. Accordingly, the court found the punishment imposed to be a violation of the First Amendment. Additionally, the portion of the student handbook providing that, "If you act in a manner in school or out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extra-curricular activities for all or part of the year," was found to be impermissibly overbroad and vague under constitutional standards.

J.S. v. Blue Mountain School District & Layshock v. Hermitage School District (3rd Cir. 2011)[15]

Both cases concern students engaging in off-campus behavior involving the posting and creation of fake profiles of each of the students' principals on social networking sites. Parents of both high school students brought actions against the school district alleging that disciplining the students was a violation of their First Amendment rights. The Third Circuit ruled that the school district did not have authority to punish these students for their off-campus expressive conduct. In *Layshock*, the Court stated "the First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline."

D.J.M. v. Hannibal Public School District #60 (8th Cir. Aug. 2011)[16]

In this case, a high school student brought § 1983 civil rights action against his school district

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[13] *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011).
[14] *T.V. ex rel. B.V. v. Smith-Green Community School Corp.*, No. 1:09-CV-290-PPS, 2011 WL 3501698 (N.D. Ind. Aug. 10, 2011).
[15] *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3rd Cir. 2011); *Layshock v. Hermitage School District*, 650 F.3d 205 (3rd Cir. 2011).
[16] *D.J.M. v. Hannibal Public School District #60*, 647 F.3d 754 (8th Cir. 2011).

alleging that his suspension, which was based on alleged threats the student made to shoot other students, violated his First Amendment freedom of speech rights. The Eighth Circuit found that the student's statements were not protected speech under either "true threat" or substantial disruption analysis. A "true threat" is a statement that a reasonable recipient would interpret as a serious expression of intent to harm or cause injury to another and is intended to be communicated to another by the speaker. Such a statement is not considered protected speech. The student communicated his statements to a friend via "instant messaging", who then shared "something serious" with an adult, who informed the school principal and superintendent. Furthermore, the student's conduct was that which might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities, and thus is not protected by the First Amendment.

PRIVATE SCHOOLS AND LIABILITY

Illinois Bullying Prevention Law

Section 27-23.7of the Illinois School Code, which concerns 'Bullying prevention' is applicable to private non-sectarian schools. Specifically, the relevant sections of the statute state as follows:

> *Because of the negative outcomes associated with bullying in schools, the General Assembly finds that school districts and non-public, non-sectarian elementary and secondary schools* ***should educate*** *students, parents, and school district or non-public, non-sectarian elementary or secondary school personnel about what behaviors constitute prohibited bullying.*
>
> *Bullying on the basis of actual or perceived race, color, religion, sex, national origin ancestry, age, marital status, physical or mental disability, military status, sexual orientation, gender-related identity or expression, unfavorable discharge from military service, association with a person or group with one or more of the aforementioned actual or perceived characteristics, or any other distinguishing characteristic is* ***prohibited*** *in all school districts and non-public non-sectarian elementary and secondary schools. . . .*
> * * * *
> *(d) Each school district and non-public, non-sectarian elementary or secondary school* ***shall create and maintain a policy on bullying, which policy must be filed with the State Board of Education****. Each school district and non-public, non-sectarian elementary or secondary school must communicate its policy on bullying to its students and their parent or guardian on an annual basis. The policy must be updated every 2 years and filed with the State Board of Education after being updated. . . .*
>
> * * * *

> *(e) This Section shall not be interpreted to prevent a victim form seeking redress under any other available civil or criminal law. . . .*

105 ILCS 5/27-23.7(a), (d), (e) (Emphasis added.)

***Cotton v. Catholic Bishop of Chicago* (1st Dist. Ill. June 17, 1976)**[17]

A student brought suit to recover for the injuries he sustained when he was assaulted by a fellow student in a gymnasium of his **private school**. The Appellate Court of Illinois held that the Illinois school code provision imposing a "willful and wanton" standard for injuries arising out of the school-pupil relationship applies to private as well as public schools. The complaint alleged a failure to supervise certain gymnasium activities and claimed ordinary negligence against the private school. Similar to lawsuits against public schools for mere negligence in student supervision or maintenance of discipline cases, private schools and their teachers have status of a parent or guardian to all students (*in loco parentis*) and the liability of a parent to a child does not attach absent willful and wanton misconduct. Thus, a private school may only be liable in a negligence suit if it acted willfully and wantonly (definition below).

> *Note:* In *Haymes v. Catholic Bishop of Chicago* (Ill. 1968), the Supreme Court of Illinois held unconstitutional a provision that limited recovery in tort actions against private schools to $10,000.

***Iwenofu v. St. Luke School* (Ct. App. Ohio Feb. 16, 1999)**[18]

This case involves an eighth-grade student at **parochial school** who was disciplined for engaging in behavior involving inappropriate touching of female classmates. The school suspended the student for three days and required him to engage in counseling before he returned. Subsequently, the student and his parents sued the school principal, school, and diocese based on various claims related to the discipline of the student and the juvenile court proceedings brought against the student by the diocese, which was resolved in favor of the student. The parents argued that the school **breached its contract** with them because the school did not follow its handbook in handling the matter, that the students constitutional rights were violated because no due process was afforded in the discipline proceeding, and that the school committed various torts against the student. The Court found that the actions taken by the school were within their discretion. Further, the Court found that private schools are vested with broad discretion in the manner in which they discipline students. "Private schools have broad discretion in making rules and setting up procedures to enforce those rules." Moreover, to uphold a claim that the private school breached its contract, parents would have to prove that the actions of the school violated the school handbook and that the handbook in fact created contractual rights between the parties.

Query: Do you have an incorporation provision in your yearly contracts?

