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Counting to Ten: The Dos and Don'ts of Special Education Discipline

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NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel.

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I. WHETHER TO IMPOSE DISCIPLINE AT ALL MAY DEPEND ON THE SPECIFIC SITUATION.

A. Why Do Schools Impose Student Discipline?

1. Safety concerns.
2. Impact on the educational environment.
3. Alter student behavior.
4. Other educational or programmatic reasons.

B. How do these concerns compare to the function of student behavior?

II. THE BASICS OF SPECIAL EDUCATION DISCIPLINE.

A. Schools Must Follow all Disciplinary Laws and Procedures Applicable to Nondisabled Students in Addition to the Legal Requirements Applicable to Students with Disabilities.¹

1. **School Authority in General.** Pursuant to SCDL § 13-32-1:
“Superintendents, principals, supervisors, and teachers have disciplinary authority over all students while the students are in school or participating in or attending school sponsored activities whether on or off school premises. Superintendents and principals may also discipline students for aggressive or violent behavior that disrupts school or that affects a health or safety factor of the school or its programs.”
2. **Suspensions, Generally.** Pursuant to SDCL § 13-32-4.2

The school board in any district may authorize the summary suspension of pupils by principals of schools for not more than ten school days and by the superintendent of schools for not more than ninety school days. In case of a suspension by the superintendent for more than ten school days, the pupil or his parents or others having his custodial care may appeal the decision of the superintendent to the board of education. Any suspension by a principal shall be immediately reported to the superintendent who may revoke the suspension at any time. In event of an appeal to the board,

¹ The quoted provisions of South Dakota law are meant as examples only and each school district must comply with all requirements of applicable state law with respect to student discipline.

the superintendent shall promptly transmit to the board a full report in writing of the facts relating to the suspension, the action taken by him and the reasons for such action; and the board, upon request, shall grant a hearing to the appealing party. No pupil may be suspended unless:

- a. The pupil is given oral or written notice of the charges against him;
- b. The pupil is given an oral or written explanation of the facts that form the basis of the proposed suspension; and
- c. The pupil is given an opportunity to present his version of the incident.

In the event of a suspension for more than ten school days, if the pupil gives notice that he wishes to appeal the suspension to the board, the suspension shall be stayed until the board renders its decision, unless in the judgment of the superintendent of schools, the pupil's presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process, in which case the pupil may be immediately removed from school, and the notice and hearing shall follow as soon as practicable.

3. "The suspension of pupils in need of special education or special education and related services includes the general due process procedures used for all pupils and the additional steps in the process specified in this chapter that a district must take if the student is receiving special education or special education and related services under an individualized education program." ASRD 24:05:26:01

4. **Expulsions in General.** Pursuant to SDCL § 13-32-4:

The school board of every school district shall assist and cooperate with the administration and teachers in the government and discipline of the schools. The board may suspend or expel from school any student for violation of rules or policies or for insubordination or misconduct, and the superintendent or principal in charge of the school may temporarily suspend any student in accordance with § 13-32-4.2. The rules or policies may include prohibiting the following:

- a. The consumption or possession of beer or alcoholic beverages on the school premises or at school activities;

- b. The use or possession of a controlled substance, without a valid prescription, on the school premises or at school activities; and
- c. The use or possession of a firearm, as provided in § 13-32-7, on or in any elementary or secondary school premises, vehicle, or building or any premises, vehicle, or building used or leased for elementary or secondary school functions or activities.

In addition to administrative and school board disciplinary action, any violation of § 13-32-7 shall be reported to local law enforcement authorities.

The period of expulsion may extend beyond the semester in which the violation, insubordination, or misconduct occurred. Any expulsion for consumption or possession of beer or alcoholic beverages may not extend beyond ninety school days. If a student has intentionally brought a firearm onto school premises, the expulsion may not be for less than twelve months.

However, the superintendent or chief administering officer of each local school district or system may increase or decrease the length of a firearm-related expulsion on a case-by-case basis. The South Dakota Board of Education Standards shall promulgate rules pursuant to chapter 1-26 to establish administrative due process procedures for the protection of a student's rights. The administrative due process procedures shall include a requirement that the school give notice of a student's due process rights to the parent or guardian of the student at the time of suspension or expulsion. Each school district board shall provide a procedural due process hearing, if requested, for a student in accordance with such rules if the suspension or expulsion of the student extends into the eleventh school day.

This section does not preclude other forms of discipline which may include suspension or expulsion from a class or activity.

