

2023 State Principals Conference

The Toughest Cases



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Agenda



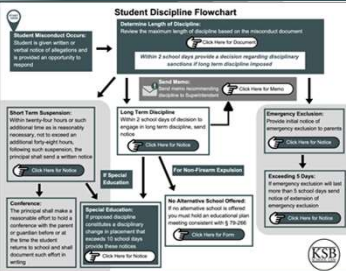
- New Nebraska Disciplinary Rules
- Students with Disabilities (or who should be evaluated...)

Nebraska Discipline Law Changes



"I know I shalt not, but...I shaltd."

The KSB Flowchart



Discipline Definitions



- Short-term suspension - exclusion of student from attendance in all schools within system for a period not to exceed 5 school days
- Long-term suspension – exclusion of student from attendance in all schools within system for 6 through 19 school days
- Expulsion – remainder of semester; remainder of semester plus following semester; one calendar year
 - Depends on timing and offense

Discipline Definitions



- Mandatory reassignment means the involuntary transfer of a student to another school in connection with any disciplinary action.
- Emergency exclusion means not allowing a student to attend school due to:
 - A communicable disease that poses an imminent threat to the health or safety of the school community
 - Student conduct presents a clear threat to the physical safety of himself, herself, or others or is so extremely disruptive to make temporary removal necessary to preserve the rights of other students to pursue an education

New Rule: Pre-Kindergarten through 2nd Grade



- General Rule: schools cannot "suspend" a student in pre-kindergarten through second grade
- Exception: if the student brings a deadly weapon on school grounds, in a school vehicle being used for a school purpose, or at a school-sponsored activity or athletic event
 - Deadly Weapon: any firearm, knife, bludgeon, or other device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or intended to be used is capable of producing death or serious bodily injury
- School must develop a policy to implement this requirement and must include disciplinary measures inside the school as an alternative to suspension

Other Authorized Actions



Other Authorized Actions



- Administrative and teaching personnel may take actions regarding student behavior . . . which are:
 - reasonably necessary
 - to aid the student
 - further school purposes or
 - prevent interference with the educational process

Other Authorized Actions



- Includes, but need not be limited to:
 - counseling of students
 - parent conferences
 - rearrangement of schedules
 - Keep student after regular hours to do additional work
 - restriction of extracurricular activity
 - requirements that a student receive counseling
 - psychological or psychiatric evaluation upon written consent of parent or guardian

Emergency Exclusion



"I mean I suppose we could run some tests, but it's definitely diabetes."

Emergency Exclusion



- If student has dangerous communicable disease transmissible through normal school contacts and poses an imminent threat to the health or safety of the school community; or
- If student's conduct presents **clear threat** to **physical safety** of himself, herself, or others, **or is so extremely disruptive** as to make temporary removal necessary to preserve the rights of other students to pursue an education

Emergency Exclusion



- Any emergency exclusion must be:
 - Based upon a clear factual situation warranting it **and**
 - Shall last not longer than is necessary to avoid the dangers described in the previous slide

Emergency Exclusion



- Limited to 5 days initially
 - Follow same procedure as short-term suspension
- Beyond 5 days
 - school board must adopt hearing procedure
 - final determination must be made within 10 school days after initial date of exclusion
 - Follow SDA pre-hearing and hearing procedures; may modify to meet shortened time period

Emergency Exclusion in Practice



- Investigate and determine if E.E. is necessary
 - Clear threat to physical safety? or
 - Extremely disruptive?
- Due Process
 - Give oral/written notice of charges to student
 - Explanation of evidence
 - Opportunity to present his or her version

Emergency Exclusion in Practice



- Give written notice to student and parents
 - Within 24 hours (or an additional 48)
 - Describe conduct, misconduct, or rule/standard violation
 - Reasons for action taken
 - Requirements for return
- Conference
 - Make "reasonable effort" to hold with parent before or at the time the student returns to school and shall document such effort in writing

Emergency Exclusion in Practice



- Extension past 5 days
 - Board must have adopted procedures for a hearing
 - Give written notice of extension
 - Include copy of procedures and hearing request form
 - If hearing is requested, must hold and make final determination within 10 school days of initial date of exclusion

Short-Term Suspensions – New Changes



"Hey, Mom, remember telling Dad you just knew you'd get a call from the principal sometime? Hold on a sec..."

