The Dangerous Student

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of certain federal and state laws that pertain to students who may be dangerous to themselves or others. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. Overview

From time to time, school districts receive information that a student may be a danger to him/herself or others. The purpose of this seminar is to provide the educator with information on the laws pertaining to the duties owed to students, families, third parties, and the dangerous student, and the options available to school districts under laws such as the IDEA and Section 504. This material does not include every aspect of the law and you are strongly encouraged to seek an opinion from your school district's attorney regarding a specific case.

II. Dangerous Students and the IDEA

A. The Philosophy Behind the IDEA

The key to understanding the IDEA lies in understanding the philosophy behind the IDEA. When Congress adopted the IDEA, it did such with the intent of ameliorating the systemic inequities that existed with regard to the education of individuals with disabilities. With the 1997 and 2004 reauthorizations of the IDEA, Congress set in law the educational concept of inclusion, by requiring that students with educational disabilities be included, to the maximum extent possible, in the regular education classroom.

1. A "Free Appropriate Education at Public Expense"

The fundamental concept behind the IDEA is that every student is entitled to a **free appropriate education at public expense ("FAPE").** The Act does not require a school to maximize the potential of each disabled child commensurate with the opportunity provided non-disabled children. Rather, Congress sought primarily to identify and evaluate disabled children, and to provide them with access to a free public education. A School District satisfies the requirement to provide a free appropriate public education by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Teachers are a key component to ensuring that the instruction is truly personalized. Without teachers actually implementing the student's individualized education program [IEP], there is a greatly reduced likelihood of truly affording a FAPE. The "appropriateness" standard is a floor rather than a ceiling.

B. Options Under the IDEA: Change of Placement Through the Disciplinary Process

The Individuals with Disabilities Education Improvement Act ("IDEA") as amended in 2004 requires that <u>all</u> children with disabilities be afforded a "free appropriate public education." The IDEA is predicated on the goal of preserving the requirement of a FAPE. The presumption extends to students who have been suspended or expelled by a school district. 20 USC § 1412(a)(1)(A) explicitly states that

local school districts must ensure that a FAPE is available to *"children with disabilities who have been suspended or expelled from school"* (emphasis added).

The disciplinary options available to educators are curtailed to some extent by the IDEA. The philosophy behind this curtailment is that educational disabilities should not be disciplined for wrongful acts that are a manifestation of their educational disability, and that they should receive a FAPE even if subject to long-term suspension or expulsion.

The traditional disciplinary options afforded the principal with regard to IDEA students are the short-term suspension or the alternative educational setting. They are defined as follows:

1. Short-Term Suspension. A suspension of a student for up to ten (10) school days in any school year.

2. Alternative Educational Setting. A change in placement for ten (10) school days or less to an "interim" alternative educational setting, e.g. an in-school suspension, library suspension, tutored at-home suspension. The interim setting should be designed to implement the IEP.

Either of these disciplinary options may be used for up to ten school days in any school year without convening an IEP Team, without engaging in a manifestation determination, without conducting a functional behavioral assessment, and without developing or reviewing a behavior intervention plan.

School personnel may remove a child with a disability who violates a code of conduct from their current placement to:

1. An appropriate interim alternative educational setting;

2. Another setting; or

3. Suspension for not more than ten (10) days

to the extent such alternatives are applied to children without disabilities.

The school need not provide services during "short-term" suspensions or removals, unless services would be provided to non-disabled students during such suspension or removal. 34 CFR Sec. 300.530(d)(3).

The IDEA also provides that, in three specific circumstances, school officials have the authority to unilaterally move a child to an interim alternative educational setting (IAES) for a period of 45 school days. 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g). School officials may unilaterally remove an IDEA-eligible student to an IAES for one of the following reasons:

1. Carrying or possessing a weapon[1] to or at school, on school premises, or at a school function.

2. Knowingly possessing or using illegal drugs or selling or soliciting sale of a controlled substance, while at school, on school premises, or at a school function.

3. Inflicting serious bodily injury upon another person while at school, on school premises, or at a school function.

20 U.S.C. § 1415(k)(1)(G)(i-iii); see also Doe v. Todd County Sch. Dist., 625 F.3d 459, 463 (8th Cir. 2010) (noting that the IDEA expressly authorizes unilateral action by school officials in these limited circumstances). The IEP Team is responsible for determining the appropriate IAES for the student. 30 C.F.R. § 531. The 45 day period allows a school district "to take appropriate disciplinary action while a more detailed investigation takes place." Kaczmarski v. Wheaton Cmty. Unit Sch. Dist. # 200, 2004 U.S. Dist. LEXIS 7823 at 9 (N.D. Ill. May 4, 2004).

When a student is placed in an IAES, the District remains obligated to continue providing services and to ensure that the student is receiving a FAPE. 20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. §§ 300.530(d), 300.536(a).

If a parent appeals a Schools District's IAES placement, the student remains in the IAES pending the decision of a hearing officer, or until the expiration of the 45 day period, whichever is shorter, unless a different arrangement is reached by the parent and the District. 34 C.F.R. § 300.533. A school district cannot permanently change a student's placement without complying with IDEA procedural safeguards regarding change of placement. 34 C.F.R. § 300.530(h); 34 C.F.R. § 300.504.

Serious bodily injury is defined as "bodily injury which involves:

- ❒ Substantial risk of death;
- ❒ Extreme physical pain;
- ❒ Protracted and obvious disfigurement; or,
- ❒ Protracted loss or impairment of the function of a bodily member, organ or mental faculty."

[1] The IDEA defines the term "dangerous weapon" as a "weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2½ inches in length." 20 U.S.C. § 1415(k)(7)(C); 18 U.S.C. § 930 (g)(2).

34 CFR § 300.530(i)(3); 18 U.S.C. § 1365(h)(3). Serious bodily injury involves more than a routine fight or physical injury. Serious bodily injury is not: a cut, abrasion, bruise, burn, physical pain, illness, impairment of a bodily member, organ or mental faculty, or any other injury to the body that does not meet one of the elements of serious bodily injury. 18 U.S.C. § 1365(h)(4). Courts have held that the following injuries did not constitute "serious bodily injury":

- **Assault of School Personnel**. Assault of school personnel will generally not rise to level of serious bodily injury, particularly if the personnel has not sought required medical attention. See In re: Student with a Disability, 54 IDELR 139 (SEA KS 2010) (Although a paraprofessional suffered pain, discomfort and disorientation and pain that she rated at "seven" on a scale of 10 after being hit by a student, she was given no pain medication at the hospital and was back to normal the next day. She thus she did not suffer extreme pain within the meaning of the statutory definition).

- **Biting.** In El Paso County Sch. Dist. Eleven, 107 LRP 33382 (SEA TX 04/16/07), a hearing officer found that a student did not rise to that of "serious bodily injury" where a student assaulted security personnel and bit one staff member on the arm.

- **Hitting/Punching.** Hitting or punching will generally not satisfy the definition of serious bodily injury. For example, a hearing officer found that a student who broke another student's nose did not inflict "serious bodily injury" within the IDEA's definition in Pocono Mountain Sch. Dist., 109 LRP 26432 (SEA PA Dec. 12, 2008). Although the student's behavior was intimidating, the Agency noted that it did not fall within the IDEA's narrow definition of "serious bodily injury."