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[17] *Cotton v. Catholic Bishop of Chicago*, 39 Ill. App. 3d 1062, 351 N.E.2d 247 (1st Dist. 1976) .
[18] *Iwenofu v. St. Luke School*, 132 Ohio App. 3d 119, 724 N.E.2d 511 (Ct. App. Ohio 1999).

Doe v. Williston Northampton School (D. Mass. Feb. 28, 2011)[19]

This case involved a student and her parents bringing an action against her **private school** and teacher for sexual harassment and sexual assault. The Court found that the private claim against the private school was actionable under Massachusetts statute making sexual harassment by any educational institution an "unfair educational practice."

Bloch v. Hillel Torah North Suburban Day School (1st Dist. Ill. Sept. 9, 1981)[20]

This older case involves a student and his parents suing a **private school** for the student's wrongful expulsion. The Appellate Court of Illinois found that Illinois law recognizes the availability of a remedy for monetary damages for a private school's wrongful expulsion of a student in violation of its contract. The court reasoned that in the case where a contract is one that establishes a personal relationship, like one between a student and his/her school, and calls for "the rendition of personal services, the proper remedy for a breach is generally no specific performance but rather an action for money damages."

Merrill v. Catholic Bishop of Chicago (2nd Dist. Ill. Dec. 11, 1972)[21]

This case involved an action against a **nonprofit private school** and its staff for injuries sustained by a student who was directed to cut a length of wire from a coil. The Appellate Court of Illinois held that the (public) School Code provision that schools stand, in all matters relating to discipline and conduct, in a relation of parents and guardians as to all activities connected with school programs applies to private schools. Accordingly, the Court relieved the private school of liability for alleged negligence.

Immunity

Private schools are not afforded all of the same immunities as public schools. The Tort Immunity Act, 745 ILCS 10/1-101 *et seq.* provides for the protection of "local public entit[ies]" (which includes public school districts and school boards) from liability arising from such claims. 745 ILCS 10/1-101.1(a), 745 ILCS 10/1-206. However, the Tort Immunity Act does not protect private schools.

Private schools may only enjoy immunity against school liability under Section 24-24 of the School Code. Section 24-24 confers on teachers *in loco parentis* status involving all matters relating to the supervision of students in school activities. 105 ILCS 5/24-24. The statute grants educators the immunity that parents enjoy with respect to suits by their children. *Templar v. Decatur Public Sch. Dist. 61*, 538 N.E.2d 195, 198 (4th Dist. 1989). As such, Section 24-24 immunizes educators and certain other educational employees from acts involving ordinary negligence, but not from acts involving willful and wanton misconduct. *Id*. "Willful and wanton conduct" is that which is either intentional or committed with reckless disregard or indifference for the consequences when the known safety of other persons is involved. To prove willful and

[19] *Doe v. Williston Northampton School*, 766 F. Supp. 2d 310 (D. Mass. 2011).
[20] *Bloch v. Hillel Torah North Suburban Day School*, 100 Ill. App. 3d 204, 426 N.E.2d 976 (1st Dist. 1981).
[21] *Merrill v. Catholic Bishop of Chicago*, 8 Ill. App. 3d 910, 290 N.E.2d 259 (2nd Dist. 1972).

wanton misconduct, one must show that the defendant has actual or constructive knowledge that the conduct posed a high probability of serious harm to others. As long as the actions of private school personnel are not considered willful and wanton misconduct, the immunity will apply and the private school will likely be protected.

Board of Directors of Private Schools

Pursuant to the General Not For Profit Corporation Act of 1986, 805 ILC 105/101.01 *et seq.*, a non-profit board of directors **serving without compensation** shall not be liable and "no cause of action may brought, for damages resulting from the exercise of judgment or discretion in connection with the duties or responsibilities of such director or officer unless the act or omission involved willful or wanton conduct." 805 ILCS 105/108.70(a). However, nothing in Section 108.70 is intended to bar any cause of action against the non-for-profit corporation arising out of an act or omission of any director exempt from liability for negligence. *See* 805 ILCS 105/108.70(e).

School Immunity and Compensation of Nonprofit Board Members

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Public and Non-Public Private School Immunity

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The purpose of this memorandum is to examine the Tort Liability of Schools Act, 745 ILCS 25/0.01 et. seq.

The purpose of this act was to ensure that there was no unnecessary diversion of public tax dollars or non-profit funds in damages actions. Therefore, the law provides, for non-profit private schools operated by *"bona fide* eleemosynary [charitable] or religious institutions" may not be sued for damages in state court except as follows:

1. The action must be commenced within one year from the date that the injury was received or when the cause of action "accrued."

2. Within six months from the date of injury (or accrual of cause of action) any person who is "about to commence" any civil action in any court against any public or private non-profit school for damages on account of any injury to his person or property must file in the office of the school board attorney, or principal of the school, a written statement giving the following information:

    a. The name of the person to whom the cause of action has accrued;

    b. The name and residence of the person injured;

    c. The date and "about the hour" of the accident;

    d. The place or location where the accident occurred;

    e. The name and address of the attending physician, if any.

It is important to note that in Section 4 of the Tort Liability of Schools Act, that if the procedures are not followed, any such civil action commenced against any school district or non-profit private school shall be dismissed and the person filing will be "forever barred" from further suing . Also, Section 5 of the Act limits any recovery (where procedures are followed) in each separate cause of action to ten thousand dollars.

Compensation of Non-Profit Board Members and Board Immunity

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NON-PROFIT OFFICERS AND DIRECTORS: WHAT IS THE LEGAL CONSEQUENCE WHEN A DIRECTOR IS "COMPENSATED"?

Some years ago, I was invited to join a well known child welfare organization as a board member. I learned that the organization included the CEO as a member of the board, and that there were other members of the board doing work on matters concerning the organization. This work was not *pro bono*. The directors were charging fees for their work.

