



Ratwik, Roszak & Maloney, P.A.

444 Cedar Street, Suite 2100
Saint Paul, Minnesota 55101

(612) 339-0060
www.ratwiklaw.com

Time Out: School Discipline & Students with Disabilities

ASBSD & SASD Convention August 4, 2023

Christian R. Shafer
crs@ratwiklaw.com

I. SPECIAL EDUCATION DISCIPLINE

A. South Dakota Law

1. Pursuant to S.D. Law Chapter 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, 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

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 While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments.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. ©2023 Ratwik, Roszak & Maloney, P.A.

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.

2. "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." SDLRC Rule 24:05:26:01

B. Removing a Special Education Student From School

1. 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.
2. 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.

3. The holding of *Honig v. Doe* is reflected in 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).
 - a. **Right to Challenge Disciplinary Decisions Using IDEA Mechanisms.** Parents may challenge any change in placement, including changes in placement resulting from disciplinary actions. 34 C.F.R. § 300.507. While such a challenge is ongoing, the IDEA mandates that the student remain in his or her current educational setting. This is called the “stay put” requirement. 34 C.F.R. § 300.518.
 - b. **Effect of Stay Put Placement.** Because the “stay-put” provision applies to any changes in placement (including expulsions and suspensions in excess of ten days), the student is entitled, if an objection to the change in placement is made, to remain in his or her current educational placement pending the outcome of conciliation, mediation, a local due process hearing, and any appeal. This process may take several months.
 - c. **Section 504 Considerations.** Under Section 504, disciplining a student for behavior that is caused by his or her disability may be evidence of disability discrimination.
4. There is no cumulative cap of ten days of suspension per school year. However, the regulations warn that school districts may not subject students to a pattern of suspensions or multiple suspensions for the same course of conduct.
5. 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.
6. In determining whether a district’s actions have resulted in a pattern of removal that constitutes a change of placement, the following factors should be considered:

- a. the length of each removal;
- b. the total amount of time that the child has been removed during the school year;
- c. the proximity of the removals to each other; and
- d. the reason for each removal, including whether the child's most recent behavior is substantially similar to the child's behavior in previous incidents that resulted in removal. 34 C.F.R. § 300.536(a).

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.

C. Manifestation Determination

1. School districts and charter schools *may not* expel a disabled student if the misbehavior is a manifestation of the student's disability, *but may* expel a disabled student if the misconduct is not a manifestation of the student's disability. *See* 34 C.F.R. § 300.530.
2. The IDEA provides that a manifestation determination meeting must be held within ten (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. *See* 34 C.F.R. § 300.530(e)(1).
 - a. Under Federal law, for purposes of conducting a manifestation determination, a "change in placement" occurs when: (1) a student has been removed from class (e.g., suspended) for ten consecutive school days; or (2) the student has been subjected to a series of removals that constitute a pattern because (i) the series of removals total more than 10 school days in a school year, (ii) the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals, and (iii) 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. 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).

- b. The manifestation determination must also be made if:
 - (i) The student is placed in an interim alternative educational setting for a period of up to 45 days; or
 - (ii) A hearing officer orders a change in a student’s placement to an alternative education setting for a period up to 45 days. *Questions and Answers on Discipline Procedures*, 52 IDELR 213 (OSERS 2009), Question F-4.

3. **South Dakota Law:** “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.” SDLRC 24:05:26:09:3

- 4. “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.” SDLRC 24:05:26:09:04

D. Manifestation Determination Process. At the meeting, the IEP team must:

1. Consider all relevant information, including any assessments, observations of the child, and the student’s IEP and placement;
2. Determine whether the behavior is 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 was caused by, or had a direct and substantial relationship to the child’s disability; *or*
 - b. The conduct was the direct result of the school’s failure to implement the IEP. 34 § C.F.R. 300. 530(e)(2).
3. 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). A school district may not expel a student for misbehavior that is a manifestation of the student’s disability.
 - a. **Manifestation Determination Under Section 504.** Section 504 requires schools to conduct an evaluation before changing a 504 eligible student’s placement. This includes conducting a so-called “manifestation determination” (a type of evaluation) once the student’s suspension or expulsion exceeds 10 consecutive days or otherwise constitutes a change in placement.
 - b. **Notification Requirement for Expulsion.** Upon deciding to expel a student, the school district must notify the student’s parent or

guardian of the decision and provide them with a copy of the procedural safeguards brochure. *See* 34 C.F.R. § 300.530(h).