- **Kicking.** In Bisbee Unified Sch. Dist. No. 2, 54 IDELR 39 (SEA AZ 2010), a hearing officer found that, although a principal's knee was swollen after a student kicked him, he did not suffer a "serious bodily injury" where he did not seek medical attention and drove 200 miles the next day. Similarly, in In re: Student with a Disability, 108 LRP 45824 (SEA WV June 4, 2008), a hearing officer held that a teacher did not suffer serious bodily injury where a student kicked her shins and stomped on her toes, but she suffered no permanent disability.

In contrast, the following injuries were found to be "serious bodily injuries" by courts:

- **Head-butting**. Westminster School District, 56 IDELR 85 (SEA CA Jan. 13, 2011). A child with autistic-like behaviors head-butted a teacher after being told to go clean up. The teacher suffered a chest contusion, went to three doctors'

appointments in one week, tried two drugs which failed to provide pain relief, described the pain as a "ten" on a scale of ten, and missed one week of work.

- **Rape.** Rape can constitute serious bodily injury, because the victim may suffer protracted impairment of mental faculties. Questions and Answers on Discipline Procedures, 52 IDELR 231 (OSERS June 1, 2009).

Nothing in the IDEA "shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability." 20 U.S.C. § 1415(k)(6)(A).

C. Change of Placement Based on a Substantial Likelihood of Injury to Self or Others

Under the IDEA, when a district believes that maintaining the current placement of a child is substantially likely to result in injury to the child or others, it may request a hearing. 20 U.S.C. § 1415 (k)(3)(A). A district cannot unilaterally change a child's placement based on a determination that a student is "substantially likely" to cause injury.[2] 34 C.F.R. § 300.532(a); see also Letter to Huefner, 47 IDELR 228 (OSEP March 8, 2007). Instead, the district must request an expedited due process hearing and seek relief from a hearing officer. The hearing officer may order a change of placement to an interim alternative educational setting for not more than 45 school days, if the hearing officer determines that maintaining the current placement is substantially likely to result in injury to the child or others. 20 U.S.C. § 1415 (k)(3)(B)(ii)(II); see also 71 Fed. Reg. 46,540, 46,722 (2006) ("[s]chool officials must seek permission from the hearing officer under § 300.532 to order a change of placement of the child to an appropriate interim alternative educational setting. Hearing officers have the authority under § 300.532 to exercise their judgments after considering all factors and the body of evidence presented in an individual case when determining whether a child's behavior is substantially likely to result in injury to the child or others"); Bureau of Special Education FY'09 Memo #11 (Sept. 30, 2008) (defining disciplinary removals as, including "removal by a hearing officer to an interim alternative educational setting for likely injury to self or others").

When confronted with a student who the district believes is substantially likely to cause injury to him/herself or others, the district should obtain an independent risk evaluation or assessment. This assessment can assist the district in determining whether the student poses a substantial likelihood of injury to him/herself or others, as well as assist in determining the parameters upon which the student can safely return to

[2] See 71 Fed. Reg. 46,540 (2006). Noting that part 300.530(g) is distinct from 300.532(a), because "School officials must seek permission from the hearing officer under § 300.532 to order a change of placement of the child to an appropriate interim alternative educational setting," whereas 300.530(g) involves unilateral removal by the District.

school, and any services, accommodations or modifications that the student may require when he returns to school.

When seeking a change of placement due to a substantial likelihood of injury, the district will bear the burden of proof. See Schaffer v. Weast, 546 U.S. 49 (Nov. 14, 2005) (burden of persuasion at a due process hearing is on the party seeking relief). These proceedings will frequently turn on factual testimony, and if the district has obtained a risk assessment, that report may assist the district in establishing that the student is substantially likely to injury him/herself or others.

The following cases illustrate the "substantial likelihood of injury" standard.

Timberlane Regional School District, 45 IDELR 139 (NH SEA Mar. 24, 2006).

Facts: From January 11, 2006 to February 21, 2006, Student, a 14-year-old with Type I diabetes, non-verbal learning disability, OHI and possible emotional disability, attended Learning Skills Academy. Student displayed psychotic symptoms, including hallucinations, disorganized thinking, and catatonic behaviors. On February 21, she attempted to harm herself by putting a bracelet in her mouth and saying she needed to choke on it and die. Student did not attend the Learning Skills Academy after that incident.

Student had last been evaluated in 2002, then was admitted to the hospital suffering from psychotic and manic symptoms. During her hospital stay, Student became aggressive with family members and physicians. Parents would not agree to allow the District to conduct any further psychological evaluation.

On March 6, 2006, the District held an IEP meeting. Parents were late and then asked to leave due to their behavior.

On March 7, 2006, the District provided notice to the parents of their intention to place Student in an inpatient treatment center and conduct assessments, for a period of 45 days. Parents objected.

Issues:

1. Whether Student's current placement at Learning Skills Academy (LSA) is substantially likely to result in injury and whether it is necessary to conduct a comprehensive reevaluation of Student.

2. Whether LSA, irrespective of the threat of harm, is an appropriate placement for Student.

Held: For District. The hearing officer determined that the student's social, emotional, physical and educational needs were so intertwined that she required

placement in a residential facility equipped to conduct a complete and comprehensive assessment.

The hearing officer found that student presented a substantial risk of injury to herself and others, warranting placement in an IAES for the purposes of conducting an evaluation. First, Student's diabetes presented a substantial risk to her, as failure to maintain proper dietary control could have drastic, and irreversible, health impacts. There was evidence that Student, and her parents, were not adequately monitoring or managing Student's diabetes. Student was completely dependent upon nursing staff to attend to her diabetic needs. Second, Student's emotional and mental state were also concerning. Student's dissociative behavior on February 21, when she attempted to swallow her bracelet, appeared to suggest that student was psychotic. The hearing officer noted that "a behavior plan for a student actively psychotic would be of no value."

The hearing officer found that LSA no longer represented an appropriate placement for Student, because LSA is not certified to handle emotionally handicapped students. Student's parents had not disclosed Student's psychiatric condition, and LSA staff was not qualified to address Student's psychiatric needs.

Placement in a residential facility was appropriate, because District needed to conduct a comprehensive assessment in an inpatient treatment facility which could meet Student's physical and mental needs. The hearing officer ordered the parents to cooperate with the IAES and to turn over all requested records pertaining to the student's physical and emotional health.

Similarly, in Westran R-I Sch. Dist.**,** 51 IDELR 290 (SEA MO 2008), a hearing officer found that a student's IAES placement should be extended by 45 days where the student had recently displayed aggressive behavior towards himself and others.

Facts: Student was a 13 year-old student receiving services pursuant to the IDEA. On June 9, 2008, following an expedited due process hearing, Student was determined to present a substantial likelihood to injure himself or others and he was placed in a 45 day IAES. Prior to the IAES, his placement was homebound instruction. Student's 45-day IAES began on August 26, 2008. A hearing was held on November 3, 2008.

On October 14, 2008, Westran requested a second expedited due process hearing seeking an extension of the IAES for another 45 school days because student continued to present a threat of injuring himself or others.