I indicated that before I would join this non-profit board, the executive director would need to step down from board membership and the other compensated board members on the board would need to refer their work to others. Not surprisingly, this was not met with the highest degree of enthusiasm. I did not join that board of directors, but have since heard that the inquiry caused a lengthy discussion about the issue of compensated directors, and some significant changes in policy. My reasons for making that request follow.

What are the Risks of Having a Compensated Director On a Non-Profit Board?

There are some appellate level cases in this jurisdiction, but these merely list the requirements.[1] My concern in making my original inquiry some years ago was that I did not want to be the "test case". The analysis is very simple. If officers and directors are directly compensated for their efforts on the board, they lose their statutorily granted immunity. In addition, I believe there is an argument that if even one member of a board is "compensated," as in the situation where a salaried executive director is allowed to serve as a voting member of the board, then it is possible that the presence of one compensated member could defeat the immunity for that member *and possibly for each and every remaining member of the board*. My position in giving advice to non-profit clients has always been that no members of any non-profit board can be "compensated" in any way, other than for expenses.

I have often been asked whether the "compensation" can be for an unrelated activity while actual board activity is uncompensated. The cleanest and safest approach, in my opinion, is that no member of any non-profit board can be paid by the entity that it governs *for any activity*. I am aware that many non-profit boards include their executive directors as members of the governing board. However, in doing so, they take the risk of being the "test case", for the presence of one "compensated" member of the board, defeating the immunity of the board

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[1] EXEMPTION REQUIREMENTS:

To exempt a board from liability under this section, several prerequisites must be met: first, the directors must serve without compensation; second, the corporation must be organized under this Act; third, the corporation must be exempt from or qualify for exemption from taxation under federal law. Robinson ex rel. Estate of Robinson v. LaCasa Grande Condominium Ass'n, 204 Ill. App. 3d 853, 150 Ill. Dec. 148, 562 N.E.2d 678 (4 Dist. 1990).

In order for a director to be immune from liability under the statute, he must be unpaid, the corporation must be organized under the Not for Profit Corporation Act, the corporation must be tax exempt under federal law, and the director's conduct must not be willful or wanton. Schmitt v. Schmitt, 165 F. Supp. 2d 789, 2001 U.S. Dist. LEXIS 15373 (N.D. Ill. 2001), aff'd, 324 F.3d 484 (7th Cir. 2003).

as a whole. This is an especially important consideration with agencies that deal with high-risk populations, such as DCFS wards.

Recent Statutory Changes

In recent years, the Act has been amended to allow for some limited compensation. With respect to "compensated" boards, what follows is an outline of relevant Illinois statutes that are applicable to the compensation of non-profit corporation board members and the preservation of their civil immunity when compensated. The Not For Profit Corporation Act of 1986 (hereinafter referred to as the "Act"), 805 ILCS 105/101.01 *et seq.*, defines "Board of Directors" as:

> [T]he group of persons vested with the management of the affairs of the corporation irrespective of the name by which such group is designated. 805 ILCS 105/101.80(d).

Pursuant to Section 108.05(c) of the Act:

> Unless otherwise provided in the articles of incorporation or bylaws, the board of directors, by the affirmative vote of a majority of the directors then in office, *shall have authority to establish reasonable compensation of all directors for services to the corporation as directors*, officers or otherwise, notwithstanding the provisions of Section 108.60 of this Act. 805 ILCS 105/108.05(c). (Emphasis added.)

Accordingly, it may be useful to take a look at the articles of incorporation and bylaws of the organization in question to determine if "compensation" is allowed in the first place, or to draft the articles of incorporation and bylaws based on the organization's preference for or against compensated board members. When compensation of board members is made permissible under the articles of incorporation and bylaws, it is important to consider the amount of compensation as it relates to statutory civil immunity. Generally, directors of a non-profit corporation have limited liability.[2] However, where the director earns in excess of $25,000 per year from his or her duties as director, a cause of action may be brought against the director for damages.[3] Section 108.70(b) of the Act states:

> (b) No director of a corporation organized under this Act or any predecessor Act for the purposes identified in items (14), (19), (21) and (22) of subsection (a) of Section 103.05 of this Act, and exempt or qualified for exemption from taxation pursuant to Section 501(c) of the Internal Revenue Code of 1986, as amended, shall be liable, and no cause of action may be brought for damages resulting from the exercise of judgment or discretion in connection with the duties or responsibilities of such director, *unless: (1) such director earns in excess of $25,000 per year from his duties as director, other than reimbursement for actual expenses; or (2) the act or omission involved willful or wanton conduct*. 805 ILCS 105/108.70(b) (Emphasis added.)

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2 *See 805 ILCS 105/108.70.*

3 *805 ILCS 104/108.70(b)(1).*

Section 108.70(b), as stated above, reflects Public Act 96-649 ("P.A. 96-649"), which went into effect January 1, 2010. Under P.A. 96-649, the Illinois legislature increased the amount of annual compensation a director may earn from $5,000 to $25,000. As such, a director may earn up to $25,000 before he/she may be held liable for damages resulting from a cause of action against the corporation.