This section does not prohibit a local school district from providing educational services to an expelled student in an alternative setting.

5. **Procedural Due Process.** Public school students possess federal constitutional rights to both procedural and substantive due process before they are removed from school. *Goss v. Lopez*, 419 U.S. 565 (1975). The U.S. Supreme Court did not address the actions a district must take before imposing suspensions longer than 10 days or in conjunction with

permanent expulsions in its decision but stated that such removals may require more formal procedures than short-term removals.

- a. What constitutes fair notice varies with the circumstances and the timeframe. The key to an appropriate timeframe lies in determining how much advance notice a student needs to prepare sufficiently for meaningful participation in the hearing. *Nash v. Auburn Univ.*, 812 F.2d 655 (11th Cir. 1987).
- b. When a student with a disability has engaged in behavior that would warrant an expulsion under the school's generally applicable student code of conduct and the behavior has been determined not to be a manifestation of the student's disability, then the student may be subjected to the same disciplinary sanction that a nondisabled student would receive. 34 CFR 300.530 (b).

Practice Point: S.D. Law Chapter 13-32-4.2 requires school districts to provide procedural due process when suspending or expelling students. Following the applicable state law, therefore, typically satisfies the requirements of the *Goss* case.

B. Schools Cannot Discipline Students with Disabilities More Harshly than Their Nondisabled Peers.

1. **The Individuals with Disabilities Education Act (“IDEA”).** The IDEA expressly limits the discipline of students with disabilities to the same action that the school district would otherwise take against children without disabilities. *See* 20 U.S.C. § 1415(k)(1)(B), (C).
2. **Section 504 and the ADA.** Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and the Americans with Disabilities Act prohibit discrimination on the basis of disability. In addition to other provisions relevant to students with disabilities, imposing more stringent disciplinary measures on a student with a disability (or imposing discipline on a student with a disability that would not be imposed on a nondisabled student at all) constitutes prohibited disability discrimination under both Section 504 and the ADA. *See, e.g., Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973* (OCR 2022).
3. **Other Antidiscrimination Laws Apply to Student Discipline.**

- a. **The South Dakota Human Rights Act.** The South Dakota Human Rights Act, SDCL Ch. 20-13, is an anti-discrimination statute which prohibits, among others forms of discrimination in educational institutions, discrimination on the basis of sex and disability. The Human Rights Act specifically prohibits discriminatory expulsions.

C. Protections for Nondisabled Students. Students who have not been formally identified as children with disabilities may nonetheless have protections under IDEA. A student who has not been identified as a child with a disability may assert the procedural and substantive protections that apply to special education students—including the right to a manifestation determination—if the school district had “knowledge” that the child had a disability before the behavior that precipitated the disciplinary action. 20 U.S.C. § 1415(k)(5)(A); 34 C.F.R. § 300.534(a).

1. **Knowledge.** In determining whether a regular education student is entitled to the procedural safeguards of IDEA, the pivotal question is whether the school district had “knowledge” that the child had a disability. Under IDEA, a school district is deemed to have knowledge if:
 - a. the parent expressed concern in writing to supervisory or administrative personnel, or to a teacher of the child, that the child is in need of special education and related services;
 - b. the parent requested an evaluation of the child pursuant to IDEA;
 - c. a teacher or other school staff has expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director or to other supervisory personnel. 20 U.S.C. § 1415(k)(5)(B).

Practice Point: Courts and hearing officers broadly construe these criteria and, depending on the totality of the circumstances, may conclude that a school district had “knowledge” of a student’s disability, despite the situation not meeting any one of the specific provisions. *See, e.g., Norwood Pub. Schs.*, 124 LRP 32443 (SEA MA 2024).

2. **Exception.** A school district will not be deemed to have knowledge of a disability if (a) the parent has refused to allow the student to be evaluated; (b) the parent has refused services; or (c) if the student was evaluated and deemed ineligible for services. 20 U.S.C. § 1415(k)(5)(C); 34 C.F.R. § 300.534(c).