During his IAES Student received six separate disciplinary referrals for inappropriate language, and aggressive, threatening and/or destructive behavior, including assault. One incident involved a statement that Student would burn down the school.

On September 22, 2008, Ms. Y. observed Student twisting his shirt into a noose and placing the noose around his neck and tightening it. Student had to be restrained by teachers, and told Ms. Y. that he enjoyed hurting himself, other people and animals. He also advised Ms. Y. that he had access to a 20 gauge shotgun, a 30-06 and .22 caliber rifles.

After being removed from the classroom and regaining self-control, Student requested his cell phone. When his request was refused Student began using profanity and screaming. Student then ran at a door kicking the glass upper section of the door, destroying the glass completely. Student then beat his head against a metal railing and used his own fists to beat himself on the face.

The IAES referred Student to the police. As a result of the referral, Student was handcuffed, taken into custody and incarcerated for three days.

At the time of this hearing, Student was awaiting trial on a Petition charging Student with Peace Disturbance, Property Damage, and Injurious Behavior to Self or Others. Student engaged in incidents while being transported to the IAES, on October 21 and 22.

Despite his continued behavior, Student did make progress academically and behaviorally at the IAES. Student either made progress on, or met the goals contained in his individualized education plan. Student received no office discipline referrals at the IAES since September 22, 2008, well over a full month before the hearing.

Issue: Whether student is substantially likely to injure himself or others, thus warranting a 45 day extension of an IAES.

Held: For District. The District presented the testimony of numerous witnesses, and sufficiently demonstrated that Student's behavior remains aggressive and antisocial. The hearing officer noted that, although Student made significant progress in controlling his behavior during his initial 45 day IAES, the evidence demonstrated a continuing pattern of volatile, antisocial behavior that presented a substantial likelihood to cause injury to Student or others. The hearing officer found that the serious nature of Student's behavior, the number of incidents, the suddenness of Student's actions, and statements about injuring people and animals, led to the "inescapable conclusion" that returning Student to his homebound instruction would pose a substantial risk of injury to Student and others.

The only witness to testify for Student was the Parent, who apparently did not acknowledge the continuing misconduct by Student. Parent also confirmed that Student does indeed have unfettered access to, and routinely uses firearms.

The hearing officer accordingly found it clear that Student still required the programming and structured educational environment of the IAES, and that modification of, and improvement in Student's behavior will continue over the course of an additional

forty-five (45) day placement. It was reasonable to conclude that extension of the IAES would continue to assist Student. Conversely, returning Student to homebound instruction would compromise the progress he had made and would present substantial likelihood that Student will injure himself or others. Therefore, Student's IAES at NCRMS was extended for an additional forty-five school days.

Smithton R-VI School District, 51 IDELR 290 (MO SEA Apr. 8 2010).

Facts: Student attended middle school in the Smithton School District. Student was diagnosed with Oppositional Defiance Disorder. He received special education and related services pursuant to the IDEA. Student demonstrated a number of problematic behaviors during the 2008-2009, and 2009-2010 school years. These incidents involved use of profanity as well as numerous instances of physical aggression against school staff and fellow students.

For example, on October 6, 2009, Student assaulted another student by striking her with his lunchbox. On November 4, 2009, Student physically assaulted two of his teachers. On December 7, 2009, Student physically assaulted his teacher and attempted to destroy school property. On March 3, 2010, Student threw rocks at two female classmates.

On February 16, 2010 Student became noncompliant and started pushing and shoving his paraprofessional, and yelling that the school staff were “a**holes.” He shoved a number of chairs and kicked an aide repeatedly. He ended up crying on the floor requesting that the school officials call his mother.

The District then requested an expedited due process hearing to remove Student to IAES for 45 days.

Issue: Whether maintaining student’s current placement was substantially likely to result in injury to Student or others.

Held: For District. Because Student presented a substantial risk of injuring himself or others, the hearing officer ordered that Student be removed to a 45 day IAES. The hearing officer particularly noted that the November 4, 2009 and February 16, 2010 incidents, demonstrated that removal was necessary. The hearing officer found that the evidence demonstrated that Student is a “very troubled second grader who exhibits episodes of aggressive behavior involving very obscene language, hitting, kicking, spitting and a biting attempt, all directed at Smithton staff.” Student had been very aggressive towards his fellow students, particularly where he pushed & dragged other students at recess; kicked other students; threw things; assaulted another student with his lunchbox. Student had also attempted to destroy school property on several occasions, including urinating on a wall.

The hearing officer found that Smithton provided credible, extensive, un-rebutted, first-hand testimony of Student's aggressive, antisocial behavior in his current

placement. The hearing officer accordingly found that permitting Student to remain in his current placement would not sufficiently address Student's behaviors, and would be likely to result in injury to himself or others. Therefore, Student was removed to an appropriate IAES for 45 school days.

Saddleback Valley Unified Sch. Dist., 52 IDELR 56 (SEA CA 2009).

Facts: Student was a 12-year-old boy in the seventh grade, who was eligible for special education under the category of emotional disturbance (ED). Because of the severity of student's behaviors, he was educated in a District special day class designed for ED children during Fifth and Sixth grades.

During Student's fifth grade year, Student engaged in self-injurious behaviors, including biting himself, pulling his hair, hitting himself, and banging his head on the desk. He engaged in these behaviors at least once a week to several times a month. He tipped desks, threw books on the floor and broke pencils. Student was verbally aggressive with staff.

During the later portion of his fifth grade year, Student was mainstreamed into general education classes. Student continued to exhibit behavioral problems in the general education program, including making offensive comments and refusing to do work and homework. Student was involved in at least one fight and at one point wrapped yarn around his neck so tightly that he almost passed out.

During the sixth grade year, Student's negative behaviors began to subside. Student engaged in self-injurious behaviors such as head pounding, hair pulling and biting, but the behaviors happened less frequently and mostly in the time-out room. There was less book throwing and pencil breaking. Student began to learn to deescalate and monitor his behavior. Student was verbally aggressive with his peers at times. He had one physical altercation with another child at the beginning of the sixth grade school year, but no other physical incidents.

In June 2008, the IEP team met to discuss Student's transition to seventh grade intermediate school. The District IEP team members believed that the appropriate placement for Student was a special education setting, but Student's mother disagreed. At the beginning of Student's Seventh Grade year, Student's mother enrolled him in the general education program. His IEP was informally modified to provide resource support in the general education setting.

After starting Seventh Grade, Student did not engage in self-injurious behaviors of the previous years. He no longer bit himself, pulled his hair, hit himself, or banged his head.

On September 19, 2008, while on the school bus, Student took out a knife and pointed it at the child sitting behind him. The child told him to stop. Student pulled the knife away, but pointed it at the child at least two more times. Student also put the knife in his mouth, or pretended to do so. Student poked the child sitting next to him in the

leg with it as he was putting the knife in his bag. (The bag was also on the floor.) The poke did not hurt the other child or tear the child's clothing.

When he was asked about the incident, Student admitted to having a knife, and the assistant principal found two more knives in Student's backpack. The knives were retractable, in excess of two and one-half inches long, with a push-button to open. When the principal told Student that he would get in a lot of trouble for having knives on the bus, Student became visibly distressed, started sobbing, and eventually curled up in the fetal position on the floor.