Immunity

Accordingly, the following provisions likely grant civil immunity to a director of a non-profit corporation who is "uncompensated" (receives less than $25,000 per year):

> (a) **No director or officer serving without compensation,** other than reimbursement for actual expenses, of a corporation organized under this Act or any predecessor Act and exempt, or qualified for exemption, from taxation pursuant to Section 501(c) of the Internal Revenue Code of 1986, as amended, shall be liable, and *no cause of action may be brought, for damages resulting from the exercise of judgment or discretion in connection with the duties or responsibilities of such director or officer unless the act or omission involved willful or wanton conduct*. 805 ILCS 105/108.70(a). (Emphasis added.)
>
> * * *
>
> (b-5) Except for willful and wanton conduct, **no volunteer board member serving without compensation**, other than reimbursement for actual expenses, of a corporation organized under this Act or any predecessor Act and exempt, or qualified for exemption, from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, shall be liable, *and no action may be brought, for damages resulting from any action of the executive director concerning the false reporting of or intentional tampering with financial records of the organization, where the actions of the executive director result in legal action.* 805 ILCS 105/108.70(b-5). (Emphasis added)
>
> * * *
>
> (c) **No person who, without compensation** other than reimbursement for actual expenses, renders service to or for a corporation organized under this Act or any predecessor Act *and* exempt or qualified for exemption from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, *shall be liable, and no cause of action may be brought, for damages resulting from an act or omission in rendering such services*, unless the act or omission involved willful or wanton conduct. 805 ILCS 105/108.70(c). (Emphasis added.)

To exempt a board of directors (not to mention those voluntarily contributing services) from liability under the Not For Profit Corporation Act, the following must be true:

1. The directors must serve without compensation;

2. The corporation must be organized under the Not For Profit Corporation Act;

3. The corporation must be exempt or qualify for exemption from taxation under Federal law; and

4. The conduct of the directors must not have been willful or wanton.[4]

While 108.70(a), (b), and (c) appear to refer to "uncompensated" directors or volunteers fairly unequivocally, the provision at 108.05(c), allowing up to $25,000 in annual compensation opens the door to an arrangement that as long as the annual compensation remains under $25,000, exclusive of expense reimbursement, the Illinois legislature intends for nonprofit board members to retain their qualified immunity. However, we still do not recommend that any board members of Illinois nonprofits be "compensated" in any way.

This conservative approach maximizes the immunity granted by statute, and fully immunizes board members from the possibility of having to defend against creative legal arguments that seek to circumvent the restriction, for example, by arguing that the "without compensation" language as above-outlined is not qualified. If a director/CEO's salary exceeds the limit, he or she will not enjoy the strong immunity granted to "uncompensated" directors. The other compensated trustees, to the extent their compensation remains below the limit, still enjoy statutory immunity. However, if anyone is "compensated" there is always the possibility of an argument that this defeats the statutory immunity for the entire board. There is no case law on this, but we maintain that it is a good argument and the reason why, to keep my client boards absolutely safe, I recommend that there be no compensation of any kind for any nonprofit board member.

[4] *Robinson on Behalf of Estate of Robinson v. LaCasa Grande Condominium Ass'n*, 562 N.E.2d 678, 682 (4th Dist. 1990) (Note: This case was decided prior to P.A. 96-649 and, accordingly, does not reflect that a board member may be uncompensated or earn up to $25,000 and still be exempt from liability).

Non-Custodial Parents

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Non-Custodial Parents: Legal Issues

Who Has The Authority To Do What?

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I. Definitions

What is custody? What is guardianship? What legal relationship does a stepparent have to a child who lives in the home? What is joint custody? All of these questions are asked on a regular basis by education professionals. The context varies: sometimes a residency question is involved. At other times, educators are attempting to unsnarl a complicated thicket of relationships just to figure out who has the authority to sign a form to release information or initiate services. The purpose of this memorandum is to inform the reader with respect to the latter quandary, using relevant statutory definitions as well as providing a tool with which to analyze whether an individual asserting that he or she has authority does, in fact, have that authority.

The Illinois Probate Act defines "Guardian" as a legal representative of a minor.[1] A "representative" is defined in the same act as a standby guardian, temporary guardian, and a guardian.[2] These terms are defined by the Probate Act,[3] as well as a comparatively new addition known as "short-term guardian,"[4] which is:

> *§1-2.24. …. a guardian of the person of a minor as appointed by a parent of a minor under Section 11-5.4, or a guardian of the person of a disabled person as appointed by the guardian of the disabled person under Section 11a-3.2.*

The Juvenile Court Act contains perhaps the best and most comprehensive definitions:

> *(7) "Emancipated minor" means any minor 16 years of age or over who has been completely or partially emancipated under the "Emancipation of Mature Minors Act", ...*
>
> *(8) **"Guardianship of the person"** of a minor means duty and authority to act in the best interests of the minor, subject to residual parental rights and responsibilities, to make important decisions in matters having a permanent effect on the life and development of the minor and to be concerned with his or her general welfare. It includes but is not necessarily limited to:*
>
> > *(a) the authority to consent to marriage, to enlistment in the armed forces of the United States, or to major medical, psychiatric, and surgical treatment; to represent the minor in legal actions; and to make other decisions of substantial legal significance concerning the minor;*

[1] 755 ILCS 5/1-2.08.
[2] 755 ILCS 5/1-2.15.
[3] 755 ILCS 5/1-2-23, et al.
[4] 755 ILCS 5/1-2.24.

(b) the authority and duty of reasonable visitation, except to the extent that these have been limited in the best interests of the minor by court order;

(c) the rights and responsibilities of legal custody except where legal custody has been vested in another person or agency; and

(d) the power to consent to the adoption of the minor, but only if expressly conferred on the guardian in accordance with Section 2-29, 3-30, or 4-27.

*(9) **"Legal custody"** means the relationship created by an order of court in the best interests of the minor which imposes on the custodian the responsibility of physical possession of a minor and the duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, except as these are limited by residual parental rights and responsibilities and the rights and responsibilities of the guardian of the person, if any.*

*(10) **"Minor"** means a person under the age of 21 years subject to this Act.*

*(11) **"Parent"** means the father or mother of a child and includes any adoptive parent.*

. . .