S-T Suspension - Procedure



- Within 24 hours or such additional time as is reasonably necessary following S-T suspension (not to exceed an additional 48 hours), Principal must send a written statement to student & parent/guardian describing conduct, misconduct, or violation of the rule or standard and the reasons for the action taken
- Principal must make a "reasonable effort" to hold a conference with parent/guardian before or at the time the student returns to school and document such effort in writing

S-T Suspension - Classwork



- Schools must develop and adopt guidelines that provide suspended students with the opportunity to complete classwork and homework
 - Cannot require student to attend the school's alternative program for expelled student to complete the work
- Must provide guidelines to student and parent/ guardian at the time of suspension

Long-Term Suspension, Expulsion, and Mandatory Reassignment - Changes



"Oh, you know, languishing. You?"

Grounds for Long-Term, Expulsion, and Mandatory Reassignment



- Review section 79-267
- 11 grounds

Procedures - Principal



- The decision to recommend discipline must be made within 2 school days after learning of the alleged student misconduct
- On the date of the principal's decision, he or she must file a written charge and a summary of the evidence supporting such charge with the superintendent
- Within 2 school days after the decision, school must send written notice by registered or certified mail or personally deliver the notice to Student and his or her parent or guardian informing them of their rights under SDA

**Procedures – Principal
Written Notice**



- The written notice to the student and his parent or guardian must include the following:
 - Statement that if student is suspended pending the hearing, student may complete classwork/homework/examinations missed during suspension pursuant to school's guidelines
 - A description of the hearing and appeal procedures
 - A statement of the right to inspect S's academic and disciplinary records and any affidavits to be used at the hearing and the right to know the names of the witnesses who will appear at the hearing and the substance of their testimony
 - A form to request a hearing to the address provided on the form

**Procedures – Principal
Written Notice**



- Mandatory reassignment is subject to all of the above procedural requirements regardless of its implementation date

**New Rule at the Conclusion of
Expulsion**



- At the conclusion of an expulsion, the school must reinstate the student and accept nonduplicative, grade-appropriate credits earned by the student during the term of expulsion from any Nebraska accredited institution or institution accredited by one of the six regional accrediting bodies in the US

The Hearing



"See, I think it broke down when you explained in court, under oath, 'my fiendish plot.'"

Scheduling Holding the Hearing



- If a hearing is requested timely, hearing must be scheduled held within 5 school days after receiving request appointment of the hearing examiner unless hearing examiner finds "good cause" with consent of the parties
- Cannot hold a hearing without 2 school days' actual notice to Principal, student, and parents/guardians unless everyone agrees

Examination Copies of Records



- Principal, school attorney, student, and parent/guardian have the right to examine receive a copy of all records, written statements, and statement of any witness in school's possession at a reasonable time no later than 48 hours prior to the hearing

The Evidence

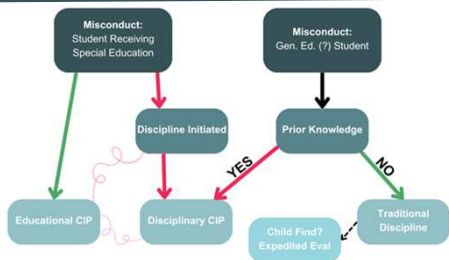


- Principal presents to the hearing examiner:
 - Statements, **in affidavit form**, of any person having information about the student's conduct
 - Student's records
 - **BUT ONLY** if the statements and records have been ~~made available~~ **provided** to the student or the student's parent, guardian, or representative **at least 48 hours** prior to the hearing
 - Appropriate school personnel must explain and interpret the information contained in the records prior to or at the hearing, to the student, parent, guardian, or representative, upon request

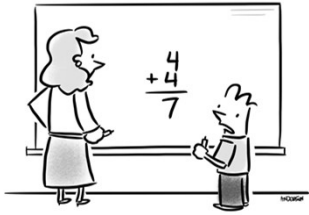
There's a time to think and a time to act! Now's the time to act think!