3. **Revocation of Consent.** A school district is not deemed to have knowledge that a student is a child with a disability if the parent revoked consent for special education services before the disciplinary incident but asks that such services be reinstated after the disciplinary incident.
4. **Impact of Knowledge or Lack Thereof.**
 - a. **No Knowledge.** If the school district did not have knowledge that the student was a child with a disability before taking disciplinary measures against the student, the student may be subjected to the same disciplinary measures applied to students without disabilities who engage in comparable behaviors.
 - b. **Knowledge.** If the school district had “knowledge” that a student had a disability before the behavior that precipitated the disciplinary action, the student may assert the procedural and substantive protections that apply to special education students—including the right to a manifestation determination. 20 U.S.C. § 1415(k)(5)(A); 34 C.F.R. § 300.534(a).
5. **Parent May Request Evaluation.** Even if the school has no knowledge of a disability, as defined above, the child’s parent may request an evaluation while the disciplinary action is pending. Such evaluations must be conducted in an *expedited* manner. Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services. If the child is determined to have a disability, then the special education and related services of IDEA must be provided. 20 U.S.C. § 1415(k)(5)(D)(ii) (2004).

III. WHEN DO DISCIPLINARY REMOVALS CONSTITUTE A CHANGE IN PLACEMENT?

- A. **The IDEA and Section 504 Have Procedural Requirements with Regard to Disciplinary Removals that Constitute a Change in Placement.** Most notably, a manifestation determination is required whenever a school district changes a student’s placement for disciplinary reasons.
- B. **Disciplinary Removals of More than 10 Consecutive Days.** An expulsion or a suspension of a special education student for a period of time *in excess of ten days* constitutes a change in placement that requires a review of the student’s IEP and triggers due process rights, including the right to a contested hearing.

Moreover, if the behavior leading to the discipline is related to or arose out of the student's disability, a suspension exceeding ten days violates the IDEA.

1. ***Honig v. Doe***. The ten-day rule is rooted in the case of *Honig v. Doe*, 484 U.S. 305 (1988). In that case, the United States Supreme Court held that an expulsion or a suspension of a special education student for a period in excess of ten school days constituted a unilateral change in the student's special education placement by a school district. Parental consent is required before changing the placement of a student with an IEP. The holding of *Honig v. Doe* is reflected in the text of the IDEA. Under the IDEA, school personnel may suspend a student (or order a change to an appropriate interim alternative educational setting) for "not more than 10 school days," if such an action would be applied to children without disabilities. 20 U.S.C. § 1415(k)(1)(B), (C).

C. Patterns of Removal Constituting a Change in Placement. A change in placement occurs when the student has been subjected to a series of removals that constitute a pattern:

1. Because the series of removals total more than 10 school days in a school year;
2. Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
3. Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 C.F.R. § 300.536(a)(2).

Note. The U.S. Department of Education articulated that "portions 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).

Practice Point. Schools are wise to limit their use of suspensions with special education students and, when necessary, suspend for shorter periods of time rather than suspending for five or ten days at a time. Rarely will a student be suspended for significantly more than ten days in a school year without triggering a change in placement.

Practice Point. A pattern of short-term suspensions, none of which exceeds ten days, can be evidence of a practice of disregarding the impact of a student's disability upon his or her misconduct. Such a practice may cause a parent to assert a denial of FAPE on the ground that the school district failed to provide

appropriate programming, improperly changed the student's placement, and discriminated against the student on the basis of his or her disability.

4. **Notice.** On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the school district must notify the parents of that decision, and provide the parents a notice of procedural safeguards. 34 C.F.R. § 300.530(h).
5. Some states may permit schools to make that determination outside of an IEP team meeting. The IDEA regulations merely state that the school district “determines on a case-by-case basis whether a pattern of removals constitutes a change in placement.” 34 C.F.R. § 300.536(b)(1).

D. The IDEA Does *not* Limit the Cumulative Number of Days that a Student with a Disability can be suspended in any given school year. But, the procedural requirements (including manifestation determinations) must be followed for each removal once a change in placement has occurred.

IV. WHAT COUNTS AS A DISCIPLINARY REMOVAL FOR PURPOSES OF THE IDEA OR SECTION 504?

A. Expulsions

B. Out-of-School Suspensions

C. In-School Suspensions. An in-school suspension counts as a day of suspension for purposes of IDEA unless the student is afforded the opportunity to continue to appropriately progress in the general curriculum, to continue to receive the services specified on his/her IEP, and to continue to participate with nondisabled students to the extent the student would have participated with such students in their current placement. *See* 71 Fed. Reg. 46715 (Aug. 14, 2006); *see also Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provision*, 81 IDELR 138 at C-1, C-6, C-7 (OSERS 2022) (“*Discipline Q&A*”).