*(13) **"Residual parental rights and responsibilities"** means those rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person, including, but not necessarily limited to, the right to reasonable visitation (which may be limited by the court in the best interests of the minor as provided in subsection (8)(b) of this Section), the right to consent to adoption, the right to determine the minor's religious affiliation, and the responsibility for his support.*[5] (All emphasis is added)

It also tends to be confusing to most people when conflicting statutory definitions are encountered. For example, the term "minor" is defined above in the Juvenile Court Act as anyone under 21, yet the Child Care Act defines "child" as follows:

*§ 2.01. Child. **"Child"** means any person under 18 years of age. For purposes of admission to and residence in child care institutions, group homes, and maternity centers, the term also means any person under 21 years of age who is referred*

[5] 705 ILCS 405/1-3.

> *by a parent or guardian, including an agency having legal responsibility for the person pursuant to the Juvenile Court Act or the Juvenile Court Act of 1987. Termination of care for such persons under 21 years of age shall occur no later than 90 days following completion of a public school secondary education program or the individual's eligibility for such a program.*[6]

To add to the confusion, the Parental Responsibility Act defines "minor" as a person between the ages of 11 and 19![7] The same act also defines a "Legal Guardian" as follows:

> *(1)* ***"Legal guardian"*** *means a person appointed guardian, or given custody, of a minor by a circuit court of the State, but does not include a person appointed guardian, or given custody, of a minor under the "Juvenile Court Act or the Juvenile Court Act of 1987".*[8] (Emphasis added)

The School Code, however, defines "parent" as "a parent or legal guardian of an enrolled student of an attendance center [for cities over 500,000]."[9] However, for homeless children the School Code defines "parent" as "the parent or guardian having legal or physical custody of a child." (emphasis added)[10]

It is well established that in most circumstances *for school purposes*, there must be a court order or an actual, legal, or documented connection between the "parent" and the "child." A stepparent, for example, who shows up at a staffing and asserts that he or she has authority over the child must be questioned. Unless there has been an adoption, court-ordered guardianship, or other document that gives the stepparent legal authority, there is no authority. Likewise, in the case of a non-custodial parent who appears at a staffing or in the administrator's office and asserts authority over the child. At the very least, a non-custodial parent should sign a document certifying that he or she has the authority so claimed.

II. Introduction to the Problem

The issue of what rights a so-called "non-custodial" parent has is cropping up with increasing frequency. For example, in the case of Navin vs. Park Ridge School District #64,[11] the non-custodial parent, who under the divorce decree only had a right to information and not concerning any educational decision making, requested a due process hearing *demanding more services*. The hearing officer dismissed the request on the basis that the father, as the requesting party, was the non-custodial parent and had no right to request a due process hearing. The District (trial) Court agreed and affirmed the decision of the hearing officer, but the Federal

[6] 225 ILCS 10/2.01.
[7] 740 ILCS 115/2(2).
[8] 740 ILCS 115/2(1).
[9] 105 ILCS 5/34-1.1.
[10] 105 ILCS 45/1-5.
[11] 36 IDELR 235.

Appellate Court disagreed and remanded the case to the District Court for further proceedings. In this somewhat aberrant opinion, U.S. District Judge Conlon outlines the facts of the case, including the Appellate Court's order (to her) to readjudicate the case. She then concluded that she couldn't do anything until a hearing officer had actually made a determination of the non-custodial parent's claims of certain procedural violations. Therefore, the District Court judge who had the case remanded to her *again* remanded the case down to the hearing officer. The hearing officer was compelled to actually hold a hearing to examine the non-custodial father's complaints and from which, if he is aggrieved, he would then have a right to again appeal to the District Court, and ultimately to the Appellate Court.

Just from precedent set by this one case, then, Illinois hearing officers must consider procedural claims made by non-custodial parents *even though the decree does not give them any right to determine educational programming*. Our opinion is that this decision creates meaningless work in a very narrow area of non-custodial parent rights, however, now that the opinion exists, it must be followed.

III. Questions to Ask in the Majority of Cases

A. Source of Authority

If you are presented with potential custodial issues, you first need to inquire as to the source of the authority claimed. Usually in domestic relations matters, there is a "decree" which includes a settlement agreement or court order that outlines the duties and responsibilities of the parties. This is always on file in a court clerk's office somewhere. If you are ever in any significant doubt with regard to the validity of the authority claimed by a parent, you always have the option of referring to the court file, which is open to public examination. The general rule of thumb here should be, "when in doubt, check the file." However, it is recognized that educators (a) don't have the responsibility to check every court file to verify the truthfulness of parents and yet (b) should have some documented basis for taking what the parent says at face value and moving forward. In this regard, we suggest the attached document entitled "Certification of Authority." Once this document is signed by a so-called non-custodial parent, as indicated in the document, a copy should be forwarded to the custodial parent. A cover letter should accompany the form, indicating to the custodial parent that if the school authorities don't hear from him or her within a week, the form will be accepted as truthful.

B. Type of Right Asserted

Non-custodial parent rights are divided into two areas: consent for **services** (in domestic relations, these are usually medical and educational) and consent for release of **information**. Generally speaking, pursuant to Illinois decisional case law in the mental health area, the non-custodial parent of a child under 12 has the right to the same flow of information as the custodial parent if he or she requests such in writing.[12] However,

[12] Dymek v. Nyquist, 128 Ill.App.3d 859, 469 N.E.2d 659.

for school records, which are governed by the Family Educational Rights and Privacy Act (FERPA)[13], there is no such restriction on the child's age. Therefore, unless the decree states otherwise, the non-custodial parent does not have the authority to consent to the initiation or administration of medical or educational services. This is, of course, another case for checking the decree which, in addition, can usually be provided by the parent who seeks information or consent authority.