The Paths

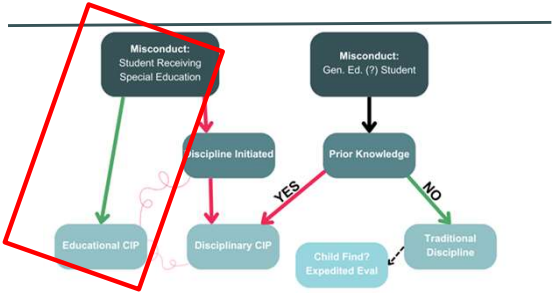


Path 1: Educational CIP/Modify IEP



"I thought you were supposed to meet me where I'm at.
And where I'm at is 7."

The Paths



34 C.F.R. § 300.324



- IEP team must consider
 - "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"
- Regular ed. teacher must speak into
 - "Appropriate positive behavioral interventions and supports and other strategies for the child"

34 C.F.R. § 300.324



- IEP team **must** revise the IEP, as appropriate, to address
 - Lack of progress
 - The child’s anticipated needs
 - “Other matters”

OSEP told you so last summer!



- Q&A: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions, 81 IDELR 138 (OSEP 2022)
 - **IEP reviews and revisions are appropriate to address, among other issues:** any lack of expected progress toward meeting the annual goals; the results of any reevaluation; information about the child provided to, or by, the parent; the child’s anticipated needs; or **other matters such as the behavior that led to the short-term disciplinary removal including the impact on the child’s learning or that of others.**

So. Tioga Sch. Dist.

123 LRP 25019 (SEA PA 7/23/23)



- Elementary student received push-in services and behavior supports in gen ed setting
- Series of short-term removals
- Team conducted MDT and determined behaviors were a manifestation
- Did not review/revise the IEP
- Instead, called IEP meeting and recommended full-time emotional support classroom
- Parents objected and filed due process
 - Argued manifestation and “out of order” discussion

So. Tioga Sch. Dist.
123 LRP 25019 (SEA PA 7/23/23)



- H.O.
 - Can't decide placement/location and then develop an IEP to fit
 - Placement in LRE is based on student's IEP
 - If IEP can't be implemented in a different setting, then the placement is not appropriate
 - In this case, IEP did not mention need for smaller class sizes, mental health services, and other supports school gave for reason for CIP
 - Can't "steer" student to a more restrictive placement and determine services after

34 C.F.R. § 300.530(a)



- This is the first section of the first regulation in the disciplinary CIP section...
- "Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct."

There's (probably) no going back



Ozark City Bd. of Educ.

121 LRP 39438 (SEA Ala. 2021)



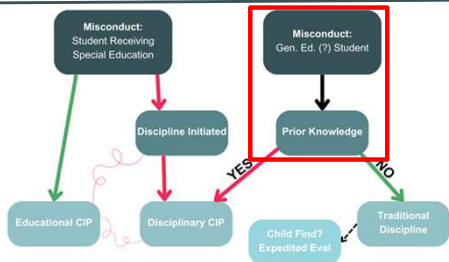
- Student with an intellectual disability and significant behavioral outbursts
- In response to behavior, school initiated long term suspension
- School then recharacterized the change of the student's placement as a non-disciplinary change of placement to homebound
- Grandmother brought complaint
- IHO: School impermissibly pulled a "switch a roo" to avoid the consequences of the pending MDR

Path 2? Disciplinary CIP for Gen. Ed.



"Your numbers are down, and your attitude stinks. I'm afraid you're on shelf duty until you can turn things around."

The Paths



"No, Bobby, she's really smart" (Rights of students not yet verified)



"Instead of calling my mom, how would you feel about exploring a more positive and preventive strategy."

Child Find Failures Resurface with Discipline



- "A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge ... that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred."
 - 34 CFR § 300.534(a)

Basis of Knowledge

34 CFR § 300.534(b)(1)



- A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred:
 - The **parent of the child expressed concern in writing** to supervisory or administrative personnel of the appropriate educational agency, **or a teacher of the child**, that the child is in need of special education and related services.