Student was suspended. Student's IEP team met and determined that Student's behavior was a manifestation of his disability, and was due to his improper placement in a general education setting. The district recommended that Student be returned to a special education setting, but Student's mother refused to agree to the change. During the meeting, the team reviewed Student's behavior intervention plan. The team found that Student had not engaged in the behaviors targeted by his plan. Until the knife incident, student's teachers reported that he was very well behaved.

Because Student possessed a weapon, the District removed Student from his general education classes to an interim alternative educational setting (IAES) for 45 days. The parties agreed that Student would be home schooled for the 45 days of his interim placement.

On October 8, 2008, Student wrote an apology letter stating that he had not realized the seriousness of his conduct at the time and that he had brought the knives with him because of his concerns about coyotes in the neighborhood. Student's mother confirmed that the family dog had been killed by coyotes earlier in the year.

On October 17, 2008, the IEP team met and discussed Student's placement after the 45-day interim placement ended. The District recommended a change of placement to a special education school, but Student's mother did not agree.

At the end of the 45 days, Student returned to his general education placement, but the District sought to extend his placement in the IAES, because Student was "substantially likely" to injure himself or others. Student had been back in his general education placement for about three to four weeks by the time of the expedited due process hearing. In that time, Student did not engage in any other conduct resulting in formal discipline.

During the hearing, teachers and administrators reported concerning conduct, including:

- A potential threat to another student in math class, but the threat was only made after the other student made fun of Student. There was no physical contact and the student was otherwise very well behaved in the class.

- During an icebreaker in English class Student had reported that he really like blowing things up, however when the teacher spoke with Student about the comment, Student clarified that he would never blow anything up, but he liked the idea of blowing things up.

- A guidance counselor testified that on the day Student returned from his 45-day interim placement Student became very upset when he learned his class schedule had changed. He remained upset for five to ten minutes, but then started to calm down. The guidance counselor stated that he was otherwise pleasant and well-behaved.

- After student returned from the 45 day placement, he was escorted off a school bus for not having a pass, and became very angry at one of the teachers. He said "It's a good thing I can control myself, because right now I feel like hitting ... something." Student did not hit anyone, and did not become upset when he was escorted off the bus on a later occasion.

Student's world history teacher and Student's physical education teacher both testified that Student has exhibited good behavior in their classes.

Student's science teacher for the entire school year reported that she observed him to be agitated on either the first or second day back after his 45-day interim placement, but she redirected him and he was fine after a minute or so.

A number of teachers reported that student would occasionally become upset and start clenching his fists, but was easily redirected and settled down after a few minutes. Student's adult brother, neighbors, and friends described Student's good behavior.

Issue: Whether maintaining Student's current placement would be substantially likely to result in injury to Student or others.

Held: For Parent.

The District had the initial authority to unilaterally place Student in an IAES for possessing a weapon at school, but the District did not establish that maintaining Student's current placement was substantially likely to lead to injury of the Student or others at this point.

The hearing officer noted that a child can be deemed substantially likely to cause injury without first inflicting serious harm. However, "danger must not only be likely (very possible), but must be 'substantially' likely." While Student's behavior in past school years might have demonstrated that he was substantially likely to cause injury, his behavior during the school year at issue did not rise to that level. He had not

engaged in head-banging or other self-injurious behaviors, he had not thrown items, and even his verbal aggression was limited to a few instances of unusual stress. The only physical altercation he had was the result of teasing, not aggression or anger.

The hearing officer found that Student seemed to be a very different person than in the past. Thus, Student's behavior in the school year at issue was a far better predictor of his behavior than his conduct of the past two years. The hearing officer did not believe that Student's head-banging or other self-injurious behaviors were likely to start again if he remained in the general education placement.

Further, the knife incident did not demonstrate that Student was substantially likely to harm others. Student's actions appeared to be annoying rather than threatening, and at the time, Student thought the incident was “funny.” The hearing officer noted that this did not mitigate the seriousness of Student's possession of a weapon at school or on a school bus, but it did demonstrate that Student's knife possession was not related to an episode of anger or frustration. Student seemed genuinely remorseful afterwards. The incident seemed to be a single mistake by Student rather than a pattern of behavior.

Although Student’s verbal altercations with other students and a teacher were concerning, they were not enough to show a substantial likelihood of injury. Student’s occasional frustration was also not enough to warrant change of placement, as student would be easily redirected or would calm down on his own. The behaviors taken together, even with the knife incident, were not enough to establish that the student was “substantially likely to cause injury” or even establish that it was likely his behaviors would escalate. Thus, the hearing officer declined to extend Student’s 45 day IAES placement.

III. Dangerous Students and Section 504

A. Brief Overview of Section 504

Section 504 provides that “[n]o otherwise qualified person with a disability shall, solely by reason of the disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance.” 29 U.S.C. § 794. The protections of Section 504 apply to both students and teachers. In order to provide equality of opportunity to disabled students, the District is frequently called upon to provide affirmative aids, services, or benefits known as “accommodations.”

Under Section 504, in the context of a public school, a “qualified” person with a disability is a person “of an age during which nonhandicapped persons are provided such [educational] services, of any age during which it is mandatory under state law to provide such services to handicapped persons, or to whom a state is required to provide a free appropriate public education under the” IDEA. 34 C.F.R. 104.3(l)(2).

Section 504 is broader in scope than the IDEA. While the IDEA focuses on an educational disability, Section 504 deals with a more inclusive definition of disability. Simply put, a disability under Section 504 usually consists of a physical or mental impairment which substantially limits one or more of that person's major life activities.

B. Disciplining the Dangerous Student Under Section 504

Pursuant to 34 C.F.R. 104.4(b), discrimination occurs when a school district denies a student with a disability the opportunity to participate in or benefit from an aid, benefit or service which is afforded non-disabled students. Examples of discriminatory conduct in the area of behavior or discipline include the following:

- Suspending a student for greater than ten (10) days for behavior related to his/her disability;

- Expelling a student for behavior related to his/her disabling condition.

The Department of Education has interpreted the non-discrimination provisions of Section 504 to permit school districts to cease providing educational services during periods of disciplinary exclusion from school where that exclusion results from conduct that was not a manifestation of the student's disability, and non-disabled students in similar circumstances do not receive educational services.

As a general rule, a school district may not expel a student with a disability or suspend the student for more than ten (10) cumulative days during the school year for conduct related to the student's disability. This rule exists under Section 504 and the IDEA.

Under Section 504 a suspension or disciplinary removal of a student with a disability for more than ten (10) days may not be imposed without a determination that the student's misconduct is not a manifestation of his/her disability. See OCR Response to Williams, 21 IDELR 73 (OCR 1994). If the student's misconduct is related to the disability, the student may not be suspended for more than ten (10) days. If the misconduct is not related to the disability, the school district may impose normal disciplinary measures, subject to the parents' right to request an impartial hearing.

C. Direct Threats

As indicated above, public entities, such as school districts, are prohibited from discriminating against individuals on the basis of disability. 28 C.F.R. 35.104.

However, school districts are not required "to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public entity when that individual poses a direct threat to the health or safety of others." 28 C.F.R. 35.139(a). It is important to note that this does not extend to a direct threat to the individual.

A direct threat is "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services." 28 C.F.R. 35.104.