1. Confidential Information:

a. School Information:

In connection with educational information as defined in the Illinois School Student Records Act, all you need is the consent of *one parent*, and generally speaking that should be the parent who has custodial authority over the child. For *school information* only, you do not need the signature of the child at any time.

b. Mental Health Information:

This is governed by the Mental Health and Developmental Disabilities Confidentiality Act[14]. Different rules apply to the release of mental health information and these are very specific. The attached form contains a second section, in the same document, for the release of mental health information only. It should be noted that where there is a need to block disclosure of information to any parent, *whether custodial or non-custodial*, and the information is "mental health" in nature, the refusal of any child age 12 to 18 to sign the form is enough to block the information in the absence of a court order for disclosure. For children below the age of 12, however, both non-custodial and custodial parents have the same right to the flow of confidential mental health information.

2. Services:

The issue of consent for services is more complicated. The decisional case law generally requires that the custodial parent authorize services. Cases have shown that when the non-custodial parent attempts to initiate services, the courts have invalidated the authorization. Thus, educators should take some steps to verify the authority of the custodial parent who seeks to authorize initiation, change, or cessation of services. Quite possibly, the attached Certification of Authority would be sufficient if there is any doubt. However, in cases with serious potential consequences, there is no equal to actually checking the court file.

C. Incarcerated Parents

[13] FERPA, 20 U.S.C. § 1232g; 34 CFR Par 99.

[14] While mental health files also are now subject to the Health Information Portability and Accountability Act ("HIPAA"), any mental health records related to students which are maintained in the student's permanent or temporary school records fall under the Family Educational Rights and Privacy Act ("FERPA") regulations, and are generally exempted from HIPAA regulations.

When the parent or guardian has been incarcerated, other issues may need to be considered. Depending on the offense, it is possible that the rights of the parent may have been terminated. If such is the case, then there might be a private guardian appointed or, alternatively, the child may be a ward of the state. If the child is a ward of the state, the state guardian (DCFS usually, in Illinois) controls decision-making. If there is a private guardian, you can usually ask for the "letters of office" which should contain all of the guardian's duties, authority, and responsibilities.

It is also possible that an incarcerated parent may have retained parental rights, in which case it would be necessary to correspond with the parent, even though incarcerated, for the purpose of obtaining consents. Likewise, an incarcerated parent continues have the legal authority to consent to information disclosure unless parental rights have been fully terminated.

[INSERT SCHOOL LOGO/LETTERHEAD]

RIGHTS OF NON-CUSTODIAL PARENT & OTHERS

This policy explains the obligations of [Insert Name of School] staff with respect to the rights and authority of divorced or separated parents (specifically, the non-custodial parent), and other individuals (e.g., grandparents, stepparents) regarding students who are minors.

It is the policy of [Insert Name of School] to uphold the equal rights of each parent with respect to their child(ren), unless and until taken away or altered by a valid court order, divorce decree, or other legal document executed by both parents. If a parent/guardian wishes that the rights of the other parent with respect to their child(ren) be restricted, it is that parent/guardian's responsibility to provide the school with a valid, current and legible court order and/or divorce decree indicating any such restriction on the parent's rights. [Insert Name of School] reserves the right to check the actual court file to verify either parent's authority at any time.

In addition, a non-custodial parent or other individual (e.g., grandparents, stepparents, etc.) claiming any authority with regard to consent for a student at [Insert Name of School] and/or the right to school records and related information, must complete a Certification of Authority form. This form will be shared with the custodial parent of the child for verification purposes. This form may be picked up at the main office.

[INSERT SCHOOL LETTERHEAD]

CERTIFICATION OF AUTHORITY

THE UNDERSIGNED, _____, BY SIGNATURE BELOW, HEREBY CERTIFIES TO **[INSERT NAME OF FACILITY/SCHOOL]** THAT HE/SHE HAS FULL LEGAL AUTHORITY, PURSUANT TO A DIVORCE DECREE CURRENTLY ON RECORD OR OTHERWISE, TO DO THE FOLLOWING WITH REGARD TO _____, A STUDENT AT THE SCHOOL: (PLEASE CHECK ALL THAT APPLY)

- ☐ CONSENT TO THE ADMINISTRATION OF EDUCATIONAL EVALUATIONS
- ☐ CONSENT TO THE INITIATION OF EDUCATIONAL PROGRAMS
- ☐ CONSENT TO THE RELEASE OF CONFIDENTIAL EDUCATIONAL INFORMATION FROM THE TEMPORARY AND PERMANENT SCHOOL FILES
- ☐ CONSENT TO THE RELEASE OF CONFIDENTIAL MENTAL HEALTH INFORMATION PURSUANT TO THE ILLINOIS MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES CONFIDENTIALITY ACT
- ☐ RIGHT TO RECEIVE AND REVIEW ALL SCHOOL RECORDS FROM THE STUDENT'S TEMPORARY AND PERMANENT SCHOOL FILE, INCLUDING DAY-TO-DAY SCHOOL RELATED INFORMATION (E.G., GRADE REPORTS, PARENT NOTIFICATIONS, STUDENT WORK, ETC.)
- ☐ OTHER AUTHORITY (EXPLAIN IN DETAIL):