- c. **Functional Behavioral Assessment and Behavior Intervention Plans.** The IDEA requires that a school district conduct a functional behavioral assessment in connection with discipline whenever:
 - (i) a student is suspended or expelled for behavior found not to be a manifestation of his or her disability;
 - (ii) a student is unilaterally removed to a 45 day interim educational placement; or
 - (iii) a student's behavior is found to be a manifestation of his or her disability.
 - (a) This requirement does not apply if the student was already the subject of a functional behavioral assessment prior to the conduct occurring if a behavior intervention plan resulted from the assessment.
 - (b) If the student already had a behavior intervention plan, but the team must then review and, if necessary, modify the plan.

34 C.F.R. § 300.530(d)(1)(ii), (f).

- (iv.) IDEA notice and meeting requirements applicable to assessments generally also apply to functional behavioral assessments.
- 4. **FAPE.** Under federal law, special education students are entitled to receive FAPE during the period of expulsion (beginning on the eleventh cumulative day of removal). *See* 34 C.F.R. § 300.530(b)(2). The end result is often an expulsion in form, but not in substance.
 - 5. **Returning the Student to the Last Agreed Upon Placement.** If the student's behavior is found to be a manifestation of his or her disability, the 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).

6. **What about Later-Discovered Information?**

- a. During the manifestation determination, an IEP team must review and consider all available information regarding the student and the student’s disability. The discussion is not (and cannot be) limited to the last evaluation or last IEP.
- b. Information that was provided to staff earlier, but not reported to administration, may interrupt the disciplinary process. For example, if a teacher received a request for a special education evaluation or was told that the student has a disability, that may trigger the protections for students not yet identified as disabled, regardless of whether that was reported to special education staff or a principal.

E. **Protections for Children Not Yet Identified as Having a Disability**

- 1. 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).
- 2. **Definition of “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.
- 3. **Knowledge of 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)

4. **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).
5. **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.
6. **Impact of Lack of 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.
7. **Impact of 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).
8. **Manifestation Determination Pending a Formal Evaluation.** Under federal law, a school district must complete a manifestation determination within ten school days of a decision to change the child’s placement (e.g., expulsion).
9. Schools must consider the available information, including all relevant information in the student’s file, any teacher observations, and any data provided by the parents. Nothing requires or prohibits a school district from revisiting the determination at a later date.
10. **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).

II. SPECIFIC CONCERNS REGARDING COUNTING SUSPENSION DAYS

- A. **In-School Suspension.** 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.
- B. **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.
- C. **Asking a Parent to Pick Up a Student.**

Case Law Review: *Brookings Sch. Dist.*, 77 IDELR 55 (S.D. SEA Aug. 7, 2020)

Background Information:

The Student's IEP provides for the Student to receive accommodations, modifications, special education services, related services, and ESY five days per week. The related services include language therapy twice per week and transportation between school and home each school day. The Student's IEP includes multiple annual goals addressing either academic content areas or functional/behavioral content areas. The Student also has a Crisis Management Plan ("CMP"). The "Student's CMP, which was agreed to by Parents, provides that if Student's behavior escalates to a point where staff cannot effectively keep Student and others safe then the Clinical Supervisor will call Parents and discuss options moving forward such as Parents ... picking Student up."

During the fall of 2019, the Parents were called to pick up the Student on 11 or 12 days. The Student's behavior while on the school bus was not the reason why. Instead, the Parents were told to pick up the Student because the Student needed to stay late to finish work due to maladaptive behaviors in accordance with the Student's positive behavior support plan or the Student's behavior at the time of the bus pickup was deemed too dangerous to ride.

During March 2020, the Student was suspended for five days. The Student was suspended for, among other behaviors, biting a student and a staff member.

Also in March 2020, South Dakota ordered all schools to close due to COVID-19. The Student was educated through distance learning from March 30, 2020 to May 19, 2020. District records indicate that special education and related services were provided to Student during distance-learning. However, the “number of direct educational service minutes provided to Student during distance-learning were less than the service minutes set forth in Student’s ... IEP.” Nonetheless, the Student’s progress reports all indicate that the Student made progress on Student’s annual goals.

The District decided to provide ESY services to the Student through distance learning. The District did not provide the Student’s educational services on the first day of ESY.

Issue:

First, did the District implement a series of disciplinary removals of Student from District transportation or from Student’s educational placement to suspension for more than 10 school days during the 2019-20 school year?

Second, did the District unilaterally change Student’s placement by implementing distance-learning for general and special education and related services to the Student when the District closed its schools during the state mandated school closure period through the period of ESY?

Third, did the District implement the Student’s special education and related services in the Student’s IEP during the state mandated school closure period and ESY?