Basis of Knowledge

34 CFR § 300.534(b)(2)



- A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred:
 - The parent of the child requested an evaluation of the child pursuant to 34 CFR 300.300 through 34 CFR 300.311.

Basis of Knowledge

34 CFR § 300.534(b)(3)



- A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred:
 - The teacher of the child, or other LEA personnel, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education or other supervisory personnel of the agency.

Letter to Nathan

73 IDELR 240 (OSEP 2019)



- OSEP
 - Child is entitled to MDR if school has prior knowledge
 - "This provision does not include an exception to allow additional time to complete an evaluation prior to conducting the MDR."
 - Team must hold MDR within 10 days of the decision to change placement for disciplinary reasons

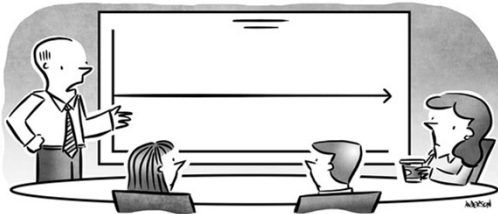
Letter to Nathan

73 IDELR 240 (OSEP 2019)



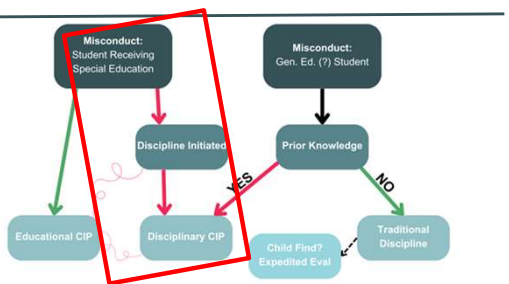
- OSEP
 - Team must still consider "all relevant information" in child's file and from teacher observations "to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability."
 - No IEP, so no "failure to implement" analysis
 - "Based upon its review and consideration of the available information, the group would determine whether the conduct in question was caused by, or had a direct and substantial relationship to the child's **suspected** disability."

Path 2: Disciplinary CIP



"I mean it's got to do something sooner or later, right?"

The Paths



34 C.F.R. § 300.530(b)



"School personnel ... may remove a child with a disability who violates a code of student conduct from his or her current placement ... for not more than 10 consecutive school days ... and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536)."

"Series of Removals"



- A "series of removals that constitute a pattern" totaling more than 10 days in the year
 - Yes, you inherit a prior school's removals for mid-year transfers
- Is the child's behavior "substantially similar to the child's behavior in previous incidents"?
- Additional factors:
 - Length of each removal
 - Total amount of time the child is removed
 - Proximity of the removals to one another

Redmond Sch. Dist. 2J

123 LRP 16827 (SEA OR 2023)



- A 10 year old student verified under ASD and ED
- Parent was asked to come pick up the student 14 times during period at issue, and 13 of those times student was considered suspended but parents were not informed
 - No MDR
 - Other disciplinary removals occurred as well
- During the investigation the Principal expressed that students are sometimes sent home because of behavior but those removals are not recorded as suspensions

Redmond Sch. Dist. 2J

123 LRP 16827 (SEA OR 2023)



- State ED:
 - District violated IDEA by failing to conduct an MDR when cumulative removals exceeded 10 school days
 - This is a result of the failure to count informal removals based on behavior as "disciplinary removals"

What about partial days?



- "[P]ortions of a school day that a child has been suspended may be considered a removal in determining whether there is a pattern of removals." 71 Fed. Reg. 46,715 (2006).
 - No federal guidance on how to calculate
- Look to state attendance requirements and school policies for how days are counted
- Watch out for repeated partial day removals--signals team may need to explore additional supports
- If the partial day removal is linked to a code of conduct violation--count towards MDR

Manifestation Determinations



- Who?
- When?
- What to review?
- What questions to ask?
 - If yes
 - If no

Who?



- The MDR must be conducted by “the LEA, the parent, and relevant members of the child’s IEP Team (as determined by the parent and the LEA).” 34 CFR § 300.530(e)(1).
 - Campus disciplinarian can participate on the team
 - Danny K. v. Dep’t of Educ., State of Hawaii, 57 IDELR 185 (D. Hawaii 2011)
 - Parents can invite participants but do not have the right to veto a schools choice of team members
 - Fitzgerald v. Fairfax County Sch. Bd., 50 IDELR 165 (E.D. Va. 2008)

When?