  _____

  _____

  _____

THE UNDERSIGNED ACKNOWLEDGES THAT ONCE HE/SHE HAS SIGNED BELOW, THIS FORM WILL BE FORWARDED FOR VERIFICATION TO THE OTHER PARENT. IF NO OBJECTION TO THE ASSERTIONS CONTAINED HEREIN IS RECEIVED WITHIN 7 DAYS OF TRANSMITTAL TO THE PARENT, **[INSERT NAME OF FACILITY/SCHOOL]** WILL COMPLY WITH ALL REQUESTS FROM THE UNDERSIGNED IN CONFORMITY WITH THIS DOCUMENT. THE UNDERSIGNED RECOGNIZES THAT IT IS A CRIMINAL OFFENSE TO EXECUTE A FRAUDULENT DOCUMENT IN THE STATE OF ILLINOIS. **[INSERT NAME OF FACILITY/SCHOOL]** RESERVES THE RIGHT TO CHECK THE ACTUAL COURT FILE, IF APPLICABLE, TO VERIFY EACH PARENT'S AUTHORITY AT ANYTIME. PARENTS MAY BE ASKED TO UPDATE THIS FORM FROM TIME-TO-TIME AS REQUIRED BY THE SCHOOL AND DUE TO ANY CHANGE IN CIRCUMSTANCES.

SIGNED:_____ **DATE**: _____

NON-CUSTODIAL PARENT

WITNESS: _____ **DATE**: _____

[INSERT SCHOOL LETTERHEAD]

[Insert Date]

[Insert Custodial Parent's Name]
[Insert Custodial Parent's Address]

Re: [Insert name of Student]

Dear [Mr./Ms. Insert Last Name],

Please note that we have received a signed copy of the enclosed Certification of Authority form from [Mr./Ms. Insert Name of Non-Custodial Parent]. This form indicates that [Mr./Ms. Insert Last Name of Non-Custodial Parent] has certified that [he/she] has authority as related to your child, [Insert Name of Child], per those items marked on the form.

We kindly request you to carefully review the form and verify its accuracy. If we do not hear from you within the next seven (7) days, on or before **[Insert due date]**, the form will be accepted as truthful and all school paperwork and school related information will be shared freely by and between you and [Mr./Ms. Insert Name of Non-Custodial Parent] and the school, and authority will be granted as per the form. All objections to the contents of the Certification form should be provided in writing to my attention via electronic or regular mail or by facsimile.

Please feel free to contact me at [INSERT PHONE NUMBER] with any questions.

Sincerely,

[Insert Name of Authorized Individual (i.e., Principal)]
[Insert Title/Position], [Insert School Name]

Enclosure

Online Activities for Staff

WHITTED + TAKIFF + HANSEN LLC

Online Activities Policy – Staff

WHITTED + TAKIFF + HANSEN LLC

School staff are encouraged to use electronic mail and other technology resources to promote student learning and communication with parents of students and the school. If those resources are used, they shall be used for purposes directly related to work-related activities. Technology-based materials, activities, and communication tools shall be appropriate for and within the range of the knowledge, understanding, age, and maturity of students with whom they are used.

School employees, including, but not limited to, classroom teachers and extracurricular activity coaches and sponsors, may set up "blogs" and other social networking accounts using school technological resources and following school policy and guidelines to promote communications with students and parents concerning school-related activities and for the purpose of supplementing classroom instruction. Social networking sites and other online communication options offering instructional benefits may be used for the purpose of supplementing classroom instruction and to promote communications with students and parents concerning school-related activities.

In order for school employees to utilize a social networking site for work-related communication purposes, they shall:

1. Request prior permission from the Head of School or the Head's designee.

2. Set up the site, if granted permission, following guidelines developed by administration and/or approved by the Board of Trustees. If the expenditure of funds is required to complete the setup or maintenance of the site, the requesting staff member shall present an itemized summary of such cost to the Head of School, who is within his/her discretion to underwrite such efforts. Access to the site must also be given to school administrators and technology staff.

3. Notify parents of the site and obtain written permission for students to become "friends" of the site prior to any students being granted access. This permission shall be kept on file at the school as determined by the Principal/Head of School.

4. Once the site has been created, the sponsoring staff member is responsible for the following:

    a. Monitoring and managing the site to promote safe and acceptable use and compliance with school policies; and

    b. Observing applicable confidentiality restrictions concerning release of personally identifiable student information under state and federal law, and pursuant to applicable school policies.

Staff members are discouraged from creating personal social networking accounts to which they invite current or future students to be friends. Employees taking such action do so at their own risk. All employees shall be subject to disciplinary action if their conduct relating to use of technology or online resources violates this policy or other applicable school policy,

statutory, or regulatory provisions governing employee conduct, or the protection of student record information; or if it impairs the staff member's job performance or effectiveness in the work setting, or otherwise casts public perception of the school in a negative light. Staff shall endeavor to protect the health, safety, and emotional well-being of students and confidentiality of student record information both in the school setting and in all online actions. Conduct in violation of this policy, including, but not limited to, conduct relating to the use of technology, social networking, or online resources, may form the basis for disciplinary action up to and including termination.

Abused and Neglected Children's Reporting Act ("ANCRA")

WHITTED + TAKIFF + HANSEN LLC

Current Standards for Neglect/Abuse Reporting Because Child is not Receiving Proper Mental Health Care

WHITTED + TAKIFF + HANSEN LLC

QUERY:

Under the Abused and Neglected Children's Reporting Act ("ANCRA"), may a parent or caretaker be reported for potential child neglect for failing to obtain mental health services for a seriously mentally ill child?

RESPONSE:

Yes, if the lack of mental health treatment could, if left untreated, constitute a serious or long-term harm to the child.

ANALYSIS:

ANCRA[1] requires mandated reporters to report any suspected abuse or neglect. It also provides rebuttable "good faith" immunity for such reports. 325 ILCS 5/9. At 325 ILCS 5/3 neglect is defined, in part, as "Any child who is not receiving proper nourishment or medically indicated treatment or other care necessary for child's well being" including "care not provided solely on the basis of present or anticipated mental or physical impairment as determined by a physician acting alone or in consultation with other physicians."