D. Bus Suspensions. If a student is suspended from the bus and bus transportation is part of the student's IEP, each day of suspension from the bus counts as a day of suspension for purposes of IDEA, unless the school district arranges for alternative transportation. If bus transportation is not a part of the student's IEP, a bus suspension would not count as a suspension for purposes of IDEA. *See, e.g., Letter to Sarzynski*, 59 IDELR 140 (OSEP June 21, 2012); *See also Discipline Q&A* at C-8.

- E. Summer Programming Suspensions.** Under SDCL § 13-26-1, each school district sets the school term for a school year, and the fiscal year begins July 1 and ends June 30. As such, any student summer programming suspension should be counted in line with how an individual school district defines a school year.
- F. Partial Day Suspensions.**
1. **The IDEA.** Partial day suspensions count towards the total days of removal when determining whether a pattern of removal has occurred. *See* 71 Fed. Reg. 46715; *see also* 34 C.F.R. §§ 300.11(c) (defining “school day” as including “a partial day”).
 2. The South Dakota Department of Education issued guidance in January 2021, stating that the definition of a “school day” is any day, including a partial day, that students are attending school for instructional purposes. *See* <https://doe.sd.gov/sped/documents/DISCIPLINE-1221.pdf>. Partial days can be counted for purposes of record keeping.
- G. Informal Removals.** In July 2022, the Office for Civil Rights (“OCR”) issued a guidance document on the discipline of students that included guidance on several types of what the OCR referred to as “informal discipline,” including asking parents to pick up students, referrals to law enforcement, and prohibitions on attending field trips. In short, the OCR cautioned that such informal discipline must be counted towards the number of days of “removal” (e.g., suspensions) for purposes of determining whether a student’s placement has been changed. *Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973* (OCR 2022).

Practice Point: While the 2022 OCR guidance specifically addressed informal removal in terms of Section 504, the guidance also noted that IDEA-eligible students “also have rights under Section 504” and that the OCR’s jurisdiction extends to alleged violations of IDEA-eligible students’ Section 504 rights. The 2022 OSERS guidance treats most informal removals similarly under the IDEA. *See Discipline Q&A* at C-1, C-6, C-7.

Practice Point: School districts should not try to avoid the IDEA’s procedural requirements related to discipline by issuing a trespass notice without following the IDEA’s disciplinary procedures may violate the IDEA. *See Southern Columbia Area Sch. Dist.*, 125 LRP 113 (SEA PA 2024).

V. SCHOOLS MUST CONDUCT A MANIFESTATION DETERMINATION WHEN DISCIPLINARY REMOVALS RESULT IN A CHANGE IN PLACEMENT.

A. Manifestation Determinations under the IDEA. The IDEA provides that a “manifestation determination” must be held in the following situations:

1. **Disciplinary Changes in Placement.** Pursuant to federal law, a manifestation determination meeting must be held within ten school days of any decision to change the placement (e.g., expulsions, suspensions in excess of 10 consecutive days, or a pattern of removal that constitutes a change in placement) of a child with a disability because of a violation of a code of student conduct. *See* 34 C.F.R. § 300.530(e)(1).

Practice Point. Districts need to conduct a separate manifestation determination for each suspension once there is a pattern of removal that gives rise to a change in placement (i.e., after the student reaches 10 cumulative days of suspension).

2. **Unilateral 45-Day Placements.** The IDEA also requires school districts to conduct a manifestation determination within ten school days of the decision to place a student in an interim alternative educational setting for a period of up to 45 days in response to the student committing a violation of the school’s code of student conduct related to weapons, drugs, or serious bodily injury. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’S Discipline Provisions*, (OSEP July 19, 2022) at Question E-1.

B. South Dakota Law

1. “Within ten school days of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the school district, the parent, and relevant members of the student's IEP team, as determined by the parent and the district, shall review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine:
 - a. Whether the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or
 - b. Whether the conduct in question was the direct result of the school district's failure to implement the IEP.

The conduct must be determined to be a manifestation of the student's disability if the district, the parent, and relevant members of the student's IEP team determine that a condition in either subdivision [a] or [b] of this section was met. If the district, the parent, and relevant members of the student's IEP team determine that the condition described in subdivision (2) of this section was met, the district shall take immediate steps to remedy those deficiencies." ARSD 24:05:26:09:3

2. "If the school district, the parent, and relevant members of the IEP team determine that the conduct was a manifestation of the student's disability, the IEP team shall either:
 - a. Conduct a functional behavioral assessment, unless the district had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student; or
 - b. If a behavioral intervention plan already has been developed, review the behavioral intervention plan and modify it, as necessary, to address the behavior.