When deciding whether a direct threat exists, districts must "make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain:

- The nature, duration, and severity of the risk;
- The probability that the potential injury will actually occur; and
- Whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk."

28 C.F.R. 35.139(b).

OCR has noted that Section 504 does not prohibit educational institutions from addressing the dangers posed by an individual who represents a "direct threat" to the health and safety of others, even if such an individual is a person with a disability. In the university setting, "[f]ollowing a proper determination that a student poses a direct threat, an educational institution may require as a precondition to a student's return that the student provide documentation that the student has taken steps to reduce the previous threat (e.g., followed a treatment plan, submitted periodic reports, granted permission for the institution to talk to the treating professional). However, educational institutions cannot require that a student's disability-related behavior no longer occur, unless that behavior creates a direct threat that cannot be eliminated through reasonable modifications." Letter to Bower, OCR # 15-10-2098 (Dec. 16, 2010).

However, there is no indication that this analysis would trump the duty to provide a FAPE under the IDEA and Section 504. Thus, the "direct threat" analysis should be used sparingly, as a possible basis for changing a student's placement under Section 504.

IV. Dangerous Students and Tuition Agreements

There are numerous school districts in New Hampshire that have entered into tuition agreements with other districts to educate their resident children. At times, the receiving district may determine that a student who resides in the sending district poses a substantial danger to him/herself or others, and may seek to prevent that student from attending school pursuant to the tuition agreement. This could either be done through the normal disciplinary process, or through a change in placement. The sending district would then be responsible for locating an alternative, appropriate placement.

Both the sending and receiving district could face exposure under Section 504 and/or the ADA for improperly excluding a student from a public school. A risk assessment may assist the sending and receiving districts in finding common ground

with regard to whether it is necessary to change the student's placement, or whether he/she can remain in the receiving district's school with additional accommodations and/or services.

V. Additional Interventions

A. Children in Need of Services

Effective September 1, 2013, RSA 169-D will undergo substantial revision. See N.H. Gen. Laws of 2013, Ch. 249 (HB 260). First, a "child in need of services" will be defined as:

> A child under the age of 18:
>
> - Who is subject to compulsory school attendance, and who is habitually, willfully, and without good and sufficient cause, truant from school;
>
> - Who habitually runs away from home, or who repeatedly disregards the reasonable and lawful commands of his or her parents, guardian, or custodian and places himself or herself or others in unsafe circumstances;
>
> - Who has exhibited willful repeated or habitual conduct constituting offenses which would be violations under the criminal code of this state if committed by an adult or, if committed by a person 16 years of age or older, would be violations under the motor vehicle code of this state; or,
>
> - With a diagnosis of severe emotional, cognitive, or other mental health issues who engages in aggressive, fire setting, or sexualized behaviors that pose a danger to the child or others and who is otherwise unable or ineligible to receive services under RSA 169-B or RSA 169-C; and
>
> - Is expressly found to be in need of care, guidance, counseling, discipline, supervision, treatment, or rehabilitation.

RSA 169-D:2, II (emphasis added).

In addition, the following definition will be added to RSA 169-D:2:

"'Truant' means a child between the ages of 6 and 18 years who is either not attending school as required by law or who is not participating in an alternative learning plan under RSA 193:1. 'Truancy' shall have the same meaning as in RSA 189:35-a." See N.H. Gen. Laws of 2013, Ch. 249:3 (adding RSA 169-D:2, XIV).

The amendments will also reflect that a petition alleging that a child is in need of services may be filed by a truant officer or a school official from the district where the child attends school, with a judge or clerk in the district where the child is found or resides. However, a truant officer or school official shall not file a CHINS petition until all steps in the district's truancy intervention process have been followed. See N.H. Gen. Laws of 2013, Ch. 249:4 (amending RSA 169-D:5, I) (emphasis added).

The petition must include "language demonstrating whether appropriate voluntary services have been attempted, the nature of voluntary services attempted, and the reason court compulsion is necessary. The petition also shall include information regarding the department's determination as to whether voluntary services are appropriate for the child or family under RSA 169-D:5-c. Refusal of the child to participate in the development of a voluntary services plan may constitute sufficient information that voluntary service and support options have been unsuccessful." See N.H. Gen. Laws of 2013, Ch. 249:5 (adding a new provision, RSA 169-D:5, II-a).

The amendments contain several provisions pertaining to "voluntary services" and the duties of the Department of Health and Human Services. These include, but are not limited to, the following:

- A determination (by DHHS) as to whether to offer the child and family any voluntary services. Such services shall not exceed 9 months, unless DHHS determines that an extension for an additional, specified period of time is appropriate.
    - Voluntary services include:
        - Individual/family counseling
        - Community service;
        - Attendance at an after-school or evening program that addresses some of the child's compliance issues
        - Supervision during the time of day in which the child most values his/her freedom and which is used to perform unruly acts.
- The voluntary services plan suspends proceedings on the CHINS petition; if the child satisfies the requirements in the voluntary services plan, then he/she will be discharged from further services or supervision, and the pending complaint shall be dismissed with prejudice.

- When the CHINS petition alleges that the child is a habitual truant under RSA 169-D:2, II(a), that the child repeatedly disregards the reasonable and lawful commands of his/her parents, guardian, or custodian under RSA 169-D:2, II(b), or that the child repeatedly or habitually engages in conduct that constitutes violation level offenses under RSA 169-D:2, II(c), the court shall not order the out-of-home placement of the child.

See N.H. Gen. Laws of 2013, Ch. 249:6-249:13.

Finally, the new law requires that the process for intervention developed by the school board "consider whether school record keeping practices and notification provided to the parents or guardians of the child's absences have had an effect on the child's attendance." See N.H. Gen. Laws of 2013, Ch. 249:14 (amending RSA 189:34, II(b)).

B. Delinquent Children

Any person may file a petition, alleging that a minor is delinquent. The petition must include the date, time, manner, and place of the conduct alleged, and shall state the statutory provision(s) alleged to have been violated. RSA 169-B:6, I.

A delinquent minor is "a person who has committed an offense before reaching the age of 17 years which would be a felony or misdemeanor under the criminal code of this state if committed by an adult, and is expressly found to be in need of counseling, supervision, treatment, or rehabilitation as a consequence thereof." RSA 169-B:2, IV.

Effective January 1, 2014, RSA 169-B will be amended to include a new paragraph, pertaining to "serious threats to school safety." N.H. Gen. Laws (2013), Ch. 198 (HB 433). That provision defines "serious threats to school safety" as "acts involving weapons; acts involving the possession, sale, or distribution of controlled substances; acts that cause serious bodily injury to other students or school employees; threats to cause bodily injury to students or school employees, where there is a reasonable probability that such threats will be carried out; acts that constitute felonious sexual assault or aggravated felonious sexual assault under RSA 632-A; arson under RSA 634:1; robbery under RSA 636:1; and criminal mischief under RSA 634:2, II and RSA 634:2, II-a." Id. (amending RSA 169-B:2 by adding a new paragraph, XIV).