- “[W]ithin 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.” 34 CFR § 300.530(e)(1).
- Before the disciplinary change of placement occurs

What to Review



- The team must “review all relevant information in the student’s file, including the child’s IEP, [and] teacher observations”
- “...and any relevant information provided by the parents. ...”
 - 34 CFR § 300.530(e)(1)

What Questions to Ask



- Was this misbehavior caused by the student's disability?
- Was the conduct in question caused by or did it have a direct and substantial relationship to the child's disability?
- Was the misconduct a direct result of the district's failure to implement the IEP?

Misconduct NOT a Manifestation



- Must follow applicable state laws regarding student discipline
- Develop Interim Alternative Educational Setting
 - Determined by IEP team
 - Can be as same meeting as manifestation

If the Behavior IS a Manifestation



- If student's conduct is a manifestation of the student's disability, the IEP team must:
 - Conduct a functional behavioral assessment (provided the district had not conducted such assessment prior to the conduct at issue) and implement a BIP
 - When a behavioral intervention plan already has been developed, review the plan and modify it as necessary
 - **Return the child to the placement from which he was removed, unless the parent and district agree to a change in placement as part of the modification of the behavioral intervention plan**

What if the situation is dangerous?!



"I've prepared a few different options."

Due Process Filing



- 34 C.F.R. §300.532(b)(ii)
 - A hearing officer has the authority to:
 - "Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others."
 - Hearing under this section is expedited

Honig Injunction



- *Honig v. Doe*, 559 IDELR 231 (U.S. 1988)
 - SCOTUS: There is no emergency exception to stay-put under IDEA that would allow a school to unilaterally violate stay-put due to dangerous behavior
 - BUT the IDEA's provisions permitting a school district to seek a judicial remedy in disputes allows it to seek a court order to change the student's placement while IDEA action is in process
 - Remedy appropriate where school "believes that maintaining the child in the current educational placement is substantially likely to result in injury to the child or others"

Light v. Parkway C-2 Sch. Dist.,

41 F.3d 1223 (8th Cir. 1994)



- Interpretation of *Honig* with similar facts
- Requires a showing of:
 - Substantial likelihood of injury in the current educational placement, and
 - School has made reasonable efforts to accommodate the student's disability so as to minimize the likelihood of injury
- "A school seeking to remove a dangerously disruptive child from [his] current educational placement can overcome the automatic stay-put injunction only by obtaining the permission of the parents or the equitable sanction of a court."

Light v. Parkway C-2 Sch. Dist.,

41 F.3d 1223 (8th Cir. 1994)



"We reject as tautological the contention of Lauren's parents that a disabled child must be shown to be "truly dangerous" as well as substantially likely to cause injury. Their argument derives from a misreading of *Honig* and warrants no extensive rebuttal. More importantly, we reject their suggestion that schools can only remove children who intend to cause injury. The Lights argue that a mentally disabled child cannot be a "dangerous" child within the meaning of *Honig* when that child's disability renders her unable to intend the injuries she inflicts. A child's capacity for harmful intent plays no role in this analysis."

Light v. Parkway C-2 Sch. Dist.,

41 F.3d 1223 (8th Cir. 1994)



"Even a child whose behaviors flow directly and demonstrably from her disability is subject to removal where that child poses a substantial risk of injury to herself or others. We note that in the case of dangerous disabled children the purpose of removal is not punishment, but "maintaining a safe learning environment for all . . . students." Moreover, the removal of a dangerous disabled child from her current placement alters, but does not terminate, her education under the IDEA."

Light v. Parkway C-2 Sch. Dist.,

41 F.3d 1223 (8th Cir. 1994)



"[W]e emphatically reject the contention that an "injury" is inflicted only when blood is drawn or the emergency room visited. Bruises, bite marks, and poked eyes all constitute "injuries" in the context of this analysis. More broadly, we reject the proposition that a child must first inflict serious harm before that child can be deemed substantially likely to cause injury."

Questions?



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