In addition, and except as provided in § 24:05:26:08.01, the IEP team shall return the student to the placement from which the student was removed, unless the parent and the district agree to a change of placement as part of the modification of the behavioral intervention plan." ARSD 24:05:26:09:04

C. Conducting the Manifestation Determination. At the meeting, the IEP team must:

1. Review all relevant information in the student's file, including the student's IEP, the student's evaluation, past IEPs, past evaluations, any teacher observations, and any relevant information provided by the parents; and
2. Determine whether the behavior was a manifestation of the student's disability. A behavior is a manifestation of the student's disability if the team determines that either:
 - a. The conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

- b. The conduct in question was the direct result of the district's failure to implement the IEP. 34 § C.F.R. 300.530(e)(1).

D. Impact of Determination.

- 1. **Manifestation.** School districts and charter schools *may not* take disciplinary action that changes the placement of a student with a disability if the misbehavior is a manifestation of the student's disability. School districts may, however, implement an interim alternative educational setting for not more than 45 school days related to weapons, drugs, or serious bodily injury. *See Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA'S Discipline Provisions*, (OSEP July 19, 2022), at Question B-2, E-1. Regardless of the outcome of the manifestation determination, the student may remain in the interim alternative educational setting for not more than 45 school days. *Id.* In all other changes of placements, the school district must immediately return the student to his or her last agreed upon placement unless the parents agree to a new placement as part of modifying an IEP or BIP. 34 C.F.R. § 300.530(f)(2).
- 2. **Not Manifestation.** If it is determined that the behavior of the child was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied generally in the same manner. 34 C.F.R. § 300.530(c). For instance, school districts and charter schools *may* expel a student with a disability if the misconduct is not a manifestation of the student's disability. *See* 34 C.F.R. § 300.530(c).

- E. Section 504 Manifestation Determination.** Section 504 requires schools to conduct an evaluation before changing a 504 eligible student's placement. This includes conducting a "manifestation determination" (a type of evaluation) once the student's suspension or expulsion exceeds 10 consecutive days or otherwise constitutes a change in placement. *See, e.g., Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973* (OCR 2022).

VI. SCHOOLS CAN UNILATERALLY CHANGE THE PLACEMENT OF A STUDENT WITH A DISABILITY FOR UP TO 45 SCHOOL DAYS IN LIMITED CIRCUMSTANCES.

- A. Under the IDEA, a school district may unilaterally place a student in an appropriate interim alternative educational setting for up to 45 school days if the

student does any of the following while at school, on school premises, or at a school function:

1. carries or possesses a weapon,
 - a. A weapon is generally defined as a device, instrument, material or substance that is used for or is readily capable of causing death or serious bodily injury, including a knife with a blade of two and a half inches in length or longer. 18 U.S.C. § 930(g)(2) (2004).
 - b. Common objects are not necessarily weapons, even if they are used to inflict some injury. *See Sch. Dist. #831*, 32 IDELR 163 (SEA MN 1999) (pencil used in a stabbing incident did not qualify as a weapon under the IDEA); *In re: Student with a Disability*, 124 LRP 24278 SEA NV 2024) (blunt pencil was not a “weapon”); *Anaheim Union High Sch. Dist.*, 32 IDELR 129 (SEA CA 2000) (paper clip used to cut another student on the bus did not qualify as a weapon under the IDEA); *Anchorage Sch. Dist.*, 45 IDELR 23 (SEA AK 2005) (where student lunged at teacher with scissors, scissors was found to be a “weapon” for purposes of disciplinary removal); *but see California Montessori Project*, 56 IDELR 308 (SEA CA 2011) (determining that rounded-tip scissors were not a “weapon” for purposes of an IDEA disciplinary removal because the scissors were not inherently dangerous); *Scituate Pub. Schs.*, 47 IDELR 113 (SEA MA 2007) (Principal’s necktie is not a “weapon” despite being used to choke principal for a short period of time that resulted in long-lasting red marks); *Kristina C. v. Klein Indep. Sch. Dist.*, Civil Action H-23-2271 (S.D. Tex. Feb 04, 2024) (clay cutter was not a weapon); *Knox County Schools*, 124 LRP 6505 (SEA TN 2024) (12-inch wrench not readily capable of inflicting serious bodily injury and, therefore, not a “weapon” for IDEA purposes when not actively used to inflict serious bodily injury); *GD v. Utica Community Schools*, (E.D. Mich. 2023) (concluding that broken plastic phone receivers and broken thermostats are not “weapons” are not inherently dangerous and, when thrown by a kindergarten student, not readily capable of inflicting serious bodily injury).
 - c. In other words, as one hearing officer phrased it, the “object’s latent capability, coupled with its manner of use, is determinative of whether an object can be characterized as a dangerous weapon.” *Knox County Schools*, 124 LRP 6505 (SEA TN 2024); *see also Ind. Sch. Dist. No. 279, Osseo Area Schools*, 30 IDELR 645 (SEA Minn.