In addition, the following paragraph will be added to RSA 169-B:6:

> Absent serious threats to school safety, when a delinquency petition is filed by a school official, including school resource officers assigned to a school district pursuant to a contract agreement with the local police department, or when a petition is filed by a local police department as a result of a report made by a school official or school resource officer, based upon acts committed on school grounds during the school day, information shall be included in the petition which shows that

> the legally liable school district has sought to resolve the expressed problem through available educational approaches, including the school discipline process, if appropriate, that the school has sought to engage the parents or guardian in solving the problem but they have been unwilling or unable to do so, that the minor has not responded to such approaches and continues to engage in delinquent behavior, and that court intervention is needed.

Id.

When a school official, including a school resource officer assigned to a school district pursuant to a contract agreement with a local police department, or a local police department as a result of a report made by a school official or school resource officer, files a petition involving a minor with a disability pursuant to RSA 186-C, upon the submission of a juvenile petition, but prior to the child's initial appearance, the legally liable school district shall provide assurance that prior to its filing:

a) It was determined whether or not the child is a child with a disability according to RSA 186-C:2, I.

b) If the school district has determined that the child is a child with a disability, a manifestation review pursuant to 20 U.S.C. section 1415(k)(1)(E) occurred.

c) If the child's conduct was determined to be a manifestation of the child's disability, the school district has followed the process set forth in 20 U.S.C. section 1415(k)(1)(F).

d) It has reviewed for appropriateness the minor's current individualized education program (IEP), behavior intervention plan, and placement, and has made modifications where appropriate.

N.H. Gen. Laws (2013), Ch. 198 (HB 433).

C. The Use of Restraints

A school official may restrain a child when the restraint is necessary "to ensure the immediate physical safety of persons when there is a substantial and imminent risk of serious bodily harm to the child or others." RSA 126-U:5, I. Restraints may only be used by trained personnel using extreme caution when all other interventions have failed or been deemed inappropriate. Id. Districts are required to adopt a written policy and procedures for managing the behavior of children. The policy must describe how and under what circumstances restraint is used. RSA 126-U:2.

When necessary to protect a student or others from serious bodily harm, school districts may engage in the use of physical restraint. RSA 126-U:6. A physical restraint

"occurs when a manual method is used to restrict a child's freedom of movement or normal access to his or her body." RSA 126-U:2, IV(c). However, "holding a child to calm or comfort the child, holding a child's hand or arm to escort the child safely from one area to another, or intervening in an ongoing assault or fight," as well as "brief periods of physical restriction by person-to-person contact, without the aid of medication or mechanical restraints, accomplished with minimal force and designed either to prevent a child from completing an act that potentially would result in physical harm to himself or herself or to another person, or to remove a disruptive child who is unwilling to leave an area voluntarily," and "the use of force by a person to defend himself or herself or a third person from what the actor reasonably believes to be the imminent use of unlawful force by child, when the actor uses a degree of such force which he or she reasonably believes to be necessary for such purpose" do not constitute a restraint. RSA 126-U:I, IV(d).

The statute contains specific requirements pertaining to the use of restraints in the school setting, and the notifications required when restraints are used. In addition, the Department of Education is in the process of developing rules pertaining to the use of restraints.

1. Limitations on the Use of Restraints

Neither the IDEA nor Section 504 expressly addresses the use of aversive techniques such as physical restraints. However, if a student's behavior impedes his own learning or the learning of others, the IEP team must consider the use of intervention strategies and supports to address that behavior. 34 CFR 300.324 (a)(2)(i). The Office of Special Education Programs has opined that the IDEA impliedly permits the use of aversive behavioral interventions, as prescribed by state law. *Letter to Anonymous*, 50 IDELR 228 (OSEP 2008).

New Hampshire education regulations specifically authorize the use of physical restraints when:

1. When a student's behavior presents a risk of "imminent, serious, physical harm." Ed 1113.04(c)(7).

2. When student's behavior does not present a risk of imminent physical harm, but physical restraint is authorized by a physician and the student's IEP team. Ed 1113.06(a).

There are some inconsistencies between Ed 1113.06 and RSA 126-U and there is a risk that Ed 1113.06 has been superseded by the provisions of RSA 126-U. The Department of Education has indicated that they intend to revise Ed 1113.06. We recommend that when it is necessary to use restraints, that districts comply with RSA 126-U.

VI. The Family Educational Rights and Privacy Act

The Family Educational Rights and Privacy Act ("FERPA") generally precludes schools from disclosing information from educational records without parental consent. 20 U.S.C. 1232g. However, under certain circumstances, districts may disclose such information without obtaining prior written consent from the parent or adult student. 20 U.S.C. 1232g(b).

One such exception allows districts to disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. 34 C.F.R. 99.31(10); 34 C.F.R. 99.36(a). When making this determination, the district "may take into the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals." If the district "determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department [of Education, Family Policy Compliance Office] will not substitute its judgment for that of the [district] in evaluating the circumstances and making its determination." 34 C.F.R. 99.36(c).

In addition, FERPA does not prohibit schools "from including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student." 20 U.S.C. 1232g(h).

VII. The Duty of Educators to Provide Adequate Protection or Supervision to Students

Marquay v. Eno, 139 N.H. 708 (1995), is a landmark case in this state with respect to the liability of teachers for failing to provide adequate protection or supervision to students. Marquay involved a lawsuit brought by three women who were formerly students in the Mascoma Valley Regional School District. Each woman alleged that she was exploited, harassed, assaulted and sexually abused by one or more employees of the school district. The alleged perpetrators were teachers and coaches of the students at various times over the course of their junior high and high school years. Each woman alleged that a host of school employees, including other teachers, coaches, superintendents, principals and secretaries, were either aware, or should have been aware, of the abuse. The women alleged that these other employees were aware of the abuse because the employees had either witnessed inappropriate conduct by the abusing employees or were told about the inappropriate conduct by these three women and other students. The women sought damages against the school district, the abusing employees, and the non-abusing employees whom they

contended were aware, or should have been aware, of the abuse. Among the non-abusing employees named as defendants were several of the women's classroom teachers.

The school district and several of the non-abusing employees moved to dismiss the claims against them, contending that they did not owe the students any duty to protect them from harm by the abusing employees. The Court disagreed, ruling that schools share a special relationship with students entrusted to their care, which imposes upon them certain reasonable duties of supervision. The Court instructed that the scope of the duty owed is limited by what risks are reasonably foreseeable to the actor. That is, a party will be held liable for negligence if he or she could reasonably have foreseen that his or her conduct would result in an injury, or if his or her conduct was not reasonable in light of what he or she could anticipate.

The Court declined to hold that every school district employee has a personal duty to all students simply by virtue of receiving a paycheck from the district. Rather, the Court held that the duty falls upon those employees who have supervisory responsibility over students and who thus have stepped into the role of parental proxy. The Court instructed:

> [t]hose employees who share such a relationship with a student, and who acquire actual knowledge of abuse, or who learn of facts which would lead a reasonable person to conclude that a student is being abused are subject to liability if their level of supervision is unreasonable and is a proximate cause of a student's injury.

The Court thus refused to dismiss the claims against the women's classroom teachers who contended that they were unaware of the abuse.

Under this holding, the Court also stated that a school employee may be subject to liability for injuries that occurred off school premises, if the student can show that the employee's negligent acts or omissions proximately caused the injury to the student.