Appendix A to the ANCRA regulations at 89 Ill.Admin.Code 300 provides a more complete definition of "medical neglect," and includes several factors to consider, such as the probable outcome without medical treatment, the seriousness of the health problem, and the generally accepted health benefits of the prescribed treatments. This definition also provides that neglect may be found where there is "lack of follow-through on a prescribed treatment plan for a condition that could become serious enough to constitute serious or long-term harm to the child if the plan goes unimplemented."

Thus, the harm without treatment needs to be of a very serious nature. Generally speaking, in the absence of a compelling state interest, parents have a right to refuse medical treatment on behalf of their children. The US Supreme Court has articulated the concept of personal liberty found in the Fourteenth Amendment as a right to privacy which extends to certain aspects of a family relationship United States v. Orito, 413 U.S. 139 (1973). Serious harm to the child, however, will constitute a compelling interest to override this right and allow the state to step in under the doctrine of *parens patriae*. Prince v. Massachusetts, 321 U.S. 158 (1944). State case law will differ over what constitutes "serious harm."

If the parent is attempting some health intervention, albeit not precisely the conventional treatment recommended, it may not be neglect. The leading case in this area, Matter of Hofbauer, 47 N.Y. 2nd 648 (N.Y. 1979), involved a child suffering from Hodgkin's disease, which is commonly fatal if not treated. Conventional physicians had recommended radiation and chemotherapy for the child. A New York Court of Appeals found no medical neglect on the part of parents who failed to follow the conventional treatment and instead placed the child under the care of a licensed physician advocating alternative therapies. The

[1] The Abused and Neglected Children's Reporting Act

court stated "in our view, the court's inquiry should be whether the parents, once having sought accredited medical assistance and having been made aware of the seriousness of their child's affliction and the possibility of cure if a certain mode of treatment is undertaken, have provided for their child a treatment which is recommended by their physician and which has not been totally rejected by all responsible medical authority." Id. at 656. (emphasis added) There was evidence at hearing to support some effectiveness of the unconventional treatment.

Illinois law also provides that it is not neglect if the parent objected to medical treatment on religious grounds. 325 ILCS 5/3. However, when the treatment needed by a child is proven to be matter of life and death, courts will routinely overrule the parent's religious arguments, find the child dependent and assign a guardian to consent to medical care. See In re Willmann, 24 Ohio App.3d 191 (Ohio 1986). (Child with aggressive cancer deemed dependent by court where parents believed he could be healed by prayer. Court heard evidence that the child would likely die within one year without recommended surgery).

There are no cases in Illinois directly addressing medical neglect in the mental health context. In Illinois, most cases have dealt with serious medical issues such as cancer, which, as described above, without treatment, could result in almost immediate death to the child. However, there is also a line of cases dealing with young children who generally experience failure to thrive, so while not in imminent danger of death, there is a substantial risk of serious future harm. The Illinois Courts did find medical neglect in these "failure to thrive" cases. For example, in In re Edward T., 343 Ill.App.3d 778 (1st Dist. 2003) the court found that a child diagnosed with non-organic failure to thrive was neglected. The 10-month old child weighed only 13.9 pounds, had severe developmental delay, and had not received any immunizations. The court heard evidence that within just a week of a hospitalization the child had gained a pound, was eating well, and had begun to hold his head up and even crawl. See *also* In re K.T., 361 Ill.App.3d 187 (1st Dist. 2005), in which one child with severe disabilities who needed continuous care and monitoring was referred for home health nursing services and physical, occupational and speech therapy. Neglect was found when the parent failed to enroll the child in these prescribed services.

An Illinois Appellate Court has also found medical neglect where the child's health was jeopardized but not immediately life-threatening. In In re Stephen K., 867 Ill.App.3d 7 (1st Dist. 2007), the court upheld a finding of medical neglect by the parents of a 17 year old with Cystic Fibrosis. The parents had consistently missed medical appointments, failed to comply with treatment suggestions, and neglected to utilize programs that would have provided them with subsidized nutritional supplements. While the child was not facing immediate death, he failed to gain weight and was chronically malnourished.

Other state cases provide guidance regarding medical neglect in the mental health context. In one such case, In the Matter of Amanda M., 812 N.Y.2d 708 (N.Y. 2006), the court found a custodial grandparent had medically neglected her grandchild for failing to provide only a single therapy session following the child's sexual assault. After the child was taken to a hospital hearing voices and threatening to hurt herself and her grandmother, the grandmother continually missed follow-up counseling sessions.

Similarly, in In the Matter of William AA, 24 A.D.3d 1125 (N.Y. 2005), a parent's handling of her child's mental health situation was deemed medical neglect. The child, who had been diagnosed with Depression and ODD, was supposed to be taking certain medications recommended by a psychiatrist. First, the parent failed to follow up with the child's physician to track side effects. When the child had problems the parent felt were related to the medication, the parent discontinued it without informing the psychiatrist. The court held that the New York family Court had proven that the parent's actions and inactions placed the child's physical, emotional or mental health in imminent danger of impairment. *See also* Miller v. Orbaker, 17 A.D.3d 1145 (N.Y. 2005), in which the court upheld a sole custody award after a parent refused to acknowledge her child's mental health issues, and indicated that, if awarded custody, she would discontinue his medication and pursue only "church," no other mental health treatment. The court noted that custody was properly with the father, who recognized the special needs of the child and was prepared to obtain the proper treatment for him.

Conclusion

The decisional case law establishes a foundation upon which an Illinois court would likely enter a finding of neglect where parents fail to obtain medically prescribed mental health services and treatment for their child. The central issue is whether the failure would result in serious, long-term harm to the child.