1999) (golf club or baseball bat could be used so as to make it readily capable of causing harm); *Pottstown School Dist.*, 118 LRP 27959 (SEA Penn. 2018) (holding that an object was a “weapon” when wielded in a manner so as to make it readily capable of causing harm); and *Anchorage School Dist.*, 45 IDELR 23 (SEA AK 2005) (rejecting the school's argument that scissors are weapons per se, but holding that student's use of the scissors rendered the scissors a dangerous weapon).

- d. Guns are inherently dangerous and, therefore, count as “weapons.” *See, e.g., McLaughlin v. U.S.*, 476 U.S. 16, 17 (1986) (quoted by *Knox County Schools*, 124 LRP 6505 (SEA TN 2024)). Lookalike weapons, however, are not (unless used to inflict serious bodily injury).
- 2. knowingly possess or uses illegal drugs;
 - 3. sells or solicits the sale of a controlled substance; or
 - 4. inflicts “serious bodily injury” on another person. 20 U.S.C. § 1415(G).
 - a. The infliction of “serious bodily injury” requires a showing of substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of function of a bodily member, organ, or mental faculty. 20 U.S.C. § 1415(k)(7)(D); *see* 18 U.S.C. § 1365(h)(3). This is a very high standard.
 - b. Only severe injuries qualify as “serious bodily injury” for purposes of the 45-day removal provisions. For instance, one IDEA hearing officer determined that, although a student engaged in “behavior that was injurious, frightening and intimidating, a broken nose does not fit within the [IDEA’s] narrow definition of the infliction of ‘serious bodily injury.’” *Pocono Mountain Sch. Dist.*, 109 LRP 26432 (SEA PA 2008). Similarly, a principal who was punched in the head and suffered a migraine, was found not to have a serious bodily injury because the principal was able to drive herself home and the pain abated shortly thereafter. *Pittsburgh Pub. Sch. Dist.*, 116 LRP 48011 (SEA PA 2016). However, a teacher who experienced severe pain after being headbutted and kicked in the chest, was found to have serious bodily injury. One of the factors the hearing officer considered was that the teacher was prescribed pain medication for a chest contusion and was unable to return to

work for a week. *Westminster Sch. Dist.*, 56 IDELR 85 (SEA CA 2011).

- c. Repeated blows to the head, resulting in a concussion, seizure, significant bruising, and memory loss constituted a serious bodily injury in at least one case. *Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 292 F.Supp.3d 413, 416-17, 421 (D.C.C. 2018) (*rev'd and remanded on other grounds*, *Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519 (D.C. Cir. 2019)). Likewise, hearing officers may consider both the part of the body targeted and the type of impairment suffered. *In Re: Student with a Disability*, 122 LRP 21820 (SEA WI 2022) (finding serious bodily injury where a student pulled a teacher's hair, squeezed the front of her throat, and hit her in the back of the head); *see also Bensalem Twp. Sch. Dist.*, 122 LRP 25399 (SEA PA 2022) (allowing 45-day unilateral placement where the student stood on a chair, hit staff member's head with a closed fist, then continued to slap staff member's head), *Southfield Pub. Sch.*, 118 LRP 11554 (SEA MI 2018 (sustaining a 45-day unilateral placement where the student attempted to punch staff member twice but was blocked, tripped into her causing both to fall, then kicked her in the stomach and knee)).
- d. In addition to establishing that the injury constitutes a "serious bodily injury," the school district must be able to show that the student "inflicted" the injury. At least one hearing officer has concluded that accidental conduct with a staff member who was trying to break up a fight did not satisfy this standard, despite the staff member suffering a broken leg and missing over two weeks of work. *Norwood Pub. Schs.*, 124 LRP 32443 (SEA MA 2024). But, intent to injure is not necessarily required. *Utica Community Schools*, 120 LRP 28499 at 46 (SEA MI 2020).