As the following case illustrates, however, the duty set forth in Marquay is limited in scope. In Mikell v. SAU #33, 158 N.H. 723 (2009), parents filed suit against the SAU, guidance counselor and a special education teacher, alleging that they had a duty to prevent their son's suicide.

Facts: In January 2005, Joshua M. was a seventh grade student at Iber Holmes Gove Middle School in Raymond. He had some difficulties in the school environment, and his teacher reported that he had a learning disability and behavioral problems. Parent disagreed with this report, and believed that it was an attempt to have Joshua removed from the school.

In November 2004, a teacher's aide overheard Joshua state that he "wanted to blow his brains out." The teacher's aide reported this statement to the school's

guidance counselor, who called the parent. Parent offered to pick Joshua up, but the guidance counselor indicated that he "was 'okay now' and she would send him back to class." Without informing parent, the guidance counselor had Joshua sign a "contract for safety," but took no further action in regard to his suicide threat.

On January 18, 2005, a special education teacher reported to the vice-principal that Joshua had referred to two mints on his desk as medicine. Parent alleged that the report was done "'falsely and knowingly' in an attempt to affect his disciplinary record, and winked at Joshua while reporting the incident as 'an acknowledgement of her lie.'" The following day, January 19, 2006, Joshua was again reported to the vice-principal for tipping his desk in class, being rude, and calling another teacher a "bitch." Joshua was suspended and his parent was called to pick him up. Parent reported to the vice-principal that she was contemplating home schooling.

When he arrived at home, Joshua went to his room, without speaking to his mother. Soon after, she left to bring Joshua's grandfather, who had accompanied her to the school, to his residence. When she returned, she found Joshua had hanged himself. He left a suicide note, which, among other things, stated he was telling the truth about the disciplinary incident involving the special education teacher.

Parent filed suit against the SAU, guidance counselor, and special education teacher, alleging intentional infliction of emotional distress and wrongful death. The defendants moved to dismiss the claims; the trial court granted those motions and the parent appealed.

Issues: Whether the SAU and guidance counselor had a general and special duty to prevent Joshua's suicide?

Whether the guidance counselor had voluntarily assumed a duty to act reasonably to prevent his suicide?

Whether the special education teacher's conduct was extreme and outrageous?

Holding: For the defendants. The court noted that as a general rule, "negligence actions seeking damages for the suicide of another will not lie because the act of suicide is considered to be a deliberate, intentional, and intervening act, which precludes a finding that a given defendant is, in fact, responsible for the harm." There are two exceptions to this rule: 1) when the defendant actually causes the suicide; and 2) when the defendant had a duty to prevent the suicide.

In New Hampshire, the first exception applies when the plaintiff demonstrates that the defendant "by extreme and outrageous conduct, intentionally wronged a victim and that this intentional conduct caused severe emotional distress in his victim which was a substantial factor in bringing about the suicide of the victim." The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible

bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

The parent argued that the special education teacher's false report of misconduct was extreme and outrageous, and that a reasonable fact finder could have determined that her conduct was a substantial cause of Joshua's suicide. The court rejected this argument, noting that the alleged false accusation (characterizing mints as medicine), even coupled with the teacher's position of authority, did not rise to the level of extreme and outrageous conduct necessary to sustain a claim for intentional infliction of emotional distress. The court also noted that the parent did "not allege any further actions that may have exacerbated the situation to an extreme and outrageous level, such as publicly reprimanding Joshua in front of his class or threatening him with additional abuse of her authoritative power." The court went on to state that "[w]hile there is no question that a teacher falsely reporting misconduct by a student is a reprehensible act, the circumstances of this case are simply not 'beyond all possible bounds of decency.'" Therefore, the first exception did not apply.

The second exception applies when the individual has "a duty of custodial care, is in a position to know about suicide potential, and fails to take measures to prevent suicide from occurring." This duty has been imposed on "institutions such as jails, hospitals and reform schools, having actual physical custody of and control over persons; and . . . persons or institutions such as mental hospitals, psychiatrists and other mental-health trained professionals, deemed to have a special training and expertise enabling them to detect mental illness and/or the potential for suicide, and which have the power or control necessary to prevent that suicide."

The parent argued that the guidance counselor and the SAU owed Joshua a general and special duty to prevent his suicide. Parent asserted that when the guidance counselor "decided to retain control and custody of Joshua after learning of the suicide threat, they exercised the requisite level of control and custody over him to create a duty to prevent his suicide." The court noted that in Marquay v. Eno (discussed above), it had recognized that schools share a special relationship with students entrusted to their care, which imposes upon them certain duties of reasonable supervision. However, that duty was limited "to only those periods of time when parental protection is compromised, and only to those risks that are reasonably foreseeable." The court "disagree[d] that this special relationship – and the duty of reasonable supervision – extends so far as to create a duty to prevent a student's suicide in this case."

The court noted that although a school "no doubt possesses some amount of custody and control over its students during school hours, such control is a far cry from that held by jails, juvenile detention facilities or similar institutions where the duty to prevent another's suicide has been imposed."

The court also rejected the parent's argument that the guidance counselor "voluntarily assumed a duty to act reasonably to prevent Joshua's suicide when, two

months before, she advised the plaintiff not to remove Joshua from school after his suicide threat, sent him back to class, stated that the threat was a result of his learning disability, and did not advise her to have Joshua examined by an outside professional." Parent asserted that if the guidance counselor had instructed her to seek help, she would have done so in a timely fashion and the student would have received proper care in time to prevent his suicide. The court noted that the plaintiff's inferences were "tenuous at best, and are far too speculative for us to find that the risk of Joshua's suicide increased based upon [the guidance counselor's] conduct, or lack thereof."

In contrast, Morton v. Bossier Parish Sch. Bd., 113 LRP 8312 (W.D. La. Feb. 26, 2013), the court denied the district motion to dismiss the parents' Section 504 claims.

Facts: Parent filed suit against the District, alleging the following facts - Student attended school in Bossier Parish from the age of 12 until May 20, 2011, when she took her own life (at the age of 15). Student suffered from severe Type 1 diabetes in addition to other physical and mental impairments such as bipolar disorder and depression. Because of her medical conditions, student was harassed and provoked by her fellow students. Student attempted suicide on January 24, 2011, and the harassing behavior escalated (students began encouraging student to kill herself). Parent alleged that the district failed to take action to prevent the harassment and accommodate student's disabilities.

Parent raised claims including deliberate indifference and failure to address the hostile environment, as well as negligent and intentional failure to accommodate student's disabilities. Plaintiff sought damages for herself and student, for violations of Section 504 and the ADA.

The District filed a motion to dismiss, arguing that the court did not have jurisdiction over the plaintiff's claims because the plaintiff had not exhausted her administrative remedies as required by the IDEA. In addition, the District alleged that the plaintiff had failed to state a claim for which relief may be granted.

Held: For the parent.

The court denied the District's motion to dismiss on the basis that the Plaintiff failed to exhaust her administrative remedies, noting that while the plaintiff had brought claims alleging failure to accommodate, she had also raised claims pertaining to deliberate indifference and a hostile environment. Those claims were separate and distinct from any IDEA based claim. In addition, to the extent that any claims did fall under the exhaustion requirements of the IDEA, those provisions did not apply because exhaustion would be futile. Since the student was deceased, the court could not order any educational based remedies. The only remedy left to address the injuries is a claim of monetary damages, which is not an available remedy under the IDEA.