Fourth, did the District’s actions in relation to transportation result in the denial of FAPE?

Holding:

First, the District did not implement a series of disciplinary removals of the Student from District transportation or from the Student’s educational placement due to suspension for more than 10 school days during the 2019-20 school year. The occasions when Parents were called to transport Student home after school were not bus suspensions or disciplinary removals. The South Dakota Department of Education (“SDDE”) reasoned that the Student’s CMP provided that the Parents would be called and options would be discussed, such as picking

the Student up, if the Student's behavior escalated to a certain point. Therefore, the Student only received one five-day suspension during the 2019-20 school year and thus, the District was not required to conduct a manifestation determination review or provide educational services during the suspension.

Second, the District did not unilaterally change the Student's placement by implementing distance-learning for general and special education and related services to the Student when the District closed its schools during the state mandated school closure period through ESY.

Third, the District provided a FAPE during the mandated school closure period even though the "District admit[ed] providing all of the educational and related service minutes during the school closure period was not possible due to distance learning." The SDDE reasoned that the "documentation does not support a conclusion that the District failed to materially and substantially implement Student's special education and related services." During the school closure period the student worked on and made progress on the student's annual goals, received speech services twice per week, and was able to advance to the next grade level. The ALJ, however, also found that the District denied a FAPE when it did not provide one day of ESY services and ordered that the District provide one day of compensatory ESY services.

Fourth, the District's actions related to transportation resulted in the denial of a FAPE. The SDDE reasoned that the Parents were required to pay for the transportation that the Student was entitled to under the IEP. Therefore, the education program was not "free" for the Parents. Specifically, the SDDE stated that the Student's IEP provides for transportation home from school as a related service. Nonetheless, on 11 or 12 occasions, the Parents were required to transport the Student home and the Parents were not provided mileage reimbursement by the District. As such, the SDDE ordered the District to compensate the Parents in the form of mileage reimbursement.

III. USING THE IEP PROCESS IN ADDRESSING BEHAVIOR

Disability related behavior must be approached through programming, not discipline. Parents have a right to receive prior notice of and to be involved in all significant decisions regarding a student's special education placement.

- 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 a Department of Education 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.

IV. THE BUILDING ADMINISTRATOR'S ROLE UNDER THE IDEA

A. Attend and Participate in IEP Team Meetings.

1. The IDEA requires that a special education or building administrator attend every IEP meeting. If the student is or may be participating in the regular education environment, IDEA also requires that at least one regular education teacher attend IEP team meetings. Minn. Rule 3525.2810, subp.1B.
2. The role of the regular education teacher is to provide input as to the requirements of regular education curricula and insight as to how a disabled student can benefit from it. This includes a realistic discussion as to adaptations and accommodations within the regular education setting.

As an administrator responsible for supervising these teachers, it is imperative to communicate how important it is for your regular educators to attend and actively participate in these meetings.

3. By being present at and participating in a student's IEP meeting, a building administrator can gain knowledge about and insight into each Student's disability and the manner in which it affects the student's education.

S/he will also better understand how a student's IEP and BIP are intended to be implemented. This type of information is necessary in order to

properly supervise staff, gauge the effectiveness of their performance and determine training needs.

Finally, by attending and actively participating in a student's IEP team, a building administrator will be able to develop a positive relationship and build credibility with the student's parents. This type of foundation is especially important when and/or if it becomes necessary to mete out discipline or propose a more restrictive educational placement for a student.

B. Be Aware of Students' IEPs, BIPs, and Other Plans.

1. As with other staff who work with students, building administrators are responsible for following portions of special education plans, including BIPs, in their interactions with students.
2. Building administrators must factor students' IEPs, BIPs, and other special education programs into disciplinary decisions.
3. Building administrators are responsible for supervising the staff under their authority, this includes addressing concerns about regular education staff members' implementation of IEPs, BIPs, and other special education plans.

C. Communicate Regularly with Special Educators.

1. Administrators should communicate with special educators to report potential problems with attendance, bullying, harassment complaints, student performance or parent-teacher relationships. These types of problems may not, at first glance, appear to be directly related to special education. However, very often, problems of this nature develop into disputes concerning the student's special education program.
2. Building administrators should report on parents' expression of concerns regarding their child's educational progress or any parental request related to an IDEA student's education, schedule, health, etc. Changes to student schedules may have an impact on the District's ability to provide the Student an appropriate education under his or her IEP. Moreover, information about parental discontent can clue the District's special education administration in on a potential problem when it can still be avoided or resolved.