Practice Point: Threats do not trigger a school's authority to implement a 45-day unilateral placement, no matter how disturbing or explicit. *See, e.g., Franklin Township School Corporation*, 125 LRP 4358 (SEA IN 2024).

- B. The IEP Team Determines the Interim Alternative Educational Setting.** The IEP team must select a setting that enables the student to continue participating in the general curriculum, although in another setting, and to continue receiving services and modifications, including those described in the current IEP, which will enable the student to meet the goals in the IEP. The alternative setting must include services and modifications designed to address the misbehavior so that it

does not recur. 20 U.S.C. § 1415(k)(1)(D); *see also In re: Student with a Disability*, 124 LRP 24427 (SEA ND 2024).

Practice Point: Homebased or virtual instruction may be an appropriate alternative setting, but only if it allows the student to continue to participate in the general education curriculum and make progress towards IEP goals. *See Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA'S Discipline Provisions*, (OSEP July 19, 2022).

- C. The school district is required to conduct a manifestation determination before implementing a 45-day unilateral placement but may implement the placement regardless of the outcome of that determination. 34 C.F.R. § 300.530(e), (g).

Practice Point: Suspending, or otherwise removing, a student for disciplinary reasons on top of a 45-day placement could violate the IDEA's stay put provision, regardless of whether the conduct is a manifestation of the student's disability. *See, e.g., Bloomfield Township Bd. of Educ.*, 125 LRP 10417 (SEA NJ 2024).

VII. SHORTENED SCHOOL DAYS, WHETHER FOR DISCIPLINARY PURPOSES OR OTHERWISE, CONSTITUTE A CHANGE IN PLACEMENT AND MUST GO THROUGH THE IDEA OR SECTION 504 PROCESS.

A. The Requirement That Students with Disabilities Receive the Regular School Day Unless the IEP (or Section 504 Plan) Contains Some Exception Based on the Individual Student's Unique Needs.

1. The term "shortened school day" is not explicitly defined in the IDEA. However, a shortened school day generally occurs when a district unintentionally or purposefully shortens the amount of instructional time a student with a disability receives during a school day.
2. For example, a principal's decision to send a student home early -- regardless of the reason for the early release -- may constitute a shortened school day, especially where the student isn't able to receive all the services required by his IEP or receives less instructional time than his nondisabled peers. *See, e.g., Alleghany County (NC) Schs.*, 69 IDELR 193 (OCR 2016).
3. Because a shortened school day may inappropriately limit a student's access to instructional time and IEP services, a district should not shorten a student's school day unless the IEP team determines that a shortened school day is necessary for FAPE.

4. To ensure FAPE, a district must assess a student's need for a shortened school day based on her individual needs and not based on the availability of resources or blanket policies.

B. Schools Must Follow the Appropriate IDEA or Section 504 Procedures to Shorten a Student's School Day, and that Decision Must be Based on the Student's Needs.

1. For IDEA-eligible students, use the IEP process to shorten a student's school day. Likewise, for Section 504 students, the Section 504 process should be followed.
2. Some reasons why a student may need a shortened school day include stamina, medical routines/appointments, and increased or significant behaviors that occur at specific times of day.
3. If a student's IEP team determines that the student requires a shortened school day to receive FAPE, the team should document the reasons why.
4. For example, the prior written notice or IEP meeting minutes can document the IEP team's consideration of other services, supports, and placements and why the team rejected those options in favor of the shortened school day. This type of documentation may help districts defend FAPE claims arising from the shortened school day.

- C.** The July 2022 OCR guidance specifically identifies a shortened school day as a form of "informal discipline" that is subject to Section 504 and its procedures. *Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973* (OCR 2022). The 2022 OSERS guidance has similar language. *See Discipline Q&A* at C-6.

VIII. USING THE IEP PROCESS IN ADDRESSING BEHAVIOR

- A. IEPs and Behavior Intervention Plans.** All staff providing services to a child with a disability must be aware of the relevant provisions of the student's IEP, including any separate behavior intervention plan ("BIP") or other behavior component in the IEP. Staff members must follow IEPs and BIPs to address student behavior.