The court also denied the district's motion to dismiss for failure to state a claim. In doing so, the court noted that plaintiff had pled sufficient facts to establish that the

student had a disability, that the school board and district had knowledge of the disability and the harassment the student received on a regular basis, and that they acted with deliberate indifference to such harassment. Therefore, the motion was denied.

VIII. Disciplining the Dangerous Student: General Disciplinary Issues

School districts may suspend any student for gross misconduct or for neglect or refusal to conform to the reasonable rules of the school, and in addition, may expel students for an act of theft, destruction, or violence and possession of a pellet or BB gun, rifle, or paint ball gun. RSA 193:13.

Districts are required to expel students for a period of not less than one year if the student brings or possesses a firearm at school or on school property, without written permission of the superintendent. RSA 193:13, III. A firearm is defined as "any weapon which will or is designated to or may readily be converted to expel a projectile by the action of an explosive," but it does not include antique firearms. RSA 193:13, III; 18 U.S.C. 921(a)(3).

In the Woods v. Winchester Sch. Bd., 49 Va. Cir. 330 (Va. Cir. Ct. 1999), the school board's decision to expel a student who submitted a bomb threat was upheld.

Facts: On November 4, 1998, school employees at a high school in Virginia discovered an e-mail that stated:

> There is a bomb at [a high school]. And another at [a middle school]. It will explode if you attempt to defuse it. I will call with instructions. The cult of skafia claims full responsibility for this action.

School officials notified law enforcement and completely evacuated the students and staff of both the middle school and high school. An investigation revealed that a tenth-grade high school student, A.W., might be involved with the threat. The police eventually traced the e-mail to a computer located at A.W.'s mother's home. The high school technology instructor helped to determine that the message was on A.W.'s hard drive.

On November 6, 1998, A.W. moved to live with his father in a different city. He did not attend any classes at his former high school after November 6, 1998. On November 10, 1998, A.W.'s father called the high school and requested that his transcripts be sent to his new school. Also on November 10, 1998, A.W.'s mother spoke with the school and was advised that he would be marked as withdrawn.

On or about November 10, 1999, a Petition was issued by the Juvenile and Domestic Relations District Court for the City charging A.W. with communicating a bomb threat in violation of Virginia law.

On November 11, 1998, the high school principal spoke with A.W.'s mother, but she declined to cooperate with the disciplinary investigation into the bomb threat. She also informed the principal that A.W. would be attending school in a different school district, because he had moved in with his father.

On November 12, 1998, A.W. was officially enrolled at a different school.

On November 13, 1998, the principal suspended A.W. from school for seven days for participating in making a bomb threat and recommended expulsion. He documented this by letter to A.W.'s mother.

On November 17, 1998, school officials met with A.W.'s mother to continue the disciplinary investigation. She did not contest A.W.'s involvement in the bomb threat. The school officials and A.W.'s mother agreed that she, A.W., and the director of student support services, would meet on November 25, 1998 to determine the next course of action.

On November 25, 1998, A.W.'s mother cancelled the meeting. The director of student services advised her by phone, and later in writing, that the matter would be presented to the school board and expulsion would be recommended. He also informed her that the next School Board meeting would occur on December 14, and that she and her son had the right to appear before the school board to present Board members with "any information you wish them to consider before they take action on my recommendation."

On December 8, 1998, legal counsel for A.W. sent a letter to the District, notifying the Board that A.W. would not be appearing before the Board, because he had withdrawn from the Winchester Public Schools.

On December 14, 1998, the School Board met and conducted a hearing on the recommended expulsion of A.W. His mother and legal counsel appeared before the Board, but A.W. did not. The student's counsel did not dispute his involvement with the bomb threat, but instead asserted that the Board had no disciplinary authority, because A.W. was no longer a student in the school system. His counsel also asserted that no defense was presented because criminal charges were pending. The School Board discussed the evidence and, following its deliberations, voted in open session to expel A.W. from any further attendance at the District's schools.

On January 6, 1999, the criminal charges against A.W. arising from the bomb threat were resolved in the Juvenile and Domestic Relations District Court.

Following receipt of A.W.'s Petition challenging the December 14th expulsion in court, the District notified the student's mother that the School Board would reopen the expulsion hearing and provide a second hearing before the School Board. A.W.'s counsel declined the Board's invitation to appear at its meeting scheduled for January

19, 1999. On two separate occasions, administrators offered to reschedule the second hearing to February 1, 1999.

On February 1, 1999, the School Board met, reopened the prior hearing, and conducted a new, second hearing. A.W., his mother, and legal counsel elected not to appear. The School Board received information from school administrators that clearly established A.W.'s culpability and voted to affirm his expulsion.

Issue: Whether a school system may formally expel a student for an infraction committed while a student in the school system, even if the student withdrew from the school system before the expulsion was completed?

If so, whether the disciplinary process has violated the Petitioners' constitutional due process rights?

Holding: For District on both issues. The District had the statutory authority to expel the student, and it provided sufficient Due Process protections.

The Court first noted that students in Virginia can be expelled for "sufficient cause," and that making a bomb threat satisfies this standard. The District did not exceed its statutory authority by expelling the student after he had withdrawn from the high school and enrolled in another school system. The Court found that the issue of the student's withdrawal was irrelevant to any disciplinary proceeding, because A.W. was a pupil in the District at the time of his misconduct. The Court explained that "If a student could evade disciplinary consequences by withdrawing, any student who commits even the most egregious act as a pupil could frustrate or prevent the School Board from exercising its lawful power to discipline him and safeguard the school environment by withdrawing after he became the suspect in a serious incident." If students could withdraw to avoid disciplinary consequences, "misbehaving student could wander about the state committing infractions, withdrawing, and then entering another school system without there ever being an official record of his having been disciplined in the school systems upon whom he had practiced his mischief or crimes."

The Court next found that the due process provided was sufficient. Although some measure of due process is required where a student faces a longer suspension or expulsion, there is also broad judicial recognition that flexibility is needed to successfully respond to different circumstances. A student need only be provided with a "reasonable opportunity to tell his side of the story." That standard was met here. Despite repeated opportunities and solicitations to tell his side of the story, neither the student nor anyone acting on his behalf ever refuted the accusation against him. The evidence clearly implicated him as the perpetrator of the bomb threat. The Court noted that the extent to which counsel for A.W. elected to refrain from presenting evidence to the school board was a tactical decision, but failure to use an opportunity to be heard does not mean that the process provided was insufficient.

Thus, the decision to expel the student was upheld.

IX. Safety Plans

When there is no legal basis for a student who poses a threat to him/herself or others to be removed from his/her current placement, the district should develop and implement a safety plan. Such plans could include the following components:

- Description of the risk
- Protocol for communication with parents
- Interested parties (scope of publication)
- Integration and communication with outside therapists
- Threat reporting protocol
- 1:1 support
- Counseling
- Social skills training (individual and/or group)
- 1:1 paraprofessional “shadowing”
- Check-in – check-out protocol
- “Buddy systems” – pro/con
- De-escalation options
- “Safe Harbors”

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