

CLEAR AND PRESENT DANGER

The Special Education Student Substantially Likely to Cause Injury

By Ernest G. Trakas © 2009

Johnny B. Goode, we'll just call him J.G., is on his way to the Principal's office. He is being escorted by the school's Resource Officer and a male teacher. Each man has hold of one of the 6th grader's arms as he is shuttled to the administrator's office. Just a few minutes before at an assembly, J.G., without provocation, struck a female student in the head with his book bag. That was the second assault on a fellow student in the past week, and the sixth in the past month. In addition to assaulting other students and staff over the past two school years, J.G. has received disciplinary write-ups for destroying property, insubordination, threats, and other conduct code violations. The school district's administration and its Board of Education want to suspend or expel J.G., but their hands are tied because J.G. is a special education student and his behavior is related to his disabilities - attention deficit hyperactivity disorder ("ADHD") and emotional disturbance ("ED").

This scenario is all too frequent and familiar to school district administrators and Board of Education members. Under the Individuals with Disabilities Education Act ("IDEA"), if a student violates the school's code of conduct, but his behavior is determined to be related to his disability, he or she cannot be disciplined in the same manner and to the same extent as regular education students.ⁱ Because the student's disability is behind the behavior the student cannot be suspended more than ten (10) school days. After that period of time the student must be returned to his or her previous educational placement.ⁱⁱ This is what has become known as "stay-put." Because of stay-put, school districts simply adopt the belief, short of a parent agreeing to change the student's educational placement, there is nothing that can be done to address the situation. To the contrary, school districts have at least two ways in which the special education student may be disciplined and stay-put circumvented.

The IDEA provides two scenarios that permit a school district to remove a special education student from his or her then current educational placement when the student violates the code of conduct. Any time the student is found to be in possession of a weapon or illegal drugs, or causes serious bodily injury, so called "Special Circumstances", the student is subject to an automatic removal from his then current placement and placed in an Interim Alternate Educational Setting ("IAES").ⁱⁱⁱ This action takes place whether or not the student's behavior is related to his or her disability.^{iv} In addition, if a school district believes that by maintaining the student in his or her then current placement the student is substantially likely to injure him or herself, or someone else, the district can request an expedited due process hearing to obtain an order removing the student to an IAES for up to forty-five (45) school days.^v This hearing takes place on an expedited basis or schedule. Indeed, the hearing must take place within twenty (20) school days of the school district's request for expedited hearing,

and a decision rendered within ten (10) days of the hearing.^{vi} Most importantly, the student remains in the IAES during the pendency of the hearing process and decision.^{vii}

Changing the student's placement to an IAES due to "Special Circumstances" – weapons, drugs, serious bodily injury – is obvious, automatic and does not require a school district to seek a hearing prior to removal. More frequent, however, is the circumstance involving a student like J.G. who isn't in possession of drugs or weapons and hasn't caused serious bodily injury.^{viii} In this situation, the obvious yet least used tactic by school districts is the IDEA's expedited due process hearing provision. While it is atypical for a school district to initiate an administrative due process proceeding, a school district should not hesitate to remove the student and seek an order extending that removal when there is a legitimate concern that the student is likely to cause injury.

Once the decision to remove the student and seek an expedited hearing is made, the district should be mindful of the burden of proof it will be required to meet at the hearing. In this scenario, the statute articulates only one (1) basis for the successful removal of a student to an IAES – maintaining the student in his or her current placement is substantially likely to result in injury.^{ix} However, hearing officers will also expect a district to show that the IAES it has placed the student in is appropriate. Substantial likelihood of injury should be easily demonstrated. The student's disciplinary history, statements and/or testimony of personnel about the student's behavior, photographs for injuries (scratches, bruises, etc.), and victim treatment records are obvious choices and should suffice. As long as the choice of IAES has been determined by the student's individualized education plan ("IEP") team, and enables the student to: 1) continue to participate in the general education curriculum; 2) progress toward meeting goals; and 3) receive a functional behavioral assessment ("FBA") and/or interventions to address the behavior, the setting should be found appropriate.^x

In Missouri, the IDEA's expedited hearing provision has been used successfully and repeatedly to remove special education students believed likely to injure themselves or others from their current placements to a more appropriate IAES.^{xi} As noted, once it is determined that the special education student presents a legitimate and substantial risk to cause injury, school districts are not powerless to address the situation. Districts can and should feel confident about placing the student in an IAES and having that decision confirmed by an administrative hearing officer. Your District's staff and students deserve nothing less.

ⁱ 20 U.S.C. §1400, et seq.

ⁱⁱ 20 U.S.C. §1415(j); 34 C.F.R. §300.518

ⁱⁱⁱ 20 U.S.C. §1415(k)(1)(F); 34 C.F.R. §300.530(f)(1)(ii)(2)

^{iv} 20 U.S.C. §1415(k)(1)(G); 34 C.F.R. §300.530(g)

^v 20 U.S.C. §1415(k)(3)(A); 34 C.F.R. §300.530(g)

^{vi} 20 U.S.C. §1415(k)(4)(A)(B); §300.532(c)

^{vii} *Id.*

^{viii} Section 1415(k)(7)(D) of the IDEA adopts the definition of *serious bodily injury* used in paragraph (3) of subsection (h) of section 1365 of Title 18 of the United States (Criminal) Code. Using this definition it is unlikely anything less than broken bones or lacerations that require sutures will meet the definition.

^{ix} §1415(k)(3)(A)

^x 34 C.F.R. §300.531; §300.530(d) (1)(ii), respectively

^{xi} See: *Westran R-1 Sch. Dist.*, 108 LRP 38482 (Mo SEA 2008) (*Westran I*), also available at http://dese.mo.gov/divspeced/Complaint_System/documents/DP0708_27_Westran_R-I_.pdf; *Dunklin R-5 Sch. Dist.*, 51 IDELR 202 (Mo SEA 2008) also available at http://dese.mo.gov/divspeced/Complaint_System/documents/DP0708_32_Dunklin_R-V.pdf; *Westran R-1 Sch. Dist.*, 51 IDELR 290 (Mo SEA 2009) (*Westran II*), also available at http://dese.mo.gov/divspeced/Complaint_System/documents/DP0809_8_Westran_R-I.pdf

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