1. Staff must implement BIPs to the same extent that they would any other provision of an IEP.

2. The failure to implement a BIP may result in a finding that the student's behavior was a manifestation of his or her disability. It may also result in an DOE complaint, due process hearing, or other type of complaint.
 3. While they vary from student to student, most BIPs (and most IEPs) do not excuse students from general behavioral expectations. Instead, they provide steps for proactively addressing student needs and responding to misconduct in a manner that is appropriate for the student's needs and (hopefully) will not result in an escalation of behavior.
- B. Teams should meet and review IEPs and behavior plans as necessary to respond to lack of expected progress or emerging behaviors.
 - C. Communication between general education and administrators and special education staff is key, especially proactive communication.

IX. RESTRAINT AND SECLUSION OF SPECIAL EDUCATION STUDENTS

- A. **Use of Restraint and Seclusion in General.** Neither the IDEA nor South Dakota law prohibit restraint or seclusion of students whose behaviors would put themselves or others in imminent danger. *In re: Student with a Disability*, No. 2020-01, 120 LRP 24071 (S.D. SEA Mar. 9, 2020); S.D. Codified Laws § 13-32-20.

The U.S. Department of Education recognizes, however, that there are circumstances under Section 504 and Title II of the Americans with Disabilities Act in which the use of restraint and seclusion may constitute discrimination on the basis of disability. For example, Section 504 does prohibit secluding or restraining students with disabilities if similarly situated students without disabilities would not have been secluded or restrained under the same circumstances. Likewise, use of restraint or seclusion on the basis of assumptions or stereotypes about disability also violates Section 504.

- B. **Definitions.** The terms “restraint” and “seclusion” are not broadly defined by South Dakota law. SDDOE indicated in 2020, however, that it follows or at least considers guidance issued by the U.S. Department of Education's Office of Civil Rights (“OCR”) regarding the use of restraint and seclusion. *In re: Student with a Disability*, 120 LRP 24071. OCR's guidance includes the following definitions:

1. **“Physical restraint”** refers to a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or

head freely. The term physical restraint does not include a “physical escort,” meaning a temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purpose of inducing a student who is acting out to walk to a safe location. The term “restraint” also does not include behavioral interventions used as a response to calm and comfort upset students (e.g. proximity control, verbal soothing).

2. **“Mechanical restraint”** refers to the use of any device or equipment to restrict a student’s freedom of movement. This term does not include the use of a device by trained school personnel, or by a student, that has been prescribed by an appropriate medical or related or related services professional, and that are used for the specific and approved purposes for which such devices were designed, such as:
 - a. Adaptive devices or mechanical supports used to achieve proper body position, balance, or alignment to allow greater freedom of mobility than would be possible without the use of such devices or mechanical supports (*e.g.: helping a student into a medically-prescribed back brace does not constitute restraint of that student*);
 - b. Vehicle safety restraints when used as intended during the transport of a student in a moving vehicle (*seatbelts are not restraints*);
 - c. Restraints for medical immobilization; or
 - d. Orthopedically prescribed devices that permit a student to participate in activities without risk of harm (*e.g., a knee brace*).
3. **“Seclusion”** refers to the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. Seclusion does not include a timeout, which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purpose of calming. Seclusion also does not include supervised in-school detentions, or out-of-school suspensions. *Restraint and Seclusion: Resource Document*, U.S. Dep’t of Education (2012); *see also Students with Disabilities and the Use of Restraint and Seclusion in K-12 Public Schools*, Office of Special Education Programs (July 23, 2019)
4. Additionally, South Dakota law defines **“prone restraint”** to mean physical pressure applied to any part of the student’s body to keep the student in a face down position on the floor or other surface. SDCL § 13-32-20.

C. Authority to Restrain. The following individuals have the authority to use reasonable and necessary physical force for supervisory control over students.

1. Superintendents;
2. Principals;
3. Supervisors;
4. Teachers;
5. Teachers' aids and assistants;
6. Any person delegated to supervise children who have been authorized to attend a school function away from their school premises; and
7. School bus drivers while students are riding, boarding, or leaving the buses.

SDCL § 13-32-2.

D. Policy Required. Under the law, each school district is required to adopt a policy for its employees regarding the use of restraint and seclusion. At a minimum, the policy must:

1. Include a procedure for notifying parent or guardian of the student, unless the student is emancipated, of an incident requiring the use of restraint or seclusion;
2. Prohibit the use of prone restraint, except when the use is necessary and reasonable in manner and moderate in degree; and
3. Prohibit the use of involuntary confinement of a student locked alone in a room, unless there is a clear and present danger.

SDCL § 13-32-20.